

## S E C T. XII.

## Circumstances inferring Convalescence, whether equivalent to going to Kirk and Market.

1671. February 7. LOWRIE of Blackwood against Sir JOHN DRUMMOND.

SIR ROBERT DRUMMOND of Meidhope, having disposed his lands of Scots-toun to Sir John Drummond, for love and favour, and for better encouraging Sir John to pay his debt, as the disposition bears, and under reversion of a rose-noble in his own life; Mr John Drummond, Sir Robert's apparent heir, grants a bond to Lowrie of Blackwood, whereupon he adjudges the land from the apparent heir, and pursues a reduction of the disposition, as done on death-bed. In which pursuit, witnesses were appointed to be examined, *hinc inde*, concerning Sir Robert's condition when he made the disposition, and thereafter till his death. The sum of the probation was, that before the disposition, Sir Robert had contracted an apoplexy, whereby he remained senseless for a time, but by cure there remained a palsy in his tongue, and a vertigo in his head, which continued till his death, and about a year after that the sickness affected his brain, so that he lost the remembrance of things; and most of the witnesses deponed, that he was not sound thereafter in his judgment, but that he kept on his cloaths, and was not affixed to his bed, and went frequently and walked in his garden and to the Court-hill, half a pair of butts off; and one of the witnesses deponed, that he came to his house alone, a quarter of a mile off; but that he went never to the kirk nor market, nor any public place. Whereupon it was *alleged* for the defender, That the defunct continued in health at and after the disposition, and that his going so frequently abroad, was equivalent to his going to kirk and market, which was sufficient to elide the reason of death-bed; and that the palsy being but in his tongue, albeit he mis-named things, it did not import his being on death-bed, especially seeing he disposed for payment of his debt, equivalent to the worth of the land, his disposition being to a friend of his name, who relieved him of his debt, his heir not being his son nor descendant, and incapable to relieve him of his debt. It was *answered*, That the contracting of his sickness being sufficiently proven to be before this disposition, and the continuance thereof to affect his brain, in that case nothing could purge the same, but his going to kirk and market, which were the acts required in law, and could not be supplied by his going privately abroad, and not to any popular public meeting; and as to his debts, they could not validate the disposition by exception, though the defender might, by way of action,

No 96.

In a proof of death-bed, it was found, that the defunct's private way of going abroad, though unsupported, was not equivalent to his going to kirk and market.

No 96. affect therewith the estate, or burden the heir on whose bond it was adjudged, especially seeing the disposition bore for love and favour, and redeemable for a rose-noble.

THE LORDS found the reason of death-bed sufficiently proven, and that his private going abroad (though unsupported) was not equivalent to going abroad to kirk and market, or public meeting, where the disease continued to affect the brain; but they found the paying of debts equivalent to the worth of the land relevant by way of exception, in regard the disposition bore to be for payment of his debt.

*Fol. Dic. v. 1. p. 218. Stair, v. 1. p. 716.*

No 97. 1671. June 28. CREDITORS OF BALMERINO *against* LADY COUPER.

IN a question of death-bed it being proved, that the defunct himself constantly put on his own clothes, walked up and down his house, conveyed strangers to their chambers freely without help or support, and in the same manner went down with others to see them take horse, made several accompts and bargains, and frequently played at cards; all this was not found relevant to infer health, or equivalent to the going to kirk or market.

*Fol. Dic. v. 1. p. 218.*

\* \* \* *See* This case, Section 10. *b. t.* No 77. p. 3292.

1683. February.

No 98.

Many strong circumstances inferring convalescence, not admitted as equivalent to going to kirk and market.

THE YOUNGER DAUGHTERS OF MOUNTONHALL *against* The ELDEST.

IN a reduction *ex capite lecti*, at the instance of James Hamilton of Mounthonhall's two younger daughters, of a disposition of his land and 20,000 merks, in favours of his eldest daughter, whereby she was made to have a greater share than the rest;

The defender, for supporting of her right, *alleged* upon deeds done thereafter by the disponer, equivalent to the going to kirk and market, which, upon probation, amounted to this, that he rode to Edinburgh, and called at Caldcots by the way, where he spoke with one Hislope, and also that he passed by Peppermill; but that appeared not to have happened on the same day. Again, one witness deponed, that he spoke with him on the street of Edinburgh; another deponed, that he bought his barley in a change-house in Edinburgh; and one deponed, that he went to Fisher-row, and bought a midden of muck: And several witnesses deponed, that he walked unsupported about the doors, and managed his business discreetly, after the date of the deed quarrelled; but that he never went to church after his disease, which was a gout and a palsy, nor did ever recover of it.