

No. 25.  
bankruptcy,  
on the head  
of fraud, not  
competent.

obtain re-delivery of the cattle, as it was uncertain whether they had reached England, and as it was impossible to apply to the interim factor or trustee, as no meeting of creditors had taken place under the sequestration, and no manager of any description had been chosen, the most regular and most prompt method seemed to be, to make an application to the Lord Ordinary on the bills for an interdict, prohibiting the sale of the cattle, until it should be ascertained to whom they belonged.

A petition to this effect was presented, and the interdict granted; but, in the mean time, the cattle having reached England, Gray (October 12.) authorised a sale of them, under protest, that the price should not be intromitted with by the creditors. A competition for the price then became the question between John Napier, trustee for Campbell's creditors, and the seller. A summary application was made to the Court, praying "their Lordships to remit to the Lord Ordinary to investigate the circumstances of this case, and, on his Lordship's report, to grant warrant, ordaining the said John Napier to pay over to the petitioner the sum of £.630, being the value of the cattle delivered over to the late James Campbell, junior, with interest from 3d October last." This application was supported by a reference to sect. 35. of the bankrupt act, which, in requiring that the trustee shall first determine upon disputed claims, and that the Court shall review his sentence, it was said, applied only to the case where the party claiming makes his demand as a creditor; but the petitioner claims, as his exclusive property, what had never belonged to the bankrupt, over which therefore the trustee can have no controul, and therefore no power of deciding whether it belong to one party or another.

It appeared to the Court, however, that a formal action of reduction, on the head of fraud, was the only competent shape in which the merits of this question could be tried.

The petition was (December 22d, 1803,) refused.

For petitioner, *W. Erskine.*

Agent, *Alex. Young, W. S.*

Clerk, *Pringle.*

*Fac. Coll. No. 131, p. 289.*

1804. July 7.

KER, Petitioner.

No. 26.  
Summary application to have a deed of tailzie produced and recorded, competent, although the heir of entail who makes the application has not proved his propinquity.

A petition was presented to the Court, in the name of Colonel Walter Ker of Littledean, for himself, and as administrator in law for his sons, setting forth, That Robert, first Earl of Roxburgh, settled and entailed the earldom and estates of Roxburgh, Halydean, and others, upon a certain series of heirs, by a deed of nomination, designation and tailzie, executed in the year 1648; that this deed of entail was never recorded, but that Robert, Duke of Roxburgh, in 1747, made up his titles to the estate under it; that Duke Robert afterwards executed a disposition and tailzie of the lands contained in the former entail, and of certain other estates, in favour of his son and other heirs of tailzie; that accordingly, a charter of resignation under the Great Seal was exped

in favour of John, Duke of Roxburgh, eldest son of Duke Robert; and his heirs-male; whom failing, in favour of Lord Robert Ker, second son of Duke Robert, and his heirs-male; whom failing, upon the other heirs of entail substituted to them in the entail executed by Earl Robert in 1748; and that John, the late Duke of Roxburgh, the institute, was duly infeft upon this charter, and possessed the estate of Roxburgh upon this title.

The petitioner farther stated, that by the death of the late John Duke of Roxburgh, without male-issue, the first branch of the descendants of the institute of the tailzie in 1648 became extinct; that William, Lord Ballenden, who succeeded him, was the last descendant of the second branch; and that, in the event of his death without issue-male, the estate of Roxburgh devolved, by the terms of the entail in 1648, upon the eldest heir-male of Lady Jean Ker, the grand-daughter of Earl Robert, the original entailer. The petitioner stated, that he was the heir-male of Lady Jean, and as such entitled to succeed, in the event of the death of the present Duke of Roxburgh without male-issue; at all events, that he was an heir of entail by the deed of tailzie. He therefore prayed their Lordships "to ordain the said William, Duke of Roxburgh, or James Dundas, Esq. clerk to the signet, his Grace's agent in this country, in whose custody the petitioner understands the said tailzie executed by Robert, Duke of Roxburgh, in 1747, is, to produce the said tailzie in the hands of the clerks of this Court, and the said tailzie being so produced, to interpose your authority thereto, and to grant warrant to the keeper of the register of tailzies for recording the same in that register, agreeably to the act of Parliament 1685." A subsequent petition was afterwards given in "for letters of incident diligence at the petitioner's instance against havens, for recovering of the said deed of entail 1747."

These petitions were intimated to James Dundas, clerk to the signet, agent for the Duke of Roxburgh, who, as the Duke was not in Scotland, gave in answers to the petition, in which he maintained, in the *first* place, that the petitioner had not instructed any title to insist in his demand, except a bare allegation that he was a substitute heir of entail, which might be made by any person, and which of itself is no evidence of propinquity. He contended, in the *second* place, that even if the petitioner's title were undisputed, he was not entitled to insist, in a summary way, for the exhibition of the tailzie; and that the only competent mode of procedure was to bring a regular process of exhibition, by which the defender would be allowed the ordinary *inducia* to state his defences; More, February 2d, 1753, *voce* TAILZIE; Spittal, August 3d, 1781, *IBIDEM*.

With respect to the application for letters of incident diligence, the respondent maintained, that the term itself implied a process already raised; Stair, B. 4. T. 41. § 4. and that it was quite irregular to apply for a warrant for this purpose, unless there was a depending action.

It was, on the other hand, contended for by the petitioner, that the Duke had no reasonable ground to resist this application; that if he possessed the estate in fee-simple as the last substitute of the entail, it would make no alteration on his

No. 26. right to have the deed recorded ; but if the tailzie was effectual, the petitioner had both a title and interest to have it recorded, to save the tailzie from being defeated ; that if he were obliged to instruct his title by proof, before the entail was recorded, the matter might be protracted for many years, and in the mean time the estate might be burdened with debt ; that the only mode of preventing this evil was by putting the entail upon record immediately, which would serve only to preserve the right as it stood, but which would not prejudice any of the Duke's objections to the validity of it ; and that it was the uniform practice of the Court to order deeds of entail to be recorded upon the summary petition of heirs-substitute, without either service or intimation.

To establish this practice, the petitioner produced excerpts from the register of tailzies of twenty-five different cases within the last twenty years, in which deeds of entail were recorded upon the summary petition of the substitutes. He at the same time obtained a service as nearest and lawful heir-male of Robert, first Earl of Roxburgh, and Henry, Lord Ker, his son.

The Court, (13th June, 1804) appointed the petition to be intimated to the Duke of Roxburgh, and ordained him to put in answers within ten days. The act for intimation having been extracted, and intimation made at the market-cross of Edinburgh, and pier and shore of Leith, the petitioner made an application of new for letters of incident diligence, which was strongly opposed upon the grounds that have been stated. The Court, (8th June, 1804,) had refused the diligence *in hoc statu*; afterwards, however, (5th July) they granted the diligence, and the deed of tailzie having then been produced by Mr. Dundas, ordained the same to be recorded.

The Court seemed chiefly to be influenced by the consideration, that the recording of this deed would be attended with no prejudice to the rights of any party ; as every objection which the Duke of Roxburgh might have to its validity, would be equally competent after the entail was recorded ; but, on the other hand, that it might be attended with great injury to the petitioner, if in the end his claim should turn out well founded, to refuse the prayer of his petition, and allow the present proprietor, in the mean time, to contract debt upon the estate, or perhaps to sell it, by which the right of the heir of entail might be defeated altogether.

For petitioner, *Hope, Blair, Erskine, Gillies.*

Agent. *R. Hotchkis, W. S.*

Alt. Clerk, *Ross, Monyhenny.*

Agent, *Ja. Dundas, W. S.*

Clerk, *Home.*

J.

*Fac. Coll. No. 174. pt. 393.*

See APPENDIX.