

possession, and may have some notion of that of mala fide or knavish possession, according to the Rule *contrariorum eadem est Scientia* If a Kaver of that which is to be restored, cease to have by Fraud, he is obliged to restore as if he still had it; that is, he is bound to satisfy the Owner for the Value estimated by his oath in *litem* l. 68. ff. de rei vind. *Quia pro possessore habetur qui dolo desit possidere* l. 131. de reg. jur. A knavish possessor who knows that he has no colourable Title to what he possesses, is obliged to restore not only the Fruits which he has enjoyed and spent, but also those which a careful Man might have reaped from the Subject possessed l. 33. ff. de rei vind. l. 22. C. eod. §. 2. Institi. de offic. iud. Jo. Voet. *Comm.* 21 Tit. ff. de acquir. rer. dom. n. 20 *Stair* iud. §. 13. in fin. *Arrogate Knowledge upon Information without legal Diligence or Intimation* both not generally put one in mala fide 14 March 1626 L. *Westraw contra Williamson and Carmichael*. But the mala fide be not inferred among Strangers from private Knowledge: yet a Mother's private Knowledge of a Right in Favour of her Children, was sustained to put her in mala fide to possess to their Prejudice 20 November 1662. *Children of Wolmet contra Douglas and Cunningham*.

In some Cases a Citation and Production of another Right clearly preferable, sufficeth to put a Possessor in mala fide, as when he hath no probable Title. But *litis Contestation* or Sentence only doth it, where his Title is doubtful *Stair* Lib. 2. Tit. 1. §. 24. mala fides is most ordinarily inferred from *litis Contestation*. But a Possessor is then generally understood to be in bona fide till Decree, when mala fides depends upon Matters of Fact, to be proved after finding the Libel relevant. In Reductions it is arbitrary to the judge, to make the Defendant liable for bygone Profits from Citation *litis Contestation* or Sentence, according to Circumstances *Stair* iud. Thus one was found in bona fide till Citation 19 July 1664 *Douglas contra L. Weatherburn* 17 Feb. 1624 *Thomson contra Law* 16 Feb. 1666 *E. Wintoun contra C. of Wintoun*. Another till *litis Contestation* 24 Januar *Jaybie contra Mortimer*.

Another was found in bona fide till Decree 7 July 1627 L. *Pitmeeden*. and Lord *Elphinston contra Smith* 8 Feb. 1676 *Scrimzeour contra E. Northesk*.

In a Competition concerning Possession and Property, the Question about Possession is judged, before Inquiry is made into the Right of Property. l. 35. ff. de acquir. vel amitt. poss. l. 3. C. de interdict. Because the Discussion of Titles necessary for deciding the Right of Property, demands often Delays, which the Dispute about the Possession cannot

cannot admit of; and it is of Importance not to leave two Possessors exposed to the Danger of the Consequences of such a Dispute touching the Property. If the Question touching the Possession be doubtful so that there do not appear Ground enough to maintain any one of the Possessors therein, the Judge will order the Thing in Controversy to be sequestrate, untill the Question relating to that of the Property or of the Possession shall be decided *Les Loix Civiles* See Tom. 1. Part. 1. Liv. 3. Tit. 7. sect. 1. Art. 19.

In pari causa possessor potior haberi debet l. 120. ff. de reg. jur. Possession distinguishes the Right in Favour of him who besides the Equality of the Title has the Advantage of being in Possession. To be in Possession tho without a Title is very advantageous. For the Proof lies upon the Person who would come in upon the possessor where in if he fails, the possessor has the Advantage of retaining the Possession whilst the Property remains undetermined, or the Possession continues till the true Title appear §. 4. Inst. de interdict. l. 24. ff. de rei vind. l. ult. C. eod. And if the Proof seem doubtful, the Presumption of Right lies for the Person in Possession d. §. 4. l. 9. §. 4. ff. de public. in rem act.

*Stair* Lib. 4. Tit. 45. §. 17. n. 7. The Possessor hath this further Advantage that he pleas with the full Hand, and may defend himself with the Profits of the Estate. Upon the whole Possession being so much favoured, and so effectual both active and passive, it became a vulgar Saying: Possession is Eleven points of the Law, and better than an ill Charter. But there is this Difference between the Possession of Church-Benefices, and that of temporal goods which enter into Commerce: that whereas in these all Possessors are maintained in their Possessions without any Title, if they who disturb them therein produce no Title on their part; the Possessor of a Church-Benefice is not maintained therein, if together with his Possession he have not a Capacity for the Function, and a good Title to the Benefice Which Difference is founded on this, that whereas all sorts of Persons are capable of Possessing the Things which are in Commerce and the Ways of acquiring them are indefinite; ecclesiastical Benefices cannot be possessed, but by Persons who have a Capacity proportioned to the Quality of the Function, and who are inducted therein by the ways which the Laws of the Church have established for that Purpose, *Les Loix Civiles* Tom. 1. Part. 1. Liv. 3. Tit. 7. Sect. 1. Art. 15.