

fender's author; and for declaring the property of the lands to belong to the pursuer: the defenders offered to exclude him, by the said disposition and infestment produced.

ALLEGED for the pursuer.—The defenders cannot exclude him by the right in their person, in regard they, as heirs to Alexander Short, the pursuer's debtor, are personally liable, as he was, for the debt in the apprising; for *quem de evictione tenet actio, eundem agentem multo magis repellit exceptio*. And this process being *mutua petitio*, or a competition, if the defenders should be preferred, the pursuer would have action upon Alexander Short's warrandice, against them as representing him.

DUPLIED for the defenders.—1. A passive title is not a title in a reduction of real rights, but a *medium concludendi* in a personal action for payment. 2. Were the pursuer's right a disposition, which the granter, or his representatives, are obliged to warrant; the defenders, did they represent the granter, could not indeed exclude it by any right in their person. But albeit a comprising doth carry all right that was in the debtor's person at the time, and he and his representatives are liable for the debt therein contained; yet they are not liable to warrant the apprising, nor tied up from excluding the same by preferable rights in their person; for an expired apprising might carry the whole subject appraised; whereas an action for payment of the debt therein, doth only make the debtor's representatives liable to the extent thereof.

ANSWERED for the pursuer.—Albeit regularly no recourse of warrandice is competent to an appriser, nor any *jus superveniens auctori* doth accrue to him: Yet he hath *exceptionem doli* against his debtor, pretending, by virtue of posterior titles, to possess the lands appraised; and may make use of that exception by way of reduction, in order to declare his own right of property against the debtor or his heirs. The passive title is not here the immediate *concludendi medium*; but comes only in by way of reply, when the defenders found upon their rights.

The Lords found it not competent to the pursuer to reply to the defenders, upon a passive title, that they were heirs to Alexander Short, in this reduction; without prejudice to his right by way of action as accords.

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1712. January 15. JOHN WOODCROFT and his Factor, against WILLIAM, EARL of STRATHNAVER.

IN the process of furthcoming, at the instance of John Woodcroft and his factor, against the Earl of Strathnaver, as debtor to the Earl of Sutherland, his father, the pursuer's debtor:—The defender, being interrogated upon oath if he had intromitted with the rents of certain lands belonging to the Earl of Sutherland in liferent, and in what manner he had paid the same; acknowledged his intromission with these rents; but that, at the time of the arrestment, he was not debtor for the same, but had made payment to the Earl, or his order, at several times before the arrestment.

ALLEGED for the pursuer.—The defender ought to depone when these orders from the Earl of Sutherland were drawn, to whom payable, for what cause, and to what extent; that the Lords may judge if the same be relevant to assoilyie or not; for he is not to be judge of the relevancy of his own payment. *Stair, Lib. 3. Tit. 1. § 41.* And these orders might perhaps have been for payment of debts which the defender himself was bound to clear; or the date of the orders might have been before, and the payment after the arrestment, which would not be relevant to assoilyie the defender.

ANSWERED for the defender.—Though a debtor by writ called in a furthcoming should be special, yet it sufficeth that the defender (whose intromission is probable only by his own oath,) depone, without descending to particulars, That he paid all before the arrestment; which implies *naturalem prestationem*: albeit extrinsic qualities, inferring a ground of compensation, or payment in goods, depone upon, must be proved *aliunde*. *June 26, 1675, Gilchrist contra Murray, observed by Dirltoun.*

The Lords ordained the defender to depone, specially, what payments were made by him to his father, and by his order, to the best of his memory.

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1712. *February 21.* SUSANNA STUART, Relict of Captain MENZIES, *against* MENZIES of Culdairs.

The Lords found no process upon a summons of aliment, because it did not contain two diets, and yet required a term to prove.

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1712. *February 22.* PATRICK HOUSTOUN, Advocate, *against* ROBERT MUSHET, his late Servant.

ROBERT MUSHET being found guilty of fraudulently abstracting his master's papers, and propaling them to his prejudice; The Lords pronounced against him the same sentence as was pronounced by act of Sederunt, July 20, 1675, *against* Hugh Riddel; and further declared him incapable of any service about the College of Justice.

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