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,

Answered for the defenders; By house and yards joined together *uno spiritu*, are only meant yards contiguous to the house, for the use and service thereof; whereas, the orchard acclaimed is both discontiguous and differs from a yard, as is clear from all charters wherein yards and orchards are expressed by different words, viz. *cum hortis et pomariis*. No 17.

Replied for the pursuer; The general term yards or *horti* (so called *quod ibi arbores et olera oriuntur*) comprehends gardens and orchards; and we are not to think *pomarium*, an orchard to be a distinct species from *hortus*, because mentioned together in charters, seeing synonimous words are frequently added in charters.

THE LORDS found the Captain had right to the orchard libelled, as comprehended under the general word yards in the decreet-arbitral.

Forbes, p. 372.

*** Fountainhall reports this case:

MR WILLIAM DALRYMPLE of Glenmuir and Alexander Inglis, having purchased in all the preferable debts upon Bruce of Clackmannan's estate, and resolving to bring it to a roup, Sir John Shaw of Greenock designing to be the purchaser, to facilitate the way, he enters into articles of agreement with Captain Hary Bruce, Clackmannan's brother, whereby, for his consent and other prestations, he obliges himself to let him have the house and yards, and ten chalders of victual most contiguous and adjacent thereto, for continuing and preserving the memory of such an ancient family in the sirname of Bruce; and thereafter having submitted all their differences to my Lord Northberwick, President of the Session, he, by his decreet-arbitral in 1701, decerns Glenmuir and Mr Inglis to denude themselves in favours of Captain Bruce of the house and yards of Clackmannan, and of ten chalders of victual of free rent, the lands of Tilligart estimated at 8 chalders of victual being a part thereof, and the rest out of the superiorities and feu-duties of the said estate, &c. Hary Bruce pursuing for implement, it was *alleged* for Glenmuir, He was ready to fulfil, by disponing the lands of Tilligart at eight chalers of victual, and as much adjacent land as would make up the remanent two chalders. *Answered*, I am willing to accept Tilligart in part, but cannot take them at that rental, because he offers to prove they are scarce worth six chalders of victual; and though the decreet-arbitral estimates them at eight, yet that is no part of the decerniture, but a mere guess and conjecture upon Andrew Inglis' information and assertion that they paid so much; and though they were once set at that rent and four bolls more, yet that was only occasioned by strong labouring and liming, which is now worn out, and the tenant became unable to pay it, and broke; and he is willing to take it at whatever it shall be proved that it may pay as a standing rental; but certainly all parties designed to give him ten chalders of victual effectively, and not at a racked imaginary rental; and

No 17. Vinnius *ad tit. Inst. De act.* tells us *iudices compromissarii* must proceed as to material justice *eodem ordine*, that the *veri judices* do. *Replied*, There is neither dubiety nor ambiguity in the clause of the decreet-arbitral, for it expressly determines that Tilligart shall be taken for eight chalders of the ten, and Captain Bruce can least quarrel this of any man living; for two years after the decreet-arbitral he set a tack of it for that. THE LORDS, by plurality, found he behoved to take it for eight chalders of victual, suppose it should now pay less. The next point disputed was, he claimed an orchard at some distance from rhe house, as falling under the designation of the yards obliged to be disponed to him. *Alleged*, That word comprehended no more but the yards and gardens adjacent to the house, which they were willing to dispone to him; but there were sundry acres of land interjected betwixt this orchard and the mansion-place; and there is a coal-sink put down in the midst of it, and it is of a great extent; and in the enumeration of charters, *cum hortis et pomariis* are different things; the first, in our stile signifying a yard, and the other an orchard set with fruit trees. *Answered*, They are truly synonimous words of the same import and signification. Littleton deriving the Latin *hortus* from *ortus, quia ibi arbores et olera oriuntur*. THE LORDS found the yards comprehended likewise this orchard, and gave Captain Bruce right thereto.

Fountainhall, v. 2. p. 545.

1714. *July* 2.

SIR ROBERT DUNBAR of Northfield *against* SINCLAIR of Dun and SINCLAIR of Lyth.

No 18.
In a declarator of right in a commonty, the pursuer was required to produce a progress of rights for 40 years, as a warrant of his author's possession.

IN the action at the instance of Sir Robert Dunbar against Sinclair of Dun and Lyth, for declaring his right of commonty in a muir lying betwixt his lands of Gilloch and those possessed by the defenders; the pursuer founded upon his charter and sasine in the said lands, with their parts and pertinents in the year 1708, and offered to prove, that the muir in question was always reputed to pertain in commonty to the said lands, and was possessed as such by him and his authors time out of mind.

THE LORDS found no process at the pursuer's instance, unless he could produce a progress 40 years backward as a warrand of his authors' possession; and ordained him to produce his authors' rights.

Albeit it was *alleged* for the pursuer, That he standing possessed of the undoubted property of the lands of Gilloch by virtue of the charter and sasine produced, his authors *præsumptione juris* are understood to have had the same right which was a title as sufficient for their possession, as his infeftment is for his, unless his title be reduced. 2*do*, In the present question, he does not pretend to have acquired right by possession as of a separare tenement, in