

## S E C T. II.

Whether a precept of *clare constat*, granted by a Superior, implies a discharge of Casualties.

1612. February 14. LORD WEDDERBURN *against* NISBET.

FOUND, that the superior's precept of *clare constat* given to the feuer was a discharge of bygone feu duties.

No 8.

*Fol. Dic. v. 1. p. 431. Haddington, MS.*

\* \* \* See this case, No 21. p. 6322.

1668. June 24. ANDREW GRAY *against* HOWISON and GRAY.

ANDREW GRAY being infeft as heir to his grandsire, in certain lands of the barony of Foulis, held blench of the house of Gray, pursues a reduction of a late infeftment in *anno* 1655, granted to Walter Watson, as long posterior to his right. Compearance is made for William Gray of Haystoun, as being infeft by the Lord Gray, and Sir George Kinnaird, who was donatar to the recognition of the estate of Gray, by the alienation of this Lord's father; which recognition hath been declared by the Lords; and *alleged*, that he hath the only right; because, by the recognition, the old rights of the house of Gray being void, the pursuer's subaltern right fell in consequence therewith. The pursuer *answered*, That before the defender's right, he had obtained a precept of *clare constat*, acknowledging his old right, whereupon he was infeft. It was *answered*, That the precept doth bear expressly to be in obedience of precepts out of the chancellary upon the pursuer's retour, and so being a necessary act, and not voluntary, it could be no acknowledgement or ratification of the pursuer's right.

THE LORDS having considered the precept, that albeit it mentioned the retour in obedience to the precept, yet it bore also, *et quoniam mihi clare constat, &c.* in the common strain of a precept of *clare constat*, acknowledging the pursuer's predecessor's right and his own,

They found that it did exclude the donatar, and all having right from him thereafter, and after the sasine past thereon.

*Fol. Dic. v. 1. p. 431. Stair, v. 1. p. 542.*

No 9.

A precept of *clare constat*, granted after recognition, was found to imply the superior's passing from the recognition.

No 9.

\*\*\* Gosford reports the same case.

THE Lord Gray did dispoſe the lands of Balbunnoth to one William Gray, to be held blench, which he himſelf held ward of the King; whereupon the ſaid lands were recognoſced to be in the King's hands, and found to belong to Sir George Kinnaird, as donatar, who thereupon did infeſt Andrew Gray as neareſt heir to the ſaid William. Thereafter, the ſaid donatar did diſpoſe the ſaid lands to William Hay of Hayſtoun, who being infeſt, did enter to the poſſeſſion by uplifting the mails and duties; there being a reduction raiſed of this infeſtment at the ſaid Andrew's inſtance, as being *a non habente po-teſtatem*, the donatar being denuded in the purſuer's favours; and it being *answered*, that any infeſtment granted by the donatar was only a precept upon a retour and requeſition, and ſo could not prejudice him of the benefit of recognition; the reaſon was ſuſtained notwithstanding of the answer, becauſe the precept did not only make mention of the retour and recognition, but likewiſe did bear *et quia per authentica documenta nobis clare conſtat, &c.* and ſo was a clear precept of *clare conſtat*. The donatar could not thereafter crave the benefit of recognition, nor diſpoſe the lands in prejudice of that infeſtment.

Gosford, MS. No 6. p. 3.

No 10. 1682. February. EARL OF CASSILLIS *against* LORD BARGENY.

FOUND, that a precept of *clare conſtat*, given without any reſervation by a ſuperior to his vaſſal, whereupon he was infeſt, purged not only bygone feu-duties and the entry, but alſo ward-duties intromitted with by the vaſſal before the entry, unleſs the ſuperior had gifted the ſame to ſome other before the precept.

Fol. Dic. v. 1. p. 431. *Harcarse*, (WARD and MARRIAGE.) No 1005. p. 284.

\*\*\* Fountainhall reports the ſame caſe.

“THE LORDS found a precept of *clare conſtat* inferred and implied in law a diſcharge of all feu-duties, recognitions, wards, nonentries, and other casualties preceding the date thereof.” This was not ſo underſtood formerly, though it ſeems equitable.

Fountainhall, v. 1. p. 172.

\*\*\* This caſe is alſo reported by Sir P. Home.

THE Earl of Caſſillis having purſued the Lord Bargeny for ſeveral bygone nonentry duties, feu-duties, and ward duties, of certain lands holding of him,