Moray's possession, and the lands are bruiked *per tacitam relocationem* ever since, and so cannot prescribe against the Earl's successors. It was *replied* for the defender, *Non relevat*, because that which was not *ab initio* part and pertinent, may by prescription of 40 years become part and pertinent, even though it had been of before a several tenement, neither will so ancient a tack exclude prescription, because there are more than 40 years since the issue thereof, during which time it cannot be continued by tacit relocation, because tacit relocation is a contract by mutual consent of parties tacitly inferred by the heritors not warning, and the tenants not renouncing, which therefore cannot reach to singular successors. *Ita est*, That it is more than 40 years since Wemyss was denuded, after which the singular successors possessing only *proprio jure*, it cannot be said to be the Earl of Moray's possession, nor tacit relocation. No 15.

THE LORDS found that the prescription by possession of 40 years, as part and pertinent, was relevant, albeit before that time the lands so possessed had been a several tenement, unless there had been interruption, and that tacit relacation could not extend to sngular successors.

Fol. Dic v. 2. p. 26. Stair, v. 2. p. 325.

1697. *January* 15. LITHGOW *against* WILKIESON.

No 16.
A seat in church and burial ground go as part and pertinent of the estate conveyed.

THERE was a debate between Lithgow in Melross and Wilkieson, about a seat in the kirk. The first claimed it by virtue of a disposition of the lands to which the seat pertained; and though it was not expressed *nominatim* in the disposition, yet it was not only carried as part and pertinent of the land, but was also conveyed, in so far as the lands were disponed conform as he had possessed them by a former tack, which mentioned the seat. Wilkieson's right was a posterior disposition to the seat *per expressum*, upon this narrative, that the prior disposition made no special mention of the seat. THE LORDS found it comprehended under the first disposition, and that both seats in churches and burial places were not *inter res sanctas et religiosas* so as to be *extra commercium*, but were conveyable by infeftment, and affectable by creditors; though some of the Lords urged, that whatever property private parties might have in the timber and materials of a kirk-seat, yet as to the *solum*, the ground right and place whereon it stood, the same belonged only to the minister, and his elders making up the kirk-session, to dispose upon the same and divided it equally among the heritors and parishioners; else many absurdities might follow, if an heritor sell off a great part of his barony, retaining still his seat, how shall these buyers be provided; what proportion of the church shall they have; shall they who at last acquire the mansion-house get the whole room in the church pertaining to the entire barony? On the other hand, if an heritor build an isle, shall the kirk-session have the power, on his ceasing to be heritor, to give it away to

No 16. the prejudice of his singular successor in the lands? And though some inclined to find that neither of the competitors could have right, yet it carried *ut supra.*

1698. *November* 18.—THE LORDS decided the competition betwixt Lithgow and Wilkieson, for the right to a seat in the kirk of Melross. The one claimed it by virtue of a disposition from the former possessor, from whom he had bought some acres. The other had a disposition both to the mansion-house and the seat, and alleged it behoved rather to belong to him. Sundry points were debated, whether a kirk-seat follows the land as part and pertinent, or if it require an express disposition *nominatim.* 2*do*, If an heritor, who got a considerable share in the church, because of his great interest in the parish, shall sell it off in parcels to severals, and then last of all the mansion-house, whether the seat divides among them all proportionally effeiring to their respective interests, or if it follows the mansion-house *in solidum*; seeing seats are bestowed conform to a person's dignity and rank, or their estate, or numerous train or family, and these may not concur in him who buys from him. 3*tio*, Whether seats may be possessed as any other property and civil right, or if they be at the disposal of the minister and kirk-session, so that no more but the frame and timber of the seat belongs to the possessor, but the area and ground whereon it stands are at the kirk's disposal. This was moved, but it was thought in many places of Scotland seats were possessed as property. The Earl of Haddington, as patron, appeared in this process, and concurred with Wilkieson, and *alleged*, a superior and patron ought to be considered in the disposal of the church. THE LORDS abstracted from all these nice points, and would only determine who had the preferable right of the two parties before them; and, by plurality of votes, found Lithgow had the best right.

Afterwards, on a bill and answers, the LORDS were equally divided; and the President, by his vote, preferred Wilkieson's right to the seat.

Fol. Dic. v. 2. *p.* 26. *Fountainhall, v.* 1. *p.* 756. *and v.* 2. *p.* 13.

1709. *December* 23.

Captain HENRY BRUCE, Brother to the Laird of Clackmannan, *against* Mr WILLIAM DALRYMPLE of Glenmure, and ALEXANDER INGLIS of Murdiston.

No 17.
An orchard discontiguous from the mansion-house, found to fall under the general words houses and yards.

IN the pursuit at the instance of Captain Bruce against Mr William Dalrymple and Alexander Inglis, for implementing a decreet-arbitral pronounced by Sir Hugh Dalrymple President of the Session, by disponing to the pursuer the house and yards of Clackmannan, who claimed an orchard separated from the house by some arable ground interjected, as falling under the general of yards,