

specially seeing they alleged, that the nature and tenor of the tack being set to the father during his lifetime, and the nineteen years tack therein to his heirs-male, therefore that he had no power to dispoise upon this nineteen years tack, which was to take beginning after his decease in the person of his heirs-male, whom he could not prejudge in his right: THE LORDS found this exception relevant, and preferred the compriser to the anterior right acquired from the father by the pursuer, as said is, seeing the pursuer had no possession; but this was in this judgment possessory, and to defend the possessor against this pursuit of wrongous intromission.

Act. ———.

Alt. Chair.

Clerk, Gibson.

Durie, p. 524.

1635. December 16.

MAXWELL against WRIGHT.

ALEXANDER MAXWELL having comprised the lands of Wringly, from Ker of Redpath his debtor, in January 1632, and being thereupon infest by public infestment upon the 2d of March that same year, and pursuing for the mails and duties of these lands, James Wright the defender *alleging* a prior infestment *in anno* 1630, granted to him to be holden of the granter, viz. the said Ker of Redpath, for most onerous and just causes, which, albeit base, yet was for a true and just debt, and done *in anno* 1630, long before this party's public right, by virtue whereof he alleged and claimed preference in respect of anteriority, and that he had become in possession of the lands by virtue of his right, by putting one of six score of sheep and sixteen kine, and some yeld goods of his own proper goods, and by conducting and hiring of herds for keeping of them and paying the herds their fees; and it being a grass-room, this should be found sufficient possession, for whatever corns were thereupon, he could not have more possession than of the grass, seeing before the acquiring of his right the corns were sown on the ground, so that he could not have any other possession of labouring; likeas, when he put on his goods, as said is, his debtor being then possessor, he removed off all his goods and sold and dispoised thereupon, and made the ground void and redd to the defender, and the next year he arrested in the tenants' hands their farms, and obtained thereupon decret against them, which is all the diligence that could be done, seeing this pursuer had neither done diligence nor recovered any possession by virtue of his public right; this allegiance was repelled, and the pursuer's right upon the comprising sustained and preferred to the excipient's prior base right, in respect that the pursuer offered to prove, that Ker of Redpath, their common debtor, remained in continual possession of the whole lands notwithstanding of the excipient's right, continually to the time of his comprising, and had his own goods pasturing thereupon; and whatever alleged goods the defender had thereupon, the same

No 13.

No 14.

Effect of possession, by tolerance, in competition between a public and a base right.

No 14.

cannot be ascribed as a possession to maintain his right, seeing he had the like possession by tolerance, or only by oversight, from Redpath divers years before; so that he continuing that same possession which he had before only in tolerance, as said is, cannot be ascribed to his infetment; likeas he did nothing upon his infetment to make the same subsist in law before the pursuer's comprising and infetment, as he ought; for he might have made warning to the debtor, his author, or to the tenant to remove against the next Whitsunday, which he did not; and his arrestment and decret cannot be respected, being all after his public right, and so can derogate nothing to the pursuer; this reply was sustained to prefer the public right, albeit no more was done upon the said public right before this pursuit.

Act. Nicolson & Dunlop.

Alt. Gilmore.

Clerk, Gibson.

Durie, p. 786.

No 15.

Daughters had been ejected upon decree of removing against their mother, to which they had not been made parties. Ordered to be replaced in possession.

1663. February 19.

SCOTS against Earl of HUME.

THE four daughters of Scot pursue an ejection against the Earl of Hume, out of some lands belonging to them. It was *alleged* for the Earl, Absolvitor; because he entered into possession by virtue of a decret of removing given at his instance *anno* 1650. It was *replied*, That the decret was only against the pursuer's mother, that they were never called nor decerned therein. The Earl *answered, first*, That the decret was against the mother to remove herself, bairns, tenants, and servants, and her daughters were in the family, being then young bairns; and he was not obliged to know them, they not being infet, but having only an old right, whereupon there was no infetment for 40 years the time of the decret.

THE LORDS, in respect of the defence, restricted the process to restitution and the ordinary profits, and decerned the Earl to restore them to possession instantly, but superseded payment of profits till both parties were heard as to their rights; for they found that the decret of removing could not extend to their children, and albeit they were not infet, yet they might maintain their possession upon their predecessor's infetment, how old soever, seeing they continued in possession.

Stair, v. i. p. 183.

No 16.

Effect of a disposition to moveables, with an instrument of possession.

1666. July 6.

CORBET against STIRLING.

CORBET of Concorse pursues a spuilzie of certain goods out of his house at Glasgow against William Stirling, who *alleged* absolvitor, because he had lawfully poulded them from his debtor, in whose possession they were. The pur-