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1627. July 26. JOHN INGLIS *against* GILBERT KIRKWOOD.

JOHN Inglis having right to my Lord Ochiltrie's escheat, by assignation from Anna Ker, Lady Garthland, who had right thereto by the Laird of Caprington, principal donator, pursued spuilie of the teind sheaves of the lands of Killeith against Gilbert Kirkwood. Alleged, That the defender did no wrong in meddling therewith, because he had a right to these teinds, disponed to him by James Donaldson, to whom my Lord Ochiltrie had disponed them, 1614; by virtue whereof the defender and his author had possessed them 13 or 14 years. Replied, That disposition made by my Lord Ochiltrie was null, as being made *stante rebellione*, during which time he could make no right in prejudice of the king and his donator. Duplied, The allegiance stood relevant notwithstanding: because the hornings upon which my Lord Ochiltrie's escheat was gifted, being the one 1603 and the other 1607; the defender having acquired lawfully for onerous causes the right of that tack, and by virtue thereof peaceably possessed the same for so many years, before any gift of escheat purchased by the pursuer,—the same tack could neither be reclaimed by the donator to the single escheat; and further, the right of the tack could not fall under the pursuer's gift, because the right thereof was not acquired by my Lord Ochiltrie four years after the first and second hornings, by virtue whereof it is craved: And, by the daily practique, there comes nothing under the single escheat, but such moveables as belong to the rebel the time of his denunciation, or at the most within a year thereafter. In respect whereof the defender brooking, by virtue of a title standing clothed with twelve or fourteen years' possession, could not be convened as wrongous intromitter, to which the pursuer had restricted his summons. The Lords found that the right made by my Lord Ochiltrie, the time of his rebellion, was null, and sustained the summons for all years after the pursuer's general declarator, (which they found put the defender *in mala fide*.) And so repelled the exception. See the case below.

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1627. July 26. JOHN INGLIS *against* GILBERT KIRKWOOD.

THERE was an action of spuilie of the teinds of Killeith, pursued by John Inglis, merchant burghess of Edinburgh,—(who had right thereto, by virtue of a tack set by the town of Edinburgh to the Lord Salton, which tack was assigned by him to the Lord Ochiltrie, by whose rebellion the right thereof fell into the king's hands, and was gifted and declared in favours of Caprington, who made Anna Ker, daughter to the Lord Jedburgh, assignee thereto, which Anna transferred her right to the same in John Inglis's person,)—against Gilbert Kirkwood. Alleged, Absolvitor; because any intromission the defender had with the

teinds libelled, was by virtue of a right or translation, granted to him by James Donaldson, of the foresaid tack of the teinds of Killeith; which James Donaldson had assignation thereof made to him, by the Lord Ochiltrie, *in anno* 1614; by virtue whereof the defender and his cedent have been in peaceable possession of the said teinds, ever since 1614; and have paid the tack-duty thereof, all the years bygone, to the town of Edinburgh, extending to £40. Replied, The said translation and disposition of the foresaid tack, made to James Donaldson by the Lord Ochiltrie, is null, as being made by him *stante rebellione*, in prejudice of the king and his donators; and so the excipient and his author were *in mala fide* to continue their possession by virtue of that null right. Duplied, His right, clothed with so many years' possession, cannot be quarrelled, as being granted *stante rebellione*, except it were alleged that the donator had obtained gift and declarator of the Lord Ochiltrie's escheat, before his said translation made to James Donaldson, without which there was no deed done to put the said James *in mala fide* to accept the said assignation from the rebel after his rebellion; seeing it is daily observed that a disposition of moveables made by a rebel, in favours of a creditor, is sustained, being granted before the gift. Triplied, The foresaid assignation made by a rebel is null, being granted after that the rebel's goods were acquired to the king by his rebellion. And as to the argument, *a simili*, anent the disposition of moveables to a creditor, it holds not; because the same is only introduced in favours of a creditor who has apprehended possession of moveable goods before the gift, and so has made them his own *bona fide*; and the most that this could infer, is to make the defender and his author to be free of all action of repetition of the teinds intromitted with by them, before the gift and declarator; *quia, bona fide, fecerunt fructus suos*; but cannot liberate them from their intromission since the declarator. The Lords repelled the exception and duple, in respect of the reply and triply.

*See the preceding case. See also The Laird of Caprington against the Tenants of Polquhairn, 1629, Dec. 18.*

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1627. November 29. ALEXANDER SMITH *against* NORMAN BAPTIE.

ALEXANDER Smith, executor confirmed to his father, pursued Norman Baptie for £200, lent to him by his umquhile father. Alleged for the defender, That the bond was heritable, as bearing, that ten of the hundred should be paid for it, as long as Norman retained it in his hand over the term of payment, (albeit it had not the clause, *as well not infest as infest*,) and so it fell not to the executors. The pursuer Replied, That he was the same party that could only be heir to his father also, and so he should be answered: Likeas, He offered caution to free the defender at all hands. The Lords first found the bond heritable; and, in respect that the pursuer was apparent heir, as well as executor to his father, they superseded to give answer to the allegiance while he had first served himself heir to his father. Which course they thought meet to keep in all the like cases thereafter.

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