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.

* * * * *

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

Rossie, and, conform thereunto, in possession of fishing therein, and debarring of all others, and that past memory of man. Duplied, The defender's infeftment, long before the pursuer's authors, being *cum lacubus*, is as good as if it had been expressly *cum lacu de Rossie*, since there is not another loch in the bounds but that of Rossie; likeas the defender's lands of Kilquhisse, and the pursuer's lands of Rossie, being both holden of the Earl of Crawfurd, and he having disponed Kilquhisse to the defender's predecessors, before ever he disponed Rossie to the pursuer's author, and that *cum lacubus*, in regard there is no other loch in the bounds, and of the defender's possession of fishing past memory, the desire of the pursuer's libel cannot be granted. Triplied, It must be granted, in respect of his express infeftment and possession, with the use of debarring all others, and the defender and his predecessors, *per expressum*. The Lords repelled the exception in respect of the reply.

*Page* 86.

---

1635. *July* 30. SIR ROBERT RICHARDSON of Pencaitland *against* SINCLAIR.

SIR Robert Richardson of Pencaitland made a disposition of his said lands to John Sinclair, for the payment of his debts and provisions to his children, particularly expressed in the contract of alienation. This disposition, with the infeftment, and all that followed upon it, was craved to be reduced by Sir Robert's eldest son and heir, upon this ground, That it was done *in lecto ægritudinis*; in so far as, before the time of the making of the said disposition, the said umquhile Sir Robert was stricken with a palsy, whereby the power of his right side was altogether taken from him, which he never received until his dying day; by reason of which palsy he kept his bed till he died, at the least never came out of his chamber, nor resorted to kirk and market. In regard whereof, the said disposition being to the pursuer's enormous hurt and prejudice, ought to be reduced. Alleged, The ground of the reason of reduction is founded on our custom only, but not on the common law, and should be extended no further than in reason it ought to be. *First*, The custom is grounded out of our old books of *Reg. Maj. lib.* 2, *cap.* 18. 7, and in the *Stat. Will. cap.* 13. In the first place, it is said, *in extremis agenti non licet hæreditatem alienare*, which is no other but *animam agenti*, he who is in the agony of death; and the reason that is given there, implieth as much, for it is, *quod ægrotus, fervore passionis instantis, et memoriam et rationem amittit*; and so, whatever he doth at that time, *potius ex fervore animi, quam ex mentis deliberatione, id facere videtur*: But the defunct could not be said to have been in that case the time of the alienation craved to be reduced; because he lived a year and a half after the making thereof, being in perfect sense and memory, having his stomach as at any time before of his life, discoursing to purpose with them that came to see him, directing his own affairs, receiving his rents, granting discharges thereof to his tenants, and doing all other deeds which a man in health is in use to do; which was offered to be proven. Likeas, of the civil law, *morbus sonticus* is interpreted by the jurisconsults to be *qui cujusque rei agendæ impedimento est, nec de levissima febri aut quartana inveterata, in qua omnibus negotiis superesse soleat, intelligi volunt.* In the statutes of King William it is said, *nullus potest, in lecto*