

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.

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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

in death; but he enjoyed all his faculties, transacted his ordinary business, and went both to kirk and market, as he expressed himself, 'in order to confirm his will.' THE COURT sustained the reasons of reduction. See APPENDIX.

Fol. Dic. v. 3. p. 174.

No 94.

1787. December 11.

ROBERT TAILZEOUR, against ELIZABETH-JEAN TAILZEOUR.

THE lands of Barrowfield, having been formerly destined to heirs-male, would have descended, after the death of the late proprietor, to Robert Tailzeour, his uncle, to the exclusion of Elizabeth-Jean Tailzeour, his sister. On 9th April 1782, however, Mrs Tailzeour was called to the succession by a deed of settlement; for setting aside which, a process of reduction, on the head of death-bed, was brought.

It appeared from the proof, that in February 1782, the deceased had been seized with a consumptive disorder; and that, in the following month, he went to Edinburgh to take the advice of physicians; who gave it as their opinion that he would not survive long; and on the 22d April he died, only 13 days after the date of the settlement.

On the other hand, it was proved, that as the settlement was most rational, by preventing the exclusion of a sister, with whom the deceased had always lived on the most friendly terms; so to the hour of his death the testator had been in the full possession of his faculties; that a very few days after the execution of the settlement, he had gone to the town of Montrrose, to dine with his sister, and on that occasion alighted from his carriage without help; and that, after standing some time in the streets, and conversing with some of his acquaintance, he went into his sister's house, which is in the market-place; and this happened during market hours.—The pursuer

Pleaded; Were the law of death-bed founded on a presumption merely, that every mortal disease was accompanied with such a deprivation of reason, as disqualifies a person from the right administration of his affairs, it might be obviated by evidence, either arising from the settlement itself, or from extraneous circumstances. This, however, would be quite inconsistent with the object of the regulation, which was introduced for the humane purpose of preserving the peace of dying persons, and for preventing settlements which had been made or approved of by the party while in full health from being set aside, at a period when it was at least a possible case, that owing to the imperceptible decay of the mind, which so often corresponds with that of the body, the deceased had been influenced by such considerations as at any other time would have had no weight with him. Thus, though it should appear that a settlement made

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Being in a market-place, though only for the purpose of visiting a friend, found sufficient to infer reconvalescence.