officers are in use to summon persons to the Bailie Court without a Magistrate's warrant; 2. As a precept, under the master's hand, is a sufficient ground to warn tenants to remove from land in the country, an heritor's verbal order to an officer within burgh, where a verbal order to warn sufficeth, is sufficient without the warrant of a Bailie; 3. The Magistrates of Edinburgh, in the beginning of the year, use to give a general order to their officers to chalk doors, when required by landlords; and what Craig says, may be understood of that general order. No 75.

Fol. Dic. v. 2. p. 336. Forbes, p. 336.

*** Fountainhall reports this case:

1709. *June* 25.—CHARLES DUNCAN, jeweller in Edinburgh, having right to a shop in the Parliament close from one Penman, he pursues Eupham Barton, the present possessor, to remove. She *objects*, The warning is null, not bearing, that the officer had any warrant from a Bailie to do it, which Craig de Feud. page 197. *in actione de migrando*, requires as necessary, *ut officiarius urbis publicus sit Balivi mandato instructus*; and Stair, Tit. Tacks, § 40. requires the same, yet he acknowledges it is done by the symbol of chalking the doors, without giving any intimation or written copy to the party warned. *Answered*, There is neither law nor custom within burgh, requiring a personal intimation of the warning, or that the officer's execution should bear the Bailie's mandate to him, which is presumed, and is a general warrant and order to execute all such warnings, by chalking the doors, whenever they are employed, and needs no other special mandate. THE LORDS repelled the objection, and sustained the warning.

Fountainhall, v. 2. p. 507.

1711. *July* 11.

JOHN CARMICHAEL, in the Park of Douglas, *against* WILLIAM BERTRAM of Nisbet, Chamberlain to the Duke of Douglas.

No 76.
One possessing by tack from a rentaller, being summarily removed after his death, between terms, without previous warning, the removing was found unwarrantable, al-

THE Earl of Hyndford, who had a rental of the Park of Douglas from the late Marquis of Douglas, having set a tack thereof to John Carmichael, with this provision, That it should be null, in case the Earl's rental right should fall before expiring of the tack, William Bertram, the Duke's chamberlain, did, at Martinmas after the Earl's death, eject John Carmichael *via facti* betwixt terms, without previous warning, or order of law. Whereupon he raised a process of ejection and intrusion, with a conclusion of damages against William Bertram, upon this ground, That the pursuer, a tenant, or labourer of the ground, though his author's right was expired, could not be summarily removed, but behoved to be allowed to possess till the next Whitsunday, act 26. Parl. 3. Ja. 4.

No 76.
though the rentaller's heir had, after his predecessor's death, renounced the possession, and the tack, by an express clause therein, was to be null, upon the expiry of the rental.

Alleged for the defender, Rentals, not mentioning heirs, subsist only for the rentaller's lifetime; and even when heirs are mentioned, expire with the death of the first heir, Stair, Instit. Lib. 2. Tit. 9. § 19. Rentallers, as kindly tenants, should labour and possess themselves, and have no power to assign or subset; and if they do, both the assignation, or sub-tack, and rental itself, become void and null, by way of exception, or reply, Stair, Ibid. § 21. Whence it is clear, 1. That the Earl of Hyndford's rental fell, not only by his death, but also by his granting a sub-tack to the pursuer; 2. The pursuer's tack became null upon the expiring of the Earl's rental, by express paction in the said tack; 3. The setter of a rental is not bound to notice any person but the rentaller; and any others in the natural possession are presumed to be only his servants, seeing he cannot possess by either sub-tenants or assignees; 4. The present Earl of Hyndford, after his father's decease, intimated, by a letter to the defender, to take possession in the name of the Duke; and so the defender having the rentaller's consent, was *in tuto* to enter the possession without any warning; yea, any possession the pursuer had, after the Earl's rental fell, and renounced, was at best but very precarious; and summary removing, without warning, obtains where the possession is vicious, or precarious, Stair, Instit. Lib. 4. Tit. 26. § 14.

Replied for the pursuer, The nature and effect of rentals have much varied. Ancient and later decisions concerning them differ; and, by present custom, tacks by rentallers are sustained; yea, though rentals *de jure* expire upon the rentaller's death; yet they are in use to be renewed or continued with their successors. Therefore the pursuer could not be summarily removed without warning, more than any other tacksman whose tack is expired; 2*do*, Seeing the pursuer entered by a tack from the Earl, who had a right for his lifetime, his possession was neither vicious, clandestine, nor precarious; and so he is justly entitled to the protection that law affords to all righteous possessors. The Earl's renunciation could not prejudice the pursuer; for, as the Earl could not have removed him without warning, neither could he impower, by his renunciation, the Duke of Douglas to do it.

THE LORDS found, that the summary removing of John Carmichael, betwixt terms, from the lands libelled, without a previous warning, was unwarrantable.

Fol. Dic. v. 2. *p.* 335. *Forbes, p.* 521.

*** Fountainhall reports this case:

1711. *July* 13.—THE last Marquis of Douglas set a rental or liferent-tack to the late Earl of Hyndford, of the room of Know, lying in the park of Douglas, and he subsets it to one John Carmichael. Hyndford, the principal tacksman, dying in September last, Bertram of Nisbet, Chamberlain to the Duke of Douglas, removes Carmichael at Martinmas last, after he had tilled and laboured a part of it by tacit relocation; and enters summarily to the possession in the Duke's name. Whereon Carmichael raises a summons of ejection and intrusion

against Bertram, who *alleged*, No wrong done you; for Hyndford your author's right, was but a rental, which, by the very nature of it, expires with the setter, and, at farthest, by the death of the rentaller; and your sub-tack bears its dittay in its own bosom; for it has an express clause, that when the Earl of Hyndford's right shall expire, his tack shall be *ipso facto* void and null; and the rental fell by Hyndford's death; 2*do*, By our constant practice, rentals are not assignable, and is a ground of forfeiting and losing them, as Stair, Tit. Tacks, observes, and backs with innumerable decisions; and such assignations to rentals is as great a nullity as the alienating or subsetting of ward lands without the superior's consent. Likeas, this present Earl of Hyndford has renounced the possession, and so *resoluto jure dantis* Carmichael had no pretence to retain it, and might be summarily removed without a formal warning. *Answered*, Law and equity has provided better for poor labourers of the ground; for if they be not better secured against such violent and tumultuary removings, (which Craig observes to have been an old abuse with us, and gave rise to sundry correctory acts amending it,) then such poor folk shall be quite dispirited and discouraged, whereby the policy and improvement of our lands shall, in a great measure, cease, and the prejudice quickly become national; and, from a righteous and deliberate view of this, that notable act of Parliament 1491 was made, declaring that the tenants of ward, or liferented lands, shall not be removed till the Whitsunday after, they paying their former rent, on which these poor, but useful people, have relied, and placed both their confidence and security: now Carmichael subsumes he is precisely in the terms of that act; and Sir George Mackenzie, in his Observes upon it, extends it to parallel cases; their simplicity placing them more immediately under the protection of law, than other persons more knowing and intelligent; and, as to Hyndford's right, it is not produced, so *non constat* whether it was a rental or not; and his son's renouncing cannot prejudge the sub-tenant, it being after he was dispossessed; and Durie observes, that a liferent tacksman may subset, see 5th July 1625, Ayton *contra* his Tenants, No 24. p. 7191., where the nature of rentals is explained. Some of the Lords thought the Duke of Douglas being proprietor, was not bound to notice the sub-tenants, Hyndford's right being expired. Yet the plurality found the summary removing, without a warning, unwarrantable; yet, in regard of the dubiety of the case, they thought the violent profits and damages might be less. No 76.

Fountainhall, v. 2. p. 659.