

pursuer's libel, offering to prove the horse his own, and that he did not sell him, but set him for hire, and, therefore, hath *rei vindicationem* against any haver thereof, whether he acquire *bona fide* or *mala fide*.

THE LORDS repelled the defence, in respect the pursuer offered to prove, that the horse did not pass from him by alienation, but by location.

Fol. Dic. v. 1. p. 592. Stair, v. 2. p. 801.

No 11.

1684. February.

GRAY against COWIE

JOHN RUTHERFORD having taken a house from Andrew Cowie merchant in Edinburgh, and Arthur Straiton having retained the said John Rutherford's household plenishing for his former mail, and Andrew Cowie having become cautioner for the house mail, and for his security and relief both of his cautionry and of his own house mail, having taken a disposition from Rutherford to the household plenishing; Mr David Gray, to whom Rutherford had granted a disposition, having pursued Andrew Cowie for the goods, *alleged*, That he ought not only to be preferred for his own house mail, as a part of the tacit hypothecation, but also for relief of his cautionry, albeit Mr David Gray had a prior disposition, upon which there followed only a symbolical tradition; seeing he had not only a disposition, but was actually in possession of the goods, and a posterior disposition, with actual and real possession ought to be preferred to a prior disposition with symbolical possession, especially where the common debtor did retain the possession. *Answered*, That a disposition of moveables upon which there follows symbolical possession, being a competent and valid right, gives the party a sufficient right, albeit the common debtor retain the possession, seeing our law makes no difference between symbolical possession and actual possession of moveables, the right of property of the goods being as validly conveyed by a symbolical possession as by an actual possession; and albeit the common debtor retained the possession, yet that does not alter the case, because in that case, after a symbolical tradition, the disposition is reputed in law to be the party's possession to whom the goods were disposed. THE LORDS preferred Mr David Gray by virtue of his disposition and symbolical possession, which they found did give him a sufficient right to the goods disposed.

Fol. Dic. v. 1. p. 592. Sir P. Home, MS. v. 1. No 184.

No 12.

A prior disposition with symbolical possession, preferred to a posterior disposition clothed with real possession.

1683. February 27.

EARL of LEVEN against MONTGOMERY.

No 13.

FOUND, that a jewel, or other precious moveable, left to a family on condition that it shall not be alienated, cannot be disposed of gratuitously.

Fol. Dic. v. 1. p. 593. P. Falconer. Sir P. Home. Fountainball. Harcarse.

*** This case is No 43. p. 5803. *voce* HUSBAND and WIFE.