No 9.

*** Gosford reports the same case.

THE Lord Gray did dispone 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 infeft Andrew Gray as nearest heir to the said William. Thereafter, the said donatar did dispone the said lands to William Hay of Haystoun, who being infeft, did enter to the possession by uplifting the mails and duties; there being a reduction raised of this infeftment at the said Andrew's instance, as being *a non habente potestatem*, the donatar being denuded in the pursuer's favours; and it being *answered*, that any infeftment granted by the donatar was only a precept upon a retour and requisition, and so could not prejudge 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 dispone the lands in prejudice of that infeftment.

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 infeft, 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,

ever since the defender's father's decease; *alleged* for the defender, That he could not be liable for any such duties preceding the year 1668, because the pursuer had granted him a precept of *clare constat* upon which he was infeft in the lands. And the granting of a precept of *clare constat* doth infer a discharge and liberation from all bygone duties, especially, seeing there was a compensation paid to the superior at the granting of this precept, and which was willingly granted without any compulsion, he not being charged upon a retour; and albeit it had proceeded upon a retour, yet a superior's granting a charter to his vassal does still infer a liberation of all bygone duties, seeing he might have suspended, and could have been compelled in law to have entered the vassal before all these duties and casualties had been satisfied and paid, unless the charter or precept did expressly bear a reservation of the same. *Answered*, That the pursuer, as superior, having right to these casualties by decease of the former vassal, the granting of a precept of *clare constat* does not discharge the present vassal from the preceding casualties, unless the same had been expressly discharged, being of great concernment and import to the superior, and the effect of an precept of *clare constat* upon which the is infeft is only to stop the course of the casualties in time coming, but not to liberate him from precedings, there being nothing designed by granting precepts of *clare constat*, but only to state the vassal in the right of his predecessor's lands; and if it were otherways, then a precept of *clare constat* should have the effect of a charter containing a *novodamus*, which were absurd; as also, in this case, the superior was minor the time of the granting of the precept *of clare constat*; and albeit there was a composition paid, yet there was no transaction made, nor any thing paid upon the account of these bygone duties and casualties. THE LORDS found the precept of *clare constat* takes away the bygone feu-duties, ward, and non-entry duties preceding the vassal's entry, which were not gifted the time of the giving of the precept.

Sir P. Home, MS. v. 1. No 133.

No 10.

*** P. Falconer also reports the same case.

IN the action pursued at the instance of the Earl of Cassillis against the Lord Bargenie, wherein he craved the ward duties of certain lands held of him ward, the non-entry of certain blench lands, and the feu duties of feu lands held likewise of him; it having been *alleged* by the Lord Bargenie, that he ought to be assoilzied from the hail, because the Earl had entered him to the hail lands by a precept of *clare constat*, which did import a formal discharge of all, either ward, blench, or feu duties, or non-entries; and it being *replied*, Whatever might be said to blench and feu duties, that they were presumed to have been past from, or discharged as being *debitum fundi*, yet as to ward duties which were not *debitum fundi*, and whereto my Lord Bargenie was not liable as heritor, but as intromitter, the precept of *clare constat* could not be extend-

No 10. ed thereto; the LORDS found, That in regard superiors use to clear all the casualties before the entry of the vassal, that the precept of *clare constat* included all, both ward duties, blench, feu, and non-entries, and did import a discharge thereof.

P. Falconer, No 22. p. 11.

SECT. III.

Effect when the Superior grants a precept in obedience.

No 11.
Granting a charter of apprising does not prejudge the King of the recognition of the debtor already fallen.

1614. *February* 18. LAIRD of LUGTON *against* LAIRD of LETHINDIE.

IN an action of recognition pursued by the Laird of Lugton *contra* the Laird of Lethindie, the LORDS repelled the exception proponed for the part of the creditors being that their lands were comprised by Andrew Fleeming of Calus, and that he was infeft by the King's Majesty long before the gift of recognition; and found, that the King's Majesty could not omit and tyne his lands falling to him by recognition by an infeft of comprising, and the King's Majesty, in this case, could be in no worse estate than a private superior who cannot tyne his right by infeftment of comprising, and therefore no more the King's Majesty, seeing there is no consent given by the treasurer, no composition paid to the King's Majesty, nor other deed done, by the which the King's Majesty may be denuded.

Argumento, The King tynes it not by a retour, *ergo*, and so it is by the entry or change of a tenant.

Fol. Dic. v. 1. p. 431. Kerse, MS. fol. 118.

No 12.

1622. *July* 5.

DONATAR of the EARL of TULLIBARDINE'S Escheat *against* ADINSTON.

GRANTING a charter of apprising prejudges not the king of the liferent escheat of the debtor already fallen.

Fol. Dic. v. 1. p. 431. Durie.

*** See this case, No 57. p. 3660.