

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 assolvit 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*.

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 up-
lifting money
upon a prob-
able title,
was found not
liable to ac-
count for an-
nualrent.

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; 3141. 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*