

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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