sumes property. And the defender having discharged his debtor of the like sum for which the bridle was appreciate, he but *suum recepit*, which ought to defend against *rei vindicatio* as well as *condictio indebiti*. Answered for the pursuer, Though *directa rei vindicatio* be properly competent *contra possessorem*, yet the *actio utilis* is competent against any person who received benefit by the thing *in quantum lucratus*, and the defender must be liable for the price, as *surrogatum;* otherwise persons might come to be disappointed of their property by the extinction or loss of the subject: and the defender's oath of calumny is craved, if he had no reason to think that the bridle belonged not to Thomas Douglass. The Lords inclined to repel the defence; but, before answer, ordained some points of fact to be inquired into.

Page 258, No. 917.

1686. *January.* SIR JAMES STAMFIELD *against* MR ROBERT BLACKWOOD.

JOHN Macfarlane having granted bond to Mr David Watson, who assigned it to Mr John Mackenzie, who transferred it to Mr Robert Blackwood; and thereafter Sir James Stamfield having, after the assignation to Mr Mackenzie, and before his translation to Blackwood, arrested the money in the debtor's hands, as truly belonging to Sir Donald Macdonald, and only in trust in Mr Watson's person;—in the competition betwixt the arrester and Mr Blackwood, it was alleged for the former, That he offered to prove, by the oaths of Mr Macfarlane and Mr Mackenzie, That the bond was granted for the behoof of Sir Donald. Answered for Mr Robert Blackwood, That the cedent could not depone, nor the debtor be examined upon the trust against him, an assignee for an onerous cause. The Lords ordained both Mr Macfarlane and Mr Mackenzie, and also Mr Robert Blackwood, to be examined about the trust.

Page 22, No. 116.

1686. *January.* JOHN ADAM *against* JAMES KER and ROBERTSON.

FOUND that a donator of *ultimus hæres*, being in the case of an heir, could not quarrel an assignation granted by the defunct, for want of intimation in his lifetime.

Page 35, No. 159.

1686. *January.* JOHN MARSHALL, and CHILDREN of ——— *against* MR JOHN RICHARDSON and the HEIR.

A HUSBAND, in his contract of marriage, being obliged to secure the conquest during the marriage, to himself and his wife in conjunct fee and liferent, and to the bairns of the marriage equally in fee, took infeftment in the conquest to himself, and the heirs of the marriage, and granted bonds of provision to the younger

children; after his decease, the younger children pursued the eldest, to denude of their proportional part of the land conquest. Alleged for the defender, That, notwithstanding of the clause in the contract of marriage, providing the conquest to the bairns equally, the father, by his paternal power, might rationally proportion the same, with some inequality, according to their circumstances and deserving, that children may, by such a check, be kept *sub paterno obsequio*. Answered, The contract being betwixt small burgesses, whose succession is ordinarily made to run *in capita*, the provision therein must hinder the father to make an equal division; and, *in anno* 1678, between Stuart and Stuart, it was found, that a father's provision to the bairns of the marriage, without the word *equally*, did hinder him to make the younger children's provision less than that of the eldest; *multo magis*, in this case, was the father bound to an equal division. The Lords recommended to the parties to agree.

Page 46, No. 205.

1686. *January.* THE RELICT of PATRICK CUNNINGHAM *against* The LAIRD of EVELICK.

A HUSBAND was found liable to pay 200 merks, contained in a ticket granted by his wife, *stante matrimonio;* whereby she obliged herself, and her heirs, &c. to pay the same; to which ticket the husband did not consent, but only signed *witness:* because his signing witness was an approbation of the act, and a kind of *præpositura ad hoc negotium*.

Page 47, No. 206.

1686. *January.* ROBERT and JOHN GILLISES *against* JANET STUART.

A HUSBAND having, several years after his marriage, provided his wife (with whom he had made no contract,) to the liferent of a tenement of land, without any clause in satisfaction of terce and third; and, thereafter, having provided her to 3000 merks of his personal estate, and to a liferent of the rest, in satisfaction of the terce and third, and there happening to be no children of the marriage, the relict claimed the half of the personal estate. Alleged for the defender, That she could not have both a liferent of the tenement and the half of the personal estate; because, 1. The infeftment being before the late Act of Parliament, it imported an acceptation, in satisfaction of terce and third, without necessity of any express clause to that purpose; 2. The last settlement of the personal estate was a tacit revocation of the preceding infeftment of liferent given *stante matrimonio*. Answered, By our law and practique, settlement of jointure upon wives, without a clause *in acceptation*, &c. doth not cut off the right of terce,—as was found in the cases of the Lady Eleistoun and of the Lady Craighouse; 2. Provisions made, *stante matrimonio*, in favours of wives, with whom no contract was made before the marriage, are not revokable as donations *inter virum et uxorem*. The Lords sustained the reply, and found, That the wife had right to both the liferent of the tenement and to the half of the personal estate.

Page 98, No. 377.