

No 42.

vestige of a right that could found him in such action, as they were all insisted in before his titles to the estate were ultimately established. And it was for this reason that the defender, during the litigation, has been preferred to the tack-duties by an interlocutor of the Lord Ordinary, which reserved to the pursuer the liberty of bringing a reduction as accords. Till such time, therefore, as this reduction was not only brought, but decerned in, the defender was well entitled to the benefit of a *bona fide* possession, and can be accountable only for the surplus rents payable by the natural possessors from that period, in the same manner as he is only bound to account for the tack-duties that fell due since the pursuer's right was finally declared in the House of Lords.

THE LORDS, upon the report of the Lord Coalston, found, ' That the defenders, the said Count Antonius Leslie and Thomas Dundas, were both of them entitled to the privileges of a *bona fide* possession, till such time as their *bona fides* were interrupted ; that of the defender Count Antonius, by the interlocutor of the Court, dated the 4th of December 1761 ; and that of Thomas Dundas, by the judgment dated the 19th of January 1764 : And therefore found the defender Thomas Dundas, in virtue of his rights flowing from Count Antonius, was entitled to retain the whole of the rents which had been uplifted from the sub-tenants before the said interlocutor of the 19th of January 1764 ; and found the pursuer entitled to the whole of the rents which were due by the sub-tenants at the date of that interlocutor, and which fell due by them thereafter. And further found, that the defender Thomas Dundas, in virtue of his assignation from Count Antonius, was entitled to retain the tack-duties which had fallen due by himself before the said interlocutor of the 4th December 1761 ; but found him liable to account to the pursuer for the tack-duties that fell due by him after that time.'

Act. Graeme.

Alt. Lockhart.

Clerk, Pringle.

Fol. Dic. v. 3. p. 95. Fac. Col. No 6. p. 9.

No 43.

A *bona fide* possessor was found accountable from the date of an interlocutor of Court, adhering to the interlocutor of an Ordinary : which was finally affirmed on appeal.

1769. June 21. LAURIE and HUSBAND against SPALDING.

MRS MARGARET LAURIE, and Andrew Sloan Laurie, her husband, having prevailed against Alexander Spalding of Home, in their reduction of the sale of the lands of Ervies, made by James Laurie, the heir of entail in possession for the time, as stated, 24th July 1764, Fac. Col. No 140. p. 324. *voce* TAILZIE ; and the judgment having been affirmed in the House of Lords, a question arose, From what period Mr Spalding was accountable for the rents ?

Pleaded for the pursuers : The defender must be accountable from the date of the decree, that is, from the date of the Lord Ordinary's interlocutor, which was adhered to by the Court, and affirmed in the last resort.

When the judgment of an Ordinary is altered, a new interlocutor is pronounced, which can have effect only from its own date. But the case is different, where

the interlocutor is adhered to: *There* the Court refuses the petition, and adheres; they adhere simply, and with all the qualities attending the interlocutor, particularly as to its date, in which respect, it is considered in the same light as if no petition had been presented.

No 43.

Answered: The defender is accountable only from the date of the judgment of the House of Lords. His *bona fides* cannot be held to have ceased at any earlier period, unless it could be shown, that the original citation was sufficient to interrupt it. *Bona fides* is excluded by the *conscientia rei alienae*; but, as the question was of too doubtful a nature to allow the presumption that such consciousness was induced by the citation, so there is real evidence, that the defender did not entertain it during the dependence; otherwise he would not have submitted to the expence of litigating the question, both in this Court, and in the House of Lords.

'THE LORDS found, That the defender is bound to account for his intromissions with the rents of the lands, from the term of Martinmas 1764, being the term subsequent to the interlocutor of the Court, adhering to that of the Lord Ordinary.'

A& G. Ferguson.

Alt. Wight.

G. Ferguson.

Fac. Col. No 44. p. 347.

S E C T. IX.

With what Modifications *Bona Fide* Consumption Saves from Repetition.

1610. July 18.

JOHNSTON. against IRELAND.

No 44.

HE who has obtained a decret in a double pouding, for a principal sum and byruns, against a party not compearing, so long as the decret stands unreduced, he will bruik the duties received; because the decret and act of Parliament make these duties to be *fructus bona fide perceptos*; but he may be decerned to pay back the principal sum, being pursued to that effect, albeit the decret of double pouding be not reduced; if the party who was absent now pursuing show manifestly that the party that received it had no right.

Fol. Dic. v. 1. p. 107. Haddington, MS. No. 1971.

1683. January.

LADY HISLESIDE. against BAILLIE of Littlegil.

No 45.

FOUND, that an apprising extinguished within the legal, by the debtor's disposing a part of the comprised lands, coming in the person of a singular successor to the