

No 45.

appriser, might be *titulus bonæ fidei* against repetition of the fruits intromitted with by the singular successor, unless the rights and progress in his own hand did instruct and narrate, that the apprising was satisfied ; but found, that though such a singular successor would be safe against repetition, yet, if there was another debt due to him the time of his intromission, by the party whose lands were apprised, it ought to be applied towards the satisfaction of that debt.

*Fol. Dic. v. 1. p. 107. Harcarse, (COMPRISING.) No 284. p. 67.*

No 46.

The Lords found a comprising extinct within the legal, but retained a minor in the possession ; *quia minor non tenetur, &c.* Being pursued after majority for by-gones, he was held to be a *bona fide* possessor.

1684. December 9.

FALCONER of Kincorth against KINNIER.

— FALCONER of Kincorth's case *contra* Kinnier is advised. It was *alleged* against a comprising led in 1622, that it was satisfied and paid by intromission within the legal ; and probation being led thereon, by virtue of a commission to Mr James Inglis in 1673, and the same advised, the Lords found the comprising proven to be extinct by satisfaction ; but, in regard it was alleged then that Kinnier was minor, they stopped to put him out of possession, because of the maxim *quod minor non tenetur placitare super hæreditate paterna* ; but ordained him to find caution for the superplus more than paid him, if there should be any. He being now major, raises a reduction of that report, on this reason, that the depositions do not bear that the witnesses were examined by these formal words, ' As they shall answer to God.' And though they be subscribed by the judge, yet they are not signed by the witnesses ; nor does the report bear that they could not write. *Answered*, These are not nullities, and the probation is already advised ; and the witnesses are all since dead, and so it cannot be loosed now. — THE LORDS adhered to the said report, and would not loose the depositions now after so long a time, and that the mean of probation was perished. *See* WITNESS.

The next question was, if he was *bonæ fidei possessor quoad* the bygone rents ? The Lords inclined to find him so, because of the brocard *non placitare tenetur* ; yet he was alleged to be *in mala fide*, because of the caution he was put under.

*Fol. Dic. v. 1. p. 110. Fountainball, v. 1. p. 318.*

1685. January.

JOHN CALDWELL against CHRISTIAN JACK.

No 47.

An aliment, although erroneously awarded, was held to be *fructus bona fide consumpti* ; and repetition denied.

A RELICT having pursued her husband's apparent heir for implement of her contract of marriage, he repeated a summons of aliment by way of defence, upon this ground, that the whole estate was liferented ; and the Lords did modify an aliment to him, of which a reduction was raised several years after, as being exorbitant, and proceeding upon misrepresentation, that the wife's jointure was great, whereas it was but an annuity of L. 700, out of which 700 merks, two-thirds thereof, was modified for the heir's aliment.

*Answered, imo,* The Lords do not go back upon modifications. *2do,* The bygone years aliment are *fructus bona fide consumpti*.

*Replied:* The *quota* of the modification proceeded upon misrepresentation, and the *fructus* cannot be thought *bona fide precepti et consumpti*, seeing the defender had the aliment only by retention and absolution from the process of implement.

THE LORDS would not go back to restrict the aliment, and absolve from the reduction.

*Harcarse, (ALIMENT.) No 20. p. 5.*

1686. *March.* LADY ECCLES *against* MR JAMES DOUGLAS of Earnslaw.

IN a special declarator at a donatar's instance against the rebel's relict, it was *alleged* for the defender, That she consumed and disposed of some part of the goods acclaimed, for the defunct's funeral expences, her mournings, and the maintenance of the family till a term.

*Answered* for the pursuer: That the goods of the defunct, who died rebel, fell to the fisk, and could not be liable to any such expence.

*Replied:* The goods were so employed before the gift of declarator, and the defender was *in bona fide* to do so, not knowing of the rebellion. *2do,* A legal third of her husband's goods belonged to herself.

THE LORDS sustained the relict's *bona fides*; but found, That the rebellion excluded legal thirds; and it was not alleged that she had any obligation for her third. *See ESCHEAT.*

*Fol. Dic. v. I. p. 110. Harcarse, (ESCHEATS.) No 437. p. 117.*

1698. *November 29.*

JAMES FINDLAY of Balchristie *against* JAMES MONRO.

WHITELAW reported James Findlay of Balchristie against James Monro, writer in Edinburgh. Mr Findlay having sent an ox to be delivered to John Macfarlane, writer to the signet; and the man employed, forgetting his name, and asking for a north-country writer, he was directed to James Monro's house by some neighbours, and he not being in town, his wife received it, and disposed on it, not knowing but it was sent by her husband, or some friend in a gift; but, when he came home, he declared he knew not whence it came; however, they salted and applied it to the use of his family; and being now pursued for L. 48 Scots, as the price of it, he *alleges*, it was *bona fide perceptum et consumptum*; if he had sold it, he would have been liable as *locupletior factus*; but he did not, except the skin, for which he got L. 3 Scots; and he had little benefit, seeing a

No 47.

No 48.

A relict's intromission with a defunct's goods, applied before his escheat was gifted, held to be *bona fide*.

No 49.

A present sent by mistake to one person instead of another, was not considered to be *bona fide* consumed, being *sine causa*.