

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,

No 37.

or Captain David Home, and the Earl Bothwell, and Lord Glamis. (See APPENDIX.)—In reduction of a service of terce, the Judge and Inquest need not to be summoned, if no reason be libelled, nor iniquity and punishment concluded against them. The apparent heir, pursuing reduction of writs, whereof some concern his predecessor, and are quarrelled, needs not to call any to represent his father, to whom he is heir apparent; because, he cannot pursue himself, and be both pursuer and defender.

*Haddington, MS. No 3055.*

No 38.

1625. *January 20.*ELPHINSTON *against* GUTHRIE.

IN an action of removing, pursued by George Elphinston of Salines against Bethia Guthrie, his brother's relict, it was *excepted* by the defender, That the pursuer's sasine produced could not instruct the summons, it being given long after the warning, and after Whitsunday. *Replied*, That it was sufficient to give him action of removing, in respect it did depend upon a precept of *clare constat*, given by his superior to him, as heir to his brother, before the warning, and should be drawn back thereto. THE LORDS found, that a sasine, proceeding upon a precept of *clare constat*, could not be drawn back to the date of the precept; because it hath no other warrant but the naked assertion of the superior, which cannot prejudge any third party; it being otherwise in a sasine proceeding on a service, this being more public and authentic.

*Fol. Dic. v. 2. p. 304. Spottiswood, (REMOVING.) p. 276.*

\* \* \* Durie reports this case :

IN an action of removing, pursued by Elphinston of Salines against Bethia Guthrie, the LORDS found the sasine produced by the pursuer, for his title, not to be a sufficient right, whereupon to seek removing upon that warning and title; because the sasine was given by virtue of a precept of *clare constat* of the superior's, which precept and sasine were both after the term, before the which the warning was made; so that he neither being seised before the term, nor obtaining the precept before the same, he had no right in his person to warn; and albeit the sasine was given to him, conform to the precept foresaid of *clare constat*, as heir to his brother, and so thereby, the pursuer *replied*, That the right which was in his brother's person, and whose sasine of the lands he produced, was transmitted in the person of the pursuer, as his heir of blood, and so that the same should be drawn back to the time of his brother's decease, this was not respected, but repelled; because the precept of *clare constat* which was the ground of the sasine, would never make the pursuer heir to his