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cannot be destitute of a remedy in such a case, where one is dilapidating the estate. Ballenden is certainly debtor in the obligement to re-employ the sums he uplifts; this must have a *correlatum* of a creditor where the *jus exigendi et cogendi* is lodged; now, if the next heir of tailzie will not, nor dare quarrel the palpable violations of the tailzie, the right of exaction must necessarily go to the remoter; not that the fourth or fifth branch should be admitted; but if the nearest be negligent, then he who succeeds him may quarrel it, and so it was sustained in the case of the heirs of tailzie of Home of Ayton against the Earl of Home, and the Lady Tarras against Hepburn, See TAILZIE.——THE LORDS considered this was an anomalous tailzie of fungibles and a moveable subject, which cannot always continue in the same state, but of necessity must be sometimes lifted and changed, either when debtors turn weak, or refuse to keep the money any longer in their hands; and that the declarator could not be regarded in this debate, whether the re-employment my Lord Ballenden was making, was profitable or damageable to the subsequent heirs of tailzie; therefore they repelled the declarator *hoc ordine*, and found the arrestment could not hinder my Lord Ballenden's uplifting, reserving Mr William Ker's declarator, as accords, where these two questions would naturally fall in; *1mo*, If a remoter heir could pursue such an action? *2do*, If the employment must be equivalent in rent and value to what it yielded before, at least in some proportion, that the inequality be not great? Otherwise, by purchasing beautiful gardens and houses, the tailzie may be materially frustrated and eluded, and the fund exhausted on things unprofitable.

Fol. Dic. v. 1. p. 518. Fountainhall, v. 2. p. 142.

1704. *November* 7. THOMAS NICOL *against* PARK of Foulfoordlyes.

No 42.

THOMAS NICOL, writer, pursues a reduction and improbation against Park of Foulfoordlyes, of all rights he has upon the lands of Nether Monynet. *Alleged*; Your title is a comprising led in 1653, whereupon nothing is done within the forty years, and so it is prescribed. *Answered*; Though this process interrupting it be without the forty years, yet no prescription can run against him; *1mo*, Because the 12th act of Parliament 1617, introducing prescription of heritable rights, excepts the case of falsehood, and so improbation is competent, though the right were 100 years old; *2do*, This is a wadset containing a reversion *in gremio*, and so can never prescribe, by a clause in the same act, seeing the wadset ever acknowledges the granter's right, and could never be *in bona fide* to prescribe the property, prescription being of two kinds, one positive, when a person is in possession by virtue of a title, by the space of forty years uninterrupted; and the second defence, arising from prescription, is the negative, when a party loses his right *non utendo* by forty years silence; but this can never be obtruded by one brooking allenarly by a redeemable right.——THE

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LORDS repelled the allegeance, and found it *jus tertii* to the wadsetter to object prescription against the pursuer, and sustained process; though it was contended the prescription took off the *jus agendi* on the apprising, as much as if it had been renounced, prescription being a presumptive legal renunciation of the right.

Fol. Dic. v. 1. *p.* 519. *Fountainhall, v.* 2. *p.* 238.

1708. *June* 19. RELICT of A, *against* Her CHILDREN.

No 43.

IN a process at the instance of a defunct's relict and children against the executors, these last being confirmed, they craved deduction for the moveable heirship, as the best of each species of the plenishing, which the heir would have right to, though here he had not claimed it.——THE LORDS found that the whole was to be accounted for, but ordained the receiver to find caution to warrant them against the heir, when he appeared.

Fol. Dic. v. 1. *p.* 518. *Fountainhall.*

*** This case is No 131. p. 5927. *voce* HUSBAND and WIFE.

1708. *June* 30.

JOHN RULE, Merchant in Dumfries, *against* ANDREW PURDIE, Merchant in Edinburgh.

No 44.

IN a removing from a tenement within Dumfries, pursued at the instance of John Rule, infeft therein as heir to John Rule, chirurgeon there, his father, against the tenants; compearance was made for Andrew Purdie, who having adjudged the tenement from the pursuer's father's author, and standing infeft therein, objected against the pursuer's warning, that it was null for being executed by one James Mackno, a borough officer that was blind, and so not capable to execute diligence, seeing a blind man could easily be imposed upon, and mistake one man, or one house or door, for another.——THE LORDS found it to be *jus tertii* to Andrew Purdie, to object against the formality of the warning, in respect he was neither a possessor, nor called in the removing, but only a pretended competing creditor, who had no further interest than to get himself preferred.

Fol. Dic. v. 1. *p.* 520. *Forbes, p.* 256.

*** Fountainhall reports this case.

JOHN RULE, standing infeft in some tenements in Dumfries, upon an adjudication led by his father, pursues a removing against the tenants. Andrew