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.

ARBRUCHELL 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 bygones are *fructus bona fide conſumpti et percepti.—Answered*, 1*mo*, *Bona fides* is not in lucrative titles of ſucceſſion and the like, but only where the cauſe is onerous, as amongſt creditors or purchaſers. 2*do*, 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, diſponed 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.

No 14.
heir of line of the laſt heir male, entered into poſſeſſion. The heir of deſtination eſtabliſhed his right by declarator. There being ſtrong ground to ſuppoſe, that the heir of line was not ignorant of the deſtination, he was found to have no plea of *bona fides*, and to be accountable for the rents.

William Agnew, ſon to the diſponee, died *anno* 1738, whereby the male-line failed, and was ſucceeded in the groſs of his eſtate by Hugh Hawthorn, his grand-nephew by his ſiſter, who entered alſo to the poſſeſſion of theſe lands.

Sir Andrew Agnew, heir-male to the diſponer, raiſed a declarator of his right to the lands, and a repetition of the rents intromitted with, in which the Lord Ordinary declared in his favour, and found he had right to the mails and duties from the citation, but made aviſandum to the Lords, how far the bygone rents were *bona fide percepti et consumpti.*

Pleaded for the purſuer:—That unleſs there were a colourable title, there could be no *bona fides;* Stair, p. 175, at the beginning, 16th November 1633, Grant againſt Grant, No 24. p. 1743.

The purſuer's action was *hereditatis petitio;* the defender in which had no right to retain the reaped fruits, l. 20. § 3. *et* l. 25. § 11. *ff. de hereditatis petitione.*

Pleaded for the defender:—He was univerſal heir, and entered to the poſſeſſion of the eſtate, not knowing the ſucceſſion to theſe two parcels was deſtined to go in a different channel; ſo that he poſſeſſed *pro herede*, which was a title of *usucapion*, *l.* 3. *ff. pro herede*, and leſs than was ſufficient to *usucapion*, was a ſufficient title to acquire the fruits; *Voet*, *num.* 30. *de acquiren. rer. dom.*

To make one poſſeſſor *pro herede*, it was ſufficient that he thought himſelf heir, *l.* 11. *ff. de her. pet.*

With regard to the lands of Oldbreck, the late Wigg was infeft therein, *anno* 1700, under the Great Seal, to him and his heirs whatſoever, upon the reſignation of the Earl of Caſſillis, which was a title to found the defender's poſſeſſion upon.

Pleaded for the purſuer: That theſe lands were part of the Abbacy of Saulſeat, the feu-duties whereof belonged to the Earl of Caſſillis as Lord of Erection; and Wigg having purchaſed from him his feu-duty, took the right in the form of a diſpoſition to the ſuperiority; but it appeared from the diſpoſition, that the property, which alone could carry the rents, depended on another right.

On the firſt report of this cauſe, it was *alleged* by the purſuer, That Mr Hawthorn had made up titles in his perſon to the whole of his grand-uncle's eſtate, except theſe two parcels; in doing whereof he could not but diſcover the nature of the deſtination, and conſequently that he had no right to them, and therefore had not attempted to make up titles.

On this it was remitted to the Ordinary, and again reported.

William, the original diſponee, was infeft in the lands of Skeog, holden of the Earl of Caſſillis, 1ſt June 1671.

He was infeft in Caſtlewigg, and ſome other parcels, 25th October 1671, on a charter from the Biſhop of Galloway.

Sir Andrew Agnew diſponed to him, 1ſt May 1672, Oldbreck and Pollmallet, on which no infeftment was expede.

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William, his ſon, was ſerved heir to him, 9th November 1695, in Caſtlewigg, &c. and infeft therein 11th May 1696. He acquired the ſuperiority of the lands of Skeog, lands of Dunance, and feu-duties of Oldbreck, from the Earl of Caſſillis, and took the right to the whole, in the form of a diſpoſition to the ſuperiority, 12th June 1700, with this clauſe *in grœmio*, 'That the ſame ſhould 'nowiſe hurt, or prejudge the rights and ſecurities of the property of the ſaid 'lands.' And, on the reſignation in this diſpoſition, expede a charter under the great ſeal, whereon he was infeft 24th May 1701.

Afterwards he purchaſed the lands of Cutreoch, and ſome others, 24th March 1724, and 25th March 1725, in none of which he was infeft.

Mr Hawthorn was ſerved heir in the whole lands contained in the retour 1695, and in the charter 1700, and alſo executed the procuratories relating to thoſe lands wherein his predeceſſor was not infeft, and was infeft in the whole.

Pleaded for the purſuer: That from this ſtate of the caſe, it appeared plainly the defender had been well-acquainted with the condition of the rights of the eſtate; and there could be no other preſumption than that he knew he had no right to theſe two parcels, and ſo could not be in *bona fide*.

Pleaded for the defender:—It ought not to be preſumed that he had made an accurate ſearch into his predeceſſor's papers, and diſcovered the diſpoſition 1672, whereon the purſuer had prevailed in his declarator: He had ſerved heir in the lands contained in his predeceſſor's infeftment,; and the purchaſe of theſe lands wherein he had not been infeft, was recent, and conſiſtent with his knowledge; and thus he entered upon the poſſeſſion of the eſtate.

With regard to Oldbreck, his predeceſſor was infeft therein under the Great Seal, which was a colourable title.

There was no queſtion put concerning the rents of Pollmallet; but concerning thoſe of Oldbreck, urged in his favour, That it appeared he had made up his titles thereto, on the foundation of the charter 1700, whence it was to be preſumed he had taken that for the title by which Agnew of Wigg poſſeſſed it, and conſequently was in *bona fide*.

Answered: This argument would extend alſo in its conſequences to Pollmallet, as proceeding on the ſuppoſition that he had not ſeen the diſpoſition 1672; but, indeed, in making up his titles, he had done no more than was neceſſary for him to carry the feu-duties, to which he had right by that charter and diſpoſition whereon it proceeded, which bore to be without prejudice to the rights to the property.

THE LORDS repelled the defence of *bona fides*.

Reporter, *Elchies*. Act. *W. Grant & Lockhart*. Alt. *A. Macdouall & R. Dundas*. Clerk, *Forbes*.

Fol. Dic. v. 3. p. 95. D. Falconer, v. 1. No 231. p. 158.