

No. 1. able for the person pleading it : But if a debtor, in a bond bearing interest, was pursued for payment, if the obligation was good, it would be no reason for *asoilzieing*, that the debtor believed himself not bound. This was precisely the present case ; the pursuer's claim was a claim of debt ; and although the defenders, by having a *probabilis causa*, might plead to get free of expenses of suit, this could be no reason for not implementing the contract, express or implied, by which they and their authors were astricted to these mills.

Answered for the defenders :

1mo, It was immaterial whether the present action was in its form declaratory or possessory. It was brought at the instance of the pursuer, but it had in fact been carried on by the proprietor of the mill in order to establish the thirlage. The defenders had not indeed been in the disuse of going to the pursuer's mill so long as to found them in the defence of the negative prescription as to the right, but they had been in the disuse of doing so since the year 1745, a term long enough to found them in the defence of *bona fides* against the claim for bygone abstractions.

2do No case could be figured where the application of this defence was more proper than the present. The exception of *bona fides* was introduced in odium of the negligence of the true proprietor, and was even sustained where the possessor had been rendered *locupletior* by enjoyment of the fruits. Now the defenders had not been possessing a subject belonging to another ; nor had they, by abstracting their grain from the pursuer's mill, been enriched. The present could not be called a claim of debt ; all that ever could have been claimed was the privilege of performing a certain piece of work for a certain hire ; and if the pursuer had not insisted to do that work, upon what principle of equity could he demand his hire ?

The Court, by a narrow majority, altered the Ordinary's interlocutor :
 " Repelled the defence of *bona fides* ; and found the defenders liable for their
 " abstractions for three years preceding the citation in the pursuer's libel or
 " claim."

Lord Ordinary, *Monbodo*.
 Clerk, *Kirkpatrick*.

For Bruce, *Macqueen*.
 For Wilsons, *Maclaurin*

R. H.

Fac. Coll. No. 22. p. 53.

1771. March 13.

JAMES BREMNER, against COLONEL ST. CLAIR of St. Clair.

No. 2.

Money found in the repositories of a factor introrited with *bona fide* by his constituent,

THE defender appointed John Ross his factor ; who, after two or three months employment, and having uplifted about £140 of the rents, died, being then, on account of his introrissions, £20 in the defender's debt. The sum of £25. was found in Ross's repositories after his death ; and Colonel St. Clair having demanded payment of the balance due to him out of that sum, as being

part of his rents uplifted by the deceased, Donald Ross, his brother, who had got himself confirmed executor, paid him the same, taking a receipt from the Colonel; wherein he obliged himself to be answerable to all concerned, and to relieve Donald Ross accordingly.

John Ross having been owing several small sums to different tradesmen, they constituted their debts; and having conveyed the same to the pursuer, he expedite a confirmation *qua* creditor of the defunct *ad omissa*, and on that title brought an action against Colonel St. Clair and Donald Ross; concluding against them, conjunctly and severally, for repetition or payment of the said sum of £20. with interest from the date of the intromission.

The Lord Ordinary pronounced an interlocutor, finding, "That the defender had no legal or proper title to intromit with the money out of the repositories of the deceased John Ross; finds, that the pursuer, having made up a legal and proper title, has right to recover the same; and therefore decerns against the defender for the sum libelled."

In a reclaiming petition, Colonel St. Clair pleaded:

1mo, As the sum in dispute was truly a part of his rents uplifted by the deceased from his tenants, it was repugnant to every idea of justice that it should be applied to pay the factor's private debts. The constituent and his factor were, in the eye of law, one person: The factor was considered merely as a hand or depository; so that the property still remained with the constituent, and could not be transferred by the factor's act or deed. On this principle it was, that arrestment used in the hands of the factor could not found an action of furthcoming without calling the constituent. The right of retention and compensation proceeded upon the same idea. Stair, B. 1. T. 18. § 6. Dict. *voce* PAYMENT. Bankton, B. 1. T. 24. § 34. Erskine, B. 3. T. 4. § 8.

2do, The defender was, at any rate, *in optima fide* to receive the money in question. There was every appearance that the sum *in medio* was part of his own rents; he received it from the nearest of kin and executor confirmed of the defunct; and he was not now contending for any thing more than a *pari passu* preference with the other creditors. The present dispute had not occurred with an executor confirming within six months; so that his *bona fide* possession was, at all events, sufficient to supply the want of a legal title by confirmation; which, if the executor had refused payment, he could at once have procured.

Answered for the pursuer:

1mo, The defender's whole argument was founded on a *petitio principii*, on an erroneous supposition that the money found in the repositories of the defunct was his property. This idea was without foundation: The possession of moveables presumed the property; and that presumption was equally strong in the case of money as in that of any other subject. All the claim which the defender had was merely a *jus crediti* to a share of the sum found; and it would be absurd to suppose, that every one who alleged he had a share or in-

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gives a legal title in competition with creditors, to retain a proportion of the sum intromitted with, corresponding to the sum due to the constituent.

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terest in this fund should be authorised to put forth his hand and lay hold *de plano* of whatever part he might pretend he had a right to. The defender being therefore but a creditor, the only regular way in which he could make his claim effectual was by a process of constitution against the defunct's executor or nearest of kin; but which mode of proceeding he had not followed.

2do, As the defender admitted he knew that the deceased had other creditors, there could be no *bona fides* in the *brevi manu* possession of the money he had assumed. But although he had been *in optima fide*, he would not be entitled to withhold the money from the executor-creditor who had made up a proper title. The act of Sederunt 1662 fixed the rule as to competitions of this kind. Colonel St. Clair had not confirmed within the six months limited: Were he still to confirm, he could not come in *pari passu* with the pursuers; and it was impossible to understand how, without confirmation, he could be allowed that preference which he could not, even by using that legal diligence, now acquire. Were *bona fides*, in cases of this kind, sustained as a justification, the consequences would be extremely dangerous: Creditors who lived in the neighbourhood, or who got early notice, would carry off every thing; and there would be an end to confirmation, as well as every other diligence now required to be used.

The Court pronounced the following judgment: "In respect there is no sufficient evidence that the money intromitted with was truly the rents of Colonel St. Clair's estate, therefore find the Colonel had no proper title to intromit in preference to the respondent; but in regard of the *bona fides* of the Colonel, and other special circumstances of the case, find the Colonel has a title to retain so much of the money as corresponds to his debt, in proportion with the debt of the respondent."

The pursuer having reclaimed, and an answer having been given in, some of the Judges expressed great doubts as to the propriety of admitting the defence of *bona fides* in the present question; but it was carried to adhere.

Lord Ordinary, Gardenston.
Clerk, Campbell.

For Bremner, G. Wallace.
For St. Clair, W. Mackenzie.

R. H.

Fac. Coll. No. 89. p. 264.

No. 3.

1804. December 11. HALDANE against ADAMSON.

No claim for repetition is competent against a minister who has drawn stipend in virtue of a decree of modification, although the discovery, in the course of the locality

IN 1793, the Reverend James Adamson, minister of the parish of Abernyte, obtained an augmentation of his stipend, which exhausted the teinds, as they then appeared to be.

All the heritors produced valuations, and among the rest Robert Haldane, Esq. of Airthrie, produced one, obtained on 23d November 1796, valuing his teinds at £10. 1s. 0 $\frac{8}{12}$ d. Sterling.

A locality was given in, proportioning the stipend agreeably to the state of teinds. Mr. Haldane's lands were burdened with twenty-nine bolls of victual, and £11. 5s. 6d. Scots money.