

No 36.

1623. *March 4.*STEVENSON *against* STEVENSON.

THE LORDS found. That a precept of *clare constat*, and sasine following thereupon, could not be drawn back, to sustain a warning against a third party, except it had been granted for obedience of a retour.

*Fol. Dic. v. 2. p. 304. Kerse, MS. fol. 240.*

\* \* \* Durie reports this case :

IN an action of removing, pursued by one Stevenson against Stevenson, the pursuer's title being a sasine as heir to his father, by virtue of a precept of *clare constat*, granted to him by the superior, after the term before which the warning was made to remove ; the LORDS would not sustain that title, nor action founded thereupon, because he was not seised, nor the precept directed nor granted at the time of the making of the warning ; and found, that the same could not be drawn back to the warning, especially against a party defender, who compeared, and clad himself with a right to the lands in his own person.

Act. —.

Alt. *Kinross.*Clerk, *Scot.*

1623. *March 6.*—THE above written action, mentioned in the preceding page, Stevenson against Stevenson, where the LORDS found that the sasine could not be drawn back ; it was *replied* for the pursuer, That the defender could not quarrel the title, because he was his tutor, who, of the law, was holden to have obtained the pursuer, in due time, seised as heir to his predecessor. *Duplied* by the defender, That he was not bound to serve the pupil heir, to evict the lands against himself ; moreover, the precept and sasine, which was the title of the removing, is procured many years after the expiring of the years of the tutory, and after his pupillarity ; so that, whatever fault is therein, cannot be imputed against the defender, who was not holden to answer for any deeds done thereafter ; and if any had been omitted within the time of his tutory, which is not granted, he had against him of the law *actionem tutelæ*. THE LORDS found, the defender being once tutor, could not quarrel the pursuer's right, albeit the tutory was expired, and albeit he defended himself with a right in his own person, acquired before he was tutor. *Partibus ut supra.*

*Durie, p. 55. & 56.*

\* \* \* Haddington also reports this case :

1623. *March 4.*—HERMISCHIELS pursued a removing from the lands of Hermischiels against Malcolm Stevenson, who *alleged*, That no process could be granted, because the pursuer's sasine was in September after the Whitsunday

of the warning ; which allegiance the LORDS found relevant ; because the sasine proceeded not upon a retour, but upon a precept of *clare constat* of the Lord Torphichen.

No 36.

1623. March 6.—In the before mentioned removing, pursued by Hermischiels against Malcolm Stevenson, it was *replied* by the pursuer, That the defender could not quarrel his sasine, because he being his tutor many years, should have obtained him served heir to his father, and obtained him infest in his lands ; which not being done in his default, he could not be heard to quarrel his sasine, passed upon a precept of *clare constat*, more than if it had proceeded upon a retour ; which reply the LORDS found relevant ; and thereafter understanding that there was an action of tutor-count depending betwixt the parties, thought fittest first to discuss it ; and finding Malcolm Stevenson paid off the sum of L. 1000, owing to him by contract, and of the profits thereof, to make him countable for the whole remanent rents of the lands of Hermischiels.

Haddington, MS. No 2800. & 2802.

1624. March 5. CUNNINGHAM against SEMPLE.

IN an action pursued at the instance of Cunningham of Mongreenan, as heir to his predecessor, against Semple, for reduction of a service and brief of terce, the LORDS sustained the pursuit, upon the production of a retour, where the pursuer was served heir ; albeit it was deduced, served, and retoured, after the intenting of the summons, which they found sufficient to instruct the pursuit ; albeit he was neither served nor retoured at that time, seeing he was nearest of blood, and that person who only could be heir, and the service drew back the retour to the time of the pursuit, and so much the more, because it was a general retour, and not in any particular lands.

No 37.

Act. Hope.

Alt. Nicolson.

Clerk, Hay.

Fal. Dic. v. 2. p. 303. Durie, p. 117.

\* \* Haddington reports this case :

A SUMMONS of reduction and improbation, raised at the instance of a pursuer, as heir to his predecessor, before he be retoured general heir, will be sustained, if he be retoured heir before the disputation of the cause ; because, a retour is only *declaratoria juris*, and, in such cases, may be drawn back. Practiques were alleged to that purpose by the Advocate, betwixt William Ker of Ancram,