

1787. *January 31.* BEADIE *against* CREDITORS of HEGGIE.

No. 21.

AFTER a sequestration had been awarded on the statute, an arresting creditor of the bankrupt discovered, that the debts due to the creditors who had applied for sequestration were not of the amount required by the statute; and he craved, that the sequestration might be recalled on that ground. The Lords were of opinion, That any individual injured by an improper application might obtain redress from the persons who occasioned his loss; but that a sequestration, which is a measure intended for the general benefit of the creditors, ought not on that account to be recalled; and they refused the petition.

Fol. Dic. v. 4. p. 267. Fac. Coll.

* * This case is No. 272. p. 1248. *voce* BANKRUPT.

1797. *January 26.*

The Honourable Mrs. MARIANNE MACKAY and COLONEL FULLARTON,
against SIR HEW DALRYMPLE and Others.

IN the action of reduction and declarator of irritancy brought, in 1773, No. 7. p. 5239. by the Honourable Mrs. Marianne Mackay, with consent of her husband, Colonel Fullarton, against John Hamilton of Bargany, and Sir Hew Dalrymple, his next heir, both of law and of provision, the defenders produced a charter and infeftment in favour of Mr. Hamilton, in 1742, which, with his uninterrupted possession, they founded on as a sufficient title to exclude the pursuer by the positive prescription.

The Court pronounced an interlocutor, (9th February, 1796,) repelling this defence.

Mr. Hamilton died at Bargany, on the 12th February, 1796.

His repositories were immediately sealed up, in presence of the minister of the parish, and a justice of peace in the neighbourhood; and, on the next day, they were likewise sealed, by authority of the sheriff-substitute of the county, upon an application from the pursuer.

Mrs. Fullarton likewise presented a petition to the Court to sequester the estate till the issue of the action; which was refused, (9th March, 1796.)

Sir Hew Dalrymple, on the other hand, complained, by bill of advocation, of the warrant granted by the sheriff, and prayed that the seals should be removed.

The bill having been passed, the pursuer contended, That the warrant granted by the Judge-Ordinary, whose duty it is, in cases of disputed succession, to secure the papers of persons deceased, Act. Sed. 23d Feb. 1692, was perfectly legal. The question of sequestration, however, having been now determined against her,

No. 22.

The dependence of a reduction and declarator of irritancy, brought against the proprietor of an entailed estate, does not entitle the pursuer, upon the death of the former, to have his repositories sealed by warrant of the sheriff, nor to insist that an inventory of the papers found in them shall be made up at sight of the Court, to lie *in retentis* till the issue of the action: But the repositories having been sealed by warrant of

No. 22. the sheriff, in such circumstances, and an interlocutor of the Court, recalling the warrant, the defender was found to have acted irregularly in removing the seals before the interlocutor was final.

she admitted, that she had no right to possession of the papers contained in the repositories, nor, *hoc statu*, to be informed what they were. But she insisted, that the repositories should be opened in presence of some person named by the Court, who should take an inventory of them, to lie *in retentis*, and thus prevent any of them being lost: a demand, she maintained, which, as these repositories probably contained not only the titles of Bargany, hitherto withheld under pretence of an exclusive title, but also a settlement alleged to have been executed by Mr. Hamilton, in which she had an eventual interest, was reasonable on her part; very different from that of a general exhibition, one which the defender had no legal interest to oppose, and which, as a matter of general right, the personal conduct and responsibility of the present defender, were no reasons for refusing her.

The defender answered, That the warrant of the sheriff, after the repositories had been already regularly sealed, was incompetent; that, in his character of apparent heir, he had a fair interest to the unqualified enjoyment of the estate; and that the present question was, in fact, decided by the interlocutor of the Court refusing the sequestration, as the pursuer had no more title to interfere with the writings at Bargany than with the rents of the estate, the ordinary remedy of a process of exhibition being open to her; 28th November, 1761, D. Hamilton against Douglas, No. 12. p. 3966.

The Lord Ordinary reported the cause on informations.

The Lords, on the grounds stated for the defender, unanimously "recalled the sheriff's warrant."

Before this interlocutor had become final, Sir Hew Dalrymple opened the repositories at Bargany, in presence of the justice of peace who attended when they were originally sealed up. On this, the pursuer presented a petition and complaint, stating, That she was *in cursu* of reclaiming against the interlocutor of 26th January; that the defender had acted irregularly, in removing the seals before the decree was or could be extracted; and insisting, that the writings should be replaced. She likewise contended, that the executor, as well as the heir-at-law, of Mr. Hamilton, should have been present when the repositories were opened.

The defender answered: When the object of an interdict is to prevent a person from exerting some act over a subject which is the property of another, or in his possession, an extracted decree of a competent court removing it, or a certificate from the clerk of the bills, when the interdict has been removed in the bill-chamber, is the only authority upon which the party in whose favour the interdict was granted is obliged to submit to further proceedings on his property. But where, like the warrant in the present case, the interdict prevents a person from exerting an act over a subject which is his own property, and in his own possession, the interlocutor of the Court removing it entitles him to act as before it was imposed.

The heir and executor are the only persons entitled to be present at opening the repositories of a defunct. The pursuer, who was neither to Mr. Hamilton, has no title to complain.

SEQUESTRATION.

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Upon advising the complaint, with answers, &c. all were agreed, that the pursuer, in this case, had suffered no injury from the defender's conduct. But a majority of the Court thought that the defender had acted irregularly in proceeding to open the repositories while the reclaiming days were running; and therefore (8th March, 1797,) he was found liable in the expenses occasioned by the complaint. No. 22.

A petition, reclaiming against the interlocutor of 26th January, which had been superseded, was, on the same day, refused without answers.

Lord Ordinary, *Cullen*. Act. *Solicitor-General Blair, Macleod Bannatyne, Tait, Hope, Cathcart, et alii.*
 Alt. *Geo. Ferguson, H. Erskine, Cha. Hay, Rae, Thomson, et alii.* Clerk, *Sinclair.*

Fac. Coll. No. 12. p. 25.

See POINDING.

See HYPOTHEC.

See APPENDIX.