

- No 42. LORDS repelled the allegiance, 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. Fountainball, 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. Fountainball.

* * * 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, infest therein as heir to John Rule, chirurgian 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 infest 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 infest in some tenements in Dumfries, upon an adjudication led by his father, pursues a removing against the tenants. Andrew

Purdie, likewise an adjudger, and infest, compears, and *alleges*, I will not let you remove these tenants, for the execution of the warning is null, in so far as it is executed by James Mackno, a town-officer, who has been stone blind these many years, and therefore incapable either to execute any diligence, or to give a written execution thereon, seeing he cannot know if the person against whom he gives it be the true party against whom it is designed; for how can he know one person's house from another. *2do*, It is further null, as being only subscribed by initial letters, and not *ad longum*, and even how could he do that, except his hand had been led. *Answered* for Rule, *Imo*, This is *jus tertii* to Purdie, who is not in possession, nor called in the removing, and has only interest to seek preference in the mails and duties; which, if he do, Rule will exclude him clearly, seeing his adjudication is not so much as within year and day of his, and so can never compete farther than to redeem him, which also Rule is not bound to accept of now; his adjudication being long ago expired, and no other used. *2do*, There is no law excluding a blind man from executing a warning, seeing he can do more, in granting valid and sufficient bonds and dispositions; and this man, though blind, is of that sagacity, that he is more employed than any town-officer in Dumfries; for there is not a house in that town but he can go to it; and if he has once heard a man, he will know him again by his voice. And Justinian, *in lege hac consultissima* 8. C. *Qui testamenta facere possunt*, allows a blind man to make a testament under the cautions there set down; and *esto* it were illegal, yet *quoad præterita* it must be sustained, by the *lex Barbarius Philippus* 3. D. *De off. prætor.*, else all his executions would be null, which would endanger the securities of many in that place. And as to the *second*, Warnings within burghs are mainly by chalking the doors, and the solemnity of a written execution is not absolutely necessary to such tenements; and Purdie, if he pleases, may improve the execution, and he will abide at the truth of it. *Replied*, That I being a creditor on the land as well as you, my interest is sufficiently founded to hinder you to remove the tenant; and as to his capacity, though he be blind, it is impossible he can discern one house or person from another; neither could he swear on the verity of his execution; and lawyers are very clear, that a blind man cannot be a witness to a testament, or any other writ; for which Masardus, Farinaceus, and others, give these reasons, that he can neither see the party, nor the writ he is to attest, nor can depone about any thing that falls *sub sensum visus*. THE LORDS waving this point of his incapacity by blindness, did take it by the other handle, that Purdie's right was not within year and day of Rule's, and that his adjudication was expired, and he in possession, and not Purdie; and, therefore, found the nullity not competent for Purdie to object, unless he were either preferable, or *pari passu*, and therefore repelled it as *jus tertii*.