1627. *June* 26. E. GALLOWAY *against* TAILZIFER.

No 25.
A rentaller having excambed his lands with another rentaller who had an equal quantity of ground, the parties exchanged possession. Found, that the rental was thereby extinct, though the contract of excambion bore, that if the setter should not consent, the contract should be null.

IN a removing at the E. of Galloway's instance, against Tailzifer, who defended himself with a rental of the lands libelled, which was set to his father, and his heirs *ad perpetuam remanentiam* by the town of Wigtoun, of whom the saids lands were holden, the LORDS found the exception upon this rental of the tenor foresaid, sufficient to defend this defender, as apparent heir to his umquhile father, to whom and his heirs the rental was set; he proving that it is the custom of the town of Wigtoun, that the rentals of the like tenor, viz. set to men and their heirs, have ever been sufficient to maintain the heir of the first rentaller, after the first rentaller's decease, in possession of the lands, during the heir's lifetime; and which was sustained, albeit the pursuer *replied*, That that rental behoved to be found expired after the decease of the first rentaller; and that it could last no longer, neither was of any force to defend his heir, being against the nature of a rental; and albeit by the custom of that burgh, setters of the rental, it might be maintained against themselves, if they were pursuing the defender to remove, yet it could not be respected against this pursuer, who was heritably infeft in the lands libelled, by the town of Wigtoun, upon the resignation of his author, who was also heritably infeft therein by them, long before the date of this rental; which reply was repelled, and the exception sustained, as said is; but the custom was found by the LORDS ought to be proved by some sentence, given in *foro contradictorio* betwixt parties, where the Judge allowed the said custom, and found the same proved; and found it not probable by the testimony of the burgh, declaring that that was their custom, nor by any trial showing that the rentaller's heirs bruicked so *de facto*, which was not found sufficient.

Act. *Stuart & Nicolson.* Alt. ——. Clerk. *Scot.*

1631. *February* 10.—EARL of Galloway pursuing removing against certain burgesses of Wigtoun, from certain lands, wherein he was infeft by an heritable feu-charter, upon the resignation of M'Dougal of Mathermuir, who was infeft in feu therein also of before, by the town of Wigtoun, to whom the lands pertained in burgage, as part of their common good; and the defender *alleging* that the said heritable feu was null, in respect by the 36th act, 3d Parl. James IV., and by the 185th act, 13th Parl. James VI., it is statute, 'That the 'burrows may not set their common good for longer space than three years;' this allegeance was repelled; for it was found, that this right, which followed upon another prior heritable right standing, there being two heritable infeftments, could not be found null *ope exceptionis*, being proponed in this removing, and not being quarrelled by the town, nor by any party, who had any other better lawful right; and it being *alleged*, That the sasine was null, for all the lands libelled therein contained, except that land only, whereat express sasine was taken, and was recorded in the clause. *Acta erant hæc, &c.* THE LORDS repelled the allegeance, and sustained the sasine for all the lands lying contigue

No 25. to the land, whereat the sasine was taken, seeing that the same held of one superior, and was one tenor of holding; but it was not respected that the superior had united them, and had appointed a sasine taken at such place, to serve for all the lands, seeing it was not confirmed by the King.

Act. *Stuart & Neilson.* Alt. *Nicolson & Gilmour.* Clerk, *Scot.*

March 15.—IN this cause of the Earl of Galloway, mentioned February 10. 1631, the LORDS found, that a rental to a man and his heirs, should endure after the decease of the first rentaller, to one heir for his lifetime, and should not expire by the decease of the receiver, it being proved by other rentals of the like tenor, that the setters have been in use to set such rentals, and that the first heirs have been in use to possess the same, without question therein made to them; after the which first heir's decease, the LORDS found the rental should expire, and endure no longer. *Item*, It was found, that a rentaller by contract excambing with another rentaller, where the rentals were both of a like quantity of land, and where the excambion took effect, by exchanging of possessions conform thereto, that thereby the rental was extinct, and the parties had tint the benefit thereof; albeit in the contract of excambion, it was provided, that if the setter should not allow of the excambion, that the contract in that case should be null; for that provision was found to be elusory, and not to be respected, no more than if a vassal of ward lands had given charter and sasine thereof to another, and had provided therein, that if the superiors consent should not be obtained thereto, that it should be null, which provision could never save from the recognition; even so after possession following upon that contract, the provision could work nothing against the setter of the rental; but because the defender, to maintain his rental, *duplied*, That the contract took never effect, seeing he offered to prove, that either party, notwithstanding thereof remained in continual possession of the lands, contained in their own proper rentals; this duply was admitted, and the excipient was preferred to prove his possession, for sustaining of his rental against the pursuer's triply of possession, tending to annul the said rental. *Partibus ut illic comparentibus.* See JUS TERTII. PROOF. TACK. UNION.

Fol. Dic. v. 1. *p.* 484. *Durie, p.* 300, 567, & 582.

*** Spottiswood reports this case:

1627. *June* 22.—IN an action of removing pursued by the Earl of Galloway against his Tenants, it was *excepted* for one John Taylor, That his father was rentalled in the lands libelled by the town of Wigton, he and his heirs *ad perpetuam remanentiam*; it being found by the LORDS, that that rental should endure only for the setter's and receiver's lifetime *conjunctim* (as had been found before between Wedderburn and the Tenants of Kymergham:) It was *duplied* by the defender in fortification of his rental, That he offered to prove, that by

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