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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.

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LADY TRAUQUAIR against MARION HOUATSON.

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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

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tenant, but also against the sub-tenant, or any who enjoyed the fruits of his ground, and may convene them personally for his rent, as well as really he has an hypothec in the fruits; neither can the subtenant prejudge the master of the ground of that obligation and action, by paying before the term, otherwise he might pay the whole terms of the tack at the very entry thereof, and so evacuate the heritor's interest as to the subtenant; yea, though the subtenant's tack-duty were less than the principal tenant's, it would not exclude the heritor pursuing him as possessor for the whole, but only give him regress for warrandice against the principal tacksman; but the term being come, if the heritor arrested not, nor pursued the subtacksman, he might impute it to himself, and the subtacksman might justly presume, that the principal tacksman had paid, and so might pay him *bona fide*.

Fol. Dic. v. 2. p. 52. Stair, v. 1. p. 435.

. Newbyth's report of this case is No. 28. p. 622I. *voce* HYPOTHEC.

See APPENDIX.