

1798.

26th of February 1794, when the debt of £3. 5s. 10½d. was paid.

M'CALLUM, & C.
v.
CAMPBELL, & C.

For the Appellant, *Sir J. Scott, Wm. Adam.*

For the Respondent, *W. Grant, M. Nolan.*

NEIL M'CALLUM, Wright in Inverary, and
HUGH MUNRO, Esq. of Stuckghoy, his
Trustee, . . . } *Appellants;*

JAMES CAMPBELL, eldest son of NEIL CAMP-
BELL, Esq. of Duntroon, and NEIL MAL-
COLM, Esq. of Poltalloch, . . . } *Respondents.*

House of Lords, 12th March 1798.

PRESCRIPTIVE POSSESSION—PROPINQUITY—BASTARDY—HEARSAY.

—A deed conveyed lands to a party, and the heirs male of his body, whom failing, to his nearest lawful heirs whatsoever. The property passed into the hands of a purchaser, but it was alleged that it had been acquired from one who was a bastard heir male. In a question raised by the heir general, nearly half a century afterwards, Held that the length of time, and failure in the proof of bastardy, made the title unquestionable.

The titles of the lands of Kilchoan, belonging to the appellant's ancestors, the M'Indeors, situated in the parish of Kilmartin, and county of Argyle, appeared by the old title deeds to have been conceived and demised in favour of heirs male.

At that period, the respondent Campbell's ancestors were the superiors of the lands, and had granted several charters and precepts of clare constat, conceived in those terms.

Aug. 12, 1725. Of this date, Patrick Campbell of Duntroon, the respondent, Campbell's ancestor, granted a charter of resignation, with consent of Neil Campbell his son, in these terms:—
“ dicto Nigello M'Indeor de Kilchoan in vitali reditu duran.
“ omnibus suæ vitæ diebus, et post ejus decessum, hæredi-
“ bus masculis legitime procreandis inter eum et Annam
“ M'Callum ejus sponsam; quibus deficientibus hæredibus
“ masculis legitime procreandis de ejus corpore, ullo subse-
“ quenti matrimonio; quibus deficien. Duncano M'Indeor in
“ Kilchoan, filio Patruï dicti Nigelli M'Indeor, et hæredi-
“ bus masculis legitime procreatis, sive procreandis de corpo-

“ re dicti Duncani M'Indeor; quibus deficien. proximis le-
 “ gitimis hæredibus masculis dicti Nigelli M'Indeor quibus-
 “ cunque; quibus etiam deficien. ejus hæredibus et assig-
 “ natis quibuscunque.”

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Neil M'Indeor, the liferenter in this last mentioned charter, died without male issue, and was succeeded by his cousin Duncan, the substitute named in the charter.

Duncan M'Indeor had only one son, Alexander. It did not appear that any title was made up in the person of this Alexander. But old Neil, the liferenter in the above charter, although he died without *male issue*, left an only daughter, who was first married to Donald Munro, upon whose death, without leaving issue, she was again married to John M'Callum. Of this marriage there was issue, the appellant.

In the meantime, both Neil M'Indeor, the liferenter in the above charter, and Duncan, the substitute therein, had died; and Alexander, only son of Duncan M'Indeor, died unmarried about the year 1746.

By his death without issue male, the succession opened to the appellant, in terms of the limitation in the charter on failure of heirs male, to heirs general of Neil M'Indeor.

But it was contended by the respondents, that as after the heirs male of the bodies of Neil and Duncan, the heirs male *whatsoever* of Neil are called; and as the said Neil had a brother, who died leaving male issue, from whom their author was descended, the heir general under the last limitation of the charter could not succeed, so long as such heir male of Neil existed. At Alexander's death in 1747, the property stood thus: one half was liferented by Ann M'Callum, Neil's widow; after her death, her daughter Mary was entitled to a liferent of one half. A fourth was liferented by the widow of Duncan M'Indeor. The other fourth was taken possession of by *John M'Indeor*, a cottager on the farm of Kintraw, without any title being made up, or any right to the property, but who, the respondents maintained, was the heir male of Neil M'Indeor.

In these circumstances, Mr. Campbell, as superior, entered into a transaction with these parties, by which he purchased the property or dominium utile of these lands from this John M'Indeor.

It seems that John M'Indeor could not write, and consequently the disposition was signed by two notaries; and was in the following terms: “ Forasmuch as Neil Campbell of Dun- Jan. 6, 1753.

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troon, my immediate lawful superior, has instantly advanced, paid, and delivered to me, a certain sum of money, which, with the burden of the liferent after reserved, and debts after mentioned, is the full and adequate value of the lands after disposed, wherewith I hold me well content, satisfied, and paid, &c. Therefore I sell, annalzie, and dispoñe from me, my heirs and successors, to and in favour of Neil Campbell, his heirs male and assignees, heritably and irredeemably, all and whole the lands of Kilchoan," &c. Then follows a reservation of the liferents above mentioned.

Feb. 16, 1753. Of this date a precept of *clare constat* was granted to Mr. Campbell of Duntroon, setting forth: " Quandoquidem per authentica instrumenta et documenta coram me pro ducta et ostensa, ac per me visa, lecta, et considerata, clare constat et est notum, quod quondam Nigellus M'Indeor de Kilchoan in vitali redditu, et quondam Duncanus M'Indeor in Kilchoan, filius patris ejus in feudo, obiunt ultimo vestit. et sasit. ut de feodo ad fidem et pacem S. D. N. in totis et integris duabus mercatis terrarum antiqui extentus de Kilchoan, cum domibus, &c. secundam certam per Patricium Campbell meum patrem, nunc demortuum in favorem dicti Nigelli M'Indeor in vitali redditu, et hæredibus masculis de ejus corpore legitime procreandis; quibus deficientibus, dicto Duncanus M'Indeor et hæredibus masculis et ejus corpore; quibus deficientibus, hæredibus masculis dicti Nigelli M'Indeor quibuscunque;" &c. Et qui Nigellus et Duncanus M'Indeor obiunt sine liberos masculos. Et quod Joannes M'Indeor, nunc in Kilchoan, est *legitimus et propinquior hæres masculus dicti quondam Nigelli M'Indeor de Kilchoan in terris aliusque subscript.*"

Feb. 19, ——— &c. Upon this sasine was taken; and thereafter an instrument
 Feb. 23, ——— of resignation ad perpetuam remanentiam followed in favour of Mr. Campbell, and thus the property and superiority became consolidated in his person. Upon this title he possessed for 39 years without any challenge, the property having come in the interval into the possession of the other respondent by purchase. But action was raised in February 1792, at the instance of the appellant M'Callum, followed by another in 1793 at his instance, and also at the instance of the other appellant Mr. Munro, to whom he had granted bond, and upon which he raised an adjudication, and the whole question was discussed in the adjudication.

In defence, the respondents pleaded, 1. That there were

several persons in existence, who, in their order, would be nearer heir male to Neil M'Indeor; and the existence of any one heir male is sufficient to exclude the appellant, who claims as heir general, on failure of heirs male; 2. That John M'Indeor, who was infeft on the precept of clare in 1753, was the true nearest and lawful heir male of Neil M'Indeor. Answered, 1. That there were no existing heirs male of the deceased Neil M'Indeor, all the previous heirs male having failed, and left the succession open to the appellant, as heir general of the body of Neil M'Indeor. 2. That the John M'Indeor, from whom the respondents derived their title, was not a lawful or legitimate heir male—his grandfather, John Dow M'Indeor, having been born a bastard.

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A proof was ordered and taken, and, when reported, the Court ordered memorials. The respondents contended, 1. That the length of time during which they and their author had possessed this property, raised a strong presumption in favour of their right. 2. That the bastardy attempted to be fastened on their author was not proved—the proof having completely failed in establishing the fact of bastardy—the whole evidence consisting of hearsay, and the eldest hearsay witness speaking only to a period nearly 100 years after the party supposed to be a bastard was in his grave. 3. There were circumstances which showed that the persons in right of the appellant had acquiesced and acknowledged the title of the respondents' author.

By the appellants, it was contended, 1. That there were circumstances appearing from the title deeds produced by the respondents, which showed a want of title, and evinced a consciousness that their title through their author was bad. 2. That the bastardy of their author's ancestor was proved by the witnesses who were living at the time when their author took possession of part of Kilchoan, particularly by two surviving sons of their author. 3. The circumstances upon which the respondents ground an acquiescence in their author's title to succeed are unfounded, and admit of a satisfactory answer.

The Court “sustained the objections to this process of adjudication, and dismiss the same, and decern.” On reclaiming petition the Court adhered.

Feb. 3, 1796.
Nov. 15, —

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—1. John M'Indeor, the author of the respondents, had no right to the lands of Kilchoan; he

1798. being of illegitimate extraction, as hath been proved in the course of the proof. In questions of pedigree, hearsay evidence is quite competent; and the general repute of the country as to the bastardy is conclusive against his right. When he took possession of these lands without any title, the appellant was an infant, and not able to assert his right.

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2. The respondent Mr. Malcolm is not a *bona fide* purchaser without notice, of which the conveyance in his favour affords evidence. But even though he had been a *bona fide* purchaser without notice, his title rests upon the right of John M'Indeor, and that being bad, the title of the respondents falls with it, as flowing *a non habente potestatem*. 3. The appellant Neil M'Callum has right to the property under the last limitation of this charter 1725,—all the heirs male previously called therein having failed.

Pleaded for the Respondents.—1. The respondents have in their favour the presumption of law that every person is the legitimate son of his parents; Vide Ersk., B. III. Tit. 8, § 66; and Craig, B. II. Tit. 8. § 19.—A presumption fortified in this case with the fact of possession of the estate for nearly half a century. That John M'Indeor, Duntroon's author, and of course also John Dow M'Indeor, his grandfather, were male descendants of Kilchoan, is a point on which all the witnesses are agreed. The only question is, Whether it is proved that John Dow M'Indeor was a bastard, and not a lawful son, and consequently, whether the connection of the respondents' author with the property was only through a bastard line? The proof of bastardy lay upon the appellants, who have completely failed in that proof. They have only proved the existence of some loose and vague reports, a century after the bastard is said to have been in his grave; and the origin of those reports has been traced to a few individuals who had an interest to raise and propagate them. But there is not the slightest vestige of any one fact or circumstance, existing at or about, or near the time of the imputed illegitimacy, tending to establish the same, nor anything like a connected chain of tradition going back to the time when the person supposed to be illegitimate lived. On the contrary, in place of illegitimacy being proved, strong positive proof of legitimacy has indirectly come out of the mouth of the appellant's own witnesses, without their intending it. 2. The long time which has elapsed since the respondents' author entered into and possessed the lands without challenge, as well as the acquiescence

or acknowledgment for his right, ought to bar the present claim. 3d. By the practice of the Court of Session, the utmost weight is always laid on uninterrupted possession, and upon the long silence or non-claim of those who dispute the right of the proprietor; and it is of the utmost importance to the rights of a *bona fide* purchaser, that such effect should be so given to a title so possessed.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed.

For the Appellants, *Sir J. Scott, M. Nolan.*

For the Respondents, *Wm. Tait, Mat. Ross, A. Campbell, J. Campbell.*

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DUNCAN
v.
RITCHIE.

ISOBEL DUNCAN, residing at Scone, a Pauper, *Appellant* ;
JAMES RITCHIE, of Hoil of Scone, . . *Respondent.*

House of Lords, 2d April 1798.

REDUCTION OF SALE—FACILITY, FRAUD, AND CIRCUMVENTION—

 BONA FIDE PURCHASER.—Circumstances where a sale of property was sought to be reduced on the head of facility in the granter, and lesion and circumvention in the grantee. Held the proof, which was conflicting, not sufficient to set aside the sale of the property in the hands of a *bona fide* purchaser from the party who was charged with the fraud.

The appellant's father, George Duncan, had, previous to his death, sold a small property to Robert Thomson, which was afterwards purchased by the respondent from him, for an adequate price paid.

After George Duncan's death, his daughter refused to remove from the property, which compelled the respondent to raise an action of removing before the sheriff; and the appellant, on her part, brought an action of reduction to set aside the conveyance by her father to Thomson, on the following grounds:—1. Facility in the granter of the disposition 1784. 2. Lesion and circumvention on the part of the grantee.

The Lord Ordinary allowed a proof; and, besides the proof, it appeared that the disposition was signed by the granter, George Duncan, on the first page, thus: "Gancan Garg Duincan;" on the second page, it was "Georg Duncan;" on