

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