1788. *November* 18.

JACOBINA REID *against* KATHARINE, ELIZABETH, &c. WOODS.

No. 32.
A precept of *clare constat* equivalent to a special service. The character of the heir must in both be distinguished with equal accuracy.

JAMES WOOD and Euphan Selcraig were infeft in a small piece of land held of a subject superior, and destined " to them, and longest liver of them, in conjunct fee and life-rent, and to the heirs lawfully procreated betwixt them in fee; which failing, to the said James Wood's nearest heirs and assignees whatever." Of the marriage between these parties, there existed a son and four daughters.

After the death of James Wood, his son obtained from the superior of the lands a precept of *clare constat*, whereby, on this narrative, " that by authentic documents and instruments shown and produced, it clearly appeared, that the deceased James Wood, father of John Wood, bearer hereof, died last vest and seised in all and whole that tenement of lands, &c. and the said John is only son, and nearest and lawful heir to the deceased James Wood, his father, and that he is of lawful age," &c. therefore the superior grants warrant to his bailies " to give heritable state and sasine of the foresaid tenements to the said John Wood, as the nearest and lawful heir to the said James Wood, his father." In virtue of this precept, John Wood was infeft.

John Wood was married to Jacobina Reid, to whom he conveyed the lands which had belonged to his father. After his death, an action having been brought by her against Katharine Wood, and the other sisters of her husband, who had continued in possession of the lands, an objection was stated to her title, as flowing *a non habente*, on this ground, that the lands having been destined to the heirs of the marriage between James Wood and Euphan Selcraig, the precept of *clare constat* obtained by John Wood, as only son and nearest and lawful heir to his father, was inept. In support of this objection, it was

Pleaded: The method of transmitting feudal property from the dead to the living, by precept of *clare constat*, arising solely from the unauthorised act of a private person, is in its nature anomalous, and ought to be confined within the narrowest bounds.

At first, this form was only used in the case of the lineal succession; and before the beginning of the present century, very few instances perhaps will be found of its having been extended to any other. In tailzied fees, where the most intricate questions frequently occur, it ought never to be resorted to, but the right of the heir should be established in the regular manner, by a service and retour, carried on under the authority of a competent judge, and ascertained by the verdict of a jury.

But even although the use of this form were to be admitted in every case, it never can be thought sufficient for transferring property, where a service in the same terms would be unavailing. And as a service of one, as nearest and lawful heir, which is the same with heir of line, or heir-general, cannot carry any subject devised to heirs of a marriage, or to those of any other character, not marked out

No. 32. by the law, but by settlement, the infeftment which took place in the person of John Wood must be of no effect.

It is true, that where the character, under which an heir has been served, and that in which he ought regularly to have been served, cannot exist in two different persons, as in the case of a son served heir in general to his father, in order to take up subjects destined to his father's heirs-male, the same strictness does not appear to have been always kept up. But under this exception, the propriety of which may be justly called in question, as introducing uncertainty in the transmission of land-rights, the present case cannot be included. Here, John Wood is indeed declared to be the only son of his father. He is also declared to be his father's nearest and lawful heir. Still, however, it was possible, that the character of heir of the marriage between his father and Euphan Selcraig might have belonged to another person. Although an only son, John Wood might have been the issue either of a prior or a later marriage. And, in the same manner, he might have been the nearest and lawful heir to his father, though born of a different mother.

Had the superior even gone so far as specially to mention the standing investitures which were destined to the heirs of the marriage, and also to declare, that John Wood was nearest and lawful heir, without adding "of provision," or "of the marriage between James Wood and Euphan Selcraig," it would not have been sufficient. From this, the meaning of the superior might have been guessed at; but still it would not have been expressed in those terms which the law requires, and which, in solemn deeds, such as a precept of *clare constat*, are indispensable. *A fortiori* in the present case, where no mention is made either of the particular destination in the investitures, or of that character in which alone the heir was entitled to demand a renewal of them, and where it is not even said that he is nearest and lawful heir in the lands formerly specified, the infeftment following on the precept can be of no avail. The only addition which could be made, so as to render the transference complete, would be by annexing to the words "nearest and lawful heir," those of "tailzie and provision," which would entirely change their nature and effects, and therefore can never be supplied by implication; Craig, Lib. 2. Dieg. 3. § 29. Lib. 2. Dieg. 17. § 22.; Stair, B. 3. T. 4. § 33.; Bankton, B. 3. T. 5. § 19, 59. B. 3. T. 4. § 29.; Erskine, B. 3. T. 8. § 74.; Edgar *contra* Maxwell, No. 14. p. 14015. *voce* REPRESENTATION; Landales *contra* Landale, No. 30. p. 14465.

Answered: The renewal of the investiture, after the death of the vassal, having been at first entirely voluntary on the part of the superior, the form of entering heirs by precept of *clare constat* seems quite congenial with feudal principles. And there seems to be no reason for confining its use to the case of the lineal succession. In tailzied fees, which are the united work of the superior and vassal, it is equally proper, that the superior should, in this manner, acknowledge those successors to his vassal whom he has previously chosen, by granting the fee under a particular destination, as that, in ordinary cases, he should, by his own act,

admit those who are now, by the provision of the law itself, called to the succession.

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There is, however, no occasion for resorting to any arguments of this sort, this mode of entering heirs having been indiscriminately practised in every instance where lands are not immediately held of the Crown, but of a subject; and the words here used for this purpose, being those which have been uniformly employed, seem to be fully adequate. When the superior sets forth, that "he had seen, by authentic documents, that the former vassal was vest and seised in the lands," it is the same thing as if he had said, that he had considered the last investitures, destined as they were, to the heirs of the marriage between James Wood and Euphan Selcraig; and when he farther proceeds to say, that John Wood was the only son of his father, and his lawful and nearest heir, his meaning is equally evident, that John Wood was heir according to the investitures, or, in other words, that he was the lawful heir under those investitures; the words "nearest and lawful heir" being applicable, *secundum subjectam materiem*, to heirs of every denomination, —to the heir of conquest, of tailzie, and provision, as well as to the heir of line.

That strictness of construction which seems to have been adopted in the cases mentioned on the other side, might be proper in general services, which refer to no particular settlements, and which are intended merely for affixing a certain character to an heir; but in the case of special services, to which a precept of *clare constat*, from its reference to the last investitures, bears more resemblance, the same rule has not been followed. Thus, where the investitures of an estate stood limited to heirs-male, a special service by the eldest son of the last proprietor, as *legitimus et propinquior hæres*, was found equivalent to a service as heir-male. And, in another case, it was decided, that a general retour, in the same terms, carried right to a provision devised to heirs-male of a marriage; although it is evident that those characters might have belonged to different persons: But it was thought sufficient that, in the case as it stood, both did actually coincide in the same person; Craig, Lib. 2. Dieg. 7. § 25.; Stair, B. 3. T. 5. § 26.; Earl of Dalhousie *contra* Lord and Lady Hawley, No. 13. p. 14014. *voce* REPRESENTATION, Livingston *contra* Menzies, No. 10. p. 14004. IBIDEM.

A separate objection was stated to the validity of the precept of *clare constat*, that the devise of a tenement, of so little value as that in question, to the heirs of a marriage, should be held as admitting the whole children equally. But this argument was entirely disregarded; the Court being of opinion, that, in destinations of landed property, how insignificant soever, the eldest son, agreeably to the course of intestate succession, was to be preferred; unless where a contrary intention was clear.

The Lord Ordinary "overruled the objection to the precept of *clare constat*;"

And, after advising a reclaiming petition, with answers, the Court affirmed that judgment.

But a second reclaiming petition having been offered, which was followed with answers,

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The Lords altered the former interlocutors, and found, "That the precept of *clare constat*, and infeftment thereon, in the person of John Wood, was inept, and could not carry the right of the subjects in dispute; and therefore assoilzied the defenders."

Lord Ordinary, *Monboddo*. Act. *Maccormick*. Alt. *Macintosh*. Clerk, *Menzies*.

C. *Fol. Dic. v. 4. p. 276. Fac. Coll. No. 45. p. 76.*

1789. *June* 17. James Fairservice *against* James Whyte.

No. 33.
Lands devised to the heirs and bairns of a marriage, not carried by a precept of *clare constat* in favour of the eldest son, as nearest and lawful heir of his father.

In the question between these parties, No. 57. p. 2317. *voce* Clause, it was stated for James Whyte, as another reason for withholding the price of the lands sold to him, that although James Fairservice might succeed to the lands, as destined to the heirs and bairns of the marriage between his father and mother, he had not made up a proper title to them, the precept of *clare constat* in his favour, as nearest and lawful heir to his father, being insufficient for this purpose.

As the general arguments were the same with those in the case of Reid *contra* Woods, No. 32. p. 14483. it is unnecessary here to repeat them. It was mentioned, as a circumstance favourable to the validity of this precept of *clare constat*, that it had a special reference to the charter of confirmation, in which the marriage-contract was recited. So that the intention of the superior to declare James Fairservice to be the heir there pointed out, could not possibly admit of dispute. On the other hand, it was observed by one of the Judges, and seemed to have considerable weight, that the imperfection in the precept of *clare constat* having been observed during the lifetime of the heir, could be easily obviated; whereas, in the preceding case, it had become altogether incurable before any objection was made. Here, therefore, it was highly expedient, by refusing effect to the deed, to preserve, in the utmost purity, the forms of transmitting landed property.

"The Lords found, That the precept of *clare constat*, obtained by James Fairservice, was ineffectual to carry the lands in question; and therefore sustained this reason of suspension.

Lord Reporter, *Justice-Clerk*. Act. *C. Brown*. Alt. *G. Ferguson*. Clerk, *Sinclair*.

C. *Fol. Dic. v. 4. p. 276. Fac. Coll. No. 70. p. 127.*