

hereditate jacente of the heir last infeft, and cannot be vested in the pursuer without a special service. The Court found, That the pursuer's general service is no sufficient title to pursue this action.

No. 85.

Fac. Coll.

* * This case is No. 9. p. 3186. *voce* DEATH-BED.

1782. June 23.

COWAN and MACGUFFOC *against* The MAGISTRATES and COUNSELLORS of the Burgh of WIGTON.

An action having been brought by Cowan and Macguffoc, as burgesses paying scot and lot, and exercising trades within the burgh, for setting aside the election of Magistrates and Counsellors at the preceding Michaelmas; their title to carry on such action was debated in the following manner:

Pleaded for the defenders: The right of enjoying offices within a burgh, being attended with a degree of rank and power, and a species of temporary freehold, is without doubt, at common law, the subject of litigation before the Court of Session. But this litigation can be maintained by those only who claim a right to these offices, or at most by those who have voted in favour of particular persons, and have an interest that their vote should be made effectual; it being a general and established maxim in law, that no man can have any title to bring an action for depriving another of an office, or other matter of right, to which he can have no manner of claim. The Legislature indeed sometimes sees it necessary to make certain matters the subject of popular action, or to infringe the rule to a certain extent, by indulging action to persons of a particular denomination, as in questions touching elections within burghs, to be afterwards more particularly stated. But this takes place by virtue of special enactments, which operate only in the cases specially provided for. On these principles the defenders contend, that the present prosecution for annulling an unanimous election of Magistrates and Counsellors, not brought by any person laying claim to these offices, or having a vote in the election, is utterly inept and incompetent.

Farther, by statute 7th Geo. II. it is declared lawful for Magistrates and Counsellors, apprehending wrongs to have been committed at an annual election, to bring an action before the Court of Session, for rectifying such wrong, within eight weeks after the election. By statute, 16th of the same King, the same power is given to any constituent member of the meeting for election, or of any meeting previous thereto, and may be exercised by way of summary complaint to the Court of Session, within two kalendar months of the election. By these statutes, the Legislature has established a code for the regulation of abuses in the matter of election in burghs, has accurately defined the mode of prosecution, and the persons having right to pursue; and from thenceforward these abuses must

No. 86.

An ordinary burghess may insist in an action for setting aside an election of Magistrates.

No. 86. either be rectified under the authority, and in the terms of these statutes, or not at all.

With regard to the mode of prosecution, the question has already received an ultimate decision. In the year 1765, an action was brought for setting aside an annual election of Magistrates for the burgh of Easter Anstruther, on the head of bribery. It proceeded in the name of persons authorised by the statutes, but its commencement had been postponed till after the term therein prescribed. The Court of Session, upon proof brought of the corrupt practices, annulled the election. But the question having been brought under review of the House of Peers, the judgment was reversed, on this single ground, that the mode of redress pointed out by the statutes was the only one which could be followed.

The propriety of applying the principle of the foregoing decision to the present case cannot be called in question, without imputing the most singular improvidence to the Legislature. It is clear that a simple burgess, having no voice in the election, cannot pursue in terms of these statutes. It is equally clear, that in the maintenance of any action which may be competent to him, his proceedings can nowise be restrained by these statutes. If then these enactments have not superseded all action, which formerly might be competent at the common law, the consequence is inevitable, that although Magistrates and Counsellors, and others having a vote in an election, after a silence for two months, can never be heard to complain; yet an ordinary burgess, who has no concern in the election, may insist in his action at any distance of time.

Answered for the pursuers: Every burgess has an interest, that the common good of the burgh shall be administrated, and the jurisdiction and power belonging to the Magistrates exercised, by those only who are legally intrusted with that charge. At common law, therefore, the competency of the present action, which is calculated to rectify several glaring abuses in the election of office-bearers in this community, seems not to admit of any argument.

The pursuers do not dispute, that the statutes of the 7th and 16th of the late King must regulate all cases falling under them. But these statutes do not anywhere expressly supersede the common law remedies. They do not reach every wrong that may be committed in burgh elections; and as it cannot be thought, that the Legislature meant to apply a remedy in particular instances, and to leave others without the possibility of redress, such effect ought not to be given to them by implication. These enactments apply only to wrongs committed at the annual elections, and to cases where there is a majority and minority of electors contending with each other. Hence, when the election has not taken place at the usual time, which sometimes happens during civil commotions; or when the wrong is committed during the year, in supplying vacant offices, it is inconceivable that there is not, in the law of Scotland, a mean by which any illegal procedure held on such occasions can be set aside. In the same manner, when the electors have unanimously chosen persons incapacitated by the public law or set of the burgh, it must be allowable for the burgesses to maintain action for preserving the magistracy

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.