

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.

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Fol. Dic. v. 1. 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.

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land, it could not be conveyed by a testament: but, without including this heritable debt, his other effects were not equal to the legacies. And the testament bore a special condition, that the legatees should be bound to execute any act or deed necessary for establishing the will, when required by the executors, under the pain of forfeiting their legacies.

By the death of William Melrose, the succession to the heritable bond devolved upon the descendents of his two sisters, who were both dead; and the one-half of it therefore belonged to Robert Howes, as descended of his nephew Alexander Goodlet, the son of his eldest sister, and the other half belonged to the descendents of Catharine. At this time James Goodlet, the husband of Agnes Melrose, had conveyed his estate to James Goodlet-Campbell, his great grandson, who was therefore debtor in the heritable bond.

As no certain information was received from America concerning the issue of Alexander, a precept of *clare constat* was granted by Duncan Campbell, acting as administrator for James Goodlet Campbell his son, the debtor in the bond to Agnes Goodlet, and also to the eldest son of Catharine Melrose, who then, in consequence of the condition above-mentioned, conveyed the heritable bond to the executors of William Melrose's will, in order to make up a proper fund for the legacies. The executors brought an action for payment against James Goodlet-Campbell; to which it was *objected*, That, with respect to one-half of the bond, Agnes Goodlet was not the true heir; for that there was a report that Alexander Goodlet had left issue in America.

To remove this *objection*, Agnes Goodlet obtained herself served and retoured heir-portioner in general to William Melrose; and, upon production of this service, the Lord Ordinary decerned for payment, and a decret was extracted; in consequence of which the money was paid and distributed by the executors of William Melrose's will among the legatees.

At the distance of ten years, Robert Howes granted a trust-bond to Alexander Cunnyngame; upon which Mr Cunnyngame led an adjudication against Robert Howes, as charged to enter heir in special to William Melrose his great granduncle; upon the title of which he brought an action against James Goodlet, as debtor in the heritable bond, to one-half of which Robert Howes had right.

Pleaded in defence, That payment had been made of the whole bond above ten years before, upon a legal and sufficient warrant; and although it now appears, that as to one-half, it was not made to the true heir, yet as it was made *bona fide*, the defender must be secure.

2dly, Supposing the payment had been made collusively; yet as the defender was then an infant, and the affair was transacted by his administrator-in-law, the payment must still be held, with respect to the defender, as *bona fide* made, seeing he is not liable for the fraud or delict of his tutor, from which he reaped no advantage.

Answered, The conduct of Agnes Goodlet was in this case extremely collusive ; and it appears, that James Goodlet her father, acting as administrator to the defender, must have been accessory to the fraud intended against Alexander Goodlet and his issue in America ; for James Goodlet was first prevailed upon to convey his estate of Abbotshaugh to the grandson of his daughter Agnes, although, according to the natural right of succession, it ought to have descended to the issue of Alexander ; and in like manner Agnes Goodlet concurred in the scheme which was concerted of disappointing Alexander's issue of the one-half of the heritable bond, and with that view Duncan Campbell her son granted the precept of *clare* to her ; and although afterwards, to save appearances, he *objected*, when pursued for payment, That Agnes was not the nearest heir, yet this defence was not properly insisted upon, and Agnes having thereafter obtained herself served heir-portioner in general to William Melrose, he readily acquiesced in the Lord Ordinary's interlocutor, decerning for payment, although he himself had acknowledged, before the Lord Ordinary, that there was a report concerning the issue of Alexander existing in America ; and in this situation it was his duty to have insisted for a proof of that fact before making payment ; and therefore he cannot be said to have acted *bona fide*, so as to afford a defence against paying the same sum over again to the person who is proved to have the only right ; for it is the duty of every debtor, when pursued by a person making up titles as heir, to object against payment, upon account of the existence of a nearer heir, and to insist upon that defence.

2dly, The question in this case is not, whether the defender shall be found liable for the fraud or delict of his administrator ? but whether he can plead a defence upon *bona fide* payment, and found that defence upon what was done in his name by his administrator ? and as it appears that his administrator not only acted collusively, but even supposing no collusion, did not proceed in such a manner in making the payment as to support the defence of *bona fide* payment, the defender cannot now be allowed to plead that defence, more than if the whole transaction had been managed by himself.

Replied, 1st, A debtor is not obliged to make objections founded upon the right of a third party, against payment, but is entitled to pay to those who appear to have a legal right. Upon these principles, a debtor who had made payment to the executors of a bastard, being afterwards pursued by a donatar of bastardy, " the payment to the executors was found relevant to liberate the defender at the donatar's hands, seeing the defender had no necessity to inquire, or to know the condition of the creditor, and that although the executor had taken no decree against him," 18th March 1626, Paterson, No 16. p. 1786.

2dly, The pursuer's argument must have the consequence of making the defender answerable for the supposed fraud of his tutor. This, however, is inconsistent with the established law, where the pupil is not benefited by the fraud,

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l. 15. ff. De dolo; and there can be no distinction, whether the tutor's fraud consisted in making payment *mala fide*, or in any other instance.

THE LORDS found the defender liable for the principal sum, interest, and penalty, and also in the expence of extracting the decret.

Reporter, *Auchinleck.*Aft. *Lockhart.*Alt. *Rae, Burnett, Ferguson.*

Fol. Dic. v. 3. p. 97. Fac. Col. No 139. p. 253.

1759. February 27.

ALEXANDER HAMILTON and JOHN PUGET, voluntary assignees of Captain ALEXANDER WILSON, *against* JOHN EARL OF ROTHES.

No 31.

Bona fide payments made by the debtor, in a bond granted in the English form, found good against an assignee who had not intimated his right. Assignment does not, by the law of England, require intimation.

THE Earl of Rothes became debtor to Captain Wilson to the amount of L. 8840, for which he granted four bonds in the English form; the last of which was dated 2d May 1746. The interest of these bonds was paid up to Ladyday 1750.

In August 1750, Captain Wilson found it necessary to draw bills upon Lord Rothes: and, at the desire of Lord Rothes, in order to enable him to answer these draughts, he furnished a credit to redraw for the money. This practice was continued from 1750 to 17th January 1751; and the result was, that Mr Wilson drew for L. 5000 and upwards more than the amount of the Earl's redraughts upon him.

During the course of these transactions, Captain Wilson, upon the 12th September 1750, assigned over two of the bonds to Alexander Hamilton, for the Sun Fire-office; and upon the 12th of February 1751, he assigned over another of the bonds to John Puget, merchant. Both these assignments were granted for valuable considerations; but none of them were intimated till after Captain Wilson's bankruptcy, and till after Lord Rothes had accepted the several draughts in question.

Upon the 14th February 1751, he drew certain bills in favour of Innes and Clerk, which they indorsed to Adam Fairholm. Lord Rothes refused to accept these bills; and they were regularly protested.

Upon the 15th February 1751, Captain Wilson became bankrupt; and from that period his estate became vested in legal assignees under his commission of bankruptcy.

A competition arose with respect to the debt due by the Earl of Rothes to the bankrupt, between the voluntary assignees, the legal assignees, and Adam Fairholm. In this competition the Court preferred the voluntary assignees *primo loco*, Mr Fairholm *secundo loco*, and the legal assignees *tertio loco*.