

\* \* 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. Compares 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.

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 disposed his lands to ' any other person, it should be null,' and that he had disposed it to his own bairns, who were in possession of the lands ;—the defender *duplicating*, That the disposition to any of his bairns made it not to fall, seeing that disposition could not be reputed, as if he had disposed 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 disposed, the matter would have been the more disputable.

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.

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

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provision, that in case assignation or disposition were granted or made of them, without consent of the setter, the rentals should be null ; and true it is, that sundry of the defenders had made assignation to their bairns, and put them in possession.—THE LORDS found, that such dispositions and assignations, made to mens' own bairns, could infer no nullity.

*Auchinleck, MS. p. 204.*

1632. February 21. L. JOHNSTON against Captain JOHNSTON.

No 29.

A rentaller assigned his rental, and the assignee entered to possession. The irritancy being thus incurred, it was found, that a posterior sub-tack could not support the assignee in possession.

IN a removing, the defender alleging that he had a sub-tack of the lands libelled, set to him by ———, who was liferent rentaller, and who was yet living ; and which rental was set to the rentaller, his heirs, executors, and assignees, and by virtue of the sub-tack in possession ; the pursuer *replying*, That the rentaller, before the setting of this sub-tack, had disposed this rental to the same defender, by virtue of the which disposition he became in possession of the lands, and was possessor thereof, and of the profits and duties, a whole year before he acquired the sub-tack, by the which disposition the rental became extinct and null, and so can neither defend the rentaller nor acquirer of the right thereof ; and, consequently, the same being null, there could no valid sub-tack be made thereafter, which could defend ; even as after the acquiring of an infestment of the lands of ward-holdings, whereby the benefit of recognition was acquired to the superior, the receiver of the ward-right could never thereafter take a feu-infestment, which could validly maintain him against the superior ; and the defender *duplying*, That the disposition could not prejudice him to take a sub-tack, after that he knew that the disposition would not be effectual to him, specially seeing he clothes not himself with the disposition, but with the sub-tack, and which he alleges he might lawfully take before ever he was called in question for the right of these lands, or that the nullity of the rental was obtruded ; for before the rental was quarrelled as null, by reason of the alleged disposing thereof, he might lawfully renounce that right, and take a better right, viz. the sub-tack, and which he having taken *debito tempore*, as said is, before any question was moved for these lands, the same should defend him in this judgment possessory ; and he cannot be so summarily removed, except the rental were reduced for that cause ; THE LORDS repelled the said allegation and *duply*, and admitted the reply, to take away the rental in this same judgment, without reduction ; for the LORDS found this disposition made before the sub-tack, albeit not quarrelled before the sub-tack, having taken effect by one year's possession before the sub-tack, was sufficient to make the rental become null, and consequently that the rentaller could not validly set thereafter a sub-tack thereof.

Act. *Stuart et Cunninghame.*

Alt. *Nicolson et Burnet.*

Clerk, *Scot.*

*Fol. Dic. v. 1. p. 484. Durie, p. 622.*