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-

No 19.
ferred by payment of the money without a charge.

ing, ' to be kept by him with his own, upon the deponer's hazard;' and that the pursuer for his security, did thereafter go to Dundee and took his goods thither, where he lost the said sum and all his other goods, by the English taking the town by storm and plundering it; yet Fiddes convened him before the English officers at Leith, who most unjustly decerned him to pay the sum, and put him in prison till he was forced to give bond for it, and thereafter paid it unto this defender his assignee, who concurred with him and knew the whole matter; and now craved repetition *condictione indebiti*. The defender *alleged* absolvitor, because the pursuer made voluntary payment, and so homologated the decreet, and never questioned the same till now. The pursuer *answered*, it was no homologation nor voluntary, he being compelled to grant it, and expected no remeid from the English Judges, with whom the officers had so great power; neither could this be counted any transaction, seeing the whole sum was paid, nor any voluntary consent nor homologation, being to shun the hazard of law; so that though that these officers had been a judicature, if in obedience to their sentence, he had paid, and after had reduced the sentence, he might have repeated what he paid, much more when they had no colour of authority. THE LORDS repelled the defence of homologation. It was further *alleged* for the defender, absolvitor, because he offered him to prove, he required his money from the pursuer, before he went to Dundee, and got not the same; and it was his fault he took it to Dundee, being a place of hazard. The pursuer *replied*, That after the said requisition, he made offer of the money, and Fiddes would not receive the same, but continued it upon his hazard as it was before.

' THE LORDS repelled the defence, in respect of the reply; and because the defence and reply were consistent, ordained the parties to prove, *hinc inde*; the pursuer his libel and reply; and the defender his defence.

Stair, v. 1. *p.* 55.

*** This case is reported by Gilmour, No 2. p. 2923.

1665. *November* 14.

BARBARA SKENE and Mr DAVID THOIRS *against* Sir ANDREW RAMSAY.

No 20.
In an action at the instance of a relict against her husband's heir to make up what was wanting of of the liferent stipulated to her in her

BARBARA SKENE being provided by her contract of marriage with umquhile David Ramsay, to eighteen chalders of victual, or 1800 merks, her husband having acquired the lands of Grangemuir, worth ten chalders of victual, she pursues Sir Andrew Ramsay, as heir to his brother, to make her up the superplus. The defender *alleged* absolvitor; because he offered him to prove, that the said Barbara stood infeft in the lands of Grangemuir upon a bond granted by her husband; which bond bears, in full satisfaction of the contract of mar-