

she could be so exact and knowing as to crave a discharge of her tocher ; *2do*, To evince that he was truly satisfied, they did produce the said James's testament, bearing his acknowledgment, that he was satisfied of all he could seek of his wife, which they alleged was equivalent to a discharge. It was *replied* for pursuer, That presumptions by the law do not take away that obligation for the tocher, which being founded upon writ, behoved to be taken away *scripto* ; and as to the testament, that acknowledgment of satisfaction being made on death-bed, and importing no more but a legacy, it could not prejudice the heir, by diminishing of the moveables, whereby he would be relieved of moveable debts. THE LORDS did assoilzie from the reason of reduction, and found, that the husband and wife having lived so many years, and he having right *jure mariti* to all that was her's, albeit she had gotten no formal discharge of a tocher, it could not prejudice her of the provisions of her contract of marriage, specially he having declared upon death-bed, that he was truly satisfied ; and therefore, found the letters orderly proceeded upon the decret.

No 475.

*Gosford, MS. No 336. p. 157.*

1673. June 17.

THALLANE *against* ARCHIBALD ORROCK.

In a pursuit at Thallane's instance, as assignee by John Orrock to the sum of 100 merks, against the heir of Archibald Orrock, which debt was instructed by an article of Archibald Orrock's testament testamentary, wherein he acknowledged himself debtor in so much to the pursuer's cedent ; it was *alleged* for the defender, That the said testament could not constitute any debt against him, who was heir, the same being made *in lecto*, at which time he could not burden the heir. It was *replied*, That the defunct having given up the debt as due to him before his sickness, in fortification thereof it was offered to be proved, that he had intromitted with as much money which belonged to John Orrock, his brother's son, who was the pursuer's cedent, and had paid a year's annual-rent thereof, which was probable by witnesses, the principal sum being within L. 100. THE LORDS did sustain the summons, and repelled the defence, in respect of the reply ; so that the debt being so constituted and proved as said is, the heir was liable as well as the executor, reserving him his action of relief ; and so found, that a declaration on death-bed for a small sum, which might be proved by witnesses if the defunct had been living, being so fortified, might burden an heir, albeit only proved by witnesses.

No 476.

A man having, in a testament executed on death-bed, acknowledged a debt, the testament, supported by witnesses, relative to correspondent facts, was found probative against the heir.

*Eol. Dic. v. 2. p. 255. Gosford, MS. No 592. p. 338.*