

in its proper order, otherwise the abuses committed when the electors are unanimous must be without end, and the chusing of representatives for the burghs, reduced to a scene of the most corrupt and unconstitutional practices. In the case quoted, as the wrong admitted of a remedy in the form prescribed by the statutes, the parties neglecting that form might justly be precluded from using any other. Here the pursuers had no other way to proceed; and they have even complied with the statutes, by commencing their action within the period therein required.

“ The Lords dismissed the action as incompetent.”

Reporter, *Lord Kennet.* Act. *Ilay Campbell, Hay.* Alt. *Rat, Wight.* Clerk, *Honz.*  
C. *Fac. Coll. No. 46. p. 73.*

No. 86.

1791. *May 25.*

DAVID ALLAN and Others, *against* JAMES MACRAE.

An action sustained at the instance of parties, who had united themselves into a society, under the title of Bereans, for religious purposes.

*Fac. Coll.*

No. 87.

\* \* This case is No. 27. p. 14583. *voce* SOCIETY.

1793. *February 21.* NEIL M'CALLUM *against* JAMES CAMPBELL.

In the year 1725, Neil Macindoe, proprietor of the lands of Kilchoan, resigned them into the hands of Patrick Campbell, the superior; whereupon he obtained a new charter, granting them to himself, “ in vitali reditu duran. omnibus sæ vitæ diebus, et post ejus decessum, hæredibus masculis legitime procreandis inter eum et Annam Maccallum, ejus sponsam; quibus deficientibus hæredibus masculis legitime procreandis de ejus corpore, ullo subsequente matrimonio; quibus deficientibus Duncanò Macindoe in Kilchoan, filio patris dicti Nigelli Macindoe, et hæredibus masculis legitime procreatis, sive procreandis de corpore dicti Duncanì Macindoe; quibus deficient. proximis legitimis hæredibus masculis dicti Nigelli Macindoe quibuscunque; quibus etiam deficient. ejus hæredibus et assignatis quibuscunque, hæreditarie et irredimabiliter.”

Neil Macindoe took infestment in terms of the charter, and died, leaving Mary, an only child. The succession therefore opened to Duncan Macindoe.

Duncan had only one son, who did not long survive his father. On his death, John Macindoe took up the succession under the charter, as nearest lawful heir-male of Neil; and on the 16th February, 1753, Mr. Campbell, the superior, granted him a precept of *clare constat* in that character, upon which infestment followed.

A few weeks previous to his obtaining this precept of *clare*, John Macindoe executed a disposition of the lands in favour of Mr. Campbell, containing a pro-

No. 88.

A general service as heir of line is not a sufficient title to pursue in a reduction of a right to lands on which infestment has followed, where the pursuer, if successful, must take them up as heir of provision.

No. 88. curatory of resignation *ad remanentiam*, on which an instrument of resignation followed on the 19th February, 1753, which was duly recorded.

When the period of the long prescription from the date of this transaction had only a few weeks to run, Neil M'Callum, son of Mary, daughter of Neil Macindoe, served heir in general to his grandfather, and brought an action of reduction and improbation against Mr. Campbell, and the representatives of John Macindoe, in order to set aside their titles, *1st*, Not only because John Macindoe was not the heir-male of Neil, but because there were no heirs-male in existence, so that the succession opened to him under the last destination of the charter 1725, to heirs whatsoever; *2dly*, Because the precept of *clare constat* granted to John did not specify any chain of connection, from which could appear that he was the heir-male of Neil. In defence it was

Pleaded: *1st*, The pursuer's general service as *legitimus et propinquior hæres* of Neil, does not give him a title to carry on the present action. Although the fact established by the service may be true, it does not follow, that the preceding destinations in the charter 1725 have failed, and that the pursuer has now right to the lands in question; nor has he in any shape connected himself with the lands.

*2dly*, The rights produced are sufficient to exclude the pursuer's title, upon the defender's instructing the fact, that John Macindoe his predecessor's author was Neil's nearest lawful heir-male, of which he now offers a proof. He will also instruct, that there are other heirs-male of Neil still in existence, which must completely bar any right on the part of the present pursuer; and this proof is thought to be competent, being precisely analogous to the proof of possession, which the Court uniformly allow when a prescriptive right is founded on as a title to exclude.

Answered: *1st*, Unless the pursuer's present title is sustained, he must be forever excluded from insisting in the present action. It is impossible for him to obtain a special service as heir of provision to his grandfather, because while the precept of *clare* and infestment in favour of John Macindoe stand in the way, it can never be said that his grandfather died last vest and seised in the lands. Neither can the pursuer expedite a general service, as heir of provision to his grandfather, because before obtaining it he must prove, that all the heirs-male called to the succession have failed. But how can this be done, till the precept of *clare* in favour of John Macindoe, asserting the existence of an heir-male, be reduced. Besides, it has been decided, that a general service is a sufficient title in the reduction of rights on which infestment has followed; 6th November, 1746, Horns against Stevenson, No. 66. p. 16093. And even if the pursuer had not been served either in general or special, yet in the circumstances of the present case, where it is impossible he can establish any feudal or personal right to the lands till the defender's titles are set aside, his right of blood alone ought to be held sufficient to enable him to insist in the present action.

*2dly*, The defender in reality acknowledges, that his title, in its present situation, is not sufficient to exclude; for he admits, that in order to render it so, certain

extrinsic evidence is necessary. The proof offered too is incompetent *hoc statu*, and the reasoning from the case of prescription inconclusive. If a deed *ex facie* defective were founded on as a prescriptive title, a proof of possession would not be granted, unless the action were allowed to proceed in its usual course; 4th July, 1781, Manson Sinclair against Sinclair, No. 151. p: 6725. No. 88.

But further, a precept of *clare constat* is in no case effectual against third parties; Stair, B. 3. Tit. 5. § 26; Erskine, B. 3. Tit. 8. § 71; Bankton, B. 3. Tit. 5. Par. 91. And, at any rate, the one in question is fundamentally null, as it neither specifies the propinquity of the vassal to the supposed ancestor; Stair, B. 3. Tit. 5. § 35; Erskine, B. 3. Tit. 8. § 66; nor the character under which he assumes the succession. He should have been styled, not merely heir-male, but heir-male and of provision to Neil Macindoe; 18th November, 1788, Reid against Woods, No. 32. p. 14483.

The Lord Ordinary found, that the titles produced were not sufficient to exclude.

Upon advising a reclaiming petition, with answers, the Court were of opinion, that the pursuer's present title was insufficient; but at the same time, it was observed, that the defect might be remedied, notwithstanding the existence of the precept of *clare constat*, in any of the following ways: 1st, By a special service as heir of provision to his grandfather; 2dly, Perhaps even by a general service in that character; or, 3dly, By an adjudication on his own trust-bond, followed by a charge to the superior to enter him. It was also observed, that an infertment flowing *a non domino* does not exclude a second.

The Lords "recalled the interlocutor reclaimed against, and found the pursuer had not yet produced a sufficient title, but allowed him to do so *cum processu*, and sisted process for that effect."

By pronouncing this judgment, the Court had no occasion to decide respecting the sufficiency of the defender's title to exclude; but on this point they seemed to be of the same opinion with the Lord Ordinary.

Lord Ordinary, Swinton. Act. Solicitor Blair, Fletcher.

Alt. M. Ross, Arch. Campbell. Clerk, Sinclair.

R. D.

Fac. Coll. No. 31. p. 62.

1794. January 16.

MATTHEW COMB and Others, against The MAGISTRATES OF EDINBURGH.

An action of declarator and damages against the Magistrates of Edinburgh, sustained at the instance of individuals, brewers, who complained of inequality in levying the duty of two pennies Scots on the pint of ale and beer. No. 89.

Fac. Coll.

\* \* This case is No. 34. p. 2539. voce COMMUNITY.