

No 3. creet obtained against him thereupon. The pursuers *answered*, That this was *jus tertii* to the defender, who could not dispute the assignee's right. The defender *answered*, That it was *exclusio juris agentis*.

THE LORDS repelled the defence, as being *super jure tertii*, and decerned; but ordained suspension to pass, without caution or consignation, that the assignee may be called, and dispute his right.

*Stair, v. I. p. 283.*

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No 4. 1666. June 23. ARBUTHNOT *against* MARY KEITH.

ANDREW ARBUTHNOT having gotten a gift to the behoof of the Viscount of Arbuthnot, of the marriage of the heirs of John Keith of Pitten, did thereupon pursue the two heirs portioners. One of them being dead, he insists now against the other for her part, who alleged no process, because none was called to represent the other, who is thus far interested, that the probation of the avail of the marriage against the one will prejudice the other.

THE LORDS repelled the defence, and found it would not prejudice the other, against whom new probation behoved to be used.

*Stair, v. I. p. 380.*

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No 5. 1685. February. JEAN COCKBURN *against* CONGLETOWN.

SIR ROBERT HEPBURN having provided his estate to young Congletown, with this provision, That he should take and use the name and arms of Hepburn, and marry Cockburn of Piltown's eldest daughter; and a clause of irritancy, That, if he contravened, his second brother should succeed to the estate; after Sir Robert's decease, Congletown was required by the gentlewoman's friends to marry her; and, upon his refusal, a declarator raised at her instance, for declaring that he had lost his right to the estate, by refusing to marry the pursuer, according to Sir Robert's appointment.

*Alleged* for the defender; That the pursuer had no title to pursue his declarator, in respect the benefit of the irritancy was not to accrue to her, but to the defender's brother, who was to succeed by the tailzie, without the burden of marrying her, and he did not concur; so that the most the pursuer could pretend was but damage and interest, against which the defender had competent defences.

THE LORDS sustained process at the pursuer's instance, for declaring the irritancy.

SIR ROBERT HEPBURN tailzied his estate to one, with this provision, That he should marry a certain gentlewoman, and if he failed to perform, his brother