July 21. 1828. *Appellants' Authorities.*—Rob. App. Ca. 197.; 1551, c. 27.; 1606, c. 1.; 1669, c. 1.; 1689, c. 3.; 1690, c. 1. 5. and 23.; 1700, c. 2.; 1702, c. 3.; 1703, c. 2.; 1707, c. 6.; 4. Burrow, 2381.; 5. Bac. 599.; 1. Burn, Eccl. Law, 373.; King's Printer, May 22. 1790, (8316.); March 7. 1823, (2. Shaw and Dunlop, No. 254.); Mackenzie's Obs. 153.; 2. Blackstone, 27.; 4. Bank. 22. 14.; 1. Ersk. 5. 6.

Respondents' Authorities.—1. Mackenzie's Works, vol. i. p. 257.; Anderson, Jan. 5. 1683, (Fountainhall); Rob. App. Ca. 197.; King's Printer *v.* Bell and Bradfute, May 22. 1790, (8316.); 1. Burn, 348.; 4. Burrow, 2381.; Hinton, July 27. 1773, (8307.); Becket, Feb. 22. 1774.; 5. Bacon, 599.; 1663, c. 27.; 1701, c. 7.; 14. Rymer, 650. 766.; 2. Blackstone, 410.; Acts of Assembly, 1643. 1647, 1648.

MONCREIFF and WEBSTER—RICHARDSON and CONNELL,—Solicitors.

No. 15. Executrix of JOHN VANS AGNEW, of Sheuchan, Appellant and Respondent.—*Adam—Pyper.*

EARL of STAIR, and Others, Respondents and Appellants.
Sol.-Gen. Tindal—A. Bell.

Bona Fides—Expenses.—The House of Lords having, on the 31st of July 1822, found, (reversing a judgment of the Court of Session), That sales made judicially upwards of thirty years previously, under a private statute, of parts of an entailed estate, were null, in respect of certain minor heirs of entail not having been properly brought before the Court; and that one of those heirs, who succeeded to the estate, was entitled to have the lands so sold restored to him; and the Court of Session having found the purchasers were bona fide possessors till the 31st July 1822, and not bound to account for the rents till Martinmas thereafter, and found neither party entitled to expenses;—the House of Lords reversed the judgment to the effect of finding the purchasers accountable for the rents due at Martinmas, without prejudice to any claim they might have for the crops of lands in their own possession reaped prior to that term; and quoad ultra affirmed the judgment.

July 22. 1828.

2D DIVISION.
Lord Pitmilly.

THE circumstances out of which the present question arose, are detailed in 1. Shaw's Appeal Cases, No. 50, 51. and 57.

By the judgment of the House of Lords there mentioned, (31st July 1822), it was found, that 'the appellant, (John Vans 'Agnew), on behalf of himself, and the said several other minor 'heirs of entail, is entitled to have the sales, made under the several 'interlocutors aforesaid, reduced, and to have the lands restored 'to him, without prejudice to any question which may be made 'in the further proceedings in the Court of Session touching 'the rents of the entailed estates, and the application thereof, 'during any period of time.' Having then petitioned the Court of Session to apply the judgment, their Lordships altered the

interlocutor complained of, in terms of the judgment of the House of Lords, and remitted to the Lord Ordinary to proceed agreeably to the deliverance; who thereupon reduced the sale, and found 'that Mr Agnew had the only good and undoubted 'right and title to the entailed lands and others libelled, and to 'possess the same; and that the defenders (respondents) had no 'right or title thereto; reserving for discussion the conclusions for 'removing, claim for bygone rents and profits, and the defenders' 'claim for meliorations.' While this inquiry proceeded, the lands were sequestrated, (5th July 1823), and a judicial factor appointed. Thereafter, the Court decerned in the removing, reserving the claim for meliorations, and bygone rents, and objections thereto, and recalled the sequestration. John Vans Agnew having died in the mean time, Anne Robertson sisted herself as his executrix and disponee; and the question as to the bygone rents having been discussed before the Lord Ordinary, his Lordship reported it to the Court on informations. When the case came on to be advised,— July 22. 1823.

**Moncreiff, for the Executrix, stated*,—I attend your Lordships for the representative of Mr Vans Agnew. The only thing I think necessary to observe in this question as to the sequestrated fund is,—

Lord Justice-Clerk.—We take the principal case first—that as to the bygone rents, which is the subject of argument in the informations. Your Lordships will proceed to deliver your opinions on that point.

Lord Justice-Clerk.—In proceeding to decide the only question now before us, which is as to the claim preferred by the late Mr Agnew, and now insisted on by his executrix, for bygone rents of the lands that were subject of discussion here, and which, by judgment of the House of Lords, were ordered to be restored to him, it appears to me to be necessary to pay absolute and scrupulous attention to the judgment of the House of Lords. That will appear clear to all your Lordships. We are, in the first place, to give full effect to that judgment, to follow it up in all its legal consequences to the fullest extent, and 'to pro-'ceed as shall be consistent with this judgment, and shall be 'just.' There cannot be any doubt, that, without that injunc-

---

* These are the Notes of what took place at the advising, which were laid before the House of Lords, in the correctness of which the appellant stated that both parties concurred.

July 22. 1828.

tion in that judgment of the House of Lords, you would not only have been so bound, but would have clearly so decided. (His Lordship then read the judgment).

This was the judgment of the House of Lords; and, if no alteration had been made on it, your Lordships would have had no proceedings to adopt in regard to the question now before us,—Mr Vans Agnew would have received his estate, and the defenders would have been bound to pay over every shilling of the rents. But, in consequence of proceedings that afterwards took place, the judgment was amended. First, on an application made here by the defenders, praying for an opportunity of applying to the House of Lords for a re-hearing on the cause, the proceedings on this judgment of the House of Lords were stayed for a certain period; and then the House of Lords, in March 1823, having heard parties on that matter to a certain extent, pronounced a deliverance. I shall only trouble your Lordships with reading the latter parts of it:—'And it is therefore 'ordered by the Lords Spiritual and Temporal in Parliament 'assembled, that the said judgment be amended, by omitting the 'words "along with the rents, from the period of his accession 'to the entailed estates."' That took away entirely the order for paying over the rents to Vans Agnew. The deliverance then proceeds, 'And inserting instead thereof the words, "with-'out prejudice to any question which may be made in the further 'proceedings in the Court of Session touching the rents of the 'entailed estates, and the application thereof, during any period 'of time."'

Now, in consequence of this amended judgment, the pursuer made application for applying it in this Court. We did apply it accordingly, and we remitted to the Lord Ordinary to follow out the judgment of the House of Lords. The Lord Ordinary, it appears, having heard parties on the subject of the bygone rents, ordered informations to your Lordships; and the informations are now before you which we are to proceed to decide upon.

In the first place, It appears to me, that, paying every attention to the information for the late Mr Agnew, and the information on the part of this executrix given in since his decease, it is absolutely necessary for us to advert to one leading feature which distinguishes the whole of the pursuer's pleading; for I have no difficulty in saying, that if you were persuaded there was any solid foundation for what is pleaded upon, and taken for granted throughout the whole of the pursuer's information, it would, to a certain effect, operate on your views in the question

before us. In the first place, we must make up our mind as to this proposition, whether it is made out, that the whole of the subject of this litigation was bottomed in gross fraud, in wilful and intentional fraud and deception, practised, it is alleged, not only by the late Robert Vans Agnew of Sheuchan, but fraud and deception in which all those parties now before you fully participated, and were, in fact, acting parties, and are therefore, of course, answerable for all the consequences of such fraud? July 22. 1828.

I certainly have read those papers with the utmost attention, and I do confess that I am entirely and thoroughly satisfied, that, instead of that gross fraud and deception which is said to have been practised by the late Robert Vans Agnew being established, it is clear that the pursuer has utterly and totally failed in that allegation. Indeed I have been able to discover nothing tangible or palpable even in point of averment on the subject. There is no condescendence of any such facts as can warrant me to draw the conclusion even of fraud from them;—no step that is stated to have been taken by that gentleman, who has now been long ago in his grave, though viewed by a jaundiced eye, does afford any ground for concluding that there was any fraudulent intention or practice on his part.

I must say for one, I think that the information for the defenders, in regard to this gentleman's allegation, is perfectly satisfactory and conclusive; and as to fraud by Robert Vans Agnew, and intention to impose on the Court, to make a most scandalous and improper use of an Act of the Legislature, and to defraud his family that succeeded to him, there is nothing like proof of that kind before you. Therefore I must lay that entirely out of view.

As to the sequel of this charge, taking for granted and as proved that Robert Vans Agnew entered into the conspiracy, that all the parties who were purchasers are to be held as participating in the conspiracy of fraud and deception, it must at first sight appear to you to be a pretty serious and strong undertaking on the part of the pursuer to make that out. I am also most decidedly of opinion, that none of all the circumstances founded on by the pursuer as proof of that collusion, is in the least deserving of attention.

In the first place, we must be aware how this proceeding took place. An Act of Parliament was passed at the instance of Mr Agnew, praying for authority to sell parts of the estates for payment of debts;—and the Act points out the proceedings that were to be adopted in this Court to bring the proper parties

July 22. 1828.

forward. We know what was done. Mr Robert Vans Agnew, the pursuer of the process of declarator and sale following upon the Act of Parliament, no doubt had an interest adverse to the other heirs of entail, if they could make out that no debts could affect the estate; and of course it was proper to have steps taken for bringing those parties forward. I need not trouble you as to what debts did or did not affect the estates. But as to the mode of proceeding,—you recollect that, in the first place, there was a personal citation of the minor heirs,—a citation of Mr Vans Agnew as administrator for the children. There were then proceedings in the Court to a certain extent; and then the Court seeing (which was adverted to by me the other day) the necessity for deciding a question that arose as to the extent of those debts, whether certain debts affected the estate, and came or did not come within the scope of the Act of Parliament, they had memorials before them upon that point. Memorials were ordered; and there was one for the creditors, the persons who wished to have this matter carried on in terms of the Act of Parliament; and another memorial expressly bearing in its title to be for the minor heirs of entail of Barnbarroch and Sheuchan, and for Robert Macqueen, Lord Braxfield, their tutor ad litem. Those memorials were advised by the Court;—their Lordships' judgment was given when they settled the amount of the debts (particularly certain bills, &c.) affecting the entailed estate. And the Court did the duty enjoined in the Act; they proceeded as deliberately as they would do in a ranking and sale,—they adjusted all matters as to the sale of portions of the lands for fair prices,—and they exposed certain lots to public sale.

I think there were four lots first exposed to sale, and you see who the purchasers were;—the Earl of Stair, the Honourable Captain Maitland, the trustees of the late Sir John Hunter Blair, and Mr Johnston Hannay of Torrs. These were the purchasers of the four first lots; and it turns out that, in point of fact, there was a great competition at the sale, some of the lots bringing prices far beyond the upset price. And, after the first proceedings at that roup, the lands were adjudged to those different purchasers.

I just mention, that, if ever there was a case, this appears to me to be one, in which, upon the shewing of the proceedings and circumstances selected by the pursuer himself to establish gross fraud and deception, those proceedings contradict this allegation. Although I think the gentlemen here concerned, the representatives of those purchasers, are well entitled to rely on the respec-

tability of the men of business they had at that time, and the characters of those gentlemen, as a sufficient answer to such suspicion of collusion and of participation in such alleged fraud; yet, independent of their high character, I ask your Lordships, whether or not it can be supposed that men of their reputation in their profession, and in character and talents,—whether you can conceive that it is possible, laying feelings of honesty and character apart, that they could advise their different clients to become purchasers of different lots of this estate, the titles of which they thought were liable to objections now alleged to be apparent on the face of the proceedings? It is said by the pursuer that they appear to be fundamentally erroneous,—that on looking to the proceedings there was no ground for proceeding on this Act of Parliament in the course that was followed, and that the judgment of the House of Lords says it appears 'on the 'face of the proceedings,' that the next substitutes of entail were minors, and were not brought properly before the Court. But were those gentlemen, acting for their different clients, not entitled to look into the productions on the table, to see that all the proceedings were properly conducted? And, with that printed paper lying on the table, revised by all those gentlemen distinguished for knowledge, talents, and integrity, with the tutor ad litem mentioned in the paper sitting in Court at its advising, and not judging in the cause for the reason that he was the tutor ad litem, and those gentlemen witnessing this proceeding,—is it conceivable that men of common understanding, if they entertained the slightest doubt that any possible cavil could attach to those proceedings, would have advised their clients to go to the roup and bid high against one another for those lands?

But the case does not rest here. For what cannot be denied by the pursuer, they relied on the purchases as unexceptionably valid—they proceeded to the amelioration of the lands. It is notorious that the lot of one of them, Captain Maitland's lot, happened to be most important in point of contiguity to his mansion-house; and it is well known that he laid out much money on his lot, from the first day he got possession, and rendered it highly valuable, as the pursuers know well now.

But to say that, at the time of the purchases, they knew well that the title was a rotten one, exceeds the extravagance of any proposition ever stated in a Court of law; and those appeals made in the pursuer's papers, to his statement of fraud and circumvention, deception and collusion, appear to me to fall down to the ground at once. Is it possible to suppose those gentlemen did

July 22. 1828.

not consider their titles valid, when we all know there is not a school-boy in law who does not know that a title of the kind they possessed is the most sure and valid of all titles? The first lesson he gets in law is, to tell him a decree of sale is the best title a man could receive, from its going through all the forms of the Court, and the title being revised by the whole Judges, instead of parties having the mere assistance of men of business. To say that a decree of sale (and the same formalities were observed here) is not to be relied on, is most absurd—any thing more contrary to any principle of legal knowledge never was alleged.

Therefore, upon those two points, I have explained distinctly, that, as far as I can discover in this paper, the loose averments, and vague statements of the pursuer, do not in the most distant manner bring forward deception and circumvention, fraud and collusion, either to Robert Vans Agnew or to those gentlemen.

That being what I conceive to be the chief circumstance upon which this conclusion, that they were altogether in mala fide, and of course not entitled to the advantages of bona fide possessors, rests,—standing on so baseless a foundation as I have said the statement does, there is little else in the case. For, from that day, down to the steps taken by the late Mr Agnew in bringing his challenge, there was nothing on the face of the earth to bring any doubt to their minds: there was no warning, no certioration as to their going on in the possession and melioration of their different lots; there was nothing till a decree went against them.

I shall just state farther, that there is not the slightest foundation for attaching any imputation of fraud on any of the purchasers of the last lot. It was put up in the same way as the former lots brought to sale, and was bought by Mr Balfour for Mr Agnew. That is matter of every day's practice. If it was exposed to sale, and bought, whether avowed at the time or not to have been for Mr Robert Vans Agnew, makes no difference; it is just as good a sale, and he was entitled to be held as good a bona fide purchaser. After an interval of fourteen years, there was a difference in the value of the lands; and, taking a favourable opportunity, Mr Balfour again exposes the land to sale, and it brings a high price. All those gentlemen, individuals about the town of Stranraer, come forward and purchase,—bid fair and adequate prices,—high prices, they say, but, at all events, fair prices, and they go on with improvements. I have no difficulty in saying, that there is no ground for imputing fraud to Mr

Balfour, who availed himself of his office as trustee for the gentleman for whom he acted. July 22. 1828.

Now, down to Mr Vans Agnew's return from India, there was nothing to alarm those parties. He first took the cases to appeal, availing himself of his minority; and the whole matter afterwards came to this Court again, he having, in the mean time, brought a new action of reduction. You had an opportunity of considering the whole of the proceedings, and not rashly, but after full deliberation, you unanimously considered the first branch of the litigation regarding the debts exactly as your predecessors had done in 1784. In the action of reduction against the present defenders, you assoilzied them from the conclusions of the action, and you found Mr Vans Agnew liable in expenses.

Up to this period, therefore, there was nothing to alarm those purchasers; seeing those very questions, so disposed of, must have had a contrary effect.

Then appeals were taken to the House of Lords, and I have read to you the judgment in this case, and the words on which so much stress is laid in this information, in which a highly elaborate discussion is made of this judgment, and an endeavour to extract a meaning from it to be binding on us in this question.

I pay respect to the judgment of the House of Lords; and looking to the grounds stated, and called to decide as I am on this point, I ask, although they have drawn the conclusion of it appearing 'on the face of the proceedings,' that the pursuer and others were minors; is it supposed to be found out for the first time that they were minors? It was impossible to read a line of the papers without seeing that. The judgment goes on to state, that they were not 'properly brought before the Court,' as enjoined by the Act of Parliament; that therefore 'the sales made 'by the said Court, in such action of declarator and sale, were 'null and void, as against the appellant, and the several other 'minor heirs of entail;' and that Vans Agnew is not to be affected by them, but is entitled to have the sales reduced, and to have the lands restored to him, from the time of his accession to the entailed estates. Considering that judgment any way you please, is not that the simple and precise ground on which it proceeded? The printed proceedings of process, the whole train of argument in regard to those proceedings, every thing apart from a certain little document, which cannot now be found, shews they were brought into the field. The House of Lords proceeded on the ground, that there was no indication of it being on record that a tutor ad litem was regularly appointed for the minors. That

July 22. 1828.

is the sum and substance of the judgment of the House of Lords, finding they were not properly brought into the field.

I know well, if the judgment had remained as at first, when it stated, 'along with the rents from the period of his accession 'to the entailed estates,' there would have been no question at all. But I know this, that the House of Lords, at the same time that the forms of the House did not warrant a rehearing as to the whole merits, directly proceeded to amend the judgment, by striking out the whole of those words, and putting it in this shape:—'Without prejudice to any question which may be 'made in the further proceedings in the Court of Session, touch-'ing the rents of the entailed estates, and the application thereof, 'during any period of time.'

Therefore I say, for one, I consider the House of Lords have left that question fairly open to your consideration, to be dealt with according to the principles of the law of Scotland. And, giving effect to the judgment of that House, I do say, I restore the estate to Mr Vans Agnew; and now that he has made his claim as to those rents, the question is, Whether the defenders were bona fide possessors, and therefore are not bound to restore them for any period while their bona fide possession lasted?

I beg leave to say for one, that if ever there was a case in which purchasers of land who had entered into possession were entitled to plead upon bona fides, and to rely on their title as bona fide purchasers, it is in this case. Every one circumstance I have noticed contributed to confirm them in the confident possession of those lands; and, as possessed by them under the best of all titles, they improved the lands, they reaped and consumed the rents; they expended the rents, and they improved the lands by consumption of those rents.

If ever there was a case of bona fides, it is in that before us; and the only question is, If they were bona fide possessors, upon what principle of law or justice can the pursuer ask you to award those rents to him?

We have had too much occasion of late to consider such questions. We had it in the case of the Queensberry leases; and you know the decision in the case of the Duke of Roxburghe against Mr Wauchope, which was in the other Division. Those decisions are so very recent, and they were so uniformly and so unanimously decided, it would be superfluous to do more than mention them, and to say, I see nothing in this case to warrant me to adopt a different line of decision. On the contrary, if ever there was a case in which bona fides might be more strongly urged

than in another, it is in the present case. It is much stronger than many of those cases which have occurred; for not only the bona fide possession applied in the Queensberry cases down to the final judgment of the House of Lords, but there happened to be opposite decisions in the Court of Session. There was good warning therefore; yet the House of Lords solemnly adjudged, that bona fides did not cease till the ink was dry on the final judgment of the House of Lords in 1819.

I say, for one, I cannot think the bona fides of those gentlemen ceased till the final and amended judgment of the House of Lords. But I beg to say, for one, you must apply to this case the same principle applied there in the other cases already mentioned, which is, that the proper period for the rents going back, is the first term posterior to that judgment, that is, the term of Martinmas 1822. That is the period at which the pursuer was entitled to have restoration made to him in regard to bygone rents for those purchases made, some of them in 1789, others in 1793 or 1794. I have no conception that, on any principle of law, or equity, or justice, the pursuer can insist for more.

I thought it proper that, in a case of this kind, there should be no doubts left of my view of this most elaborate paper for the pursuer; and I am clearly and decidedly of opinion, that after all the pains that have been taken, he has failed to make out any grounds for a different judgment.

Lord Glenlee.—Why, my Lords, I confess that I have never been able to find out that there was any doubt or difficulty about this question. I cannot conceive that there could be a doubt on the subject. The pursuer makes allegations of fraud in the proceedings with regard to the sales—he alleges there was fraud, both on the part of his predecessor, Robert Vans Agnew, and of the persons who purchased and possessed the lands under the title of those judicial sales. But, in the first place, I entirely agree with your Lordship, that fraud is not made out against the pursuer's father; and, in the next place, there is no evidence of any fraud on the part of Lord Stair and the other purchasers at the sales; and still less, if possible, is there any evidence of fraud on the part of the other defenders, Mr Macneel and others, because they were not the original purchasers at the judicial sales, but purchased subsequently to those sales. The whole circumstances stated and founded upon by the pursuer, even as detailed in Mr Vans Agnew's own paper, make out nothing to establish or countenance at all his charge of mala fides against the defen-

July 22. 1828.

ders. Therefore, the allegation of fraud can have no effect in this question, nor can I have any conception that there is the least foundation for it.

It appears to me, therefore, that the pursuer is not entitled to the bygone rents which he claims from the defenders. He takes up a notion that the fruits of a subject necessarily go in the nature of an accessory to the property itself. I very well understand that, in a general sense, the proposition is true, that fruits growing go as an accessory to property; but with respect to those fruits that were bona fide reaped and long ago spent by those who possessed the property, I confess I doubt very much whether those fruits should be held as being still accessory to the property. This right to bygone rents depends more upon the right of possession than any thing else; and here the question is, Had the defenders a probable title and right on which they possessed the property and reaped the fruits? You acquire the fruits of property by its actual occupancy. Being in possession of the property, you reap and consume the fruits. No doubt, if, in the way and manner in which you acquired the occupancy, there was a fraud, you are obliged to restore the fruits as well as the property. But fraud implies a consciousness of wrong. Your wrong must be made out against you; and then the restoration of the fruits is rather as a penalty against the person who has got possession fraudulently, than a right following upon the property. That is the true way of considering the matter. And the burden of proving there was virtually and truly mala fides on the part of those who were in occupancy and possession, lies on the person who claims restoration of bygone fruits of the property which have been reaped and consumed.

There is a mistake in saying that there is a difference as to this question, when there is a nullity, and when there is only something capable of reduction. It just depends upon this, whether the nullity is of that kind that no man could fail to be aware of it. Is a man, who did not perceive that sort of nullity on which the sales here were declared void by the House of Lords—is he to be held as having possessed in mala fide? I have no conception of that. To be sure, the House of Peers has found that this was a nullity apparent on the face of the proceedings, and that the Act of Parliament, authorizing the sales, was not properly followed out in the proceedings in regard to the minor substitutes of entail; and the House of Peers, therefore, reduced the sales as null and void, and ordered the lands to be restored to Mr Agnew. But it is a totally different question,

when a claim for restoration of bygone rents and fruits is made, and the bona fides of parties comes to be considered. July 22. 1828.

The rule I always understood in such a case, whether reduction is founded upon an intrinsic or extrinsic nullity, to be, that if there was a reasonable ground for trusting in the title as just and correct, the possession was good. If you were actually aware there was a good objection to the title, you would be in mala fide; but if there was a probabilis causa for maintaining that the title was not null, there was bona fide possession, which is a sufficient defence against a claim for bygone rents.

Very lately we have had some very nice questions as to the effect of errors in sasines; and although we sustained the objection, and found the sasines null, it would be a very hard case that the persons possessed of the sasines should be said to have been in mala fide possession.

In questions as to restoration of bygone rents and fruits, there is no difference in regard to the ground upon which the title is set aside. The point for consideration is, whether the possessors had a consciousness that the title was bad.

In the present case, I think there was some ground for maintaining, that the bona fides of the defenders who purchased and possessed the lands, continued down to the date when the judgment of the House of Peers was amended, in March 1823. I cannot certainly say what hopes lawyers may have had, yet I suspect, when the application was made to this Court to delay proceedings on the judgment of the Court of Appeal pronounced in July 1822, in order that the defenders might have an opportunity of petitioning the House of Lords to rehear the cause, the application which we acceded to was of such a nature, and to such an effect, that the bona fides of the defenders, as to their title of possession, could only be held to have terminated when they found, by the order of the House of Lords in March 1823, that a rehearing of the cause could not be granted by that supreme tribunal. I am not sure that enough had previously passed to make them perfectly aware, that, of necessity, the judgment was final, that their title was reduced, and that they must restore the lands, till the House of Lords refused to rehear the cause.

But we have no occasion to extend the effect of the plea of bona fides farther than the parties themselves ask of us, and that is to the first term of Martinmas after the judgment of the House of Lords pronounced in July 1822.

Lord Pitmilly.—Your Lordship and Lord Glenlee have ex-

July 22. 1828. pressed your opinions in this case so very fully, that nothing remains for me to do, except to say that I concur in every thing stated by your Lordships, both on the facts and on the law.

I am quite satisfied that there is not the slightest ground for a charge of fraud or deception from beginning to end of the transactions, even on the part of Mr Vans, and still less on the part of the defenders.

And next, with regard to the law of the case, I think that this which is now before your Lordships is not one of a difficult kind, and has no resemblance to some of the difficult cases which have been before the Court of late. That being the case, it is quite clear that there is no ground for maintaining that there was any conscientia rei alienæ to constitute mala fides in this case as to fructus percepti, to entitle the pursuer to bygone rents, till from the term of Martinmas ensuing the judgment of the House of Lords. We see all the cases before us in those papers; and, in many of them founded upon, you will observe the defence had been repelled in this Court, and the House of Lords had affirmed the decision of this Court; and yet there it has been held, that the claim for bygone rents could not receive effect till the date of the judgment of the House of Lords. That was decided in some of those cases.

In this case, the decision was in favour of the defenders; and there was not the slightest ground for supposing that there could be a doubt of their title till the decision of the House of Lords.

In a case of this kind, it is not necessary to say more on the law.

Lord Alloway.—I entirely concur in the opinion delivered by all your Lordships, and certainly I would have said nothing more than that I concur in the opinion you have expressed, and so much better expressed than I could; but, in a case of this kind, as every stage of this case has gone to the House of Lords, and I suppose this will also, it may be proper to explain the grounds of my opinion; and I shall endeavour to do so without repeating, as far as I can avoid repeating, what has been said by your Lordships. Perhaps the House of Lords may have better means, by the opinions of the Judges being thus fully given, of knowing the precise grounds on which they proceeded, than they can in any other way.

The point of law that occurs here is very short, and, as I apprehend, very clear. The judgment of the House of Lords has been pronounced, by which the proceedings in the former process of sale are declared null and void,—those sales themselves

July 22. 1828.

are declared null and void,—and, of course, that the lands must be restored to Mr Vans Agnew. Whether that judgment was well founded or not, it is not our duty or business to inquire. Obedience now is simply our duty. But, in the question now before your Lordships, every point here is reserved for your consideration; and you are bound to lay down the principles of the law of Scotland applicable to the case before you. I beg to observe, therefore, that in any opinion I am giving, I am not calling in question a single principle of the judgment of the House of Lords. I have neither power nor inclination to do so. But when you come to consider this point,—whether those persons who have possessed upon those purchases were in mala fide possession of those lands,—it is impossible not to explain what we understand to be the law of Scotland, and whether those persons were entitled to act as they did or not. My observations on that subject have no other tendency, but are confined to the point under your consideration—are confined to the point of bona fides of the purchasers of the lands, the defenders; and whether they were entitled to retain possession, and therefore cannot be accountable for rents till they were put in a different situation as to bona fides when the judgment of the House of Lords was pronounced.

We are now better acquainted with the principle on which the House of Lords proceeded, from the very acute dissection of that judgment, in all its findings, by the gentleman who prepared a most able paper in this case for the pursuer, the late Mr John Vans Agnew. The House of Lords conceived that those minors had not been called according to the forms of the law of Scotland,—that there was no evidence produced in process of a tutor ad litem being appointed for them. It was certainly, and it could only be on that last ground, that the judgment of the House of Lords proceeded. For I am quite aware of what your Lordships stated, that there was a citation, the only one required by the law of Scotland; and I see besides, in the decree of sale, it is expressly mentioned, that all the tutors and curators of the minors were cited edictally. That was independent of the other species of citation personally; and it is not possible for human imagination to contrive any other as requisite. What the House of Lords proceeded upon was, that there was no appearance in the process of the interlocutor nominating Lord Braxfield as tutor ad litem for the minor heirs of entail. There could be no doubt of the nomination of Lord Braxfield as tutor ad litem for the minors. The proceedings all go on—the informations—the

July 22. 1828.

able papers—all go on, in the name of those persons, and of Lord Braxfield nominatim as their tutor ad litem.

Now, my Lord, as your Lordship has already mentioned, there is, in the first place, the judgment in 1784 with regard to the debts affecting that estate. That judgment was pronounced, I believe, during the period when there was a bench of as great Judges in the Court of Session as this country ever possessed. Lord Justice-Clerk Braxfield was one of those Judges, and on this point he was then entitled to judge; for Robert Vans Agnew being a defender in that action, as well as his children, there was no objection to his acting as their administrator at law, and therefore no necessity for a tutor ad litem. That was a pure point of law how far the estate was liable for the debts. That was the only point decided in the case of Drew, and it was decided by the most able Judges that were ever seen here. We are now considering the question of bona fides, and that is all the inference I draw. It was an unanimous judgment, and from that time till the appeal was entered, I do not know that the judgment was ever called in question.

We now come to the next part of the proceedings,—to the Act of Parliament. The moment the creditors were let in to affect the estate, the estate must have been actually destroyed at once, unless an Act of Parliament was obtained for selling part to pay off the debts. That Act of Parliament was obtained, the proceedings were placed under this Court for guidance, and the debts were calculated and examined by one of the most eminent accountants of his day, and who is still at the head of his profession. Every objection was discussed, and papers were given in in name of those minors and their tutors.

All this I merely observe to call your attention to this circumstance, that, from any calculation I can make, there could not have been fewer than a hundred persons to examine this process; for surely the agents of parties would look into the process before the lands were bought and the prices paid; and every person who examined this process must have been convinced, according to his opinion at the time, that the proceedings had been properly managed.

Sales were advertised,—sales by authority of this Court. And I always understood that, at one period of our law, and till very lately, sales under authority of this Court formed the best title to property any human being could receive. Those sales took place in presence of one of your Lordships. Competition took place upon every lot. The competition shewed bona fides.

Mr Hannay offered three times the amount of the upset price for his lot, and the upset prices were twenty-five years' purchase. I hardly remember, at that early period, to have heard of any instances equal to the high prices given at those sales. When I come to the question of bona fides, is it possible for any human being to believe that those persons, who offered such large prices above the upset prices, had not the most perfect bona fides? Those gentlemen, whose agents must have examined the titles, must have been satisfied all was right and regular in every respect. There was not only one agent, but many, and they all must have gone through the examination. Suppose they had no confidence in the respectable men who conducted the sale, there were other agents of abilities and integrity, some of whom are still living and preserving their high character; and is it possible to believe, that every one of those agents had not examined the whole of the proceedings of your Lordships, and found all clear? Therefore, if ever purchases took place to which bona fides attached, it was those purchases. I suppose a hundred men of business examined the proceedings, many must have examined them as the agents of intending offerers who did not purchase, and not an objection was stated at any one period to those proceedings. July 22. 1828.

Surely there must have been real bona fides, from the circumstances I have mentioned, from the real evidence of the high prices, and from the competition.

Your Lordships mentioned another circumstance, that of the persons who made those purchases laying out large sums in meliorations and improvements. In the report made by your authority, there are ameliorations stated to the amount of L.14,000; and is it possible that any persons, supposing they had a bad right, would have laid out that money? With all the ability which distinguishes the paper of the pursuers, I wish they had pointed out any circumstance from which the smallest suspicion on the part of those purchasers could arise. There is one circumstance mentioned—the only one I recollect—that of the warrandice. But is not that explained to your satisfaction? When a person, in a ranking and sale, signs the disposition, he must grant warrandice to the extent of what he receives; and how any argument can be founded on that circumstance I cannot comprehend. But this case going to another Court, that may not be acquainted with this circumstance, I think it my duty to enter on this explanation—and it is triumphant—that every person who receives a farthing of money at these sales is obliged

July 22. 1828.

to give his warrandice for the amount of the sums he receives. Lord Galloway and Admiral Stewart were not only trustees but creditors; and the warrandice was not only proper, but absolutely necessary. When the matter goes elsewhere, I trust this circumstance will not be mentioned without the explanation that is necessary.

Let us go on. It has been said, that, at one sight, they must have seen this was an incompetent title, because there was wanting the appointment of Lord Braxfield as tutor ad litem—that it was not produced in the process. I believe it is not necessary for this Court, in delivering their opinions, to state what is the custom of this country—the situation of our records—and the effect such an objection would have had at any period on the minds of men of business. But, in speaking of bona fides, you must go to the country, and to the opinions in the country at the time the transactions took place. Suppose a new understanding and new law on the subject, you cannot apply that to bona fides in judging of the former transactions of men. You must apply the question of bona fides in relation to the time and to the persons acting under it.

I do not mean to question the judgment of the House of Lords, but to explain what I know with regard to the situation of the records of decrees at that period; from which it strikes me as extraordinary, that there is no other warrant of importance here at this time awanting but this one. I had what perhaps may be termed the misfortune of being apprentice with a writer to the signet, with my brother on my right hand (Lord Pitmilly); and he will I am certain concur with me as to the kind of places in which running processes were then kept—that they were low, dark, confined, miserable places. I never saw in my life such places as that and other offices of that time; and I was obliged to go to those places to borrow processes.

But that was not the worst. I ask, in whose hands were the whole processes, and warrants, and decreets, to be extracted? They remained in the hands of the extractors, who might have kept them in their own houses, or little closets, such places as were never seen in the world.

Most fortunately, there is a regulation that persons are not bound to produce their warrants after twenty years, otherwise I do not know what would have been the case, if a person who who had obtained decreet, and, in giving out execution, was called on to produce any of the warrants that had been left in this miserable state. Fortunately we have now a person appoint-

ed for such registrations—Mr Hay; and this is a most excellent change for the country, and most happy for the safety of the lieges. July 22. 1828.

I am only talking now of bona fides; and here were all the writers, agents—if the whole of them had searched those records, and seen those pleadings in the name of Lord Braxfield as tutor ad litem for the minor heirs of entail in existence, such an objection as that now founded upon by the pursuer could never have occurred. I say honestly and bona fide, the objection never would have occurred to me either as a lawyer or Judge. I do honestly and conscientiously believe, there was no lawyer at the Bar, no writer to the signet, nor a Judge in the country, who would have considered that as an objection, so as to affect the bona fides of the purchasers. I go no farther. That matter has been decided on by the Supreme Court of Judicature—I dare say well decided; but we have nothing to do with the merits of the decision, in considering the question now under consideration.

I do not know that one-half of the papers in that old process now exist. The half of many of them perhaps is worn away. Now, Lord Pitmilly and I, who were not long ago in the Outer-House, have had knowledge and practice of late as to the appointment of tutors ad litem. The thing is done in a moment. The gentleman is called to the Bar; and all that takes place is recorded in two lines on a paper. It may get out of the way, and the fact not be discovered; but the whole papers afterwards are given in in the name of the minors and their tutor ad litem. And is it possible to conceive, that the want of what is stated in two words as to this mere form of appointment, if observed, would have created a doubt in the mind of any agent employed for purchasers, or in the minds of Counsel that might have been consulted, and considered as sufficient to set aside those sales?

I concur in every word which your Lordships have stated; and I am only anxious to express my views as to what may not have been already stated by your Lordships; and if the question comes to be one of bona fides, and to rest on the non-production of a document, at the distance, I believe, of thirty-six years, to state my conviction, that it is impossible that any objection to bona fides can be founded upon this.

And, as this matter is open to us, I come to the question in point of law. I say, first, I can see nothing that can affect their title of bona fide purchasers; and I come now to the law as applicable to that.

July 22. 1828.

Lord Stair and all our lawyers state, that bona fide consumption, in such cases, is a sufficient plea against a claim of restoration of bygone fruits. One case, which he cites in illustration, is, where 'forgery' applied to the title of possession; yet as the possessor was found to have been a bona fide possessor, he was not bound to restore what he had bona fide reaped and consumed. The case is collected and reported by his Lordship. In that and other cases, he gives a clear and philosophical explanation of the application of the Roman maxim to our law; and he states, that where there is a probable title, the possessor will be entitled to plead bona fides; the rule of the Roman law being, 'Bona fide 'possessor rei alienæ facit fructus perceptos et consumptos suos,' and the definition of a bona fide possessor being, 'Bona fidei 'emptor esse videtur, qui ignorávit eam rem alienam esse; aut 'putavit eum, qui vendidit, jus vendendi habere.'

According to the law of Scotland, can any man doubt whether the title of those purchasers was a probable title? Nay, could any man have suspected any error in the title?

Such being the case, all lawyers, from Balfour downwards, are agreed. And not one of them says otherwise than that a probabilis causa must have the effect of supporting the plea of bona fides.

There remains only this other point,—from what period was the bona fides of the defenders put an end to? It could not be put an end to by the unanimous judgment of this Court in their favour. Then, when was it put an end to? The first thing assuredly that could have shaken it, was the decision of the House of Lords in July 1822.

There was a great deal in Lord Glenlee's opinion, which it must be quite impossible for any one to depart from; and I confess, that on reading the papers in this case I supposed, with his Lordship, that the bona fides here must be held to have continued till the second opinion of the House of Lords was pronounced; and which, of course, necessarily carried down the bona fides of the defenders to the term of Whitsunday 1823, the term immediately succeeding the deliverance of that opinion; because the petition for delay to this Court, and the consequent reconsideration in the House of Lords, did keep the matter open, and obtained an alteration in the judgment which that Supreme Court pronounced, and on the very point you are now considering.

I agree with Lord Glenlee, as to what his Lordship stated in that view of the case; but it seemed to me impossible to main-

tain or give effect to that, after looking to Mr Bell's paper for the defenders, in which this claim is only insisted on from Martinmas 1822, the term immediately succeeding the first judgment of the House of Lords. I had formed an opinion similar to that of Lord Glenlee, till I was stopped by the parties limiting their claim in this way; and I think the Court should not go beyond what is desired by the parties themselves. July 22. 1828.

With regard to the period of Martinmas 1822, there cannot be a doubt that is the period down to which your Lordships must hold those parties had bona fides in their possession. Though the date of the first judgment of the House of Lords is the 31st July 1822, yet you know the bona fides must always be carried till the next term. When a man enters to a landed estate, he cannot draw a sixpence till the next term; and during that interval, though the rents are not percepti, yet is he not subsisting on the footing of those rents? He got his wine, meat, &c. relatively to them, and, therefore, they are actually consumed, although de facto they are not reaped.

This is a principle adopted by you in other cases, and adopted by the House of Lords in the two cases referred to by the parties, and that have been mentioned on the Bench. I allude to the case of Lord Wemyss and the case of the Duke of Buccleuch. Lord Wemyss had executed a summons before the Duke of Queensberry's death. The whole parties were put on their guard from the moment of the Duke's death. Yet, even in that case, where one Division of the Court of Session had decided in favour of the reducer's rights, and the House of Lords merely affirmed that judgment; the House of Lords was clear, and judged that there were no violent profits due—that the possessors were bona fide possessors till the term after the judgment of the House of Lords. Can you compare that with the present case, where the parties had not the least reason to expect their situation to be altered, or any thing on record that could touch their right, till that judgment of the House of Lords?

Therefore you must go to the term of Martinmas following the first judgment of the House of Lords, according to the limitation made by the defenders in this case.

I must say, of all the cases I ever saw, in which bona fides was disputed, I never saw one in which it was more completely and satisfactorily established, than in the present case by those purchasers, the defenders; and in which there was less brought forward to impugn that plea.

July 22. 1828.

Lord Justice-Clerk.—It is not necessary to say much on the other question in the sequestration.

Lord Glenlee.—There is a proposition by Mr Bell, in his answers to the petition on that subject. He says, 'The respondents therefore agree, that the petitioner shall receive the 'rents recovered by the judicial factor falling due from and 'after Martinmas 1822, provided the respondents are found entitled to receive the rents recovered by the factor falling due 'at and preceding Martinmas 1822.'

Moncreiff.—I apprehend that what your Lordships have said on the former question which you have just now decided, settles this too.

A. Bell, for the respondents.—Your Lordships will give us expenses.

Moncreiff.—It seems quite unnecessary to say any thing, as you are acquainted with the case. But you will observe, that the question of expenses involves a great deal. There is a question of expenses before the appeal; and you must remember the judgment you pronounced in the case of Maberly and Company against the Bank of Scotland, in which I was one of the Counsel for the pursuer.

Lord Alloway.—Was there any appeal on the question of bygone rents?

Lord Justice-Clerk.—Mr Agnew appealed against the judgment of your Lordships in favour of the defenders; and it is since the House of Lords pronounced judgment of reversal, and afterwards amended that judgment of reversal, that the questions before us to-day came to be discussed here.

Moncreiff.—I am speaking at present as to the question of expenses prior to the appeal. In the case of Maberly, you had found for the defenders, and gave them expenses—the pursuer appealed, and the House of Lords reversed your decision, but said nothing about expenses. When the case came back here, you awarded to the pursuer the expenses prior to the appeal. You will find this reported 11th March 1826, Shaw and Dunlop's Reports, where the title is, 'Competent to award 'to a pursuer expenses prior to an appeal to the House of Lords, 'who had reversed a judgment of absolvitor which found expenses due to the defenders.' The report says, 'The judgment of your Lordships, (which, besides assoilzieing the Bank 'of Scotland, found them entitled to expenses of process), 'having been taken to appeal, was reversed by the House of 'Lords, and the cause remitted, to allow a proof, but without

July 22. 1828.

'any finding as to expenses.' The subsequent proceedings are then noticed; and 'no evidence having been led by the Bank, 'the Court decerned against them in terms of the libel.' Then it is stated, 'A motion was then made on the part of Maber-'ly and Company for the expenses of process in this Court, 'both prior and subsequent to the appeal. The Bank objected, 'that so far as regarded the expenses prior to the appeal, it 'was incompetent to award them; but the Court unanimously 'found Maberly and Company entitled to expenses, both prior 'and subsequent thereto.'

The *Lord Justice-Clerk* is reported as saying, 'I am of opi-'nion, that there is no incompetency in awarding those prior to 'the appeal.'

It is then added, 'The other Judges concurred, and Lord 'Alloway mentioned that the same thing had been done in the 'case of Falljambe against Fullerton.'

So that, here, the first question relates to the expenses prior to the appeal. Your original interlocutor awarded expenses to the defenders; but the pursuer of the action having been found right by the judgment of the House of Lords, has a competent claim to the expenses, though nothing is said on the subject in the judgment of the House of Lords,—just as in the case of Maberly with the Bank of Scotland, when the House of Lords reversed the judgment of this Court which had given expenses to the defenders, and when you afterwards awarded them to the pursuer, although the House of Lords had said nothing on the subject.

With that observation I leave that part of the case.

As to the claim for expenses in the question as to bygone rents, consider the situation of the pursuer here. You see, in the first place, if the pursuer was not to get the expenses of the prior proceedings, he would be in a hard situation. He was a liferenter, and did not live to draw enough to defray the expenses of the action for obtaining that which he has been found to have had the right to possess;—he did not live to draw enough to defray the expenses of the action in which he was found in the right. It is a very harsh demand, therefore, by the defenders, to say they will have expenses as to the claim for bygone rents, while they withhold the rents to which it has been found the pursuer had right.

Dean of Faculty, (Cranstoun), for the respondents.—We are not demanding expenses previous to the appeal, but as to the bygone rents since the case came back from the House of Lords. Can it be held there was a probabilis causa to the pursuer to

July 22. 1828.

insist in his claim for bygone rents, after your opinions just delivered; and considering the whole tenor of the law of Scotland on the subject, and the late judgments of the House of Lords in the Queensberry cases, shewing the established law of Scotland?

As to the expenses, therefore, of the discussion regarding bygone rents, there cannot be a doubt we are entitled to them. Whether the parties can ask expenses before the date of the appeal is a different question.

Moncrieff.—It is we who are asking the expenses prior to the appeal. They make the one motion, and we make the other.

There is a little more in the case. There is the expenses in the question as to the removing, in which we were also successful; and, in that case, the question of expenses was expressly reserved, and may now be decided.

And, in the process of sequestration, we were substantially successful.

A. Bell.—Your Lordships, in the original action, found us entitled to expenses. They were paid to us. The House of Lords reversed the decision of this Court, but said nothing of expenses. The expenses were paid back by us to the pursuer. So the matter stands. And now they demand their previous expenses.

The question of removing was connected with that as to meliorations. If expenses had been asked when the removing was ordered, the Court would have determined on the subject.

The question as to the bygone rents having now been decided in our favour by your unanimous judgment, the expenses in it ought to be awarded to us as matter of course.

Moncreiff.—The question as to expenses prior to the appeal is exactly in the same situation in which it stood in the case I have mentioned.

Lord Justice-Clerk.—In that case of Maberly, we thought there was sufficient ground to find for the defenders, without any investigation as to the practice. From the shewing of the summons, we held there was ground for assoilzieing the Bank, and we gave expenses to the Bank. The House of Lords reversed our decision, and made a special order for proof. On parties being allowed that proof, the Bank led none; and the Court, seeing the pursuer had proved his case, gave him expenses. We had turned him out of Court upon what we considered a preliminary objection to the action; and having given the Bank expenses when we so decided in its favour, we thought it right,

when the case came back and was decided differently, to give the pursuer expenses. July 22. 1828.

Lord Alloway.—This question is limited to the bygone rents.

Lord Justice-Clerk.—But the pursuer says, if you give that to the defenders, give me the previous expenses.

Moncreiff.—In this action they had no termini habiles for liquidating their meliorations. They insisted on a right to retain possession for the meliorations. In that they were found in the wrong, and there was much expense in it.

A. Bell.—That was a small part of the case.

Lord Glenlee.—We may delay the questions of expenses till the termination of the whole case.

Moncreiff.—On page seventh of the additional petition before you, you will find your interlocutor on the question of removing. 'On report of Lord Pitmilly, and having considered the mutual 'informations ordered by the Lord Ordinary, and heard Coun-'sel for the parties, the Lords decern in the removing against 'the defenders from the several lands libelled at the term of 'Martinmas next, and allow the decree to be extracted as an 'interim decree in the cause, after the expiry of the reclaiming 'days, reserving to the defenders all claims for meliorations and 'bygone rents, and to the pursuer his objections thereto, and to 'both parties their mutual claims for expenses; ordain the defen-'ders to deliver up to the pursuer, quam primum, the title-deeds 'of their respective purchases anterior to the periods of the sales; 'and before answer as to the claims for meliorations, remit to 'Dr Coventry, whom failing, to Mr George Brown, land-'valuator, to visit the different estates in question, examine the 'same at the sight of all parties, and report on the nature and 'extent of the alleged meliorations to this Court, on or before 'the first sederunt day in November next.' And on the same day, 7th June 1824, you 'recall the sequestration of the lands sold 'to the defenders, and that at the term of Martinmas next, and 'decern.' And by another interlocutor of the same date, you recalled the judicial factory as at that term of Martinmas.

Dean of Faculty Cranstoun.—The question of meliorations was not decided.

Moncreiff.—But it was decided that the defenders were not entitled to retain possession of the lands.

Lord Glenlee.—In the question of meliorations, we may still decide as to expenses.

Moncreiff.—There is no such question here. There was a separate action raised as to meliorations.

July 22. 1828.

Lord Justice-Clerk.—The question as to meliorations is no branch of this litigation.

Lord Glenlec.—You are now obliged to decide as to the expenses.

Lord Justice-Clerk.—This question is really a sequel of the judgment of the House of Lords,—'And further, to proceed as 'shall be consistent with this judgment, and shall be just.' The demands of both sides are quite competent to be determined by the Court.

Moncreiff.—If you do not dispose of the question of expenses now, there is no possibility of bringing it again before you.

Lord Justice-Clerk.—There is no other stage. And so far as regards the remit made to Dr Coventry, that had reference to the question of meliorations. The only thing decided by our interlocutor referred to, as to which we are now called to decide as to expenses, is in relation to the removing. Therefore, as to all expenses in relation to the remit to Dr Coventry, they come under the question of meliorations. But we are otherwise bound to decide, the demand having been made. The Dean of Faculty maintains, as to this latter branch of litigation regarding the bygone rents, that Mr Agnew having failed in it, we should award the expenses of it to the defenders. But, on the other hand, Mr Moncreiff says,—It having been found by the House of Lords, that in the general question Mr Agnew was in the right, he is entitled to his expenses, in as much as he has been successful in the litigation between the parties. It is competent for us to decide on both the motions which have been made.

Lord Glenlee.—The prayer of the petition before us is, 'to 'find that the petitioner is entitled to receive the rents collected 'by the judicial factor, and now in manibus curiæ, and to decern 'accordingly; also to find her entitled to the whole expenses of 'the sequestration, or otherwise to do in the premises as to your 'Lordships shall seem just.'

Lord Justice-Clerk.—Pronounce judgment, and before answer as to expenses ordain mutual accounts to be put in. It is not necessary, at one and the same moment, to decide the case and to find as to expenses.

The following interlocutor was then pronounced:—'19th May '1826.—On report of Lord Mackenzie, and having advised the 'mutual informations for the parties on the claim by the pursuer 'for bygone rents, find, that the defenders were bona fide pos- 'sessors of the several subjects purchased by them, down to the 'period of the judgment of the House of Lords on 31st July 1822,

'and therefore repel the claim of the pursuer, so far as concerns 'the rents thereof for crop and year 1822, and preceding years, 'and decern; and before answer as to the mutual claims of expen- 'ses, appoint both parties to put in their accounts of expenses.'* July 22. 1828.

Thereafter, the accounts of expenses for the parties having been lodged,

Lord Glenlee observed,—Our competency to give a party expenses prior to an appeal, on which the House of Lords reversed the decision of this Court, which also decerned as to expenses, but where, on the subject of expenses, the judgment of reversal is silent,—may be liable to doubt at present on general principle. But as to the case of Maberly, it was of a different nature from the case of Mr Agnew, which is now before us. In this case, the whole matter was before the House of Lords, with our finding as to expenses; and the real and true ground to go upon is, that unless such a full and articulate judgment of reversal gave express instructions as to expenses, we are not perhaps called upon or entitled to decide as to those previous expenses. But that did not apply to the case of Maberly. There the House of Lords held, that we should be far better judges of the propriety of the action, after a proof should have been taken, and, when uncertain of the result of that proof, they would say nothing as to expenses: and when the case came back to us, in consequence of the Bank declining to take any part as to the proof, there were strong grounds, from what turned out in the case, to find the Bank liable in expenses. But here we are called on to decide as to expenses, in a question which was fully before the House of Lords. Was not the whole case before the House of Lords, with our interlocutor in favour of the defenders, and awarding them expenses? Therefore, as the judgment of the House of Lords, which reversed our judgment on the merits, says nothing of expenses, I am quite clear we ought not to give expenses to the pursuer in this case.

As to another question regarding expenses, it is a very different thing where meliorations are ascertained, and possession is retained or claimed till security be found for them, from the case where lands are claimed to be retained till meliorations shall be ascertained.

I think the best way here is to give no expenses to either party.

(His Lordship then spoke of the bona fides of the defenders in this case, and of the effects of it in law in the questions betwixt

---

* See 4. Shaw and Dunlop, No. 379.

July 22. 1828.

the parties; but the reporter could not hear distinctly what his Lordship said on the subject.)

Lord Pitmilly.—I agree in the opinion which has been delivered. As to the expenses before the reduction by the House of Lords, I am clear, as Lord Glenlee has put it, that there is nothing, in point of rule or principle, as to expenses in general, to govern imperatively the present case. I think his Lordship's clear distinction between this and the case of Maberly, founded upon by the pursuer, is well founded; and there can be no question about it.

As to expenses since the remit:—There have been two questions discussed by the parties since the remit, in one of which the pursuer has succeeded, and in the other the defenders have succeeded. The defenders have lost their plea as to retention of the lands for meliorations, in which a good deal of discussion took place, and expenses were incurred; and, on the other hand, the pursuer has lost his plea as to bygone rents. It appears to me that no expenses should be allowed in either case, but the one should stand against the other.

Lord Alloway.—My conclusion is very much the same with that of your Lordships who have spoken on the points as to expenses.

As to that regarding the first case, viz. the proceedings prior to the appeal, it is impossible that the pursuer should get expenses. Here there was an unanimous judgment against him by your Lordships, and finding him liable in expenses to the defenders; which judgment of this Court was no doubt reversed by the House of Lords; but that judgment of reversal by the House of Lords said nothing on expenses. Your judgment was reversed by the House of Lords; but if the House of Lords had considered that the pursuer was entitled to expenses, their judgment would have stated the point of expenses, and found them due to him, or mentioned them in the remit.

Mr Bell's argument, founded on the case of Pringle *v.* Tod's Legatees, 6th March 1799, and other cases, is, that it is incompetent for this Court to find now as to those previous expenses. I have doubts upon that subject; and if it was necessary to give an opinion I would say, that I rather think that the point of competency is still open.

Although the judgment of this Court was reversed, the defenders were entitled to hold that judgment to be the law till they were taught the contrary by the judgment of the Court of appeal; and the question of bona fides here makes the case diffe-

July 22. 1828.

rent from that of Maberly, and that of Falljambe, mentioned in the report of the case of Maberly. Had this been a question of duty, and the House of Lords had fixed a different principle from what you did, and had altered your judgment upon that point, the case of Maberly would have applied. There the circumstances justified the claim. The whole case went to the House of Lords; it was remitted to this Court to allow a proof; a proof was allowed; and it was upon the result of that proof the case of Maberly was then decided.

We had a case, which is alluded to in the report of the case of Maberly, Falljambe, not reported, in which this Court had first found that there was no claim for damages. That case went to the House of Lords, and it then came back here. The Court found there was no claim against William Elphinston. The House of Lords reversed that judgment; and when the case came here, it became necessary to find whether damages would include the previous expenses. None were found due. The case then went to the House of Lords. Expenses could not be found there. The case came back from the House of Lords, and then you found the whole expenses, from the beginning of the action, due as part of the damages. And I think the interlocutor was right. But it is impossible to apply that case to this.

With regard to the right of retention on account of the meliorations, I confess that, if I had been sitting here when that point was before your Lordships, I should have hesitated as to finding it did not belong to the defenders. My reasons of doubt are founded upon the right in law, which, whenever it allows this plea of meliorations to persons holding property and thinking it their own, gives them retention till they are repaid. This was also the clear rule of the Roman law. If I had been sitting here when that question was before you, I would have expressed those doubts; but that is decided.

But is there any ground for giving expenses to the pursuer? I cannot find that the purchasers were wrong in defending what they believed to be their own; and I rather hold that they should have held the estate till indemnified in these very expenses. And therefore, if the question had depended on that point, I should have been quite clear that no expenses were due to the pursuer.

But coming to the last point, that as to bygone rents and fruits, is it possible there can be any doubt as to it? No bygones were due till the decision of the House of Lords. Mr Pyper

July 22. 1828.

has stated strongly, that we should take into consideration the advantages derived by the defenders from the other party, the pursuer, being kept long out of possession. I am rather surprised at what has been stated. It occurs to me that this gentleman has been the most successful litigant that was ever before a Court of law. I do not remember ever to have heard of such success in such a plea. I do not find fault with the judgment of the House of Lords; but I never can change my opinion, that Mr Agnew has been a wonderfully successful litigant; and, therefore, the other parties have been just as unsuccessful and unfortunate.

If it had been necessary to decide the question of bygone rents as a single point in this case, and not upon taking a complex view of the whole case, my opinion would have been decidedly that this party was liable in the whole expenses to the purchasers. But I do not wish to take a different view from your Lordships in this matter, and I adopt the opinion which has been given as to expenses, finding none due to either party.

Lord Justice-Clerk.—Upon all the three points as to this claim for expenses, my opinion is the same with your Lordships, that we ought not to allow them.

As to the first point, I am surprised the claim is made. No doubt it was reserved. But, considering the peculiar circumstances in which the cause originated here, the manner in which the litigation was conducted, and the different judgments pronounced here, and only altered by the House of Lords in 1822, unless that House, which could have done so, had directed us not only to restore the lands to the pursuer, but to award full expenses, I did not think the party would have made that demand. For, unless it were imperative in every case, whatever might be the ground of doubt as to an action, that expenses were always given to the prevailing party, it was extravagant to entertain any hopes that we would here award them.

And here there is this peculiar feature in the case. The judgment of this Court awarded expenses against Mr Agnew, the pursuer. Execution pending appeal was granted, and they were paid by him; and that must have been pressed upon the House of Lords. And yet that House did not instruct us to give expenses to Mr Agnew. Therefore, admitting there may be cases in which, after a judgment of the House of Lords, it may be competent for this Court to award expenses incurred previous to appeal, sure I am that this is a case where, the House of Lords having given no hint that such should be the sequel of their

reversal of our judgment, you would not interpret that this was their meaning. July 22. 1828.

As to the other matters, I am also of the same opinion as your Lordships.

As to the plea of retention of the lands in security of meliorations, I may remark, that it was not considered by us so free from doubt as that we should be surprised that Lord Alloway does not agree with what the Court found. But the question was well heard and considered here. We felt, as we ever have done, that whatever our opinions might be, we were bound to follow out the judgment of the House of Lords, and therefore we decerned in the removing. It was only retention for security; and, under all the circumstances, we decerned in the removing. But is that a case for expenses?

As to the other case, regarding the bygone rents, considering the very hard fate of those gentlemen, whatever Mr Vans Agnew, or others for him, may have stated, I venture to say, that there is no part of the human race who differ on the subject; all must agree in opinion that the hardship is upon the defenders. And after they had been in possession during thirty or forty years, a demand being made of bygone rents, we are well entitled to award expenses to the parties.

We must measure out justice to both parties; and I concur with you in thinking, that setting off the one case against the other, as has been proposed, is right, and to refuse expenses to both parties.

The Court accordingly, on the 24th June 1826, 'found no 'expenses due to any of the parties.'*

Both parties appealed; Mrs Robertson on the merits and expenses, and Lord Stair and others as to expenses.

Appellant, (Mrs Robertson).—I. The House of Lords having declared, that the children of Robert Vans Agnew appear, on the face of the proceedings, to have been minors when the interlocutors in the action of declarator and sale raised against them were pronounced, and not to have been properly brought before the Court as defenders in that action, it is now quite incompetent for the respondents to say that, de facto, the children were properly called. The question must be argued as one in which it has been finally decided, that the sale has been made a non do-

---

* 4. Shaw and Dunlop, No. 456.

July 22. 1828.

mino; leaving the single inquiry, to whom belongs the rents and profits which have fallen since the accession of the person illegally kept out of possession? The general rule clearly is, that a party who is bound to restore an estate, of which he has illegally had possession, to its true owner, must also restore the fruits and profits of which the true owner has been deprived. To this there is the exception, Bona fide possessor facit fructos perceptos et consumptos suos. But this rule, from the nature of the property in question, is inapplicable. The present is an instance of an heir of entail, a mere liferenter; and if bona fides did protect, it would only do so to the extent of the interest of the fruits. The most unjust consequences would ensue if the fruits themselves could be swallowed up; an heir of entail might litigate for his lifetime, and dying on the day his right was declared, take nothing by his victory. The maxim, therefore, of bona fide possessor, &c. cannot to any extent be pleaded against the right conferred by the statute 1685 on heirs of entail. Besides, the sale was authorized by a private Act, to the provisions and directions of which the seller was bound to adhere. The purchasers did not make themselves acquainted with the provisions of the statute; they were guilty of an indiscretion and rashness for which they alone must suffer; and if they were aware, then they stand in this question in pessima fide, and in both cases must make restitution of the fruits to the true owner. The exception has been introduced in favour to the innocent possessor, who has reaped and consumed the profits; and in pœnam of the neglect of the true owner, who allowed the innocent consumer to be deceived. But here there was no neglect on the part of the true owner. The only inquiry therefore is, What is meant by the innocency of the consumer? Now, where the circumstances of the case are such, that the party taking the null or defective right ought to have been aware of the fraud, the plea of bona fides is no protection. Culpa lata equiparatur dolo. But here the gross departures from the provisions of the statute were too apparent to permit the purchasers to say that they were ignorant of them. The smallest attention and reflection would have shewn that the title was void. In truth, they were in mala fide throughout. But the plea of bona fide possessor, &c. is barred by the late pursuer's privilege as a minor to restitutio in integrum. This is undoubted law, and founded on the soundest policy. The lesion done to the substitute heirs is manifest, and the expiry of the quadrennium utile does not bar the privilege, since the quadrennium has only reference to deeds requiring reduc-

July 22. 1828.

tion, not to deeds which, being null in themselves, admit of a mere declarator of nullity. Besides, the respondents, by the very terms of their purchase, have protected themselves by clauses of warrandice, and recourse is therefore still open against the pursuer of the sale, and the creditors paid under it.

II. At all events, the appellant is entitled to repetition from the date of the service of Mr Agnew's appeal in July 1810. That was equivalent to citation, and was a judicial warning that the sales were to be challenged, and operated as an absolute extinction of bona fides; for this challenge did not rest on grounds of an obscure and doubtful nature, (which might warrant the continuance of bona fides until the first and final judgment on it), but on plain and manifest nullities. At any rate, it is quite impossible to conceive that the bona fides can last longer than the judgment of the House of Lords on the 31st July 1822; and therefore, the profits from that day, and not merely from the Martinmas following, belonged to the appellant.

III. The appellant is entitled to the expenses incurred in this litigation, and particularly to those prior to the appeal in which he was successful.

Respondents.—A question of bona fides is one of fact, depending on the circumstances of the case. The doctrine it involves is founded on equity, and enforced by positive law. There is nothing in the res gestæ of this case that is inconsistent with the most perfect bona fides of the purchasers. Neither collusion nor any moral blame attaches to them; and if there did, that could not affect the respondents, who were neither cognizant nor participant therein. But the judgment of the House of Lords does not proceed on the presumption of delinquency, but on a technical flaw in the proceedings;—a nullity neither so obvious nor indisputable as to operate as a bar to the defence of bona fides. A mere mistake in law, if a real and sincere mistake, will not shut out bona fides, or the benefits flowing from it. In order to exclude the plea, there must be an error of that glaring kind, that no person of ordinary understanding can be supposed to have overlooked it, or to be ignorant of its fatal nature. But there is nothing of this kind tainting the proceedings in the present case. Indeed there is still very great doubt whether the fact truly was as assumed in the House of Lords, that no tutor ad litem had been appointed to conduct the minors' defence; and, at all events, the parties purchasing could not be held to be very blamable if they allowed themselves to be misled on a point so dubious. Besides, the error, if one, is imputable to the Court;

July 22. 1828.

but purchasers at sales under Acts of Parliament, carried on before the Court of Session, are not liable for mistakes of the Court. The private statute gave no particular instructions as to conducting the process of sale, but left those to the usual form of the Court; and there was nothing to warn the respondents that these forms had not been rigidly observed. Though it may not in questions of title, yet in questions of bona fides ignorance excuses. The plea of restitutio in integrum is inapplicable. This is not an action of reduction on the head of minority and lesion, either in form or substance, and besides, was not brought within the quadrennium utile. The warrandice is of little or no value, but even if it were the reverse, the plea is jus tertii to the appellant. There is nothing in the argument founded on the statute 1685; for whenever part of an entailed estate is set free from the fetters of an entail by an Act of Parliament, the entail becomes quoad hoc non existant.

The period at which the bona fides must be held to cease is in the arbitrement of the Judge. In the present instance there is nothing that should have created the conscientia rei alienæ, until the judgment of the House of Lords reducing the sales. Bona fides is not lost by mere citation, unless the nullity be so clear as not to bear two opinions, which certainly is not the case here. It is plain that a term cannot be divided into fractional parts, and therefore the Court most correctly found the rents due up to Martinmas, the first term after the judgment of the House of Lords, to belong to the respondents.

Every consideration of justice tends to shew that the appellant was not entitled to expenses, and that the respondents were.

The House of Lords found, 'that their Lordships having, on 'the 31st of July 1822, declared the title of the then appellant, 'John Vans Agnew, to have the lands in question restored to 'him, the possession of the respondents in the present appeal 'could not be deemed a bona fide possession after that day, and 'the said John Vans Agnew ought to be considered as entitled 'to demand from the tenants of the lands the rents due from 'them, as if he had then first succeeded to the title under the 'entail under which he claimed, unaffected by any act to his 'prejudice; and their Lordships are of opinion, that the repre-'sentative of the said John Vans Agnew is entitled to receive 'the rents which fell due at Martinmas 1822, being after the 'judgment of this House. It is therefore ordered and adjudged, 'that the interlocutors complained of in the said original appeal,

July 22. 1828.

'so far as they repel the claim of the appellant as the represen-
'tative of the said John Vans Agnew to the rents due from the
'occupiers of the lands in question under the respondents, which
'became due at Martinmas 1822, subsequent to the judgment of
'this House of the 31st of July 1822, be, and the same are here-
'by reversed; and it is also declared, that the appellant is en-
'titled to the rents which became due at Martinmas 1822, from
'the several tenants of the lands in question, without prejudice
'to any question whether, if the respondents, or any of them,
'were in the personal occupation of any part of the lands in
'question, and had sown crops thereon, they were entitled to the
'benefit of such crops gathered before Martinmas 1822, although
'subsequent to the 31st of July preceding. And it is further
'ordered, that the cause be remitted back to the Court of Session
'to give directions accordingly. And it is further ordered, that
'the said cross appeal be, and the same is hereby dismissed this
'House, and that the interlocutor of the Lords of Session of the
'said Second Division, so far as complained of in the said cross
'appeal, be, and the same is hereby affirmed. And it is further
'ordered, that the appellants in the said cross appeal do pay or
'cause to be paid to the respondent, the sum of L.60 for her
'costs, in respect of the said cross appeal.'

LORD REDESDALE.—My Lords, There is the case of Robertson *v.* the Earl of Stair, which has been argued before your Lordships, and the question upon which is now confined to one point. Your Lordships will recollect that there was a decision of the Court of Session, giving the profits of the estate to the representatives of Mr John Vans Agnew, but only from the time when the Court of Session adopted the decision of this House. My Lords, the decision of the Court of Session I conceive to have been well founded in other respects, though certainly a very harsh decision, because the consequence of it was to give a certain degree of effect to a most fraudulent transaction which had taken place, by which the original party in this cause, Mr John Vans Agnew, was deprived for many years of the possession of a considerable property to which he was entitled; but the Court of Session having at first decided against his title, when this House afterwards reversed that decision, they decided in favour of his title.

My Lords,—According to what has been of late years decided to be the law of Scotland, though it was not certainly the original law of Scotland, what are called bygone profits are not to be given against persons who hold by a bona fide title. The decisions of the Court of Session have of late years been very strong upon that subject, though I think they were contrary to the old law upon the subject,—contrary, I should say, to the law as it is manifested by the old Act of the Scot-

July 22. 1828.

tish Parliament, which thought it necessary to make a particular law in the case of a succession to entailed estates, upon the decease of the heir in possession, that bygone profits should not be given against the tenants who were bona fide in possession, and holding by leases, and paying the rents that were due, which shews that the old law of Scotland upon that subject was far different from that which has been recently established; but I should hold, that we are so bound by what has been recently established, that we cannot do that in this case, which, if the question had arisen in the Courts of this country, would have been thought justice.

My Lords,—I conceive that the Court of Session have clearly been wrong upon their own principles, but to a small extent. I conceive that the moment that this House pronounced against the right of the persons who were in possession, they could no longer be deemed bona fide possessors, because they protected themselves before under the decision of the Court of Session in their favour, and they could not protect themselves any longer by that decision, when the judgment of this House reversing that decision was against them. I apprehend, therefore, that according to the principle even of the recent decisions of the Court of Session in Scotland, this interlocutor ought to be reversed, so far as it refuses the profits of the estate until the order of this House was made the order of the Court of Session; because it is perfectly clear, that under that old Act of Parliament I have mentioned, the old law of Scotland was unquestionably different from that which is now the rule of the Court of Session.

My Lords,—I should therefore say, that although, when the Court of Session had decided that the proceedings had been proper under the Act of Parliament, under the authority of which the estates in question were disposed of, the persons who take under the sales that took place might be the bona fide holders of the property, yet, from the moment that this House had reversed those decisions, they could no longer, upon any principle whatever, be the bona fide holders.

My Lords,—For a number of years the profits of this estate will be lost to the representatives of Mr John Vans Agnew, according to the rule applicable to this subject laid down by the Court of Session, which it is desirable to adhere to, so as not to throw the law of that Court into confusion; and though I think that they have decided against what was the law in my humble opinion, and against what has been laid down as the law, yet that has been done in so many cases, and was recognized by this House in the case of the lessees of the Queensberry estate, that it would be impossible now to alter that part of the decision; but so far as it refuses the bygone profits from the time when this House pronounced a decision against the title of the respondents, I think it is impossible to say, that the representative of Mr John Vans Agnew is not entitled to those rents and profits; and therefore I should propose so far to reverse the decision, and to declare that the repre-

sentative is entitled from the time of the order of the House upon the subject. July 22. 1828.

My Lords,—It would be very extraordinary indeed, if the order of this House was not to have any effect till it was made an order of the Court of Session. Those of your Lordships who were present in this House upon the former occasion, will remember the pains which the Court of Session took to delay obedience to that order; and perhaps, under those circumstances, this House ought to have taken stronger notice of that than they did.

My Lords,—There is a cross appeal, which is with respect to costs; and it is most extraordinary that those persons should conceive that they ought to have had costs. That under these circumstances they should conceive themselves entitled to costs, against a person who is in conscience unquestionably entitled, and whom nothing but a rule of law excludes from a portion of what ought to be the result of that title, is certainly very extraordinary. Therefore I should submit to your Lordships, that that ought to be dismissed with costs. With respect to the other subject, upon which the Court of Session have given the decision I have mentioned, the only alteration that can be made upon that subject will be, to give the profits of the estate from the time that the House pronounced the decision in favour of Mr John Vans Agnew. It is not a large sum in itself, but it is considerable with respect to the property in litigation.

My Lords,—I believe it will be necessary to frame an order upon the subject, which I have not done, not knowing whether the noble and learned Lord near me would be able to attend to-day or not; but if your opinion concurs with mine, it will be necessary to frame an order to that effect.

EARL OF ELDON.—My opinion is exactly the same with that which has been stated by the noble and learned Lord; and I state that opinion with great regret, because it does appear to me that the law of Scotland, as it has been established, works a most gross injustice; and it is very desirable to consider whether by statute it should not be altered. This is the case of an heir of entail, who is, as your Lordships know, for many purposes, not more than a tenant for life; and if those who go before him in the enjoyment of the estate abstract the whole value from his life estate, he can have no remedy, although he can recover the estate for himself and those who come after him. But such is the law of Scotland, so often pronounced, and in the Queensberry case confirmed by this House, that I apprehend it is impossible to remedy it except by statute. I say again, that I regret that I am obliged to concur with the opinion of the noble and learned Lord.

LORD REDESDALE.—I cannot forbear from making an observation with respect to the Queensberry case. The Duke of Buccleuch

July 22. 1828. quarrelled the disposition which had been made of the estate. The final judgment in this case was not obtained till shortly after his death. He was in litigation a number of years,—at last, after incurring immense expense, his representative obtained a judgment in his favour, and by that judgment he got nothing.—That is the law of Scotland!

On a subsequent day Lord REDESDALE rose and said,—My Lords, There is a case of Robertson *v.* the Earl of Stair, which was heard before your Lordships some time ago, on which I will trouble your Lordships with only a few words. The case simply was in respect of the bygone rents and profits of a property which had been recovered, as to which there was a former judgment by this House, avoiding certain transactions which had taken place. The question was, whether the succeeding tenant in tail was not entitled to those bygone rents and profits; but as the Court of Session had not seen fit by their judgment to avoid the acts of the former tenant in tail, they were of opinion that they could not give those bygone profits to the person who was the succeeding tenant in tail. It was insisted, when the case was remitted to the Court of Session, that the parties who were in possession were, under the title they had acquired, to be considered as bona fide holders of the estate, and consequently not answerable for the bygone profits.

My Lords,—When the cause came on to be heard on the appeal, as to that part of the decree which decided that these individuals ought to be considered as in bona fide possession, (the Court of Session having been of opinion in their favour as to the validity of the sales, hut which was reversed by this House), it followed, that from the moment that was reversed on the 31st of July 1822, it could no longer be said that they were to be considered as bona fide possessors; and therefore I conceive, beyond all question, from that moment the party who had the judgment in his favour was entitled to the estate; and that would, according to the law of Scotland, and according to authorities which might be referred to on the subject, entitle him to demand of the tenants in possession under the preceding tenant in tail, the rents which became due at the next rent day, not at the moment disturbing those tenants. Under that impression I originally proposed the course I did. I understand that some of the parties were in the actual possession and enjoyment of land,—not that that appears, as I can find, in the proceedings, but it is so suggested. Therefore the course I would propose, my Lords, to take, would be to declare, that, with respect to the rents which were due from tenants, and which were received under the sequestration, and which were received by the judicial factor at and from Martinmas day after the 31st of July 1822, these should belong to the representative of Mr Vans Agnew, who was then entitled, as tenant in tail; and that if any of the parties, the respondents in that appeal, were in actual possession or occupation, and cultivated the land, they

were, according to the practice in the Courts of Scotland, founded in some degree on the civil law, but carried much further than the civil law, to pay rent for the land they so held and enjoyed. With that simple alteration, I should propose that that be the judgment of your Lordships. July 22. 1828.

Appellant's Authorities.—2. Stair, 1. 22. and 23.; 2. Ersk. 1. 21. 25. 35.; 4. Ersk. 2. 34. and 35. and 3. 5. 10.; 4. Bank. 45. 104.; 1. Stair, 9. 15. and 2. 12. 7.; 1. Bank. 8. 12.; Fonblanque on Equity, 2. 151.; Grant, Nov. 16. 1663, (1743.); Cardross, Jan. 3. 1711, (1747. and Rob. Appeal Cases, 37.); Rutherfurd, June 20. 1722, (1770.); Agnew, July 15. 1746, (1732.); York Building Company, March 8. 1793, and May 13. 1795, (13,367.); 6. Stair, 20, 21.; 6. Ersk. 1. 22.; 1584, c. 3.; 1621, c. 7.; 1663, c. 10.; 1681, c. 19.; 1695, c. 6.; 1. Ersk. 7. 38. and 41.; 1. Stair, 6. 44.; Thomson, July 3. 1781, (8985.); Cod. 5. tit. 71. § 16.; Cuningham, Feb. 19. 1635, (1738.); Gray, Feb. 23. 1672, (1755.); Milne, July 19. 1715, (1759.); Oliphant, Nov. 30. 1790, (1721.); Wedgewood, June 13. 1820, (not reported); Duke of Athole, June 20. 1822, (1. Shaw and Ballantine, No. 560.); Maberly, March 11. 1826, (4. Shaw and Dunlop, No. 362.); Wilson Bowman, March 29. 1802, (No. 4. App. Bona and Mala Fides).

Respondents' Authorities.—50. Dig. 16. 109.; 1. Stair, 7. 12.; 2. Stair, 1. 23. and 24.; 1. Bank. 8. 12. and 13.; 2. Ersk. 1. 25.; 4. Stair, 40. 21.; 1621, c. 18.; Mackenzie, July 1. 1752, (7443.); Bonny, July 30. 1760, (1728.); Grant, Feb. 9. 1765, (1760.); Lane, Jan. 17. 1782, (5179.); 4. Ersk. 1. 22.; Campbell's Executor, Nov. 20. 1815, (F. C.); 1. Stair, 6. 44.; 1. Bank. 7. 44.; 1. Ersk. 7. 34. and 41.; Lawrie, June 21. 1769, (1764.); Jackson, July 5. 1811, (F. C.); Duke of Roxburghe, Feb. 17. 1815, (F. C.); Turner, March 3. 1820, (F. C.); Potts, May 30. 1822, (1. Shaw and Ballantine, No. 499.; and 2. Shaw's Appeal Cases, 181.); Queensberry Cases, (2. Shaw's Appeal Cases, p. 43.); Moir, June 16. 1826, (4. Shaw and Dunlop, No. 438.)

J. FRASER—SPOTTISWOODE and ROBERTSON,—Solicitors.

JAMES BRYCE, JOHN DICKSON, and Others, *Appellants.* No. 16.

WALTER GRAHAM, *Respondent.*

Idiotry and Furiosity—Interdiction—Expenses—Law-Agent.—The Court of Session having appointed a curator bonis to a party alleged to be fatuous; and, on an application by him and his interdictors, (one of whom acted as his law-agent), having refused to recall the appointment, and repelled an objection that his fatuity could be ascertained only by the verdict of a jury; and having found both his interdictors and agent liable in expenses to the curator;—The House of Lords, after a remit to the Court of Session for the opinions of all the Judges, affirmed the judgment without costs.

THIS was the sequel of the case reported ante, Vol. II. p. 481. 26th May 1826, (which see). After it had been remitted to the Court of Session for the opinions of the whole Judges, as there July 23. 1828.

1ST DIVISION.