

SECT. II.

What esteemed *Fructus Percepti*.1745. February 13. ANTONIUS COUNT LESLY *against* LESLY of Pitcaple.

THE competition among the heirs of tailzie of Lesly of Balquhain, being determined in favour of Lesly of Pitcaple by decree of the Court of Session, 20th February 1741, he took a decree in his own baron-court, 11th March, against the factor, who had been named by the consent of all the competitors, and against the tenants for the rents fallen due since the death of the last possessor; but before he could levy them, an appeal was served against him, and a summons of mails and duties executed against them.

The appeal being dismissed on some informality, a second was brought next session of Parliament, viz. in December 1741, and the cause at last finally decided in favour of Antonius Count Lesly, who thereupon pursued Pitcaple and the factor, as intromitters with the rents of the estate.

THE LORDS, 14th February 1744, sustained the defence of *bona fides* with respect to the rents of the estate of Balquhain for the 1740, uplifted and intromitted with by Pitcaple before the second appeal.

A reclaiming bill was offered, which being refused as to some other points contained in it, was ordered to be answered with respect to this, Whether, in so far as the rents of the crop 1740 were not consumed by Pitcaple, but remained in the tenants hands, though upon bills payable to him, his *bona fides* did entitle him to them?

Pleaded, That the *bona fide* possessor's privilege went no further than not to be accountable *pro fructibus perceptis et consumptis*.

Answered, That the possessor's right extended to all that fell due during the time that his possession was not quarrelled; for these rents he looked upon as his own, and thereupon regulated his affairs; *l. 13. in fine ff. quibus modis ususfructus, et l. 78. ff. de rei vindicatione*.

At any rate, he was not liable for what was not extant, and the rents which were discharged were not extant, though the tenants might owe equivalent sums by bill.

THE LORDS adhered.

Act. Graham, sen.

Alt. Graham, jun.

Clerk, Kilpatrick.

Dic. v. 3. p. 95. D. Falconer, v. 1. p. 74.

No 6.

A person holding a decree of the Court of Session, as his right to an estate, took bills from the tenants, and granted them receipts for the rent. The decree was, before the bills were paid, reversed; but the rents were considered as *percepti et consumpti*.