

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*.

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 *ius 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-