

to the said Thomas Weir, renouncing the former wadset: Kennedie of Auchtifardel did acquire right to this wadset, and Hamilton of Raploch acquired right to the reversion: Thereafter Auchtifardel did take a new right from John Weir, the oy, and infest him, as heir to his goodsire, passing by his father.—In the competition of which rights, it was alleged for Raploch, That the right of John Weir, the son, could not be quarrelled; because it was perfected by prescription, in so far as he produced the son's seasine *in anno* 1599, and the wadset granted by the son shortly after, which had been clad with possession much more than 40 years, and which was sufficient, without production of the precept whereupon the seasine proceeded, conform to the Act of Prescription; so that the son's right being perfected, no right derived from the oy, as heir to the goodsire, passing by the son, could be respected. It was answered, That the Act of Prescription excepted falsehood; and the son's seasine behoved to be false, because it was offered to be proven that the father lived seven years after the date of the son's seasine; so that that seasine could not make him have right as heir to the father. And there being a mutual probation allowed for instructing the time of the death of the first John Weir, Auchtifardel adduced several witnesses, some past 80, and one past 100 years of age, who deponed, that the first John Weir died *in anno* 1606, or thereby: Which coming to be advised, it was alleged for Raploch, That this probation could not take off the benefit of prescription:—*1mo.* Because it was not positive, bearing only “to be such a year or thereby;” and, in a matter so ancient, where the question was only of the date, the oaths of old doating men could not make a sufficient probation, much less could it take off the adminicles for astructing the seasine, *viz.* the wadset right granted by the son, and mentioning both the seasine and precept whereunto Auchtifardel himself had taken right; and the notary's protocol, bearing, “this and many other seasines set down by their dates orderly, both before and after this seasine, and all before the year 1606. *2do.* This ground of improbation is but indirect, and not on a necessary consequence; for, if the superior gave a precept of *clare constat* to the son, as heir to the father, and seasine was taken thereupon,—albeit the father had been alive, so that it was the superior's error to suppose him dead,—the precept and seasine would be true, though erroneous and invalid, and 40 years' possession would valid them by prescription; so that, *in dubio*, error is rather to be presumed than falsehood. The Lords sustained the seasine as a true seasine, perfected by prescription, and adminiculated as aforesaid, notwithstanding of the probation in the contrary.

*Vol. II, Page 227.*

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1673. November 7. JOHN THOMSON *against* ROBERT ROSS.

JOHN Thomson being infest, by Provost Mains, in an annualrent of £24 out of certain lands of his, pursues poinding of the ground. Compears Mr Robert Ross, and produceth a public infestment of property of the same land from Provost Mains; and craved preference, because the infestment of annualrent was base. The annualrenter replied upon possession, by the heritors' payment of the annualrent before the public infestment; and, for proving thereof, adduced certain witnesses, who proved certain bolls of victual were delivered by Provost Mains

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

*Vol. II, Page 229.*

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 obligation 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.

*Vol. II, Page 232.*

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