that complaint of the high retours of the shires being then known, these of the property would doubtless endeavour to have easy retours. It was answered, That the Act of Convention expressly regulating the taxation, both as to the spirituality and temporality, it cannot be thought but that these members did comprehend the whole; and, seeing the property cannot be of the spirituality, it must be of the temporality, which hath the abatement, as to these shires, without exception: and, albeit the property was lately retoured, yet, there being no rule to estimate a merk-land or pound-land's retour by, or how many pounds of real rent makes a pound of retour, there could be no other rule but to make the retour of the property proportional to the remaining lands lying in that shire; so that, where the other lands are generally highly retoured, it is evidently presumed that the property was so retoured; and, seeing the property did of old pay no taxation, it were strange now to make it bear more than the other temporal lands about it. The Lords found that the property of the shires had the same abatement with the rest of the temporality in these shires.

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1670. *June 22.* JOHN DOWGLAS of LUMSDEAN *against* ARCHIBALD DOWGLAS.

UMQUHILE Dowglas of Lumsdean dispones his estate to Archibald Dowglas, his son, reserving power to himself, at any time during his life, to burden the estate with four thousand merks: and did thereafter grant a bond of four thousand merks in favours of Elizabeth Lyel, his wife, in liferent, and of John Dowglas, their son, in fee; who thereupon pursues the said Archibald for payment. The defender alleged Absolvitor; because the reservation in the disposition, being in favours of the defunct, can only be understood of a legal power, to burden according to law: *ita est* this bond of provision was granted by the defunct when he was not *in legitima potestate*, but on death-bed: especially seeing the reservation does not bear a power to dispone at any time in his life, *etiam in articulo mortis*, which is the clause ordinarily adjected, when the meaning of parties is, that the power should extend to deeds on death-bed: And thereupon the pursuer hath intented reduction, which he repeats by way of defence. The pursuer answered, That the defence is no ways relevant; because the privilege excluding deeds on death-bed is introduced by law in favours of heirs only, that the defunct may not prejudge his heir on death-bed; but if a party dispone, he may qualify his disposition as he pleases, and he who hath so accepted the disposition cannot quarrel the same; and albeit these words *etiam in articulo mortis* are sometimes adjected *propter majorem cautelam*, yet the words, "at any time during his life," are sufficient to import either in his health or in his sickness. The defender answered, That whatsoever might be alleged, if the disposition had been to a stranger, of that interpretation of the words, yet this disposition being granted to the disponer's own eldest son and apparent heir, it must be understood only of such deeds as might be done against an heir; and here the creditors do also concur, who, in place of the heir, might pursue the reduction, and against whom the personal objection of acceptance cannot be alleged. The pursuer answered, That the defender was not apparent heir; because it is notourly known that his father begot him in adultery, upon the

wife of Sir Alexander Hume, for which adultery she was divorced from her husband; and albeit he did cohabit with her thereafter as his wife, that cannot infer, as in other cases, that she was his wife, because marriage cannot consist betwixt the adulterer and the adulteress, and all their issue are disabled to succeed; so that the pursuer of the reduction is the eldest son and apparent heir, in whose favour the provision is made. *2dly.* Albeit the defender were, or could be apparent heir, yet here, having accepted a disposition of the whole estate, burdened with this provision, his acceptance excludes him, who is thereby bound, and cannot pretend to any privilege of an heir; for, albeit, *re integra*, he might renounce the disposition, and return to bruik as heir, now he cannot, having bruiked by the disposition: and for the creditors' concourse, they are not pursuers, and they may insist in any action competent to them by law, but cannot oppose this personal obligement, whereby the defender, by the acceptance of the disposition in these terms, is become obliged to pay the pursuer the sum in the reservation. The Lords repelled the defence, and found that the reservation, in the terms as it stood, did extend to burdening of the estate at any time the disponer pleased and was in capacity of sense and reason, though on deathbed; and found no necessity to dive in the questions concerning the defender's procreation and capacity of succession, seeing he had accepted and bruiked by the disposition so qualified: and did not admit the creditors to oppose this conclusion, but reserved their rights as accords.

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1670. *July* 8. THOMAS KENNEDY *against* ARCHIBALD KENNEDY of CULZEAN.

THE Laird of Culzean having three sons, John, Archibald, and Alexander,—for a provision to Archibald, the second, dispones his lands of Corrowa, and others, with this provision, That, if John should die, and Archibald succeed to be heir, Archibald should denude himself of the lands in favours of Alexander; and, if Archibald wanted heirs of his body, Alexander should be his heir, notwithstanding of any law or custom to the contrary. Thereafter, a few months before the father's death, this fourth son; called Thomas, was born. John, the eldest, and Alexander, the third, are both dead, infants; Archibald falls to be heir, and so the condition exists, in which he was obliged to dispone to Alexander. Thomas enters heir of line to Alexander, and pursues Archibald to dispone the lands to him. It was answered for Archibald, That Thomas, as heir of line to Alexander, can have no right to this provision:—1*st.* Because the provision is only in favours of Alexander, without mention of his heirs. *2dly.* Though it could be extended to Alexander's heirs, yet, it being no heritage to which Alexander could succeed, it is conquest, and would not descend to Thomas, Alexander's heir of line, but would ascend to Archibald, as heir of conquest to Alexander. It was answered for the pursuer, That, in this case, the meaning and intention of the father must be considered by his provision *inter liberos*, which is clear to have been, that Archibald should not have both his estate and these lands of Corrowa, but that the same should descend to Alexander; and, if Thomas had been then born, he would no doubt have provided, that, failyieing of Alexander, Archibald's portion should fall to Thomas; and,