No 24.

not only ſuſtained for the years to come, but alſo for all by-gones, for which the Lords found the relict had no right, and that ſhe could not meddle with the ſame *bona fide*, in reſpect of her huſband's deceaſe within the year; and, therefore, that ſhe ought to refund the ſame, albeit her poſſeſſion was never interrupted before this purſuit, and albeit alſo that ſhe alleged, that the purſuer, by virtue of his ſaſine only upon a precept of *clare conſtat*, not being retoured, ought not in reaſon to claim the bygones before the precept, ſince her huſband's deceaſe, but that her intromiſſion therewith was favourable, for theſe years before his right; which allegeance was repelled, and the ſaids years ſince the huſband's deceaſe were all found due to the heir, albeit only received by the ſuperior's precept, ſeeing the ſuperior nor none other claimed theſe bygones by non-entry; and alſo this ſaſine, albeit making no mention to be given to the wife *intuitu matrimonii*, nor having any reference to the contract, yet expreſſing no other cauſe, and no other cauſe thereof being qualified by the party, and being the ſame deed, whereto the huſband was obliged in the contract, the ſame was found to be done for implement thereof, and to depend thereon.

Act. *Gibson.* Alt. *Baird.* Clerk, *Gibson.*

Fol. Dic. v. 1. *p.* 109. *Durie, p.* 692.

1708. *July* 7.

MR ANDREW REID, Miniſter of Kirkbean, *againſt* GEORGE MAXWELL of Munſhes, and JOHN LANERICK of Torrorie.

No 25.
A miniſter held a decree of modification and locality. Some years after, an heritor obtained a decree of valuation, by which his proportion would have been leſs. In a ſubſequent proſecution by the miniſter, he was not allowed to plead *bona fide* poſſeſſion.

GEORGE MAXWELL of Munches having raiſed a valuation of the teinds of his lands of Torrorie, lying within the pariſh of Kirkbean, during a vacancy of the cure, wherein the patron, titular, and moderator of the preſbytery were called, as the proper contradictors. He, in February 1699, thirteen days after Mr Andrew Reid's admiſſion to that church, obtained decreet, valuing his teinds to a leſs duty than the proportion of ſtipend impoſed on his lands by a decreet of modification and locality in the year 1650: Which decreet of valuation being reduced by the commiſſion upon this ground, That the miniſter was not called to the pronouncing thereof: Mr Andrew Reid purſued the ſaid George Maxwell, and John Lanerick, preſent heritor of Torrorie, for ſeveral years ſtipend due to him out of theſe lands, conform to the decreet of modification.

Alleged for the defenders: They were *bona fide* poſſeſſors, by virtue of the decreet of valuation, till the ſame was reduced; and could be liable in no greater quantity of ſtipend than their valued teind-duty; eſpecially, conſidering that their teinds are truly worth no more, and the higheſt flown divines never claim more than the teind: For even null decreets and other deeds have been found *tituli colorati*, affording the benefit of *bona fide* poſſeſſion till they were reduced, Guthrie *contra* Laird of Sornbeg, No 65. p. 861.; Earl of Wintoun *contra* the

Counteſs, Stair, v. 1. p. 357. *voce* MINOR; Hamilton *contra* Harper, Stair, v. 1. p. 606. *voce* REMOVING; Scrimzeour *contra* Earl of Northeſk, No 30. p. 1751.; 14th December 1677, Dick *contra* Oliphant, *infra h. t.* Conſequently the decreet of valuation in queſtion, is a ſufficient *titulus bonæ fidei*, not only to John Lanerick, who bought the lands from Munſhes, and was not obliged to know but the decreet of valuation was the rule of paying the teind; but alſo to the ſeller, who thought himſelf under no obligation to call a miniſter, not in the cure at the raiſing of the proceſs; and yet he was cited in a manner, by calling the moderator of the preſbytery, whereof he was then a member. No 25.

Answered for the purſuer: There is no pretence for *bona fides*, ſo long as the miniſter's decreet of locality ſtands unreduced; for *ignorantia juris excusat neminem*, Grant *contra* Grant, No 24. *supra*; and till Mr Reid was eſtabliſhed miniſter of Kirkbean, it had been officious and unſeemly in him, though a member of the preſbytery, to middle in matters of the ſtipend of the pariſh.

THE LORDS repelled the defence of *bona fides*, in reſpect of the miniſter's ſtanding decreet of modification and locality.

Fol. Dic. v. 1. p. 109. Forbes, p. 260.

*** The ſame caſe is reported by Fountainhall:

By decreet of modification and locality in 1650, there is made payable to the miniſter of Kirbean, a chalder and eleven bolls of meal out of the lands of Torrory, as a part of his ſtipend. Maxwell of Munches finding his teinds of theſe lands over-valued far beyond their worth, purſues a valuation of them in 1699, and, upon a clear probation, gets a decreet liquidating them to a chalder of victual, and ſome leſs. Mr Andrew Reid being about the ſame time tranſlated from Dunſcore to Kirbean, he purſues a reduction of that valuation before the Lords, as Commiſſioners to the Plantation of Kirks, and obtains a decreet reducing the ſaid valuation, in ſo far as it diminiſhed his quota of ſtipend eſtabliſhed by the allocation in the year 1650; and that valuation being thus taken out of the way, he raiſes a new proceſs againſt Munches, and John Lanerick who had ſince that time purchaſed the lands from him, for paying the old quota of ſtipend impoſed on theſe lands by the decreet 1650, and that for all the years bygone ſince his entry and admiſſion in February 1699, and in time coming.—*Alleged*, As to all years ſince the reduction of the valuation, they were content to pay the old quota; but, for the years preceding, during which the decreet of valuation was a ſtanding right, they were ſecure as *bona fide* poſſeſſors, which is the great charter and ſecurity of the lieges, otherwiſe poſſeſſion, or a preſumptive right, inſtead of a benefit would be a ſnare. What have we for moſt of our properties, but ſentences of the ſupreme judicatures? And if this did not induce a *bona fides*, ſo as to quiet our minds and poſſeſſions, but that we muſt be ſtill accountable for the fruits and intermediate profits uplifted and ſpent by us on the faith of theſe decreets, what certainty or probability ariſes from them, and who will improve or meliorate lands on ſuch a ſandy foundation? And, therefore,

No 25. it has been ever ſuſtained to aſſoilzie from bygones, as *fructus bona fide percepti et consumpti;* as was found in the following caſes, 18th November 1664, Guthry *contra* Sornbeg, No 65. p. 861.; Hamilton *contra* Harper, Stair, v. 1. p. 606, *voce* REMOVING; the Earl of Winton *contra* the Counteſs, Stair, v. 1. p. 357, *voce* MINOR; Scrimzeour *contra* the Earl of Northeſk, No 30. p. 1751.; 14th December 1677, Dick *contra* Oliphant, *infra h. t.*; where *bona fides* aſſoilzied from bygones, though their author's right was improven as falſe and forged, he having no acceſſion to, nor knowledge of the falſehood.——*Answered*, None of theſe allegations can ever amount to a *bona fides*, for his decreet of valuation is reduced *ab initio*, and declared null as if it had never been pronounced, and can no more defend as a *titulus bonæ fidei* than an adjudication againſt one who was not proprietor of the lands adjudged could ſecure againſt repetition of the rents uplifted thereby. 2*do*, He interrupted their *bona fides* by a charge of horning for the old quantity, and they having offered, by way of inſtrument, the leſſer valued duty contained in the laſt decreet, Mr Reid proteſted he would not depart from his firſt modification, and would not homologate nor acknowledge the leſſer quantity; which was ſufficient to put them *in mala fide*.—3*tio*, Being purſued by Torrory for a riot, in offering to poind for more than the valued duty, the ſaid Mr Andrew raiſed an advocation, which Torrory has never inſiſted in to this hour. Likeas, he removed him out of his houſe, becauſe he would not acquieſce to take the leſſer quantity; all which demonſtrate, that his *bona fides* was interrupted; and the very decreet of valuation itſelf is *ipso jure* null, for he is not called thereto, though he was admitted as incumbent before it was pronounced. *Replied*, That the reducing deeds *ab initio* are exuberant words of ſtile only, and in many caſes operate nothing *retro*, but only in time-coming; and he did all that was incumbent on him; for the kirk being vacant, he cited the patron, titular, and Moderator of the Preſbytery of Dumfries, where it lay; and Mr Reid was miniſter in the ſame bounds, and, ere he was tranſlated, the whole probation was led and prepared, and nothing remained but the adviſing the report, and decerning. And how can he be reputed *in mala fide*, when he had proven by unexceptionable witneſſes to a demonſtration, that his teind was within a chalder of victual; ſo the miniſter, moſt iniquitouſly, exacted eleven or twelve bolls more than his teind was yearly worth; and the *maximum quod sic*, that the higheſt flown divines pretend to, is the teind. Why then ſhould they covetouſly graſp at the ſtock, which as juſtly belongs to the heritor, both by the laws of God and of the land, as their teind does to them or the church? And if Mr Reid prove it to be a peck more, he ſhould not only have it, but the double. The Lords ſaw, that both the parties were *in damno evitando*, and that one of parties behoved to be a loſer; yet found Munches and John Lanerick had not taken the legal method to ſecure themſelves, which was by reducing that old decreet of locality in 1650, and calling the other heritors, that the proportion wherein he was over-burdened, might be laid upon the free tiends of other heri-

tors within the pariſh, and not to have purſued a valuation of their own tiends, miſkenning that old decreet, ſeeing *ignorantia juris neminem exculpat ;* and ere they diminiſhed the miniſter's ſtipend, they ſhould have a fund for ſupplying what was taken from him ; and therefore they repelled his *bona fides*, and found him liable to pay the old ſtipend aye till he get it lodged upon another. This was ſo decided *me referente.* Some thought the *bona fides* not interrupted till Mr Reid's citation in his reduction, which was not till October 1705 ; but in regard the old locality in 1650 was ſtanding, the Lords found *ut ſupra.* No 25.

Fountainhall, v. 2. *p.* 449.

1711. *January* 2. LADY CARDROSS *againſt* HAMILTON.

No 26.
A tenant claiming for meliorations, was found a *mala fide* poſſeſſor on a tack by a minor, bearing to be with conſent of his curators ; as their ſubſcriptions were not adhibited.

THE deceaſed Sir William Stewart of Kirkhill, having ſet a tack of ſome of his lands of Strabrock to Alexander Hamilton of Brockſburn for three 19 years, the Lady Cardroſs, his ſiſter, raiſed a reduction of the ſaid tack on minority and leſion. The tack itſelf inſtructed the firſt part ; for it bore to be ſet with conſent of his curators, and there was none of them ſubſcribing. The Lords found the tack *ipso jure* null. But he having *replied* on great meliorations and improvements of the ground, by which the rent was raiſed, a probation before anſwer was allowed ; but at adviſing it was contended for the Lady, that no reſpect could be had to his improvements, (*esto* it were ſo, as was denied,) neither could they afford any repetition or allowance, becauſe he was *mala fide poſſeſſor*, his own tack bearing its dittay *in græmio*, that it wanted the curators conſent, and ſo he could not be ignorant of the nullity and defect of his own right ; for *ignorantia juris neminem excuſat*, and *ſcire et ſcire debere æquiparantur in jure ;* and therefore law never affords him action for the expences wared out by him on a ſubject which he knew he poſſeſſed *mala fide*, no more than he who builds on another man's ground *ſciens id eſſe alienum* can crave repetition of his expences ; beſides, it appears by the probation, that all the meliorations uſed here was during the firſt ſix years of the tack, by digging out whins, dunging, faulding, &c. the benefit whereof he enjoyed by poſſeſſing 20 years longer, which did more than compenſe his former deburſements.—*Anſwered*, The tack, though relating to curators, yet names none ; and *non conſtat*, that he had any ; in which caſe, not being revoked *intra quadriennium utile*, it was a good and valid tack ; and ſo never put him in *mala fide.* And *esto* it were taken at the worſt, *mala fide poſſeſſor deducit impenſas neceſſarias et utiles*, and only loſes his voluptuary ones ; and the law has determined, that a tenant having a long tack, and building on his farm for his better accommodation and convenience, *non præſumitur materiam domino fundi donaſſe, l.* 55. § 1. *D. locat.* Yet the LORDS found, That Hamilton by his null tack was in *mala fide*, and could have no allowance for his improvements ; and if any were due, they were more than compenſated and reimburſed by his long lucrative poſſeſſion poſterior thereto.