

1768. July 14. WILLIAM LIVINGSTON *against* WARROCK.

MARY Countess-Dowager of Callendar, as having right to the lands of Westquarter, by conveyance from Sir James Livingston, her second husband, and a disposition by Lady Newton, his niece, and heir of line, granted procuratory, with consent of the Earl of Findlater, whom she afterwards married, for resigning those lands in favour of herself, and the Earl her husband, in conjunct fee and liferent, for the Earl's liferent use allenary, and of James Livingston, son of Alexander Livingston of Bedlormie, and his heirs-male, and other substitutes, in fee, with the prohibitory and irritant clauses usual in tailzies.

James Livingston infest himself on the procuratory, after the death of the Countess, and sold the lands. Upon the death of James, his brother William served heir of tailzie and provision to the Countess, and, having infest himself upon the procuratory in the disposition to her, prevailed in a reduction of the sale of Westquarter, upon the ground, that James had neglected to serve heir to the Countess, so that the lands still remained *in hæreditate jacente* of her; and that, supposing the personal right to be carried by James Livingston's infestment without service, yet he was barred from selling by the tailzie, the clauses of which were ingrossed in his infestment. See 9th March 1757, William Livingston *contra* Francis Lord Napier, *voce* TAILZIE.

The present question respected a small part of the estate, which James Livingston had sold to Andrew Henderson. From Henderson, it had come into the person of James Warrock, against whom a reduction was now brought by William Livingston.

*Pleaded* for the defender; Allowing the pursuer's service to have been regular, still his title is exceptionable. The Countess of Findlater, to whom he served, had no effectual right to the lands. For, 1st, Her author Sir James Livingston, never having made up titles, could not dispone *cum effectu*; the lands remained *in hæreditate jacente* of William Livingston, his father. 2do, The conveyance to the Countess was null and void, being executed in the form of a mutual contract, but wanting witnesses. 3tio, The disposition by Lady Newton was ineffectual, in respect the lands stood devised to heirs-male.

Nor can the defender be barred from pleading these objections, as if they were *jus tertii* to him, and founded in the right of the heirs-male. Were he endeavouring to annul the pursuer's rights, and turn him out of possession, there might be greater difficulty in the case. But, when the defender is himself in possession, upon titles good *ex facie*, it cannot be *jus tertii* for him to found upon the right of another, when the effect of that plea is to continue him in possession, and to exclude the pursuer, upon whom it is incumbent, first of all, to show that he has a valid title, before he can be allowed to disturb the person in possession of the lands. Accordingly, in many cases, it has been found competent for defenders to plead upon the rights of others, where those

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Where the title of two parties is derived from one author, neither party can object to the right of the common author.

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rights were available to protect them against the claim of a third party. See the Decisions, § 1, & 2. *h. t.*

*Answered*; The decisions referred to only prove, that the defender must be assoilzied, unless the pursuer instruct a title to the subject in question. But, in this case, the pursuer supports his title sufficiently, when he connects it with the Countess of Findlater, the common author. And so the law is clearly laid down by Lord Stair, IV. 35. 13. and the Lord Bankton, IV. 43. 7. It is evidently *jus tertii* for the defender to object to the title of the Countess; because, by doing so, he does not support his own right, but effectually destroys it. At any rate, the right of the heir-male is out of the question, being cut off by the negative prescription.

THE LORDS found, that it is not competent for the defender to challenge the title of the Countess of Callendar, the common author both of pursuer and defender.

Reporter, *Pitfour.*Act. *Macqueen.*Alt. *Lockhart.*

G. F.

*Fel. Dic. v. 3. p. 360. Fac. Col. No 71. p. 313.*

\* \* \* This case was appealed :

THE HOUSE OF LORDS, 29th April 1773, 'ORDERED and ADJUDGED, that the appeal be dismissed, and that the interlocutor therein complained of be affirmed.'

1788. July 10. M'MASTER, INGLIS, and COMPANY *against* COLIN CAMPBELL.

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Effect of a  
decree set-  
ting aside a  
sale of lands,  
as in defraud  
of creditors.

A REDEEMABLE right of lands, in favour of Colin Campbell, was set aside in an action at the instance of the creditors of the seller, as importing a conveyance *omnium bonorum* in favour of a particular creditor. But Colin Campbell having soon made a compromise with the creditors, by whom the action was brought, he continued in possession for several years.

Some time after these proceedings, M'Master, Inglis, and Company, became creditors to the bankrupt. They deduced an adjudication against the lands which had been sold to Colin Campbell, and then brought a process of ranking and sale; to which he was made a party. In support of this action, it was

*Pleaded*; An agreement that has been set aside as fraudulent, cannot afterwards be attended with any legal consequences. The rights of all parties thereby become the same as if no such agreement had ever been made. When an illegal transference of property has been attempted, the original owner must therefore be understood to be reinstated in all his former rights; and these must, of course, be liable to attachment, indiscriminately, by all his creditors. Without this, instead of making room for an equal distribution of the bankrupt's