1671. *December* 20. PATON *against* STIRLING of Ardoch.

No 477.
A person upon death-bed, having executed a declaration of trust, with relation to an estate in his person, the declaration was found not probative against the heir, unless supported by other adminicles.

SIR HENRY STIRLING of Ardoch did grant a back-bond in favours of ——— Paton, his sister's son, whereby he obliged himself, that being satisfied of the debts due to him, he should denude himself of the right of the lands of Panholls, which pertained to the said Paton's father; whereupon a pursuit being intented against Ardoch's son, as heir and executor to his father, it was *alleged*, That the bond was granted *in lecto*, and could not prejudge the heir, and that he had a reduction depending upon that reason; and as executor he could not be liable, the bond being anent the right of lands, and in effect a reversion which is not prestable by executors. It was *answered*, That the said bond, tho' on death-bed, may and ought to affect the executry, seeing *in lecto* the defunct might do any deed to burden his executry, and his obligements at that time are effectual as to his executry; and *loco facti imprestabilis succedit interesse*, which is prestable by executors; and if he had *in liege poustie* granted a disposition of lands, and thereafter having infeft another in the same, he had become incapable to fulfil the obligements thereof, both his heir and executor would be liable for damage and interest; and there is the same reason in this case, the defunct as to burdening and disposing of this executry being in the same condition as if he were *in liege poustie*. THE LORDS, before answer, thought fit to try if the right was in trust, and if there had been a former back-bond, which the pursuer's step-mother had destroyed as was informed, and certain other circumstances.

1674. *June* 9.—SIR HARY STIRLING of Ardoch, on death-bed, did by a writ acknowledge, that the right he had acquired from Dr Paton, of certain lands, was under trust, and for surety of sums which he had paid for the Doctor; whereupon Dr Paton's son intented a pursuit against Ardoch's heir to declare the trust, and for count and reckoning; and before answer, the LORDS having ordained witnesses to be examined for clearing the trust, they found, that by the probation the trust did not appear, and that the said declaration *in lecto* could not prejudge his heir, unless there had been some further evidence that the declaration was emitted by the granter, of his own accord, and upon conviction and for exonering his conscience; which did not appear by the probation.

1674. *November* 12.—WILLIAM PATON, son to the deceased Dr Paton, pursued ——— Stirling, and Sir Hary Stirling of Ardoch, as representing his father, for implement of a writ granted by his father on death-bed, whereby he was obliged to denude himself of the lands of Panholls, being satisfied of such sums of money as should be found to be due to him by the said William and his father, after count and reckoning.

No 477.

It was *alleged* for the defender, That his father had acquired a right to the said lands from the said Dr Paton, being his brother-in-law, having married the said Sir Henry's sister, upon a back-bond, containing a reversion in favours of the said William, the said Sir Henry's nephew, and that thereafter the said William being major, had discharged the reversion; so that the defunct, and now his heir, has an irredeemable right to the said lands, and that the same pretended deed on death-bed could not take away the same.

It was *replied*, That the defunct on death-bed did and might exoner his conscience, by a declaration, that the discharge of the reversion was on trust; and there were other adminicles and presumptions concurring to evince that it was a trust, viz. the near relation of the parties, the defunct being the pursuer's uncle, and that the bonds granted by the Doctor, either to the defunct himself, or to other persons from whom Ardoch had right, were not retired, which would have been, if the right in Ardoch's person had not been on trust; it being against reason, that Ardoch should have both right to the lands, and to the debts for which the said right was granted.

It was *duplied*, That the defender being an infant, neither doth, nor is obliged to know what was betwixt his father and the pursuer, unless there were a writ to clear the same; and his irredeemable right by the discharge of the reversion cannot be taken away by presumptions, and that a writ on death-bed, upon what pretence soever, cannot prejudge the heir; and it cannot be thought, but that if a trust had been intented, the pursuer would have taken a back-bond as he had done formerly, and the defender's father might have given a discharge of the said bonds as to personal execution.

THE LORDS found, That the trust was not proved, and that the declaration on death-bed could not prejudge the heir. Thereafter it was urged for the pursuer, that at least he should have action against the defenders as executors, for affecting the moveable estate belonging to the defunct, and in implement of the said writ, at least *in subsidium*, as to damage and interest.

Upon a debate amongst the Lords themselves, it was urged, That the said writ being in effect a reversion, was only prestable by the heir, who only could denude himself of the right of the said lands; and persons on death-bed, *ipso momento* that they become sick, lose their *legitima potestas*, either as to prejudging their heirs, or their bairns and relicts; and they cannot dispose of their dead's part, but by a nomination or legacy, and a reversion could not be given by way of legacy.

THE LORDS found, that the said writ could not affect the executry. See QUOD POTUIT NON FECIT.

Act. *Lockhart and Falconer.* Alt. *Longformacus and Cuningham.* Clerk, *Gibson.*

Fol. Dic. v. 2. p. 255. Dirleton, No 157. p. 63. No 186. p. 75. & No 193. p. 82.

*** Gosford reports this case:

No 477. In a declarator of trust at the instance of William Paton against the Heirs of said William Stirling, of Ardoch, whereby it was *alleged*, That Dr Paton having granted an absolute right to a wadset of some lands, upon a back-bond, bearing, upon payment of a less sum than that lent upon the wadset, to dispone back again the right of wadset, and that the Doctor having married Ardoch's sister, who was the pursuer's mother, immediately after that he was major, upon pretence that his father was much in debt when he died, and upon advancement by Ardoch of some money, he did grant a discharge of the former backbond upon verbal promise to grant a new backbond, relative to Ardoch's true debt, and no more; which he delayed to grant until he was upon deathbed, at which time to take off the trouble of his conscience and mind, he did subscribe a declaration of the trust; and therefore concluded that he ought to count and reckon for his intromission, whereby it would appear, that he was satisfied of all, or most part of the true debt, and accordingly, his heir ought to dispone back again or grant a reversion. It being *Alleged*, That the declaration for evincing the trust, being subscribed on deathbed, could not be sustained to prejudge the heir, who was a minor, nor could the trust be proved by the deposition of any witnesses, to take away from the heir the benefit of the discharge; the Lords before answer having ordained witnesses to be examined, who were present at the granting of the discharge by the pursuer, upon the communings betwixt him and Ardoch, or any promises made by him, as likewise upon Ardoch's condition when he subscribed the declaration of the trust upon deathbed; after advising of the depositions, hearing of both parties, did find, that any promise to grant a backbond after a discharge made by the pursuer, was not proved nor relevant; and, as to the declaration upon deathbed, it being proved, that he was then in a most weak condition, and not able to subscribe his name, his hand being led by one who was present, and that his judgement and memory were failed, they found that that declaration was not a sufficient evidence to prove the trust, unless the pursuer would offer to prove, that it was read to him, and that he was of perfect judgement and memory, and declared that it was to exoner his conscience, and gave order to lead his hand when he subscribed the same.

Gosford, MS. No 691. *p.* 412.

*** Stair also reports this case:

1674. *November* 26—Dr Paton having a right to the lands of Panholes, did dispone the same to the Laird of Ardoch, his wife's brother, who gave a backbond, bearing, That he being paid of 3000 merks, he should denude himself in favours of William Paton, the Doctor's eldest son thereafter. There is a

bond of corroboration by the Doctor and his son to Ardoch, corroborating the first sum of 3000 merks, and adding seven. Some years thereafter there is a discharge granted by William to Ardoch of his backbond. Ardoch on his deathbed granted a declaration that the discharge of the backbond was in trust. William Paton pursues a declarator of the trust against this Ardoch, upon these adminicles, viz. That there was first a trust, as is clear by the backbond, and that the parties were of near relation, uncle and nephew, and that the discharge did not mention the bond of corroboration of 7000 merks, and did not bear to be in satisfaction thereof; so that Ardoch who yet keeps the bonds, may both seek payment thereof, and bruik the land by the discharge; and because Ardoch upon his deathbed did declare, that the discharge was in trust, which declaration being on deathbed, though it cannot prejudge the heir simply, yet it may well be joined with other adminicles of trust. It was *answered* for the defender, That declarations on deathbed can operate nothing as to the heir; for the law presumes that persons on deathbed are weak, and doth not lay weight upon their testimonies and declarations to burden their heir; and in this case, Ardoch was *in extremis*, incapable to understand, as appears by his subscription, whereunto his hand was led; and as to the other presumptions, they are of no moment alone, seeing the discharge bears, onerous causes, and sums paid equivalent to the sum of the reversion, which though it were meant of the backbond granted by Ardoch, it would import 3000 merks, seeing the like sum is contained in that backbond, which with the first 3000 merks, and the 7000, will make 13000 merks, and the bond of corroboration ratifies an apprising of Ardoch's, all which far exceed the wadset-right. It was *replied* for the pursuer, That the wadset-right had a clause irritant, which was incurred, though not declared, and that the Doctor was excluded from the possession of the half of the lands by a liferenter, and so his annualrent run long on; but since the liferenter's death Ardoch hath possessed all, which will satisfy the most part of his sums. No 477.

The Lords having examined witnesses *ex officio*, in what condition Ardoch was when he subscribed the declaration, and whether or not he had expressed his mind so to do, before he became sick or weak; by which is was proved that Ardoch subscribed the declaration at the same time he subscribed his testament upon a Sunday at midnight, the day before he died, that he desired the declaration to be read to him, that his hand was helped to subscribe; some of the witnesses did depone, that they thought he understood; others said, that he always slumbered and roved when he was waking.

THE LORDS found, that the trust was not sufficiently proved, and therefore assoilzied.

It was further *alleged* for the pursuer, That if the declaration on deathbed would have no effect against the heir, yet it might be valid to infer a debt of the defunct, and so might affect his executry, and burden his son, who is both heir and executor, *quoad valorem* of the executry; for if a person on deathbed

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