

1773.

LIVINGSTON  
v.  
WARROCK.

[Fac. Coll., Vol. iv., p. 313; et Mor., p. 7847.]

ALEXANDER LIVINGSTON, Esq., . . . . . *Appellant* ;  
JAMES WARROCK, . . . . . *Respondent*.

House of Lords, 29th April 1773.

ENTAIL—JUS TERTII.—In the entail of the estate of Westquarter, the question was, Whether James Livingston could sell the estate, under the following destination of the entail, “to  
“ and in favour of the said Countess, and James, Earl of Findlater, her husband, and longest liver of them two, for the  
“ Earl, his liferent use allenary, and to James Livingston and  
“ the heirs male of his body, whom failing, to his heirs male  
“ whatsoever?” James Livingston was, by express clause, prohibited from selling; and in a former appeal it was found he could not sell (*vide ante* vol. II., p. 108.) This was a part of the estate which, from the state of the title, it was thought he could sell; and it having been sold, the next heir after his death brought a reduction. Held, that where the title of two parties is derived from one author, neither party can object to the right of the common author.

The Countess Dowager of Callender was married a second time to Sir James Livingston, and afterwards to the Earl of Findlater.

By the former marriage, she was settled in the liferent of Sir James' estate of Westquarter, remainder to the heirs of the marriage.

There were no heirs of the marriage; and, on Sir James' death, Lady Newton succeeded to the estate of Westquarter, and she and her husband conveyed the same to the Countess, now married to the Earl of Findlater.

The Countess then, 1705, with consent of her husband, executed an entail of the estate, “to and in favour of the said  
“ Countess and James, Earl of Findlater, her husband, and  
“ longest liver of them two, for the Earl, his liferent use  
“ allenary; and to James Livingston, third son of Alexander  
“ Livingston of Bedlormie, and the heirs male procreate or  
“ to be procreate of his body; which failing, to his other heirs  
“ male whatsoever, which failing, to such person or persons  
“ as the Countess should nominate and appoint, by a writ  
“ under her hand at any time during her life.”

After the Countess' death, charter and infestment was obtained, proceeding on the deed of entail.

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James Livingston's father devised a scheme, which had for its object the defeating of the entail and the sale of the estate; and, accordingly, part of this estate was sold to a Mr Henderson, and by him to the respondent.

The appellant's uncle then brought an action to set aside the sale, on the ground that James Livingston was barred from selling these lands, as they were settled in strict entail by the deed of entail executed by the Countess as above set forth. This action was, after his uncle's death, carried on by the appellant.

In defence, the respondent pleaded, 1st, That the lands conveyed to Andrew Henderson were not comprehended under the entail, neither could they, as they never belonged to the Countess, to whom the pursuer had served, but were a fee simple estate in the person of James Livingston, and might be sold by him at pleasure. 2d, As both parties derived right from the same author, the appellant could not be heard to object to the right of the common author.

The Court, after much discussion, pronounced this interlocutor:—"Sustain the defence, assoilzie the defender, and Nov. 18, 1772. "decern."\*

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\* Opinions of the judges:—

LORD COALSTON.—"Both parties derive right from Lady Callender. Neither of them can object to the author's right. Had the objection been made by the heirs male, it would have been good; but then the defence of prescription would have been good. The party here cannot plead in the right of the heir male, without being liable to the same defence as *he* would have been. If the defender may object to Lady Callender's right, by parity of reason, he may object to a progress of 1000 years."

LORD MONBODDO.—"If a person is in the course of usucapion, he may maintain his right against every one who is not *verus dominus*; it is, therefore, material to inquire into the right of Sir James Livingston and Lady Newton. If the fact is true, that the lands are not in the charter of adjudication, then the pursuer has not proved that he is the *verus dominus*, and the subject is still in *hæreditate jacente* of James Livingston."

LORD AUCHENLECK.—"It is not competent for the defender to say that James Livingston had no right himself, and, therefore, could not sell to me. How can he dispute the right of the person from whom he himself derives right?"

LORD PRESIDENT.—"I always understood it to be a fixed rule that no one can object to his author's right."—*Hailes*, vol. i., p. 230.

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After hearing counsel,

It was ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *E. Thurlow, Ja. Montgomery.*

For the Respondent, *Al. Wedderburn, A. Crosbie.*

1774.

LESLIE  
v.  
LESLIE, &C.

The Honourable ANDREW LESLIE, . . . *Appellant;*  
LADY JANE ELIZABETH LESLIE, and her  
Husband, LUCAS PEPYS, Esq., . . . *Respondents.*

House of Lords, 10th May 1774.

ENTAIL—DESTINATION—HEIRS MALE—HEIR FEMALE.—In an entail the destination was “to John, Lord Leslie, and the heirs male, *or* eldest heir female, lawfully to be procreated of his body.” The respondent was the eldest heir female, and heir-at-law, and heir portioner with her sister, both being granddaughters of Lord John Leslie. The appellant was their uncle, who was the heir male of the body of Lord John Leslie, but not the heir general. Held, that by the above destination, the eldest heir female in the lineal or legal order of descent, was to be preferred to the collateral heir male of the body.

A question here arose upon the investitures of the estate of Rothes, which appeared at one time to have been in favour of heirs male. The appellant claimed to succeed under an entail 1684, and the respondent claimed to succeed as one of the heirs called under her father and mother’s contract of marriage, and also as granddaughter of the maker of the entail under the destination therein, and above quoted.

It was pleaded by the respondent, in the first place, that the entail 1684, not having been recorded in the register of entails as required by the Act 1685, the same was not good against creditors; and that she being one of the heirs called under her father and mother’s contract of marriage, was to be considered as a creditor, marriage contracts, and the provisions therein contained being in their nature onerous, and such as ought not to be affected by an unregistered entail. 2d, That, independent of her right under the marriage contract, Lady Jane was the heir called by the entail 1684, in preference to her uncle, the appellant, the destination to John, Lord Leslie, “and the heirs male, or the