

not of the father. In the present case the House affirmed a contrary doctrine laid down with regard to the renunciations made by the children of the first marriage of their provisions by contract.

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John Walker of Edinburgh, Merchant, - *Appellant*, Case 91.  
 Robert Forrester of Edinburgh, Merchant,  
 and William Macpherson of Edinburgh,  
 Writer, - - - *Respondents*.

16th Feb. 1721-2.

*Bonâ fide consumption*.—An adjudication obtained in 1678, being found extinguished by receipts of the rents : in a subsequent action of count and reckoning, the Court having found the defence of *bona fides* sufficient to liberate till the date of the interlocutor, finding the adjudication compensated, and that the defenders were not put *in mala fide* by the citations and arrestments, the judgment is reversed, and they are ordered to account from the date of the arrestments used at commencement of the former action.

*Costs and Expences*.—In an action relative to the commencement of *mala fides*, the Court having found that the same did not commence from the date of citation and arrestment, but from the date of the decree, and refused the pursuer his expences; on a reversal of the judgment, it is ordered that the Court tax, and ascertain the expences in that action, and that the same be then paid to the appellant.

**J**OHAN HANDYSIDE, who was the proprietor of several houses in the city of Edinburgh, being indebted to the respondents, or those under they claim, they obtained an adjudication of these houses for payment of the said debt, in December 1677; and by virtue thereof got into possession of the same in 1678. As stated by the appellant, the debt due to the respondents or those under whom they claim amounted to 277*l.* 15*s.* 6*d.*, and the yearly rents of the premises were 66*l.* 13*s.* 4*d.*

In 1713 Janet Handyside, the daughter of the said John Handyside, who had been abroad for several years, and who claimed right to the premises as heir to her father who had died many years before, conveyed all her right and title to the premises, and all her right of reversion, to the appellant; who was thereupon infeft.

The appellant soon after brought his action before the Court of Session against the respondents, to have it declared, that the debt due to those under whom they claimed was satisfied and paid by their receipt of the rents and profits; and to have the respondents decreed to account for what they had received over and above the payment and satisfaction of their just demands. And in 1714, the appellant likewise arrested the rents in the hands of the tenants; but the respondents having found security to make the same forthcoming as accords, the arrestment was loosed; and the respondents were suffered to continue in possession till the event of the cause.

Several preliminary defences were now insisted on by the respondents, particularly that the legal was expired; but it appearing that there were several informalities in the adjudication, this defence, among others, was repelled.

The appellant now insisted, that the premises should be sequestered; but the respondents offering to find security to make the rents forthcoming, the Court allowed them to continue in the possession upon finding security to be accountable for the rents thereof to those who had best right; but in case they did not find security, that then a sequestration should issue.

After various other proceedings the Court on the 13th November 1719, reduced the adjudication as null, in so far as concerned 4000 merks thereof, and as to 5000 the remainder of the sum claimed, found the same extinguished by intromissions; and by subsequent interlocutors in January and July 1720, found the respondent's right extinguished, and paid by the receipts of themselves, and those under whom they claimed, and therefore reduced the same, and preferred the appellant to the rents in time coming. So far the judgments were not appealed from.

Subject of  
the present  
appeal.

The appellant having extracted this decree, commenced an action, against the respondents, to compel them to account for, and pay to him the rents they had received pending the said action from 1713 to 1720. The appellants made two defences to this action; the first, that the decree extracted by the appellant having ordained the respondents' receipts of the rents to be imputed in satisfaction of their debts, they could not now be compelled to account in any other method; the appellant however having insisted, that the respondents were paid their debts before the said action commenced, the objection of the respondents was overruled by the court. They afterwards contended, that they possessed by virtue of a good title, a right that was thought irredeemable, and consequently that they were *bona fide* possessors; that a possessor in that view was not accountable for any rents or profits he might receive out of the premises in question, even though another person should be afterwards decreed to have a better right; and that he was only to account from the time, such other right was found preferable to his, upon the ground of the maxim, *bona fide possessor facit fructus perceptos et consumptos suos*. On the 28th of June 1721, the Lord Ordinary "sustained the defence of *bona fide* possession to liberate the respondents from accounting for " the rents preceeding the interlocutor 13th November 1719, by " which the said adjudication was found null, and repelled the " allegation of the respondent's being put in *mala fide* by the " appellants citations and arrestments." The appellant having reclaimed, the Court, by several interlocutors of the 14th and 21st of July, and 22d of November 1721, adhered to the interlocutor of the Lord Ordinary, and refused the appellant his expences in both actions.

Entered,  
4 Dec. 1721.

The appeal was brought from an "interlocutor of the Lord Ordinary of the 28th of June 1721, and from the interlocutors " of

“ of the Lords of Session of the 14th and 21st of July, and 22d of  
 “ November following.”

*Heads of the Appellant's Argument.*

Though the law does indulge a *bona fide* possession against repetition of the rents, yet to that is required a well-grounded opinion and belief, that what a man possesses is his own, and no other person's. But so soon as he begins to doubt of his right he falls into a *mala fides*. and ought no longer to retain his possession. But the plea of *bona fides* cannot avail the respondents in the present case, since they knew they possessed by a redeemable right, and since they also knew that they had received five times more than paid their debt, before commencement of the action. When that was once begun, and the rents were attached in the tenant's hands, and the respondents had given security to account for the rents to such person as should be found to have right, there cannot be any, the least pretence for a *bona fide* possession.

The appellant has prevailed in every step of the proceeding, and had 18 interlocutors in his favour; and since the respondents have by their affected delays prolonged this action for seven years, and continued in possession of the premises for that time, and pretend not to account for the rents, the appellant humbly hopes also to have his expences allowed.

*Heads of the Respondents' Argument.*

The respondents had no reason to doubt their title to be an absolute right to the property of the premises in question, since the adjudications under which they claimed, not being paid off within the time limited by law for that purpose, become absolute rights, and they were only declared redeemable upon some informalities, which the respondents did not, nor could discover, and the appellant is so sensible, that they were all the time *bona fide* possessors, that he himself demands no account *prior* to the action. A citation or commencing of an action is no argument to take away *bona fide* possession, because till judgment be given, the title of the possessors is good, especially in a case where it is doubtful which of the parties had the best right, or where the title of the possessors was evidently a preferable right, and so sustained by the Court till the very date of the interlocutor finding their right extinguished by their receipt of the rents. And this has been the uninterrupted practice of the Court, in all cases, as can be vouched by decisions.

Though the appellant has prevailed in the action reducing the respondents' title as being extinguished by payment, yet he did not prevail in the action relative to the arrestments. On the contrary he never insisted thereon, nor obtained any judgment upon them; and the Court by an interlocutor of 6th July 1715, not appealed from, found the tenants *in tuto* to pay their rents notwithstanding of the arrestments, and discharged him from laying on any other arrestments, and that because he had not at that time established his title, nor for some years after. An arrestment is a very

improper way to make a person in *mala fide*, since by that very thing he owns the right to the rents to be in another person, and found his title to those rents upon the foot of another claim, not as proprietor but as creditor.

The respondents apprehend that they can in no view be liable to the appellant for costs and expences, in regard the appellant's right laboured under so many apparent imperfections, that without the aid of the Court the same could not be supplied; and the rather since at the appellant's own desire a commission was granted for examining witnesses to supply such defects, which occasioned a great expence to the respondents. There is no interlocutor of the Court of Session in the first process, which refuses expences to the appellant appealed from. And in the summons, which is the foundation of the second process, the appellant does not so much as pray to be allowed expences of the former process. The appellant indeed in the prayer of one of his petitions, craves an allowance for the expences of that process: but the same could with no shew of reason be granted, in regard all the interlocutors of that process are in favour of the respondents, nor can any instances be given where the Court has given expences in causes of a similar nature.

Judgment,  
16 Feb.  
1721-2.

After hearing counsel, *It is ordered and adjudged, that so much of the interlocutor of the said Lord Ordinary of the 28th of June 1721, and of the interlocutors of the Court of the 14th and 21st of July and 22d of November following, whereby the defence of bona fide possession to liberate the respondents from accounting for the rents preceding the interlocutor of the 13th of November 1719, is sustained, and the allegation of the respondents being put in mala fide by the appellant's citations or arrestments is repelled, be reversed: And it is further ordered that the respondents account for, and pay to the appellant the rents and profits of the estate in question, intromitted with by them since the time of the arrestments at the instance of the appellant in July 1714, and that such parts of the said interlocutors whereby the appellant is denied his costs, so far as concerns the costs of the former suit be affirmed, and so far as concerns the costs of this last suit, be reversed. And it is hereby further ordered, that the said Lords of Session do forthwith tax, and ascertain the appellant's costs of the said last suit; and that the said last costs when so taxed and ascertained be immediately paid by the respondents to the appellant.*

For Appellant,      Sam. Mead.      Will. Hamilton.  
For Respondents,    C. Talbot.