to Thomson, for payment of the annualrent, prior to the public infeftment. Which was found sufficient, though thereby the public infeftment was excluded.

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1673. *November* 27. DAVID KENNOWAY *against* JAMES DAVIE.

DAVID Kennoway, having incarcerated William Cassils, by an act of warding, in the tolbooth of Linlithgow, for £1700, uplifted by Cassils, as his sub-collector of the excise of Linlithgow,—James Davie obtained Kennoway's consent to his liberation, upon granting a bond, betwixt and such a day, to cause Cassils count and pay, or to enter him then in prison, or otherways to pay the sum. Kennoway charges upon this bond. Davie suspends, and alleges That he had fulfilled the same, in so far as, upon the day prefixed in his bond, he presented Cassils to the bailie of Linlithgow, who gave the act of warding, and he refused to accept him; as an instrument, produced, bears; and that day falling to be Saturday, he actually entered Cassils in prison on Monday, where he continued several months. It was answered, That the offer to the bailie was not sufficient without intimation to Kennoway, and actual entry into prison, conform to the bond. *2do.* That Davie consented to let Cassils out of prison thereafter. *3tio.* That, the same day, after that he had offered himself to the bailie, there was a requisition to him to enter in the prison, which he refused, and so was wilfully contumacious, upon the day prefixed; so that Kennoway was not obliged to notice what he did after, nor to dispute whether his condition became worse than before he entered. It was replied, That this being a penal obligation, delay was purgeable, when the difference was inconsiderable, being the next week day, without detriment, and when obedience was offered the very day, though all formalities had not been exactly observed,—seeing it was no pretence, but a true imprisonment for several months; nor is it relevant that the cautioner consented to his liberation thereafter, for the bailies could not warrantably liberate upon his consent; [for] he, having performed his obligement to re-imprisonment, was not further interested. The Lords found the reasons of suspension relevant to liberate the cautioner; but, as to the charger's answer,—of requiring the cautioner to enter Cassils that same day after his offer to the bailie,—it not being debated, the Lords ordained them to be heard before the Ordinary thereupon.

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1673. *December* 3. SIR ROBERT DALZELL *against* The LAIRD of TINWALL.

SIR Robert Dalzell, being infeft in the ten-pound land of Achnan, which is a part of the barony of Amisfield, pursues a declarator of property of the moor of Achnan, and that the Laird of Tinwall hath no right thereto, or servitude of pasturage, moss, feal, or divot, therein. Tinwall pursues a declarator of his right of pasturage, moss, feal, and divot, in the said moor of Achnan, as part and pertinent of his lands of Tinwall. Upon both processes, the Lords, before answer, ordained either party to produce such writs and evidents, and to adduce

such witnesses as they could, for instructing their right or possession; and gave commission to one of their own number to visit the bounds, and examine witnesses there. Which being reported, Sir Robert Dalzell produces an infeftment of Sir John Charters, of the ten-pound land of Achnan, having a special bounding, which incloses this moor; and Alleged, That thereby, and by the natural situation of the moor, which is in a great part surrounded by his property, and only touched by Tinwall's property at one place by some few pairs of butts; and that it is denominated the moor of Achnan; and that the neighbouring heritors, whose lands touch far more than Tinwall's, pretend no pasturage in it; and that his witnesses have proven that it is part and pertinent of the barony of Amisfield, whereof Tinwall hath no part; and that Tinwall holds of another superior; and any possession of pasturage, peat, or turf, he hath had, was by Amisfield's tolerance, for the yearly payment of three moss-fowls out of each half-merk land. It was answered for Tinwall, That there is no respect to be had to the bounding charter produced by Sir Robert:—1*mo*. Because it bears to have been granted upon Amisfield's own resignation in his own favours, and doth not proceed upon the resignation of any author obliged in warrandice; who would not have disponed with such a bounding, and warranted the same, if it had not truly been so. But it is easy for any man to make his own bounding as this is. And, by the Act of Parliament 1592, cap. 136, such boundings granted, or to be granted, by the king or any superior, upon the vassal's own resignation, albeit they contain a *novodamus*, shall not be extended to the prejudice of any third party; but the right of property and commonty shall be determined, as if there were no such bounding mentioned. And there is no deed of property proven: For what is informed, of riving out two or three acres of the moor by Sir Robert's tenants, is but inconsiderable, and lately done: neither doth it import that the moor is holden of another superior than the lands of Tinwall; for whosoever is infeft in lands with common pasturage, &c. may prescribe a right, by uninterrupted possession forty years, in any land; for the pasturage and pertinents of lands can no otherways be constituted or known but by long possession, which will add or abate parts of it; which is much more than pertinents. And as for the tolerance of the moss-fowls paid by Tinwall's tenants to Amisfield:—1*mo*. Witnesses cannot prove a tolerance, but writ; neither can these witnesses' testimonies prove *quo nomine* the fowls were paid; for they might have been paid to Amisfield, who was a great man, and a friend to Tinwall, by the tenants, as a gratification; nor doth it appear that Tinwall knew of it. And there is produced a commission by Tinwall to Amisfield, in his absence out of the country, to manage his affairs. And, as to the interruption by Amisfield, the same was only by threatening a tenant of Tinwall's while he was casting of turfs, and doth not relate to the pasturage, and was neither solemn nor reiterate: and, notwithstanding thereof, Tinwall's possession was never stopped, and hath clearly proven possession of pasturage, turf, and moss, for fifty years and above; and though a small interruption might suffice, if the property were clearly Sir Robert's, yet, where it appears to be but a promiscuous commonty, neither party having a clear property, such interruptions, *via facti*, taking no effect by discontinuing the possession, are not redargued. The Lords found it sufficiently proven, that the property of the moor in question belonged to Sir Robert Dalzell, he being infeft in the ten-pound land of Achnan, and this moor of Achnan lying in the bosom of the land, wherein none but Tinwall claims pasturage. And found, that

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 apprysing. 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 apprised the lands in question before Andrew Alexander, and was infeft 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 decreet, 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