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.

*** This case is also reported by Auchinleck:

No 27.

WILLIAM LOCKHART of Carstairs being infeft in the lands of Bothwell, which pertained to the Laird of Cleghorn, pursues the Tenants for removing. Compears William Hay, one of them, and alleges he has a rental set to him of a room of the said lands, by the Laird of Cleghorn, long before the pursuer's right, and warning, and by virtue thereof was in possession. To which it was *replied*, That the said rental cannot now defend him, because he has made assignation and disposition thereof to another, who, by virtue thereof, is in possession, and so is denuded of that right, which cannot return to him, but must accresce to the master; which allegeance the LORDS found relevant, and to be received by way of reply.

Auchinleck, MS. p. 203.

1630. *July* 28. LA. MAXWELL *against* Her TENANTS.

No 28.
An assignation made by a rentaller to his children, was found not to be such a deed as to make the rental fall.
In this case, the rentaller retained possession with his children.

IN a removing La. Maxwell *contra* Her Tenants, one of the defenders alleging, that he was rentalled by the pursuer, in the lands libelled, during his lifetime, and by virtue thereof in possession;—the pursuer *replying*, That the rental bore a clause and provision, 'that if the rentaller disponed his lands to 'any other person, it should be null,' and that he had disponed it to his own bairns, who were in possession of the lands;—the defender *duplying*, That the disposition to any of his bairns made it not to fall, seeing that disposition could not be reputed, as if he had disponed his rental to a stranger, which behoved to be the only meaning and interpretation of that clause of the contract, specially seeing he and his bairns, to whom the disposition was made, remained in household, and dwelt together, and possest altogether;—THE LORDS found the exception and duply relevant; and found the disposition, made by the rentaller to his own bairns, not to be such a deed as to make the rental fall, specially seeing he retained the possession with his said bairns; whereas, if he had not been in possession, but only the bairns, to whom he disponed, the matter would have been the more disputable.

Act. ——— *et Douglas*. Alt. ———. Clerk, *Hay*.

Fol. Dic. v. 1. *p.* 484. *Durie, p.* 536.

*** Auchinleck reports this case:

THE Lady Maxwell against the Tenants of ———. It is excepted by some of the tenants, That they had rentals set to them by the pursuer. To which it was *replied*, That the said rentals were null, because they were granted with