

1735. February 10. LORD BALCARRAS *against* L. ARDROSS.

No 41.

A bond and tack of teinds granted *in lecto*, reduced only *a tempore litis contestatæ*.

IN reductions of rights, the Lords sometimes reduce the rights from the beginning, sometimes *a tempore litis contestatæ*; according to their arbitrament; and as they find the party defender to be *in bona vel mala fide*; so, in the reduction pursued by Lord Balcarras against the Laird of Ardross, of a bond and tack of teinds made by his father the umquhile Sir William Scott, *in lecto egritudinis*; THE LORDS reduced the bond and tack, *a tempore litis contestatæ*.

Fol. Dic. v. I. p. III. Auchinleck, MS. (REDUCTION.) p. 188.

1765. February 9.

PETER LESLIE-GRANT of Balquhain *against* THOMAS DUNDAS of Fingask.

No 42.

A tacksman held from a person whose right was reduced. Found that the *bona fides* of the tacksman was not interrupted till his own tack was reduced; from which term only he was liable to the pursuer for surplus rents.

IN the year 1756, Peter Leslie-Grant, a substitute in the settlement of the estate of Balquhain, brought an action of reduction and declarator against Count Cajetan Leslie and his three sons, Counts Leopold, Anthony, and Charles, James Leslie of Pitcaple, and his own father; concluding for reduction of the titles of Count Antonius, who had been found, by a judgment in the last resort, to be the next heir upon whom the estate of Balquhain devolved, who had, accordingly, made up his titles to that estate; and for declaring his own right thereto, in regard the several heirs called before him were persons professing the Popish religion, or aliens, born without the allegiance of his Majesty, or both the one and the other.

The result of this process of reduction, was a judgment of the Court of Session, pronounced on the 4th of December 1761; by which it was found proven, that the pursuer's father was a professed Papist past the age of 15; that Count Cajetan and his three sons were aliens, whereby they had no inheritable blood; and therefore the Court declared the right in Count Anthony's person to be void and null; and another judgment, pronounced upon 5th February 1762, finding and declaring, that the pursuer was then the nearest lawful protestant heir of tailzie entitled to succeed to the estate of Balquhain: Which judgments, upon an appeal, were affirmed by the House of Lords, on the 2d of February 1763.

Count Anthony, whose residence was abroad, had set the estate to Mr Dundas of Fingask, for a tack-duty of 1000 ducats, payable upon the exchange of Rotterdam, at two terms, by equal portions, viz. the 15th of January and the 15th of August, yearly; and as Mr Dundas was creditor to Anthony in very considerable sums, it was agreed between them that Mr Dundas should retain the tack-duty till such time as these sums were extinguished.

The pursuer, immediately upon obtaining the judgment of the 4th of December 1761, had raised a process of mails and duties against the tenants upon the estate of Balquhain, libelling particularly upon the above judgment, and

concluding for payment of the bygone rents, and in time coming ; and, immediately after the judgment of the 5th of February 1762, had also raised another process of mails and duties against the said Thomas Dundas and the other tenants, and against Antonius Count Leslie, libelling particularly upon the last interlocutor.

The pursuer had likewise commenced a reduction of Mr Dundas's tack from Count Antonius, upon the 27th of July 1762, and obtained an interlocutor, reducing the same, upon the 19th of January 1764. Upon the 16th of November 1762, the pursuer, during the dependence of the appeal against the judgments annulling Count Antonius's right, and declaring his, in consequence of an order from the House of Lords, of the 7th of May 1762, allowing the Court of Session, notwithstanding of the appeal, to sequestrate the estate, if they judged proper, obtained a sequestration of the tack-duty payable by Mr Dundas for the last half of crop 1761, and in time coming.

Mr Dundas had let out the estate to sub-tenants, from whom he drew more rent than was payable by him to Count Anthony ; so there arose two questions in the course of these processes ; one respecting the tack-duty payable by Mr Dundas, the other respecting the surplus rents over and above the tack-duty payable by the sub-tenants.

The pursuer *insisted*, That he was entitled not only to the tack-duty payable by Mr Dundas, but likewise to the full rents payable by the natural possessors, his sub-tenants, for the crop 1762 and 1763, and in time coming, and likewise for the tack-duty payable by Mr Dundas for the whole crop 1761.

And, *first*, with regard to the full rents for crop 1763, the pursuer *contended*, That as Count Antonius's right was reduced upon the 4th December 1761 ; that of the pursuer's, declared 5th February 1762 ; and these judgments affirmed by the House of Lords in February 1763 ; and before the terms of payment for that crop specified in the sub-tenants tacks had elapsed, the money rent for said crop 1763, as appeared from the tacks granted by Mr Dundas, falling due, the one half at Martinmas 1763, the other half at Whitsunday thereafter, and the victual rent deliverable at Candlemas, after the separation thereof from the ground ; whence it was evident, that the pursuer's right was affirmed before any part of the rent for that crop was payable ; and that the interlocutor reducing the tack, was pronounced upon the 19th of January 1764, before any part of the victual for crop 1763 was deliverable, and before the last half of the money rent for that crop became due ; so that the *fructus* were not so much as *percepti*, which was certainly indisputable with regard to the victual rent, and the last half of the money rent for crop 1763. Therefore the *bona fides* was beyond all doubt set aside by these judgments, and the pursuer, in consequence of his right of property declared, and of his having operated a reduction of the defender's tack, as above stated, necessarily became to have the only right to the rent of that year, excepting the first half of the money rent thereof, as to which there might be some doubt. *2dly*, With regard to the first half of that year's money rent,

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and the full rents for crop 1762, the pursuer *contended*, That he was justly entitled to them. Count Antonius's *bona fides* was interrupted by the interlocutor of the 4th of December 1761; and if this plea of *bona fides* ceased with respect to him, it must also cease with respect to his tacksmán, whose only right was derived from him, especially that Mr Dundas himself was the person who chiefly conducted the process on the part of the Counts Leslie, the defenders therein. But there was still more done to put this defender *in mala fide*; a process of mails and duties was raised immediately against this defender and the other tenants on the estate, after the 4th of December 1761; processes of multiplepoinding were commenced by the tenants before any part of the rent for crop 1762 was payable; a summons of reduction of the defender's tack was brought in July 1762; and the pursuer's right to the estate declared the 5th of February preceding; and another process of mails and duties against the defender raised the 9th of the same month. In these circumstances, the defender can never pretend to the protection of a *bona fide* possession for crop 1762. The pursuer's intention to recover the rents of that crop, as payable by the natural possessors, was sufficiently declared by the above-mentioned processes, in which several steps of procedure were made before any part of the crop 1762 was exigible. And, 3dly, With regard to the tack-duty for the year 1761, which the pursuer was only claiming, though he was well entitled to the full rent, it was in vain to argue, that, though Count Antonius's right was annulled in December 1761, yet that was no such interruption of the *bona fides* as to entitle this pursuer to the tack-duty of that year, in respect that his right was not declared till the 5th February thereafter. For it was evident, that the interlocutor on the 4th December, put Count Anthony *in mala fide* to intermeddle with the fruits of that year. These behoved necessarily to belong to the person who should afterwards be declared to have right to the estate: That this pursuer was that person, whose right truly existed as much upon the 4th of December 1761, as it did upon the 5th of February 1762, though it was only declared at this last-mentioned period; neither could Mr Dundas, betwixt those two periods, *bona fide* make payment of that half year's rent to Count Leslie after his right was declared void; and if he could not make payment of it to the Count himself, he could not retain it in payment of any debt due by the Count to him: That the reason why only the last half of the tack-duty 1761 was sequestrated, was obvious: That both when the House of Lords allowed the sequestration, and the Court of Session actually sequestrated the estate, the first half of that year's tack-duty could not be considered as *in medio*, but as actually received by Count Leslie, or his order.

On the other hand, it was *maintained* for the defender, That, the *bona fides* of Count Antonius, and, of course, his, was not interrupted by the interlocutor of the Court of Session 4th December 1761, but remained entire, and entitled him to retain the tack-duties which had fallen due, until the final judgment upon the appeal affirming the above interlocutor of the Court of Session was pronounced by the House of Lords, the 2d of February 1763; and that, with

regard to the surplus rents payable by the sub-tenants over and above the tack-duty payable by the defender to Count Anthony, he was entitled to retain them till such time as his own *bona fides* was interrupted, which was not the case until the 19th of January 1764, the date of the interlocutor reducing his tack.

It was also contended, That the pursuer's prevailing in the declarator of right against Count Anthony, and in the reduction of his titles to this estate, did not, *eo ipso*, vacate and annul the defender's tack, or liberate him from the obligations he had thereby come under; for that it was optional to the pursuer, upon his evicting the estate from the Count, to have held Mr Dundas bound by his tack, if he had esteemed it a beneficial bargain; and therefore, this judgment against Count Anthony could be no interruption of the defender's *bona fide* possession under the lease; at least, it is certain, it could not have this effect, till such time as the pursuer, after establishing proper titles in his own person, did obtain a judgment of this Court setting aside the tack.

Nothing was more arbitrary, and less ascertained by the decisions of this Court, than how long a *bona fides* ought to protect the party that loses the cause, from being accountable for the bygone profits. In reductions *ex capite lecti*, though the death had been never so notorious, yet still the disponee is protected by his *bona fides*, until the moment that the right be actually reduced.

That, the case of Douglas against the Laird of Wedderburn, determined in July 1764, (*see* p. 1750.) was directly in point, where the defence of a *bona fides*, pleaded by the Laird of Wedderburn, who was pursued for a spuilzie of teinds, upon this ground, that the Earl of Hume, his author's right, being reduced, his subaltern right of a tack also fell of course though he was not called as a party in that reduction, was sustained.

The like judgment was given in the competition about the estate of Pittrichie; where the sisters of Charles Maitland* were found not accountable for the rents prior to the date of the judgment reducing their right to the estate. As Count Anthony himself, therefore, could not have been quarrelled for maintaining his possession until his right was finally reduced by the House of Lords in February 1763, so the defender must consequently be entitled to the protection of the Count's *bona fides*, as to all the tack-duties prior to that period. That the defender, even upon supposition that the perception of the rents had been fraudulent on the part of the Count, must be considered as a *bona fide* purchaser, in virtue of his tack from him, agreeable to the doctrine of the *actio Pauliana* in the Roman law, and to our law in reductions upon the statute 1621. With regard to the sequestration of the tack-duty for the last half of crop 1761, and in time coming, as also the different processes of mails and duties raised by the pursuer, no advantage could be derived from them in his favour in the present competition. The sequestration was intended only to secure the rents till the event of the cause, and could operate in favour of neither party. The processes of mails and duties were commenced by the pursuer when he had not the

* General List of Names.

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vestige of a right that could found him in such action, as they were all insisted in before his titles to the estate were ultimately established. And it was for this reason that the defender, during the litigation, has been preferred to the tack-duties by an interlocutor of the Lord Ordinary, which reserved to the pursuer the liberty of bringing a reduction as accords. Till such time, therefore, as this reduction was not only brought, but decerned in, the defender was well entitled to the benefit of a *bona fide* possession, and can be accountable only for the surplus rents payable by the natural possessors from that period, in the same manner as he is only bound to account for the tack-duties that fell due since the pursuer's right was finally declared in the House of Lords.

THE LORDS, upon the report of the Lord Coalston, found, ' That the defenders, the said Count Antonius Leslie and Thomas Dundas, were both of them entitled to the privileges of a *bona fide* possession, till such time as their *bona fides* were interrupted ; that of the defender Count Antonius, by the interlocutor of the Court, dated the 4th of December 1761 ; and that of Thomas Dundas, by the judgment dated the 19th of January 1764 : And therefore found the defender Thomas Dundas, in virtue of his rights flowing from Count Antonius, was entitled to retain the whole of the rents which had been uplifted from the sub-tenants before the said interlocutor of the 19th of January 1764 ; and found the pursuer entitled to the whole of the rents which were due by the sub-tenants at the date of that interlocutor, and which fell due by them thereafter. And further found, that the defender Thomas Dundas, in virtue of his assignation from Count Antonius, was entitled to retain the tack-duties which had fallen due by himself before the said interlocutor of the 4th December 1761 ; but found him liable to account to the pursuer for the tack-duties that fell due by him after that time.'

Act. Graeme.

Alt. Lockhart.

Clerk, Pringle.

Fol. Dic. v. 3. p. 95. Fac. Col. No 6. p. 9.

No 43.

A *bona fide* possessor was found accountable from the date of an interlocutor of Court, adhering to the interlocutor of an Ordinary : which was finally affirmed on appeal.

1769. June 21. LAURIE and HUSBAND against SPALDING.

MRS MARGARET LAURIE, and Andrew Sloan Laurie, her husband, having prevailed against Alexander Spalding of Home, in their reduction of the sale of the lands of Ervies, made by James Laurie, the heir of entail in possession for the time, as stated, 24th July 1764, Fac. Col. No 140. p. 324. *voce* TAILZIE ; and the judgment having been affirmed in the House of Lords, a question arose, From what period Mr Spalding was accountable for the rents ?

Pleaded for the pursuers : The defender must be accountable from the date of the decree, that is, from the date of the Lord Ordinary's interlocutor, which was adhered to by the Court, and affirmed in the last resort.

When the judgment of an Ordinary is altered, a new interlocutor is pronounced, which can have effect only from its own date. But the case is different, where