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 infeftment; likeas he did nothing upon his infeftment to make the same subsist in law before the pursuer's comprising and infeftment, 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 decreet 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.

1663. *February* 19. SCOTS *against* Earl of HUME.

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.

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 decreet of removing given at his instance *anno* 1650. It was *replied*, That the decreet was only against the pursuer's mother, that they were never called nor decerned therein. The Earl *answered*, *first*, That the decreet 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 infeft, but having only an old right, whereupon there was no infeftment for 40 years the time of the decreet.

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process to restitution and the ordinary profits, and decerned the Earl to restore them to possession instantly, but superseded payment of profits till both parties were heard as to their rights; for they found that the decreet of removing could not extend to their children, and albeit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

Stair, v. 1. *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 poinded them from his debtor, in whose possession they were. The pur-

suer *answered*, That he offered him to prove that he had disposition of these goods from that party, from whom the defender alleged to have poinded them, and an instrument of possession thereupon; and that he had paid mail for the house where they were several years, and still when he came to Glasgow he did reside in the house and made use of the goods. The defender *answered*, That his defence did yet stand relevant, because the condescendence makes it appear, that the pursuer's right was from the defender's debtor, and any possession he alleges might be simulate; and the defender, in fortification of his legal execution, offered him to prove, that his debtor remained in the natural possession of the house, and made use of the goods as his own goods, and so was in natural possession thereof, whereby he might lawfully poind from him. The pursuer repeated his reply, and further *alleged*, That one of the Bailies of Glasgow alleged that they were his goods at the time of the poinding, and offered his oath. The defender *answered*, That that Bailie was neither the pursuer's servant, neither had commission. No 16.

The Lords found the defence for the poinder relevant, and more pregnant than the condescender's allegeance, and repelled that member of the duply anent the Bailie's offering of his oath.

Stair, *v.* 1. *p.* 391.

1666. *July* 12. Mr John Hay *against* Sir James Douglas.

No 17.
What understood to be 'natural possession' of land.

Mr John Hay of Haiston and Sir James Douglas having both rights of apprising of the estate of Smithfield, did agree, that Sir James should have three parts, and Mr John one, and did obtain a decreet at both their instances for removing a tenant from some acres; but Sir James laboured and did sow the whole. Mr John did thereafter sow as much corn upon the sown land as would have sown his quarter, and now pursues an intrusion against Sir James, who *alleged* absolvitor, because Mr John was never in natural possession, and offered to give the fourth part of the rent the acres paid before. The pursuer *answered*, That the removing of the natural possessor was equivalent, as if Mr John had been in natural possession of his quarter; and therefore the offering to him the rent was not sufficient, yet he was willing to accept the rent for this year, so as Sir James would divide for time coming.

The Lords found that in this process they would not compel Sir James to divide, but sustained the process, *ad hunc effectum*, that Mr John should have the fourth part of the crop, paying Sir James the expenses of labourage.

Stair, *v.* 1. *p.* 393.