in death; but he enjoyed all his faculties, transacted his ordinary business, and went both to kirk and market, as he expressed himself, 'in order to confirm his will.' THE COURT sustained the reasons of reduction. *See* APPENDIX. No 94.

Fol. Dic. v. 3. p. 174.

1787. *December* 11.

ROBERT TAILZEOUR, *against* ELIZABETH-JEAN TAILZEOUR.

No 95.
Being in a market-place, though only for the purpose of visiting a friend, found sufficient to infer reconvalescence.

THE lands of Barrowfield, having been formerly destined to heirs-male, would have descended, after the death of the late proprietor, to Robert Tailzeour, his uncle, to the exclusion of Elizabeth-Jean Tailzeour, his sister. On 9th April 1782, however, Mrs Tailzeour was called to the succession by a deed of settlement; for setting aside which, a process of reduction, on the head of death-bed, was brought.

It appeared from the proof, that in February 1782, the deceased had been seized with a consumptive disorder; and that, in the following month, he went to Edinburgh to take the advice of physicians; who gave it as their opinion that he would not survive long; and on the 22d April he died, only 13 days after the date of the settlement.

On the other hand, it was proved, that as the settlement was most rational, by preventing the exclusion of a sister, with whom the deceased had always lived on the most friendly terms; so to the hour of his death the testator had been in the full possession of his faculties; that a very few days after the execution of the settlement, he had gone to the town of Montrose, to dine with his sister, and on that occasion alighted from his carriage without help; and that, after standing some time in the streets, and conversing with some of his acquaintance, he went into his sister's house, which is in the market-place; and this happened during market hours.——The pursuer

Pleaded; Were the law of death-bed founded on a presumption merely, that every mortal disease was accompanied with such a deprivation of reason, as disqualifies a person from the right administration of his affairs, it might be obviated by evidence, either arising from the settlement itself, or from extraneous circumstances. This, however, would be quite inconsistent with the object of the regulation, which was introduced for the humane purpose of preserving the peace of dying persons, and for preventing settlements which had been made or approved of by the party while in full health from being set aside, at a period when it was at least a possible case, that owing to the imperceptible decay of the mind, which so often corresponds with that of the body, the deceased had been influenced by such considerations as at any other time would have had no weight with him. Thus, though it should appear that a settlement made

No 95. on death-bed was highly reasonable, and although no circumstances could be alleged from which either an improper influence on the part of the person called to the succession, or an ill-grounded resentment against the heir at law, could be discovered, still the deed, as executed by one under a legal disability, must be ineffectual.

As, therefore, it has been proved, that the deceased, before making out the deed in question, had contracted that illness which was the occasion of his death, the only thing to be considered is, whether any proper evidence of the reconvalescence has been established, so as to bring this case under one or other of the exceptions that have been made to the general law. That he did not, by surviving the 60 days, remove the legal challenge, agreeably to the statute of 1696, c. 4. must be admitted. It seems equally clear, that the other requisites of his going to kirk or market have not been complied with. It is true, that posterior to the date of the settlement, the deceased was in the market-place, and on a market-day; but this alone never can be thought to answer the purpose of the law, which was, not only that testators should be brought into a situation where their conduct might be observed by impartial witnesses, but that, in the course of the proceedings which usually take place there, an opportunity might be given of examining the real state of their minds. Such an opportunity could not be afforded by the testator's having merely appeared in a market-place in the way of travel, or, as in the present case, for the purpose of visiting a friend.

Answered; In order to a proof of legal reconvalescence, by the testator's being at a market, it is only necessary that he should be in the market-place, during market hours, unsupported. It is no more required that he should buy or sell while there, than that, in the case of his going to church, he should preach. Indeed, the circumstance of his not attending minutely to the observance of the ordinary formalities ought to go a considerable length in support of the deed. For, if the mere going to kirk or market, when performed for the sole purpose of giving effect to a settlement, is to be held sufficient, though it must afford the clearest indication of the testator's declining health, it would be unreasonable that the same event should not be attended with the like effect, when, so far from going to either of those places with a view of excluding the legal challenge, it appears that none of the parties imagined this to be necessary. This reasoning has been confirmed by several decisions. In that of the Earl of Roseberry *contra* his Sisters, 29th July 1736, No 102. p. 3322. the deceased came to Edinburgh from his country seat, and afterwards went to the cross, between the hours of twelve and one in the afternoon; and although it was objected, that the cross was not a market-place, the objection was over-ruled.

THE LORDS, not unanimously, 'sustained the defences.'

Reporter, *Lord Ankerville.* Act. *Wight, Maclaurin.* Alt. *Lord Advocate, Abercromby.*
Clerk, *Menzies.*

C. *Fol. Dic. v. 3. p. 175. Fac. Col. No 11. p. 19.*