

estate, which was not opposed by Sir Walter Montgomery Cuninghame, the proprietor; the Creditors applied to have the estate sequestrated: but this Sir Walter would not agree to, alleging that, as sequestration was a rigorous diligence, (Ersk., *B. 2, tit. 12, § 56,*) and as there was already a faithful honest factor upon it appointed by him, provided the same factor was continued, he was ready to find caution for his behaviour, in the same way as if he was a Lord's factor. But this measure the Lords did not incline to adopt: they thought it might open a door to fraud and collusion; therefore they, 25th February 1778, sequestrated the estate, but remitted to the Ordinary to hear parties on the nomination of the factor; and if it should appear to him that Sir Walter's factor was proper to be the Lord's factor, it was probable he would be the man.

1778. *March 5.*

WILLIAM HUNTER OF CLERKINGTON.

WILLIAM Hunter of Clerkington, merchant in Edinburgh, having become bankrupt, his effects were sequestrated on the late statute. But the creditors, suspecting that he had acted fraudulently, applied to have him examined in presence: he attended one diet, but the next he absconded and went to Holland. Mr Williamson, an heritable creditor, thereupon raised maills and duties, and an adjudication, which were executed; and then he applied for a sequestration. The Lords, in respect of the unusual circumstances of the case, got over the Act of Sederunt 1764, limiting such applications to be made before the 20th of February, and also that the actions were not in Court. And they sequestrated the estate.

SERVICE

Of ——— KENNEDY.

ON the 24th March 1796, came on the service of ——— Kennedy, as sister and nearest heir to Lieutenant Kennedy, her brother.

It was *in limine* objected, That Lieutenant Kennedy was not dead; and, 2do, That the claimant was not nearest heir, in respect that the deceased, if he was dead, had a sister elder than the claimant, which elder sister left a child still alive, who was pursuing a declarator of legitimacy before the Commissaries.

ANSWERED,—It is altogether out of shape to enter here into the question, Whether Lieutenant Kennedy is dead? Hear our evidence, but do not say, before you hear it, that it does not prove his death.

REPLIED,—Let the Court find that certain evidence only is competent.

On the other point, ANSWERED,—This matter also is matter of evidence, for the claimant must prove that she is nearest heir, otherwise her service cannot proceed.

But, *2do*, It is impossible to stop the service of the claimant, upon the allegation that the objector means to prove herself legitimate: she is not in possession of that *status*,—her father and mother were not habite and repute man and wife; she is therefore only in course of making out her legitimacy; and, unless she will prove that *instanter*, she cannot be heard. She is like an heir of tailyie pursuing a declarator of irritancy.

REPLIED,—The fact of the objector being the daughter of the elder sister is not denied, and her legitimacy is presumed.

DUPLIED,—No; as she was, *ex concessis*, not in possession of the *status* of legitimacy, the *onus probandi* falls on her that her father and mother are married.

There were cited, 1503, c. 94, Stair, M'Kenzie, Erskine, Bankton,—case of *Mountstewart, Missinich, Burnet* against *Bannerman*, 4 Fac. Coll., &c. &c.

The service proceeded.

In proof of the death:—

1. The London Gazette, bearing, that A. B. was appointed Lieutenant in the 65th Regt., vice Kennedy deceased.

2. The Army List, and a factory to one of the objectors, proving that Kennedy was in the 65th Regt.

3. An affidavit of Captain Clark, that he was in the 65th Regt., and that Kennedy died in Guadaloupe, the 28th December 1794.

4. The oath of Kennedy's brother-in-law, that he and all the family, from many circumstances, believed that Kennedy was dead.

OBJECTED to the affidavit,—That it bears to be signed by Clark, before A. B. mayor of High Wycombe; but *quomodo constat* that Clark signed it, or that A. B. signed it, or that he is mayor of High Wycombe?

ANSWERED,—The attestation of A. B. proves the signature of Clark; and, as to the signature of A. B. it might be just as well said, when an extract from the Court of Session is produced, *quomodo constat* that the subscription of the clerk is genuine, and *quomodo constat* that Sir James Colquhoun is a Clerk of Session?

The Jury unanimously served.

There was no competition of brieves. The objection that Lieutenant Kennedy was not dead, was made by his factor; the other objection by the child.