Friday, February 2.

FIRST DIVISION.

[Lord Craighill, Ordinary.

DUKE OF HAMILTON *v.* JOHNSTON.

Property — Recompense — Mala fide *Possession — Ameliorations.*

A party built a house upon the ground of another in *mala fide.—Held* that when removed by the owner he was not entitled to recompense for meliorations.

Observed, that the summons concluding only for removing from the ground, there might be a question how far the house and its materials might be removed by the evicted party.

This was an action at the instance of the Duke of Hamilton against Peter Johnston, residing at Muirbank Cottage, Reddingmuir, for declarator that a piece of ground situate in Reddingmuir was the property of the pursuer, that the defender had no right to it, and for decree of removing from it accordingly.

The pursuer averred that he was proprietor of the muirs of Reddingrig and Whitesiderig in the parishes of Falkirk and Polmont, forming part of the barony of Kerse, anciently belonging to the Abbots of Holyrood House. The rights of parties to the lands in question were determined n a process of division of the commonty in the year 1765, since which time the pursuer's predecessors had been in uninterrupted possession of the share of common set apart for them. The defender had wrongfully intruded upon a portion of it, extending to 185 parts of an acre, and had erected a house upon it, without any leave from the pursuer and without any right or title. He had refused to remove, though frequently requested to do so. He had been warned before building not to take the ground, and also to desist after he had commenced building.

The defender stated that his father had in 1861 sold the lands of Middlerigg to the pursuer, but that did not include "his rights and interests in the portion of the common muir of Redding as presently possessed by the defender, upon which he lately built a house."

The pursuer pleaded—"(1) The pursuer being in virtue of his titles proprietor of the ground in question, and the defender being but a vitious possessor thereof, the pursuer is entitled to decree of declarator and removing in terms of the conclusions of the summons. (2) The defender having been warned not to build on the ground in question, did so in *mala fide*, and is not therefore entitled to any reimbursement."

The defender pleaded—(2) "The defender and his ancestor having been in the uninterrupted possession of the ground in question for a period of 90 years, the pursuer was not entitled to remove him therefrom; and (3) "In any view, the defender is entitled to be reimbursed for the house and dykes erected by him on the said ground."

After a proof (the purport of which sufficiently appears from the opinion of the Lord President) the Lord Ordinary pronounced an interlocutor finding as matters of fact that the ground in question was part of the land set apart in the process of division to the Duke of Hamilton for the use of the heritors entitled to servitudes in the said commonties; and "(2) That the defender's father had for many years taken the use of said ground without objection on the part of the Duke of Hamilton, and had neither paid nor been asked to pay rent therefor, and the defender, at the time when the house built by him on the same was erected, was or believed himself to be, as one of these heritors, still proprietor of that portion of the lands of Middlerig known by the name of Herdshill, which was excepted from the disposition of these lands granted in 1861 by the father of the defender to the Duke of Hamilton; (3) That though the defender, before beginning to build, not only did not get, but when he applied for it was told that a building lease would not be granted, he in prosecuting his operations acted on the persuasion that he had such an interest in the *solum* as entitled him, even without leave from the Duke, to put up the buildings which were erected; and (4) That the erection of these buildings increased the value of the property of which the pursuer claims in the present action to be the proprietor: In the second place, Finds as matters of law (1) that the pursuer is entitled to remove the defender from the ground in question; (2) that the buildings erected by the defender thereon were not erected in *mala fide*; and (3) that the defender, in case he shall be removed, will be entitled to claim from the pursuer, in name of recompense, the sum by which it may be shewn that the pursuer is *lucratus* through the erection of the said buildings," &c.

A second interlocutor was afterwards pronounced, in which the above findings were applied, and the cause was appointed to be enrolled again for further procedure upon the question how far the pursuer was *lucratus* by the erections of the defender.

Upon leave being given, the pursuer reclaimed, and argued:—Upon the facts as proved, the defender could not be said to be in *bona fide*. He was not therefore entitled to recompense. The case of *Barbour* v. *Halliday*, July 3, 1840, 2 D. 1279, was a direct authority.

At advising—

Lord President—This action is brought by the Duke of Hamilton, and concludes for declarator that he is proprietor of a certain portion of ground upon which the defender has built a house, that the defender has no right thereto, and for decree of removing against him. The defender disputes the Duke's title to the ground, and the first question which it is necessary to answer is, Whose is the right of property?

[*After stating the facts*]—The defender's house, it thus appears, is built upon the pursuer's ground, and it is quite plain that the pursuer must prevail in the removing. But the question comes to be, upon what conditions is the removing to take place. The defender holds that in any view he is entitled to be reimbursed for the house and dykes erected by him upon the ground. All that he could possibly claim is recompense, and that would entitle him to be reimbursed so far as the pursuer is *lucratus*. But we have not the means of judging the merits of that question here.

We have first to consider whether in the circumstances of this case the defender is entitled to plead recompense. That depends upon whether

he was in good or bad faith in building his house. There are a great many circumstances which bear upon this point. The defender here produces no written title, but he avers that the ground upon which the house is built was sold in 1861 by the defender's father to the Duke of Hamilton. He further states—"The defender's father, however, did not include in his disposition of sale to the Duke his rights and interests in the portion of the common muir of Redding as presently possessed by the defender, upon which he lately built a house." The disposition has been produced, and we can see how far that contention is supported by the title. There is conveyed by that deed "All and Whole the lands of Middlerig . . . . with the share and proportion of the common muir of Redding given and allotted to the said lands of Middlerig by the decree of division of the same,"—so that that subject is expressly conveyed by the disposition. There is no doubt a reservation of certain lands called Herdeshill, Now, if the defender's house had been built upon Herdeshill, he would, so far as the disposition goes, have a good title, or at least the foundation of one, which he could have no difficulty in proving, for there is an obligation in the deed to produce these titles. But the defender knows that the house is not built upon Herdeshill. That defence was unfounded, and contradicted by the terms of the disposition to which reference has been made.

But he further says when he is examined as a witness, that if he has no title neither has the pursuer, and the property belongs to the Carron Co. In this way he exposes himself by his own statement to a claim of removing at the instance of the Carron Co. The whole object of his proof is to show that the house is built upon their ground, and apparently that it was put there expressly because the Carron Co. and not the Duke of Hamilton were the proprietors. These are important circumstances in the consideration of the question of *bona* and *mala fides*. It is quite plain that when the defender built the house he not only had no title, but that he knew that he had none. That view is supported from the evidence by what took place afterwards. The pursuer's factor says that in the month of January or February 1872 the defender called upon him and asked permission to get a piece of ground to build a house upon, which was refused. He was further informed by letter that the Duke was not to grant any more leases; and the first time the defender was cautioned by the factor was before he began to build. In what the factor states upon this matter he is corroborated by other testimony. The defender's case is thus placed in a very awkward position. We begin with a contention that he himself has a title to the ground. He then shows a consciousness that he is wrong in that by going to ask the permission of the factor to build upon the ground which was not his, and permission was refused. He has thus put himself in the position that his grounds of defence shift about with the most wonderful dexterity. And when the disposition is produced the defender then insists that his house is built upon the Carron Company's ground.

I search in vain for any evidence in support of the findings in point of fact in the Lord Ordinary's interlocutor. I think there is nothing to justify them, and it is upon them his Lordship has constructed the legal deduction he makes. The defender was in *mala fide* in this case, and therefore I use in reference to this case the very emphatic words of Lord Fullarton in the case of *Barbour* v. *Halliday*, July 3, 1840, 2 D. 1279—"He had not even a title challengeable; he had no title at all, and he knew it." That is quite the position of the defender here.

But it occurs to me that while it is impossible to sustain any defence founded upon *bona fides*, there may be one which is not stated here. The summons concludes for decree only as regards the piece of ground, and does not conclude for removing from the house. No doubt the defender cannot remove from the ground without removing from the house also. But there may be a question how far the house or its materials are removable? I only mention this for the purpose of saying that no such question as that is determined by the judgment which I propose your Lordships should pronounce here. The defender had an excellent offer made him of a lease from the pursuer at a very small rent, and if the advisers of the Duke have still in mind to make the same terms, I think the defender would do well to come to an arrangement. In the meantime, my opinion is entirely adverse to the defender, and I think we must pronounce decree of declarator and removing against him.

LORDS DEAS, MURE, and SHAND concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming-note for the pursuer the Duke of Hamilton, against Lord Craighill's interlocutors, dated 28th June and 10th July 1876, Recal the said interlocutors: Repel the defences, and declare and decern in terms of the conclusions of the libel: Find the defender liable in expenses, allow an account thereof to be given in, and remit the same to the Auditor to tax, and report."

Counsel for Pursuer (Reclaimer)—Asher—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defender (Respondent)—Mair—Rhind. Agent—William Officer, S.S.C.

Friday, February 2.

FIRST DIVISION.

[Lord Shand, Ordinary.

WYPERS *v.* HARRISON CARR & CO.

Diligence—Arrestment ad fundandam jurisdictionem—*Bankrupt*—19 *and* 20 *Vict. cap.* 79, *sec.* 103.

Held that an arrestment used *jurisdictionis fundandæ causa* in the hands of a bankrupt's trustee, who deponed that he had not funds sufficient to pay the expenses of sequestration, was ineffectual as it had attached nothing, and as any estate that might afterwards belong to the bankrupt did not vest in the trustee until the date of its acquisition or the