1623. *March* 21. L. CRAIGIE WALLACE *against* His TENANTS.

No 23.
A rental found null *in toto*, the rentaller having assigned more than half of the lands, without the master's consent; but, if less than the half had been assigned, the irritancy would only have taken effect as to the part assigned.

A clause, allowing a rentaller to input and output tenants, does not entitle him to assign.

IN an action of removing, pursued by the L. Craigie Wallace, against his tenants, an exception being proponed by one of the defenders, founded upon his rental, set to him by the pursuer's father, during the excipient's lifetime; whereto it being *replied* for the pursuer, That that rental could not furnish any ground of defence, because, the defender had assigned and disponed his rental to another, which disposition made the right of the rental to become extinct, as well to the rentaller himself, as to him to whom the same was assigned and disponed: *Duplied* for the defender, That the rental was not personally set to the defender, but thereby also, by a special clause thereof, he had power to output and input tenants and subtenants in the lands under him; in respect of the which clause, he had power to dispone upon his rental to another, being of the like degree with himself, seeing that clause behoved to import the same, so that, by the disposition, the rental could not fall. THE LORDS found, that, notwithstanding of the clause, bearing power to input and output tenants and subtenants, under the rentaller, yet that he had no power, by that clause, to assign or dispone the rental; and found the disposition of a rental *in toto*, or of the most part of the land contained in a rental, made the whole rental to fall *in toto*; but, if the disposition was made of a less part than the half of the lands contained in that rental, such dispositions should not make the whole rental to fall, but only *pro tanto*, *viz.* for the part disponed, and that the rental should stand, and subsist for the rest of the lands, which were not disponed, where the disposition was not made of all, or the most part of the lands therein contained.

Act. *Hope & Lawtie.* Alt. *Nicolson & Miller.* Clerk, *Gibson.*

Fol. Dic. v. 1. *p.* 484. *Durie, p.* 60.

*** See Kerse and Haddington's reports of this case, No 34. p. 6432, *voce* IMPLIED DISCHARGE AND RENUNCIATION.

1625. *July* 5. L. AITON *against* TENANTS.

No 24.
The inputting of a subtenant has not the effect of a forfeiture where there is no subtack or other written deed.

IN a removing pursued by the L. of Aiton, who had bought some lands from L. Wedderburn, against the tenants of the lands, for removing therefrom, the LORDS found, that albeit the defenders, who had rentals of their lands, had put other tenants in possession of the lands, wherein they were personally rentalled themselves, yet by the putting of others in possession thereof, they had not tint nor annulled their rentals, except that they had expressly disponed the right of their rental; and that the putting of others in the real possession of the land, was not a sufficient cause, to debar them from the

No 24.

right of their rental; but the setting tacks by the rentaller annuls the rental, except they be only set to his eldest son.——See No 21. p. 7189.

And in the same process, the LORDS found, that albeit the L. of Wedderburn, author to the pursuer, had before the pursuer's right, written with his own hand, in his own rental-book, and had insert therein, the defenders to be rentalled to him, tenants and rentallers of the lands, during their lifetimes; and that they offered to prove, that it was the custom of the barony, that those who were so rentalled, bruiked during their lifetime; yet that that was not sufficient to maintain them against this removing; for albeit it might maintain them against the writer himself, so long as he remained heritor, yet it was not enough against a singular successor, they never being lawfully nor formally rentalled, by a perfect writ subscribed by the heritor before witnesses, and delivered to the party, whereby both the setter and receiver might be *hinc inde* obliged to the other; for that writing in the book would not bind the defenders, nor be a good ground, which would produce action thereupon, against the defenders, if they pleased to refuse the same; and so that allegeance was repelled. In this same process also, the LORDS found, that a rental perfected, and delivered to the defenders, bearing the defenders to be rentalled to the setter, and his heirs, without adjecting therein of any certain, special, and definite time for the which the rental should endure, was sufficient to maintain the defenders, in the right and possession of the lands contained in the rental, so long as the setter and receiver were in life both together; and that the same expires with the death either of the setter or receiver; so that how soon any of the two died, the same became extinct, with the death of the first of the two deceasing, and endured no longer; and it was found, that the excipients needed not to prove, that it was the custom of the barony, that rentals set after that manner, should endure during the space foresaid; but that albeit there had been no such custom, yet that such rentals should be sufficient to maintain the rentaller, during that space, but no longer, albeit the rental bore, 'them and their heirs 'to be rentalled to the setter, and his heirs;' likeas, the LORDS found, that albeit the rental was but personally set to the receiver, and that no mention was made, neither of the setter's heirs, nor receivers, yet the same, albeit containing no definite time, should last during the same space.

Also upon February 4. 1629, it was found betwixt Maxwel and Graham, that a rental set by the Master of Nithsdale, having power from the Earl to set rentals, insert in the Earl's court-books, and extracted by the ordinary clerk, who was the Earl's servant, was enough to defend from a removing pursued by a tacksman, acquiring tack from the Earl's self, after that rental, viz. the defender therewith proving, that about the time of his rental, there are other rentals inserted in that same court-books, by virtue whereof the rentallers bruik; and found the rental sufficient, albeit it was not subscribed by the setter. See TACK.

Act. *Hope & Belches.* Alt. *Nicolson.* Clerk, *Gibson.*

Fol. Dic. v. 1. p. 484. Durie, p. 172.