

PRESIDENT. The statute does not mean, under the phrase, *parties concerned*, to comprehend tenants.

On the 18th July 1782, "The Lords assoilyied the defender;" adhering to the interlocutor of Lord Braxfield.

Act. Ilay Campbell. *Alt.* H. Erskine.

1782. July 27. DAVID CRAWFORD *against* ELIZABETH KINCAID and DAVID CRAWFORD.

DEATHBED.

How the sixty days are to be reckoned—What constitutes Deathbed?

This was a reduction *ex capite lecti* of the settlement of the pursuer's brother. It appeared that the deed was executed on the 8th of November at eight o'clock in the evening. He had no formed disease, but had long been addicted to drinking to excess, which had totally ruined his health. The reduction was opposed by the defender, *first*, On the ground that the testator had lived long enough to exclude the law of death-bed; *secondly*, That the pursuer had not proved that the deceased had contracted any distemper before the deed was executed.

The deed was understood to have been executed on the 8th November, at eight o'clock in the evening, and the testator died on the 6th of January following, at two o'clock in the morning.

The following opinions were delivered :—

KAIMES. The law of deathbed was formerly the law of other countries as well as of Scotland. It was so in England until the reign of Henry VIII. It is a salutary one, but I do not see any proof of a formed disease.

HAILES. The Act 1696, cap. 32, has an expression precisely similar to that in the Act under our consideration. The ten days in cap. 32, have been interpreted, by a decision in Fountainhall, to be ten days complete; and *that*, in the most favourable case for a liberal interpretation, words a case of liberty.

BRAXFIELD. As to the first point, I highly value the law of deathbed. It is not a law introduced merely for the benefit of the heir, it is also for the benefit of the testator. Besides, the Act 1696 is a correctory law, and is not to be extended beyond its precise words. A man cannot be said to live for the whole space of 60 days, who only lives 58 and a few hours more. Had the testator lived another day, the question of *dies inceptus* might have occurred. As to the *second* point, there is no occasion to give a name to the disease. A man may grow weaker and weaker, and die without any formed disease at all, and yet his settlements may be reduced *ex capite lecti*. Here the testator was long ill: he

was ill before he executed the deed, and he grew worse and worse, but never reconvalesced. As the law is now modelled, it matters not whether there is a *morbis santicus* or not. Were there any proof of a new supervenient disease, it would be of more consequence.

GARDENSTON. As the case of the defender is favourable, we ought to guard against our prejudices, and not introduce, by the favour of the case, a dangerous precedent. It is plain, that the testator did not live out the sixty days; that is, sixty days, each consisting of twenty-four hours. There is clear evidence that the testator, when he executed the deed, was labouring under the disease of which he died. Two-thirds of mankind die without having their disease named. It is not the circumstance that this man was addicted to dram-drinking, which proves his having a disease; for there is evidence that he was confined to the house by reason of his valetudinary state, from which he never recovered.

MONBODDO. I hold that the testator died on the sixtieth day; for I reckon the day on which the deed was executed to be the first day. The law of deathbed is not common but correctory law. *Agitur de commodo*. When the question is as to *testamenti factio*, there is indeed an *incommodum* to the heir; but, in all cases, the advantage of one man must be the loss of another in patrimonial interest. I think, however, that the testator was sick of the disease of which he died; but that, in my view of the statute 1696, is of no moment.

KENNET. The testator did not live sixty days. I think that, if he had begun another day, he would have fulfilled the time. The *cause* of his disease was hard drinking; but the *disease itself* was formed before he executed the deed.

PRESIDENT. The law of deathbed is beneficial, and must be supported. I am clearly of opinion that the sixty days were not run. When a time is required by law, I look on the first day as one; but then I require fifty-nine days more, and those complete. Thus, in a case quoted, the 23d of November was the day of the marriage, so the year ended with the 22d November after. Mr Erskine observes, that in some cases *year* and *day* are required for giving legal effect: and that the day is only added for more certainty in proving the year to have been completed. *There a begun* day might be held *completed*. As to the second part, the testator had contracted a disease before he executed the deed, of which he never recovered; and he did not live for the space of sixty days after executing the deed.

On the 27th July 1782, "The Lords found that Thomas Crawford was on deathbed when he executed the deed: that he did not live for the space of sixty days after executing it; and therefore reduced as to the heritable subjects."

Act. J. Monro. *Alt.* Ilay Campbell.

Hearing in presence.