

The pursuer next insisted upon this ground of reduction, 'That the disposition, containing a faculty to revoke, innovate, and alter at any time during the granter's life, *et etiam in articulo mortis*,' he had, in pursuance of that faculty, altered and annulled the same, by granting the two bonds above mentioned, since thereby the subjects in the disposition were fully exhausted, which was a virtual alteration thereof; and in effect the case came to be the same, as if William the disponent had by a second disposition annulled the first, and of new disposed in favours of the persons to whom the bonds were granted; in which case the first disposition would have fallen, and the second would have been reducible *ex capite lecti*, as was found 23d January 1708, Livingston against Baillie, No 69. p. 3261.

It was answered for the defenders; That the granting of these bonds was no more than an exercise of the reserved faculty to burden; and since they were willing to pay the sums in the bonds, they might retain the heritage; and it was *jus tertii* to the pursuer to found on these after-rights.

THE LORDS repelled the reason of reduction founded upon granting bonds to Alexander Ragg and Marjory Forbes, in respect the disponees were satisfied to pay these bonds.

Reporter, Lord Pollock. Act. Ja. Graham, sen. Alt. Jo. Horne & Alex. Garden. Clerk, Justice. Fol. Dic. v. 3. p. 174. Edgar, p. 157.

1763. July 9.

LAIRD against KIRKWOOD.

JAMES LAIRD, as heir at law, having raised a reduction against Margaret Kirkwood, of a disposition in her favour by John Kirkwood, as having been granted by him after contracting the disease of which he died, about three weeks after the date thereof; it came out, upon proof, that the disease of which Kirkwood died was a disease proceeding partly from old age; that he laboured under this disease a considerable time before granting the disposition in question; that after granting it he went to a horse-race at Lochwinnoch, where there was a sort of market occasioned by the conflux of people, but no legally established market; and he complained to several people in the market that he was ill.

In support of the reduction it was urged, *imo*, That the being in kirk or market as an evidence of reconvaescence must be restricted to a legal market, where it is presumed that all sorts of persons are convened; *2do*, That the going to kirk or market is only a presumption of reconvaescence, and must yield to more pregnant evidence of the continuance of sickness. And here is direct evidence even by the disponent's own acknowledgment to several people in the market that he was no better. The judgment was as follows:

'Find it proved, That the deceased John Kirkwood went unsupported to the market of Lochwinnoch after the date of the disposition, and therefore repel the reason of reduction.'

No 92.

No 93.

In a reduction of a disposition on the head of death-bed, it was proved that the disease of which the granter died was a decay, proceeding partly from old age; that he laboured under this disease a considerable time before granting the disposition in question; that after granting it he went to a horse-race, where there was a sort of market oc-

No 93.
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The going to kirk or market after executing the deed challenged, is commonly considered as evidence of reconvalescence, and might justly be so considered during that period of our law, when the lapse of time did not bar the challenge, and when, after the deed was granted, there was latitude sufficient for the granter to be ill and well more than once. But the time of three-score days, which secures a deed from being challenged upon the head of death-bed, according to our present law, makes it scarce credible, without the most direct proof, that a man who is under a *morbus santicus* when he makes a deed, should afterward be restored to perfect health, and at last fall ill of a disease which occasions his death, all within the space of three-score days. In our present practice, however, the going to kirk or market continues as formerly to bar the reduction; not surely as a proof of reconvalescence, but only as evidence of that degree of sense and understanding which is sufficient to support the deed.

In the present case, the granter went to the market of Lochwinnoch the same day he granted the deed; and if he was ill in the morning when he granted the deed, and for a long time before, which is proved, he could not be in perfect health at noon when he went to the market, even abstracting from his own acknowledgment of his being no better. If it was right, therefore, to sustain this circumstance as sufficient to bar the reduction, it could be upon no other foundation than that Kirkwood, by going to the market, showed himself to be in such a condition as to be capable to execute a deed. From this consideration I draw the following inference, That whatever disease a man may labour under, yet if it disqualify him not for public worship, nor for transacting his ordinary affairs in a public manner, such disease will not be considered as *morbus santicus*, nor bar him from executing a rational deed.

Hence a ready answer to the two topics urged in support of the reduction. With respect to the *first*, if the going to a market be considered as evidence of such vigour of mind and body as to qualify a man for granting a deed in prejudice of his heir, which undoubtedly it is held to be, it can make no difference whether the market be legally established or not; because the one is no better evidence of health than the other. And with respect to the *second*, did the going to kirk and market rest upon the footing of reconvalescence, the argument would be invincible; but as it is laid hold of only to prove a degree of vigour sufficient to qualify a man for making a deed, the argument is of no force.

Fol. Dic. v. 3. p. 174. Sel. Dec. No 208. p. 274.

No 94.

1776. July 9.

FAICHNEY against FAICHNEY.

FAICHNEY pursued a reduction *capite lecti* of a disposition of heritage made by Mr Faichney, minister of Collace, within thirty days of his death. It was proved, that the disponent had been in a declining state of health, with some symptoms of palsy, before executing the deed, and that this disease terminated