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.

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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*

ægritudinis suæ de qua moritur, alienare terras suas, &c. But here it cannot be presumed that the defunct died of the palsy, which was the only sickness he was affected with, the time of the making the alienation, but rather of common mortality, he having lived so long after the contracting thereof. Next, in that same place, there is an exception, *nisi forte ære alieno sit oneratus*, in which case a man on his death-bed may dispone or wadset his lands for relief of his debts; but so it is, that the defunct had made this disposition for the relief of his debts, and paying the provisions made by him to his other children beside the heir, as the disposition itself bears; in regard whereof the defender ought to be assoilyied. Replied, It hath been the inviolable practique of the kingdom, that all dispositions of heritage made *in lecto ægritudinis*, after which the defunct never came to kirk and market, are null, in so far as they are done to the heir's prejudice; but this disposition is such as his reason bears; *ergo*——. And the inviolable custom cannot be broke by offering to prove that the defunct was in perfect sense and memory when he did it, and was in use to do all these deeds alleged; for, however his memory and judgment were, yet the old law and our custom presume a man that is sick not to be so; against which presumption no probation can be led; otherwise, if that were admitted, that maxim would prove to be of no use, for there should never want witnesses to prove that the sick man were of perfect judgment and memory at making of such deeds. As to the statute of King William, The defunct must be presumed to have died of the palsy he had at the time of the making of the disposition, because he never haunted kirk nor market after the contracting thereof: And, as to the exception mentioned therein, it bears, *Ubi hæres nec potest nec vult eum de suo debito relevare;* but here the heir offers to take the heritage with the burden of the debts, which he will undergo and pay himself, and retain his own lands. Withal, he remonstrated his great prejudice, that his father's land being worth sixty thousand pounds at least, his debts being no more than 24,000 merks, he had exhausted the rest of his estate in provision to his younger children, having left to the heir only 10,000 merks for all provision. The Lords, in respect of the constant practique, and the heirs enormous prejudice, found the reason of reduction relevant.

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1635. *November* 27. DAVID WILLIAMSON *against* AUCHMOUTY.

THERE was a decreet of removing obtained by Mr David Williamson, minister, against one Auchmouty, before the provost and bailies of Couper in Fife, for removing from a tenement within the said burgh. This decreet was suspended on this reason, That it was null, as given against the said Auchmouty, who was an indweller in St Johnston in the mean time, and therefore could never have been cited before the magistrates of Couper, within whose jurisdiction she did not dwell. Answered, That ought to be repelled; because the magistrates of Couper were judges competent, *ratione rei sitæ*, and might proceed against the suspender, though she dwelt not within their bounds; likeas, the charger, in supplement, procured the Lords' letters and warrant to summon the suspender before the magistrates of Couper for the same cause, which was suf-