

1787. December 11.

ALEXANDER BLACK *against* DAVID BLACK.

No 83.

Not necessary to constitute death-bed, that the illness should, before the date of the settlement, be so violent as to confine the party to his bed, or even to his house.

AN action was brought by Alexander Black, for setting aside a deed of settlement in favour of David Black, as having been executed while the granter was on death-bed.

It was proved, that for several years the testator had laboured under a severe cough, attended with a difficulty of breathing; that before executing the settlement, he had become considerably weaker; and that he died thirty-five days after; but that he had never been confined to his bed, or even to his house, nor prevented by his illness from going about his ordinary business, his faculties till the last remaining in full vigour.

*Pleaded in defence:* The law of death-bed, which originally resulted from feudal principles, and was afterwards continued from a distrust of the Popish clergy, who often exercised their influence on dying persons, to the disinheriting of the legal heirs, ought now to be confined within very narrow bounds. But even while its operation was most extensive, the settlement in question could not be thought to fall under it. It is true, that the deceased did not outlive the sixty days, and that he was not either at kirk or market. These circumstances, however, are not indispensably necessary to validate a settlement, but only to prove, in those cases where the testator had been formerly ill, that he had been restored to such a situation as sufficiently qualified him for making a distribution of his effects. But here there is no occasion for any proof of re-convalescence; because it does not appear, that before making the settlement, the testator laboured under such a distemper as could subject his actings to any legal objection. He was neither *sick* nor on *death-bed*, but continued, for a month after, to conduct his affairs in his ordinary way, and with his usual propriety. If it were sufficient to constitute death-bed, that the most trifling indication of decay had appeared, there would be no end to disputes of this sort.

*Answered;* Though the causes from which the law of death-bed was at first introduced may not now exist, the regulation itself is not the less binding; nor has it yet ceased to be of the utmost use in preserving the rights of the lawful heirs, and the quiet of dying persons. To admit the argument offered on the part of the defender, were to set it aside altogether. It is not necessary for supporting a challenge on the head of death-bed, that the distemper under which the testator at the time laboured should be a *morbus soniticus*, or the certain cause of immediate death. All that is required is, that at the time of making the settlement, he shall have been subject to that particular illness which terminated in his death: A circumstance fully established in the present case, where the disorder being of the consumptive sort, its ordinary symptoms had appeared, and grew more and more distressing as his dissolution approached.

' THE LORDS repelled the defences.'

Lord Ordinary, *Ankerville*.  
Alt. *Maconochie, Abercromby*.

Act. Dean of Faculty, *Hagart*.  
Clerk, *Colquhoun*.

G.

Fol. Dic. v. 3. p. 173. Fac. Col. No 12. p. 22.