

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' concurrence, they are not pursuers, and they may insist in any action competent to them by law, but cannot oppose this personal obligation, 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 disponent pleased and was in capacity of sense and reason, though on death-bed ; 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, disposes 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 dispoise to Alexander. Thomas enters heir of line to Alexander, and pursues Archibald to dispoise the lands to him. It was answered for Archibald, That Thomas, as heir of line to Alexander, can have no right to this provision :—*1st.* 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,

if he had declared that the lands of Corrowa should only belong to the heirs of line, it would undoubtedly have excluded the heirs of conquest. He has done the equivalent; for, having provided the lands to Archibald, and his heirs whatsoever, he does, by a posterior explicatory clause, declare, that, if Archibald died without heirs of his body, Alexander should be Archibald's heir therein, notwithstanding of any law or custom to the contrary; which can have no other meaning than that, notwithstanding by the law, John, as heir of conquest, would succeed to Archibald, wanting heirs of his own, yet Alexander, the younger, who would be heir of line, should succeed; which is as much as to say, that this provision should belong to Archibald's heirs of line, and not to his heirs of conquest; and, consequently, having made no mention of Alexander's heirs, he did also mean Alexander's heirs of line, who is the pursuer Thomas; and the case is so much the more favourable, that, if this failed, Thomas hath neither provision nor aliment. The Lords, considering that both parties were infants, and that, if Archibald should die, Thomas would get all, superseded to give answer anent the heritable right of succession until both parties were major; and, in the mean time, allowed Thomas to possess the profits of the lands, who had no aliment nor provision.

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1671. *February 14.* GEORGE BAIN *against* The BAILIES of CULROSSE.

GEORGE Bain pursues the bailies of Culrosse for payment of the debt of a rebel, whom they had suffered to go free up and down their streets; whereupon he had taken instruments against them, and protested that they should be liable for the debt,—seeing *squalor carceris* is justly introduced against debtors that will not pay their debt, and the magistrates of burghs may not take it off in whole or in part; and produced a practick observed by Durie upon the 27th of March 1623,—Smith against the Bailies of Elgine,—where the prisoner being suffered to walk freely upon the streets till he obtained a charge to set to liberty, the magistrates were found liable. The defender alleged Absolvitor; because he offers to prove that this prisoner's going out was necessary, *viz.*—he, being a person altogether indigent, was permitted sometimes to go and mendicate his bread, and once to go to the burial of a child of his own; and immediately thereafter, the pursuers having taken instruments, the rebel was put in ward, and continued there till he died. Which the Lords found relevant to liberate the burgh.

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1671. *July 18.* The COUNTESS of CASSILS *against* The EARL of ROXBURGH.

THE Countess of Cassils, in her contract of marriage with the Lord Ker, being provided to £5000, he did, *stante matrimonio*, provide her to an annualrent of 10,000 merks further during her lifetime. And, upon his deathbed, he made two testaments of one date: By the one he nominated his father tutor to his