

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.

*Answered* for the defender ; That every act of supportation should be proven by two witnesses ; and the taking of a glass of sack was proper enough to the party at his going abroad to hear a long sermon, though he had not been sick. *2do*, Sir John used to go to church in coach. And, further, his taking of a coach on this occasion was but reasonable, his Lady being with him, and the season of the year dirty. *3tio*, The taking his Lady by the hand at the church-door was but an act of civility ; and his sitting in the church during a long sermon, and the christening of a child, was *per se* a sufficient act to demonstrate such a measure of health and strength as the going to church required ; and the instrument bore, that he went vigorously, and all the way unsupported, which the witnesses insert adhered to ; and the witnesses as to the supporting being but *testes singulares*, the defender's probation is most pregnant.

THE LORDS found the deed was done on death-bed, and that the positive probation of *supported* was more pregnant than the negative of *unsupported*. And the LORDS thought, that the exercising acts of health and strength, for validating rights, by the help of coaches, sedans, or leading Ladies, are used but as blinds to cover weakness, and subject to a suspicion, which was rational for the party to prevent, had he been able.

Thereafter it was *alleged* for the defender ; That the deed could not be reduced as on death-bed, because it was granted in remuneration of a right passed from by the receiver, in favours of her husband the granter.

*Answered* ; That the bond quarrelled was of a date five days posterior to the Lady's renunciation, and she accepted a settlement of the date thereof, in full satisfaction of all that she could claim, &c.

*Replied* ; The Lady offered to prove, by the writer and witnesses of the deed of settlement, made to her when she quitted her former security, that it was communed she should have the 20,000 merks bond over and above ; and that it was drawn at the same time with the rest of the papers, but that Sir John being indisposed, could not sign them altogether.

THE LORDS adhered to their interlocutor, in respect of the clause, *In acceptation, &c.* in the settlement, prior to the bond ; but, before reporting, recommended to the Lord Chancellor to settle the parties.

*Fol. Dic. v. 1. p. 218. Harcarse, No 654. p. 181.*

1686. *March.* JOHN CUNINGHAME *against* JAMES HAY.

IN a reduction of a disposition by John Suttie to James Hay, *ex capite lecti*, at the instance of John Cuninghame, who had adjudged from Balgon, apparent heir to the disponent ;

The defender having *alleged* upon the disponent's going to kirk and market, and adduced witnesses for proving thereof,

No 90.

It is not being at church and market, so much as the going there, which infers perfect health.