1667. *July* 10. MR JAMES DEAS *against* KYLE.

No 18.
Although a certain number of acres only were specified in a tack, yet as it mentioned 'as possessed by the tenant himself,' he was entitled to all, altho' more acres than expressed.

MR JAMES DEAS being infeft by the Earl of Haddington in certain husband lands and acres in Earlston, with a general clause of all lands within such bounds, pursues Robert Kyle to remove from certain acres within that bounds, who *alleged* absolvitor, because he has tacks standing from the Earl of Haddington of all the lands possessed by him, and produces the tack, bearing the Earl to have set him 14 acres of land presently possessed by himself, and declares he has no other than what he possessed before the tack, and during the time of the tack, now by the space of 30 years. The pursuer *answered*, That his tack gave him only right to 14 acres; so that the pursuer, by the general clause, must have all the rest. It was *answered*, That the defender was not obliged now to dispute the extent or quantity of his acres, nor to restrict to the present extent of acres, especially seeing that which he did possess the time of the tack, was set to him by his tack, simply without reservation; and albeit designed 14 acres, and were more, it is nothing; for an erroneous designation vitiates not, unless it did appear to be restrictive or taxative; likeas the pursuer's acres in his infeftment will be as large proportionally as the defender's. The pursuer *answered*, That whatever the extent of his acres were, the general clause gave him all that was not reserved to the defender; and he offered him to prove, that there were six acres beside the 14 acres, severally kend and known, and possessed by different possessors before his tack. The defender *answered*, That he opponed his tack, bearing the lands to be then in his own possession, at the granting of the tack, and he having possessed 30 years accordingly, *hoc judicio* he was not obliged to dispute any anterior possession:

Which the LORDS found relevant.

*Stair, v.* 1. *p.* 477.

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1668. *July* 25. DUNCAN CAMPBELL *against* The LAIRD of GLENORCHY.

No 19.
A distinction made between natural possession, and by tenants.

DUNCAN CAMPBELL pursues the Laird of Glenorchy, for ejecting him from certain lands, and especially that his brother, by his direction, did violently cast out the pursuer's children and servants out of a part of the land laboured by himself, and persuaded and enticed his tenants to receive tacks from him, and pay the mails and duties to him, and therefore craves re-possession and double mail, as the violent profits of the whole lands during the defender's possession. The defender *alleged* absolvitor, because he had obtained improbation against the pursuer of all his rights of these lands, and others, and likewise decreet of removing. The pursuer *answered*, That the defence ought to be repelled, because the improbation was only by a certification when he was prisoner in Ireland, and the defender, by articles of agreement produced, had acknowledged

the pursuer's right, and obliged himself to infeft him in the lands in question; 2*dly*, Though the pursuer had but possession without any right, he might not be ejected, but by a precept of ejection from a judge, which is not alleged. The defender *answered*, That these articles of agreement were never perfected nor extended, and could only import a personal action against the defender, for extention or implement, wherein, when the pursuer insists, he will get his answer, that he can have no benefit of the articles, being mutual, until he perform his part thereof, which is not done. No 19.

The Lords repelled the defence and duply, and sustained the ejection.

The defender *alleged* further, That that member of the libel, craving violent profits for that part of the land possessed by tenants, because, by the defender's persuasion, they became his tenants, is not relevant, because ejection is only competent to the natural possessor upon violence, and persuasion is no violence. The pursuer *answered*, That the prevailing with the tenants was consequent to the casting out of the defender out of his own house and natural possession, and was as great a fault as intrusion, and equivalent thereto. The defender *answered*, That the law has allowed violent profits only in ejection or intrusion, which can be drawn to no other case, though it were as great, or a greater fault.

The Lords sustained the defence, and found violent profits only competent for that part that the pursuer possessed naturally; but if the whole lands had been an united tenement, or labouring, that the pursuer had been ejected out of the principal messuage of the barony, and the ejector had thereby got possession of the whole, it is like the Lords would have sustained ejection for the whole; but this was not pleaded.

*Stair*, *v.* 1. *p.* 558.

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1669. *February* 19. Mr. John Hay *against* The Town of Peebles.

No 20.
Right of property in a commonty held to depend on the possession and interruptions of the parties, which admitted to proof before answer.

Mr John Hay insisting in his declarator, that certain hills libelled were proper part and partinent of his lands libelled, wherein he stands infeft in property; it was *alleged* for the Town of Peebles, That they do not acknowledge his right of property; but they alleged that they are infeft by King James II. in their burgage lands, with the commonty of Priestshiels, and likewise by King James IV.; and that Queen Mary having directed a Commission of Perambulation to the Sheriff of Edinburgh, he perambulated their commonty, and hath set down meiths and marches thereof, which are expressed in their decreet of perambulation, within which their meiths lie; and that *in anno* 1621, they have a charter from King James VI. of their burgage and commonty of Priestshiels, comprehending expressly these hills, by virtue whereof they have been in peaceable possession thereof, as their proper commonty, by pasturage, feuel, fail, and divot, and by debarring all others therefrom. The pursuer *answered*, That