

PAYMENT BEFORE HAND.

10023

before the said terms of payment, the donatar had arrested the same *debito tempore*; for, if it should be lawful to allow this payment made before hand, before the terms, the donatar and creditors might ever be prejudged; and, therefore, those who pay before they can by law be compelled, must do the the same *suo periculo*, and not to the hurt of others, and they should provide for their own relief.

No 3.

Act. *Mowat.*

Alt. \_\_\_\_\_

Clerk, *Hay.*

*Durie, p. 352.*

1629. June 12.

GRAY against CAMPBELL.

SOME feu mails, for divers years and terms to come, paid and advanced to the heritor or lifereater, or any other having right to the lands, by the tenants, is not allowed to liberate the payer of those terms which were not come the time of making of the payment, if he, to whom the payment was made, shall happen to be denuded of his right, in favours of any other, before the expiring of these terms, the duties of which terms will pertain to him, who then shall have right to the land, notwithstanding of the tenant's payment making to his master before hand, the master then having a right undenuded, but prejudice of the tenant's relief against the master to whom he paid, or for whom he paid to another, there being no real deed done by the tenant to affect the land to him, whereby to retain the duties for his relief.

No 4.

*Fol. Dic. v. 2. p. 52. Durie, p. 445.*

1662. January 7.

EARL of LAUDERDALE against TENANTS of SWINTON.

EARL of LAUDERDALE, as having right to the forfeiture of the barony of Swinton, pursues the tenants for mails and duties. George Livingston, one of them, *alleges*, That he must be assoilzied from one year's duty, because he offers him to prove, that it is the custom of the barony of Swinton, at least of a distinct quarter thereof, that the tenants do always at their entry pay half a year's rent, and are free of rent at the term they remove, and so do all along pay a year, at the least half a year before the hand; and subjoines, that he has paid accordingly to Swinton himself, for a term's mail, due for the crop which is after the pursuer's right. The pursuer *alleges, Non relevat* against him a singular successor, or against the King his author; because, that party that hath right to the land, hath right to the fruits, and so to the rents which are payable for the fruits which were extent upon the land, or growing after that party's right, and no payment before the hand can liberate the possessor.

No 5.

Payment of rent made at entry, such being the custom of the barony, found relevant against a donatar of forfeiture.

No 5.

from the pursuit of a singular successor; therefore it hath been frequently found, that payment before the hand is not relevant against an appriser, yea even against an arrester; so that the King and his donatar (since their right was established and known) cannot be excluded by payment before the hand to a party who had no right to the land, or to the fruits, that year; otherways both the King and creditors might be defrauded by fore-mails, or by tacks appointing the fore-mail to be paid the first term, (whatsoever length the tack be); 2dly, Any such allegeances were only probable *scripto vel juramento*. The defender answered, That the case here is not like the fore-mails instanced, because every year is paid within itself; and so the first year, the half at the beginning thereof, and the half at the middle thereof, and subsequent years conform, which must be sufficient to the tenant; otherways paying at Whitsunday and Martinmas, should not be liberated, because the whole year is not run out; or a tenant paying his farms at Candlemas should not be secure against singular possessors for the profit of grass thereof till Whitsunday.

THE LORDS found the defence relevant, and the custom of the barony to be proven by witnesses, and likewise the payment of the duty in so far as in victual; and also for the money not exceeding an hundred pounds termly.— See PROOF.

*Fol. Dic. v. 2. p. 52. Stair, v. 1. p. 75.*

1667. February 5.

LADY TRAUQUAIR against MARION HOUATSON.

No 6.

The exception of payment made *bona fide*, found not to extend to payment made by a tenant, or by a subtenant to the tenant, before the term.

THE Lady Traquair pursues Marion Houatson for the mails and duties of a part of the liferent lands, who *alleged*, Absolvitor, because her umquhile husband, who was immediate tenant to the umquhile Earl, had *bona fide* made payment to him. Likeas the defender being only subtenant to her son, had *bona fide* made payment to her son of her duty. The pursuer answered, That neither of the allegeances was relevant; because any payment that was made by the defender, or her umquhile husband, was before the term of payment, and so could neither be said to be *bona fide*, *nam ex nimia diligentia suspecta est fides*, neither could it prejudice the pursuer.

THE LORDS were all clear, that the payment made by the principal tacksman before the term was not relevant; but, as to the payment made by the subtenant to the principal tenant, the Lords debate the same among themselves, some being of opinion, that the subtenant's payment *bona fide* before the term was sufficient, because he was only obliged to the principal tenant, and he might have a tack for a less duty than he, or for an elusory duty, which, if he paid, and were discharged, he was not convenable; and oft-times the subtenant's term was before the principal tenant's; yet the LORDS found, that payment made *bona fide* by the subtenant to the principal tenant was not relevant, and that because the master of the ground has action, not only against the