

No. 32. The Lords altered the former interlocutors, and found, " That the precept of *clare constat*, and infestment 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.*