1765.

LORD NAPIER
v.
LIVINGSTONE.

[M. 15,418, 15,461.]

The Right Honourable FRANCIS LORD NAPIER, *Appellant;*
WILLIAM LIVINGSTONE, Esq. - - - *Respondent.*

House of Lords, 11*th March* 1765.

SERVICE—ENTAIL—SASINE—BONA FIDE POSSESSION.—An heir of entail made up titles, disregarding the entail, and sold the estate, under the supposition that by the destination he was fiar. Held, (1*st*), That he was substitute heir of entail, and as sales were prohibited, he was not entitled to sell the estate, and sale reduced. (2*d*), Also held that a party who is not infeft in an estate, may make a valid entail though not infeft; but that the heir substituted, in completing his title under the entail, must expede a general service, so as to carry right to the tailzie. (3*d*), Also, that as the purchaser could not plead ignorance of the records, where the entail was recorded, he could not plead *bona fides*, or the positive prescription. (4*th*), Also, that an error in the designation of the writer of the entail, appearing in the sasine as recorded, though correct in the entail itself; and the name of the procurator to whom the symbols of infeftment were delivered, being different from the name of the procurator named in the other parts of the sasine, did not annul the sasine. (5*th*), That the entail might be recorded after the death of the entailer, at suit of a remote substitute heir of entail. (6*th*), That the sasine taken by the party succeeding to the entailer uninfeft, may validly contain the prohibitions, and irritant and resolutive clauses, although the anterior precept under which infeftment was taken did not contain these.

Sir James Livingstone married Mary, Countess Dowager of Callender, and, by the marriage contract, he settled his estate of West Quarter on the Countess for life, and the heirs to be procreated by the marriage in fee; whom failing, to the Countess in heritage for ever, and to be disposed of at her pleasure.

Sir James predeceased, without issue of the marriage, and there being no procuratory of resignation, or precept of sasine, the Countess was compelled, in order to make up her title, to bring an action against Lady Newton, his neice, and heir at law, for making up titles, and conveying the estate of West Quarter pursuant to the contract. Accordingly, in obedience to the decree obtained, Lady Newton was served heir to her uncle, and was infeft in the lands on a precept of clare from the Duchess of Hamilton, the superior, where-

upon, with consent of her husband, she conveyed the estate of West Quarter to the Countess, her heirs and assignees. 1765.

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No infeftment ever followed on this conveyance, and the Countess, who afterwards married the Earl of Findlater, did, with his consent, execute an entail, in the following terms: Mar. 8, 1705.

"To and in favour of us, the said Mary, Countess of Find-
"later, and the said James Earl of Findlater, our said
"husband, and longest liver of us two, in liferent and con-
"junct fee, and for the said Earl, his liferent use allenarly,
"and to James Livingstone of Bedlormie, and the heirs
"male lawfully to be procreated of his body, which failing,
"to his other heirs male whatsoever; which failing, to such
"person or persons, as we the said Mary, Countess of
"Findlater, shall nominate and appoint," &c. declaring
"that it shall not be in the power of the said James Living-
"stone, nor any others of the heirs and members of tailzie,
"named or to be named, by us the said Countess, *to sell*, an-
"nailzie, wadset, or dispone the foresaid lands above men-
"tioned, nor any part or portion thereof, nor to contract
"debts," which if they do, "the said James Livingstone and
"the other heirs of entail above written, shall *ipso facto* omit,
"lose, and tyne the right of succession to the said lands."

The Countess died in about a year thereafter, without issue of the marriage, whereupon James Livingstone, the next heir of entail, succeeded, and made up titles by applying to the superior, (the Duchess of Hamilton), and obtaining a charter, confirming Lady Newton's disposition to the Countess, and the Countess' entail, but no general service was expede by him. Infeftment followed thereon, but it was not recorded. Yet he procured himself infeft on the precept in Lady Newton's disposition of the estate to the Countess; and this infeftment, although the precept in the disposition did not warrant it, contained all the prohibitory, irritant, and resolutive clauses in the entail. The entail itself was not recorded until after the death of the entailer; and then only, on the prayer of the father of the infant heirs of entail, next entitled to succeed. 1719.

James Livingstone, on attaining majority, got involved in debt, and thereafter became insolvent, and was obliged to sell the estate to one Drummond a writer, who, it was alleged, sold it a few years thereafter for double the price, to Lord Napier the appellant.

On James Livingstone's death without issue, the right of succession to the entailed estate devolved on the respon-

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dent, the deceased's brother, who brought the present action of reduction, to set aside the sale, on the ground, 1*st*, That the lands of West Quarter were never properly vested in James Livingstone; he was only an *heir substitute*, named by the deed of entail, and ought to have been served and cognosced as heir called to the succession, and, consequently, his resignation into the hands of the superior, and charter thereon, were void, without the service. But supposing no service necessary, yet James Livingstone could only take under the limitations of the entail, which contained express prohibitions against selling and contracting debt; 2*d*, If James Livingstone's title, by the resignation on Lady Newton's procuratory without service was void, so were those deriving right from him. In defence to the action, it was stated, that James Livingstone, by the conception of the entail, was joint fiar with the Countess, and not a substitute, and so entitled to sell. It was further objected, that the recorded infeftment following the entail, bore that the entail in the testing clause, was "written by John Dick, servant to Alex- "ander *Hamilton*, writer to the signet, in place of Alexander "Cuninghame," writer to the signet, the proper name in the entail. The name of the procurator, to whom the symbols of infeftment are delivered, is written John Burn in the record, whereas, it is John Bryce in the sasine proceeding on the entail, and, therefore, he insisted that the infeftment 1706 was void and null. The sasine itself was lost, and, consequently, it could not be known whether the error was in the record, or in the sasine itself. But a proving of the tenor having been brought, the case was discussed, of these dates, and interlocutors pronounced almost in similar terms to that ultimately pronounced, as follows:—"Repel the ob- "jections to James Livingstone's base infeftment 1706, that "the designation of the writer of the Countess of Callen- "der's tailzie is different in the sasine from what it is in the "tailzie, and that the name of the procurator, to whom the "symbols of infeftment were delivered, is different from the "name of the procurator who, in the other parts of the sasine, "is marked as compearing for James Livingstone; but find "that a general service was necessary to James Livingstone, "in order to carry right to the Countess' tailzie, and there- "fore find, that James Livingstone's base infeftment 1706, "and the charter from the Duke of Hamilton's commis- "sioners, in the year 1728, and infeftment following thereon, "proceeding without the said general service, were ineffec-

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" tual, and did not vest the property of the lands of West " Quarter in him; and, *separatim*, in respect it is not proved " that the charter of confirmation by the Duchess of Hamil- " ton, in the year 1706, was ever delivered to James Living- " stone, and that it appears still to have remained in the " hands of the doers for the family of Hamilton, find that " the said charter of confirmation can have no effect in this " cause: Find that the Countess of Callender had power to " make a tailzie of the lands of West Quarter, in terms of " the Act of Parliament 1685; and that the tailzie made by " her, of date 8th March 1705, having been recorded in the " register of tailzies, on the application of Alexander Living- " stone of Bedlormie, an heir substitute in the tailzie, was " effectual against singular successors; and, therefore, find, " that the disposition by James Livingstone to Wm. Drum- " mond, and also the disposition by him to Lord Napier, " were not only void, as proceeding *a non habente*, but were " also granted contrary to the prohibitions and clauses irri- " tant in the Countess of Callender's tailzie: And repelled " the defence of the positive prescription pled (pleaded) for " Lord Napier, and also the other defence pled for him, that " William Drummond had purchased *bona fide* from James " Livingstone, and reduced the said dispositions granted by " James Livingstone to William Drummond, and by William " Drummond to Lord Napier, with the infeftments follow- " ing thereon, and decerned."

It was afterwards discovered that infeftment had followed on the charter of confirmation of 3d May 1706, and on petition against the above interlocutor, in so far as it finds the said charter an undelivered document, the Lords altered so far as to find that the same was delivered, and found that thereby James Livingstone's sasine in the said lands, 1706, was sufficiently confirmed, and they repelled the objections to the said sasine, that the prohibitive, irritant, and resolutive clauses in the entail were engrossed in said sasine, they not appearing in the precept of Lady Newton's disposition, upon which precept it proceeded. Mar. 2, 1763.

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

Pleaded for the Appellant.—When the appellant purchased West Quarter, he had not the least idea or suspicion that the property was held under a strict entail. No limitations were contained in the titles of James Livingstone, who had possessed for twenty-two years, or in those of Drummond, who had possessed for six years before the ap-

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pellant purchased. The entail act 1685 expressly declares, "that if the prohibitory and irritant clauses shall not be re-"peated in the rights and conveyances, whereby any of the "heirs of tailzie shall bruik or enjoy the tailzied estate, they "shall not militate against creditors, or other singular suc-"cessors." This clause ought sufficiently to protect the appellant, who is a *bona fide* purchaser, and was sufficient of itself to prevent him from looking further into the old title; and, upon the faith of this title being good and unexceptionable, he has entered into improvements of a large and most extensive nature. But, *separatim*, as the Countess of Callender had only a personal right, and had never completed her title to the estate by charter and infeftment, she had no power to execute a valid entail of the same, the feudal right remaining with the person last infeft. But, supposing she had a power to entail, it was not in the power of Alexander Livingstone, acting as guardian merely of his son James, to call for the registration of that entail after the death of the entailer. This act, even if valid in law, was otherwise void, in so far as it operated to the prejudice of an infant, and he was entitled to be restored against such act when he came of age. Accordingly he completed his titles, and sold the lands without regard to the entail. But the prohibitions cannot bind him, because independently, and supposing the entail good, these only operated in favour of the *heirs male of his body*, but as there were none such, and as the next series of heirs, (*his own nearest lawful heirs and assignees whatsoever*,) could not plead the privileges of the entail, they not being heirs of entail, but heirs whatsoever, the fetters did and could not operate in their favour, and therefore the estate was free in James Livingstone. Besides, the sasine 1706 is null, because of the discrepancy between the record and the entail itself, in the names of the party, and the procurator who delivered the symbols of infeftment.

Pleaded for the Respondent.—The appellant has no real interest in the question; because, as he purchased from Drummond with absolute warranty, under that warrandice he is entitled to complete indemnification. He is not *in pessima fide* in pleading the rights of a *bona fide* purchaser; because, if he had resorted, like all purchasers, to the record, he must have seen that the estate was held under strict entail, expressly prohibiting the sale thereof. That entail was recorded, and when it was made by the Countess of Callender, it was enough that she was unlimited proprietor

in fee of the estate, and though she had not been infeft, yet this did not prevent her from executing an entail of the estate, or assigning the procuratory in the disposition whereon no infeftment had followed. The entail was no doubt recorded long after her death, but Alexander Livingstone was a substitute, and had an obvious interest to insist in its being recorded. The critical and trifling objections taken to the sasine 1706 have been justly repelled, these two inaccuracies in the record being correctly written in different parts of the same instrument, which thereby corrects itself.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed the House, and the interlocutors affirmed.

For Appellant, *Al. Wedderburn, William Johnstone.*
For Respondents, *Tho. Miller, C. Yorke, Al. Forrester.*

Lord Monboddo, one of the Judges, says:—" This day, 2d Nov. 1761, the Lords determined several points concerning entails. And, in the first place, it was determined unanimously, dissent. tantum Kames, that a man having only a personal right to lands, may, nevertheless, make an entail in terms of the act 1685; and, upon searching the records, it was found that a great number of estates, and those the greatest in the kingdom, had been entailed in that way. The second point was, Whether an entail could be recorded after the death of the maker? and it carried that it could; dissent Alemore and Justice Clerk; and, at the distance of a remoter substitute, upon a summary application, as had been decided before in the case of the tailzie of Dunsinnan, March 1757, and in two or three other cases.

" There was a third point determined concerning an objection to a sasine, which was, that in beginning of the sasine, John Bryce is named as the procurator for the person who was to be infeft, but the symbols are delivered to John Burn, who is there called the foresaid procurator. The objection was overruled by a considerable majority, dissent President; and the Lords were of opinion that it was only a mistake in the name, and that the reference to the procurator first named, fixed the person. Some of the Lords too observed, that the principal sasine was here lost, and that the tenor was made up from the copy in the register, where that mistake might have been made in transcribing."