tion and a power to him to assign, dispone, and transfer the said bond, *etiam in articulo mortis*, to whom he pleased: and so this dispensation must save the said assignation from reducing *ex capite lecti*.

Upon this reply, my Lord Halkerton was content to give both parties the Lords' answer. Who having very ripely canvassed the same, found it a point of great importance and weight, and demurred exceedingly thereon; and being the last week of the winter Session, they superseded to give their judgment thereon while the 1st of June. And truly it was so: for, on the one side, it would seem that the said dispensation should sustain the said assignation, though made on death-bed, because it is an act *inter vivos*, and it is uncontraverted but a man may dispone upon his heritage and heritable bonds for implement and performance of acts or obligements contracted by him in his *liege poustie*; *exempli gratia*, for payments of debts contracted before. *Hope, titulo De Testamentis et Codicillis.* Yet, on the other hand, it seems very hard that such a dispensation should be enough to empower a man to dispone upon his heritage *in lecto ægritudinis*, the cause of which prohibition is most rational and most excellent, viz. because the most part of men *in confinio mortis constituti* are not *sanæ mentis*, and not in that integrity of mind as is sufficient for a man who would dispose upon so important rights: likewise the law has wisely considered how much a man, at such a time, lies exposed to the solicitations and importunities of friends or flatterers in whom he has no interest, and how easily a man, in that case, may be wrought upon to give away his means to the prejudice of his righteous heir. So then, this being the reason of that noble custom, no dispensation or reservation which a man makes in his *liege poustie* should be sufficient to give him a power to dispose upon heritage in death-bed; unless he had likewise a dispensation and assurance from God Almighty, that when he should come to die, he should have his wits fresh, vigorous, and rational, as may be required in a man who is to dispose upon his heritage; which assurance none can have.* *Item*, If such dispensations were sustained, the whole country would make use of the same; and so that useful custom would be rendered useless, where our law repetes dispositions of heritage upon death-bed. (*Vide infra, No.* 227.) *Item*, The Lords have been loath to determine whether or no the King, under his Great Seal, can dispense with the said law, and give a man power *ea non obstante* to test upon heritage; if which be dubitable, much more must it be so whether every private person may reserve that power to himself, by an act *inter vivos*.

Advocates' MS. No. 7, *folio* 70.

1670. *February.* SIR JOHN WHYTFOORD of Milnetoun, *against* JAMES, Bishop of Galloway, and CLAUD HAMILTON of Parkhead.

SIR JOHN WHYTFOORD of Milnetoun, pursueth James Bishop of Galloway, and Claud Hamilton of Parkhead, his brother, upon all the passive titles, as represent-

* *Vide omnino Zacchiam, Q. M. Legalium, lib.* 2. *tit.* 1. *Quaest.* 19, *per totum. Vide infra, 26th June,* 1677, Birnies *against* Morray, No. 580, § 2; *item, November,* 1677, Gray of Wariston and James Cunyghame, about Doctor Cunyghame's estate.

ing their father, Sir James Hamilton of Broomhill, for a debt owing to his father (to whom he is served and retoured heir,) by the said Sir James. The said two defenders having received dispositions from their father of some lands, after the contracting of the debt now pursued upon; my opinion was asked, Whether or no accepting of the said dispositions would be sufficient to make any of them *successor titulo lucrativo post contractum debitum?* I answered not, for two reasons, the first was, that I was well informed that any lands either of them had by disposition from their father, was with very great burden of his debts, and so they could never be reputed to have got them *ex causa lucrativa.* But the second was an answer *in jure,* and unanswerable, *viz.* that they were not persons that could be convened as successors by a lucrative title after contracting of the debt, which passive title only adequately quadrates to those who are *alioqui successuri* to the disponers, such as neither of thir defenders were; they having an elder brother, *viz.* my Lord Belhaven, who could only be heir, and succeed as heir to their father; for this passive title can in reason be no farther extended against a man than if he were really entered heir, and therefore cannot militate against him that is not heir to the disponer: *nam absurdum esset fictionem plus operari posse in casu ficto quam operatur veritas in casu vero.* Yet the Lords have sustained this passive title against the eldest son of the apparent heir, receiving disposition of lands after the debt from his goodsire, though he be not *persona immediate successura;* and that because, by the course of law, he is *alioqui successurus necessarie,* though not *immediate.* It is likewise required, that the person who is liable to this passive title, be apparent heir, and *alioqui successurus necessarie;* and not immediate apparent heir *probabiliter tantum et pro tempore:* as a disposition by one brother, having no children at the time, to another brother, (who so is his apparent heir,) will not infer this title, because the brother is not *alioqui successurus necessarie* by the course of law, *quamdiu liberi sunt in spe.* (*Vide infra, February,* 1674, *No.* 444.) And therefore I thought that the foresaid defenders could not be overtaken on that head, but that the pursuer's best course would be to pursue *actione rescissoria Pauliana, Eorum quae in fraudem creditorum;* or reduce upon the 18th act of Parliament *in anno* 1621, ordaining all dispositions posterior to the debts of lawful creditors, and made to conjunct and confident persons, without a just or onerous cause, or any true and competent price paid therefore, to be reduceable and annullable at the instance of any anterior creditor.

This cause being called, and the pursuer insisting against the defenders aforesaid as vitious intromitters, I REPLIED, Ought to be repelled, for Parkheid, because I offer me to prove executor creditor confirmed, before the intenting of your cause.

Whereunto it being DUPLIED upon superintromission, I TRIPLIED that the said superintromission (unless the pursuer would say it was fraudulent, and before the confirmation,) cannot be received here by way of exception, but requires a new process, or a dative *ad omissa,* which the pursuer may take. *Vide* Dury, 28th March, 1632, *Maxwell.*

Notwithstanding, the Lords found the duply upon superintromission relevant, and assigned him a day for proving thereof, and that same day to me to prove executor creditor.

As for the Bishop of Galloway, I ALLEGED, that there being an executor confirmed, viz. Parkheid, *esto* he had vitiously intromitted, that was enough to

purge the same, and make him allenarly countable to the executor. Which was found relevant by the Lords.

Advocates' MS. No. 8, *folio* 71.

1670. *February.* SIR THOMAS STUART of Gairntullie *against* SIR WILLIAM STUART.

IN an action betwixt Sir Thomas Stuart of Gairntullie and his brother Sir William, an assignation produced by Sir William, granted to him by his sister, to a bond for 20,000 merks, granted to her for a portion by her father, being quarrelled by Sir Thomas *, because he offered him to prove *per testes omni exceptione majores*, that their sister, at the time of the making that assignation, a good space before, as also after the same, was furious and mad, and so, during that time, could do no deed that can be valid, or can subsist in law.

Whereunto it was REPLIED, That he offered him to prove that though she took whiles fits of distraction, yet that she had *dilucida intervalla*, and that it was in one of these that she granted the said assignation; and so the same, as done *a sana*, must be sustained.

The Lords ordained them to adduce witnesses *hinc inde*; Sir Thomas for proving the furiosity before and after the assignation, and Sir William for proving the *dilucida intervalla:* Whereupon, witnesses having been led by either side, and the Lords being about to advise the depositions, they desired to hear both parties' procurators; whereupon Sir George Lockhart, being for Thomas, did seriously recommend to the Lords their consideration what truly *dilucidum intervallum* was; and that every remission of that height of madness called by the physicians *rabies furoris* will not amount to make a dilucid interval, but that it must be a full intermission and clear cessation of the fury, and of all the degrees and steps of it; and therefore he confessed that by the depositions of the witnesses adduced by Sir William, it might possibly be proven, that at sometimes she was more calm and quiet, and not so agitated and tossed with the vehemency of the madness as at others: but he humbly conceived that that noways could infer a dilucid interval, which imports a firmness, gravity, and consistency of spirit, to validate an act of such importance as this assignation was, and which was no ways observable in her; and for this his opinion he cited Zacchias his *Quaest. Medico-leg. lib.* 2. *tit.* 1. *quaest.* 21. *versus finem.*

Sir George Mackeinzie, being for Sir William, regretted first that Sir Thomas should have been so cruelly unnatural as to have been the publisher of a pitiful infirmity his poor sister had been detained with, whereas the bonds of blood and nature should have made him conceal it rather, and extenuate it. Next he complained, that that ancient and excellent practice in our country of trying of idio-

* By a prior solemn decision the Lords had found, though in this bond Sir Thomas was substitute to her, yet she remained still in the fee, and might assign the same, as she had done, notwithstanding the said substitution. The information see beside me. Vide infra No. 48. [23*d February*, 1671,—against *Viscount of Oxenfurd;*] where there is something contrary.