

No 25. possession, was preferred before a similar grant to the Laird of Grant of a later date.

*Fol. Dic. v. 4. p. 177. Sel. Dec. No 218. p. 282.*

1765. November 13. HENRY WALKER *against* SPENCE and CARFRAE.

No 26.

If one purchasing cattle, *bona fide*, and selling or slaughtering them before action, is liable to the real owner?

HENRY WALKER, stabler in Edinburgh, had sent a parcel of sheep to John Spence, to be grazed at a certain sum for grass mail. John Spence sold these sheep as his own, partly to William Spence butcher in Musselburgh, who paid ready money, and slaughtered and sold them in the public market; and partly to Carfrae, who likewise had paid the price, and disposed of them before any action was commenced.

Henry Walker brought an action against Spence and Carfrae, and *pleaded*, That no man's property can be taken from him, and transferred to another, without his consent, except by legal diligence, to which he is supposed to consent, by contracting the obligation on which it proceeds; and, therefore, it may justly be doubted, though the defenders could plead *bona fides* in the purchase, if that would protect them from restoring the sheep or their value to the lawful proprietor. It is certain, if they were still in their possession, it would be no good defence against restitution, that they bought them *bona fide*, for rem meam vindicare possum ubicumque inveniam. Indeed, if they had sold them to another person, *bona fide*, no action would lie against them, but against the possessor; but, where the purchaser has slaughtered and consumed the sheep, the pursuer apprehends, the action does properly lie against him. If a person purchases corns, and pays the price, *bona fide*, he is nevertheless liable to the landlord, in virtue of his right of hypothec; and, if this holds in a right of hypothec, it must much more hold in a right of property; for it is impossible that a right of hypothec should have stronger effects than a right of property.

*Answered* for the defenders; Supposing the property of the sheep did actually belong to the pursuer, yet they fall to be assoilzied upon the principle laid down by the pursuer, That, if the goods are both bought and sold to another *bona fide*, action lies only against the possessor. Now, that the defenders were *in bona fide* to purchase these sheep from John Spence, is clear from this, that they were in his custody and used as his property; for he had disposed of the lambs and wool as his own, without any challenge from Walker: These were such deliberate acts of property, as left the defenders no reason to doubt that they were really his own, and that he was entitled to dispose of them; and, consequently, they were *in bona fide* to purchase them; nor can it be said, that either of the defenders *dolo desit possidere*. See Lord Stair, lib. 1. tit. 7. § 10. and 11.; Lord Bankton, lib. 1. tit. 8. § 11.; and Scot *contra* Low, 15th June 1704, No 16. p. 9123.

“ THE LORDS found it proved, That the sheep libelled were sent by the pursuer to be grazed on the farm of Sauchinside, possessed by the deceased John Spence as tenant, and that the grass mail was paid by him: Found, that the said sheep were purchased *bona fide*, by the defenders, from the said John Spence, and the price paid at the time of delivery: Found it not proved, that the defenders were in the knowledge that the property of the sheep did belong to the pursuer; and therefore, and in respect that the sheep so bought by the defenders, had been sold or slaughtered by them, before citation in this process, and that it is not proved that the defenders, or either of them, were gainers by the transaction, assoilzied the defenders.”

No 26.

Act. James Dundas.

Alt. Dav. Dalrymple, jun.

C. B.

Fac. Col. No 14. p. 223.

1767. January 20.

JAMES DEWAR of Vogrie *against* Mr WILLIAM FRASER junior, Writer to the Signet.

MR FRASER was proprietor of a house and some lands a few miles to the south of Edinburgh, where he and his family were in use to reside during the vacations.

Mr Dewar of Vogrie was proprietor of some lands in Mr Fraser's neighbourhood, a part of which run out into a point, reaching within 324 feet of Mr Fraser's mansion-house.

Upon the extremity of this point, nearest to Mr Fraser's house, Mr Dewar set about building two draw-kilns for burning lime. Mr Fraser stopt the work by a suspension, which came to be discussed before the Lord Auchinleck Ordinary; who, after having ordered a plan of the grounds, found, 'That as Mr Fraser the suspender, has no servitude upon Mr Dewar's grounds, and that the place where Mr Dewar proposes to situate his draw-kiln, appears, in sundry respects, to be most commodious for him, and no ways *in æmulationem* of Mr Fraser, although it will be attended with inconveniences to him, Mr Dewar has right to carry on his work, and allows the same to proceed, and repels the reasons of suspension, and decerns.' But his Lordship afterwards reported the cause to the Court upon informations.

*Pleaded* for Mr Dewar, The place where he proposes to build his kiln, although upon the nearest part of his lands to Mr Fraser's house, is in sundry respects the most convenient situation he can have, and therefore cannot be considered as carried on *in æmulationem* of Mr Fraser; and that being the case although it should be inconvenient for Mr Fraser, or disagreeable to him, that is not sufficient to prevent the work from being carried into execution, as every proprietor has the undoubted right of using his property in the way most for his own advantage. And Mr Dewar will reap considerable profit from this

No 27.

A proprietor may build a draw-kiln for burning lime on any part of his property, although there by a contentious heritor's property should be hurt.