

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 decreet 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.

*Vol. II, Page 240.*

---

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,

spouse to Halyburton. It was alleged, No process ; because, by an Act of Sederunt in June 1672, All summonses are appointed to proceed upon twenty-one days' citation ; and that no writer should insert any privilege, except the particular causes mentioned in the Act ; whereof actions of executors against legators are none. It was answered, That the defenders live in Edinburgh ; and there was a special privilege to cite parties in Edinburgh on twenty-four hours, which was neither mentioned nor taken off by the Act of Sederunt, and had been accustomed by the Lords since. It was replied, There was no exception, in the Act, of that privilege. The Lords found no process, but resolved to consider how far they would allow the privilege of citation within Edinburgh : whether only as to the second summons, this being the first summons ; or when, by their own deliverance *in præsentia*, and not of course : But, having considered the Act the next day, they found it took not away the privilege of citation within Edinburgh, as to causes that, before that Act, were accustomed to be executed in Edinburgh, and that upon such time as was accustomed : And granted process.

*Vol. II, Page 247.*

---

1674. *February 11.* MITCHEL of DALGAIN *against* The EARL of DUMFREIS.

MITCHEL of Dalgain, having apprised the lands of Auchincross upon umquhile Auchincross his debt, and the Earl of Dumfreis having right to an apprising for the heir's debt in a competition betwixt them ; it was alleged for Mitchel, That his apprising was to be preferred, by the late Act of Parliament preferring diligences upon the defunct's debt, to diligences done upon the heir's proper debt. It was answered, That the Act bears such diligences for the defunct's debts as are done within three years after his decease ; as this apprising was not. It was replied, That there were not three *anni utiles* past after the defunct's death, before Mitchell's apprising ; there being surcease of justice a great part of the time. The Lords found, That the Act could only extend to diligences done within three years after the defunct's death.

*Vol. II, Page 265.*

---

1674. *June 12.* The COMMISSIONERS of LINLITHGOWSHIRE *against* The HERITORS thereof.

SIR Walter Seatoun and James Dundass, having charged the heritors of Linlithgowshire for five pounds a-day for their commissioners' charges to Parliament, from the first day of Parliament to the last day thereof, conform to the late Act of Parliament ; they suspend on these reasons :—*1mo.* That the Act bears expressly, “ This allowance to be for the commissioner's attendance on the Parliament ;” and, therefore, there is none due for such days and time as the commissioners were absent out of Edinburgh, or for such days as the Parliament sat and they were not present in Parliament. *2do.* There can no more time be accounted than what the Parliament actually sat : but in recesses of Parliament, the chargers can have no allowance, unless they had been upon the Articles ;