No 49. little Highland cow would have served his small family, *et lautius vixit*, looking on it as God's gift, or some friend's who had forgot to write with it.—*Answered*, It is a law of nature, *jus suum cuique tribuere*, and reason suggests *quod omnes scire debent quod suum non est, hoc ad alios modis omnibus pertinere, et error non facit jus;* and whether you was *in dolo* or *culpa*, yea or no, I may vindicate my property wherever I find it; and there was not so much as a title of donation, or any other to sustain his *bona fides; et nemo debet locupletari cum alterius jactura;* and the law is clear in this as to parallel cases, *l.* 23, *et* 32. *D. de reb. credit, et. l.* 6. *D. de condict. ob turp. causam, et sine causa*, and the *Decisiones Gennenses, cap.* 171. determine, that *ille, cui spectant merces, licet directæ ad alium, potest agere contra tertium, cui per errorem traditæ sunt.*—THE LORDS repelled the defence, and found him liable, but modified the price of the ox to L. 3 Sterling.

Fol. Dic. v. 1. *p.* 107. *Fountainhall, v.* 2. *p.* 20.

1707. *July* 10.

DAME JEAN NISBET and SIR WILLIAM SCOT of Harden, her Husband, against The LAIRD of PRESTOUNGRANGE.

No 50.
A person uplifting money upon a probable title, was found not liable to account for annualrent.

THE deceased Dame Jean Morison having, during the life of Sir John Nisbet of Dirleton, her husband, when he was about to settle his estate, got a bond of 40,000 merks, bearing annualrent from the present Laird of Dirleton, to take effect in the event of his succession to the estate; and the Lady having, in *anno* 1691, after her husband's decease, when the granter of the bond was in possession of his estate, transacted the old for a new bond of 30,000 merks, whereof she uplifted 6000 merks that same year; 3141l. in the year 1693; and, by the foresaid transaction, got communicated to her a general disposition and assignation, granted by Sir John, of all that should belong to him at his decease. The Lady Harden, executrix to her father, pursued the present Dirleton for payment of the 30,000 merks bond, and called Prestoungrange as executor to his sister the said Lady Dirleton, for his interest. In which process, the Lords, 25th February 1697, preferred the Lady Harden to Prestoungrange, as to what was resting of the 30,000 merks, and reserved action against him, as accords, for what had been paid to his sister. The Lady Harden and her husband pursue now Prestoungrange for annualrent of the foresaid partial payments, made to his sister from the 25th February 1697.

Alleged for the defender:—That no annualrent was due, though the money uplifted did bear annualrent, till a denunciation for not payment thereof; because it was uplifted by a probable standing title at the time, viz. The bond in the Lady Dirleton's own name, fortified by her husband's disposition *omnium bonorum;* and it was she herself that first made the sum to bear annualrent. Yea, it is the great interest of mankind, that no *bona fide* intromitter *pro sue*

be insnared into annualrents upon the emergent decision of a dubious point of law; as one who has a probable title, though it be reduced thereafter, is not accountable for *fructus medio tempore bona fide perceptos*. So a person having uplifted a sum bearing annualrent, by the colourable title of an executor-creditor, which was thereafter reduced, was not found liable for annualrent; Jan. 10. 1673, Ramsay *contra* Robertson, *voce* CONDICTIO INDEBITI. 2*do*, No annualrent is due with us without a particular statute, or paction, or a confirmed custom: Thus, no annualrent was due even after denunciation till an act of Parliament was made for that effect; nor was annualrent due to a distressed cautioner paying the debt, or due by a factor appointed by the Lords for sums bearing annualrent that he uplifted, till acts of sederunt ordained it. No 50.

Replied for the pursuer:—Albeit it be true in general, that annualrent is only due *ex pacto vel lege*, that general rule hath many exceptions. Now here annualrent doth plainly arise *ex pacto*; in so far as the 40,000 merks bond, bearing annualrent, belonged to Sir John *jure mariti*, and consequently to the pursuer his executrix; and no unwarrantable deed of the defender's sister, inverting the right and possession of the said bond, could stop the course of annualrent in prejudice of the pursuer. Therefore the defender who represents her, must make up the pursuer's damage thereby, and restore the bond in the same case as it stood betwixt them and the debtor before her intermeddling. There is no shadow of a *bona fides* in this case; for the lady's concealing the 40,000 merks bond from her husband, to whom it belonged, was upon the matter a crime, which the common law, out of reverence to the married state, did vindicate in softer words, *actione rerum amotarum*; and she could as little pretend to an *illesa conscientia rei alienæ*, when she took the 30,000 merk bond in place of the *res amota*. Nor is it to the purpose to allege, that the lady had a colourable title from Direlton, who had a general assignation from her husband; seeing the Lords already found that assignation could not comprehend *incognita* to the cedent; and it were absurd to imagine that the assignation should contain the very bond granted for obtaining thereof. 2*do*, Albeit there be particular laws and statutes for making annualrents due only *ex mora*; yet annualrents arising from other rational causes are sustained without any special law. So the price of lands by custom bears annualrent; and annualrent hath been granted between merchants without any express paction. Again, a person delivering up another's blank bond to the debtor, who afterwards turns insolvent; or entering into a contract with him to conceal the bond from the owner, would be liable *ex dolo* for the sum and annualrents, as if himself had been debtor in the bond.

Replied for the defender:—Money of itself is not like lands or other things which naturally produce fruits; and therefore an obligement for annualrent thereof, which with us may exceed the stock, cannot be introduced without consent of party or a particular law. Annualrent is due for the price of land, only because the debtor possesseth the equivalent rents; and is sometimes de-

No 50. cerned in name of damage against one merchant in favour of another; because, by the nature of their employment, the one is supposed to have trafficked with the money, and the other wanted the subject of his trade.

THE LORDS assoilzied the defender from annualrent.

Forbes, p. 178.

1715. *January* 21.

COLONEL JOHN ERSKINE *against* SIR GEORGE HAMILTON.

No 51. *Bona fides* saves from repetition of super-intromissions after extinguishing any extinguishable right in the possessor's person.

IN the competition betwixt these parties about the lands of Tulliallan, the LORDS having, by interlocutor of the 17th of February 1714, (which is marked with the whole state of the case in the Journal of that Session *), found Sir George Hamilton's possession ascribeable to the preference in the decreet 1682, grounded on the Earl of Kincardine's disposition in 1678, until Sir George founded on his other rights to support that disposition, and that he did found on his other rights for supporting that disposition in the month of July 1701; and therefore found him accountable since the said month of July 1701, and that his possession and intromission ought to be imputed to extinguish the said separate rights accordingly: Upon a reclaiming bill given in this day by Sir George, and answers for the Colonel,

THE LORDS adhered to the former interlocutors and deliverances, finding Sir George accountable for his intromissions since the month of July 1701, *ad hunc effectum* only, for extinguishing his rights, but not for repetition of superintromissions; and refused the desire of the petition accordingly.

For Colonel Erskine, *Ro. Dundas.* Alt. *Graham.* Clerk, *Mackenzie.*

Bruce, No 34. *p.* 44.

1720. *January* WALKER *against* M'PHERSON and FORRESTER.

No 52. AN adjudication, long after the expiry of the legal, being restricted to a security, because more was adjudged for than due; the LORDS found the rents intromitted with, after expiry of the legal, while the adjudger *bona fide* considered himself as proprietor unaccountable, did yet impute to extinguish the adjudication.

Fol. Dic. v. 1. *p.* 107.

*** *See* The particulars, *voce* ADJUDICATION, p. 302.

1722. *June* 22. RUTHERFORD *against* CROMBIE.

No 53. AN adjudger, after the expiration of the legal, entered to the possession of the lands. The adjudication was afterwards reduced to a security on account of

* Examine General List of Names.