

tended for, advance money, in the hope of recovering it from the opposite party, which ought not to be encouraged.

LORD CHIEF COMMISSIONER.—We should be extremely sorry were we called on to decide upon a technical rule, in opposition to the justice of the case; but here the technical rule is got quit of. Here there is a case with six Issues, and three are found for, and three against the party applying; and he has, on the whole, lost instead of gaining. The order must be for the balance of the accounts.

LORDS PITMILLY and GILLIES expressed their concurrence in opinion that the order should be for the balance.

DUMFRIES.

PRESENT,
LORD CHIEF COMMISSIONER.

M'CRACKEN, &c. v. PEARSON.

REDUCTION on the ground of death-bed.

**M'CRACKEN,
&c.
v.
PEARSON.**

1821.
September 14.

Deathbed.—
Found that at the date of a deed under reduction, the granter was ill of the disease of which he died; but that he went to, and returned from, the public market unsupported.

M'CRACKEN,
&c.

v.

PEARSON.



ISSUES.

“ It being admitted, that on the 27th day of
“ December 1819, the late Robert M'Cracken
“ subscribed the disposition and deed of set-
“ tlement in process, in favour of the defend-
“ ers, Robert Jackson, William M'Kie,
“ James Young, and John Kerr, bearing
“ date the said 27th December. It being
“ also admitted, that the said Robert M'Crac-
“ ken died on the 28th day of the said month
“ of December,

“ Whether, at the time the said Robert
“ M'Cracken subscribed the said deed, he had
“ contracted the disease of which he died? or,

“ Whether, on the said 27th day of De-
“ cember, and after subscribing the said deed,
“ the said Robert M'Cracken went to the
“ public market of the town of Dumfries,
“ and returned from the same: And Whe-
“ ther, upon the said occasion, the said Ro-
“ bert M'Cracken was supported?”

Dr Maxwell, a witness for the pursuer,
having stated that he had been informed
that the late Mr M'Cracken was ill,

Forsyth, for the defender, objects.—This is hearsay.

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&c.
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PEARSON.

LORD CHIEF COMMISSIONER.—They cannot ask this to prove the fact of the illness; but it is competent in reference to the opinion given by the witness.

Another witness was asked as to the regulation of the market days in Dumfries.

Parol evidence incompetent to prove regulations which have been reduced into writing.

LORD CHIEF COMMISSIONER.—Was that regulation reduced into writing? You may cross-examine him to this, in order to try the truth of his memory; but if it was reduced into writing, and if the evidence is tendered for the purpose of constituting a right, I can only take it from the writing.

Marshall opened the case for the pursuer, and stated the grounds of the reduction, and that the exception founded on in this case was, that the deceased went to market. But this was on a Monday; and there is an act of Charles II. prohibiting markets on Monday.

Forsyth, for the defender, stated—The act of Charles only prohibits large markets. The Act Sed. 17th February 1682, shews the meaning of the law. It is said there

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must be a grant of market ; consuetude makes law in burgh, and every day is a market for fish in Dumfries.

The meaning of the law of death-bed is, that the person should go to a place of common resort for buying and selling.—Ersk. B. 3. T. 8. § 96.

This person cannot be said to have been on death-bed, as he was ill of the same disease for twenty years.

Jeffrey.—In this case there is no dispute about the facts proved, and it is for you to draw a conclusion from them, or, if you prefer it, to return a special verdict. The only question is, what you are to find as to this person being at *market* and *unsupported*. Buying and selling in the open air is not enough to constitute a market. It must be on a day, and at an hour, when ordinary dealers are entitled to sell within the burgh ; and it is in evidence that Wednesday and Friday are the market-days in Dumfries.

In this case he went, in presence of picked witnesses, and was supported in the sense of law. He had a stick, and sat in the shop.—Stair, B. 4. T. 20. § 46.

LORD CHIEF COMMISSIONER.—(*To the Bar.*)—The questions of whether this was a

market, and whether sitting in a shop is support in a question of death-bed, are pure questions of law. If this is to go to the Jury, I must direct them in point of law; and they will apply the facts to the law, as stated; or if the Bar prefer it, the Jury may find a special verdict; and with that view I have noted the facts as a scheme of a special verdict, and shall read to the Jury the evidence applicable to each.

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&c.
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If I give the direction in point of law, then a Bill of Exceptions can be tendered to the law I state; and in this case, the only inconvenience is, that it forces one party to move the question. If a special verdict is found, the case will go back to the Court of Session to decide the law.

Though I think there would have been much weight in the argument urged by Mr Jeffrey, had it been soon after the time of Lord Stair, yet I find there are two cases which would lead me to state, that in this case the person went to market, and unsupported. The cases are referred to in a case tried in this Court; and in the last we have the opinion and decision of Lord Kames.—Patterson's Trustees, Vol. I. p. 76.—Earl of Roseberry, &c. v. Ladies M. and D. Primrose,

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&c.
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PEARSON.

24th Nov. 1736, M. 3322; Laird v. Kirkwood, 9th July 1763, M. 3315.

I do not, by this statement, wish to create any impression as to the decision of the question; and I am aware of the force of Mr Jeffrey's argument; but with these two cases presented to me, I cannot advise the Jury to find for the pursuer.

On the question of support, it appears that he was not supported by any person; and the support relied on I do not consider sufficient to warrant a verdict for the pursuer.

But if the Bar wish it, I shall state the facts to the Jury, in order that they may find a special verdict.

The Bar on both sides thanked his Lordship; but stated, that they were not in a situation to make impartial suggestions, as each would of course advise what they thought most for the benefit of their own client; and they therefore left it entirely to his Lordship.

LORD CHIEF COMMISSIONER.—(*To the Jury.*)—You have heard what has passed; and as the least expensive and most expeditious method of having this question discussed, I think you ought to find, That this person was under the disease of which he died.

On the other part of the case, my opinion

is, that he did go to the public market of Dumfries. You must therefore find that he did go to, and return from, the market, if you are satisfied of the fact that he went and returned in the manner described.

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&c.
v.
PEARSON.

With regard to the support, the evidence, I think, is, that he was not supported by any person, but that he used a stick, which he was accustomed to do. Sitting down differs as to the effect to be given to it, when a person goes on purpose to render his settlement valid. But though this was the purpose in the present case, yet, on my view of the law at present, his sitting down is not such as amounts to support, in the meaning of the law of death-bed.

Verdict—"For the pursuers on the first Issue, and for the defender on the second Issue, in both its branches."

Jeffrey and Marshall for the Pursuers.

Forsyth and J. Henderson for the Defender.

(Agents, *James H. Ross, w. s.* and *John Thorburn, w. E.*)