

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.

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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

sale or otherways, that would subject the present possessor to restitution or payment." *Vide* February 3d 1672, Scot of Gorenbery *contra* Elliot, *voce* PROOF.

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Kilkerran, (PRESUMPTION.) No 4. p. 427.

DIVISION XII.

Presumption, *rite et solenniter actum.*

1586. November. BARCLAY *against* IRVINE.

THERE was one Barclay that pursued Irvine, the goodman of , and certain others his colleagues, for the ejection of him forth of house, and spoliation of certain goods and gear. It was *answered* by Irvine, that the pursuer was lawfully denounced rebel, and put to the horn, and the gift of his escheat disposed, and letters passed thereupon, and so, if the defender had any intromission with the said goods, not granting the same, the same was done *auctore pratore*. To this was *answered*, That the horning, with all that followed thereupon, was reduced, by reason that the pursuer was put to the horn for not finding of lawburrows, according to the act of Parliament, to one Peter Craick; and true it was, that the said Peter Craick never made faith that he feared him bodily harm; as the extract of the horning given forth by the Sheriff-clerk made no mention of the offering of faith that he dreaded bodily harm. To which it was *answered*, That the defender was never called to the reduction; and as where the reason of reduction was, that there was no faith made to the officer, the defender offered him to prove, by the principal letters of horning, and executions thereof, and, if need be, by the witnesses insert, that the said Peter Craick made faith, and the principal letters, as the original, ought rather to make faith, than the said extract, which was but exemplum exemplatum et secundum Bartol. in L. Sempronius, D. De legatis, quandocunque est diversitas inter exemplum et originale stabitur originali. To which it was *answered*, That, in so far as the principal letters, and not the extract, were alleged to be the original, it was not of truth in this case; because the words, 'offered to make faith,' were put in the margin, and not in the body of the letters, and were tanquam instrumentum reformatum, et juxta Bald. pulcherrime disputantem in

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The principal letters of horning having some words added on the margin, and an extract thereof wanting these words, the extract was found to bear more faith than the principal, the presumption being, that the words in question were added *ex post facto*.