

Tinwall's servitude of pasturage was not constitute by his possession, in regard the same was precarious : the tenants who acquired the possession having paid the moss-fowls ; and it being interrupted by the Laird of Amisfield, which several of the witnesses saw : and though they condescend not upon the particular year, yet there being but fifty years, or thereby, of Tinwall's possession of pasturage proven, any time that the late Amisfield was laird, would fall within forty years of Tinwall's possession, the last five years being frequently interrupted by Sir Robert Dalzell.

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1673. *December 5.* DR HAY *against* ANDREW ALEXANDER.

DOCTOR Hay, having apprised the lands of Artrochie, pursues Andrew Alexander, and others, the tenants, for maills and duties, who alleged Absolvitor, because he hath right to the lands by an apprising long anterior to the pursuer's apprising. It was answered, That the pursuer,—having raised improbation and reduction against George Stuart, Marjory Jamison, and Andrew Alexander,—hath obtained certification against them, improving all their rights. And, albeit there be a reservation in favours of Andrew Alexander, yet certification being granted against George Stuart, doth exclude Andrew Alexander ; in so far as George Stuart had appraised the lands in question before Andrew Alexander, and was infest therein, and so had a right preferable to Andrew Alexander ; so that the pursuer, having prevailed against George Stuart, who would have excluded Andrew Alexander, *vincit vincentem*. It was replied, That the common brocard hath many exceptions, and can never be extended to a certification, or an improbation, which doth only take away the right quarrelled, and communicates nothing thereof to the pursuer : and, it being but a certification, it hath no effect but as to the pursuer Dr Hay ; so that George Stuart might yet make use thereof against Andrew Alexander. The Lords found, That the certification against George Stuart's prior apprising could not operate against Andrew Alexander's apprising, though posterior to George Stuart's.

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1673. *December 13.* SIR FRANCIS CLERK *against* SMEITOUN.

THE ship called the Calmer being adjudged prize by the admiral, and brought in question by reduction before the Lords, they adhered to the admiral's decret, except as to a parcel of brass wire ; which, being alleged to be the proper goods of Sir Francis Clerk, merchant in London, the Lords gave commission to the Lord Mayor of London to examine witnesses thereupon ; which being reported, they found the brass wire to be the proper goods of the said Sir Francis Clerk. It was alleged for the privateer, that, though this wire belongs to Clerk, yet it must be confiscated with the ship and loading :—1. Because, as to this wire, there was no document at all aboard. *2do*. Because the ship being declared prize upon this ground mainly, that the skipper was a Hollander, and

nothing instructed of his domicile in Sweden, and that he was an eight-part owner of the ship; and therefore, by the custom of nations, and the king's instructions, "a part of the ship belonging to the king's enemies" confiscates the ship and loading. It was answered, That the king's subjects, residing in his dominions, are necessitated to carry on a covered trade; and therefore the presumptive probation, which is inferred from want of documents, false documents, throwing of papers overboard, or the like, do always admit a contrary probation of the property: which doth not hold as to neuters, or others living abroad, who, being free to trade with both parties, need no such contrivances; and therefore the presumption is so strong that the ship and goods belong not to free men, but to enemies, that it admits no contrary probation of the property, unless it be in the case of the defect of some formalities requisite in the passes by the treaties. And albeit a part of the ship belonging to the king's enemies forefaults the whole, and the loading,—the ground in justice whereof is, that the other parties concerned do concur with the king's enemies in carrying on of their trade,—yet that cannot be extended to the king's subjects residing in his dominions, giving order to their factors abroad to send them home goods; or, if without their knowledge, such goods being embarked in ships whose documents bear them to be free ships, but, being convelled by the oath of the skipper; his Majesty's subjects are innocent of the interest of any enemy. Neither can they secure themselves better, unless they were abroad for the time; so that they might, and ought, to cause the skipper depone upon the property of the ship and loading: whereas oft-times false passes are taken out without oath, and are found false by the oath of the skipper, as in this case. It was answered for the privateer, That the king's instructions bear no exception of his subjects, who should be more cautious than neuters, not to concur with his enemies; and the factors abroad ought to do the same that they would do if they were abroad: neither is there any loss to Sir Francis Clerk; for, if the factor pursue for the price of this wire, Sir Francis hath this good exception,—That through the factor's fault it was shipped in an unfree bottom, and thereby became prize. It was replied, That the price of the wire was not to pay, but was paid by provisions in the factor's hands when it was embarked. The Lords found, That the want of documents, or the like presumptive probation, is always elided by the contrary probation of property, in favours of the king's subjects residing in his dominions; and that, if they be ignorant of a latent interest of an enemy, not being upon the place of unloading, and have paid their factor *bona fide*, that their goods are free, and not to be prize. The Lords also found, That the privateer was only liable for such prices as he got for the wire, if he sold the same by virtue of the decret of adjudication, before he was summoned by the reduction: otherwise, to be liable for the price as it was proven to be bought at Stockholm, such wire not having a known price here.

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1674. *January 6.* JOHN HALYBURTON *against* JOHN WATSON.

JOHN Halyburton pursues John Watson and Grissel Ogilvie his spouse, for payment of a legacy of £5000, left by Henry Thomson to Cicill Thomson,