

No 3.

Pleaded for the defender, His lands are held by charter and *saſine cum decimis inclusis* ; which at leaſt is a good title of *bona fides* : Nor is there any thing in his rights inconſiſtent with this claim ; he is burdened with ſtipend to the miniſter of Mauchline, that is to ſay, the titular, when he granted the feu, made this a part of the *reddendo* ; and that it was the ſame thing to the vaſſal, whether he paid it to his ſuperior, or an aſſignee ; but there is no ſtipend impoſed on him to his own miniſter, which was the natural burden upon his teinds, if they were liable in any. Mr Rig cannot be ſuppoſed to have remembered the procedure betwixt Mr Lindſay and Enterkine, or if he did, it would have ſerved rather to perſuade him the lands were free, as there was a decreet of that import ; and Mr Lindſay neither diſcuſſed the ſuſpenſion, nor a reduction which he raiſed thereof.

THE LORDS, 5th February, ſuſtained the defence of *bona fide* poſſeſſion, founded on the charter *cum decimis inclusis* : And, on bill and anſwers, they repelled the defence. See PERSONAL OBJECTION.

Act. Boswel & J. Grant.

Alt. Ar. Hamilton.

Clerk, Forbes.

Fol. Dic. v. 3. p. 97. D. Falconer, v. 2. No 117. p. 260.

1752. November 24.

CAPTAIN HAMILTON BLAIR of Blair, *againſt* LAURENCE SCOTT of Baviſaw, and his Curator *ad litem*.

No 4.

Lands were adjudged, with teinds, &c. and expoſed to judicial ſale. There was no title to the teinds in the perſon of the common debtor. The purchaſer, from circumſtances, knowing that the ſale did not in fact include the teinds, being purſued for bygones, found not entitled to plead *bona fide* perception.

THE lands and eſtate of Kerſland, with the teinds, parſonage, and vicarage thereof, were brought to a judicial ſale before the Lords, at the inſtance of a creditor upon the eſtate, by an adjudication which adjudged both lands and teinds ; and William Blair of that ilk was called as a defender in the proceſs ; and in the year 1738, William Scott of Baviſaw became purchaſer of the lands and teinds, as expoſed to ſale before their Lordſhips.

Captain Hamilton Blair of Blair, as patron and titular of the teinds of the pariſh of Dalry, within which the lands of Kerſland lie, brought an action againſt Laurence Scott, ſon and heir of William Scott, the purchaſer of Kerſland, for payment of the bygone teinds of theſe lands ſince the time of the purchaſe. Sundry objections were moved to the purchaſer's title ; which being over-ruled :

It was *pleaded* for the defender, That the title under which the ſale proceeded, contained the teinds, parſonage, and vicarage, of the whole lands ; and the decreet of ſale adjudges and diſpones to the purchaſer the lands, with the teinds, parſonage and vicarage ; and therefore, had he continued to poſſeſs the teinds under this title for 40 years, he would have acquired an abſolute right to the teinds by poſitive preſcription : And as the defender has poſſeſſed the teinds for twelve years before the date of this action, he is entitled to plead that he is a *bona fide* poſſeſſor, and that they are *fructus bona fide percepti et conſumpti*, more eſpe-

cially that the pursuer's predecessor was called in the process of sale, and, during a dependance of eleven years, made no claim to the teinds, but allowed them to be uplifted with the stock, and applied for payment of the creditors.

Answered for the pursuer, It is impossible to plead a *bona fides* without a title, far less contrary to the express tenor of the title. In this case the teinds could not be sold, because there was no sort of title to the teinds in the person of the common debtor; and the creditors only insisted that the usual value should be put upon the heritor's privilege of purchasing his own teinds, as appears from the first article of roup. And that William Scott the purchaser well understood that the teinds did not fall under his purchase, appears from a petition given in by him to the Court relative to the purchase; and as to the adjudication upon which the sale proceeded, wherein the teinds are comprehended, it is only conveyed to Bavidaw for security of his purchase, which was not of the teinds, but only of the privilege of buying the teinds; and so far he has right to the adjudication, and no further. The decret of sale is his cardinal title, and beyond it he cannot plead a *bona fide* possession.

Replied for the defender, The articles of roup, referred to by the purchaser, proves that the creditors had not recovered a sufficient title to the teinds in the common debtor, and that they did not choose to risk an abatement of the price which might be demanded by the purchaser upon this account; but if such title had been found after the sale, this precaution of the creditors would have been no objection to the purchaser's claiming the heritable right of the teinds; nor would there have been any objections to the purchaser's acquiring a right by prescription; and therefore, till a better right was produced, he was *bona fide* possessor of the teinds, as well as of the lands; and if, in any case, a *bona fide* possession is pleadable, it is in the case of teinds: For, if the titular had made his claim, the heritor would have redeemed himself by payment of six or nine years purchase; whereas, by secreting his right, as in the present case, he subjects the heritor to twenty years purchase of his teinds; so that the titular's delay ought to prejudice himself and not the possessor.

'THE LORDS repelled the defence of *bona fides*, in respect of the answers.'

Act. *Tho. Hay.*

Alt. *Miller & Craigie.*

Clerk, *Kirkpatrick.*

Fac. Col. No 36. p. 57.

1790. November 30. JOHN HARRISON OLIPHANT, against DAVID SMYTH.

IN 1750, the predecessor of Mr Smyth, obtained a decree against the predecessor of Mr Oliphant, for payment to him, as titular, of the teind-duties of the lands of the latter, for thirty-nine years preceding; and then deduced an adjudication against the estate for the amount, being a considerable sum.

No 5.

A *bona fide* possessor of teinds found liable to repeat by-gones accumulated by him in an