

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 Bavalaw 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

No 5.
 adjudication,
 with the in-
 terest of the
 accumulated
 sum; but not
 the teind-
 duties uplift-
 ed after his
 decree,
 prior to
 citation in
 the reduc-
 tion of his
 right.

Many years afterwards, during which period Mr Smyth continued in possession of the teinds, Mr Oliphant, in consequence of the recovery of title-deeds, shewing his right to them, prevailed in an action of reduction of the above-mentioned decrees, for payment, and of adjudication.

It came then to be a question, how far the possession on the part of Mr Smyth, which was admitted to have been *bona fide* held, could avail him; whether the whole sum of arrears understood as *fructus percepti*, or at least the annualrents of that sum as accumulated in the adjudication, should be found to belong to him; or if he was to retain only the teind-duties subsequent to the decree in his favour, which he had levied.

THE LORD ORDINARY 'sustained the defence of *bona fide* possession, with regard to all bygones antecedent to the date of the first interlocutor in the process of reduction.'

This interlocutor having been brought under the review of the Court, by petition and answers, it was

Observed on the Bench:—Mr Smyth, prior to 1750, not being in possession, the bygone teind-duties then found due to him, are to be considered as one individual debt. But the *condictio indebiti*, as the present action really is, admits no claim for annualrents, as *bona fide percepta*, repetition of interest not being less due than of the principal.

'THE LORDS found Mr Smyth not entitled to retain the interest of the accumulated sum contained in the adjudication for the bygone teind-duties previous to the decret 1750; and found, That the point respecting the accumulate sum in the adjudication, is a *res hæcenus judicata*, by the final interlocutor of the Court, setting aside both the adjudication and the decret upon which it proceeded; and that the *bona fides* of Mr Smyth was interrupted from the date of the citation to this action; but found, That the defence of *bona fides* is applicable to the teind-duties uplifted by Mr Smyth from the date of the decret 1750, to the date of citation to this action.'

In a reclaiming petition, it was endeavoured to show, by the following authorities from the civil law, and from the law of Scotland, that a *bona fide* possessor is not bound to restore the interest of money *indebite solutum*, any more than the natural fruits of other subjects, *l. 48. ff. de acquir. rer. dom.*; *l. 19. de her. pet.*; *l. 34. de usur.*; *l. 88. § ult. ad leg. Falc.*; *l. 1. Cod. de condict. indeb.*; *Voet. ad eund. tit. § 12.* Erskine, b. 2. tit. 1. § 26. Dict, voce ANNUALRENT.

But this petition was refused without answers.

Lord Ordinary, Gardenston.
 Stewart.

Aff. Hay. Alt. Rolland. Clerk, Colquhoun.
 Fol. Dic. v. 3. p. 96. Fac. Col. No 153. p. 305.

* * See Caldwell against Jack, *infra*, b. 1.