

1716. July 4. LADY MARGARET MACGILL *against* PATRICK CRAWFURD.

LADY MARGARET MACGILL being infeft in liferent in the lands of Kerse, and a competition thereafter arising betwixt her and the creditors, she was at length preferred; but, during the dependance, the apparent heirs-portioners set a tack of the lands to Patrick Crawford, to whom he made payment of the tack-duty, before intimation of the decret of preference; and, in a process at Lady Margaret's instance against him for the same tack-duty, by virtue of the said decret, he alleged *bona fide* payment, he having paid to the setters before any legal intimation of the decret.

*Answered* for the pursuer: That, before setting of the tack, her action was commenced; and, being a real action, the decret is to be drawn back to the action, or rather to the first term after her husband's decease, at which time her jointure fell due, by virtue of her infeftment, which effectually stated her the true and real creditor, whereas the setters were not yet infeft: And, by law, the tacksman was obliged to know the condition of those with whom he contracted, whose right had been rendered litigious before the setting of the tack; so that the depending process and the lady's infeftment, whereon it was founded, sufficiently interpellated every person concerned, as tenants, intromitters, &c.; and, if it were otherways, every intrant tenant, after a multiplepointing raised, might pay the rent to the setter, and so disappoint the effect of the law. Nevertheless,

THE LORDS found the payments made by the defender to the setters of the tack, which were made prior to the intimation of the lady's decret of preference to him, relevant to extinguish the tack-duties of those terms that fell due prior to the said intimation.

A.G. Rigg.

Alt. Hutchison.

Clerk, Robertson.

Fol. Dic. v. 1. p. 112. Bruce, No 10. p. 14.

1711. February 22.

POOR GEORGE TERSIE *against* MARGARET BURNET, Relict of William Strachan in Edindjak, and William Forbes his grandchild.

IN the action at the instance of George Tersie, as assignee by Adam Gordon, eldest son and apparent heir to the deceased John Gordon of Murrailhouse, against Margaret Burnet and William Forbes, as representing William Strachan, for the mails and duties of the lands of Murrailhouse, for several years that William Strachan possessed the same as tenant: THE LORDS sustained the defence of payment by the defenders *bona fide* to John Gordon, second son to the said deceased John Gordon, who was held and reputed his apparent heir, in respect of his eldest brother Adam Gordon's long absence off the kingdom, and his being held to be dead.

Fol. Dic. v. 1. p. 112. Forbes, p. 503.

No 11.

Payment by a tacksman to the apparent heir who let him the land, made before intimation of a decret of preference in favour of a liferentrix infeft, held to be *bona fide*; though the process commenced before letting the subject.

No 12.

Payment to a second son as apparent heir, the eldest being supposed to be dead, was held to be *bona fide*.