the custom of the burgh of Wigton, such rentals were extended to the first heir of the receiver, which he would prove by a testificate of the Bailies and burgh thereof. THE LORDS found the custom of the burgh of Wigton only probable by writ or oath of party. No 25.

Spottiswood, (RENTAL.) *p.* 289.

*** This case is also reported by Auchinleck:

1631. *March* 5.—RENTALS set by the town of Wigton to certain persons and their heirs *ad perpetuam remanentiam*, in a removing pursued against them by the Earl of Galloway, this sustained to defend the first heir, who, by virtue of the said rental had apprehended possession, the defenders proving that the town of Wigton had been in use to set many rentals of this kind, and that the heirs had bruiked conform to such unquarrelled.

Auchinleck, MS. p. 203.

1629. *March* 5. L. LEY, Younger, *against* KIRKWOOD.

No 26.
A rental was found not to fall, being assigned, where it bore a power to remove, out-put, and in-put tenants, to let subtacks, and to grant subaltern rights.

A service done by the tenants since the warning, which was a part of the duties used to be paid for the lands, done at command of the pursuer's grieve, and who was sole guider of his affairs, the pursuer, who made the warning, being then in England, the time of the command, and doing of the service, was not found relevant to defend the tenants from removing, by virtue of that warning, for none could prejudge the warning made and subscribed by the master but himself, or some having power from him, whether he had been without or within the country; for no servant might do that but by express warrant to that special effect. *Item*, a rental set to a man and his wife, during their lifetimes, not bearing to be set during the longest life of them two, but during their lifetimes, was found sufficient to defend the relict during her lifetime, and was found to be expired by the decease of the husband; for otherwise, if the wife had died, and the husband had survived her, it would not have defended him thereafter during his lifetime, which had been unreasonable. *Item*, a tack set for payment of a hundred merks yearly, to endure ay and while the tacksman were paid of a thousand merks lent to the setter, and the tack duty therein allowed to the tacksman for the annual of the said money, was not found sufficient to defend against the removing pursued by the singular successor, for so it had neither ish nor duty. *Item*, a rental bearing power to the rentaller to remove, out-put, and in-put tenants, and also to place subtenants under himself, and to set subtacks, and give subaltern rights

No 26. to others, the disposition of such a rental to another made not the same to fall. See PRESUMPTION. TACK.

Clerk, *Gibson.*

Fol. Dic. v. 1. *p.* 485. *Durie, p.* 433.

1630. *February* 26.

WILLIAM LOCKHART of Carstairs *against* The TENANTS of BOTHWELL.

No 27.

IN a removing pursued by William Lockhart against the Tenants of Bothwell, *alleged* for William Rae, Absolvitor, because he was rentalled in the half of the lands libelled, for terms to run. *Replied*, He could not clothe himself with the said rental, because it being only personal, not set to his heirs or assignees, he has denuded himself thereof by assignation to Gavin Rae, who, by virtue thereof, is in possession of the said lands. *Duplied*, His rental standing cannot be taken away by way of exception, but by reduction or declarator.—THE LORDS repelled the exception in respect of the reply, which they sustained by way of exception.

Fol. Dic. v. 1. *p.* 484. *Spottiswood*, (RENTAL.) *p.* 290.

*** Durie reports this case:

THE defender alleging in a removing, that he could not remove; because he was rentalled in the lands libelled for terms to run; and the pursuer *replying*, That the said rental was personal, only set to himself, without any mention of his heirs or assignees, and so that it might not be disponed by him to any other; and that it was true, that the defender had disponed the same to another, viz. ———, who was also in possession of the said lands, whereby the rental was extinct;——THE LORDS found this reply relevant; and that the rental could not defend neither the rentaller's self, who was only pursued to remove, nor yet the assignee thereto, if he had been pursued also, as he was not. But the LORDS found, that the pursuer was holden to prove, that the assignee was in possession of the land, albeit he was not warned, without which, many of the Lords thought, if the reply had not been proponed upon his possession, that the rentaller himself, who was only pursued, might have maintained his possession, if he had retained the same, by virtue of that rental, against the removing, albeit so transferred; which opinion would appear to be hard; for, if the disponing of a rental will make it fall to the assignee, if he had been warned, and had possest as it was found, (the rentaller's possessing in the assignee's name, and to whom he was become sub-tenant, by payment of the duty for the land), can never defend the rentaller himself, seeing his possession behoved to be reputed the assignee's, so that the retaining of the possession is of no force.

Act. *Mowat.* Alt. ———. Clerk, *Gibson.*

Durie, p. 495.