ring the life of Thomas Wauch; for the comprising being a sentence, (said they,) all execution upon it must cease, while it were transferred, if the parties against whom it was pronounced be deceased. The Lords repelled the allegeance, and thought it sufficient to take sasine upon that comprising at any time after the man's decease, for they thought the comprising an execution rather of a sentence than the sentence itself. *Page* 42.

1635. *January* 29. The TENANTS of LAWDER *against* JOHN HAMILTON and JAMES WILSON.

IN a double poinding, raised by the tenants of Lawder, who were distressed for payment of their mails and duties by John Hamilton on the one part, who had an annual-rent of 200 merks out of the said lands, and by James Wilson, writer, on the other part, who had comprised the same lands;—it was alleged by the compriser, That he ought to be answered, because he was infeft in the property, and none other could have right to the mails but he: As to the annual-renter, he might poind the ground for his annual-rent, but could not have the mails from the tenants. Alleged by the annual-renter, He ought to be preferred, because his infeftment of annual-rent was long before the compriser's right, and that he was in possession of his annual-rent all the while; likeas the duties of the lands would extend to no more than his annual-rent. The Lords preferred the annual-renter. *Page* 201.

1635. *February* 3. INNES *against* GORDON.

IN a special declarator, pursued by one Innes, donator to the escheat of N. against Gordon, who was addebted by bond, to the rebel, in 500 merks;—Alleged by Gordon, Absolvitor; because he had paid, as cautioner for the rebel, as great a sum, and so should retain the same for his relief. Replied, Good against the rebel, but not against the king nor his donator, who will not be liable to pay the rebel's debt, except that whereupon the horning proceeds. Duplied, As he might compense against the rebel, even so against the donator; for, he having his relief still in his own hand, it is as good to him as if the rebel had given him as much out of his hand, which he might have lawfully taken, notwithstanding that he was at the horn; neither could ever the donator have repetition of it. The Lords found the exception relevant, and sustained the compensation. *Page* 107.

1635. *Feb.* 6 *and* 27. MARGARET AITON *against* JANET WATSON.

BY contract of marriage betwixt Mr Andrew Aiton and Janet Watson, Captain Watson, her father, was bound to pay to the said Mr Andrew, in name of tocher, 10,000 merks, at Whitsunday 1630, at the receipt whereof Mr Andrew

was bound to employ 5000 merks thereof upon land or annual-rent, to him and her, and the heirs to be procreate betwixt them; which failyieing, to his heirs. Mr Andrew, having got payment of 5000 merks thereof, maketh assignation of the other 5000 merks, destined to be employed, as said is, in favours of his spouse, and the heirs begotten betwixt them, (she then being great with child;) and, in case of their decease, 3000 merks thereof to her and her heirs, and the other 2000 merks to his sister's children. This assignation was sought to be reduced upon this reason, at the instance of Margaret Aiton, sister and heir to the said Mr Andrew, That the said 5000 merks, being destined by contract of marriage to be employed upon land or annual-rent, was heritable, and, consequently, could not be disponed by Mr Andrew *in lecto ægritudinis*. Alleged, Absolvitor; because the said sum was noways heritable, neither by infeftment nor payment of annual-rent: And for the destination, it did not alter the nature of it; but it remained always moveable till it had been employed, conform to the contract, and so might have been assigned. Replied, From the beginning it was heritable, being destined to be employed upon land or annual-rent, and so could not have been assigned in prejudice of the heir. The Lords found the exception relevant.—*6th February* 1635. *Page* 72.

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In the former cause betwixt Aiton and Watson, it was further replied by the pursuer, That the reason of reduction was relevant; because, albeit the sum was moveable, yet, it being destined, by the contract of marriage, to be employed heritably upon land or annual-rent to him and his heirs, the defunct could not alter the obligement conceived in favours of his heirs, upon his death-bed; because, by our practique, nothing done in favours of an heir can be altered upon death-bed to his prejudice. Duplied, Our custom, in this point, being against the common law, and founded only on practique, cannot be extended farther than it hath been in use hitherto, *viz.* That no heritable thing can be analyied upon death-bed; but so it is, that this obligation is not of this kind, as an actual heritable thing. Next, The bond would have fallen under escheat; *ergo* it might have been assigned *quocunq. tempore:* Sicklike it would fall under testament, and behoved to be confirmed. Triplied to the two instances, Moveable heirship will fall under escheat, and yet cannot be assigned *in lecto ægritudinis:* And, although it behoved to be confirmed, yet the heir would compel the executor, after it were confirmed, to employ it conform to the destination in the contract. The Lords found the reason of reduction relevant, in regard of the reply, &c.—*27th February* 1635. *Page* 73.

1635. *July* 22. Sir James Scott of Rossie *against* Lindsay of Kilquhisse.

Sir James Scott of Rossie pursued a declarator of the property of the loch of Rossie, against Lindsay of Kilquhisse. Alleged by the defender, The property of the loch cannot be decerned to appertain to the pursuer, because the defender and his predecessors are infeft, 200 years since, in the lands of Kilquhisse *cum lacubus*, and, conform thereunto, in possession of fishing in the said loch of Rossie, past memory of man. Replied, That ought to be repelled, in respect the pursuer and his authors are infeft, *per expressum*, in the loch of