

1783. November 18.

HENRY BLAIR, against JOHN BRUCE-STEWART, and CLEMENTIA STEWART, his Spouse.

THE lands of Scausburgh, wadsetted in the year 1689 to the family of Bigton, were the source of continual litigation between them and the reversers till the year 1732. At that period the estate of Bigton devolved to Mrs Clementina Stewart, then a minor, who, on occasion of her marriage in 1744, disposed her whole lands, including those of Scausburgh, to her husband; and by him they were possessed without challenge till the year 1771. An action was then brought by Henry Blair, in which it was found, that the lands of Scausburgh were redeemable, and in general, that the holders were accountable for the rents.

In the accounting which followed, the predecessors of Mrs Bruce-Stewart, who were well acquainted with the true nature of their right, could not be thought entitled to the benefit of a *bona fide* possession. But, with regard to their own possession, that lady and her husband

Pleaded: As *mala fides*, or the commission of a wrong, is never to be presumed; so there is, in this case, the most satisfying evidence, from the age of Mrs Bruce-Stewart when she succeeded to the estate, and the taciturnity of those in the right of reversion, that at no time previous to the commencement of the action in 1771, she ever entertained a doubt of the justice of her possession. And the plea of her husband is yet more favourable, to whom the subject was transferred, in return for the provisions stipulated by marriage-contract to the disponent and her children.

Answered: *Bona fides*, in the consideration of law, is not created by a mere ignorance of a better or preferable claim, but by a belief, founded on reasonable grounds, that the subject was in truth the rightful property of the possessor, Erskine, book 2. tit. 1. § 25; Bankton, book 1. tit. 8. § 12. It cannot then, with any propriety, be alleged by the defenders, to whom their obligation to account must have been apparent from the slightest inquiry into the nature of their right, or the circumstances of the possession. Nor can the case of the husband be distinguished in any respect from that of his wife. Even the conveyance of a special subject, in name of dowery, accompanied with absolute warrandice, ought not to bestow the privilege here insisted for, where the right of the original holder was manifestly tortious and illegal, or proceeded on titles *ex facie* subject to defeasance. That, however, is not the point now in dispute. In virtue of the universal disposition, Mr Bruce-Stewart acquired right to the estate of Bigton, merely as it stood in the disponent, subject to every disability or exception which could have been formerly urged.

Several particulars were stated by the pursuer, tending to show the defender's private knowledge of the exceptionable nature of their possession; but the

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A minor succeeded to a property held in wadset. Found, that the rents were not to be considered as *bona fide consumpti*, but that she was accountable in terms of her title.

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judgment of the Court seemed to rest on the general principle, that the privilege here contended for, was due to those only who could qualify probable reasons for having considered the subject as their own. A separate question, how far Mr Bruce-Stewart, as his wife's universal disponee, was liable, personally, beyond the extent of his own intromissions, likewise occurred, but was not determined.

THE LORDS 'repelled the defence of a *bona fide* possession pleaded by the 'defenders during the whole period since the wadset granted to Laurence Stewart of Bigton upon the 23d of August 1689, to the present time: But remitted to the Lord Ordinary to hear parties procurators, how far the defender 'John Bruce-Stewart is personally liable to account for the rents of the subjects 'in question, prior to the date of his own possession, in virtue of his contract 'of marriage with Clementina Stewart.'

Lord Ordinary, *Kennet.* Act. *Abercromby.* Alt. *Hay, Honyman.* Clerk, *Menzies.*
Fol. Dic. v. 3. p. 93. Fac. Col. No 121. p. 191.

* * * See Guthrie against Sornbeg, *Stair, v. 1. p. 226. ASSIGNATION, p. 861.*

Winton against Winton, *Stair, v. 1. p. 357. voce MINOR.*

Hamiltoun against Harper, *Stair, v. 1. p. 606. voce REMOVING.*

Neilson against Menzies, *Stair, v. 1. p. 736. voce TACK.*

Gillespie against Auchinleck, *Dirleton, p. 50. voce HUSBAND and WIFE.*