[29*th August* 1833.]

No. 6. Sir PATRICK WALKER, Appellant.—*Dr. Lushington—Murray.*

JAMES GIBSON CRAIG, Esquire, Respondent.—*Lord Advocate (Jeffrey) Kaye.*

Bona et Mala Fides—Writ.—1. Circumstances in which held (affirming the judgment of the Court of Session), that a party holding a deputation to a public office by virtue of a commission vitiated in substantialibus was accountable for all the emoluments from the date of citation in an action by a party who had acquired right to the office.

Public Officer.—2. Question, Whether a party performing the duties of a public office in which he had been erroneously inducted was entitled to the emoluments?

2D DIVISION. Lord Pitmilly.

IN the year 1750 Carr Lord Ballenden, principal usher in the Court of Exchequer in Scotland, granted a deputation to Mr. Archibald Tod, W. S., and Mr. Thomas Tod, W. S., his son, as deputies during their joint lives, and the life of the survivor.

Lord Ballenden died in the year 1753, and was succeeded by his son John. In 1778 Mr. Archibald Tod died; and on the 21st of April of that year William Walker (an attorney in Exchequer, the appellant's father,) entered into a transaction with Lord John, by which, in consideration of the sum of 250*l.*, his Lordship agreed to grant a commission, as deputy ushers of Exchequer, in favour of Mr. Walker and his son, the

late Mr. George Walker, solicitor in London, " from " and after the death, voidance, or resignation of " Mr. Thomas Tod, W. S., presently acting as deputy " in said offices."

In 1791 the Mr. Walker entered into another transaction with Lord John, the object of which was to obtain a deputation in which the name of the appellant, who was an advocate at the Scottish bar, should be substituted in the place of that of his father. This was acceded to on payment to his Lordship (who was in very embarrassed circumstances) of ten guineas. The commission was accordingly executed by Lord John on the 23d of December 1791. It proceeded upon a recital that the deputation previously granted in favour of William and George Walker had been resigned; and " therefore know all men by these presents that I, the " said John Lord Ballenden, for the valuable consi- " derations formerly mentioned, and certain other " valuable considerations and good causes moving me, " do hereby, for me, my heirs and successors in the said " office of heritable usher and doorkeeper of the said " Court of Exchequer, nominate, constitute, and appoint " the said George Walker and Patrick Walker, lawful " sons of the said William Walker, during all the days " of their lives, and the survivor of them, to be deputy " ushers and doorkeepers of the said Court of Exche- " quer under me, my heirs and successors, from and " after the death, voidance, or resignation of the said " Thomas Tod presently acting as deputy in the said " offices, to begin from and after the vacancy or other " determination of the right or interest of the said " Thomas Tod for and during the natural lives of the " said George Walker and Patrick Walker, or the

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" survivor of them; giving hereby and granting full " right, title, and power to the said George Walker " and Patrick Walker jointly, or either of them, and " the survivor, to possess, enjoy, and exercise the said " office, and to uplift, receive, and discharge all salaries, " fees, profits, casualties, duties, and privileges per- " taining to the said office of deputy usher and door- " keeper, in as full and ample form and manner as the " same have been in use to be received and enjoyed by " any former deputy in the said office; and generally " every other thing in the premises to do and exercise " as fully and freely in all respects as I, my heirs and " successors, could do if personally present, and as my " former deputies in the said office have been in use to " do in times bypast." This commission was recorded in the books of Exchequer.

Lord John died in October 1796 insolvent, and was succeeded by his uncle Robert. The latter died soon thereafter (also insolvent), after having been charged to enter heir to Lord John, which he did, cum beneficio inventarii. Their respective creditors proceeded to lead adjudications of the office of principal usher, and acquired right to be ranked pari passu. The appellant's father acted as trustee for a large body of Lord John's creditors in name of a Mr. Sommers, a vintner in Edinburgh, while Mr. Gawler adjudged as a creditor of Lord Robert.

In 1800 Mr. Thomas Tod died, whereupon the appellant and his brother presented their commission, and were received into the office of deputy usher. Thereafter a process of ranking and sale of the office of principal usher was raised at the instance of Sommers, in which the appellant's father acted as common agent, and

the appellant as counsel; and on 27th February 1802 the Court "ordained the said heritable office of usher-"ship and doorkeeper of Exchequer, with the whole "fees, profits, and benefits belonging to the same, and "free ish and entry thereto, with the power of ap-"pointing deputies, as more particularly described in "the aforesaid prepared state and memorial and "abstract" to be sold; "but under the reservation "always to the said George and Patrick Walker, and "the survivor of them, of all right, title, and interest they "and each of them have in said office, salary, fees, and "perquisites thereof, as deputies therein, during all the "days of their respective lives, according to and in "terms of the commission granted in their favour." This reservation having been objected to by certain of the creditors, the Court altered and modified it so as that, in place of the words "according to and in terms "of the commission granted in their favour," the reservation should be "so far as they have right thereto "by their said commissions."

The office of principal usher was thereupon exposed to sale on the 18th July 1802, at the upset price of 479*l.* 7*s.*, and after a competition (in which the appellant's father was a bidder) it was purchased by the respondent for the sum of 1,370*l.* On the 6th of November thereafter the respondent instituted an action against the appellant and his brother, Mr. George Walker, for having their commission as deputies reduced, on these grounds:—"Primo: The said commission is false and "vitiated in substantialibus, and it wants the name, "subscriptions, and designations of the writer and wit-"nesses. Secundo: By the charter granting the office "of heritable usher and doorkeeper of our Exchequer

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" in Scotland, power is given to the granters to name " deputes, for whom they should be answerable, and " no otherways; but by the said charter no power is " given to the granters to name deputes whose right " should continue longer than the subsistence of the " granter's own right; and by the charter the said " parties are virtually debarred from the power of ap- " pointing deputes to continue in office for a longer " time than that of the subsistence of their own right, " and therefore the said deputation now to be reduced " necessarily fell, in respect that the said principal office " of heritable usher and doorkeeper of our Exchequer " in Scotland was adjudged from the said deceased " John Lord Ballenden by his creditors, in whose right " it now is, and also in respect of the death of the said " deceased John Lord Ballenden; and also that in " respect that the creditors of the said John Lord " Ballenden brought a process of sale of the foresaid " office before the Lords of Council and Session, in the " course of which the same was sold by the said Lords " and purchased by the pursuer. Tertio: The said John " Lord Ballenden never had sufficient power to grant " the said deputation, because he never made up any " titles to the said office as heir to his predecessors who " were infeft in the same; and therefore, and for other " reasons to be proponed at discussing hereof, the said " commission, and all that has followed thereon, ought " and should be reduced," &c. There was also a conclusion to account for the emoluments of the office.

On production of the commission it was discovered that the signature of one of the witnesses to the execution was written on an erasure, and that the word " witness " annexed to the signature was in a different

handwriting from that of the signature. The witness was ordered to be examined, and acknowledged his signature, "but he does not recollect the deed itself, "nor the circumstance of subscribing it. And being "farther interrogated, whether the word witness added "to his subscription in the deed under challenge be of "his handwriting,—depones that it is not, nor can he "positively say whose handwriting it is, though, from "the appearance of it, especially that of the letter W, "he rather inclines to suppose it the handwriting of the "defender, Mr. George Walker. And being shown and "desired to look at the third page of the deed, and say "whether there has not been a previous erasure at the "place where his subscription now is, and whether he "recollects any thing of the said erasure, or when or "by whom it was made,—depones that from now "looking at the third page of the deed he is satisfied "that there has been an erasure, but he does not "know any circumstances respecting it."

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The proceedings in the action were suspended till the beginning of 1807, by certain obstacles arising from disputes among the creditors (which the respondent alleged were instigated by the appellant's father), by which a decree of sale was prevented from being issued in favour of the respondent; but this being at last obtained, the action was resumed; and on 16th of June 1807 the Court pronounced this interlocutor:—"Sustain "the reasons of reduction founded on the ex facie "vitiation in substantialibus of the commission, and "reduce, decern, and declare accordingly; and remit "to the Lord Ordinary to hear parties on the other "points of the cause, and to do as he shall think fit."*

* Fac. Coll.

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Against this judgment the appellant entered an appeal; and the Court, on an application by the respondent for interim possession, found him entitled to it; and against this judgment the appellant also entered an appeal. The House of Lords in the principal appeal pronounced, on the 11th of May 1814, this judgment:—

"The Lords Spiritual and Temporal, in Parliament "assembled, Find that the commission 23d December "1791 is reducible as vitiated in substantialibus; and "it is therefore ordered and adjudged that, with this "finding, the cause be remitted back to the Court of "Session in Scotland, to apply such finding and to hear "parties further on all the other points of the cause."* The appeal against interim possession then fell as a matter of course.

Thereafter the appellant's father, and his brother George, brought an action of declarator against the respondent, upon the narrative of the commission which they had obtained from Lord John as deputy ushers of Exchequer in 1778, for the purpose of having it declared that they had right, in virtue of that commission, to enjoy the office of deputy usher.

To this action the respondent pleaded, in defence, that the deputation by Lord John had been resigned, and a new one granted in favour of George Walker and the appellant, or the survivor of them; and that the office of principal usher had been sold by judicial sale, and purchased by the respondent solely under burden of this new commission.

The two processes were conjoined; and on the 6th of July 1814 the Lord Ordinary, in the reduction at

* See 2 Dow, 270.

the instance of the respondent against the appellant, reduced and decerned conform to the reductive conclusions of the libel; and, in the action of declarator at the instance of the appellant's father and brother, sustained the defences, and assoilzied. To this interlocutor the Court adhered on the 17th of January 1816. An appeal having been entered, the House of Lords, on the 22nd of February 1819, affirmed the interlocutors.

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The question which now remained for decision related to the period from which the appellant and his brother should account for the emoluments of the office, and as to the amount intromitted with by him. Lord Pitmilly, on 15th of November 1821, found "that the defenders must account to the pursuer for "the profits and emoluments of the office of deputy "usher of Exchequer from the 6th of November "1802, the date of citation to this action, to the "time when the pursuer was put into possession by "a judgment of this Court in 1809; and ordained "the defenders to give in an account of their in-"tromissions accordingly, and that within fourteen "days." The appellant and his brother having presented a reclaiming petition, the Court on 29th of May 1823 pronounced this interlocutor:—"In respect "all questions with regard to the amount of the intro-"missions to be accounted for will be open before the "Lord Ordinary, adhere to the interlocutor reclaimed "against, and refuse the desire of the petition; and "reserve to his Lordship, at the issue of the accounting, "to determine as to all claims of expenses."*

* 2 S. & D., p. 348 (new ed. 306).

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The cause having returned to the Lord Ordinary, various questions arose in the accounting chiefly of a special nature; one being whether the appellant was entitled to any allowance for alleged services performed by him, but which it was denied and not proved that he had ever performed; and another as to an allowance by the crown of 50*l.* a year, which the appellant alleged was a pension not attached to the office but personal, while the respondent averred that it was a part of the emoluments of the office. The Lord Ordinary, on the 3d June 1824, pronounced this interlocutor:—"Finds the "defender Sir Patrick Walker liable to the pursuer "for the sums of fees condescended on, with legal "interest from the end of the years in which the same "were received: Finds him also liable for sums of "salary or pension condescended on, with legal interest "from the receipt of each sum: But finds, per contra, "that the defender is entitled to deduct the sums "actually paid to the person or persons who performed "the duty of the office libelled, with legal interest on "the same since paid; and appoints him to put in a "condescendence of the sums so paid for doing the duty, "and that within ten days, with certification that if not "then put in, an interim decree will be granted." And on refusing a representation his Lordship issued this note:—"The present representor and his brother "jointly keeping an office which has been found to have "belonged to the pursuer, it seems to the Lord Ordi- "nary they must either of them be liable for the whole "emoluments thereof, so far as the pursuer is entitled "to claim these. Then the Court having found the "defender liable to account for the emoluments of the "office, not before but after a certain date, it appears to

" the Lord Ordinary that this clearly implies that
" before that date the defender was in bonâ fide, but
" after that date he was in malâ fide, in keeping the
" office. If, however, the defender be held to have kept
" the office malâ fide, the Lord Ordinary does not think
" that he can claim from the pursuer payment for his
" own trouble in doing so, and of course as little for
" that of his brother. It seemed, and still seems, to be
" admitted by the pursuer, that the duty or part at least
" of the duty of the office was such that neither the
" defender nor pursuer could have executed it in per-
" son, but only by paying any inferior person to do it;
" and this payment the pursuer did not and does not
" yet appear to deny ought to form a deduction from
" the emoluments of the office; and this is implied in
" the interlocutor of the Lord Ordinary. But the
" personal trouble of the defender in keeping the office
" after his bona fides has been held to have ceased is a
" different thing. As to the 50*l.* a year, it seems to the
" Lord Ordinary that it was a known and ordinary
" accessory of the office. The defender's predecessor in
" the possession of the office had it as holding the office,
" the defender had it in the same way, and the pursuer's
" nominees in the office have since had it in the same
" way. The defender, therefore, by keeping the office
" malâ fide (as has been found), kept the pursuer out of
" this accessory profit, and drew it himself; and the
" Lord Ordinary cannot see any substantial ground
" why he should not account for it himself. The Lord
" Ordinary is in no respect moved by the statements that
" the office was malâ fide acquired at first, or was malâ
" fide kept all along; nor does he pass any judgment
" now as to when the defenders bona fides ceased: he

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" holds himself bound in that respect by the interlocutor " of the Court. The Lord Ordinary has looked over " the case of Jackson against M'Donald (not quoted by " either party), but has not found that it touches the " point here exactly."

The appellant having presented a reclaiming note to the Court, their Lordships, on the 26th of June 1827, pronounced this interlocutor:—" Find that, in addition " to the sums which the petitioner has been found " entitled to deduct, he is also entitled to a suitable in- " demnification for any part of the duty performed by " him in person, and remit to the Lord Ordinary to " receive a condescendence accordingly, and quoad " ultra adhere to the interlocutor complained of."*

The cause having again returned to the Lord Ordinary, and a condescendence having been lodged by the appellant, the Lord Ordinary remitted to Mr. Adam Longmore of the Exchequer, " to inquire into and ascertain " the amount of the fees and salary due by the defender " to the pursuer, and the deductions and indemnifica- " tions the defender is entitled to from the pursuer, on " the principles fixed by the interlocutors of 8th June " 1825 and 26th June 1827, and to report to the " Lord Ordinary quamprimum, it being understood " and agreed to that the said report shall have the same " effect, and none other, that the verdict of a jury in " relation to the points remitted and disposed of by the " said report would have had." Mr. Longmore made a report, in which he stated, inter alia, " that he has very " frequently called upon the defender's agent to furnish " him with an account of the deductions and indemni-

* 5 S. & D., 843 (new ed. p. 782).

" fications he is entitled to in respect of the said office; and the only answer he received is that which is stated in process, namely, that as the defender did the whole duty he considers himself entitled to the whole salary and emoluments," a statement which Mr. Longmore did not consider to be satisfactory. Thereafter, the appellant having undertaken to comply with the requisition, the case was again remitted to Mr. Longmore, who reported " that the defender had not adduced any evidence of his having performed in person any of the duties of the office; and, so far as the reporter knew, the defender never performed in person any of such duties." The appellant then tendered a note of objections; but the Lord Ordinary, on 21st January 1831, pronounced this interlocutor:—" Finds that the written note of objections tendered against Mr. Longmore's reports is not admissible as a step of process: and having at the bar resumed consideration of the said reports, and heard parties thereon, approves of the said reports, repels the objections stated against the same, and decerns against the defender, in terms thereof, for payment to the pursuer of the sum of 1,269*l.* 16*s.* $7\frac{5}{10}$*d.*, with interest thereof from the 15th day of February 1830; and appoints parties procurators to be ready to debate, on Tuesday next, at the end of the motion roll, on the question of expenses." On this latter point his Lordship, on the 26th, found the respondent " entitled to expences in this Court since the last appeal to the House of Lords was determined." Both parties having presented reclaiming notes, the Court, on 13th May 1831, pronounced this interlocutor:—" The Lords having considered this note (the appellant's), and another re-

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"claiming note for the pursuer, with the other proceedings, adhere to the interlocutor of the Lord Ordinary, with this variation, that the accumulation of the principal sum and interest thereof, to the effect of bearing interest on such accumulated sums, shall not take place prior to the date of the decreet on the 21st of January last, and quoad ultra refuse both notes."*

Sir Patrick Walker appealed.

Appellant.—1. The appellant was on good grounds entitled to believe that his commission as deputy usher of Exchequer was valid and effectual till reduced by a judgment of the Court of Session; and therefore he is not bound to restore to the respondent the fruits and emoluments of the office which were bonâ fide percepti et consumpti. It is an established principle that bona fides is always presumed, and therefore the onus of proving mala fides lies on the respondent.† But the only reasons alleged for inferring mala fides is, that the commission was liable to a technical legal objection. The signature of the witness was proved to be authentic; and the Judges, in deciding the case, had the greatest difficulty in finding that it was a good objection. Neither did the acts of the appellant indicate any mala fides. On the contrary, he recorded the commission in the books of Exchequer; and if he had considered for a moment that it was invalid, he could easily have got a valid deed from the granter. Besides, the commission was received by the Barons of Exchequer without objection, and the appellant and his brother were inducted

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* 9 S. & D., p. 587.

† Stair, b. ii. tit. xii. sec. 7.

into the office. It is impossible, therefore, to maintain, under such circumstances, that the mere citation to an action must have the effect of inducing mala fides, for this would be to give to the allegation of a pursuer an effect which can only be produced by the judgment of the Court.* Mala fides is induced from the date of the citation in those cases only where the statement in the summons carries along with it the most indubitable conviction of its truth and efficacy. But in the present case, this was so far from being so that the question was held by the Judges to be very doubtful; and the judgment of this House found, not that the commission was null and void ab initio, but simply that "it is "reducible as vitiated in substantialibus,"—a decision which recognizes the commission as a good title of possession till actually reduced. But the distinction between a reducible deed, and one which is null and void from the beginning, must always be gathered from the nature of the particular case. If it be a contract contra bonos mores, it is null from the beginning, and all the parties are in malâ fide from its commencement. But if the question depend upon the construction of a particular clause, or upon the power which is supposed to be given by a particular deed, although the right granted be in the end reduced, its reduction does not carry along with it the consequences of mala fides,—the restitution of all the fruits, whether percepti or consumpti.†

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* Stair, b. i. tit. vii. sec. 28; Stair, b. ii. tit. i. sec. 24; Erskine, b. ii. tit. i. sec. 25, 27, 29.

† Douglas v. the Laird of Wedderburn, 19th July 1664; Leslie v. Leslie, 13th Feb. 1745, Mor. 1793; Bonny v. Morris, 30th July 1760, Mor. 1728; Leslie Grant v. Dundas, 9th Feb. 1765, Mor. 1728; Duke of Roxburghe v. the Duchess Dowager of Roxburghe, 17th Feb. 1815,

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2. But even on the supposition that the commission in favour of the appellant and his brother were reducible as being vitiated in substantialibus, and that from the date of the service of the summons they must be presumed in law to be aware of the serious character of the objection to its validity, still, so long as they discharged the duties of the office with the sanction and under the authority of the Barons of Exchequer, they were, as public functionaries, entitled to draw the salary and emoluments of the office, without being subject to any claim of repetition on the part of the respondent. The appellant and his brother were regularly inducted into the office of deputy ushers. The Barons of Exchequer received the commission, sustained it, and ordered it to be recorded in the books of court, whereupon the appellant and his brother received the sign manual for the salary of 50*l.* per annum, as the persons discharging the duties of the office: they were therefore bound, and could not refuse, to perform the duties of the office, for if they had declined, the barons could have obliged them to perform them. Therefore, so long as the appellant and his brother executed the functions of the office, they were equally entitled to the emoluments of it, as the highest officer in the state is to the emolu-

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Fac. Coll.; Turner v. Turner and Watson, 3d March 1820, Fac. Coll.; Bowman v. Henderson, 11th June 1805, App. Mor. Bona et Mala Fides; Smith v. Beatton, 6th Feb. 1810, Fac. Coll.; Duke of Buccleugh v. Hyslop, Nov. 1822, affirmed in the House of Lords 10th March 1824, 2 Shaw's App. Ca. 43: Elliot v. Pott, 29th Jan. 1822, affirmed 10th May 1824, 4 S. & D. 604, 2 Shaw's App. Ca. 181, 286; Agnew v. E. of Stair, 22d July 1828, ante, iii. p. 286; Moir v. Mudie, 16th June 1826, 4 S. & D. 725 (new ed. 731); Carnegie v. Scott, 4th Dec. 1827, 6 S. & D. 206; Duke of Gordon's Trustees v. Innes, 19th June 1828, 6 S. & D. 996, affirmed 10th Nov. 1830, ante, iv. 305; Brisbane's Trustees v. Lead, 26th Nov. 1828, 8 S. & D. 65; Colquhoun Stirling v. Dunn, 14th Jan. 1831, 9 S. & D. 276.

ments of his office; and, till they were ejected by competent authority, they were not only entitled, but bound, to perform the duties of the charge, and at the same time entitled to receive the benefits accruing from it.*

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Respondent.—1. It is a general principle of law, that when a party has been found entitled to a subject improperly withheld from him he has right to its fruits from the time when it ought to have been restored to him. Where the possession has begun in bonâ fide, the question as to when the bona fides ceased must depend for its solution on all the circumstances, and is in some degree in arbitrio judicis. Mr. Erskine says, that "the con-"scientia rei alienæ is most ordinarily presumed to com-"mence when the proprietor insists in his action against "the possessor; for, by the libelled summonses in that "suit, the possessor has full opportunity to consider the "strength of his own right which is brought under chal-"lenge; and if his title appear by the nature of the "action to be lame or insufficient the citation must "induce mala fides.†" All the circumstances of this case support the general principle so laid down. Both the appellant and his father were professional men, and the deed was prepared by the latter, and could not fail to be well known to the appellant. It bore, ex facie, a radical nullity; and even if they could pretend that they were not aware of this before the institution of the action, the appellant cannot be allowed to plead ignorance after it was served on him. The validity or, invalidity of the deed did not depend on the applica-

* Simpson v. the College of Aberdeen, 7th June 1809; and Jackson v. M'Donald, 5th July 1811, Fac. Coll.

† Ersk. b. ii. tit. 2. sec. 29.

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tion of abstract principles of law; its invalidity was obvious at a single glance, and more especially to the appellant, who was a member of the bar, and at that time engaged in practice. The consciousness of its invalidity is made more apparent by the attempts to get its validity recognized in the articles of roup; and the objection then given effect to by the Court to the reservation must have called the appellant's attention to the fact, that the deed was likely to be challenged, so that he was put on his guard. It is therefore impossible for the appellant to say that he stood in the position of those who, in the words of Lord Stair, "consume the fruits without expectation of "repetition or account."*

2. The report of Mr. Longmore having decided the fact that the appellant performed none of the duties of the office, renders unnecessary any inquiry as to whether he would be entitled to the emoluments if he had performed them.

LORD CHANCELLOR.—My Lords, though I shall not, for the reasons I am presently to state, recommend that this case should be finally disposed of, at least in all its parts, yet I shall throw out on the present occasion to your Lordships the opinion which I have formed on hearing the arguments at the bar and on reading the arguments in the cases brought before us. Nothing can be more clear, than that the question of bona fides in the possessor of the fructus percepti is a question of circumstances, and must be taken as such in each

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* 2 Stair, 1, 32; Agnew v. Hathorn, 17th July 1746, Mor. 1732; Blair v. Bruce Stuart, 18th Nov. 1783, Mor. 1775; More v. Anderson, 9 S. & D. 744, Ersk. b. ii. tit. 2, sec. 28.

particular case; and to lay down a proposition like that which appeared to be asserted in one part of the argument on the part of the appellants, from the words rather than the plain meaning and spirit of some of the decisions of this House upon the question, that until the ultimate decision of a disputed point in the Court of last resort, viz. your Lordships House, mala fides or conscientia rei alienæ on the part of the possessor cannot be presumed or be made the ground of proceeding on the part of the Court. To lay down such a proposition as that would be neither more nor less than affirming this monstrous doctrine, that any person might purchase a disputed claim, and provided it were of a large amount, might purchase a property or any other possession—any other right, with a most disputed title—provided it were of a large annual value, and then keeping possession during the litigation, which would be the inevitable consequence of such a purchase, might be safe, on the consideration that the annual expenses of the litigation, and even of all costs thrown upon him ultimately in that proceeding for setting his title aside, being less than the annual value of what he had bought, he could all that time pocket the difference, and ultimately keep it, and therefore become a gainer by such grossly unfair means. It would reduce it in every case to a mere consideration of the value. If the legal expenses were 50*l.* a year and the property were worth 550*l.* a year, the profit would be 500*l.* a year, from the impossibility of attacking that 500*l.* until the ultimate decision of the Court of Appeal. That would be the consequence of a proposition so monstrous. I was exceedingly glad to find the counsel for the appellant did not push the doctrine to that length, for it was one

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which upon the very face of it was too absurd to deserve a moment's notice. It depends, therefore, on the particular facts and circumstances of each case; and in one case it may be the mala fides begins from citation, in another case it may be the mala fides begins from the first decision, and there may be cases where until the ultimate decision of the Court of Appeal the mala fides does not commence.

In this case, then, the purchaser having paid bonâ fide for this office held by purchase, the question is, whether he was in mala fides in the year 1802, or not until the year 1809? And upon the whole, when I take into consideration the nature of the vice in the title of the appellant, and that the instrument on the face of it called the attention of the party in whose possession it was to the other circumstances upon the face of it also, though not so apparent upon the first inspection—I mean the erasure, which was apparent from the difference in the colour of the ink, (assuming all the while that the fac-simile, to which your Lordships have access, is an accurate representation of the original in the colour of the ink, as well as in the form of the writing,)—I say, my Lords, that which at first sight appears on the most cursory inspection sufficient to attract attention, and to lead the party possessed of it to a more close examination of the other matters appearing upon the face of it, and clearly indicating that there had been the important circumstance of the witness's name written over an erasure,—was sufficient notice to him that there most probably would be a ground for the reduction of the instrument. Why, then, he might have inquired of Charles Cummins the witness, to whom he had as much access as the Court

had; he might have inquired of him all the particulars of which upon his examination the Court afterwards became possessed. What was there that the party did not know, or (which is the same thing) might not know, which either was not or might not be known to him immediately on his being served with the summons? If he did not think fit upon that service to look at the instrument which was made the ground of reduction, surely he had himself only to blame for not so inspecting it. If he looked at it carelessly,—if he did not pay due attention in the inspection of it,—there, again, he had himself only to blame; but if he, a professional man, looked at it and saw what clearly appears upon its face, and did not have recourse to the inquiry which its aspect manifestly ought to have suggested to him or those who advised him, viz. to inquire farther of Charles Cummins the attesting witness,—there, again, he had only himself to blame. He had obviously access to all those particulars, whether upon inspection or upon inquiry, of which the Court became possessed, and upon which the Court pronounced their opinion in the first instance by a very great majority, though only one of the learned Judges then in the Court pronounced the precise opinion which was at all times sustained, and afterwards finally affirmed by this House.

My Lords, with respect to the defence they now raise to the interlocutor here and the defence to the interlocutor below, that has been the ground of a good deal of remark in the course of the argument, and it is not necessary I should trouble your Lordships with any further remarks upon it. It appears to me that this House affirmed the interlocutor, and remitted it back to the Court of Session only because they deemed that

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more than the ex facie vitiation in substantialibus was necessary to be the ground of that decision. Then, does it amount to more than this, that the Court of Session having relied on one ground or on one part of the evidence, the House of Lords relied upon another, though they ought to have relied upon the whole, inasmuch as they might find that one part was not sufficient to support the interlocutor, and remitted it with that instruction, recommending to the Court below that they should, instead of founding their judgment upon one part, found their judgment upon the whole. The Court then had nothing new whereupon to found its judgment, but only had the same evidence, the same authorities, and the same arguments before it in the last instance which it had had in the first instance. The remit could not be said to cast any doubt on the judgment; it could not be said to express any difference of opinion with those who pronounced that judgment; but the House of Lords had, when it came before them, upon the whole thought it would have been better to give one reason for it, whereas they had given another; but there was no doubt, there was no difference, there was no discrepancy of opinion.

My Lords, I am, upon the whole, therefore clear there was no bonâ fide possession after the year 1802; and if I recommend your Lordships to postpone ultimately disposing of this case for the present, it is only that I may have time to look into those interlocutors appealed from in which the question is raised with respect to Mr. Longmore's report, and as to the interest. With respect to the interest, I will merely say, I have seen the opinion the Court below has given, with which I agree. As to Mr. Long-

more's report, I have not had that so explicitly before me in the consideration I have given to the argument, and the statements which I read before I came here, as to the other parts of the case; and therefore I should wish to have time to reconsider that part of the question.

My Lords, the authority which has been cited at the bar, and which was before your Lordships originally in the former appeal, is that of Lord Stair, which leaves it perfectly clear how fatal to a deed any writing of a substantial nature upon an erasure must be. Lord Stair, after stating the particular case, says, " the worst " kind of deletion is where the words deleted cannot be " read, for if they are so scored that they can be read, it " will appear whether they are in substantialibus, but if " they cannot be read, they will be deemed to be such," (that is to be in substantialibus,) " unless the contrary " appears by what precedes and follows;" to which, in the original, there is this added, which is not given in this excerpt, " unless some note of the deletion is in the " margin, or some such words as those are to be found " in the original." My Lords, it is quite clear why the law of Scotland by the act of 1685 and the practice of the Courts under that act gives such particular weight to objections of this description. They are much more important in that law than they are in ours, because we have no such thing as an instrument proving itself. Unless an instrument be of a certain age it does not prove itself; but in Scotland, if it be ever so recent, provided the statutory solemnities are duly complied with, the instrument proves itself; consequently it becomes the very essence of those solemnities that every one of them should be most strictly adhered to; and none can be conceived more important than that of

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the whole instrument appearing on the face of it to be such as it was originally at the time of the execution. Now, Lord Stair says, and most justly, that if an erasure be so complete as to render it impossible to decipher what may have been originally written, every thing should be presumed. That is the substance of the opinion given by Lord Stair. It must be presumed to be in substantialibus; and in such a case as this it does not appear to me it would be going too far, when it appears the name of the subscribing witness has been written on an erasure, to presume that the original name was of a witness wholly incompetent; it might be the very party taking under the deed who attested the execution of it.

My Lords, it appears to me in this case the Court below have come to a perfectly right decision on the present question, which they appear to have decided unanimously, as well as the original question out of which this arises; which was the origin of this very tedious, protracted, and expensive litigation, and which they had all unanimously decided. One of the learned Judges is said not to have made up his mind until he came into Court; for any thing that appears to the contrary he may not have inspected the instrument. I should rather infer from what he is stated in the report to have said that he had not, and I do not wonder his Lordship had not made up his mind if such should be the fact; but ultimately he entirely agreed with his learned brothers in the decision they came to. Another of the learned Judges, now no more, appeared to entertain so much doubt that he did not give any opinion. For my own part, I should conceive the Judges who formed the majority in that case had no reason to

entertain any doubt on a case such as this. Upon these grounds therefore I shall, in all probability, afterwards recommend your Lordships to affirm the judgment in all respects; but, for the reasons I have given touching the argument raised respecting Mr. Longmore's report, I shall, until I have looked into it, for the present postpone moving your Lordships to give final judgment.

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His Lordship afterwards moved, and

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein appealed from, be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the sum of 237*l.* 13*s.* 10*d.* for his costs in respect of the said appeal.

RICHARDSON and CONNEL—MONCREIFF, WEBSTER, and THOMSON, Solicitors.