1758. *December* 19. JAMES LUNDIN of Drums, *against* JAMES HAMILTON.

No 86.
Warning only necessary in removings from land, not from a house, though in the country.

THE question which occurred betwixt these parties was, Whether a regular warning was necessary to be executed forty days before Whitsunday, previous to any process of removing, against a tacksman of a house in the country? or, Whether the act 1555, anent warnings, does not apply only to the possessors of lands?

See Craig, Lib 2. D. 9. § 18.; Stair, Title TACKS, § 38.; Sir George Mackenzie, Observ. on said act.; Bankton, vol. 2. p. 110.; 21st November 1671, Riddel, No 67. p. 13828.

"THE LORDS unanimously found, that the act 1555 did not extend to houses in the country."

Reporter, *Lord Justice-Clerk.* Act. *D. Graeme.* Alt. *Lockhart.*

G. C. *Fol. Dic. v.* 4. *p.* 223. *Fac. Col. No* 149. *p.* 266.

1760. *February* 22. TENNENT and FRAZER *against* TENNENT of Westerinch.

No 87.
Upon the death of a tenant having a liferent-tack, the proprietor may enter at short-hand, without giving any warning.

JEAN TENNENT, possessed of a liferent-tack of lands, having died in December 1755, the proprietor, without warning her heirs to remove, entered at short-hand into the possession, which produced a process against him at the instance of the heirs, concluding that they were entitled to continue the possession until they were removed by due course of law; and also concluding damages against the proprietor for his violent intrusion into the land.

THE LORD ORDINARY having found, That the pursuers could not be lawfully removed from the possession without a previous warning; and having therefore found the defender liable in damages, the COURT, upon a reclaiming petition, altered the interlocutor, and assoilzied from the process. Jean Tennent could have no heir in a liferent-tack. Her tack ended with herself, and no person but the proprietor was entitled to apprehend the possession. There could be no occasion to warn Jean's heirs, if they had no title to possess. They could not even claim any part of the crop, because all the corn was sown after Jean's death.

Fol. Dic. v. 4. *p.* 222. *Sel. Dec. No* 161. *p.* 221.

*** This case is reported in Faculty Collection:

JOHN TENNENT of Westerinck, granted a tack of part of his lands called the Glebe, worth about 200 merks a-year, to Jean Tennent, his cousin and housekeeper, during all the days of her life, for the yearly rent of one merks Scots; and he bound John Tennent his heir, by a disposition of the estate in his fa-

No 87. vour, to maintain her in possession of this farm, and plough and labour it for her.

John Tennent, the granter of the tack, died in 1740; and Jean Tennent entered into possession, and peaceably enjoyed the glebe, at the elusory tack-duty, till her death, which happened about the beginning of January 1756. John Tennent now of Westerinch immediately thereupon took possession of the farm without any warning, ploughed and sowed it, and reaped the crop, though a protest was taken against him in name of Robert Tennent, brother and heir to Jean, That he could not be deprived of the farm without a warning.

Robert Tennent brought a process against John, for having it found, That he as heir to Jean, had right to continue the possession of the lands until removed therefrom by a legal warning; and therefore concluding for the price of the crop, damages, &c.

Pleaded for the pursuer, That by the statute 1555, it is enacted, That tenants cannot be removed from their farms without a legal warning, that they may have time to be provided in new habitations. This is a general rule, and takes place in all tacks. A tack granted by a liferenter is effectual to protect the tenant from removing on the liferenter's death without a warning; by analogy of law, a liferent-tack set by the proprietor must be effectual to protect the heir of the liferenter from removing without warning.

The heir of the liferent-tenant has right to possess without making up any titles; and therefore must continue the possession till he is legally warned to remove. Nor can it make any difference, that the rent is small; for otherwise a tenant might be summarily turned out whenever he does not pay a rent adequate to the subject possessed.

Answered for the defender; That warning is only necessary to prevent tacit relocation. The heritor thereby intimates to the party in possession, that he must remove: It is therefore only necessary when one is in the lawful possession. A tenant who has enjoyed his farm during the tack, is lawfully in possession; and therefore, though it is at an end, he may continue on the same conditions till he is legally warned; and after his death, his heir, who is *eadem persona cum defuncto*, may maintain the possession. But in a liferent-tack, the case is very different. Then the duration of the tack is expressly limited to the tenant's life. His heir cannot succeed. In such a tack the defunct has no heir, because he is directly excluded; though therefore the heir should enter into possession after the tenant's death, he possessed without a title; and therefore cannot plead tacit relocation.

Suppose Jean Tennent had paid a high rent for the farm, and after her death, her heir, instead of entering into possession, had left the farm unoccupied; he could not have been found liable for the rent. It would have been a good defence, That the tack was limited to the life of his predecessor, and that he was not entitled to possess. If no renunciation was necessary on his part, neither

was a warning necessary, on the part of the proprietor, to remove him from the farm. No 87.

Whatever may be the law when the tenant pays an adequate tack-duty, the case is very different here, where the rent is one merk instead of 200, which is the real value of the farm. This can by no means be looked upon as a tack, but rather as a right of liferent. Jean Tennent possessed the liferented lands herself; and therefore, as she died before the crop was sown, her executor had nothing to claim; and as the liferenter's right was totally at an end by her death, the fiar might enter into possession without the necessity of a warning.

"THE LORDS found, That there was no necessity for a warning in this case; and therefore assoilzied, and decerned."

Act. Ja. Dundas. *Alt. Macqueen.* *Clerk, Justice.*

P. M. *Fac. Col. No 214. p. 388.*

1767. December 15.

ANDREW WAUCHOPE of Niddery *against* ARCHIBALD HOPE.

MR HOPE having acquired right to a tack of the coal of Niddery, which expired at Martinmas 1767, Mr Wauchope, in spring that year, executed a warning against him, and brought a process of removing; but the warning having been informal, Mr Hope was assoilzied. Mr Wauchope having brought another process of removing in October, not founded upon the warning, "The Sheriff sustained the defence pleaded for Mr Hope, of the pursuer's having neglected to take the proper steps for getting him removed, either in terms of the act of Parliament, or act of sederunt, and assoilzied." No 88.

The act 1555, with regard to warnings, does not apply to coal-works.

See No 55. p. 13820.

Mr Wauchope presented a bill of advocation, which, with the answers, was taken to report by the Lord Ordinary.

Pleaded for the pursuer; That the act 1555 only applies to rural subjects. Prior to the act, removings from lands were very summary. The proprietor broke a wooden spear before the tenant's door, and told him he was to remove. This might have been done upon the term-day, and followed by a *brevi manu* ejection, which often have brought great distress and inconvenience to tenants of lands. It was to obviate this that the statute was enacted. Hence, the statute has been considered by all the writers on our law as respecting rural subjects only; Craig, L. 2. D. 9. § 18.; M'Kenzie's observations; Stair, B. 2. T. 1. 9. § 39. and 42.; and Lord Bankton, v. 2. p. 110. It is also upon this construction of the statute that it has been found not to apply to removings from towers and fortalices, Lady Salton *contra* Livingston, quoted by Lord Stair, from soap-works, (See APPENDIX.); November 21. 1671, Riddel *contra* Zinzan, No 67. p. 13828. from houses in the country; 11th March 1756, D. of Queens-