

1816.

LAWRIE, &C.  
v.  
LIVINGSTONE.

JEAN LAWRIE, AGNES GILLESPIE, and }  
THOMAS MENZIES, Heirs Portioners in } *Appellants;*  
General, served and retoured to the de- }  
ceased Richard Burn of Clarkston, . }  
ALEXANDER LIVINGSTONE of Parkhall, . *Respondent.*

House of Lords, 24th June 1816.

POSITIVE PRESCRIPTION—NULLITIES IN TITLES—ERROR IN DATE, &c.—Objections were stated, by a party claiming an estate, to the titles as null and void, and other reasons of reduction; held these objections to be barred after prescriptive possession of forty years.

The estate of Clarkston belonged formerly to the ancestors of the appellants.

In 1699 James Burn owned the estate. He had two sons, Richard and John, the eldest of whom succeeded to the estate. Richard Burn married Margaret Livingstone, a daughter of the family of Parkhall, and from whom the respondent is descended. She, on her marriage, was provided with the liferent of one half of the estate.

Richard Burn was much in debt, and Sir George Warrender of Lochend, after doing personal diligence, acquired a decree of adjudication of the lands of Clarkston, for the sum of £94, 1s. 8d. Richard Burn was also indebted to his brother John, and had granted to him, an heritable bond over the estate, for one of the two debts owing to John. To both of these debts Mrs Burn afterwards acquired right by disposition and assignation, in favour of trustees for her behoof; and she also acquired right, by disposition and assignation, to the debt and adjudication vested in Sir George Warrender, by paying him the sums therein, taking the right as above mentioned in favour of Mr James Monteith, and Alexander Mitchell, trustees for her behoof.

She, by the portion given her by her father paid off other debts, acquiring right to them in the manner above-mentioned. Richard Burn afterwards granted her a deed corroborating the rights so acquired, and, at the sametime, granted her the liferent of the *whole* estate of Clarkston, upon which she was infest. Richard Burn died soon after this infestment, without issue.

1733.

John Mitchell, afterwards Livingstone, son to the above Alexander Mitchell, and nephew to Mrs Burn or Margaret Livingstone, had acquired right to other debts contracted by

Richard Burn, to an amount far exceeding the value of the estate. In 1735 Mrs Burn, with consent of her trustee, conveyed these lands to the said John Mitchell.

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John Burn, the brother of Richard, who knew well the circumstances of his brother, did not, after his brother's death, make up any titles to the lands. He died in 1752, leaving three daughters, Margaret, Jean, and Euphemia, who were entitled to the lands after paying these debts if any reversion remained over.

Margaret married John Lawrie, by whom she had one son, John.

The mode of procedure adopted in 1761, was to obtain a ratification of these debts held by Mr Mitchell, by these heirs, together with a renunciation of all their rights, in favour of John Mitchell. This he made the foundation of a decree of constitution as to the debts other than those due on Sir George Warrender's adjudication. This was followed up by special charge and decree of adjudication. Thus, Mr Mitchell, who, by entail afterwards succeeded to the estate of Parkhall, and assumed the name of Livingstone, had two adjudications vested in him, and obtaining charter of adjudication, he was afterwards infeft of this date.

1768.

He settled his estates, and among others the lands of Clarkston, upon Thomas Livingstone, his son, by strict entail; and upon his death the respondent succeeded as substitute under that entail.

1788.

The present action of reduction was brought by the appellants to set aside that right on the following grounds:—  
1. That the adjudication laboured under an intrinsic objection and nullity, inasmuch as in the conveyance granted by the said Sir George Warrender to James Monteith and Alexander Mitchell, as trustees for the behoof of Margaret Livingstone, there was a palpable error: for the date of the conveyance, as narrated in the instrument of sasine in favour of the said John Mitchell, is said to be the fifth April "*One thousand and twenty,*" in place of One thousand seven hundred and twenty.  
2d. That the said John Mitchell, in place of taking a conveyance of Sir George Warrender's debt from James Monteith and Alexander Mitchell, as trustees for behoof of Margaret Livingstone, took a conveyance from Margaret Livingstone herself, and the conveyance thus deduced was, therefore, inept.  
3d. That William Mure of Caldwell, one of the Duke of Hamilton's factors, who signed the charter of adjudication, was, in the instrument of sasine following thereon, described

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only as William, the name Mure being omitted. 4th, And it will also appear that, on a just accounting had with those who uplifted the rents, that these debts are extinguished and paid.

The defence stated to this reduction was, that the deed of renunciation was a complete title to exclude. And the respondent also produced his charter and sasine on which he founded the plea of the positive prescription; and he maintained, besides, that the claim of the respondent was barred by the negative prescription.

May 4, 1811.

The Lord Ordinary, Armadale, pronounced this interlocutor:—"Having considered this condescendence, with the answers thereto, and titles produced, finds that the charter of adjudication in 1766, and instrument of sasine thereon in 1768, form a sufficient title for pleading the positive prescription in favour of the defender, and giving him an exclusive right for ought yet shown: Finds that the different objections thrown out in the long paper, for the pursuers, appear to be insufficient, groundless, and in some particulars totally irrelevant after the positive prescription upon charter and seisin, and possession has followed for forty years; and, moreover, that the pursuers have not shown any sufficient or proper title, as yet, to insist in this reduction, and, from the detail given in the papers, that their predecessors, if they had originally any right, are, independently of the plea of the positive prescription, cut off, both by voluntary and judicial proceedings; therefore, upon the whole circumstances of the case, and as it is not disputed that the defender and his predecessors have been in the uninterrupted possession of the subject in question, originally very trivial and of little value, for upwards of forty years, upon a sufficient title, sustain the defences, assoilzies from the present action, and decerns." On reclaiming petition,

June 2, 1812.

the Court pronounced this interlocutor:—"Alter the Lord Ordinary's interlocutor, in so far as it finds the pursuers have produced no proper title to insist in this action, but, *quoad ultra*, adhere to the interlocutor reclaimed against, and refuse the desire of the petition. Further, find the pursuers liable to the defender in expenses; appoint an account thereof to be given in to this Court; remit to the auditor to tax it and to report." On advising another petition,

June 30, 1812.

the Court were unanimous in adhering.

Against these interlocutors the appellants brought an appeal to the House of Lords.

After hearing counsel,

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

For the Appellants, *John Clerk, Thos. W. Baird.*

For the Respondent, *Geo. Cranstoun, Fra. Horner.*

NOTE.—Unreported in the Court of Session.

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[Dow's Reports, vol. iv., p. 97.]

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JOHN REID AND COY., Merchants in Glasgow, *Appellants* ;

ROBERT HARVEY, ANDREW M'MILLAN and  
Others, all Underwriters on the Ship } *Respondents.*  
"Nancy," and ANDREW STEEL, W.S.,

REID, &C.  
v.  
HARVEY, &C.

House of Lords, 24th June 1816.

INSURANCE—CONCEALMENT—RUNNING SHIP.—In effecting an insurance on the cargo of a ship; held, that having concealed that the ship was a prize ship going home for condemnation, and not a British bottom, and that she was not to go with convoy, but to make a running voyage, the insured were not entitled to recover. Affirmed in the House of Lords.

Insurances were effected by the appellants on a cargo of fruit per the ship "Nancy," from Lisbon to Clyde, premium ten guineas, to return five per cent. *for convoy and arrival.*

On the same day that the appellants effected this insurance, they had received information by letter, stating that the "Nancy" was a ship going home for condemnation, and that she was a running ship, to sail without convoy, but these facts they concealed from the respondents at the time they insured. Five days after sailing she was taken by a Spanish privateer, and carried into Vigo; and the respondents refused to pay in consequence of the concealment of these material facts.

After various procedure in an action brought on the policies, the Court sustained the defences as to the concealment of these two facts, and assoilzied the respondents. And on two reclaiming petitions they adhered.

Against these interlocutors the present appeal was brought.

After hearing counsel,

The House of Lords affirmed the judgment of the Court of Session.

For Appellants, *J. A. Park, Jas. Wedderburn.*

For Respondents, *Sir Saml. Romilly, John Dickson.*

June 27, 1812.

June 25, and  
July 1, 1813.