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tute apply to leases of urban tenements. It is declared to have been made for the " saftie and favour of the puir people that labours the ground." Indeed, at its date, there were no leases of houses within burgh, and therefore it could not be intended to remedy an inconvenience which did not exist.

Besides, a farm or other rural subject, when let in lease, yields an annual profit; from it the lessee in general derives the maintenance of himself and family, and upon the faith of the lease, he lays out his stock in making improvements. Such lease is therefore much more an object of favour than that of an urban tenement, from which the possessor derives no income, and on which he is not even entitled to make meliorations without the consent of the proprietor; Erskine, b. 2. tit. 6. § 27.; 5th February 1680, Rae against Finlayson, *voce* TACK.

Answered: The act 1449, was meant to protect lessees of all heritable subjects, Stair, b. 2. tit. 9. § 2.; accordingly, although poor labourers of the ground only are mentioned, it was early extended to lessees of mills and fishings; besides, the word " lands," in our law language, comprehends burgage as well as rural tenements; 27th January 1768, Maclauchlan against Maclauchlan, *voce* TAILZIE.

The exclusion of urban tenements, too, from the benefit of the statute, in the present state of society, would be highly inexpedient and unjust, when leases, not of dwelling-houses only, but of valuable buildings within burgh for the purpose of manufactures, are frequently granted, and on the faith of the latter large capitals expended; particularly, as the universal understanding of the country has long been, that they are good against singular successors.

The decision, 5th February 1680, Rae against Ferguson, is erroneously stated in Lord Kames's Dictionary, the point now in question not having occurred in that case; and as Mr Erskine refers to this decision, as abridged in the Dictionary, as the sole ground of his opinion, it is entitled to no consideration.

The Lord Ordinary found, " That the missive of set by David Macquater the former proprietor, in favour of John Brown the tenant, being clothed with possession, is effectual against James Brown the purchaser."

On advising a reclaiming petition and answers, the Court considered the case as perfectly clear, and unanimously " adhered."

Lord Ordinary, *Polkemmet*. Act. *Jo. Clerk*. Alt. *Connel*. Clerk, *Menzies*.

R. D. *Fac. Col. No* 142. *p.* 326.

1781. *July* 4. ALEXANDER M'KENZIE *against* GULLEN, and Others.

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Rentallers whose rights are derived

AT the judicial sale of the Winton estate, belonging to the York-Building Company, two lots were purchased by Mr M'Kenzie; who, having expeded as

charter, and taken infeftment, pursued an action of removing against the whole tenants and possessors of the subject.

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Among the defenders in this process, were the inhabitants of the village of Seaton; many of whom, together with their predecessors and authors, had for ages possessed, for a trifling duty, the small tenements from which they were now to be removed. These subjects had been long considered by them as their property; they had descended from father to son; they had been transmitted to disponees; heritable securities had been taken upon them; and they had been carried by legal diligence. The present possessors, however, had no feudal title to produce; and, therefore, found it necessary to defend their possession upon the following grounds.

Pleaded for the defenders; 1*mo*, The subjects in question did not fall under the forfeiture of the Earl of Winton; they never belonged to the York-Buildings Company; they made no part of Mr M'Kenzie's purchase; and, therefore, he has no title to pursue a removing from them.

2*do*, Not only are the defenders entitled to maintain their possession, against one whose title to remove them appears defective; but they are themselves proprietors of the subjects, having such a right as renders them irremoveable.

That the defenders do not produce written titles, in the strict form now practised, is not inconsistent with their being proprietors. It is no more than always happens, where the right is older than the record. The ancient titles may be kept up by possession alone, without submitting to the modern forms of constitution by charter and sasine, which, as far down as the reign of James IV. were termed new inventions. Such was the opinion of the Court, and such was the judgment of the House of Lords, in the case between Lord Stormont and the irremoveable tenants, or perpetual rentallers of Lochmaben, *voce* TACK. And, under the authority of that decision, it is now incontrovertible in point of law, that a right of property in lands, wherever situated, may be effectually established without the intervention of written titles, or a feudal infeftment.

Indeed, by the more ancient practice, no proprietor held his lands by more than simple possession; and long after the feudal law had been introduced into Scotland, the only method of determining questions of property, was by the verdict of a jury, proceeding upon a proof of the possession.

On this simple footing, many of the land-rights in Scotland long did, and some of them still do remain; such as, 1*st*, the rights of the tenants and rentallers of the bishoprick of Glasgow, and monastery of Paisley, mentioned by Craig, lib. 1. dieg. 11. § 24.; 2*dly*, Most of the rights to bishops' teinds, which rest merely upon possession, and on their appearing in the rent-rolls of the crown kept in exchequer; 3*dly*, All, or most of the rights to church-lands before the reformation; whence the possession of churchmen for a much shorter period

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than the years of prescription, has, *quoad* such lands, been admitted as evidence of the property. *4thly*, The rights of ministers to their glebes. And, *5thly*, Such rights as that of the rentallers of Lochmaben, above-mentioned. Similar rights are known in most countries, where the feudal law has been established; and such, in particular, are the copy-holds of England, which are founded solely on immemorial possession.

It is not, therefore, to be inferred from their wanting written titles, that the defenders are not real feudal proprietors of the subjects in question. That the reverse of this is the case, may be fairly presumed *in re tam antiqua*, from their long possession, and from the report made by the commissioners of inquiry, after an accurate investigation of the rights of parties. It is further proved by the old rental-book of the estate of Winton, authenticated by the Earl's subscription, wherein, under the title of feu and rental mails, are specified about thirty different persons, paying in all L. 45 Scots of money duties; and in the abstract, this L. 45 Scots is stated in one article as feu-mails; which shows clearly that they were feuers or proprietors. And, accordingly, two of the defenders in the present action have been assoilzied, as proving themselves really heritable proprietors.

In this old rental too, several of the subjects are described as possessed by heirs and relicts; which perfectly corresponds with the idea of a feudal right. And that the possessors were universally held and admitted to be heritable proprietors, appears from the various dispositions, securities, and diligences produced by them. It is also remarkable, that the family of Winton and the York-Buildings Company gave no repairs to the houses possessed by the defenders; that their small duties have not been raised for time immemorial; and that no attempt was ever made to remove them, till the present action; circumstances, which argue strongly in favour of the argument now maintained by them.

It is therefore of no consequence by what appellation the defenders are described in the old rental-books; or even that they have been in use to call themselves rentallers. The possessors of the four towns of Lochmaben were no where termed proprietors, but went under the denomination of poor tenants of his Highness's property, occupiers of his Majesty's lands, kindly tenants, and other names the most opposite to any idea of property; their duties were called rents, and their possessions rooms. Yet the court looked to the nature of their right, and found them to be irremoveable proprietors.

But supposing the defenders to be rentallers only, still their title will prove sufficient to defend them against the present action. Rentals are distinguished by law into feu rentals and common rentals. Formerly, both kinds were considered as heritable rights, transmissible to heirs and other successors. And, although the act 1587, c. 69. declared rentals granted by the crown to be no better than personal liferents, it expressly excepted feu-rentals set to men and

their heirs, and left common rentals granted by a subject upon their original footing. Whether, therefore, the rights of the defenders are accounted of the one kind or of the other, they do not fall under the enactment of that statute, but must be heritable in the persons of the present possessors.

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Nor is the doctrine, that rentals are not good against singular successors, agreeable to the principles of modern practice. Rentals are a species of tacks; and the act 1449 declaring tacks to be real rights, makes no exception. Accordingly, rentals have been sustained as giving a perpetual right; Carruthers *contra* Irvine, 23d Janurry 1717, *voce* TACK; and tacks for a term of endurance almost equal to perpetuity, are also sustained against singular successors; 6th December 1758, his Majesty's Advocate *contra* Fraser, *voce* TACK; 27th January, 1760, Irvine of Luss *contra* Knox of Kirconnel, *voce* TACK. In the one case, the tack was for 1140 years; in the other, for 1260. The tacks on the estate of Ormiston too, which, in consequence of the indeterminable obligation upon the landlord to renew them at every return of a certain period of years, do not substantially differ from a rental, have been sustained as good against a purchaser; Wight *contra* Earl of Hopeton, *voce* TACK. And, as the act 1449, upon which all these decisions are founded, entitles every tenant, without distinction, to sit unto the issue of their terms, no good reason can be assigned for denying to rentals the benefit of that enactment.

Answered for the pursuer: In order to support the defenders in their objection to the pursuer's title, it must be taken for granted, that they are the feudal proprietors of the subjects in question. For, if they are not so, and if the Earl of Winton had a right to remove them from their possessions, there cannot be a doubt that his right is now regularly vested in the pursuer, by virtue of his charter and sasine.

The charter conveys to him the village of Seaton, and every subject and right which formerly belonged to the York-Buildings Company, lying within the boundaries of his purchase. The subjects in question are locally situated in the village of Seaton; and, therefore, it follows as a necessary consequence, that the right of removing the defenders, competent to the Earl of Winton and to the York-Buildings Company, was conveyed to the pursuer, as much as that of levying the duties which they are bound to pay for their several possessions.

2*dly*, Although a doubtful or a defective right may be secured from challenge by prescription, yet, a definite and temporary right can by no lapse of time become permanent and indefeasible; nor can a proper feudal title be created by possession alone, without the intervention of a charter and sasine.

The case of rentallers in general affords no aid to the defenders argument on this point; because, in fact, such rights were never reckoned to be of a permanent nature. It is true, that, anciently, the King's rentallers were held to

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be heritable proprietors; Balfour, *voce* Assedation, c. 28.; and they continued on that footing till the act 1587, c. 69, gave his Majesty à power, with advice of the comptroller, to let the lands at an advanced rent, upon the death of any of the rentallers. But there was something very special in their situation; Bankt. B. 2. T. 9. § 43. Placed, as they always were, around a royal castle, they might be considered as a sort of permanent garrison; and their rights being perpetual, could be attended with little inconvenience, as a failure of duty in them, like that of any other subject, inferred treason, and was punishable by an immediate forfeiture. Whereas a subject, who had not the same power of inflicting punishment on his rentallers, however undutiful they might prove, would naturally be led to guard against such inconveniencies, and certainly would never have granted a rental, had it been reckoned a right of perpetual endurance.

Accordingly, there is no reason to believe, that, at any period, rentals granted by a subject were accounted permanent rights. The act 1587 was necessary to correct a mistake which custom had introduced, with respect to the King's rentallers. His Majesty, however, did not always exercise the privilege conferred upon him by that statute; and, in some cases, the lands, with the antient rentallers, came into the possession of a subject, who had no power to remove them. Upon this specialty stands the decision in the case of Lochmaben; and, therefore, it can afford no support to the general plea, that feudal rights may be created without writing.

Nor is the argument drawn from the different kinds of church-lands more conclusive. The destruction of the title-deeds belonging to the church, at the time of the Reformation, was so general, as to give occasion for a particular statute in favour of those who derived their rights from that source.

But, that the possessors of the subjects in question were originally no better than rentallers, is abundantly evident. The family of Winton understood perfectly well the difference between a feu and a rental; as is evident from the rights produced by the two defenders that have been assoilzied, which are proper feu-charters granted by George Earl of Winton, in the 1662. The same difference was marked by the commissioners of inquiry, in framing their report; and the very nature of the thing speaks it, that a chieftain establishing a set of rentallers at his castle-gate, by way of body guard, would chuse them for some qualification; but would never think of fettering himself, by rights of an heritable or perpetual nature. Accordingly, that some of these rights were originally but rentals, cannot be disputed; and so is to be presumed of all the defenders, who have no better title to produce. Every thing leads to that conclusion; and the contrary can never be inferred from the negative circumstances alleged by the defenders.

Indeed, this is a more favourable construction of these rights, than they are in every respect entitled to. For, that writing is necessary to the constitution,

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as well as to the probation of rental-rights, is laid down by Lord Stair, B. 2. T. 9. § 18.; Lord Bankton, B. 2. T. 9. § 41.; and Mr Erskine, B. 2. T. 6. § 37. Yet, not one of the defenders has produced any thing that has the smallest resemblance to a rental ticket; nor can they even connect themselves with the persons mentioned in what is supposed to be the list of the original rentallers.

But, holding the rights in question to be really good rentals, it is a proposition, established by the concurring opinions of all our most respectable authors, that a rental-right, granted even to heirs, goes no further than to the first heir; Craig, lib. 1. dieg. 9. § 10.; Spottiswood, tit. Removing and Rentals, p. 290.; Lord Stair, B. 2. tit. 9. § 17. And his Lordship mentions a case, Lord Seaton *contra* his Tenants, (See TACK,) which shows that the family of Winton did not understand a rental to be more than a temporary right, pendent on the behaviour of the rentaller, and renewable, or not, at the master's pleasure; Ib. § 19.; Sir George Mackenzie, B. 2. T. 6. § 9.; Bankton, B. 2. T. 9. § 41.; Erskine, B. 2. T. 6. § 37, and 38.; Ker against Waugh, No 115. p. 10307.

In opposition to these authorities, the decision in the case of Lochmaben, proceeding upon a speciality very different from any thing that occurs here, can have no weight. Both the general principle, and the particular usage of this barony, concur in reprobating the idea of a rental's conveying a permanent right. The defenders' original authors, though considered in the most favourable light, had no more than beneficial leases for two lives; and they have produced nothing to show that their right now stands upon a better footing.

Nor does the pursuer's situation, as a singular successor, render his right of removing more doubtful. His title is rather the better on that account. For obligations respecting lands, which would be ineffectual against a purchaser, are frequently sustained against the granter and his heirs. But, as the rights of the defenders terminated many years ago, with the lives of the first heirs, the pursuer's title to insist in the present action stands altogether unquestionable.

Few of the Judges expressed any doubt, and the Court adhered to the interlocutor of the Lord Ordinary; 'Sustaining the pursuer's title, and decerning in the removing.'

Lord Ordinary, *Braxfield*. Act. *G. B. Hepburn & Elphinston*.
Alt. *G. Wallace & Crosbie*. Clerk, *Robertson*.

L. *Fol. Dic. v. 4. p. 71. Fac. Col. No 70. p. 116.*