

1671. June 28. CREDITORS of BALMERINO against LADY COUPAR.

It is not necessary to prove that the defunct went both to kirk and market unsupported ; either is sufficient.

Going free to the market must include going free to the market-place, and returning back from the same, not being supported any part of the way.

Fol. Dic. v. I. p. 218.

* * * See this case Section 10. *b. t.* No 77. p. 3292.

1672. December 5. CLIELAND against CLIELAND of Faskin.

CLIELAND of Glenhove having no children, disposed his estate to Clieland of Faskin, of whose family he was descended ; his sister's son as nearest heir to him, did raise a reduction of the disposition, as being done upon death-bed ; and the defender having alleged, that the defunct having had a pain in his legs and feet, did thereby keep the house for many years before he died ; but that he contracted no inward disease when this disposition was made, being two years or more before his death, but at that time he was in perfect soundness of judgment, and of the same condition of health, as he had been for seven years before ; *2do*, Though it could be proven that he contracted any sickness, he perfectly convalesced and came abroad unsupported, when he gave sasine upon his disposition, *propriis manibus*, and did oft-times walk about his house, and did play several games at penny-stone, which was an exercise requiring far more strength than going unsupported to kirk and market, and returning, being so short a space, for no man was obliged to walk further than men did ordinarily come upon horseback to the kirk ; nor can it be controverted, that albeit going to kirk and market be the ordinary evidence of convalescence, yet there may be other evidences sufficient ; and that going to kirk and market cannot be the sole evidence of convalescence, as in the case if a person were lame, or had received a hurt in his foot or leg, by a fall, or otherways, that it did not arise from any inward disease. *3tio*, The defender offered to prove, that the defunct went to the kirk unsupported. The pursuer *answered* ; That his reason of death-bed stood most relevant, and was libelled in the ordinary form, *viz.* that the disposition in question was made after the defunct contracted the sickness, and went never abroad thereafter, until his death ; so that the contracting of his sickness being proven, and his dying before he went abroad, *probatis extremis præsuntur media* ; and as for the allegiance of his health, it is contrary to the libel, and sickness is more positive and pregnant ; neither can the acts equivalent be sustained, unless they were such as were clearly more pregnant to prove convalescence, than going abroad to the kirk in the time of the gathering of the

No 87.

Two witnesses deponing that the person alleged sick was supported when he went to kirk or market, was found to make a full probation, although many witnesses deponed *negative* that they did not see him supported ; and it was found that domestic deeds were not to be regarded for proving convalescence.