

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.

Gosford, 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.

No 88. and drank with him at that time, *but in several cups*, he being under suspicion of the plague, and never cleansed, but that they knew not when he was actually infected;

THE LORDS found that the bond was granted *in lecto*, and reduced the samen, and all that had followed thereupon; but declared the effect of the reduction to be only from the sentence, that the defender might make use of the bond as a legacy against the moveables, and so reserved the samen, and the pursuer's allegiance of intromission, by this apprising, in satisfaction, as accords.

Fol. Dic. v. 1. p. 218. Stair, v. 2. p. 146.

1685. *January.* LAIRD OF LUSS *against* CARDEN.

No 89.

In a case where a party had gone to church, his deed was notwithstanding reduced, as there was evidence that he had been supported, which preponderated over some presumptions to the contrary.

In the reduction of a bond of 20,000 merks, granted by Sir John Colquhoun of Luss to his Lady *ex capite lecti*, at the instance of the granter's brother and heir of tailzie, a probation being led as to Sir John's going to kirk and market, and supportation, one witness deponed, That Sir John, in the going down stairs, leaned his hand upon a man's shoulder. *2dly*, Several witnesses deponed, That, at the foot of the stairs, he took a glass of sack for a cordial. *3dly*, A single witness deponed, That the defunct staggered as he went through the close, and was supported by the deponent, and then was transported to the church in a coach, and when he came out of it near the church door, he handed his Lady down the steps to it, where he staid sermon, and did not re-enter his coach till most of the people were gone. And one witness says, that the defunct's Lady went close at his shoulder when he came out of the church, and, as he thought, gave him some support. These separate exceptions and qualifications of supportation, at several places, were proven by single witnesses; but all agreed that he went in coach, and that the coach waited for him till sermon was over. Again, it was proven, that four days after the going to church, he went in coach to a shop, and bought golf-balls, but was supported.

Alleged for the pursuer; That the party cannot be said to have gone to church unsupported, when he made use of a coach, whereby he was carried, and not suffered to walk. And though the going to church in coach, or taking a lady by the hand, when a person has no other design than to hear sermon, should not be thought to import weakness, yet where a person goes industriously to ratify deeds by the performance of acts of strength and health, the using of such helps is to be considered as an *indicium* of weakness, in respect the person who puts himself to such a test of health, is *in maximo naturæ conatu*; besides, supporting in the going to church was proven by single witnesses, admiculative of one another; and the going to market thereafter evinceth, that they thought the going to church was not duly performed; and the failing in the last effort doth invalidate the first.