The Lords had no difficulty in decerning conformably to the conclusions of the declarator, being satisfied that the proposed plan was not adverse to the intentions of the original grant. No. 104.

Lord Ordinary, *Bannatyne.* Alt. *Cranstoun.* Act. *Moncrieff.* Agent, *Jo. Macritchie.* Agent, *Jo. Mowbray, W. S.* Clerk, *Home.*

J. *Fac. Coll. No. 165. p. 372.*

SECT. XXV.

Description of the Vassal's Title.

1798. *January* 16.

The PERSONAL CREDITORS of ALEXANDER CRICHTON *against* The SOCIETY FOR PROPAGATING CHRISTIAN KNOWLEDGE, and ALEXANDER WOOD.

No. 105.
A precept of *clare constat* sustained, although it contained an inaccurate description of the vassal's title.

In 1751, John Henderson disponed the lands of Newington to Patrick Crichton, and, at his death, to Charles, William, and Alexander Crichtons, his three sons, equally amongst them; and failing one or other of them, by decease, before marriage or majority, to the survivors or survivor, their or his heirs and assignees; whom failing, to Patrick Crichton, and his heirs and assignees, in fee;" reserving "full power to the said Patrick Crichton, without consent of his said children, to sell or dispose of, or contract debts on, the foresaid whole lands and others, in the same manner as if the substitution had not been taken to the said children before named."

The disposition contained procuratory and precept. Infeftment was immediately taken on the precept to "Patrick Crichton, for himself, and as procurator for his said sons."

In 1758, Patrick Crichton executed a general disposition, without precept or procuratory, in which he revoked all former settlements in favour of Charles Crichton, his eldest son, and, reserving to him an annuity, disponed his whole heritable and moveable property, at his death, to the said "William and Alexander Crichtons, his second and third sons, equally betwixt them, and the heirs whatsoever of their bodies; and failing any one of them, by decease, without heirs of his body, to the survivor of his said two younger sons, and to the survivor's heirs and assignees whatsoever, except the said Charles Crichton."

No. 105. After Patrick's death, William and Alexander, in 1770, obtained from the Magistrates of Edinburgh, the superiors, a charter, confirming the disposition 1751, and their father's infeftment, so far as it related to their own two thirds, as to which the charter likewise contained a precept of *clare constat* in their favour, as nearest heirs of provision, under the deed 1751; upon which charter infeftment was immediately taken.

They, at the same time, adjudged Charles's third from him, in terms of the disposition 1758, and were infeft on a charter of adjudication.

William died in 1782, unmarried, and without a settlement which could affect his heritable property; (10th June, 1795, No. 44. p. 4489. *voce* FOREIGN.) In 1784, Alexander expede a general service, as nearest heir of provision to William, in terms of the deed 1758, and immediately after obtained a precept of *clare constat*, which bore, that, "by authentic instruments and documents, produced to, and publicly read before," the superiors, it appeared that Alexander was nearest heir of provision to William, in the half of Newington, "conform to his service as such." Infeftment followed.

At this time Charles Crichton was alive.

In 1793, Alexander granted an heritable bond over the whole lands of Newington, to the Society for propagating Christian Knowledge, and another to Alexander Wood, upon both of which infeftment was taken.

In 1794, Alexander Crichton's estate was sequestrated, and Charles Selkrig appointed trustee for his creditors. After Newington was sold, Mr. Selkrig proposed to prefer the heritable creditors on the price: But the personal creditors having objected to this, in so far as the price arose from William's third of the lands, the trustee presented a petition to have the objection discussed, which was appointed to be answered.

Pleaded for the personal creditors: On their father's death, William and Alexander could only complete their right to Charles' third, by adjudging in implement of the deed 1758; but they had it in their power to complete their title, each to his own third, either by an adjudication in implement against themselves, or under the disposition 1751. They preferred the latter mode, when they obtained a confirmation of that disposition and their father's sasine on it as to their own thirds, and a precept of *clare constat*, upon which they were infeft, and took no further notice of the deed 1758, than as a foundation of an adjudication against Charles. Now, the deeds 1751 and 1758 differ materially from each other. By the latter, Charles was altogether excluded, and the survivor of the other two was to take the whole subject, upon the death of the other, at any time, without children; whereas, by the first deed, the substitution in favour of survivors took place only if the party predeceasing died before marriage or majority. By William's death, therefore, unmarried, and after majority, the feudal right of his third went to Charles, as his heir of conquest, in terms of the deed 1751, upon which William had chosen to make up his titles. In these circumstances, the title made up by Alexander to William's third was inept. Instead of applying

to Charles for a conveyance of it, or adjudging it from him, Alexander expede a general service as heir of provision to William's third, under the deed 1758, though William had made up his titles under a deed by which the right, at his decease, was not vested in Alexander, and then he obtained a precept of *clare constat*, referring to his general service, or, in other words, declaring, that he was entitled to take up William's third under the deed 1758, which was not true. But precepts of *clare constat* come in place of services, and neither can be granted, except to the heir of the last investiture, described in his proper character; Reid against Wood and others, No. 32. p. 14483. *voce* SERVICE OF HEIRS; Fairservice against Whyte, No. 33. p. 14486. IBIDEM. No. 105.

Answered: Upon the death of the vassal, lands are, in law, held to revert to the superior, who may grant a precept of *clare constat*, merely on his own personal knowledge of the right of the party applying for it; and, provided it be granted to a person *de facto* entitled to hold the lands, it is not essential that any legal evidence of his right should have been previously produced, or even that he should be the heir of the last investiture; Stair, B. 3. Tit. 5. § 26.; Ersk. B. 3. Tit. 8. § 71. Alexander's general service in 1784, therefore, was unnecessary; and it would be hard that an inaccuracy in it should be fatal to the precept, which was substantially well founded, as Alexander was clearly entitled to possession of the whole lands.

Besides, the reference to the deed 1758, in the service 1784, was not inaccurate, as, in consequence of the powers reserved to Patrick by the deed 1751, the two deeds are to be considered as parts of the same settlement, and the right under the one modified by the other; so that, in fact, the precept was granted to the heir of the last investiture.

It is a mistake, too, to suppose that the precept proceeded solely upon the service 1784. It bears to have appeared, from "authentic documents, produced to, and publicly read before," the superiors, that Alexander was heir to William in the half of the lands of Newington. It must therefore be presumed, that, besides the service 1784, the deed 1751 and subsequent titles were produced, from the whole of which Alexander's right was clearly established.

Lastly, Although Alexander's present title were admitted to be defective, it would not avail the objectors, as the heritable creditors would be preferable, *jure accrescendi*, or any title to be afterwards made up in his person; Creditors of Graitney, No. 195. p. 1127. *voce* BANKRUPT; Creditors of Watson against Cramond, No. 223. p. 1180. IBIDEM.

Observed on the Bench: Precepts of *clare constat* were originally granted only to the descendants of the last vassal; but they may now be granted to any person who, the superior is satisfied, is heir to the lands. In this respect, a precept is a safer title than a service; the latter, being an *actus legitimus*, must be accurate in every particular, whereas, it is sufficient that the former be substantially right. The service 1784 is only one of the documents which, it must be presumed, were produced to the superiors. Besides, the deed 1758 may be considered as not

No. 105. merely creating an obligation on Charles Crichton to denude, but as an exercise of the power to alter reserved by the deed 1751, and the case the same as if Charles had not been mentioned in it.

The Lords (7th July, 1797,) " repelled the objection;" and, upon advising a reclaiming petition, with answers, they with one dissentient voice " adhered."

For the Heritable Creditors, *Rolland, M. Ross.* Alt. *Tait, John Clerk.*
Clerk, *Menzies.*

D. D. *Fac. Coll. No. 54. p.* 121.

1798. *January* 31.

The TRUSTEES of MRS. CALDERWOOD DURHAM *against* ROBERT GRAHAM.

No. 106.
The objection to a precept of *clare constat*, that it did not sufficiently specify the character of the vassal, repelled.

Alexander Muirhead, in his son David's contract of marriage, disponed certain lands to him, and the heirs-male of the marriage, and other substitutes. The contract contained procuratory and precept. David made use only of the latter, upon which infeftment followed.

Upon his death, Alexander, the only son of the marriage, expede a general service, as heir of provision to his father, " conform to the contract." And having thus taken up the unexecuted procuratory contained in it, he obtained a charter of resignation, upon which he was infeft. He afterwards granted a precept of *clare constat* in his own favour. The precept narrated his right to the superiority, in consequence of the charter of resignation; and that it appeared, from authentic instruments and documents produced, that his father died infeft in the lands, in terms of the contract by which the lands were conveyed to him, " and the heirs therein mentioned." The precept adds, " And that I am nearest and lawful heir of the said David Muirhead, my father," " and desirous to consolidate the property and superiority;" and directs sasine to be given to himself, " as heir aforesaid." Alexander took infeftment on the precept, and afterwards sold the land to the predecessor of Mrs. Calderwood Durham.

She again sold them to Robert Graham; and having died before part of the price was payable, her trustees claimed the remainder.

Upon this, Mr. Graham, in a suspension, contended, that he was not in safety to pay the price to the chargers, *inter alia*, because Mrs. Calderwood Durham was not feudally vested in the property of the lands: That Alexander Muirhead's precept of *clare constat*, in his own favour, was inept, from its being granted to him as nearest and lawful heir " to his father;" from which description it did not necessarily follow, that Alexander was heir of provision, in terms of the contract, which was his title to the lands: That the matter was not mended by the reference to other deeds in the precept, as a precept, like a service, must fix the character of the vassal, without the aid of extrinsic evidence: And that, therefore, the property of the lands remained *in hæreditate jacente* of David Muirhead.