APPENDIX.

PART I.

DEATH-BED.

1776. *July* 9.

JOHN FAICHNEY, and his Curators ad litem, *against* WILLIAM and GEORGE FAICHNEY, Merchants in Perth.

No. 1. Whether being at church and market is to be considered as *probatio probata* of convalescence?

THE deceased Mr. Faichney, Minister of Collace, about a month before his death, disponed to the defenders William and George Faichneys, his brothers german, equally betwixt them, the lands of Cowbyres of £85. 10s. Sterling of yearly rent, besides certain tenements in Perth, worth about £400. but under the burden of £800. Sterling to his nephew and heir at law John Faichney, the pursuer, and his Brothers and Sisters, who were eight in number, equally among them.

The Rev. Mr. Faichney having died at the age of 66 years, and about a month after granting this disposition, his heir at law, insisted in a reduction of this deed upon two grounds,—Incapacity of the granter,—And his not having survived the execution of the deed for sixty days, which rendered it reducible *ex capite lecte*. A proof having been allowed to both parties, it appeared that no actual incapacity could be established against the deceased; that he was considered to be in a dying condition before the execution of the deed; that at that time he laboured under the indisposition which terminated in his death, being a general decline of nature, with some appearance of a paralytic disorder, and that he died within a month after executing the deed; but that he was perfectly sensible when the deed was executed, and had afterward continued to transact some of his ordinary business, and had been both *at church and market*, subsequent to that period: It was, however, at the same time proved, that he had not gone to Church and market in a convalesced state, but, as he expressed himself, "in order to confirm his will."

No. 1. The Court, in judging of memorials upon this proof, pronounced the following interlocutor, (26th January 1776): "Having advised the state of the pro-"cess, testimonies of the witnesses adduced, writs produced, memorials *hinc* "*inde*, and heard parties procurators thereon, they repel the reasons of reduc-"tion, assoilzie the defenders, and decern."

The heir at law, however, stated in a reclaiming petition, That the law of death-bed is not at all founded upon the idea of an actual incapacity in the granter, because actual incapacity is a good ground of reduction at whatever time the deed is executed; so that if it was requisite, there would be nothing peculiar in the law of death-bed. Moreover, it has been found that where actual incapacity is not proved, a *settlement of moveables*, however valuable, will be sustained, though executed the last hour of a man's life. Neither is it necessary in a reduction *ex capite lecti* to prove that any undue means were used for obtaining the deed. These means are always used in the most secret manner *inter privatas parietes et remotis arbitris*; so that a proof that they were really practised in obtaining settlements becomes in most cases impracticable. This very evil was one of the chief inductive causes of establishing the law of death-bed, which has in general established a legal incapacity in dying persons to dispose of their heritage as the most effectual method of preserving the peace and quiet of persons in that situation against improper importunity and solicitation, which in many cases might be attended with the grossest injury and injustice to them and their representatives.

It is likewise nothing to the purpose although there should be the clearest proof of an *ennia voluntas* upon the part of the testator to execute and support the settlement: For the law of death-bed does not at all proceed upon the idea that the deed was not the will of the defunct. If it could be shown that such was the case at any period, it would be a sufficient ground for setting aside the settlement, even although the granter was in perfect health at the time the deed was executed. In the same way the rationality of the deed is totally out of the question; for as a reduction *ex capite lecti* is founded on the want of power in the defunct, rationality can be no reason for supporting a deed which the granter had no power to make. Thus, it is held to be established law, that bonds of provision in favour of younger children, if executed in death-bed, cannot be supported to the prejudice of the heir, although it cannot be disputed, that such bonds are of all others the most rational deeds.

In establishing death-bed, it is by no means necessary to prove that the person was at the time labouring under a *morbus sonticus*: It is of no moment what was the nature of the distemper, or, whether it was a violent or a lingering disease, provided it ended in death. So that before the act 1696, a man might have been on death-bed for several years. This doctrine is accordingly so laid down by Lord Stair. "That it is not necessary to allege or instruct that it "was *morbus sonticus*; January 7th, 1624, Shaw *contra* Gray, No. 32. p. 3208; "neither that the defunct was bedfast when the deed was done; February 1st,

No. 1.

"1622, Robertson *contra* Fleming, No. 73. p. 3290." If so stood the law before the act 1696, when a person might have been whole years upon death-bed, how much more so must it necessarily stand now when that period is limited to sixty days? When a person therefore is in a sickly state, and is declared by his physicians and persons around him "to be in a *dying state*," it is of no moment whether it was old age or any other disease or infirmity under which he laboured; and so it has been found by the decisions of the Court, 30th July 1635, Richardson Lord Cranstoun *contra* Sinclair, No. 64. p. 3210. where a sale of lands made by a person paralytic a year before his death, and when he was *sound in judgment and understanding, and in the constant exercise of managing all his affairs*, was found reducible *ex capite lecti*, unless he had come abroad after it. And in another reduction *ex capite lecti*, it was offered to be proved, that, though the defunct was confined to the house, having broken his legs so that he could not go to kirk or market, he was notwithstanding in perfect health when he granted the bond, but this defence was repelled; 25th February 1668, Dun against Duns, No. 76. p. 3291. As therefore it is proved that the defunct laboured under the disease of which he died before executing the deed, the question comes simply to this, whether he had legally and properly convalesced before his death? Now here it is to be recollected, that the going to church and market does nothing more than establish a presumption of convalescence, but the presumption from thence arising is not a *presumptio juris et de jure;* because private and domestic acts, however much they may indicate health in the party, are not admissible as a proof of convalescence. The law, in order to prevent the true state of the person from being disguised by partial witnesses, has required that he be exposed to public view, that his true state and condition may be judged of by impartial and unsuspected witnesses; so that the pursuer of the reduction may have it in his power to prove, that notwithstanding of going to church and market, yet the person still laboured under the disease, if the fact really stood so.—This is clearly laid down by Lord Stair, B. 4. Tit. 20. § 46.—"The defence of public appearance pre-"sumes convalescence, unless the contrary appear, as if there were evident "tokens of the continuance of the sickness either by the view of the party's "countenance, or by fainting and vomiting in going or returning." This same doctrine also is clearly supported by Lord Fountainhall in his observations subjoined to the decision, 5th December 1711, Crawford *contra* Brichen, No. 91. p. 3312. where he supposes the very strong instance of a man, during the paroxism of a raging fever, having run to kirk and market after a disposition signed by him, but which there can be no doubt would not have the effect of validating the settlement. If the going to church and market established a presumption of convalescence *præsumptione juris et de jure*, it would lead to the most absurd consequences.

As therefore it evidently appeared by the proof, that the defunct looked very ill in church; and instead of appearing to be in a state of convalescence,

No. 1. the witnesses state that he "had a dying appearance," and "that he looked "very ill, and like as if death was coming on him;" the result arising from his appearance on this public occasion must have been, that he had not convalesced, but laboured under the disease of which he died.

Besides, the very mode in which the going to church and market was performed, is not sufficient to afford even presumptive evidence of convalescence. It is here necessary to observe, that there is a very material difference whether the going to kirk or market was occasional and a matter of course, or whether it was done for the very purpose of supporting a deed recently made. This distinction is clearly marked by Lord Stair, B. 3. Tit. 4. § 28. "But where the kirk and "market is upon design, the least defect in the exact performance will render "it ineffectual. And so in the case of the disposition made by Lord Cupar, "June 28th, 1671, No. 77. p. 3292. it having been evident that it was of de-"sign to validate the disposition, that the next day after the disposition my "Lord went to the market at Cupar; the laying his hand upon Thomas "Ogilvie's hand who walked by him, and that only at some times, and in rugged "places, where he was accustomed to take any walking by him by the hand "before, yet, seeing he put nature to the utmost stretch to manifest health by "that act, and could not fully perform it, it was not found sufficient, but he "was found to be supported."

In this case it has been proved, that the defunct, although he had been in use to go to church on foot, yet had gone on horseback on that occasion, and that he received assistance, both in mounting and dismounting, which he never before had received. That he did not come in till near the middle of the lecture, and had gone out before the end of it; and that when he went to market, he was put upon his horse by assistance, and never dismounted until he was taken off his horse at home, so that his horse only walked through the market and returned, which so far from affording evidence of health and convalescence, proves the very reverse, and shows that after *putting nature to the utmost stretch*, he could not effectuate what he intended. There was therefore clearly a defect in the exact performance, which must render the attempt ineffectual, for when the law has pitched upon the going to church and market as a proof of health, it necessarily supposes that the act must be performed in the same manner as it is done by a person in health, and particularly by that person who is attempting to validate his settlement thereby.

It was answered by the disponees, That the only disease or symptoms of a disease, under which the defunct seemed to labour at the period of executing the settlement in dispute, amounted to nothing else, than the gradual decay of nature. That old age is properly no disease; and that therefore, as the defunct continued to transact his ordinary business after granting this disposition, he cannot be understood to have laboured under such a disease as the law of death-bed meant to speak of.

No. 1.

But even supposing that the defunct had laboured under the disease of which he died, at the time of executing his settlement, yet as he afterward appeared to have been of sound understanding, and to have transacted his ordinary business, these circumstances, established by a variety of unsuspected witnesses, are equipotent to the legal proof of convalescence by being at church and market. But, besides, the legal acts of convalescence themselves being proved must beyond all doubt validate this settlement. The pursuer has endeavoured to avoid the force of the defunct's having been at church and market, by insisting that it only affords a *præsumptio juris* of his convalescence, and not *præsumptio juris et de jure*. In short, that such public acts may be redargued by a contrary proof, showing that in spite of that public appearance, the defunct still continued to labour under the disease of which he died. The authorities quoted by the pursuer on this subject seem only to amount to this, that the going to kirk and market must not be the effect of the very disease, under which the granter of the deed laboured at that time. But the law does not require, in order to validate a settlement, that the person who makes it should be restored to a complete and confirmed state of health: Nothing more is required than that he should survive sixty days, or go freely and unsupported to kirk and market. Now, agreeably to the pursuer's doctrine, the going to kirk and market would be of no avail, unless it could at the same time be proved that the disease was completely cured. But such an inquiry is hardly possible, and the going to kirk and market is held as the legal proof of convalescence for the very purpose of excluding all such disquisition. Going to kirk and market, then, freely and unsupported, by a person in the knowledge of the acts he has performed, is *probatio probata* of such convalescence, as is sufficient to bar a reduction *ex capite lecti*. This doctrine is accordingly so laid down by all our lawyers. Lord Bankton, B. 3. Tit. 4. § 41. observes, "That if the going to the church and "market is proved, convalescence in the judgment of law is thence inferred, "though the party continued sickly to his death, and never actually recovered, "unless undoubted symptoms of disease at the very time of performing such "act inferring convalescence appeared." Both Lord Stair, B. 3. Tit. 4. § 28. and Mr. Erskine, B. 3. Tit. 8. § 96. seem to be of the same opinion. Agreeably to these principles also, in a case Pargilles against Pargilles, observed by Lord Stair, No. 85. p. 3304. the point seems to have been fully established: "The defunct having gone several times to the market, and walked there un-"supported, and other times abroad after the disposition challenged, sometimes "a foot, and sometimes on horseback; this was found relevant to elide the "reasons of reduction on death-bed, notwithstanding of his being helped up "and down stairs, and to and from his horse, and by leading his bridle, and "that notwithstanding he continued sickly till his death."

It is evident, then, that the going to church and market being held as the legal proof of convalescence is founded upon this circumstance, that by such a public exhibition, both the situation of any person's body and mind may be

No. 1. clearly discernible by a number of unsuspected witnesses, who can easily discover whether these acts of convalescence are the free and voluntary acts of the person himself, or if he is a mere machine, carried and supported by others. Now, none of the witnesses even insinuate that Mr. Faichney was not in the full possession of himself, and in the full knowledge of the acts he was performing at the time they saw him at kirk and market.

With regard to the defunct's having gone to church on horseback, and received some assistance in mounting and dismounting, it was answered, That the going on horseback could be no objection; and that there was nothing extraordinary that an old man at sixty-six, who happened likewise to be a very bad horseman, should have received a little assistance in mounting his horse. When the law talks of going to kirk and market, freely and unsupported, it does not mean every incident of natural and ordinary assistance, such as every man at the same period of life might take.

As to Mr. Faichney's not having remained in church during the whole service, it does not seem to have arisen from any pressure of disease, but from mere conveniency. And there is not a single word either in the statute 1696, in the act of Sederunt 1692, or in the writings of any of our lawyers, from which it may be inferred that the granter of the deed should remain in church during the whole course of the service.

Mr. Faichney fulfilled both the words and the spirit of the law. He went to church unsupported, and he remained long enough for the observation of the congregation; so that he believed he had done every thing which the law could require for validating his settlement.

The pursuer has made a distinction, taken notice of by our lawyers, betwixt the going to kirk and market being occasional, and its being done for the purpose of supporting a deed recently executed. The jealousy of the law, no doubt, presumes that persons who could impetrate a deed in their favour, could also prevail upon the granter to perform the mechanical part of going to kirk and market, and therefore it strictly examines whether such performance is his own free and voluntary act, or whether he is supported and carried there by others. But if his freely performing these acts arose from an inclination to validate his settlement, certainly the *enixa voluntas* of the testator is to be favourably construed in support of the deed.

As the going either to church or market will establish convalescence, any one of them is sufficient. And therefore with regard to Mr. Faichney's appearance in the market, it is only necessary to observe, that although he did not alight there, still he answered the object of the law by exhibiting himself to the numerous spectators.

The Lords, 9th July 1776, altered their former interlocutor, reduced the disposition, and decerned and declared accordingly.

Act. *M'Queen and Nairn.* Alt. *D. Dundas.* Agent, *A. Elphinstone.* Clerk, *Campbell.*
D. C.