

No 26.

Upon this debate, some of the LORDS proposed, That the Earl might depone before answer, what was in his hands the time of the arrestment, and when paid, that the whole matter of fact might be under their consideration; but, in regard the case was of general concern, and that it was important for creditors to know how they might prosecute their diligences in such cases, which do frequently occur; therefore the Lords thought more proper to determine the point in law.

THE LORDS repelled the defence of *bona fide* payment, after the arrestment at the market-cross of Edinburgh, &c.; and found, That the arrestment did legally affect all sums that were then in the Earl's hands, and reponed him to his oath.

*Dalrymple, No 41. p. 52*

1713. June 12.

MR JOHN STUART of ASCOG, BAILLIE HOPE, and Other Creditors of the deceased James Muirhead of STEVENSON, *against* The EARL of ORKNEY, and WILLIAM HAMILTON of Wishaw.

No 27.

A person who had received money from a person holding English letters of administration, was found to have been paid *bona fide*, in competition with creditors regularly confirmed executors in Scotland, although the letters of administration had been improperly taken out.

ASCOG and others confirmed before the Commissaries of Edinburgh executors *qua* creditors to James Muirhead who died in Flanders, pursued the Earl of Orkney, as having intromitted with their debtor's money, and the Laird of Wishaw who received it from the Earl.

*Alleged* for the Laird of Wishaw: He cannot be obliged to repeat or pay back the money: Because, *1mo*, He, as creditor to James Muirhead, had, by virtue of letters of administration from the Prerogative Court of Canterbury, uplifted the money from the Earl of Orkney, residing in England, as Colonel of an English regiment, before the pursuer's confirmation in Scotland. And James Muirhead having died an officer in a regiment under English pay, in a foreign country, without having *larem & focum*, or any effects in Scotland, (whereby he had changed his *domicilium*), there was no other way to affect the money which he left behind him, but by administrating to him conform to the law of England. *2do*, An administration in England being a title of intromission, equal to a confirmation in Scotland, February 1687, Elliot of Dunlabyres *contra* Dryden\*; and the defender being *prior tempore* in diligence, is *potior jure*: But again, *3tio*, Whatever might be said were the money still *in medio* unuplifted, yet after the defender, invested with a lawful and effectual title, hath *bona fide* uplifted the money, and got payment, it were strange to make him refund it, *qui suum recepit*! And as, by our law, an executor, though not *qua* creditor, uplifting the defunct's money, may exhaust the same by debt due to himself before the confirmation, merely *exceptione compensationis*, Stair, Instit. tit. Exe-

\* See SERVICE and CONFIRMATION.—FOREIGN.

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.