

No 12. *mala fide*, they are noways sufficient; by her consent, that the children should be provided with the coal, was in contemplation of her eldest son's marriage, which took effect; and the rest are mere presumptions; and *dato*, she had known *privata notitia non nocet*, unless there had been some intimation, citation, or judicial act, to put her in *mala fide*; and especially private knowledge infers not *mala fides*, unless it had been anterior to her possession.—The pursuer *answered* to the last point, That albeit private knowledge in some cases would not infer *mala fides* among strangers, yet a mother, knowing the right of her own children, whereof one were in her womb, it puts her in *mala fide*, seeing she was thereby obliged to have sought tutors, and preserved their right.

THE LORDS found the evidences sufficient to prove the defender to have been in *mala fide*, and therefore repelled this defence also, and ordained the defender to compt for the intromissions; but found that the charge ought not to be stated according as the profit of the coal fell out to be, but as the profit thereof might be *communibus annis*, in regard she quitted her certain liferent of the lands for an uncertain coal; and therefore abated a fourth part of what the free profit of the coal was found to be by the last account. See HUSBAND and WIFE.

*Fol. Dic. v. 1. p. 109. Stair, v. 1. p. 141.*

1697. February 12. WILLIAM COCKBURN against ROBERTSON and SLEICH.

No 13.

The plea of *bona fides* was not sustained to support the sole possession of a co-heir, the other co-heir being reputed dead. The presumption is for life.

ARBRUGHELL reported William Cockburn, son to Provost Cockburn in Haddington, against Robertson and Sleich, for the half of the mails and duties, as heir-portioner with her to his uncle. *Alleged*, The pursuer having gone out of the country to Barbadoes, and being reputed dead, I Sleich served sole heir to my brother, by which colourable title I having possessed, the by-gones are *fructus bona fide consumpti et percepti*.—*Answered*, *imo*, *Bona fides* is not in lucrative titles of succession and the like, but only where the cause is onerous, as amongst creditors or purchasers. *2do*, The presumption lay for me, that I was still alive; and my father appeared at your service, and protested against the inquest, if they should retour you sole heir.—THE LORDS repelled the defence founded on the *bona fides* in respect of the two answers.

*Fol. Dic. v. 1. p. 110. Fountainhall, v. 1. p. 766.*

1746. July 15. SIR ANDREW AGNEW, against HAWTHORN of Wigg.

No 14.

An estate being destined to heirs male; whom failing, to a different series of heirs, the nearest

SIR ANDREW AGNEW of Lochnaw, 1st May 1672, disposed to his brother William Agnew of Wigg, and his heirs-male and assignees whatsoever; which failing, to return to the said Sir Andrew Agnew and his heirs-male, the lands of Polmallet and Oldbreck.