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The first time the pursuer could have used this vote was in 1826, and I cannot tell you what sum ought to be paid for being deprived of this privilege. I cannot say that no damages should be given; but, considering the forgetfulness of both parties, it is not so clear a case that I can direct you what verdict to find, and therefore I leave it to your good sense; but if I were in your situation, I cannot say I would give the sum claimed, or that stated by the witness; but if any damages are given I think the sum named by the defender much the most judicious.

Verdict—For the pursuer, damages L.583.

Moncreiff, D.F., and *Cuninghame*, for the Pursuer.
Forsyth and *Cockburn*, for the Defenders.
(Agents,

PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

1827.
July 16.

HOGG *v.* NIMMO.

Finding that a person was in *liege poustie* at the date of a deed.

THIS was an action of declarator brought by the trustees named in a deed, to have it found

that the deed, and a codicil attached to it, were executed in *liege poustie*, and that the defender, the heir-at-law, should be liable in damages for obstructing the pursuers in the management of the trust.

DEFENCE.—The action was unnecessary, but the pursuers having brought it, must prove their case. The defender was ready to approve of the deeds, on getting satisfactory information as to the state of health of her brother, the truster.

ISSUE.

"It being admitted that the late Hugh "Nimmo, baker in Edinburgh, died on the "6th day of August 1825.

"Whether a deed and codicil, bearing to be "executed by the said Hugh Nimmo on the "17th day of June, and 14th day of July "1825 respectively, an extract of which deed "and codicil is produced in process, were not, "or either of them was not, executed on death-"bed?"

Cockburn opened the case for the pursuer, and explained the nature of the law of death-bed. That, as the person had not lived sixty days after executing the deeds, the question

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would turn on his going to kirk and market, which he had no doubt of proving; and the heir might get out of this, by proving support if she could. It was for the Court to say on whom the *onus* of proving support rested; and if the direction is against us, we will argue it on a bill of exceptions.

Stair, B. iii. t. 4. § 28, and B. iv. t. 20, § 48.

There was another point for the Court on the codicil, as we may not be able to prove him at kirk and market after it; but it does not affect heritage; and there is a power reserved in the deed to alter it on deathbed. The titles to the subjects were taken to the truster and his wife, which excludes the heir; and a special verdict is probably the best way of disposing of this part of the ease.

When the widow of the truster was called as a witness,

Jeffrey objects,—She is a party, and has a beneficial interest.

Cockburn.—She is not a pursuer, and has an interest to reduce the deed; but as they insist in the objection, we do not call her.

Moncreiff, D. F. opened for the defenders, and said, This is a most extraordinary case, and is the first in this form in the recollection of any one in Court. There are many reduc-

tions on the ground of deathbed, but here the parties have changed sides, and the pursuers are bound to make out all that law requires to make this a valid deed. The presumption is in favour of a regular deed, but the pursuers have so little confidence in this, that they will not act upon it, but come to have it found by the Court. Death of the disease of which the maker of the deed was ill, being proved or admitted, the party must make out the exception in every point; and here the date of the deed is not proved.

LORD CHIEF COMMISSIONER.—Is it not a probative deed?

Moncreiff, D. F.—In this peculiar case they were bound to prove the date. They have only proved his being at kirk and market, but have not proved his going to and returning from them, which are the material points; and unless they prove him *not* supported, they fail in their case. Stair. 623. Ersk. 689.

LORD CHIEF COMMISSIONER.—It being agreed that there shall be a special verdict, or special case, which is more convenient as to the codicil, we are relieved from the consider-

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ation of that part of the cause at present, and, therefore, have only to apply the evidence to the deed. If, on consideration, you are of opinion that the deed is valid, then the question as to the codicil will remain for the other Court; but if you are of opinion that the deed was executed on deathbed, then the codicil also fails. You must consider particularly the issue, without any prejudice for the one side or the other: and you have nothing to do with whether the law of deathbed is beneficial or not. I believe it beneficial; but it is sufficient that it is the law, and has been so for centuries, and the law must take its course.

This case is not concluded here, but in the Court of Session; but, as it comes to trial on a general issue, any of the special facts applicable to deathbed may be proved. We must therefore consider what is deathbed. This term in law has not the same meaning as in ordinary life, but means that the person is ill of the disease of which he afterwards dies, and that he dies within sixty days without having gone to kirk and market unsupported. In this case the death being admitted, the question is reduced to going to kirk or market unsupported. If he goes to either it is sufficient; and it will simplify the case to consider the church and

market separately, and the support as applicable to both. The evidence of this person going to the stamp-office is no evidence of going to market, though it is more difficult to say that his going to a shop is not, still it would be a pity to involve this case with any question of this nature. You will therefore consider the evidence as to the office and shop more as proof of his general strength, and how far they corroborate the presumption of his being supported or not when he went to church. The evidence as to the dates in this case is not by a witness swearing to the dates, but by proving facts and circumstances, which is even more satisfactory than the other.

I wish to limit your attention to the going to church; for if you agree with me in thinking that it is established that he went to church subsequent to the execution of the deed, then the deed is valid, unless he was supported. On this there is a question raised on whom the burden of proof lies. In the ordinary case the heir proves the illness and death within the sixty days, and the other party proves the going to church unsupported. I do not in this case wish to say any thing that might seem to take it out of your hands, I rather wish you to attend to the facts, which places it in such

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a situation that the law is of little importance. This was not a disease in the limbs of this person, but in his breathing; and there is evidence of his habit of walking alone; and when he went to church there is the evidence of the coachman, that after he left the coach he walked in the usual way.

The evidence of his being at market is not so clear, as none of the witnesses fixed a particular day; and though there are cases going nearly as far as would hold going to a shop sufficient, still I do not wish to embarrass the case with this.

Lord Roseberry v. Lady M. and D. Primrose, 24th Nov. 1736. Mor. 3322.

On the evidence, therefore, you will find for the pursuer or defenders.

Verdict—For the pursuers as to the deed.

Cockburn, Skene, and *Marshall,* for the Pursuer.
Moncreiff, D. F., Jeffrey, and *More,* for the Defender.
(Agents, *D. & A. Thomson,* W. S. and *Alexander Gifford,* S. S. C.)

PRESENT,

LORDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

SMILES *v.* KERR AND TROTTER.

1827. July 17.

THIS was an action of declarator to have the