

*Answered* for the defender, The strict rule of law is, that he who is found to be proprietor has a right to vindicate his property, in whose hands soever it may be; and a right to all the fruits or rents must go along with the right of the lands. The law has wisely admitted a mitigation of this rule, from considerations of humanity, to prevent the hardship of making one restore what he had received, and made use of, believing it to be his own; but no law can allow a person who has no right, to evict from the true proprietor rents that are *in medio*.

The defender never acted as pro-tutor for the pursuer. He agreed, for his advantage, when an infant, to become tenant in a part of the lands, and to pay for them a certain rent; but as there was no person entitled to receive the rent, the defender was, from necessity, obliged to retain it in his hand till the minor should be of age. The true proprietor has right to recover his rents wherever he finds them *in medio*, in the hands of tenants, and must of consequence have right to retain them when in his own hand.

THE LORDS found the defender David Morris liable to account for the rents in question.

Act. Macqueen.

Act. Macintosh.

Clerk, Gibson.

W. Nairne.

Fol. Dic. v. 3. p. 94. Fac. Col. No. 242. p. 442.

## S E C T. III.

## Private Knowledge of a Preferable Right.

1628. March 22. ——— against CHESHOLM.

IN action betwixt ——— and Chesholm, for payment of the by-gone mails and duties of a land, to the alienation whereof, made to the pursuer, by the defender's husband, the defender convened, being then his spouse, and who was then infest in the lands, gave her consent; and now, after her husband's decease, she being convened for repayment, to the pursuer, of the said mails of certain years, intromitted with and uplifted by her since her husband's decease, and which preceded the intending of this cause: THE LORDS sustained this action pursued against the relict *personaliter* for payment making, notwithstanding of her defence proponed against the personal pursuit, founded upon her liferent right, which the *alleged* could not be prejudged by her consent adhibited to the said alienation, at command and reverence of her husband; and she remaining now possessor, *alleged*, that, in this judgment, she could not so summarily be decerned to refund by-gones uplifted by her, conform to her infestment, standing *bona fide*, no deed being done by the pursuer before the defender's intromission,

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A relict was decerned to repeat rents of lands, provided to her in liferent, because she had consented to the alienation of them by her husband to the pursuer.

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which might make her subject to refund these by-gones uplifted *bona fide*, and consumed, which allegiance 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, 1st, absolutor, 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 infest in the half of the lands of Wolmet; which infestment 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 hail land rent would