

1671. June 28. CREDITORS of BALMERINO against LADY COUPAR.

It is not necessary to prove that the defunct went both to kirk and market unsupported ; either is sufficient.

Going free to the market must include going free to the market-place, and returning back from the same, not being supported any part of the way.

Fol. Dic. v. I. p. 218.

* * * See this case Section 10. *b. t.* No 77. p. 3292.

1672. December 5. CLIELAND against CLIELAND of Faskin.

CLIELAND of Glenhove having no children, disposed his estate to Clieland of Faskin, of whose family he was descended ; his sister's son as nearest heir to him, did raise a reduction of the disposition, as being done upon death-bed ; and the defender having alleged, that the defunct having had a pain in his legs and feet, did thereby keep the house for many years before he died ; but that he contracted no inward disease when this disposition was made, being two years or more before his death, but at that time he was in perfect soundness of judgment, and of the same condition of health, as he had been for seven years before ; *2do*, Though it could be proven that he contracted any sickness, he perfectly convalesced and came abroad unsupported, when he gave sasine upon his disposition, *propriis manibus*, and did oft-times walk about his house, and did play several games at penny-stone, which was an exercise requiring far more strength than going unsupported to kirk and market, and returning, being so short a space, for no man was obliged to walk further than men did ordinarily come upon horseback to the kirk ; nor can it be controverted, that albeit going to kirk and market be the ordinary evidence of convalescence, yet there may be other evidences sufficient ; and that going to kirk and market cannot be the sole evidence of convalescence, as in the case if a person were lame, or had received a hurt in his foot or leg, by a fall, or otherways, that it did not arise from any inward disease. *3tio*, The defender offered to prove, that the defunct went to the kirk unsupported. The pursuer *answered* ; That his reason of death-bed stood most relevant, and was libelled in the ordinary form, *viz.* that the disposition in question was made after the defunct contracted the sickness, and went never abroad thereafter, until his death ; so that the contracting of his sickness being proven, and his dying before he went abroad, *probatis extremis præsuntur media* ; and as for the allegiance of his health, it is contrary to the libel, and sickness is more positive and pregnant ; neither can the acts equivalent be sustained, unless they were such as were clearly more pregnant to prove convalescence, than going abroad to the kirk in the time of the gathering of the

No 87.

Two witnesses deponing that the person alleged sick was supported when he went to kirk or market, was found to make a full probation, although many witnesses deponed *negative* that they did not see him supported ; and it was found that domestic deeds were not to be regarded for proving convalescence.

No 87.

congregation, or to the market in market time ; but all the acts condescended upon, are but performed before a few persons picked out for that purpose ; and are far less than the acts performed by the Lord Cowper, which yet were not found relevant : And as to the alleged going to the kirk, all that can be pretended is, that the defunct was borne in a chair within a pair of butts or two to the kirk, and did thence attempt to go to the kirk freely of himself, of design to validate this disposition ; for though he lived two years thereafter, he never came out again ; and such attempts of design are most suspicious ; and if they be not perfectly performed, as the law requires, they are of no force ; as in this case, where the going to the kirk was not to any public meeting of the congregation, nor was there either market or market-place : And albeit the defunct might have ridden to the ordinary place where men alight, he being carried to that place in a chair, is no ways equivalent ; for sick folks, as they are not able to go without help, so they are not able to sit upon horseback without support ; nor doth it import whether the defunct kept the house long before, or after this disposition ; for in a most favourable case, wherein Sir Robert Richardson makes a disposition for the use of his children ; after which, though he remained eighteen months in his house, yet did all his affairs, and had only a palsy in one of his sides, which was not *impedimentum rebus agendis* ; nevertheless the Lords reduced the disposition. No 34. p. 3210.

THE LORDS, that they might not give either party the sole probation, did, before answer, ordain witnesses to be adduced for either party, anent the condition of the party deceased, when he made the disposition, whether he was sick or in health ; and anent the manner of his going abroad thereafter ; and especially anent his going to the kirk ; and whether he was supported, or whether he walked freely of himself without help ; and there being many witnesses adduced upon either hand, the import whereof was, that the defunct was not only sore by an extrinsic pain or trouble in his legs or feet, but that the sameness proceeded from inward sickness, whereby he had kept the house for several years before and after the disposition, but that all along he was very infirm, and spoke of himself as a gone and a dying man, and ordinarily sat in a chair, and lifted himself by a pole that was fixed by him, but that he was still sound of judgment and memory, and did his affairs. It was also proven, by the notary and witnesses of the disposition, that he went out unsupported, and gave sasine *propriis manibus* upon the disposition, upon the croft near the house ; and that some time he went to the barn, and to some roan trees about a pair from the house ; and one of the witnesses deponed, he played three or four plays at penistone with him, but he could not be positive whether before or after the disposition. It was also proven, that he was carried in a chair from his house to a house within two pair of the kirk ; and that he walked from the chair to the kirk, and staid some time there in a house, and returned from the kirk to the chair again, and was carried home therein ; and as to his walking free unsupported, from his chair to the kirk, and back again, several of the witnesses de-

poned, that they did not know, in regard there was a number of persons about him as he walked ; and several deponed, that he walked freely without help ; and two deponed, that themselves helped him, as he went to the kirk, from a strand which was in the way. Upon which probation the Lords found that the contracting of the sickness, whereof he died, was sufficiently proven, notwithstanding of the allegiances and testimonies as to his health : And they found also, that his going abroad about his house was not equivalent to kirk and market ; but because of the one witness, who proved the playing of several games at pennistone, deponed that the pursuer was one that played with him, the LORDS did presently examine Mr Robert Boyd, who followed the pursuit, and whom the Lords conceived to be understood to be the pursuer, in regard the pursuers named in the process were women, who being examined, he deponed he never played with the defunct at pennistone, but that he heard that the defunct had played at it with others the time he kepted his house, but that was long before the disposition.—THE LORDS also found, that the manner of the defunct's going to the kirk was not sufficient to infer convalescence, and therefore reduced the disposition.

1672. *December 6.*—There was a bill given in by Faskin, containing many allegiances, founded upon the depositions of the witnesses, and the LORDS proceeded in the advising, and craving, that seeing the act was only before answer, and that there was yet no litiscontestation in the cause, that the LORDS would hear them further ; and that they offered to prove, by witnesses above exception, that the defunct, after the disposition, went with them a mile from his house freely unsupported, which, with the other acts of going abroad, already proven, was sufficient to instruct convalescence.—THE LORDS repelled the bill without any deliverance, as being upon the matter of testimonies, and advising of the cause, which was improper to parties to allege upon. And it being questioned amongst themselves, whether or not, after probation is closed and advised, and such acts before answer, parties might propone new defences, and crave terms to prove the same ?—THE LORDS found, that when acts before answer were upon the whole moment of the cause, both anent the libel, the exception of going to kirk and market, and the reply of supporting, and that the Lords had ordained the probation to be before answer, that there could be no new allegiance or probation more than if it had been in an ordinary litiscontestation ; because, the intent of making it before answer was, that there might be in effect a conjunct probation, which form admits not after litiscontestation, and yet was of great importance, as carrying men's inheritance ; wherein, if ordinary litiscontestation had been made, the pursuer might have by any two habile witnesses proven, contracting of the sickness, and supporting ; and the defender, by any two witnesses, might have proven going to kirk and market ; whereas, by this probation, there was none that knew any thing of the affair, but were examined, and thereby the lieges are in much more security ; and if, after that new litiscontes-

No 87.

tation were made, or new probation admitted, it would never be wanting in any case, and would exceedingly vex parties by the length and expense of process; but that the Lords *ex proprio motu*, if any thing occur to them in a dubious probation, for clearing thereof, as they do in all concluded causes, so in this manner of probation they might *ex officio* ordain the same to be adduced. See PROCESS.

Fol. Dic. v. 1. p. 218. Stair, v. 2. p. 126. & 128.

. Gosford reports the same case :

IN a reduction pursued at the said Margaret's instance, as heir of line to James Cleland of Glenhove, her brother, of a disposition of his lands made to the Laird of Faskine, as being done in *lecti ægritudinis*, he having contracted a deadly disease, whereof he never recovered until he died; it was *answered*, That any disease he had was only an infirmity in his legs, wherewith he was afflicted by the space of ten years before the disposition, which infirmity was not *morbus soticus*, and such as the law requires, being *impedimentum rebus agendis*; in so far as he continued to do his business, in making of accounts and bargains, and did eat, drink, and sleep, and take tobacco, in that same manner that he had done for ten years before. And, when he made the disposition, he went to the fields and gave sasine *propriis manibus*; and thereafter went to the kirk of Cumbernauld, and made merchandise with a chapman for some ribbons, and survived the said act for the space of two years, and died of a general infirmity and weakness of his whole body, which did not appear but a few days before he died. It was *replied*, That the reason stood relevant notwithstanding, because the defunct's sickness did appear not only in the infirmity in his legs, but that in many years before that deed, and until his death, he was not able to go abroad, and do such acts of health as the law requires; but, on the contrary, when he went to kirk and market, he was supported in a chair made of purpose, until he came near to the church, and, when he came out of it, he was not able to walk, but was supported; and any merchandise he made was only simulate in buying a few ribbons from a chapman brought there of purpose; and for all other acts, they being only domestic and *inter privatos parietes*, were not such as the law regards to evince a full recovery from sickness. And for that instance of giving sasine *propriis manibus*, it could not be regarded, seeing he only went through the close a little way to the next field, and returned again.—THE LORDS, before answer, having allowed to both parties to adduce witnesses for proving the condition of the defunct before the disposition, and when he went to kirk and market; as likewise having considered the practices adduced for both parties, such as Richardson, No 34. p. 3210. Pargilleis, No 85. p. 3304. Lord Balmerino, No 77. p. 3292. they did sustain the reason of reduction, and found, that as to all domestic deeds, they were not relevant to infer a full recovery of health; and it being proven, that when he went to kirk

and market, he was supported in a chair till he came within a quarter of a mile of the church, and that, by the deposition of two witnesses, he was even there supported a part of the way, albeit there were but two witnesses who deponed the same, whereas there were many witnesses deponed the contrary; notwithstanding that no mortal disease was condescended on and proven; they did reduce the disposition as said is; seeing two witnesses were positive that he was supported even when he came out of the chair to walk to the church, which being positive acts demonstrating infirmity, were more to be regarded than the depositions of many witnesses deponing that he was unsupported, which was a negative, especially this going to church and market being designed to make the disposition valid, and thereby to satisfy the law; and that he having survived the same for the space of two years, did never hazard to go again to kirk or market to do any acts equivalent.

Gasford, MS. No 539. p. 286.

No 87.

1673. *January 9.*

NICOL against JOHNSTON.

UMQUHLE Henry Peers having granted a bond, dated the 5th day of September 1645, of 2000 merks of borrowed money, the right thereof coming now to John Johnston in *anno* 1656, there was a decret recovered thereupon against Thomas Nicol and Lawrie, two heirs-portioners to the defunct, and thereupon an apprising which is now expired. Nicol raises reduction of the bond, and all that followed in consequence, as being granted by the defunct *in lecto agritudinis*, after he and his wife and family, upon suspicion of the great plague in *anno* 1645, were put out to lodges in the moor, and died there within some few days after the date of the bond; and albeit the condition of the defunct did not admit of the access of witnesses to prove that he was actually infected before, yet his being sequestrate, and dying shortly thereafter, and never cleansed, but remaining in his lodge, did infer a sufficient presumptive probation thereof. And the defender having *alleged*, That the time of the bond the defunct was in health uninfected, and that he had frequently walked abroad in the moor after the date of the bond, and drank with several persons, which behoved to be sufficient to instruct convalescence, seeing his being suspect of the plague hindered his access to kirk and market; especially considering, that the pursuer is scarce within the eighth degree to him, and hath of design forborne this reduction till the witnesses were dead, who might have proven the party's health, convalescence, or the onerous cause of the bond, seeing he is compearing in the decret 1656, without any mention of death-bed, or any reduction thereupon; —THE LORDS having, before answer, ordained witnesses to be examined concerning the condition of the defunct the time of the bond, who proved that the defunct died about the middle of September 1645, and that they saw him several times walk abroad in the moor after the date of the bond, before his death.

No 88.

Found as
above.