could carry, and there was no reason to make him accept of lands with a plea; and *de jure* pendicles and pertinents do well extend to common pasturage, when the said pasturage is so possessed; and it cannot be controverted, but the heritors and possessors of Halheriot have been in undoubted possession of common pasturage in this muir, and that the rent payable therefor is upon consideration of the pasturage, without which, it could neither give the rent it pays, nor the price; so that when my Lord dispones the lands, with the pertinents, and at the time of the disposition, this pasturage is unquestionably possest as a pertinent of the land, the extended charter and disposition ought in all reason to comprehend it expressly; neither is there any difference whether the pasturage be of a muir contiguous, or belonging to the whole barony, seeing it cannot be controverted, but it was possest as pertinent of this room the time of the bargain; and to clear that it was possest, the charger produced a wadset granted by the Lord Borthwick to himself of the same room, bearing expressly pasturage in the common muir of Borthwick. The suspender *answered*, That the wadset made against the charger, in respect this clause being express in the wadset, he had not put it in the minute, which as *jus nobilius* absorbed the wadset, and cannot be looked upon as a discharge of the reversion only, because my Lord was superior by the wadset, and by the minute he is to resign, likeas in the minute there is a disposition of the teinds, which is not in the wadset.

No 12.

THE LORDS found that the minute ought to be extended, bearing expressly the common pasturage in the muir of Borthwick, in respect the same was a pertinent of the lands, sold the time of the bargain, and was not excepted.

Stair, *v.* 1. *p.* 523.

1669. *July* 2. LAIRD of GRUBBET *against* MORE.

No 13.
In a competition, personal service to the superior ascertained by tack or inrolment of Court, was found sufficient to ascertain, of which property the disputed subject was part and pertinent.

THE barony of Linton belonging to Sir John Ker of Littledean, the lands of Morbattle and Otterburn are parts thereof; there is a piece of land called Greenlaw, lying in the borders of Morbattle and Otterburn, and there is an heritable right of the lands of Otterburn granted by Sir John Ker to one Young, and by that Young a subaltern right to another Young, bearing the lands of Greenlaw *per expressum*. Both these Youngs jointly dispone to Grubbet the lands of Otterburn, with the pertinents, comprehending the lands of Rashbogs; in the end of which disposition there is a clause, bearing, that because the Youngs were kindly tenants in the lands of Greenlaw, therefore they dispone their right thereof, and kindliness thereto to Grubbet. More having acquired the rights of the lands of Morbattle from Sir John Ker; and the Earl of Lothian having apprised Sir John's right of the barony of Linton, *in anno* 1636, gives a particular right of Greenlaw alone, which is now also in the person of More; whereupon arises a competition of right between Grubbet and More,

No 13. Grubbet *alleged*, That he has right to Greenlaw, as a part and pertinent of Otterburn, which he and the Youngs, his authors, have possessed far beyond 40 years, as part and pertinent of Otterburn; and offers to prove, that there are standing marches between Morbattle and Otterburn, within which marches Greenlaw lies on Otterburn side, and that his infeftment produced granted by Young to Young, bears expressly Greenlaw. It was *alleged* for More, *First*, That Grubbet cannot pretend Greenlaw to be part and pertinent of Otterburn, because by his own infeftments produced, granted by the Youngs, and accepted by him, Greenlaw is not expressed as part and pertinent of Otterburn, albeit Rashbog, though less considerable than it, be expressed; and, on the contrary, it is declared that the Youngs were kindly tenants of Greenlaw, and disponed their kindness thereof; and offers to prove that the Youngs were in constant custom of service to Sir John Ker in arms, and otherwise, whenever they were required, and that most of the lands on the border were set only for service, which service could not be attributed to Otterburn, because it was holden blench of Sir John, and if need be, offered to prove by witnesses, that when the said Youngs came not to the said service, they were poinded therefor. *2dly*, More offered to prove that Greenlaw is a distinct tenement, both from Otterburn and Morbattle, and hath past as a distinct tenement since the year 1636, and hath a known march between it and Otterburn, viz. a knoll. *3dly*, For Grubbet's pretence of bruiking Greenlaw as part and pertinent of Otterburn for 40 years, so that he might claim it by prescription, the allegeance ought to be repelled, *first*, Because prescription cannot proceed without an infeftment, and it cannot be ascribed to the Youngs' infeftment, wherein they acknowledge that they were kindly tenants of Greenlaw, after which no course of time can ever prescribe a right to Greenlaw, as part and pertinent of Otterburn by that charter, and therefore any possession that is thereof is without infeftment. *2dly*, There is not 40 years possession abating More's minority. *3dly*, There are interruptions, and therefore if Greenlaw be either a distinct tenement, or part of Morbattle, it belongs to More. It was *answered* for Grubbet, That he and his authors possessing Greenlaw these 40 years past, as part of Otterburn, gives him sufficient right thereunto, notwithstanding of any acknowledgment in the charter, or without the charter before that time, for prescription may change part and pertinents, so that which was once not acknowledged to be a part by possession, 40 years thereafter may become a part, and that acknowledgment never being made use of prescribes, and the charter in which it is, is a sufficient title, both for what was parts the time of the charter, and what becomes thereafter parts by prescription. *2dly*, The acknowledgment of a party having right is of no effect, when by demonstration of the right itself the contrary appears, as here, there being an anterior right of property of the Youngs produced before that acknowledgment. *3dly*, The acknowledgment is not, that they were only kindly tenants, otherwise it is very well consistent with the property, that they being first kindly tenants, and that kindli-

ness being thought more favourable to maintain possession in these places, than any heritable right, they might very well dispone Otterburn, whereof Greenlaw is a part, and might also dispone their kindness of Greenlaw they had before the right of property; neither doth it infer, because Rashbog is exprest as part and pertinent of Otterburn, which hath been upon account that Rashbog was then unclear, that therefore Greenlaw is no part thereof, or else it could have no more parts but Rashbog, there being no more exprest; and as for the alleged services done by the Youngs to Sir John Ker, they cannot infer that the Youngs were then tenants of Greenlaw, because such services being only general, and no particular services accustomed by tenants, they might have been performed to Sir John as superior, or as out of kindness to a great man in the country; and it is offered to be proved (if need be) that hundreds granted such service, who were not tenants; so that unless there were a tack, inrolments of Court, or executions of poinding produced to instruct services as a tack-duty on Greenlaw, it is irrelevant. No 13.

THE LORDS, by a former interlocutor, had found, that, by the acknowledgment in Young's charter, or any thing therein was not sufficient to exclude Greenlaw from being part and pertinent of Otterburn; but they found that if More would allege a tack or inrolment of Court to the Youngs of services for Greenlaw, it were sufficient, or otherwise if he would allege constant service of the Youngs, by riding, &c. with Sir John, and their being poinded by him when they were absent, they found the same, with the acknowledgment in Grubbet's right, to exclude Grubbet from Greenlaw; and if these were not alleged, they ordained witnesses to be examined upon the ground *hinc inde* before answer, upon these points, whether Greenlaw was known to be a distinct tenement, both from Otterburn and Morbattle, or whether it was known to be part and pertinent of either, and what were the marches and meithes thereof, and what services were done by the Youngs to Sir John Ker, and if such services were done by others, not being moveable tenants.

Stair, *v.* 1. *p.* 629.

*** Gosford reports this case:

IN the declarator of property of the lands of Greenlaw, (*See* APPENDIX.) it being *alleged* in fortification of Grubbet's right, That More of Otterburn, conform to his disposition, wherein it was acknowledged, that he was a kindly tenant and possessor of the said lands, he and his authors had done service as tenants, by riding with Sir John Ker of Littledean, who was common author to both parties; the LORDS, before answer, ordained a visitation of the said lands; and that both should lead witnesses, as to the marches and bounds thereof; and the manner of possession, if it was property or a tenandry, and the manner of service by riding, if it was only prestable by tenants or vassals. Notwithstanding, it was *alleged*, That riding, by custom of the borders, was not a proper service of tenant only, but ordinarily was performed by

No 13. vassals, or friends and neighbours to great persons, and that such a qualification of service could not be sustained to interrupt More's right of property and make him a tenant, unless there were a tack or rental produced, bearing, that riding was a part of the duty or service.

Gosford, MS. No 154. p. 61.

1671. *November* 17. YOUNG *against* CARMICHAEL.

No 14.
A separate tenement may become part and pertinent of another tenement by long possession.

WALTER YOUNG having apprised a piece of waste ground in the west side of Mary King's closs, and being therein infeft, pursues William Carmichael to remove therefrom, who *alleged* absolvitor, because he stood infeft in a tenement on the east side of the closs, over against the waste ground in question, with parts and pertinents, and possessed the waste ground as part and pertinents of his tenement the space of 40 years, and thereby prescribed a right thereto. It was *answered*, That no prescription can take place by possession, without a title; but the defender's infeftment could be no title for possessing this waste ground; *first*, Because it was *separatum tenementum*, bruiked by a several infeftment competent to the pursuer's author, from whom he had apprised and produced his predecessor's infeftment *in anno* 1556; 2*do*, The defender's infeftment is bounded, and bears his tenement to lie upon the east side of King's closs, and so can be no title to possess this waste ground lying upon the west side of the closs. It was *answered*, That there being no infeftment of the waste ground since the year 1556, it might become part and pertinent by long possession;—" Which the LORDS found relevant, but withal found that the defender's infeftment being bounded, as said is, could be no title for the prescription of this waste ground lying without the bounding."

Fol. Dic. v. 2. p. 26. Stair, v. 2. p. 3.

1675. *February* 20. COUNTESS of MORAY *against* WEMYSS.

No 15.
Found in conformity with the above.

THE Countess of Moray pursued Mr Robert Wemyss to remove from two pieces of land, the one called Harroneas land, the other called Alexander's land. It was *alleged* for the defender, Absolvitor, because he bruiked these lands as part and pertinent of his lands of Cuthil Hill by the space of 40 years, and so not only hath the benefit of a possessory judgment, but an absolute right by prescription. The pursuer *answered*, That the Earl of Moray was infeft in these pieces of land *per expressum*, as serveral tenements, and so could not be pertinent of any other land, and produceth his charter, together with a tack set by the Earl of Moray *in anno* 1606 to Wemyss, then heritor of Cuthil Hill, for 19 years, expresly bearing the same designation, so that the defender's author having attained possession by a tack, his possession was the Earl of