

ing no real right, and which could not be supplied by his diligence, albeit prior to this defender's, seeing nothing followed thereupon; and the said compriser, after he had charged the superior, did never prosecute his charge, but suffered the same to lie still and sleep, and did no more while July 1632,—at which time the superior being of new charged by him, and the superior then suspending, the suspension was discussed, and he ordained to be infest, paying to the superior the year's duty, then modified for his entry, which yet he had not paid; and so in effect it was his own fault and cessation that he was not infest, which ought not to be prejudicial to another creditor, as the excipient was to use his lawful diligence; and, having so done, and being infest and in possession, he was preferred, and assolyied from this pursuit, especially the question being for bygone years, now not extant, but consumed; the excipient having a just title *et possessionem bona fide acquisitam; et ubi præcedit titulus verus, vel etiam putativus, quamvis ex errore, si justus error sit, semper bona fides præsumitur, et possessor bona fide semper postea facit fructus suos, donec constiterit de ejus mala fide; tunc vero ab illo tempore tenetur fructus restituere, ut ait Bartol. in leg. qui, bona fide, ff. de acquirendo rerum dominio, et in l. qui scit, sect. finali, ff. de usuris; idem in l. usucapio. sect. fructus, ff. de usurp. et usucapionib. ubi dicitur bonæ fidei possessorem, non teneri restituere fructus, quamvis extantes, si per triennium possederit; mala fides autem probatur per denunciationem possessori factam: item, si fama fuerit in vicinia, eum mala fide possidere, et ipse erat vicinus; ut ait Bartol. Leg. Celsus ff. de usurpationib. et usucapionib.*

*Act. M'Gill. Alt. Mowat and Neilson. Gibson, Clerk. Vid. 22d January 1633, Gordon; 14th February 1633, Charters; ult. January 1632, Ferguson.*

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1632. December 12. JOHN MARTIN against ADAM LIVINGSTON.

JOHN Martin, Englishman, having obtained decret against Adam Livingston, before the admiral, for payment of twenty-one pounds sterling, for his service in a ship called the Lyon, which was referred to his oath, and confessed to be owing, and therefore decret given against him; to which decret, John Ker, in the Cannongate, being made assignee, and suspending upon compensation of eight pounds sterling, owing by the cedent to Livingston; which being reasoned, the Lords received the compensation, *eodem modo*, against the assignee, as against the cedent: but, because the ticket subscribed by the cedent, of the sum for which compensation was craved, was dated before the sentence, and the term of payment also before the sentence, and that the decret was given against the suspender, compearing and granting the debt, being referred to his oath; at which time he neither proponed the said compensation, it being then competent, nor made no defalcation of the sum in that ticket, nor no mention thereof at that time;—therefore the Lords found, that it could not now be received against the sentence, after the same, and not being proponed before the decret.

*Gibson, Clerk. Vid. 20th December 1632, Knox; and the cases there cited.*

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