

1760. July 30.

JOHN BONNY *against* DAVID MORRIS.

No 10.

The true proprietor who possessed as tenant under a *bona fide* possessor, was found accountable to him for the rents in his hand.

THOMAS BONNY was proprietor of a small estate, and died without issue.

William Bonny the eldest son of John Bonny, who was brother consanguinean to Thomas, was served heir to his uncle Thomas; and dying, was succeeded by his brother John Bonny, the pursuer, then an infant, who was served heir to him, and infest.

Thomas Bonny, at his death, left a sister-german, Janet Bonny, mother of David Morris, the defender.

David Morris possessed a part of the lands for several years as tenant, in virtue of a written agreement, by him and some others of the pursuer's nearest relations; whereby they agreed, that, to save the expence of serving a tutor in law, each of them should possess a part of the pursuer's lands, at a certain rent, during his minority, for his behoof.

John Bonny was, for several years, supposed proprietor of the lands; but at length it was discovered, that his title was null; that William Bonny, who was nephew to Thomas only by half blood, has been erroneously served heir to him, as his nearest heir was Janet, his sister-german. Upon this Janet Bonny was served heir to her brother Thomas; and mutual processes being brought before the Court of Session, (during the dependence of which, Janet Bonny having died, was succeeded by her son David Morris), the LORDS found, 'That Janet Bonny was sister-german, and nearest heir, to Thomas Bonny; and that David Morris, in the right of his mother, had right to the subjects in question.'

Thereafter John Bonny *insisted*, That David Morris should account to him for the rents which were in his hand, of that part of the lands which he had possessed as tenant, for the behoof of John Bonny, while he was supposed proprietor.

Pleaded for the pursuer, That as he stood infest in the subject as proprietor, he was entitled to the rents till his right was set aside. If the rents had been uplifted, he would not have been obliged to repeat them; and their happening to lie in the tenant's hand ought to make no difference. The rule of the civil law, which is adopted into ours, was, *Bonæ fidei possessor fructus perceptos et consumptos suos facit, et non cogitur restituere consumptos quantumvis iis sit factus locupletior*; and as the fruits, how soon they are consumed, belong to the *bona fide* possessor, it can make no difference whether they were consumed by himself, or by his tenant.

It was in the character of one of the pro-tutors for the pursuer that David Morris took the possession; as such it was his duty, to lay out regularly, for the pursuer's behoof, the rents of the lands, of which he kept the possession himself, in the same manner as he ought to have uplifted, and laid them out, if he had set the possession to another tenant; and if he neglected to do what his duty as pro-tutor obliged him to, he cannot reap a benefit from that neglect.

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.

Aft. Macqueen.

Alt. 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 saids 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 she *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,

No 11.

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.