

No 289.

1687. February 16. ABERCROMBY *against* STORY.

THE cause of Abercromby and Story was called *in præsentia*, that it might be the subject of Lord Lochore's trial. A relict continues in the possession of her first husband's goods, and marries again. The children of the first husband claim the goods, as once belonging to their father. *Alleged*, Possession is a sufficient title in moveables. *Answered*, It is but a presumption; and I take it off by a positive probation, that the goods were my father's. THE LORDS preferred the children.

*Fol. Dic. v. 2. p. 161. Fountainball, v. 1. p. 448.*

\* \* \* Harcarse reports this case :

1686. *March*.—A woman having, after a treaty of second marriage, disposed a caldron and some brewing looms to her children of the first marriage, reserving her liferent use thereof, and delivered the same by an instrument of possession, and the husband being pursued for the same after her decease; it was *alleged* for the defender, That the disposition was granted *contra fidem tabularum nuptialum*; for it was after the marriage-treaty with the defender, and there was no contract. Again, the disposition being made *retenta possessione*, it was simulate, and the subsequent marriage was a legal assignation to the goods disposed.

THE LORDS decerned in favours of the children.

*Harcarse, (CONTRACTS OF MARRIAGE) No 380. p. 98.*

No 290.

1749. *January*. FERGISSON *against* the OFFICERS of STATE.

THE creditors of the deceast John M'Ilvain, a bastard, having assigned their debts to James Fergusson, in order to his constituting the same against the Officers of State, Fergusson *inter alia* brought a proof by witnesses, that one of his cedents, Wiliam Cunninghame of Auchinskeith, having, in the end of the year 1744, pointed from one of his tenants four cows, three horses, &c. John M'Ilvain got the same from him, and kept and disposed thereof; but the witnesses added, that they were not present at any bargain between them; but that, in their judgment, the cows were worth about L. 67 Scots, and the horses about five guineas.

Upon advising this proof, the LORDS " found the proof not sufficient to instruct a debt against John M'Ilvain; because possession in moveables presumes a title; and the possessor cannot be subjected to restitution or payment of the value, unless it be instructed that the possessor *desiit possidere*, by a bargain of