

No 100.

*Answered*; The qualified defence is not relevant to import health, nor equivalent to the going to kirk or market: For, 1. The defunct's going in coach, contrary to his former custom, is an argument of great weakness; and the reason of the law's pitching on kirk and market is, because there indifferent and unsuspected witnesses will be found; and a person will not willingly expose himself in public. But if men were allowed to perform the *indicia sanitatis* before picked out witnesses and confidants, heirs could have no security against death-bed deeds.

THE LORDS repelled the defence as qualified.

*Harcarse, (LECTUS ÆGRITUDINIS.) No 660. p. 189.*

1694. February 20.

LADY SCOTSTOUN and COLQUHOUN of Tillihaven *against* DRUMMOND of Innermaith.

No 101.

THE following acts to prove re-convalescence sustained equivalent to going to kirk and market, viz. going from Edinburgh to Inverkeithing, to assist at the election of a Commissioner to Parliament, spending the whole day in a boat at sea in the way of diversion, walking in the Lady Home's yards, and visiting prisoners in the tolbooth.

*Fol. Dic. v. 1. p. 219. Fountainball.*

\* \* \* See This case, Section 10. *b. t.* No 79. p. 3297.

1736. November 24.

JAMES Earl of ROSEBERRIE and His CREDITORS, *against* Lady MARGARET and DOROTHEA PRIMROSE.

No 102.

In a reduction, it was proved, that the defunct, after granting the deed challenged, had come into Edinburgh from his country seat some few miles distant, gone to the Cross betwixt twelve and one, walked there half an hour unsus-

ARCHIBALD Earl of Roseberrie, after contracting the disease of which he died, disposed part of his heritage to his younger children; of which the present Earl brought a reduction on the head of death-bed; and, a proof having been allowed to both parties, the substance thereof amounted to this, That the grant-er, some months before the date of the deed, was seized with a *diabetes*; but thereafter growing better, so as to be able to go about his ordinary affairs, he one day rode into Edinburgh, lighted at the Grass-market, and from thence came up to the High-street, and walked at the Cross for a considerable while, betwixt twelve and one o'clock; but, having rode out that evening to Dalry, he met with such stormy weather by the way, as occasioned his disease to return upon him, of which he died in a fortnight thereafter.

At advising the proof, it was *argued* for the Earl, &c. *imo*, The going to kirk and market unsupported, is not a *præsumptio juris et de jure* of convalescence; for, if there are evident tokens of the continuance of the indisposition, it will be sufficient to exclude the presumption of recovery, arising from the party's going to kirk and market. So says Lord Stair, p. 601. (623.) 'That the presumption of convalescence, by public appearance at kirk and market, may be elided by contrary evidence; particularly, if there were evident tokens of the continuance of the sickness,' &c. Now, if this is the law, surely a proof, as there is in the present case, (by the granter's physician and surgeon) that he had the disease upon him the day upon which he came to town, is sufficient to take off the presumption. *2do*, Though going to kirk and market has been found a presumptive evidence of re-convalescence, yet equivalents have not hitherto been admitted; for a party's going publicly abroad has not the same effect in law, as going to the kirk or market: *e. g.* To go to a field conventicle, to a wedding, or to a court of justice, would not be equivalent to going to kirk and market; because the law allows no other presumptive evidence, but the going to kirk in time of divine service, or to market in market-time. Now, to apply this to the point in hand, it is not pretended that the defunct went to the kirk; and, with respect to the market, the Cross is no market-place for any thing whatsoever: The town has several other places for selling commodities, and to which these must be brought before they are sold; nay, persons acting otherwise are punishable. But, supposing it were a market-place, the defunct's coming there is not enough, unless it appear he came in market-time; for, if it was not the market-day, the coming to the market-place goes for nothing. Now, here the proof is silent what day of the week the defunct walked at the Cross.

*Answered* for the disponees; If by re-convalescence the pursuers mean an absolute recovery, so as to be out of danger of dying of the disease, no such thing is required; the legal re-convalescence is only to be so far free from the influence of the distemper, that a man may follow his ordinary affairs; such as going a journey, or to kirk or market, where multitudes meet, and business is done. If the granter can do this, without failing in the attempt, or being defeated by it, he is deemed out of the case of death-bed; which is Lord Stair's opinion, who treats this very question, in the decision, 26th February 1669, Pargellies, No 85. p. 3304.; where the Lords assoilzied from the reduction, notwithstanding there was a proof of the continuance of the sickness, in regard the defunct went to the market unsupported; which holds with greater force here, as the granter came to the Cross without any particular view to validate the deed. Nor is it to the purpose, the disease was then upon him; seeing its effects were then suspended, so as they did not hinder him from going about his business; were it otherwise, this absurdity would follow, That persons subject to the gout and gravel, and who often go abroad with such ailments upon them, would be considered as on death-bed.

No 102.  
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The Lords re-  
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No 102.

To the *second* it was *answered*; In fact, the market cross stands in the market-place, although the magistrates have appointed, for the conveniency of the lieges, other places for selling commodities; at the same time, the area round it is the only place where herbs and fish are sold, and where the merchants keep their exchange. *Lastly*, As to the observation, That it does not appear the Earl was there upon a market-day, it is sufficient to observe, That from some circumstances of the proof, it is probable it was not on a Sunday; and the rest of the week, there is a fish-market and daily exchange held about the Cross.

THE LORDS repelled the reason of reduction.

*G. Home, No 35. p. 66.*

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S E C T. XIII.

Apparent Heir's Consent.

No 103.

1672. *July 16.*GRAY *against* GRAY.

A MAN, upon death-bed, disposed his estate to his daughter, (apparent heir) and her husband, in conjunct fee, whom failing, to her husband's heir. The daughter and her husband bruiked the subject several years, and never reclaimed, or raised any process against this death-bed deed; yet this possession of the apparent heir being under the influence of her husband, was not found an homologation to debar a posterior apparent heir from quarrelling the same.

*Fol. Dic. v. 1. p. 219.*

\*\*\* *See* This case Sect. 3. *b. t.* No 16. p. 3196.

1685. *January 9.*LAURENCE POUR *against* Bailie CHARLES CHARTERIS and AGNES DEANS.

No 104.

A deed was in favour of an immediate apparent heir, whom failing, to strangers. The heir died an infant,

THE LORDS advised the case between Pour and Pour (and Deans.) Laurence Pour is interdicted to sundry persons; his brother *in lecto* makes a disposition of his estate in favours of sundry persons, with a substitution, and some of the substitutes are Laurence's interdictors. Laurence is moved to ratify it, on this