

No 90.

It was *answered* for the pursuer ; That the probation was defective, in so far as the witnesses do not say that they saw the defunct come out of his chamber and return home ; but only, that they saw and left him at such a place upon the street, which argues, that he was not in a condition to go down and up stairs unsupported, otherwise the witnesses had been also called to that part of the progress. And it is not the being at church and market, but the going there, that infers perfect health. *2do*, The progress was performed in an unlawful time, under cloud of night, between four and five o'clock, in the month of December. *3tio*, Acts of supportation are proven at the shop where he was, and he returned home in a chair or sedan, into which he was helped, and groaned heavily ; and he died within seven days after. *4to*, The witnesses vary in their depositions from what is asserted in the instrument, *5to*, The going to church in the night-time, when the party's condition could not be exposed to the view of indifferent and unsuspected persons, but only to picked witnesses, taken along to serve a turn, is not sufficient to elide the exception of death-bed. *6to*, The not returning home before the witnesses is a material defect. And the being carried in a sedan is a plain supportation and argument of death-bed.

Replied for the defender ; It was not necessary to have witnesses to the going out of the house and returning. *2do*, The progress needed not to be made in the time of the forenoon's service ; for the vespers was the most solemn meeting at church before the Reformation, and the evening prayers since ; and the defender passed from the instrument. *3tio*, Any acts of supportation are denied ; and a sedan is not a supporter.

THE LORDS, *nemine contradicente*, found the disposition was made *in lecto*, and reduced.

Harcarse, No 656. p. 183.

1711. December 5. CRAUFURD *against* BRICHEN.

No 91.

A man having been many months ill of a *tympanites*, and while under the disease having signed a disposition, after which he did not live 60 days, but died of the same disease, yet went unsupported to kirk and market after granting the writ ; the Lords finding

JAMES CRAUFURD skinner in Glasgow, having disposed some houses and other heritage to one Brichen, to breed up a boy in the skinner-craft, as a fund in all time coming ; Mr Mathew Craufurd, his nearest heir, raises a reduction of that disposition as done *in lecto* ; and a probation being allowed both parties, before answer, as to the state and condition of his health the time of subscribing, and his coming to kirk and market after the date of it, unsupported ; the probation came this day to be advised ; and it appeared that in February 1707, he was taken with a dropsy, but which did not hinder him to go about his business abroad till September thereafter : That on the 13th of August he signed the disposition quarrelled, and on the 15th he was all day in church, and thereafter he went to the flesh-market and bought some meat therein, as also cleared accounts with several people, and interchanged discharges with them ; and went to Doctor Maitland's house, and consulted him, who depones he found

him far gone in that species of hydropsy called a tympanites. Others said, his belly was as big as a woman's with child used to be ; and that they looked upon him as a dying man before the disposition. THE LORDS agreed in this, that from the probation it appeared he had contracted the sickness whereof he died before he signed the disposition, and that he did not live 60 days after it, as the 4th act 1696 requires. Yet it was argued, that his going to kirk and market after the deed, seemed to be proven ; which the law has pitched on as characteristic of sanity and reconvalescence, and is *præsumptio juris et de jure*, not admitting a contrary probation, seeing he was not struck by a *morbis soticus*, which is *impedimentum rebus agendis*, such as acute fevers affecting the head, and disturbing our reason ; which dropsies, gout, &c. do not ; under such, men continue as sensible and rational as ever. The old custom was, they went to church though not in sermon-time, and then bought something in the market, and had a notary and witnesses pickt and chosen to the purpose ; which the Lords justly suspected as *affectata diligentia et ultimus naturæ conatus*, a straining of nature, but here the man went carelessly to kirk and market as he was wont, without any view, prospect, or design, and nothing of fainting or supportation proven, as was in these cases cited by Stair, tit. SUCCESSION, in Galtam of Garvock's case *, where he vomited in the return, which the Lords found sufficient to annul the disposition ; and in Stewart's disposition to Drummond, in 1692, No 79. p. 3297. the Lords found his going out in a boat on the Forth to the fishing, and marroting, as pregnant and equipollent a deed, as his going to his parish church of Dunfermline. Some of the Lords thought his being hydropic in February, and dying of it in September, instructed sufficiently that he laboured under that distemper in August, when he signed the disposition, and so was incapable by law as *constructione juris* then *in lecto* : But the plurality thought the going to kirk and market so clearly proven, that they sustained the disposition, and assolizied from the reduction *ex capite lecti*. It is not every going to kirk and market that will satisfy the law. I suppose a man in the paroxism of a hot raging fever, when their blood is exalted by the agitation of the animal spirits, and they have more than ordinary strength, should run to kirk and market, after a disposition signed by them. I believe no body will think this answers the design of the law, which is to give some mark of their recovery, though afterwards they may relapse and die of the same disease : And upon this ground to prevent clandestine attempts, the act of sederunt 29th February 1692, has most rationally provided, that the going to church when there is no congregation there, or going to the market, not in market time, when there is no confluence of people to observe him, shall not be sufficient to validate any prior right ; for the custom was to go to the old kirk (that always stands open) with his notary and picked out witnesses at his back, and make a turn or two when there was no other body there, and then go to the Creams, and buy some little penny worth and so return home. Which abuse THE

No 91.
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* See This case, mentioned p. 3298.

No 91. LORDS condemn, and declare they will not sustain, in time coming, any such practice.

Fol. Dic. v. 1. p. 219. Fountainball, v. 2. p. 683.

1725. January 28.

ALEXANDER RAGG Merchant in Aberdeen, *against* GEORGE FORBES and ALEXANDER DOUGLAS Merchants there.

No 92.

The Lords found the alternative of having gone either to kirk or market relevant to support a disposition challenged on the head of death-bed.

WILLIAM RAGG (after he had contracted the sickness of which he died) made a disposition of his heritage and heritable effects to the defenders, his brother-in-law and nephew, which contained a full power to the disponent to revoke, alter, and innovate at his pleasure, or to burden the right with what sums of money he should think fit, without consent of the disponees. Thereafter, and within a few days of his death, he granted two several rights of the same tenor, one in favours of Alexander Forbes, and the other of Margaret Ragg, by which he bound and obliged him, his heirs and successors in his lands and heritages, to make payment to them of L. 2000 Scots equally between them; and there was a clause adjected, whereby it was provided and declared, that in case his heritage should not amount to the sum of L. 2000 Scots, that then Alexander Ragg and Marjory Forbes should be holden and obliged, each of them to accept of the just and equal half of the said heritage and heritable effects, in full payment and satisfaction of those bonds.

Alexander Ragg, as apparent heir to William, insisted in a reduction of this disposition upon the following grounds: *imo*, That it was executed on death-bed; to which it was *answered*, that the granter had gone either to kirk or market unsupported, after signing the disposition; and in support of this defence, the decisions, Pargillies against Pargillies, No 85. p. 3304.; Lord Balmerino against Lady Cowper, No 77. p. 3292., and the act of sederunt 1692, were adduced. *Replied*, That the alternative was no qualification of convalescence in terms, but the defenders ought to qualify and instruct, that the disponent had gone both to kirk and market, because the law of deathbed being consuetudinary, the relevancy of this defence against it must be determined from the acceptance in which our lawyers have taken it, who have constantly conjoined both members in their treatises and pleadings; and likewise from the sense of the nation with respect to this question, which appears from the decisions, Shaw against Gray, No 32. p. 3208., and Maxwell against Fairly, No 84. p. 3303., in which the parties who endeavoured to validate a disposition, never rested their endeavours, by going to kirk or market, but attempted to go to both.

THE LORDS found it sufficient to support the right quarrelled, that the defunct, granter thereof, went to kirk or market, after granting the same; but found it relevant for eliding the same, that the defunct was supported, to be proven *prout de jure*.