

1624. July 24.

DONATAR OF SIR WILLIAM STUART'S Liferent *against* HIS LADY'S TENANTS.

No 3.  
A rebel died after the term of payment of farms of his Lady's jointure, by a former husband. The tenants paid the lady thereafter, who was in-  
debt. This was found *bona fide* payment as to them, when pursued at the instance of a donatar to his escheat.

SIR WILLIAM STUART, constable of Dumbarton, being rebel, the donatar to his escheat pursues the tenants of certain lands, whereof his wife was liferenter, by a conjunct-fee granted to her by the L. of Lochnoreis, her first husband, for payment of the farms of the lands of that year wherein the said Sir William died, seeing he died not while after the term of payment were both bypast of that year acclaimed, and the same were claimed by the said donatar, as pertaining to the rebel *jure mariti*, and, being owing the time of his rebellion, to him. The defenders compearing, *alleged*, That they had made payment to the lady his spouse, who was clad with the principal right, and that the rebel her husband hath only right as husband, who being dead before payment made, they behoved to be reputed in *bona fide* to have paid the same to their mistress, and ought not to pay the same again to any pretending right from the husband, or by his rebellion, which they could not know, that rebellion being unknown to them; and there being eight or nine years past since syne, during the which time there was never pursuit nor action, or any question moved, for the said farms. This exception was found relevant to liberate the tenants, and action was reserved to the donatar against the Lady, who had received payment of the farms; but the tenants always were ordained to furnish probation to the donatar, which might verify lawfully her receipt of the same, whenever the donatar should pursue her therefor.

Act. *Burnet*.

Alt. —

Clerk, *Gibson*.*Fol. Dic. v. 1. p. III. Durie, p. 141.*

No 4.

An exception against a spuilzie of teinds, that the defenders had paid their old duty to the minister, for the year libelled, by order of the pursuer's factor, sustained; although there had been an inhibition executed the year preceding; as it was not renewed for the year in dispute.

1627. February 13.

E. LINLITHGOW *against* MENZIES.

IN an action of spuilzie of teinds by the E. of Linlithgow against Menzies of Culterawis, the Lords found an exception relevant to elide the spuilzie proponed, upon payment made by the defender, at command of the Chamberlain, to the pursuer, to the minister of the parish, of the old duty, the year libelled, which was in use to be paid to the same minister, for the same teinds, the years preceding, at command of this same Chamberlain, he being still Chamberlain, the same year libelled; which was found relevant, notwithstanding that the pursuer replied upon an inhibition, executed the year immediately preceding this year libelled; and which, he alleged, did interrupt the alleged use of payment; notwithstanding whereof the exception was found relevant, seeing there was no inhibition executed this year controverted; neither was it found necessary to the excipient to allege, that the Chamberlain had warrant from the pursuer to ap-

point the said payment, or that it was made of the pursuer's allowance; for the pursuer replied, That without that were alleged, it could not be sustained; that the Chamberlain might more prejudice his master in a spuilzie, than he might prejudice his master's warning, by receiving of duty after the same, without the master's allowance, which was repelled, and the exception sustained *ut supra*.

A& Stewart.

Alt. —.

Clerk, Gibson.

Fol. Dic. v. I. p. 112. Durie, p. 271.

No 4.

1627. December 13.

HEPBURN against TENANTS of FAIRNIFLAT.

IN a spuilzie of teinds by Hepburn *contra* The Tenants of Fairniflat, the Lords found an exception proponed for the tenants, relevant to liberate them, founded upon payment made by them to their master, viz. Robert Lighton, of the same teinds of the crop libelled, who had right thereto before the pursuer's right; which payment was sustained for the said tenants, albeit the pursuer *replied*, That this payment could not be sustained to liberate them, seeing their master's right could not so much as defend himself, if he would compear and allege, and so cannot defend them; for he would refer, as he presently refers, to his oath *simpliciter*, that his right is antedated, and so could not prefer him to the pursuer; likeas the master being admitted for his interest, in this same process, and proponing this defence to liberate the tenants, the Lords had found the said reply, upon the antedating of his right, relevant, which being so once found against himself, his passing from his interest, and now proponing it for the tenants, cannot make it more relevant for them, to elide the judgment, where the master had once compeared, and now will pass from his interest, and propone it only in the name of the tenants; and that they must be found in *bona fide* to pay their own master, who was heritor of the lands, for the teinds whereof this spuilzie was pursued, and who had paid to him a certain duty promiscuously for stock and teind together: Likeas the pursuer *replied*, They could not be found in *bona fide* to have paid, seeing, before their payment, the pursuer had served inhibition upon the same teinds; which inhibition was intimated to them particularly; after which they must be reputed to have paid *mala fide*, even as if they had paid after arrestment; and so he *replied*, That they paid after inhibition executed particularly against themselves; and to one who had not a right, but antedated, and which was already found in the process against their master; so the exception should be repelled; notwithstanding whereof the exception was sustained, and the payment made after the inhibition found to be *bona fide*, being made to their master, who was heritor of the ground, albeit they never alleged that he was their master of any preceding year, or that they had paid him the duty of any other year before the year libelled, either for stock or teinds; but only that they had paid to him a certain duty for land and teind the year libelled, promiscuously, as they had done divers years before to Graham of Fairniflat, their master, from whom this defender had acquired the right to the

No 5.

A spuilzie of teinds was elided by this exception, proponed by tenants, that they had paid to their own master, who was heritor of the ground. This was found *bona fide* payment, notwithstanding of an inhibition of those teinds served and intimated to them.