

No. 2. 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.

In April 1800, Mr. Haldane paid to Mr. Adamson £35. to account of augmented stipend ; and in August 1801, £25. more was likewise advanced.

The locality was approved 21st January 1801.

Reclaiming petitions were presented against it by Mr. Haldane, as well as by other heritors, who contended, that, in virtue of the judgment of the Court, then just given, in the case of Lamington, they could not be called upon to pay more than their money-teind.

A new scheme of locality was accordingly made out upon these principles, and Mr. Haldane's proportion was accordingly fixed at £16. 1s. 0 $\frac{8}{12}$ d. This locality was approved by the Court, 27th January 1802.

Mr. Haldane having discovered a valuation of his teinds in 1767, by which it appeared, that they were nearly exhausted by the old stipend, insisted in a petition to the Court, (17th February 1802), that the locality should be again rectified.

This was accordingly done.

An action was now brought against Mr. Adamson, to make him pay back the £60. which had been advanced to him : As Mr. Haldane's lands could not be subjected to such a proportion of the augmented stipend, the payment had in fact been made out of the stock.

The Lord Ordinary (16th February 1803) repelled the defences.

Mr. Adamson reclaimed ; and

Pleaded : Wherever a person, upon a fair and probable title, has received and consumed the fruits of a subject, he cannot be called upon to restore them, if any error in his title shall afterward be discovered ; Stair, B. 1. Tit. 7. § 11, 12. ; Ersk. B. 2. Tit. 1. § 25. ; Leslie, 13th February 1745, No. 6. p. 1723. Bonny, 30th July 1760, No. 10. p. 1728 ; Oliphant, 30th November 1790, No. 5. p. 1721. From the time the decree of augmentation was in force, and the amount of the teinds acquiesced in by the heritors, the minister was *in bona fide* to receive payment of what was awarded by it, and consequently to expend his augmented stipend. " *Bonæ fidei possessor fructus perceptos suos facit, et non cogitur restituere consumptos.*"

Answered : There is no room for the plea of a *bonæ fidei perceptio* ; because the title under which this sum was received, was a scheme of locality, never final, and which was afterward altered. Although, indeed, a decree of modification entitles a minister immediately to attach any teinds in the parish, it must be remembered, that here there is no question about teinds : These he has exhausted. But he has also acquired a part of the stock, which it was not in the power of the Court of Teinds to assign to him. The question in fact resolves into a *condictio indebiti* ; as such, there can be no doubt of the claim for repetition being well founded ; Reid against Maxwell, 7th July 1708, No. 25. p. 1744 ; Keith against Grant, 14th November 1792, No. 12. p. 2933.

The Court (17th May 1804) altered the Lord Ordinary's interlocutor, and assolvied from the claim of repetition.

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of a valuation, shew that the teinds had been previously exhausted.

No. 3. To which interlocutor, they "adhered," upon advising a reclaiming petition, with answers.

In both cases the judgment was by a narrow majority.

Lord Ordinary, <i>Hermann.</i>	Act. <i>Craigie.</i>	Agent, <i>Alex. Duncan, W. S.</i>
Alt. <i>Dickson.</i>	Agent, <i>Arch. Gibson, W. S.</i>	Clerk, <i>Ferrier.</i>

F.

Fac. Coll. No. 190. p. 427

1805. June 11. WILSON BOWMAN *against* HENDERSON.

No. 4.

Bona fides
not stopped
by the serv-
ing of an ap-
peal.

By the final judgment of the Court, (21st February 1797), Robert Henderson was found entitled to the estate of Logie, No. 59. p. 15444. in consequence of which, having extracted the decree, he (8th May 1797) charged his competitor, George Wilson, to make up a title under the entail 1757, and to denude in his favour; upon which he obtained decree of adjudication. Having expedite a charter, he was (29th November 1797) likewise infeft.

Wilson (18th November 1800) served a warrant of appeal upon Henderson.

The succession opened to the parties in the year 1792; and it was agreed that the rents should be uplifted by a joint factor, appointed by the parties, and applied to the discussion of the claim to the estate. In consequence of this agreement, the whole rents previous to 1797 were so expended.

Henderson for the first time uplifted the rents of the estate of Logie, on 1st April 1801, when the rents of the year 1797, 1798, and 1799, were settled with the various tenants. The rents of the year 1800 becoming due at Whitsunday and Lammas 1801, were in like manner settled on 1st July 1802.

The cause having been heard in the House of Lords, it was (29th March 1802) "Ordered and adjudged, by the Lords Spiritual and Temporal, in Parliament assembled, That the said several interlocutors complained of in the said appeal, so far as the same concerns the estate of Logie, which belonged to the late Walter Bowman, be, and the same are hereby reversed: And find, That the succession to the said estate falls to be governed by the deed of entail executed by Walter Bowman in the year 1757; and it is therefore ordered, that the appellant be assoilzied from the action brought against him by Robert Henderson; and decern also in the declarator brought by the appellant, according to the prayer of his declarator."

In consequence of this judgment, Wilson now obtained possession of the estate, and brought an action against Henderson for payment of the balance of the rents, after deducting expenses, as well as for the price of some wood, which had been cut down by him. The defence was, that the rents were *bonâ fide percepti et consumpti*.

The Lord Ordinary (11th December 1802) "Finds the defender accountable for the rents of the estate libelled, preceding the final judgment of the Court