

form to the eighteenth, twentieth, twenty-fifth articles. Upon which account it was thought necessary to rescind expressly by the sixth article, the duty imposed upon Scottish cattle carried into England, belonging to Sir Christopher Musgrave and the town of Newcastle, who got an equivalent for it from the Parliament: since otherwise that private right would have remained after the treaty as before. So the manufactures of sugar at Glasgow, aquavitæ in the north, and several others, maintain their private rights against exactions of the duties of excise and customs. The city of London has, by their charter, the duty of package and scavage, which is exacted to this day of Scotsmen, since, as before the Union; and so the duty of a merk upon the pack of foreign goods imported to Edinburgh hath been exacted of English goods since the Union, as well as before; conform to the opinion of Sir James Montague, then Attorney-General, which was entered in the records of the treasury. As to the certificate from the mayor and aldermen of London, that is a demonstration that the exemption in favours of the freemen of that city, is not looked upon to be inconsistent with the equality of trade established in England before the Union, or in Britain since; and that Scotsmen have no benefit or ease of the duty of package and scavage by the articles of Union, more than they or any strangers, or Englishmen not being burgesses of London, had before: consequently the duty upon English ale granted to the town of Edinburgh, as a private right, can as little be quarrelled. Albeit Englishmen and English commodities, cannot be reckoned since the Union foreigners, or foreign simply, or with regard to the public state; yet there is no alteration, by uniting the two kingdoms into one, in matters of private right or law; viz. persons residing in England can be cited only upon sixty days, and no advocate can compare for them more than if they were still out of the kingdom, as before the Union. Again, if the fourth article, containing a communication of privileges, intended an absolute equality, it would confound the rights of all incorporations, which is not to be supposed; the equality introduced by the Union being only with respect to the common rights of subjects, as subjects. And here the Scots and English are upon an equal foot; both being liable to the same duty for importing English ale.

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1712. *January 4.* WILLIAM WILSON, Merchant in Edinburgh, *against* ELIZABETH, ANNA, and CATHARINE SHORTS, Daughters to the deceased ALEXANDER SHORT in Stirling.

IN the reduction, improbation, and declarator at the instance of William Wilson, as having right by progress to an apprising of a tenement in Stirling, and some adjacent acres, belonging to the deceased Alexander Short, with infetment thereon, for payment of 2300 merks contained in a bond granted by him to the pursuer's author, against Elizabeth, Anna, and Catharine Shorts; for reducing a disposition and infetment of the lands granted by Alexander Short to the de-

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 competion, 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.