

**No 76.**  
 though the defunct had broke his leg, and so could not go to kirk or market, he was notwithstanding in perfect health when he executed the deed challenged. This defence was repelled.

ing done on death-bed, after the defunct had broke his leg, and the same was out off, whereof he took a fever and died, and never went out to kirk or market :—The defenders *answered*, That they offered them to prove, that albeit the defunct happened not to come out, yet he was in his *liege poustie*, and perfect health, and did all his affairs, which did much more evidence his health, than the stepping out to the market; *2dly*, The bond in question being a provision to a daughter, it was a natural obligation; which the father might do on death-bed.—The pursuer *answered*, That the law allowed no other evidence to give capacity to dispone in *liege poustie*, but going to kirk and market; and if any equivalent were accepted, it would render the most ancient law dubious and elusory; as to the *second*, the defender having been portioned before, any addition on death-bed had not so much as the favour of a portion-natural.

THE LORDS repelled the defences, and sustained the summons.

*Fol. Dic. v. I. p. 217. Stair, v. I. p. 534.*

1671. June 28. THE CREDITORS OF BALMERINO *against* The LADY COUPER.

**No 77.**  
 In a reduction upon death-bed, it is not necessary to condescend upon a particular disease.

THE deceast Lord Couper having made an heritable and irredeemable right of his whole estate and dignity to his Lady and her heir; the Lord Balmerino, his nearest heir in the estate, making use of the names of certain of his creditors, that he might not be necessitate to enter heir before the event of this plea, pursues a reduction of the said disposition, as being on death-bed.—The defender *alleged*, *1st*, That the reason of reduction, as it is libelled, is not relevant; that the defunct contracted a deadly disease before the making of the disposition, and that he died of the said disease, which is not relevant, unless the particular disease were condescended upon, otherwise it will remain conjectural and unsure; and witnesses cannot distinctly depone whether he was sick or not, specially he being an old man, so that they could not distinguish betwixt sickness and weakness through old age; *2dly*, The reason is not relevant, unless the disease were alleged to be *morbus santicus*, that might affect the mind, and infer a weakness, which is different from fatuity or insensibility; *3dly*, The defender alleged absolvitor, because he offered him to prove that the defunct was in health the time of the disposition, at least in as good health as he had been for several years or months before, when he did go ordinarily abroad to kirk and market, about all his affairs; at least, if he had any indisposition, it was not *impedimentum rebus agendis*, because it is offered to be proven that he constantly put on his clothes, and walked up and down his house, convoyed strangers to their chambers freely, without being helped or supported; and in the same manner went down with others to their horse to the green, made several accounts and bargains, and frequently played at cards, all which must necessarily infer his health, unless a circumstantial disease were condescended upon and proven; *2dly*, The defender offered to prove that after the disposition, the defunct went

to kirk and market, at least to one or other of them, which the law hath allowed as unquestionable evidences of recovery of health, and which therefore is relevant, though sickness were specially proven to have been contracted before, and condescends that, the disposition being dated the 8th of December 1668, upon the Thursday immediately after, the defunct went to the market of Cupar, it being the market day, and upon the Sabbath thereafter heard sermon in the kirk of Cupar.—The pursuer *answered*, That this reason of reduction is most relevant, and in the same terms that the reason of death-bed has always been libelled; neither was it ever found necessary to condescend upon *morbus soticus*, but as Craig expresses it, *sufficit si morbus precedat et mors sequatur*, before the defunct goes abroad, yet *probatis extremis presumuntur media*, it is still presumed, that so long as the defunct, after the disease, remained within doors, that the disease continued, and that *presumptione juris et de jure*; neither doth it admit a contrary probation, by alleging that the party convalesced *medio tempore*, otherwise than by his going out to public meetings at kirk and market; nor is there any necessity to condescend on the kinds of diseases, which even physicians themselves, and the most skilful can hardly determine. And as to the *first* defence, offering to prove that the defunct was in health, it is contrary to the libel, and nowise competent; for in the case of contrary allegations, the pursuer offering to prove sickness, and the defender offering to prove health at the same time, the pursuer, as being in the libel, must be preferred, especially considering that where such deeds are procured through importunity from sick and weak persons, who would do any thing to get leave to die in peace, the contrivers, by the same facility, may debar the access of any, but such as they have confidence in, and who have concurred with them in the contrivance, so that the disponent's sickness is *difficillima probationis*; yet *qualibet probatio sufficit*, as in this case, within a day or two of the disposition, my Lord was put to violent nature to attempt to go to the market, and three days after to the kirk, in both which attempts he failed; which doth sufficiently presume that he was sick before, and was not able to cover his sickness for a little time to attain the evidences that law requires to infer health; but if a contrary probation should be sustained, or preferred as more pregnant, and which would be by familiar persons in the house, and concurrers in the contrivance, this ancient and excellent law would easily be elided; and as to the evidences of health, they are noway relevant, neither are any private acts; but the law hath justly determined that the disponent must appear publicly in the solemnest meetings, that thereby it may be known that he is able to abide the air; and that matters of this importance be not probable by two picked or prepared witnesses, but that the same be cleared by the whole witnesses of a kirk or market, which cannot all be bribed, and no few witnesses dare adventure to depone against that common knowledge; so that no private or domestic acts, in or about the house, can be equivalent to coming to kirk or market. And as to the *second* defence, that the defunct came out to kirk and market, it ought to be repelled, because the pursuer offers to prove that he was supported.

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—The pursuer *answered*, That the reply was not relevant, unless it were condescended *quomodo* supported, and that it was by upholding the defunct under the oter or by the elbow ; but it is not relevant to allege that the defunct took any of the company by the hand, or that they took him by the hand, especially if it was in rugged or uneven places, in respect of the defunct's age ; and that it is offered to be proven that he was ordinarily accustomed to take those who walked with him by the hand in such places ; and for this there was alleged a practise lately done by the Lords betwixt Pargilleis and Pargilleis, No 85. p. 3304. whereby a disposition by Pargilleis was sustained, because he came to the market of Calder, albeit he was helped to and from his house, and up and down the stairs, and that he was not able to tell money, and was never at the kirk thereafter ; and likewise a practise in anno 1647 was alleged, whereby Graham, merchant in Edinburgh, having made a disposition to his wife's daughter, the same was sustained, because he lived a long time and did his affairs in the house, and wrote the disposition, being two or three sheet of paper, all with his own hand, which is found sufficient though he did not go out to kirk or market\*.—The pursuer *answered*, That the reply was most relevant, even though the supporting were only by the hand ; for albeit where there were reiterate acts of going abroad without design, such circumstances would not be noticed, yet where the going abroad was so near to the disposition, and evidently done to validate the same, it hath been *ultimus conatus nature*, and hath not been of custom, but of necessity ; so that when such an attempt is made of design, if the disponent have not so much strength as to walk without the help of any hand, it infers clearly the weakness and continuance of the disease. The defender repeated his allegiance, and offered to prove that not only the defunct went out to kirk and market, but that he went freely by his own strength, no body touching him.

THE LORDS being desirous that neither party should have the sole probation, by picking out such witnesses as made most for them, but that all the witnesses might be adduced, did, before answer, appoint either party to adduce witnesses to instruct the defunct's condition the time of the disposition, and thereafter, and anent the manner of his going abroad ; and there being a great multitude of witnesses adduced by either party, the LORDS considered the relevancy and probation both together, by which the LORDS found that the reason of reduction was relevantly libelled, and that it was sufficiently proven that the defunct had contracted the disease whereof he died, before the disposition ; and as to the defence and reply, the witnesses proved all clearly, that he was supported to the kirk and from it, and that he fell aswoond in his return ; but the LORDS found it not necessary that the defunct should both go to kirk and market unsupported, but that either was sufficient ; but that where both were attempted shortly after, and upon design, the manifest failing in the attempt in going to the kirk, did much weaken the prior attempt in going to the market ; as to which the LORDS did consider, that the going free to the market behoved to in-

\* See APPENDIX.

clude the free going to the market-place, and returning back from the same, not being supported in any place of the way; so that albeit many witnesses deponed the defunct walked freely, none being by him in some parts of the way coming and going, there was no number of witnesses that proved his walking freely all the way coming and going, even while he was within the town, but that many witnesses proved that he was supported, some in the whole way, and some as to several places, some by the oxtter, some by the elbow, and most by the hand.

Therefore the LORDS found the reply relevant of supporting even by the hand, in any place of the way within the town, whether even or rugged, and found the same sufficiently proven; and therefore reduced the disposition, albeit the defunct's custom to take those who walked with him by the hand was also proven, whereunto they had no regard, this going to market being so soon after the disposition, and so evidently of design to validate it, and the defunct never having gone out after, except to the kirk when he was supported and fell aswooned; and as to the practise, that in anno 1647 was not produced, but it was in consideration of a sum left to the church by that disposition, and was generally cried out against by all persons, yet *una hirundo, &c.*; and as for Pargilleis' case, the LORDS perused the whole debate and testimonies, and found that Pargilleis lived near a mile from Calder, and that being an old goutish man, he was accustomed to be helped to and from his house, and that he rode to the town, but that he lighted then and walked freely through the market, and up a brae to my Lord Torphichen's house, and returned again to his horse without any help either by the hand or otherwise, and regarded not that he was helped up and down stairs, or to and from his horse, which the law doth not require, but only the going freely from the entry of the town to the market-place, and back again unsupported.

THE LORDS did also find none of the private acts alleged upon, relevant to prove health, or equivalent to going to kirk or market, and that there was no necessity to condescend on particular diseases.

*Fol. Dic. v. 1. p. 219. Stair, v. 1. p. 742.*

\* \* \* Gosford reports the same case:

IN a reduction of a disposition of the Lordship of Cupar, made by my Lord *ex capite lecti*, the LORDS, before answer to the dispute, having ordained both parties to adduce witnesses; the pursuer for proving that the defunct had contracted a deadly disease the time of the disposition, and that he never convalesced, in so far as the next day thereafter, he having offered to go to the market, was supported both in the going and the coming, and did fall aswoon before he came back to his own house, and was carried in a chair; and the defender for proving he was in good health the time of the disposition, and that not only he went to the market and returned unsupported, but did other deeds

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of health equivalent to the going to kirk and market, such as going about his private affairs, making accounts and subscribing discharges, playing at cards, dining and supping with gentlemen, and conveying them to their chambers: —THE LORDS having considered the whole debate in law, and the depositions of the whole witnesses adduced for both parties, did find, that it being proven by the testimony of many witnesses, that the defunct was sick and in a decaying condition; that the allegiance that he was an old man past 72 or 73, did not elide the summons upon that ground, that old age is enough to put the person in a decaying condition, unless other acts of a perfect convalescence, equivalent to going abroad to kirk and market, had been proven; *2do*, They found that all these deeds of convalescence, which were only proven to have been done privately in his own house, to which his domestics were only witnesses, for the most part were not equivalent to going publicly abroad; *3tio*, That the going to market being of purpose to make valid the disposition, that it being proven that he took help of those who were nearest him, by laying his hand upon theirs, was sufficient to prove that he was supported, albeit it had not been more strongly proven by several witnesses, that they did take and hold him up by the arms, as many did depone; but the LORDS declared, that where going to church and market is done of purpose to make valid any right, if it be proven that they were any ways supported, and had not strength enough of themselves to walk, it did not elide the reason of reduction *ex capite lecti*; and that notwithstanding it was alleged that some of the way was rugged, and that the defunct was in the custom to lay his hands upon those that were next to him, upon any rugged or dirty way, when he was in perfect health; which the LORDS did not regard, seeing *hoc agebatur*, and was principally intended that he might give evidence that he was in perfect health and strength, especially in this case, where, within three days, he having gone to the church by the unanimous testimony of all the witnesses, it was proven that he was supported to the church and from it, and did fall down by the way in a swoon, till he was recovered by strong waters, and that he never came abroad thereafter until he died, which was within three weeks. Likewise in this process the LORDS did not find the pursuer obliged to condescend and prove any particular disease which he had contracted, before the disposition; albeit it was much urged that old age and the season of the year were sufficient to put him in a sickly condition, and to keep the house, so that some other disease which might be deadly, ought to have been proven to have affected the defunct; for the LORDS found, that the knowledge of diseases being only proper to physicians, and a thing of itself most uncertain, it was sufficient to allege in general, that he had contracted sickness whereof he died, and never convalesced by going to kirk and market.

*Gosford, MS. No 363. 364. 365.*