

1736. February 17.

ANNUITANTS of the YORK BUILDING COMPANY *against* GARDEN of Troup.

No 13.

Payment, made by a tenant to his master, conform to orders, before the conventional term in the tack, found to liberate him in a question with creditors, who, after such payment, interpellated him before the said term.

IN the year 1728, Troup obtained a lease of some lands from the said Company, whereby he was entitled to crop 1728 ; and for which the tack-duty was made payable at Lammas and Christmass 1729 ; and so on, at the same terms for the ensuing years.

About this time, they likewise gave several heritable rights on their lands in Scotland to certain annuitants, in security of debts owing to them by the Company, whereupon they were infest ; and, as the Company were then carrying on considerable undertakings in this country, they sent Colonel Horsey their governor hither, with power to manage their affairs as fully, in all respects, as they could have done, if they had been here. Whereupon he applied to Troup to furnish their works with some necessaries, and to be as speedy in the advances of his rent as he could, without adhering strictly to the conventional terms of payment ; as appears from a letter he sent to him in September 1730, wherein the Colonel promised, ‘ That such advances shall be allowed as money paid, ‘ upon account of the tack-duties ;’ and then adds, ‘ if it shall appear that you ‘ are in advance, before the rent is due, you shall have lawful interest allowed ‘ you.’

In consequence whereof, Troup was in use to make advances before the conventional terms in the tack, until about the end of the year 1732, when it would seem the Company’s affairs had gone into disorder ; for, on the 9th of November that year, Sir John Merress, one of the annuitants, intimated his right to Troup ; and, in the January thereafter, a multiplepinding was raised in his name, (though without his knowledge) in which a process of mails and duties at the instance of the annuitants was repeated, wherein an interlocutor was pronounced that session.

After this, they brought another action against Troup ; in which they insisted particularly for the rent of crop 1732.

Against which it was *pleaded* for the defender : That in consequence of the above letter, he had *bona fide* made advances for the Company, to the amount of that year’s rent before he was interpellated ; which, it is believed, he was in safety to do ; as the legal terms of payment, scil. Whitsunday and Martinmas 1732, were past before the above process of mails and duties was raised ; and, although by the tack, the conventional terms were later, yet, as he was empowered by Colonel Horsey to make advances earlier, the conventional terms must be understood to be brought forward ; which, as the Company might undoubtedly have done at first, so it was equally in their power, or any having authority from them, thereafter to alter to the legal terms.

Answered for the pursuers : Their real rights in the lands gave them a title to the rents, especially to such as fell due after they had interpellated the defender ;

so that, granting he had paid that year's rent, it could have afforded no defence in the present question. At the same time, what he pleads as payment, cannot so properly be called payment of rent, as a compliance with orders, by a correspondent or factor, nothing being paid directly to the Company, or any having their order to levy rents. However, supposing it were to be considered as such, yet, being made prior to the terms agreed on by the tack, it cannot liberate the defender; seeing those who pay before the term of payment, do it at their own hazard; and therefore ought to provide for their relief. If the law stood otherwise, it would be impossible to prevent heritors from evacuating the rights of creditors: And, if payment before the terms agreed on in the lease cannot liberate a tenant, the defender is not entitled to plead compensation or retention on account of money laid out by him; seeing that would put him in a better situation as a creditor, than if he had fulfilled the obligation contained in the tack.

As to the pretence, the advances were made *bona fide* before interpellation, that is fully removed by the intimation to him before Martinmas 1732, of Sir John Merress's right, which contains an assignation to mails and duties: But the legal terms ought not to be considered as the rule whereby to determine this point; seeing it has been often decided, that interpellation before the conventional terms is sufficient; which is founded on this reason, that before such period, the tenant cannot be compelled to pay; nay, so little are the legal terms regarded, that payment by a tenant, at the terms agreed on, has been found to liberate him, though before the legal ones; therefore, as he was interpellated by the above process of mails and duties, long before the conventional terms, he must still be liable to the pursuers; as it would be of dangerous consequence to allow proprietors, after their granting infeftments of annualrent, to evacuate the same, by taking money before hand.

Replied for the defender: That the pursuer's infeftments being only in security, give no right to the rents, until they are claimed in a proper process, before which he behoved to pay his rent to his masters. Nor can it make any variation in the present argument, whether the legal or conventional terms are to regulate this question; if it is the legal ones (which is the rule betwixt heirs and executors, fiars and liferents,) there was no proper interpellation made before these elapsed: If, on the other hand, the terms in the tack are to settle it, these were altered by the posterior agreement with Colonel Horsey, at a time when there was no view to prevent the diligence of creditors.

And, with regard to the circumstance, that one of the annuitants intimated his right before the last legal term, that cannot avail him; as the defender could not refuse to pay his rent to his masters, upon pretence of such intimation; nothing but a judicial interpellation, by process, where the pursuer's titles are produced, being sufficient for that purpose, as Stair expressly lays down, lib. 1. tit. 18. § 3.

- No 13. THE LORDS found, That the defender might pay according to the instructions in Colonel Horsey's letter, after the legal term, and before the conventional, before interpellation by process.

C. Home, No 16. p 37.

S E C T. II.

Payment to a Person who has lost his Right; to one who is not the true Creditor; to a Creditor denuded. *Bona Fide* Payment must be actual and real Payment.

- No 14. 1610. February 10. BLACKBURN *against* WILSON.

TENANTS who have made payment of their farms mails and duties to their master, being at the horn, before declarator was got of his escheat, will not be compelled to pay over again the said farms and duties of the same years, to the donatar obtaining thereafter declarator of their master's escheat and liferent; but the donatar will have action for these terms only against the rebel's self.

Fol. Dic. v. 1. p. 113. Haddington, MS. No 1795.

- No 15. 1610. February 23. LYON *against* LAW.

INTIMATION of an assignation being made only to a cautioner, the LORDS found, that the principal was in *bona fide* to make payment to the cedent, so as to liberate him and all other cautioners, no intimation being made to him.

Fol. Dic. v. 1. p. 113. Haddington, MS. No. 1971.

*** See This case, *voce* CAUTIONER.

*** It was found in conformity with the above, where intimation was made at the market-cross of the head burgh of the shire, which was no regular intimation; 21st July 1632, Hume against Hume, No 47. p. 848.

1626. March 18. PATERSON *against* EXECUTORS OF PATERSON.

No 16.
Payment being made to one confirmed executor, *qua* nearest

A PURSUIT being moved at the instance of John Paterson, as donatar to the bastardy of umquhile Robert Hunter, and as having right from the King as *ultimus hæres* to umquhile James Hunter, son to the said bastard; which son