

No 627.

Loan of  
moveables  
found to ex-  
clude the pre-  
sumptive  
title of pro-  
perty of a de-  
funct dying  
in possession  
of them, the  
loan being  
proveable by  
witnesses.

1678. January 17.

GEDDES against GEDDES.

MARION GEDDES pursues James Geddes for re-delivery of the furniture of a chamber lent by her to his brother, and intromitted with by the defender after his death. The defender *alleged*, Absolvitor, because he had confirmed these goods as executor to his brother, who died in possession thereof, from which property is presumed, against which witnesses cannot be received.

THE LORDS repelled the defence, and found, that the presumptive title of property was excluded, by offering to prove, that the goods were delivered by way of loan; and that the same was probable by witnesses.

*Fol. Dic. v. 2. p. 270. Stair, v. 2. p. 592.*

1679. November 6.

BRUCE against DOUGLAS.

No 628.

What proof  
of intromis-  
sion by an  
executor be-  
yond the in-  
ventory and  
estimate?

ALEXANDER BRUCE as executor-dative *ad omnia et male apprehensata* to ——— Williamson, pursues Anna Douglas, his relict and principal executrix, for certain goods and sums intromitted with by her, and omitted in her inventory, or misappropriated; which being referred to her oath, she depones, that she caused some skilful persons make an estimate of the corns in her husband's barn-yards, and confirmed them accordingly, and that they only arose to six bolls of oats, and two bolls of bear more, and that she confirmed a part of two bonds due by the Lord Arbuthnot to her husband, and that both she and the Commissary knew, that by payments made to her husband, and compensation, there was no more remaining than the sum she confirmed. At advising of the oath, it was *alleged*, that her oath proved her meddling with the whole corns and the bonds, and that the estimate could not liberate her, not being by the proof, but by guess; and that the quality adjected, concerning the payment and compensation, could not be proved by her oath, for if thereupon she gave up the bonds, or discharged Arbuthnot, the pursuer being a creditor would be excluded by collusion, and therefore she ought to have confirmed all; and if, upon her pursuit, Arbuthnot's defence upon payment or compensation had been proved, it would have liberated both her and him. But an executor's oath of knowledge can prejudice no creditor. It was *answered*, That before confirmation, the executrix could not cast the proof, and so could do no more but make an estimate, which would have made her liable, though it had come short; and as to the bonds, the oath of an executor is only *ad vitandum dolum*, and the executor could not depone the inventory was true, when she knew a part paid, neither had she intromitted with any more than what she confirmed, nor could she discharge Arbuthnot effectually, so that the pursuer ought to pursue him for the remainder of the bond, if any be.

THE LORDS found the executrix liable for the surplus of the corns above the estimate, and that according to the fiars of that year, though more than the prices confirmed; for if by the proof, the corns had come short of the estimate, the executrix would have had deduction thereof; and found, that she had meddled with the bonds, and decerned for the superplus, conditionally, that if she produce the bonds, that thereby the executor *ad omnia* might insist, or having given them up, if she could instruct the compensation or payment, the same should be received to liberate her, for which she got a month allowed her to do diligence.

No 628.

*Stair, v. 2. p. 704.*

\* \* \* Fountainhall reports this case:

IN the action pursued by Alexander Bruce against Anne Douglas, Lady Kair, the LORDS having this day advised the defender's oath, they found it proved, that she had intromitted with six bolls of oats and two bolls of bear more than was confirmed by her, and therefore find her liable for the price of the same according to the Candlemas fiars of the year; and refuse to sustain the quality adjected to her oath anent the destination of nine bolls and a firlof of bear to pay small debts with; and therefore decern the defender to pay likewise the price thereof according to the Candlemas fiars; and find the defender liable for the sums contained in the Viscount of Arbutnot's two bonds to her husband, unless betwixt and the 6th day of December next, she exhibit and produce in the clerk's hands, either the bonds, or if they be not extant, the grounds of compensation by which her husband owed my Lord Arbutnot sums of money, as is mentioned in her oath; and superceded extracting of the decret as to this last, of the sums due by the said Viscount, and to him, until the 6th day of December next, to the effect foresaid."

*Fountainhall, v. 1. p. 61.*

1687. July.

MR JAMES BOYES *against* ABERCROMBY.

IN a pursuit for re-delivery of the pursuer's watch, it being referred to the defender's oath, that he got such a watch from the pursuer, he deponed, that he got the watch to give a watch-maker to help it, whom he saw deliver it back to the pursuer.

No 629.

THE LORDS repelled the quality of re-delivery, and ordained the defender to prove it as a defence.

*Harcarse, (OATHS.) No 742. p. 210.*