

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 infestment 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.