1680. *July* 21. VISCOUNT of ARBUTHNOT *against* RAIT of Halgreen.

No 45.
Found, that a superior's granting a a precept of *clare constat* inferred a presumptive probation that the double of the feu-duty had been paid to the superior, unless he would offer to prove by the vassal's oath, that it was not paid.

IN the mutual declarators between the Viscount of Arbuthnot and Rait of Halgreen, the Viscount concluding that Halgreen had incurred the irritancy of his feu-charter through not paying of his feu-duty for two or three years together; the other craving liberation therefrom, because of payment of some, and timeous offer of the rest;—this cause being reported, the LORDS "found, that the superior's granting a precept of *clare constat*, does import and infer a presumptive probation that the double of the feu-duty was paid to the superior, unless he will offer to prove, by the vassal's oath, that the same was not paid; and find, that the precept being dated in October 1676, it does purge for the current year, viz. for the feu-duty owing at the Whitsunday preceding, and likewise for the half year owing at the Martinmas subsequent to the precept, though the term of payment was not yet come; so that none of these two terms can be counted or made use of, to make up or infer the vassal's failzie or commission of the clause irritant: But assoilzie Arbuthnot from that conclusion of Halgreen's declarator, bearing, that he, the vassal, ought to be free of offering his feu-duty hereafter, unless his superior (who hath refused it now these several years) required him; and find the vassal is liable to offer the feu-duty, albeit the superior do not require him." I find the customs of France agree with this; if the superior be absent, or refuse, the vassal must take instruments upon his offer and the superior's refusal. So after this decision, there is no more room for doubting but a precept of *clare constat* cutteth off and dischargeth all preceding feu-duties, not as an absolute discharge thereof, but so as the want of these feu-duties, owing for years before the precept, cannot be counted, nor made use of by the superior against his vassal, for losing and amitting his feu, for not payment of the feu-duty; the precept being a dispensation *quoad* that caducity whether incurred in whole or in part, whether it have a clause of *novodamus* in it or not.

Fountainhall, v. 1. *p.* 109.

1684. *January* 31. SETON *against* COCKBURN.

No 46.
By a fitted account, prior accounts are held to have been settled.

THE compt and reckoning between Sir Walter Seton and Sir James Cockburn is reported by Pitmedden; and the LORDS assoilzie Sir James conform to his articles of discharge, unless Sir Walter offer to prove, by Sir James's oath, that the instructions are in his own hands, which he is ready to depone he gave up at the time of the compting; and ordain Sir James to compt for the deleted articles.

Fol. Dic. v. 2. *p.* 135. *Fountainhall, v.* 1. *p.* 265.

No 46.

*** Sir P. Home reports this case:

Sir Walter Seton and Sir James Cockburn being sharers together in a tack of the customs, Sir Walter pursues Sir James for his intromissions with the same, amounting to considerable sums. *Alleged* for the defender, That he had already counted, in so far as he having given in an account to the pursuer of his intromissions, and subscribed the same, by which there was a certain balance due by the defender, which was carried to a second account, and the balance of that carried to a third account, which being fitted and closed by both parties, is equivalent to a discharge, seeing by the custom of merchants, the fitting and closing of the last account wherein the balance of former accounts is stated, is understood to be a closing and fitting of all accounts; and when the last account was fitted, all the instructions was given up. *Answered*, That the first account given in by the defender, albeit signed by him, yet it cannot exoner him, unless it had been likewise signed by the pursuer; and albeit the balance of several accounts be brought to the last account which is signed by both parties, yet that cannot import an exoneration to the parties for the preceding accounts, unless they had been likewise fitted and signed by both partis, *quia hoc non agebatur* by signing the last account, that all preceding accounts not mentioned in the last account should be discharged. The Lords found, That the balance of the first account being carried to the second, and the balance of the second to the third account, which being subscribed by both parties, did fit and close likewise the two former accounts, and that it was presumed the instructions were given up to Sir Walter, unless h eoffer to prove by Sir James Cockburn's oath, or by writ, that the accounts were fitted upon trust, or that notwithstanding of the fitting of the accounts, the instructions were left in the hands of Sir James Cockburn.

Fol. Dic. v. 2. p. 135. Sir P. Home, MS. v. 1. No 560.

1684. *February.* Duff *against* The Taylors.

No 47.

A taylor having left his own incorporation tutors-testamentar to his children, and they being pursued for not doing diligence upon some notes and subscribed accounts:

Alleged for the defenders; That it was presumed those notes and accounts, though subscribed, not being in the inventory, were satisfied, especially bearing date some time before the defunct deceased.

Answered; It was not to be presumed, that men who paid debt would leave subscribed papers unretired; and people make short inventories to save charges of quot and confirmation.