

1702. February 3.

LORD BALLENDEN *against* The EARL of ROXBURGH and His BROTHER.

No 41.
Found in conformity with Lord Ballenden against Earl of Anandale, No 38. P. 7811.

RANKEILOR reported the Lord Ballenden against the Earl of Roxburgh, and Mr William Ker his brother. The late Lord Ballenden tailzied his estate, consisting of L. 112,000 Scots, in money, upon personal security, to John Ker, youngest son to the late Earl of Roxburgh, his nephew, with irritancies not to alter the succession, and in case of uplifting any of the sums, to re-employ the same, in the terms of the tailzie. The present Lord Ballenden having bought the lands of Whitehill from James Smith, and having 80,000 merks of his money lying in Lord Roxburgh's hands, he pursues him for payment. *Alleged*, He can do no deed to deteriorate or prejudge the succession, and therefore he cannot uplift, unless he employ the same of new again upon land, or other good heritable security, rendering the like rent or annualrent yearly that it did formerly, otherwise he may evacuate the whole estate and succession, by employing his money fancifully upon a house and yards, which afford no rent; and whatever others may cast out on a *pretium affectionis*, he cannot do it, but must keep up a solid stock for the use of the next heirs of tailzie, and content himself with the annualrent of the money for maintenance of himself and family. *Answered*, The Earl of Roxburgh being the debtor, he had no interest in the re-employing, it being *jus tertii* to him, who would be abundantly secure by the decret of the Lords and my Lord Ballenden's discharge, as was found in former processes he pursued against the Lord Drumcairn, and the Earl of Anandale; * whom the LORDS found not concerned in the re-employment, which my Lord Ballenden was to do upon his peril.—THE LORDS repelled the Earl of Roxburgh's defence, and found he had no interest in the re-employment, neither would they name any of their own number at whose sight it should be again employed, the tailzie requiring no such thing. *2do*, *Alleged* for the Earl of Roxburgh, and Mr William Ker, his brother, that he, as the next branch and member of the tailzie, had raised a declarator that my Lord Ballenden had contravened the irritancies and incurred the forfeiture, by uplifting sundry considerable sums formerly; which he had never re-employed, but spent and consumed, and so has lost and amitted both the dignity and title, and likewise the property of what remained, and the same was devolved to him as next heir; and upon which process Mr William had laid on arrestment of their sums in the Earl's hands, and so the Earl was not *in tuto* to pay, till the same was either loosed or discussed. *Answered*; This declarator cannot be received *hoc ordine incidenter*; and though it were, it could never be sustained at Mr William's instance, who is not the next immediate heir of tailzie, but my Lord Ballenden's own sons are before him, who are not complaining nor pursuing any contravention. *Replied*; He is tutor and administrator to his son, who is but a minor, and so will never pursue any such action against his father; and therefore law.

cannot be destitute of a remedy in such a case, where one is dilapidating the estate. Ballenden is certainly debtor in the obligation 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; *imo*, 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. Fountainball, v. 2. p. 142.

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

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; *imo*, 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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