of duty in the first tack, viz. of a merk for ilk last that should happen to be taken, was not such a definite special rentalled duty, as might make it appear to be a diminution, when the duty should be thereafter appointed to be 100 merks; for it might have happened, that there should not have been 100 last of fishes taken, *quo casu* it could not be a diminution of the rentalled duty, seeing there was no special certain determined duty, for which the saids fishes were rentalled before. And the tack being further quarrelled, because the same wanted a sufficient number of the chapter prescribed by the act of Parliament, to the bishoprick of the Isles, (which is an unprinted act) for one of the chapter had not subscribed as a consenter, but as a witness, and some others were not of the chapter, albeit they had subscribed as of the chapter; for some others had served the cures and charges of those kirks, the ministers whereof by the said act of Parliament were appointed to be of the chapter, and these consenters had not served that charge, and so were not to be respected as of the chapter;—THE LORDS assoilzied from this reason, and found that the subscription of that person as witness, who was of the chapter, was as sufficient as if he had expressly consented; and also sustained the consent of the rest, seeing the defenders offered to prove, that they were ever reputed to be of the chapter, and that they had these many years by-past consented to tacks, and other deeds done of the bishoprick, as those persons who had the charge of these benefices, required by the act of Parliament, and as of the chapter of that bishoprick; and albeit others served the cure, yet seeing the pursuer offered not to prove, that others were provided to these benefices, by lawful provisions, therefore the exception against the reason was sustained to maintain the tacks. *See* KIRK PATRIMONY. No 17.

Act. *David Stuart.* Alt. *Nicolson & Mowat.* Clerk, *Gibson.*

Fol. Dic. v. 1. *p.* 378. *Durie, p.* 601.

1661. *June* 29. TELFER *against* MAXTON and CUNNINGHAM.

JOHN KER, merchant in Edinburgh, having a wadset-right of some tenements in Edinburgh, William Clerk his creditor comprised the wadset-right from him, and obtained decree of removing against the tenants of the tenements: James Telfer having right to the reversion of the said wadset, consigned the sum for which the wadset was granted, in the hands of the clerk of the bills, and thereupon obtained a suspension of the decreet of removing; and thereafter having obtained right from William Clerk to his apprising, did, by supplication, desire the sum consigned by him to be given up to himself; 1*st*, because the consignation was not orderly made, conform to the reversion; and, 2*d*, though it had been orderly, yet before declarator he might pass from the consignation and take up his money, whereby the wadset right would remain unprejudged; No 18.
A bond drawn in name of several apprisers, and subscribed by some, was found not homologated by one who did not subscribe, although *de facto* he concurred in pursuits with the apprisers to

No 18.
exclude other rights, since it did not appear that he knew of the bond.

3*d*, The wadset-right being now returned to himself, by acquiring Clerk's apprising, he had thereby right to the sum consigned for redemption of the wadset. Compearance was made for Maxton and Cunningham, for whom it was *alleged*, that the consigned sum ought to be given up to them; because, before William Clerk's apprising, they and William Clerk had jointly obtained from the King, a gift of the escheat and liferent of the said John Ker, who had been year and day at the horn, before William Clerk apprised from him; so that the sum consigned, being now moveable, fell under Ker's escheat, and thereby they have right to two-third parts thereof, and Clerk or Telfer by his right can only have the other third; and if the sum were not found to fall under Ker's escheat, the annualrent thereof during Ker's life would fall to the three donatars of his liferent equally, and the sum ought to be given out in security to them for their liferent, and to Telfer, as having right to Clerk's apprising in fee, except the third, whereto Clerk had right as joint donatar with them; neither could Telfer pass from his consignation, seeing they accepted thereof; nor could he object against any informality in the consignation made by himself, seeing they pass from that objection. It was *answered* for Telfer, That Maxton and Cunningham had no right by the single escheat of Ker; because before the consignation, by which it is pretended the consigned sum became moveable, Ker was denuded by Clerk's apprising; so that the consigned sum came in place of the apprising. It was *answered* for Maxton and Cunningham, That albeit the apprising might carry the stock and fee of the consigned sum; yet the liferent of the annualrent thereof belongs to the three joint donatars of Ker's liferent, seeing Ker was year and day denounced; whereby *jus fuit acquisitum domino regi*, before William Clerk apprised. It was *answered* for Telfer, The diligences of lawful creditors are still preferred to the fisk before declarator, and here there was no declarator of the liferent of Ker; and therefore Clerk's apprising must carry the whole right of the wadset, and in consequence the sum consigned in place thereof. It was *answered* for Maxton and Cunningham, That although complete diligences of creditors, attaining effect before declarator, are not liable to restitution in single escheats, it is not so in liferent escheats; especially where the diligence is not complete, *in cursu rebellionis*, as in this case, and likewise Clerk, Telfer's author, had homologated the right of liferent, by concurring with them founding thereon in many processes.

'The Lords found the allegeance for Maxton and Cunningham, upon the joint gift of Ker's liferent, homologated, as said is, relevant and proven; and therefore, ordained the consigned money to be given up to Telfer, who by virtue of his right to Clerk's apprising, had the right of the stock thereof, and ordained him to employ the same, or give security for the annualrent of two-third parts thereof to Maxton and Cunningham, during John Ker's lifetime.

No 18.

1661. *July* 6.—In the competition betwixt Telfer, Maxton, and Cunningham, mentioned June 19th, where Telfer was preferred to the stock of the sum consigned for the redemption of the wadset in question, it was further *alleged* for Maxton, That he ought to have a share of the stock, because he produced a mutual bond betwixt himself and William Clerk, Telfer's author, who apprised the wadset, whereby they were obliged to communicate the profit that should accresce to them by their actions intented, and to be intented upon their rights of John Ker the common debtor's lands, without opposing one another upon their several apprisings. Telfer answered *non relevat* against him, who was a singular successor, this being but a personal bond of his author, and could not affect his real right of apprising. It was *answered* for Maxton, *First*, Albeit apprisings and infeftments thereupon be real rights in some respect, yet in many others, they were only accounted as personal rights, at least might be taken away by personal deeds, as by intromission with the mails and duties of the apprised lands, or by payment of the sums therein contained, which would be valid against singular successors, without necessity of any consignation. It was *answered* for Telfer, That this is by reason of the act 1621, cap. 6. declaring apprisings satisfiable by intromission with the mails and duties, and so to expire *ipso facto*, but cannot be stretched beyond the tenor of that statute contrary to the nature of real rights. THE LORDS repelled the allegeance for Maxton upon the bond for communication, which did not affect singular successors. It was further *alleged*, That this mutual bond was homologated by Telfer in so far as he had concurred in all pursuits with Maxton conform to the tenor of the said bond, and had uplifted the mails and duties accordingly. It was *answered* for Telfer, *non relevat* to infer homologation, seeing these deeds are not relative to any such personal bond, which Telfer never knew, and therefore could not homologate; whereupon Telfer's oath was taken, if he knew the same, who denied; and thereupon the allegeance was repelled. Maxton farther *alleged*, That albeit there had been no more but the concurrence judicially, it was sufficient to communicate the apprisings. It was *answered* for Telfer, *non relevat*, unless the concurrence had borne expressly, 'to communicate' for the concurrence only to exclude third parties would never infer the same.

THE LORDS repelled Maxton's allegeances, and adhered to their first interlocutor. *See* PERSONAL AND REAL.—SURROGATUM.

Fol. Dic. v. 1. *p.* 378. *Stair, v.* 1. *p.* 47. & 51.

1661. *July* 24. THOMAS JACK *against* FIDDES.

No 19.
Homologation of an informal decree found not to have been in-

THOMAS JACK pursues ——— Fiddes, *alleging*, That Fiddes having given him in custody the sum of 500 merks in anno 1650, by a ticket produced, bear-