No. 3. To which interlocutor, they "adhered," upon advising a reclaiming petition, with answers.

In both cases the judgment was by a narrow majority.

Lord Ordinary, *Hermand.* Act. *Craigie.* Agent, *Alex. Duncan*, W. S.
Alt. *Dickson.* Agent, *Arch. Gibson*, W. S. Clerk, *Ferrier.*

F. *Fac. Coll. No.* 190. *p.* 427

1805. *June* 11. WILSON BOWMAN *against* HENDERSON.

No. 4.
Bona fides not stopped by the serving of an appeal.

BY the final judgment of the Court, (21st February 1797), Robert Henderson was found entitled to the estate of Logie, No. 59. p. 15444. in consequence of which, having extracted the decree, he (8th May 1797) charged his competitor, George Wilson, to make up a title under the entail 1757, and to denude in his favour; upon which he obtained decree of adjudication. Having expede a charter, he was (29th November 1797) likewise infeft.

Wilson (18th November 1800) served a warrant of appeal upon Henderson.

The succession opened to the parties in the year 1792; and it was agreed that the rents should be uplifted by a joint factor, appointed by the parties, and applied to the discussion of the claim to the estate. In consequence of this agreement, the whole rents previous to 1797 were so expended.

Henderson for the first time uplifted the rents of the estate of Logie, on 1st April 1801, when the rents of the year 1797, 1798, and 1799, were settled with the various tenants. The rents of the year 1800 becoming due at Whitsunday and Lammas 1801, were in like manner settled on 1st July 1802.

The cause having been heard in the House of Lords, it was (29th March 1802) "Ordered and adjudged, by the Lords Spiritual and Temporal, in Par-"liament assembled, That the said several interlocutors complained of in the "said appeal, so far as the same concerns the estate of Logie, which belonged "to the late Walter Bowman, be, and the same are hereby reversed: And "find, That the succession to the said estate falls to be governed by the deed "of entail executed by Walter Bowman in the year 1757; and it is therefore "ordered, that the appellant be assoilzied from the action brought against him "by Robert Henderson; and decern also in the declarator brought by the ap-"pellant, according to the prayer of his declarator."

In consequence of this judgment, Wilson now obtained possession of the estate, and brought an action against Henderson for payment of the balance of the rents, after deducting expenses, as well as for the price of some wood, which had been cut down by him. The defence was, that the rents were *bonâ fide percepti et consumpti.*

The Lord Ordinary (11th December 1802) "Finds the defender accountable "for the rents of the estate libelled, preceding the final judgment of the Court

No. 4.

" of Session, in so far as these rents were received by him from the factor, after " deduction of expenses; and appoints him, betwixt and next calling, to give in " an account thereof: Finds, That *bona fides* must be understood to have com- " menced from the date of said judgment, and to have continued till that judge- " ment was reversed by the House of Lords, (29th March last); and therefore, " that the rents during that period are to be considered to have been *bonâ fide* " *percepti et consumpti*, and that the defender is not accountable for these, nor " for any wood that may have been cut or disposed of during that time: " Further, of consent, finds, That from and after the 29th day of March last, " the rents, mails and duties of the estate, belong to the pursuer."

Wilson Bowman reclaimed, and

Pleaded: Where a person obtains possession of any subject without challenge, or the suspicion of it, and believes, upon probable grounds, that it truly belongs to him, it is just and expedient, that, until a challenge be brought by the true owner, he should be permitted to enjoy the fruits of it. But the right in this estate was litigious from the very beginning; it was only by means of litigation, where opposite judgments were given, that even a title to possess could be attained, and that title has ultimately been found ineffectual. The party who has since been found to have had the only title, had, by the situation of the titles, the immediate right to possess, so that there is no room for any *bona fides*. For a party obtaining a decree of a court, subject to review, may be entitled to possess till the decree be recalled by the superior tribunal, but then its effects must be completely done away; and the rights of the parties, though for a time suspended, must have the same force and effect as if no such interlocutory decree had been pronounced. The reversal of the House of Lords must operate *retro* to the very commencement of the litigation, and put the rights of the parties upon the same footing as if no other judgment had been at any time pronounced.

Answered: A *bonâ fide* possessor is one who, though he be not truly proprietor of the subject which he possesses, yet has reasonable ground to believe himself to be so; Stair, B. 2. Tit. 1. § 23, 24; Ersk. B. 2. Tit. 1. § 25. A final judgment of this Court entitles the successful party immediately to enter into possession, and enjoy the subject; it therefore unquestionably confers such a probable title, and induces such a conscientious belief, as to constitute a *bonâ fide* possession, especially when the case depends upon an abstract question of law, of which the Court is the authorised judge. The service of an appeal indicates, indeed, the opinion of the appellant, that the judgment may be reversed; but it does not shew that it necessarily must be so; nor can it alter the title by which the possessor holds his property; Leslie against Leslie, 13th February 1745, No. 6. p. 1723; Leslie Grant against Dundas, 9th February 1765, No. 42. p. 1760; Bonny against Morris, 30th July 1760, No. 10. p. 1728.

The Court pronounced this interlocutor, (12th December 1804): " The " Lords having advised this petition, with the answers thereto, find the respon-

No. 4. " dent is accountable for the price of the wood that may have been cut and " disposed of betwixt the date of the first judgment of the Court of Session, " and the reversal of that judgment by the House of Peers; and with this al- " teration, adheres to the interlocutor reclaimed against."

To which judgment the Court (11th June 1805) adhered, upon advising a reclaiming petition, with answers.

The Court, in this case, were a good deal divided; some of the Judges doubting whether *bona fides* should not be held to be excluded from the date of serving the appeal. But the majority considered, that, by the practice before the Union, an appeal never prevented execution; probably because it was introduced and notified merely by a protest, " for remeid of law." After the Union, it came to be understood, that as soon as an appeal was served, the decree appealed from became suspended, and could no longer be enforced, till the matter was again decided. If execution has previously taken place, the effect of an appeal is now the same as it was previous to the Union *. The service of an appeal, still stops only executorial diligence; but it does not prevent those steps which are necessary, *rei servandæ causâ;* such as confirmation in order to make up a title, to be afterward used if the appeal be dismissed; Ross against Aglianby, 22d January 1793, No. 5. p. 582. Inhibition also may be used during the dependence of an appeal, not for the purpose of immediately enforcing the decree, but only when it shall be adhered to. The practice seems to have gone far enough, when its stops execution; it would be carrying it too far to hold, that it also excludes *bona fides*.

Lord Ordinary, *Methven:* Act. *Craigie, J. Clerk.* Agent, *W. Keyden*, W. S.
Alt. *Solicitor-General Blair, Maconochie,* Agent, *J. Thomson*, W. S. Clerk, *Pringle.*

F. *Fac. Coll. No. 213. p. 474.*

* It was objected to an appeal taken in 1708, that as the claim of right allows appeals only from *sentences* of the Lords, this ought to be considered to mean ultimate definitive sentences, not interlocutors: but the appeal was admitted. See Fountainhall, v. 2. p. 460; See Selkirk against Gray, No. 19. p. 4453.——Fountainhall, Vol. 2. p. 643. expresses himself as follows: " I have marked no less than ten protests this winter session. They are turned more frequent and " numerous since the Union than they were before, though access now is both more difficult and ex- " pensive than the discussing them before our own parliaments was. The reason may be, 1*st*, To " concuss the victor to a composition, rather than undertake a tedious uncertain journey to London. " 2*do*, They have this advantage now, that how soon it is tabled in the house of Peers, all execution " is stopt; whereas withus they were not suspensive of the sentence, but only devolutive."