

1685. *March.* HARY GRÆME *against* DOUGLASSES.

MR DOUGLAS having, after he was condemned to die for murder, acknowledged, in exoneration of his conscience, by a declaration under his hand ratified before the justices, that he had raised fire in Hary Græme's chamber; Hary raised a process of damage against his heirs.

Alleged for the defenders, *1mo*, The defunct was minor, and lesed by that confession; *2do*, It was emitted without consent of his curators, and so null; *3tio*, The defunct, after sentence, and before execution, was reputed to be *in lecto ægritudinis*, so that he could not prejudice his heir by his confession.

Answered; Minors cannot revoke confessions of crimes, unless they can *docere de errore*; *2do*, As minors may commit crimes without consent of their curators, so they may confess them; *3tio*, The law of death-bed is founded upon the presumption, that persons *ex favore et impatientia morbi*, may be imposed upon to prejudge their heirs; but here the defunct was in firm and perfect judgment and health. Again, it were absurd if a person condemned for a private crime, acknowledging high treason, might not be indicted again for treason, and forfeited upon his confession. Now, *de facto*, the defunct was indicted again for the fire raising; and though he was acquitted by an assize, because he did not ratify the said confession before them, yet the declaration before witnesses is not sufficient to infer an obligation for damage; and if a party on death-bed should judicially acknowledge himself guilty of treason, he might be forfeited for the same after his death.

Replied; No heir can be directly prejudged by any writ of his predecessor made on death-bed.

THE LORDS found, That Mr Douglas, after sentence, was in the case of death-bed; and therefore did not sustain process on his confession.

Fol. Dic. v. 1. p. 220. Harcarse, (SUMMONS.) No 913. p. 257.

1724. *July 15.*

AGNES MAXWELL and EDWARD M'CULLOCH, her Assignee, *against* JAMES CORRIE, Provost of Dumfries, and Others.

EDWARD MAXWELL of Hill, by his contract of marriage anno 1718, 'came bound to settle his estate on the heirs of the marriage; which failing, it was provided to the heirs of his body, by any other marriage; which failing, to his sister Agnes and the heirs of her body; which failing, to Edward M'Culloch the pursuer, and his heirs;' with the burden of an annuity of 500 merks to his future spouse, in case she should survive him, and that there were children of the marriage, and of 800 merks if there were none. He also be-

No 110.
Found as
in No 107.
p. 3328.

No 111.
The Lords found, that a person by a sale in the rational way of administration, might dispose of his woods even upon death-bed; and the sale being

No III.
brought under challenge, they reduced it only in so far as the price was taken payable to heirs, executors, or assignees; upon this *ratio*, that the party was obliged by his contract of marriage, to provide his estate, and particularly the woods, according to a special destination therein mentioned.

came bound to dispose of the woods upon his estate, which were of considerable value, ' with the advice of Mr James Elder, husband to his sister Agnes, and ' the said Edward M'Culloch, his own nearest friends, and of Thomas Gordon ' and Joseph Corrie, friends to his spouse, and to lay out the price of them in ' land or other good security, under the same destinations and substitutions ' with his lands, but with a liferent of the third to his spouse in case of children, ' and of the half in case of none.'

After the marriage had subsisted upwards of three years without children, or hopes of any, the husband fell into a languishing state of health, and within less than 60 days of his death, he sold the woods by a private agreement, (having first tried to sell them at a public roup, whereof he had published advertisements both in Scotland and Ireland,) to Provost Corrie, William Martin, John Brown, and John Gordon, for 16,000 merks; and by the contract the price was made payable to himself, his heirs, executors, or assignees.

Thereafter, and but a few days before his death, he made his last will and testament, by which he appointed his spouse his executrix and universal legatrix in all his moveables, and particularly in the price of the woods; and about six months after his death, Provost Corrie married the relict.

Of this contract and testament, in so far as related to the price of the woods, the pursuers raised reduction on the following grounds, *1mo*, That the contract was entered into on death-bed in prejudice of the pursuers, his lawful heirs of blood, as well as by destination; *2do*, Mr Maxwell was fraudulently induced to enter into the contract in his languishing state of judgment, as well as of health, with a view of gratifying and enriching his relict at the expense of his heirs, and this was done by the procurement and participation of the defenders, who bought the wood, and advised the application of the price contrary to the obligations in the contract of marriage, to which they were all witnesses except one, and in the particular knowledge of the terms of it, and of the limitations with respect to the disposal of the price of the wood; and this appeared the more evidently from the sudden marriage of the relict with one of the defenders, whose brother Joseph was one of the trustees named in the contract of marriage, for the due application of the price of the woods; *3tio*, The woods were sold for 16,000 merks, which was one-third under their value; and the effect of the advertisements was fraudulently disappointed by the contrivance of the defenders, in adjourning the sale in order to make way for this private bargain, though there were persons present at the appointment ready to have offered 24,000 merks for the woods; besides, the defenders have in the contract a tack of the grass of the wood; and neither are obliged, (as they ought to have been) to fence the cut parts of the wood from the uncut, nor have they done it, whereby the young wood is almost destroyed.

It was *answered* to the *1st*, That a sale, even of heritage, for an adequate price, was not reducible *ex capite lecti*, much less of woods when they are fully grown and fit to be cut; for then they become of the nature of moveables, at least they may and ought to be sold, and the price falls by law under executry,

in the same way as a person *in lecto ægritudinis* may charge for a sum heritably secured, and make it moveable so as to fall to executors, or may receive payment of it and discharge it, and the money received will belong to the executors; all which is settled in practice, particularly by a decision, Brown against Thomson, No 20. p. 3200. 'where the husband on death-bed received and discharged the tocher, and immediately disposed of it gratuitously to the wife, and the marriage having dissolved by his death within year and day, the heir was obliged to repay the tocher to the relict.'

It was *answered* to the 2d, That there was not so much as one circumstance libelled, notwithstanding the many strong expressions used in the debate, from which there could be the least imposition on the defunct inferred; on the contrary, it seemed evident that he followed his own natural inclination in disposing of a considerable part of his effects to his relict, since he had no children of his own to succeed to him. And as to the defender's knowledge of the limitations contained in the contract of marriage with relation to the disposal of the price of the woods, there was no sort of evidence that they were in the knowledge of them; and though they had been, yet since there were no children of the marriage, these limitations could not hinder the defunct from disposing of the price of the woods even gratuitously. Had there been children, they would have been in some sort creditors, so as to be preferable to gratuitous, but not to onerous disponees of the woods or of their price, and yet the substitutes, being but collateral heirs, would have had no such claim.

Answered to the 3d, That the 16,000 merks was the full value of the woods, and that the appointment, in pursuance of the advertisements, was fairly kept, where the pursuer, Mr M'Culloch, might have been present, having been duly advertised, and that there was not the least ground for the allegation that 24,000 merks were to have been offered; on the contrary, the defenders were willing to give up the bargain upon the first complaint made by the pursuers, and still are willing to do so, though they have been employed these two years in cutting the woods, and are ready to account for every farthing of the price of what has been sold, they being allowed a fifth-part of the 16,000 merks for their own pains and trouble. As to the tack of the grass of the wood during the time of cutting, it was not only customary but absolutely necessary; and as to the making of fences between the cut and uncut wood, that is generally reserved to the proprietor of the wood, who will do it most carefully, and it is not committed to the discretion of the buyers; and therefore Mr M'Culloch has himself to blame if any hurt was done to the young wood, since it was incumbent on him to have made the proper fences.

It was *answered* in general to all the reasons of reduction, That admitting they were well founded, and that the contract was reducible *ex capite lecti*, yet the pursuers had acquiesced in it, and ratified it by deeds of homologation, not only in seeing and suffering the defenders to go on in cutting and selling the wood for near two years without challenge, but by express deeds, viz. missive letters, one of them entreating the defenders to carry off the cut wood so as not to

No 111.

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.

No 112.

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