No 477.

oblige himself to any fact, his obligation being liquidated, will be effectual against his executor; so here the defunct having obliged himself to dispone these lands upon payment of what was due to him, the liquidation of that obligement is the value of the land more than that debt; at least if it will not be effectual as a debt to exhaust the executry, it must be effectual as a legacy to exhaust the dead's part, which he might freely give away on deathbed; and therefore bonds granted by defuncts on deathbed, though not in the terms of a legacy or donation *mortis causa*, yet are sustained as equivalent thereto, to exhaust the dead's part; and if the defunct had obliged himself to dispone, and had adjected, that if his heir would not fulfil the same, he left in legacy in place thereof, his dead's part, it would have been valid, and so must be understood as implied. It was *answered*, That the law hath on good ground presumed, that men on deathbed are weak, and easily subject to importunities or mistakes, and that so strongly, that it admits of no contrary probation. It hath only this exception, That they may dispose of that part of their moveables which remains free, over and above the wife's part and bairn's part; and therefore no deed relating to their heritage is valid, but is esteemed as flowing from weakness; and albeit a moveable bond may be equiparate to a legacy, yet no deed relating to the heritage was ever sustained in Scotland to affect the heritage, albeit in all cases of deeds on deathbed, that might ever have been proponed.

The Lords found, that deeds on deathbed relating to heritage, could not affect the executry, either as a debt or a legacy.

Stair, v. 2. p. 284.

1682. *March.* Sir William Nicolson *against* Dick of Grange.

No 478.
A person having been holden as confessed upon a promise, what effect this ought to have against the heir in a reduction *ex capite lecti* of the decree of circumduction?

Sir John Nicolson being holden as confest by circumduction of the term for not deponing upon a promise of payment of L. 5000; after his decease, a reduction of the decreet of circumduction *ex capite lecti* was raised, upon this reason, That as Sir John could not by a deed under his hand or by his acknowledgment of a debt on deathbed, prejudge the heir, he could far less do it by suffering himself to be holden as confest, which is only a presumptive acknowledgment.

Answered; Collusion is not to be presumed where the verity of a thing is instructed by oath, which is stronger than an acknowledgement in writ; and the holding as confest is equivalent to an explicit oath; besides, if it was in the power of debtors to be absent, when they could not deny what is referred to their oath, and not go to kirk and market thereafter, the legal diligence of creditors would often be disappointed.

Replied; Holding as confest is but equivalent to a judicial acknowledgement without oath, and so not so strong against deathbed as an oath; and yet neither

ought to be more effectual than a deed in writing; for if it were, persons on deathbed might easily prejudge their heirs. No 478.

THE LORDS inclined to find the reason relevant in these terms, viz. That Sir John the time of litiscontestation was sick of the disease whereof he died; and that it was not enough to allege he was sick, or on deathbed, at the taking of the term, or the time of the circumduction; because litiscontestation is *contractus judicialis*, where parties are compearing, and one upon deathbed may satisfy prior obligations; but, before answer, a joint probation was allowed, as to the state of the defunct's health the time of litiscontestation.

Fol. Dic. v. 2. p. 256. Harcarse, (LECTUS ÆGRITUDINIS.) *No 650 p. 179.*

1687. *November* 22. CRAWFURD *against* BELL.

No 479.

THE case of Crawfurd in Lithgow against Bell, was reported by Carse. A father on deathbed calls his son, and declares that the right of such a comprising standing in his name is but a trust, and takes his promise to denude of it to the true party; accordingly the boy afterwards gives them a bond, but being minor he is induced to revoke it. *Alleged*, He cannot revoke it, being charged by his father, *ad levamen et exonerationem conscientiæ*, to do it. *Answered*, What his father did *in lecto* does not tie him, being heir. THE LORDS, from a principle of conscience, allowed a trial by witnesses, or otherwise, if the father was heard, at any time in his health, to acknowledge that right to be only a trust; but did not sustain his declaration *in lecto*.

Fol. Dic. v. 2. p. 255. Fountainhall, v. 1. p. 481.

*** Sir P. Home reports this case:

JAMES BELL having granted a bond to Euphane and Christian Crawford, making mention that Walter Buchanan of Drumakill having granted a bond to Mr Andrew Kerr for the sum of 1000 merks, and that Mr Andrew had granted an assignation of the same to Isobel Main, the said Euphane and Christian's mother, which being blank in the name, they filled in Alexander Bell, their nephew, his name, in the same; upon which there being an apprising led of Drumakill's estate, and infeftment past in the said Alexander's name; and that the said Alexander Bell, upon death-bed, did declare to the said James Bell, his son, that this assignation was only in trust to the said Euphane and Christian Crawfords, and required his son to denude himself of the trust in their favours; and being willing to perform his father's commands, and having got up the charter of sasine, that past upon the apprisings, in order to serve heir in special, therefore he is obliged to serve himself heir, and then to demand the apprising, in the pursuer's favours, and to deliver back the charter and sasine;