No 11. which might make her ſubject to refund theſe by-gones uplifted *bona fide*, and conſumed, which allegeance was repelled.

Fol. Dic. v. 1. *p.* 109. *Durie, p.* 368.

1662. *November* 20.

CHILDREN of WOLMET *against* DOUGLAS and CUNINGHAM.

No 12.
A donation by a huſband to a wife being revoked by poſterior donation to the children; in accounting for the interim profits, the wife was conſidered as a *mala fide* poſſeſſor, becauſe ſhe knew of the right of her children. The *relation* of the parties was here deemed an important circumſtance.

IN a purſuit at the inſtance of the Children of Wolmet, for the profit of the coal of Wolmet, intromitted with by Jean Douglas Lady Wolmet in her viduity, by virtue of a tack of the coal granted by umquhil Wolmet to his children for their portions: It was *alleged* for the defender, 1*st*, abſolvitor, becauſe the ſaid Jean had right to the ſaid profit of the ſaid coal, ever ſince her huſband's death, by virtue of the wadſet of the lands and coals of Wolmet, granted by umquhile Patrick Edmonſtoun of Wolmet, to James Loch, wherein there is a back-tack of the land and coal ſet to the ſaid umquhile Wolmet, and the ſaid Jean his ſpouſe, for the annualrent of the money. It was *replied* for the purſuers, that the foreſaid back-tack was taken by Wolmet *ſtante matrimonio*, and ſo was *donatio inter virum & uxorem* null in itſelf, *niſi morte confirmetur*, and was confirmed by Wolmet's death, but revoked by Wolmet's tack granted to his children after the ſaid back-tack. It was *answered* for the defender, That the reply ought to be repelled, becauſe the back-tack was no donation, but a permutation, in ſo far as the lady, by her contract of marriage, was infeft in the half of the lands of Wolmet; which infeftment ſhe renounced in favours of James Loch, at the taking of the wadſet, and in lieu thereof, ſhe got this back-tack, which therefore can be no donation, which muſt be gratuitous without a cauſe onerous. It was *replied* by the purſuers, That the duply is not relevant; for albeit it be not a pure donation, yet *quoad excessum* the ſuperplus of the benefit of the back-tack, above the benefit of the contract of marriage, is gratitude, and a donation; and the reaſon of the law againſt donations betwixt man and wife being *ne mutuo amore se ſpolient*, it holds in it, and it would be eaſy to elude the intent of that good law, if donations contrived under the way of permutation without any real equality were allowable. It was *answered* for the defender, that the duply ſtands relevant, and the ſuperplus of a permutation cannot be called a donation more than the benefit of an advantageous vendition: it is true, that if the donation of the back-tack had been *ex intervallo*, after the ladies renunciation, it would (*not*) have been *unicus contractus*, but two diſtinct donations; or if the matter exchanged had been *aliquid ejusdem speciei*, as an annualrent of 500 merks, with an annualrent of 1000 lib. the ſuperplus would have been a donation; or if the lady had received a notable exceſs above the half, yea, above the third, of what ſhe quitted, it might have been revocable by her huſband, ſhe being reponed to her firſt condition, by her contract of marriage, but here there is no ſuch exorbitant exceſs, ſhe having quitted a certain land rent for the profit of a coal, which is moſt uncertain, for the haill land rent would

not pay the back-tack; and it is now wadſet; and likewiſe ſhe is perſonally liable for the back-tack duty. No 12.

THE LORDS repelled the defence and duply, in reſpect of the reply and triply; and found the exceſs ſo conſiderable in this caſe, that it was as a donation, and was revoked by the childrens tack; but found, that before the defender made payment of what ſhould be found due by this account, ſhe ſhould be reponed and put *in ſtatu quo prius*, by her contract of marriage.

It was further *alleged* for the defender, abſolvitor, becauſe that albeit her right to the back-tack were revoked by the children's tack, yet ſhe is *bona fide* poſſeſſor, *et fecit fructus conſumptos ſuos*, according to the law of this kingdom, and of moſt of other nations neceſſarily introduced, for the good and quiet of the people; becauſe, as to and profits, they ſpend as they have, and therefore what they ſpend *bona fide* by a colourable title, they are ſecured in that, albeit their title be taken away; yet they ſhall not be called in queſtion for what they have enjoyed *bona fide* before ſentence or citation.—It was *answered* for the purſuers, That the defence was not relevant in that caſe, where the queſtion is not of induſtrial fruit, but of natural fruit, ſuch as coal. 2*do*, It is not relevant, unleſs it were *cum titulo*, not *ipſo jure* null; but here the defenders title being a donation betwixt man and wife, is by the civil law, which herein we follow, null *in ſe niſi morte confirmetur*. 3*tio*, There muſt be *bona fides* which is not here; becauſe it is inſtructed by a minute of a contract, produced within five months before the childrens tack, that the Lady conſented to the providing of the children by the profit of the coal; and ſhe cannot be preſumed ignorant of ſo domeſtic an affair in favour of her own children done by her huſband; and ſhe hath given up an article in her account of the expence of regiſtering the childrens' tack, by herſelf; and ſo ſhe muſt be preſumed to have poſſeſſed as pro-tutrix for her children, and not to defraud or exclude them.—It was *answered* for the defender, That the defence ſtands yet relevant, and the law makes no difference betwixt induſtrial and natural fruits; he who poſſeſſes lands *bona fide* is no more acccountable for the graſs that grows of itſelf, nor for the corn that he labours for. 4*to*, And coal is an induſtrial fruit, having as much pains and expence as corns and other induſtrial fruit, and more uncertainty: As to the title, albeit it be invalid, yet *ſufficit coloratus vel putativus titulus*; and albeit in the antient Roman law ſuch donations were null, *in ſe niſi confirmentur morte*, yet by the ſubſequent courſe of law, *per orationem Antonii*, they are declared valid themſelves, unleſs they be revoked, and therefore are not null, but *annullantur medio facto*; and there are many nullities which may conſiſt with a colourable title, *ad hunc effectum lucrari fructus conſumptos*; as if the nullity be not *ex defectu ſubſtantialium*, but by defect of ſome ſolemnity, as the not regiſtration of a ſaſine will not make it ſo null, but that the poſſeſſor *bona fide* thereby may employ the fruits; but if it want tradition of the ſymbol, it will be null *in ſe*; but here ſuch donations have all their eſſentials, but they are only annullable by a ſubſequent fact; and as to the evidence, that the Lady was in

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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.