No 3. vocation, she and her husband have homologated the bargain, in so far as she and her husband having fitted accounts with him, they have acknowledged themselves to have received a part of the said 1000 merks.—It was *answered*, That Mary does not subscribe the accounts, and her husband's deed cannot prejudge her other heritage, to which he has no right but *jus mariti*. 2*do*, Nor can it reach him, because the money was not received *animo homologandi*; but there being a submission standing betwixt them, he took a bond of borrowed money for the sum.

THE LORDS having considered the account, which expressly bears a receipt of a part of 1000 merks, and only subscribed by her husband, they found it an homologation of the bargain, so far as might take away the husband's right *quocunque nomine*, but prejudice of the wife's heritable right, if she were not denuded otherwise. The like the Lords found this same session, Straiton against Frazer and Forbes, in the case of an heritable sum belonging to the wife before in legacy by her predecessor, and homologated by her husband. See HUSBAND and WIFE. *Fol. Dic. v.* 1. *p.* 377. *Gilmour, No* 72. *p.* 53.

1666. *June* 28.

The LAIRD of PHILORTH *against* The HERITORS of the Parish of Rathan, or LORD FRASER.

No 4.
An action having been raised for having it declared that part of a church-yard was the property of the pursuer, it was found, that the pursuer had homologated the right of the heritors, by burying the dead of his own family in the ground disputed.

IN a declarator of property pursued by the Laird of Philorth against the Heritors of the parish of Rathan, to hear and see it declared, that the kirk-yard dyke and stile of Rathan erected therein, may be cast down upon the ground, because the foresaid kirk-yard was enlarged 18 feet outward upon the ground of the lands of Rathan, whereof he had right, and was in possession by all deeds of party, and which dyke was built without his knowledge and consent in *anno* 1636; and thereanent, and of the stile made therein, he entered action of declarator and demolition in the year 1637, which is of new again wakened.—To which it was *answered*, That the place was now *locus religiosus*, and became *sepulchrum*. 2*do*, That the same hath not been quarrelled by the space of 30 years; and that this being a kirk-yard, must have the privilege of *decennalis et triennalis possessio*, whereby the right is prescribed *in favorem ecclesiæ*. 3*tio*, That Philorth had homologated the destination of the ground, in so far as he had built a part of the dyke himself, and others at his direction; and that he caused inter his tenants there, and had been present thereat; and last of all, craved a cognition.——THE LORDS sustained the declarator, and refused, in the first place, to grant a cognition, the same being once competent, where both parties pretend to the property, which was not in this case; and found, that the right of the kirk-yard could not prescribe by 10 or 13 year's posssession; and found, That Philorth had homologated the designation, in so

far as he caused or consented to the burying of his own dead, and had consented and given warrant for the burying of his tenants; and repelled the homologation founded upon the bigging of the dike, but in so far as he had built, and no more, or given warrant therefor; and without prejudice to him to quarrel the putting up of arms on the kirk style. No 4.

Fol. Dic. v. 1. p. 377. Newbyth, MS. p. 66.

*** Stair reports the same case:

THE Laird of Philorth pursues a declarator of property of lands lying about the kirk-yard of Rathan; and particularly, that a part of the land, within the kirk-yard dyke, is his property; and that therefore the dyke ought to be demolished, and specially the Lord Fraser's arms upon the common entry of the kirk-yard dyke. It was *alleged* for the defenders; 1*st*, Absolvitor; because the pursuer had homologated the right of the kirk, as to the kirk-yard dyke, and all within it, in so far as he had buried the dead of his own family in the bounds in question, and likewise his tenants.

THE LORDS found the former part relevant, but not the latter, unless he had been present at his tenants burials, or otherwise had consented.

The defenders further *alleged* absolvitor; because the minister and parishioners of Rathan had possest the kirk-yard and dyke peaceably by the space of 30 years, which is sufficient to give them a right upon this point.

There occurred to the Lords these points, 1*st*, Whether less possession than 40 years could constitute the full right of a kirk-yard? 2*dly*, Whether less possession, by burying of the dead, could take away another's property? And whether simply, or so as to give him damage and interest? 3*dly*, Whether an interruption, made after the building of this dyke, by the pursuer's raising summons, shortly thereafter, could operate any thing? if the defenders had bruiked, since the interruption, by that space, that would have been sufficient to constitute a full right before interruption.

Many were of the opinion, that kirk-yards have as great privilege as any kirk lands; and that, in kirk lands, 10 years possession before the reformation, or 30 years after, according to the old act of sederunt of the Lords, did constitute a full right, as well as the long prescription in other cases; and likewise, that, in *ecclesiasticis*, 13 years possession did constitute a right, *decennalis et triennalis possessor non tenetur docere de titulo*; and that accordingly the Lords were in use to decide in all such rights. But the point to be decided was, Whether interruption once used endured for 40 years? so that albeit 13 years would suffice, yet the interruption long before these 13 would always be sufficient, till the interruption did prescribe by 40 years; wherein many were in the negative, that as, in a possessory judgment on seven years, if interruption were alleged, it was always a relevant reply, that since the interruption, the defender has possest

No 4.

seven years without interruption; so, if 10 or 13 years be sufficient to the kirk, no interruption preceding, but only such as are done during these years, can be sufficient; for, if 13 years will take away the solemnest rights and writs, much more may it a citation.

Others were for the affirmative, on this ground, that, in the short prescription of three years, in spuilzies, &c. interruption once used serves for 40 years, so it must in this case; for he that once interrupts is always holden as continuing in that interruption, until it prescribe, or be otherwise past from. But it was *answered*, That it did prescribe, by possessing 13 or 30 years *in rebus ecclesiæ*, church-men seldom have or keep evidents; albeit, in other cases, interruption would only prescribe in 40 years.

Yet the plurality found, that, after interruption, no less than 40 years possession was sufficient, but reserved to the Lords the question anent the ground, in so far as dead were buried therein after probation. See PRESCRIPTION.

Stair, v. 1. *p.* 381.

No 5.
A decree of declarator of irritancy, *ob non solutum canonem*, pronounced by a Sheriff incompetent to such processes, was found homologated by a voluntary offer of obedience, after which the vassal was not allowed to reduce the decree.

1671. *February* 4. LOWRIE *against* GIBSON.

LOWRIE being superior to Gibson in a feu, pursued him before the Sheriff for annulling his feu, for not payment of the feu-duty, and obtained decreet against him; and thereafter pursued him before the Lords for mails and duties, wherein compearance being made, Gibson made an offer, that if Lowrie would free him of bygones, and pay him 1600 merks, he and his author would dispone their whole right, which being accepted by the superior, decreet was pronounced against Gibson to denude himself upon payment. Shortly thereafter, Gibson drew up a disposition, and subscribed it in the terms of the decreet, and offered it to Lowrie, who refused it, because his author had not subscribed. Thereafter Gibson suspended upon obedience, and consigned the disposition, which was never discussed; but Gibson continued in possession still from the decreet, which was in *anno* 1650. Now Gibson raises a reduction of the Sheriff's decreet of declarator annulling his feu, because the Sheriff was not a competent judge to such processes, and because Gibson had offered the feu-duty, which was refused, so that the not payment was not through his fault; and also insisted for reduction of the Lords' decreet, as built upon the Sheriff's decreet, and falling in consequence therewith. And as for any offer or consent, the assertion of a clerk could not instruct the same, unless it had been warranted by the party's subscription. It was *answered*, That Gibson having homologated the decreet by an offer of the disposition, conform thereto, which was only refused because it wanted the author's subscription, and having suspended upon obedience, he cannot now object either against the decreets or consent. It was *answered*, That so long as the decreets of the Sheriff and the Lords were stand-