

cutry, § 73. January 26. 1628, Adie *contra* Gray, Durie, p. 332. *voce* PASSIVE TITLE : *Multo magis* may this be done by the defender, who is administrator *qua* creditor for debt due long before the administration.

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*Answered* for the pursuers : Had the subject of the competition been *res mobiles*, (which we call goods as distinct from sums of money or obligations for money), a title behoved to have been made up to them in Flanders, where Muirhead died, and the goods were. But here the question is concerning a sum of money belonging to a Scotsman dying abroad, which, as *res fungibilis, usu perit*, and can be no otherways affected than by a confirmation in Scotland, which is *additio hæreditatis mobilium*. The defunct's dying in Flanders at the time of payment, will make no alteration in the point of law : For the maxim, *mobilia sequuntur personam*, must be understood either of the place where he died, and then it excludes the English administration, as well as the confirmation in Scotland ; or it must be understood of the *locus originis*, which affords preference to the pursuers, who have made up their title in Scotland. Nor doth the English administration concern the Earl of Orkney, who made payment to the defender ; the Earl being a Scottish man, and a Scottish Peer, and commander of a regiment originally levied in Scotland, (though under English pay), and subject to answer before the Courts in Scotland. The practick in February 1687, Elliot of Dunlabyres *contra* Dryden, is a quite different case ; for an English administration might be a colourable title to excuse from vitious intromission, and yet not sufficient to prefer in a competition. *2do*, Where can there be a legal *bona fides* with such defects, which might as well be pretended from a title made up in any foreign country ? Again, *bona fides* doth liberate a man from repetition of annualrents, fruits, and profits, but never from answering for the stock or inheritance. And the brocard *sum receptit* holds only, *imo*, Where payment is made by the debtor, and not where it is recovered by diligence out of his effects : *2do*, Where the diligence is just in the form of law, though not preferable. Neither of which can be applied to this case.

THE LORDS sustained Wishaw's allegiance and defence, That he, a true creditor of the defunct, did *bona fide* uplift the money by virtue of an administration in the Prerogative Court of Canterbury, before any process or confirmation in Scotland. See FOREIGN.

*Forbes, p. 677.*

1715. January 14.

HENRY ECCLES and DAVID CRAIGIE, Merchants in Edinburgh, *against* WILLIAM ROBERTON, Vintner in Holyroodhouse.

THE said William Robertson having employed John Lind, cooper in Leith, to choice and send up to him two hogsheads of wine ; Lind accordingly choosed

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A person ordered another.

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to buy wine  
for him. The  
merchant sent  
it immediately  
to the former.  
He  
notwithstanding  
accepted  
a bill drawn  
by the person  
whom he em-  
ployed to  
buy; which,  
in the circum-  
stances, he  
was found in  
*bona fide* to  
pay.

one of them, in the cellar belonging to Henry Eccles and David Craigie, which they thereupon sent up to Robertson. Thereafter the said merchants having acquainted Robertson that they had sent him a hogshead of wine, which Lind had bought on his account; he told them, that he had employed Lind, but knew not from whom he had got the wine: Whereupon Robertson goes with them to Lind's house, where Lind told him, that one of the hogsheads was got from the pursuers, in presence of Mr Eccles, one of them, and several others; but gave no express order to Robertson to pay them. Nevertheless, sometime thereafter, Lind draws a bill upon Robertson for the price of both the hogsheads, payable to James Murray merchant; wherewith Robertson having acquainted the pursuers, and certified them, that if they did not settle the matter with Lind he would accept the bill: Accordingly, after three months delay, he accepted, and thereafter paid the whole to Murray. But Mr Eccles and Craigie insist against him still, as liable to them in payment of an hogshead: And that,

*1mo*, Because a cooper is only employed as a *proxeneta* or broker, for tasting and choosing wine, which the merchant himself sells to the vintner. Nay, by the custom of all trading nations, observed by *Scaccia de Mercatura*, brokers are prohibited to deal for their own behoof in those subjects in which they use to procure for others. *2do*, Lind, in his above declaration, says not that he bought the wine from the pursuers, but that it belonged to them, and therefore he is to be considered only as a *nuncius* or servant. *3tio*, Though Lind had really bought the wine himself, yet his above declaration evinces, that if they sold it to Lind, it was in Robertson's name.

*Answered* for the defender, to the *1st*, That the assertion is without either authority or reason; for, as it is arbitrary for any man to gratify another by buying any thing upon his own credit, and giving it to his neighbour at the same price, so it were ridiculous to cut off coopers from the common privileges of mankind. And, in our practice coopers do trade for their own behoof; nay, by the law of the burgh, they must be burgesses and guild, and consequently are entitled to merchandize. To the *second* and *third*, *answered*, That the simple declaration that the wine belonged to the pursuers could never infer that the defender thereby became liable to them; for one would think, if Lind had intended any such thing, he would have drawn a bill upon the defender to the pursuers, as he did to James Murray; and having not done it, it is clear that he acted not as a *proxeneta*, but judged himself bound for the price. *2do*, The defender never having agreed to become the pursuer's debtor, and thus remaining still debtor to Lind, with whom only he contracted, he did *optima fide* thereafter accept of his precept, and pay it to Murray accordingly; specially considering his delay for three months to accept, and his desiring them in the interim to do something in the matter, with certification that he behaved otherwise to accept: So that it is plainly imputeable to themselves, that they did not either adjust the matter with Lind and Murray, or secure the price in the defender's hands by an arrestment.

THE LORDS found, That the payments made by the defender to Murray by Lind's order, were made *bona fide*; and that the same is relevant to assoilzie, unless the pursuers offer to prove, by the defender's oath, that he promised to pay them, or that Lind ordered the defender to pay them, and that he acquiesced.

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Act. Robert Craigie.

Alt. Walter Stewart.

Clerk, Robertson.

Bruce, No 26. p. 34.

1729. January.

LORD HALKERTON against DRUMMOND.

THE purchaser of an estate, upon which there was an infeftment of annual-rent, having made payment of the same to an heir who had only a general service, and had not established the infeftment in his person; this was not found to be *bona fide* payment, because he might have seen the infeftment in the register, and ought to have known the defect of the creditor's title.

No 29.

Fol. Dic. v. I. p. 113.

\* \* \* See This case, voce SERVICE of HEIRS.

1758. December 2.

ROBERT HOWES, and ALEXANDER CUNNYNGHAME his Trustee, against JAMES GOODLET-CAMPBELL of Auchline and Abbotshaugh.

JOHN MELROSE had three children, William, Agnes, and Catharine.—Catharine was married and had issue.

Agnes Melrose married James Goodlet of Abbotshaugh, and had issue, James, John, Alexander, and Agnes.—James and John died without issue.—Alexander went to America about the year 1702, where he was supposed to have died childless, but had issue a daughter, married to Job Howes, the father of Robert Howes.

Agnes Goodlet married Robert Campbell of Auchline, and had issue Duncan Campbell, the father of James Goodlet-Campbell.

In April 1719, William Melrose, then residing in London, obtained from James Goodlet, the husband of Agnes Melrose, an heritable bond for L. 710 Sterling, for money advanced, upon which he was infeft.

In April 1739, he made a will after the English form, and died soon after. By that will, besides other legacies, he bequeathed L. 50 to his neice Agnes, the wife of Robert Campbell, and L. 500 to her younger children; also L. 500 to the descendents of his sister Catharine.—He made no mention of the heritable bond in his will; and it is uncertain whether he knew, that, by the law of Scot-

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Payment made by the debtor's administrator, to one who is not the true creditor, does not afford the defence of *bona fides* to the debtor.