

---



---

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

---



---

PATTERSON'S TRUSTEES v. JOHNSTON and  
HUSBAND.

1816.  
June 24.

THIS was an action of declarator of *liege poustie*.

Found that a person died of a disease different from that of which he was ill at the time of executing a trust-deed. †

DEFENCE.—Deathbed.

ISSUES.

“ 1st, Whether, on the 11th May 1815, the  
“ date of the trust-disposition executed by the  
“ said deceased Ralph Patterson in favour of  
“ the pursuers as his trustees, the said Ralph  
“ Patterson had contracted the disease of which  
“ he afterwards died ?

“ 2d, Whether, on the 26th May 1815, or  
“ any other day subsequent to the date of the  
“ said trust-disposition, the said Ralph Patter-  
“ son went to the market of the town of Ber-  
“ wick, or returned from the same unsup-  
“ ported ?”

It appeared in evidence, that this gentleman, in the month of April and beginning of May,

PATTERSON'S  
TRUSTEES  
v.  
JOHNSTON &  
HUSBAND.

was attacked with symptoms indicating an affection of the prostate gland. These symptoms abated, and towards the end of May and beginning of June he was so much better as to be able to walk in his garden, and to go to several houses in Berwick. In the beginning of June his health was so much improved, that most of his medical friends ceased attending him. In the forenoon of the 11th of that month, he paid several visits in the town of Berwick, and drank wine, (which usually disagreed with him,) and ate biscuit or cake. In the afternoon he paid one or two more visits, and supped with a friend, where he ate fried eggs, and drank a little brandy and water. The day following he had a violent attack of bilious vomiting, which he said had thrown him back eight days, and he died on the 21st of that month.

During his first illness, he was attended by Dr Robertson and Messrs Gilchrist, Stevenson, and Pattison. The last of these gentlemen had not practised medicine for some time, and did not see him during his second illness; he and Dr Robertson thought his illness an affection of the prostate gland, which they (as well as Dr Gregory) consider a growing and incurable disease, at least in an old man. Gil-

christ and Stevenson thought him on the 8th June so much recovered from the first illness, that the one expected he might recover his former strength, and the other thought he might live for years ; they considered the disease of which he died quite different from his former illness ; and Dr Gregory, to whom the case was minutely stated, from the evidence of the other witnesses, was of the same opinion. Dr Robertson, on the other hand, did not conceive that a few eggs and glasses of wine could, even in a very indifferent state of health, produce death ; at the same time, he concurred with the two other medical gentlemen in stating, that Dr Patterson had no sickness and vomiting during his first illness ; and that, during the second, none of the symptoms of the first returned, except a disposition to make water more frequently than is natural, which last fact was not mentioned by the two surgeons.

With regard to being at market, it was proved that, on the 26th May, Dr Patterson went, between eleven and twelve o'clock, to the shop of H. Ross, at the foot of Hydehill, one of the most public streets in Berwick ; that it was the day of the annual fair ; that there were a number of strangers in the shop ; that meat was hung out at the door as on a

PATTERSON'S  
TRUSTEES

v.

JOHNSTON &  
HUSBAND.



PATTERSON'S  
TRUSTEES

v.

JOHNSTON &  
HUSBAND.



market-day ; and that the corn market is held at the top of the street, (between twelve or one and three o'clock,) but that, owing to the steepness of this street, it is not easy, from the corn market, to see a person at the foot of it. It was also proved that this street is not included in the perambulation by the magistrates on the fair day.

Dr Patterson was in the habit of walking with his hands behind his back ; but, on this occasion, he went arm in arm with Major Foster, to and from the middle of the street opposite Ross's door. After returning home, he immediately went out alone.

A question being asked as to the Doctor's age, and his own opinion of his complaint,

**LORD CHIEF COMMISSIONER.**—This hearsay evidence of what the party said of his age is incompetent. If his age is of any consequence, it must be regularly proved.

*Cockburn*, for the defender.—There is no occasion to go into the history of the law of deathbed ; it is fixed that going to kirk or market is the only proof of convalescence. The Court have explained what is a market.

Did he die of the same disease? Dr Pat-

It is incompetent to prove a person's age by his own account of it.

Ersk. III. 8.  
§ 95 and 96.

terson, a man on the extreme verge of life, has an attack of an incurable disease ; he afterwards has an attack of bilious vomiting, which is incident to a man in perfect health, and dies within six weeks of his first attack. Can you suppose that he died from drinking a few glasses of wine, and not from his growing and incurable disease ?

PATTERSON'S  
TRUSTEES  
v.  
JOHNSTON &  
HUSBAND.



Act. Sed.  
Feb. 29, 1692.

A shop is not a market, neither is merely buying and selling going to market ; the act of sederunt expressly says so. Were the whole of Berwick, on the day of the fair, a market, Dr Patterson had only to step out of his house, and he was in the market. Hydehill is not the market. “ The History of Berwick ” says that, 40 years ago, they applied to have the market *extended* to Hydehill. He was neither in the place, nor at the hour of the corn-market. Besides, he was supported.

*Cuninghame*, in opening the case, and *Jeffrey*, in reply, contended,—Going to kirk and market is not the only proof of convalescence.

The question as to the disease is properly one of medicine, and the medical opinions must decide it. Dr Robertson had formed a theory as to Dr Patterson's first complaint ; but what would he have said if he had seen him for the

PATTERSON'S  
TRUSTEES  
v.  
JOHNSTON &  
HUSBAND.



Earl of Rose-  
berry and Cre-  
ditors, v. La-  
dies M. and D.  
Thomson, 24th  
Nov. 1736. M.  
3322.  
Laird v. Kirk-  
wood, 9th July  
1763. Dic. 3.  
174. M. 3315.

Act. Sed.  
Feb. 29, 1692.  
1696, c. 4.

first time on 8th June? You cannot inquire into all the circumstances that prepared him for being killed by the cake and wine. There was a great difference proved in the symptoms of the two complaints.

If we prove that he was at market, the presumption is in favour of the deed, and they must prove the support. It is not necessary that he should be in the market, if he is exposed in the market-place to the observation of indifferent persons. Hydehill is a market. The act of sederunt is only intended to guard against going to a private shop at unseasonable hours. Was he supported? The act 1696 makes it sufficient that the person lives 60 days, though he dies of the same disease. Was his going to market a "straining of nature," and before select witnesses? He had no idea of rendering his settlement valid. He went on a subsequent occasion, alone, six times as far as the market.

The LORD CHIEF COMMISSIONER, after detailing the medical evidence, observed,—The Jury will attend particularly to Dr Gregory's evidence. Upon a very particular and correct statement of the evidence given by the other medical men, Dr Gregory has been asked

whether he considered the death to arise from the irregularity, or from the previous disorder, and he has given it decidedly as his opinion, that the death arose from the irregularity, and not from the previous disorder. This coincides with the opinion of two of the witnesses, and it is for you to consider whether there be any testimony to affect that evidence. If not, then the law of deathbed does not apply, as it is necessary, to bring the case within that law, that the person should die of the disease of which he was ill at the time he executed the deed ; but if he died of another disease, though within the time, it has no effect on the deed. If this be your opinion, it is unnecessary to go farther ; but if you think he died of the first disease, it will be necessary to consider the second issue, whether, after executing the deed, he went to the market and returned from it unsupported ?

Upon that issue, if it becomes necessary to consider it, you may find the facts specially, so as to enable the Court of Session to decide whether the shop to which he went was within a market in the legal acceptation of a market ; or, I may direct you to find, that he did not go to a market ; for the purpose of having that question decided upon a motion for a new trial.

PATTERSON'S  
TRUSTEES  
v.  
JOHNSTON &  
HUSBAND.



PATTERSON'S  
TRUSTEES

v.

JOHNSTON &  
HUSBAND.



But it is unnecessary to settle this till your opinion is known on the other question.

As to the question of support, it does not appear from the evidence that he was supported.

The Jury “ Find a verdict for the pursuers,  
“ in respect the said deceased Ralph Patterson  
“ did not die of the disease which he had con-  
“ tracted previous to the 11th May 1815, the  
“ date of the trust-disposition executed by him.”

*Jeffrey and Cuninghame, for the Pursuers.*

*Cockburn and Forsyth, for the Defenders.*

(Agents, *Renton and Grant, w. s. and William Smith, s. s. c.*)

---

The defenders moved for a new trial, 1st, On the ground that the medical evidence had not been correctly stated to Dr Gregory; 2d, On the ground of *res noviter veniens ad notitiam*. The first was afterwards abandoned by the counsel for the defenders. On the second they were appointed to give in a condescendence, stating the new evidence, and the witnesses of whom they had recently obtained knowledge, and could not have known before.

The First Division of the Court of Session were unanimous in refusing the new trial. The Lord President observed, Practitioners must



bring forward their cases well and thoroughly prepared, but not overloaded. The Jury Court is an experiment, and it will shake the confidence of the country in the verdicts of Juries, if we grant new trials as easily as we receive reclaiming petitions. It will also double the expence, as in any case of mismanagement like the present, a new trial could only be granted on payment of the expence of the former trial. The rule as to the expences may be different if it is granted on the ground of misdirection.

PATTERSON'S  
TRUSTEES  
v.  
JOHNSTON &  
HUSBAND.



PRESENT,

THE THREE LORDS COMMISSIONERS.



LANDLES v. GRAY.

THIS was an action of damages for slander.

DEFENCE.—The accusation is false.

The pursuer is a fish-curer in Perth, and rents considerable fishings in different rivers in Scotland. As he did not reside in Perth, it was necessary to employ some one to manage his business there, and he accordingly entered into partnership with Mr Proudfoot, who was

1816.  
July 18.



A person using the same defamatory expression to two individuals at different times, one witness swearing to each time is sufficient.