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

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