

December 1684, in name of his son James, that umquhile John Suity was *in liege poustie* when he made the disposition of his whole estate in his son's favours, and that he went to kirk and market unsupported, after the same :—ALLEGED by Suity of Balgone, called as heir,—1<sup>mo</sup>, No process ; because all the nearest of kin, *viz.* Balgone's sisters, are not called. ANSWERED,—Balgone, who is the apparent heir, is called, and that is sufficient. 2<sup>do</sup>, ALLEGED,—The principal disposition is not produced, but only a copy attested.

This being reported by Drumcairn, the Lords repelled the first, because the apparent heir was called ; and ordained the principal disposition to be produced, and the defender to see it against Tuesday ; and, if he had nothing then to say, then they, before answer, ordained a conjunct probation to both parties,—the pursuer to prove *liege poustie*, and the defender, death-bed.

Four nice points came to be considered in this cause :—1<sup>mo</sup>, If the witnesses in the instrument of John Suity's going to kirk and market will not be obliged to depone that they were with him, and looking on all the time, from his coming out of the house till his going to kirk and market ; or if it be sufficient that they met him on the street : seeing he might have been supported thither down stairs, or supported at rugged ground, when they looked away of purpose. 2<sup>do</sup>, If one's going out under night in winter, about five o'clock, when it is dark, satisfies the Act anent going to kirk and market : for going to any one of them is thought to satisfy ; the design of it being to make the deed public, and seen by indifferent unconcerned witnesses ; whereas the other way it may be done most latently and clandestinely, in presence only of domestic and picked-out witnesses. 3<sup>tio</sup>, If our law does only require the going to kirk or market unsupported, or if, *ad perfectionem et consummationem actus*, he must not only come to it, but likewise return back, free and unsupported, to his house again, as the *terminus a quo* from which he set out : for this being required as the badge of sanity, how can it be clearly otherwise ? and what if he shall fall in a swoon, or die in the return ? 4<sup>to</sup>, If, in a case so circumstantiate, women may not be adduced as witnesses, especially where they become so necessary, by the secluding of all men from coming near the deceased person, whom they besieged ; so, to render the probation difficult : and the law reprobates *nimia cautela*. For though it be not like *puerperium*, where other witnesses are not present, yet the contrivance is the same here. And, in the *Lady Monteith's case with her Lord*, women-witnesses were allowed to prove adultery ; *supra*, 1<sup>st</sup> January 1684. See this case decided 23<sup>d</sup> March 1686. *Vol. I. Page 356.*

1686. *March 23.*—The case of Sir George Suty of Balgone and John Cunningham against John and James Hays, mentioned 20<sup>th</sup> March 1685, is advised ; and the Lords find the death-bed, and supportation in his coming to kirk and market, proven ; and therefore reduced the disposition, and assoilyied from the declarator of *liege poustie*. *Vol. I. Page 409.*

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1686. *March 23.* THOMAS AIKMAN *against* MARY LITTLEJOHN.

LORD Carse reported the case of Mr Thomas Aikman against Mary Littlejohn : Mr Thomas pursues on a comprising for maills and duties. ALLEGED,

—They have the benefit of a possessory judgment by virtue of an infestment on a comprising ; and so it must stand good till it be reduced.

ANSWERED,—There was an old Act betwixt them in 1667, ordaining Littlejohn to count and reckon ; which interrupted the *bona fides*.

REPLIED,—*Imo*, That count and reckoning was now sleeping these many years, and behoved to be wakened. *2do*, They had attained the benefit of a new possessory judgment since that.

The Lords found no possessory judgment in this case, and sustained process. The words are:—Find no need of wakening or transferring the same, and therefore, conform to Lord Carse's decerniture, ordain the Act of count and reckoning to be extracted, and a diet to be appointed for that effect before the auditor in the said count and reckoning.

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1685 and 1686. SIR DANIEL CARMICHAEL *against* SIR JOHN WHITEFORD.

1685. *December 17.*—The Lords heard the case between Sir Daniel Carmichael and Sir John Whiteford of Milnton, anent a seasine which is marked by the clerk of the register of seasines as registrate, but when the registers are searched, there is no such seasine found inserted or recorded there, nor in their minute-book ; so it was ALLEGED to be null, because all that buyers and singular successors are bound to do, is to search the registers, and, if they find nothing there, they are *in bona fide* to buy or contract. On the other hand, it was contended, that the seasine must subsist in law, because all that can be done by one that is infest, is allenarly to give it in to the register ; and when he gets it back marked registrate, he is neither obliged nor concerned to see it actually registrate ; but any who are prejudged have action of damage against the keeper.—See for this, Stair's Institutions, *tit. 13, § 22.*

The Lords having advised this narrow point on the 23d of December, they found Milnton could not quarrel his father's seasine as null on that head, that so he might have access to annul Sir Daniel's right as flowing from his father who was not infest. And though the Lords were pressed by the lawyers to determine if it was null in general, yet they shunned it. So Milnton will cause one of his own creditors quarrel it, and then the Lords will be put to decide the general point ; anent which, *vide 25th March 1686.*

This is now determined by the 19th Act of Parliament 1686.

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1686. *March 25.*—Whiteford of Milton's creditors their reduction, for annulling his father's seasine, that so Sir Daniel Carmichael's right might fall in consequence, (anent which, *vide 17th December 1685,*) was decided. Their first objection was, that though it be marked registrate, yet it is not truly registrate ; and though three of the witnesses in the seasine depone *non memini*, yet the Lords sustained the seasine, because, by a bill to the Exchequer, it appears Sir John Whiteford had founded on this seasine.

This was an unnatural action, to tash his father's memory with a design of cheating.

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