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hurt the young growth, and to give access to make the necessary fences ; and another begging to save some trees next the orchard ; all which necessarily imported their knowledge and acquiescence in the contract now craved to be reduced, and imported a homologation of it on stronger grounds than were sustained by a decision, December 1723, Edwards against Edwards, *voce* HOMOLOGATION, where it was made evident that the contents of the deed found to be homologated, were not known to the party at the time of the deed on which the homologation was founded.'

In reply to the acts of homologation it was *contended* for the pursuer, That they could not infer any intention to confirm the defender's right, because he had no process then depending, upon which he might have obtained a stop ; and therefore all he could mean was, to prevent further mischief and damage to the young growth and small tuft of trees, of which he was fond.

THE LORDS repelled the defence of homologation, and found the defunct, by a sale in the rational way of administration, might dispose of his woods even upon death-bed ; but sustained the reason of death-bed relevant to reduce the contract of sale, in so far as the price was taken payable to heirs, executors, or assignees ; and remitted to the Ordinary to hear parties as to the *bona fides* in purchasing the woods to support the contract made by the buyers, so far as concerned the sale, &c.

Reporter, *Lord Grange.* Act. *Dun. Forbes.* Alt. *Alex. Hay.* Clerk, *Dalrymple.*
Fol. Dic. v. 3. p. 171. Edgar, p. 84.

1744. *November 4.* IRVING against IRVINGS and Others.

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No renunciation or discharge by the heir of the law of death-bed, during the lifetime of the ancestor, can give that ancestor the power of disposing of his property on death-bed, or can bar the son's title to reduce.

IN the contract of marriage of Patrick Irving younger of Prestonpans, his father Patrick Irving elder, disposed to him certain tenements, which, with 2000 merks, which he acknowledged himself to have formerly received from his father, ' he accepts of in full contentation and satisfaction of all he could any ways ask or pretend to from his father, by virtue of his mother's contract of marriage, or any other manner of way ; and in full of all interest, claim or pretence he could pretend to, or claim of his father's estate, personal or real, after his death, excepting his father's good will ; and discharges his father and his heirs for ever.'

Thereafter Patrick Irving elder having, while on death-bed, disposed certain heritable subjects in favour of his younger children, Patrick, the eldest son, brought a reduction thereof upon the head of death-bed. And, at first, the LORDS ' Repelled the reasons of reduction,' by a narrow majority, who considered the contract as implying a renunciation by the eldest son of the law of death-bed for an onerous cause, and which ought to be effectual, even though such renunciation, when gratuitous and impetrated by the father, would not be

available ; which was said to be the case of Inglis *contra* Hamilton, 4th December 1733, No 106. p. 3827.

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But, upon advising bill and answers, it was *argued*, That the contract did not even imply a renunciation of the law of death-bed, as it only discharges the father of any obligation he might be under to his son by his mother's contract of marriage, or otherways ; and renounces all claims that might arise from any obligation of the father's at his death, but by no means bars the son from succeeding to his father in any estate which he should happen not otherwise to dispose of, and consequently, the son must be entitled, upon any legal ground, to quarrel every deed whereby he is debarred from that succession ; and *separatim*, that even the most express antecedent consent of the son could not have conferred on the father a power of disposal of his heritage on death-bed ; for, that though an onerous cause on the part of the father may support his death-bed deed, as where he is previously obliged to dispo, yet no clause, however onerous, can be pleaded in support of the son's renunciation of the law of death-bed, as such renunciation is a *non obstante* to the law of the land.

THE LORDS altered their former interlocutor, and sustained the reasons of reduction. See No 49. p. 2304.

Fol. Dic. v. 3. p. 170. Kilkerran, (DEATH-BED.) No 4. p. 152.

1745. July 19. JANET PATERSON *against* AGNES SPREUL.

JOHN PATERSON died of a decay April 1731, leaving issue, two children, a daughter of a first marriage and a daughter of a second. Being upon death-bed he executed a settlement of his whole heritable and moveable estate, to his wife Margaret Spreul in liferent, and his two daughters equally in fee. And he further provides, in case of the decease of his youngest daughter before majority or marriage, that her mother should have an adjudication upon a certain estate named in the deed, at her own disposal.

The younger daughter having died soon after the father, the elder, who became heir in the whole, brought a reduction of her father's settlement, so far as concerned the alienation of the adjudication, being an heritable subject, in favour of the relict. The defence made for the relict was, that the deceased having settled upon his heirs all his moveables, of which he had the disposal even upon death-bed, the heir who is a benefiter by this disposition cannot quarrel the alienation of the heritable subject, which amounts not to the value of the moveables.

This defence, it was *answered*, resolves into a proposition which hitherto has not got the sanction of practice ; to wit, that, to the extent of the moveables left to the heir, a man upon death-bed may alien any part of his heritage. This seems not consistent with the maxim, that the law denies liberty to dispose of heritage upon death-bed. Such a deed is null and void, and can infer no war-

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In a deed upon death-bed, a man having settled his moveables upon his heir, an adjudication, conveyed to his wife in the same deed, was supported against a reduction upon the head of death-bed, the moveables being of greater value than the adjudication.