ty, but has an interest in the ship, (which is our case,) then, in all sense and reason, the ship, at least his part thereof, must stand engaged to the skipper for his fraught, and must be interpreted to be *debitum reale;* and so whoever comes in his right thereof, *etsi transierit per mille manus*, must be liable for it.

This was very hotly debated betwixt Sir George Lockhart and Sir John Cunyghame, who was for the reducer.

Advocates' MS. No. 69, *folio* 81.

1670. *July* 13. LYON of Muresk *against* ———

IN this cause it was resumed, how oft the Lords have found, that *possessio in mobilibus non solum præsumit sed et dat titulum;* for this was a pursuit at the pursuer's instance, as executor confirmed to ———, against the defender, as he who had intromitted with the moveable goods pertaining to the defunct.

The DEFENCE was,—That he could never be pursued for these goods, because he had acquired them *titulo et jure emptionis* from ———, who possessed the said moveables by the space of thirty years, before the intenting of any action therefore: and it was alleged, that if any creditor to the defunct had poinded them, the defunct's executor could never have repeated the same. *Item*, if my goods be grazing by the space of two or three years with another man, and be poinded upon the ground for that other's debt, there will be no *rei vindicatio* sustained against the poinder, but the owner has his recourse against him to whom he gave them in grazing; and so it was inferred, that possession would give them the same benefit here. ANSWERED,—That no possession can satisfy for giving a right to moveables, unless they possess them by the space of forty years, and so prescribe the same. This went to interlocutor.

Then ALLEGED,—*2do*, No process for the moveable heirship, and for the doors, windows, irongate, and sundry other things fixed in the house, and so *pars soli et ædificii*, and noways moveable nor confirmable, though they have foolishly confirmed the same.

The pursuer restricts his summons to such goods as are truly moveable.

Act. Thoires and Cunyghame. *Alt.* Birnie and Wallace.

Advocates' MS. No. 71, *folio* 81.

1670. *July* 13. DUKE of HAMILTON *against* The TENANTS of Lesmahago.

THIS was a declarator of the property of the Moor of Dovan, intented by the Duke, against divers gentlemen lying adjacent and contigue to the said moor. ALLEGED for the Laird of Stainebyres, that there can be no process, because there is nothing produced but the Duke's seasine of the barony of Lesmahago, whereof this moor is alleged to be part and pertinent; which being only the as-

sertion of a notary, cannot prove till the warrant of it be produced. ANSWERED, he shall produce the charter *cum processu*. This was FOUND RELEVANT.

Secundo, ALLEGED,—The property of this moor could never be declaimed at the Duke's instance, because it was offered to be proven for Stainebyres, and divers other gentlemen who lie adjacent to the moor, that they stood infeft in their lands by the abbots of Kelso, (of which abbacy, Lesmahago and their lands were a part,) and in whose place, the Duke, as lord of erection, was come; and were in possession of this moor as a commonty past all memory of man, and so had prescribed a right of pasturage there, and so can never be declared the property of any other man; yea some of them were infeft in their lands *cum communi pastura*, which could be exponed of no other commonty but this moor. And in fortification of this their possession, it is offered to be proven, that the Duke himself, under his own hand, gave warrant to some of his own vassals having also a common interest in that moor, for dividing the said moor betwixt them and the said defenders.

REPLIED,—That their exception, being only upon a servitude of pasturage, was very consistent and compatible with his declarator of property; and therefore he craved the property might be declared to appertain to the Duke, and reserve them action for constituting a servitude therein, as accords.

Act. Harper. *Alt.* Lockhart and Wallace.

Advocates' MS. No. 72, *folio* 81.

1670. *July* 13. LORD ELIBANK *against* WALTER and JAMES SCOT.

MY Lord Elibank having sold his wood of to Walter and James Scots for 17,000 merks: and they being by contract obliged to cut the same in seven years, and to inclose and fence the same yearly as they cutted it, they neglected the fencing of it. Whereupon my Lord charging them for damage and interest sustained by him in not fencing;

They SUSPENDED on this reason,—That by the contract, they were not obliged to enclose the same yearly as they cutted it, that being a thing almost impossible, but only to enclose it after it was wholly cut.

The contract being read and considered, it was found they were bound yearly to fence it. Then they offered to purge the failyie, by fencing it in time coming, and craved a day betwixt and which they might do the same.

ANSWERED,—That can never assoilyie them from the damage already sustained, through the not timeous fencing thereof.

The Lords appointed them to inclose betwixt and such a day; and, in the interim, a visitation of the wood, for considering in what condition the same is, and what prejudice my Lord has sustained through the suspenders their default.

Char. Eleis and Sinclair. *Alt.* Pringle and Lockhart.

Advocates' MS. No. 73, *folio* 81.