The fields let to Macharg were entirely for pasture, and let from year to year; in which situation, it is universally understood, that the doctrine of tacit relocation does not take effect. Unless the tenant makes a new bargain, he is not entitled to remain a single day after the term is expired; and if he does, he may be summarily removed, because he has now no title of possession whatever. No. 4.

Lord Ordinary, *Bannatyne.* For Petitioner, *Boswell.* Agent, *Geo. Tod.*
Clerk, *Mackenzie.*

F. *Fac. Coll. No. 207. p. 464.*

1808. *March 2.*

JAMES CAMPBELL *against* DONALD M'KELLAR, and Others.

No. 5.
Infeftment prior to the period of 40 days before the term of Whitsunday, and prior to the calling of the summons of removing in Court, but posterior to the date and execution of the summons, sustained as a sufficient title in an action of removing

BY disposition dated 8th August 1806, the Duke of Argyle disponed the lands of Baringlongart, and others, to Lord John Campbell, who was infeft on the 3d and 5th of September following.

In the month of February 1807, Lord John Campbell disponed these lands to James Campbell the pursuer, who was infeft on the 24th March, and whose entry to the lands was declared to commence at Whitsunday thereafter.

The right of the pursuer, therefore, was completed before the period of 40 days preceding the term of Whitsunday.

The lands were possessed by the defenders, from year to year, at a low rent.

The pursuer raised a summons of removing, dated 7th March 1807, which was executed on the 16th and 17th days of the same month, and concluded for removal at the term of Whitsunday 1807 from the pasture, and at the separation of the ensuing crop from the arable ground.

The action was called in Court on the 3d April. Thus the libel was dated and executed before the pursuer had taken infeftment; but before it was called in Court his right had been completed *.

The Sheriff of Argyleshire assoilzied the defenders from the action.

The cause was then brought by advocation before this Court; and having been discussed before Lord Balmuto, Ordinary, his Lordship advocated the cause, and decerned in the removing; and, upon advising a representation, pronounced the following interlocutor:—"In respect that it appears that the "pursuer, in February 1807, obtained a disposition from the Duke of Argyle "to the lands occupied by the defenders, his entry to be at Whitsunday fol-

* Certain communings, relating to the removal of the defenders, occurred between them and the pursuer, which were made the subject of argument in the pleadings, and were thought worthy of notice in the interlocutor of the Lord Ordinary. But these were of a nature altogether indecisive, and did not in the slightest degree influence the Court in deciding the question.

No. 5. "lowing, and infeftment taken upon the said dispositions upon the 24th "March 1807; that the summons of removing, raised by the pursuer against "the defenders, bears date the 7th of March, to remove from the lands pos- "sessed by them at the Martinmas following, and was executed personally "against the defenders upon the 16th and 17th days of March 1807; that "the same was called in Court upon the 3d day of April following, ten days "after the pursuer was infeft in the lands, when decree passed in absence; "that, previous thereto, it is stated by the pursuer, and not denied by the de- "fenders, that intimation was given to them of the pursuer's intention, to re- "move them from the lands which they possessed on verbal agreements; and "that in consequence thereof a transaction for purchasing their stock was con- "cluded betwixt the defenders and the pursuer's brother, and a missive grant- "ed by him to them as to the terms of the purchase, and also an agreement "made for allowing them to possess pasture for their cows: Therefore, and "upon the whole circumstances of the case, refuses the desire of the represen- "tation, and adheres to the interlocutor complained of."

The defenders reclaimed to the Court.

Argument for defenders.

1st, The pursuer having raised his summons before investing himself with a legal title, all proceedings thereupon must be null; and the production of an infeftment, *posterior* in date to the execution of the summons, cannot cure this fundamental defect.

Of all civil processes that of removing tenants from their possessions has been subjected to the greatest strictness of interpretation in every step. If the summons of removing be called a day within the period of 40 days prescribed by the act of sederunt, the process is ineffectual.—Being thus rigorous in the formality of the process, Is our law less attentive in a much more essential matter, the sufficiency of the pursuer's title?

On the contrary, in the early times of our law, previous to the act of 1555, ch. 39, and when the warning in its form and period was barbarous and precipitate, (Stair, B. 2. Tit. 9. § 39.) the utmost accuracy and certainty was required in that article. A warning could only be given by the *master of the ground*; and this character could only be vested in him by infeftment.

Thus, at a period when the civil rights of the lower orders were much disregarded, the utmost strictness was required in the title of those who pretended to disturb or remove a tenant. In 1449, tacks were invested with the character of real rights, and were rendered effectual against singular successors; and doubtless the importance of this rank of labourers had risen in the public opinion, because, about a century afterwards, in the year 1555, an act was passed prescribing the order of warning and removing.

The act 1555, ch. 39. while it introduced certain regulations relating to the mode and period of warning, left the title of the pursuer in its former situation; and, in the opinion of the best institutional writers, after that act passed, in-

No. 5.

feftment, previous to the precept of warning, was necessary to constitute a title to pursue.—Stair, B. 2. Tit. 9. § 39, 40, 41.—Bayne's Notes on Mackenzie, B. 2. Tit. 6. § 11. & 12.—Bankton, B. 2. Tit. 9. § 54.—See Feb. 1749, Paxton against Hunter, No. 71. p. 16121. Erskine, B. 2. Tit. 12. § 28.—The act of sederunt 1756 was then passed, rendering the process of removing more simple; but, so far as the requisites of the pursuer's title are concerned, it introduced no innovation. Accordingly, in the case of an apparent heir, whose possession may in some degree be considered as a mere continuation of that of his predecessor, and whose situation therefore is highly favourable, infeftment was nevertheless required. This case, too, occurred immediately after the passing of the act of sederunt; and was decided by the judges by whom the act was framed, (15th December 1757, Paton against M'Intosh, No. 38. p. 13806.)

In later cases an heir has been allowed to make up his titles, *cum processu*, and to produce his infeftment before extract. But a singular successor cannot have any such indulgence.

2. The entry of the pursuer was not to commence till the term of Whitsunday; and, prior to this period, his right, even if infeftment had followed on it, was not complete. The pursuer was thus attempting to exercise one of the most important acts of property, before he could in law be held as having obtained possession of the lands.

Argument for pursuer.

Prior to the act 1555, warning was merely a verbal intimation by the *master of the ground;* and subsequently to that act, it was given in the form of a precept in writing, executed by the baron officer, and was thus an act of jurisdiction. Feudal investiture was necessary to authorise any act of jurisdiction; and therefore a person uninfeft could not issue a precept of warning. Hence the origin of the custom or rule.

The substantial policy of the law, however, was merely to protect tenants from being disturbed by persons without sufficient title; and, therefore, in cases where the tenant could have no doubt of the master's right, infeftment, previous to the precept of warning, was not required. Thus, a removing was sustained at the instance of an heir, though his retour and sasine were after the warning,—Stair, B. 2. Tit. 9. § 41.—and at the instance of a liferenter by courtesy and terce, and of a tacksman in possession. With the decay of the ancient principles of jurisdiction this maxim has still farther relaxed; and a late writer (Erskine, B. 2. Tit. 6. § 52.) has stated, that there is room to doubt of the unqualified observance of the rule in modern times. The Court, accordingly, by a series of decisions, have gradually departed from the rule; and have considered that a naked disposition carries to a singular successor a right to the lands, rents, and leases, and consequently a right to remove tenants. The possession of a tenant depends merely on his lease; and, on the expiry of its endurance, it can afford no title to stand in opposition to the conveyance

No. 5. of the estate in favour of a purchaser. There is no sound reason why the Judge-ordinary should not, in these circumstances, give effect to the purchaser's title.

Accordingly the Court have found that a judicial factor uninfeft could remove tenants, (Thomson against Elderson, 9th July 1757, No. 28. p. 4070.) It was afterwards found that a decree of sale was a sufficient title to enable the purchaser to pursue a removing; (21st January 1791, Stewart against Spalding, not reported,) More recently, a summons of removing at the instance of an uninfeft purchaser, and the factor of the seller, who had been invested with the usual powers, including that of removihg tenants, was sustained (24th June 1802, Morison against Ferguson, No. 39. p. 13806.) And by the last decision on the subject, a removing was sustained at the single instance of an uninfeft purchaser (23d November 1807, Milne against Petrie, See Note I. below.)

This rule, therefore, may now be fairly considered to be antiquated, and to have expired with those peculiar principles and institutions in which it arose.

But independently of this view of the case, the supervening infeftment, produced before the decree, must draw back to the date of the summons, and cure all defects.

The act of sederunt 1756, enables proprietors to raise a summons before the Judge Ordinary; and there is no reason why an infeftment produced before decree should not be as admissible and available in this as in any other ordinary action, (See Note II. below.)

2*d*, A purchaser, after obtaining his disposition, is entitled to take measures to render his possession effectual at the term of his entry. He is not entitled, and does not attempt to enter or insist in a removing previous to the term of Whitsunday. But he has right to use all legal remedies to make his right good at the period of its commencement.

A great majority of the Court were of opinion, that the title of the pursuer was sufficient. While the removal of tenants was accomplished by a precept of warning executed by the bailie or officer of the proprietor of the land, and while the landlord was exercising an act of jurisdiction, infeftment previous to the date of the precept might be necessary. But the law has relaxed gradually from the rigour of this ancient rule; and, without injuring the security of the tenantry, a more simple process of removal has been introduced. In terms of the act of sederunt, the calling of the summons 40 days before Whitsunday, is equivalent to an execution of warning. If infeft, therefore, as in this case, *at the time of calling the summons*, the pursuer is to be held and considered as having warned. Such was the opinion of the Court in the case of Stewart against Spalding; and the security of the tenant is not affected, because, before decree, the title of the pursuer must be completed.

The Court adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Balmuto*. Act. *Wm. Macdonald*. Alt. *J. Burnett*. *Coll Macdonald*, W. S. and *Rob. Campbell*, W. S. Agents. Clerk, *Buchanan*.

J. W. *Fac. Coll. No. 35. p.* 121.

No. 5.

*** I. The case Milne against Young mentioned above, was reported by Lord Newton from the Bill-Chamber; and was as follows:—

Alexander Young purchased a ridge of land lying in the Burgh Acres of Arbroath, but did not take infeftment on his disposition. (5th December 1799). Young let this piece of ground on a verbal lease to William Petrie, a carter in Arbroath.

Young, remaining still uninfeft, disponed the property to James Milne, (23d November 1805.) Milne, without taking infeftment, raised a summons of removing before the Magistrates of Arbroath, concluding that Petrie should remove at the term of Martinmas 1807. This summons was executed and called in Court more than forty days before the previous Whitsunday.

The defender objected, that the pursuer was not infeft; and the Magistrates pronounced the following interlocutor (18th Sept. 1807.) "Having "again considered this process, with the reclaiming petition, sist farther pro- "cedure until the pursuer produce a sasine in his favour, which is the only "proper title for carrying on the action."

The Court were of opinion, that, in the circumstances of the case, infeftment was not necessary. The defender could not have objected the want of sasine in a question with Young, from whom he derived his lease. Every right, however, that existed in Young's person was conveyed to the pursuer; and the objection must be as incompetent in the one case as in the other.

The Court remitted, with an instruction to repel the defence.

*** II. The following case affords another instance of the inclination of the Court to disregard the ancient rule. It is not reported; but was as follows:— 10th February 1802, Brown against Lang.

James Lang, the defender, derived his lease from the father of John Brown the pursuer.

After his father's death, Brown, on his mere apparency, and before investing himself with any title, raised (21st February 1800,) a summons of removing on the act of sederunt 1756, concluding that the defender should remove from the arable lands at March 1800, and from the grass and pasturage at the Whitsunday thereafter, which was called in Court on 7th March, more than forty days preceding Whitsunday.

The summons was given out to see; and (14th June) returned with a defence, that the pursuer had produced no title.

The process remained in this situation till 1st April 1801, when the pursuer raised and executed a summons of wakening.

On the 1st July 1801, the pursuer completed his titles, and was infeft.

The pursuer, therefore, had commenced the process, and allowed the term at which he concluded against the tenant for removal to elapse, before completing his title.

No. 5. The case was discussed before Lord Bannatyne, Ordinary, who pronounced (7th July 1801,) the following interlocutor: "The Lord Ordinary having "heard parties procurators upon the grounds of the libel and defences; in "respect the pursuer came into Court with his action before establishing a "title in his person by infeftment, and did not afterward obtain his title, "and procure himself infeft until more than a year after the original action "was called in Court, and the term long expired at which he concludes for "removing; therefore sustains the defences, assoilzies the defender, and "decerns; superseding extract till the 3d sederunt day in November next."

The Court, however, (10th February 1802,) altered this interlocutor, and decerned in the removing with expenses.

J. W.