

1677. December 11.

LOCKHART *against* LOCKHART.

UMQUHILE John Lockhart did dispoſe his whole means and eſtate in truſt to the Lord Lee, for the uſe and behoof of ſeveral perſons related to him on the mother's ſide, leaving nothing to William Lockhart, his brother by the ſecond marriage. There was a declarator purſued againſt the ſaid William, for declaring, that the diſpoſitions made by John his brother, were valid deeds done in *liege pouſtie*, and that after the firſt diſpoſition he went from Edinburgh to Calder, and was there at ſermon in the kirk; and after the ſecond diſpoſition renewed at Calder, becauſe the firſt was vitiate by alterations, he did ride to the Lee. William not compearing, witneſſes were adduced and proved the libel, and thereupon decret followed. William raiſeth reduction of this decret, and of the two diſpoſitions, upon this reaſon, that the decret was in abſence, and the allegiance of ſupportation was neither proponed for him, nor were the witneſſes examined or deponed thereanent; but he offers to prove, that John had contracted the diſeaſe (whereof he died) before both diſpoſitions, and that after he ſubſcribed the firſt, he was carried in a ſedan to Calder, and when he went on foot to and from the kirk, he was ſupported; after the ſecond diſpoſition, that when he rode from Calder to the Lee, his man rode behind him to hold him upon the horſe; that he was viſibly in a dying condition, and was helped to and from his horſe, and that he never came out of the houſe of the Lee till he died, but was carried once in a chair to the garden, and not able to walk up and down his chamber without help, and that in a part of the way to the Lee he was tied with a cloath that he might not fall from the horſe.

All which the LORDS found proven, and therefore reduced both the diſpoſitions and decret, albeit a prior teſtament was produced, wherein moſt of the ſame proviſions were left in a legacy, ſigned two years before his death. Whereupon it was *alleged*, That the preſumption of doing theſe things by weakneſs or importunity, were taken off; which was not reſpected, ſeeing his teſtament was ambulatory, and ineffectual as to heritable rights, ſo that he might have changed his mind between the teſtament and the diſpoſitions; neither was it reſpected that moſt of his eſtate came by his mother's father.

Stair, v. 2. p. 576.

1694. February 20.

LADY SCOTSTON *against* DAVID DRUMMOND.

THE LORDS adviſed the probation led in the caſe purſued by Lady Scotſton and Colquhoun of Tilliquhen, her truſtee, *contra* David Drummond of Invermaith, for reducing the diſpoſitions made of the lands of Roſſyth, &c. by William Stewart, the laſt Laird thereof. THE LORDS did not regard the firſt defence proponed for Invermaith on his bond of tailzie, ſeeing it did not appear that it ever was delivered, or that the poſterior diſpoſitions were relative to, or in im-

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No 78.

Death-bed was inferred by the defunct being held on horſe-back by a perſon ſitting behind him, when he went a journey.

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A running ſore was found to be a diſeaſe whereof one may die as well as of ſickneſs; and there-

No 79.
fore sufficient
to subject a
person in that
situation to
the law of
death-bed.

plement thereof; and therefore refused *hoc loco* to examine the witnesses in the instrument taken on his going to kirk and market, to validate that tailzie in October 1687. The next question was, Whether a sore running in a person might not be such a disease whereof one may die as well as of sickness, and if after that he can validly dispoise his heritage? The LORDS generally thought that the one might distemper one's health as much as the other, and so might incapacitate him from disposing, seeing *in edicto Ædilitio vitium dat locum redhibitioni* as well as *morbis*, and both Hippocrates and Galen were cited as of this opinion. The third point was, If by the probation it appeared that this infirmity in his leg, which he got by a fall, with the swelling and ulcer therein, was the sickness whereof he died. And the plurality of the LORDS found it was, though this extended death-bed to a great latitude; for the first disposition was in February 1688, and he did not die till December 1690; so that here the mortal disease is made to be upon him near three years. And in Cleland, No 86. p. 3305. it was much complained upon, that the LORDS had found him on death-bed for several years before his death, and reduced rights he had granted *medio tempore*. The fourth question arose on the probation of Rossyth's going to kirk and market, and of his being supported or unsupported therein; and though there were some objections against two of Scotston's witnesses, that they were not worth the unlaw, yet generally the LORDS thought the two attempts Rossyth made of satisfying the law in going to kirk and market, the one at the Tron-church, and the other at the High-church of Edinburgh were not sufficient, nor did give any convincing evidence of his reconvalescence; and that the probation of his being supported was more pregnant than the other; though it was confessed, that being cripple, he needed more support than another man, and that it could not be expected that he could perform that solemnity with the strength and vigour that another could; for he was brought near the kirk in a sedan; and, in Colquhoun, No 89. p. 3310. the going in a coach to the Abbey-church was found a supportation; and, in Lockhart, *supra*, No 78. it was found, though John Lockhart his brother did ride several miles after the disposition, that it was supportation; though it was argued for Invermaith, that Rossyth through infirmity of his legs, used to be carried in a chair; for the LORDS, thought this was but *ultimus naturæ conatus*, and in such cases, state and ceremony is required to be laid aside; as was found between Blair Drummond and Graham of Garvock about Drummond of Balloch's estate*. And the President instanced in a Lady that used to be led by the hand at other times, if she goes to kirk and market on such an occasion, she must dispense with that civility and go alone. They next considered the acts of sanity condescended upon as equivalent to kirk and market, wherein it first occurred, whether they are to be taken jointly, or considered separately, *ut quæ non prosunt singula multa juvent*. But the LORDS deferred the advising of these till 22d current.

* See Stair's Institutes, B. 3. t. 4. § 28.

February 22.—THE LORDS advised the rest of the points of Tilliquhen's reduction against Invermaith, mentioned 20th current; and considered the probation anent the equivalent acts of sanity: And though the President affirmed, that he never saw them sustained, yet the LORDS thought there might be such acts stronger, and more pregnant, than the evidences of health required by our law of going to kirk and market. What if a man should ride several stages post after he had signed a disposition, which is drawn in question as signed on death-bed, and should come to the Session-house and plead causes, would not that validate the right, though he should never go to kirk or market, especially if they be deeds that are not strained nor affected, nor done of purpose and design, but ordinary acts in management of affairs, or for diversion or recreation? Therefore, the LORDS found the equipollent acts proven to have been done by Rossyth after February 1688, as his going to Inverkeithing at the election of a commissioner for that town, to the meeting of estates in 1689, his staying a whole day at sea in a boat at fishing, his walking in Lady Home's yard, his visiting prisoners in the tolbooth, were such as proved his convalescence, and that he was then in *liege poustie*, and were sufficient to validate the dispositions in January 1688, because many of these reiterated deeds were in 1688 and 1689. But the LORDS did not yet determine the validity of the disposition given by Rossyth to Invermaith in August in 1690, about four months before his death, because there were few deeds of health proven after that time, and the two attempts of his going to kirk and market after that were already found strains of nature, and therefore they superseded to advise this last part, till it might be tried if the parties in the mean time could settle and agree.

Fol. Dic. v. 1. p. 217. Fountainhall, v. 1. p. 611. & 614.

1696. June 11.

GORDON against GORDON.

THE LORDS advised the reduction *ex capite lecti*, pursued by James Gordon of Techmuiry against Gordon of Daach, of some bonds granted by the parson of Rothiemay, his father, to his daughters of the first marriage, and whereunto Daach had acquired right. The answer was, any thing the granter then laboured under, was not a *morbis* but a *vitium*, he, by a rheumatism, having contracted a lump in his back which dislocated two of the *vertebræ* or whorl-bone; and though he kept his bed, and was unable to walk even with crutches, yet the last of the bonds is more than three years before his death, and he cannot be reputed to have then contracted the sickness whereof he died; but truly he took a fever, which, in two or three weeks, dispatched him. *Answered*, The disjoining of his back was the cause of the sickness which carried him off, *et causa causæ est causa causati*; and, after he took bed, he had several fainting fits, and used much physick and cordials; and though he took a fever, yet

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A person by rheumatism contracted a lump on his back, which dislocated two of the *vertebræ*, so that he kept his bed, and was unable to walk even with crutches. In that condition he granted bonds, the last of which was more than three years before his death.