1664. *December* 14. LADY COLVIL *against* LORD COLVIL.

No. 5.

The Lady pursues the Lord Colvil to relieve her of the whole debt, heritable and moveable, of the defunct, his predecessor, because the defunct, in his testament, had named her, his Lady, executrix and universal legatrix, with a special clause, that she should be free of all his debt whatsoever. The defender alleged, Absolvitor, because no deed done by a defunct *in lecto*, or in testament, can prejudge his heir. The pursuer replied, That this testament was made in the defunct's *leige poustie*. The defender answered, That on death-bed, and by testament, *equiparantur*.

Which the Lords found relevant, and assoilzied.

Stair, *v.* 1. *p.* 241.

1667. *January* 31. HENDERSON *against* HENDERSON.

No. 6.

A paper being signed by a party going beyond seas, disposing upon heritage, but in its narrative beginning with the common stile of testaments, and yet giving power to the party to enter, and obtain confirmation from his immediate superior, excluding his heirs of line, and all others, yet so far making it a *donatio mortis causa*, that in another clause it is declared, that if he return home it shall be leisom for himself only to revoke the said writ; and he having returned, and deceased, without making any revocation; the Lords found the writ not to be of a testamentary nature.

Fol. Dic. v. 2. *p.* 459. *Stair. Dirleton.*

*** This case is No. 7. p. 11339. *voce* PRESUMPTION.

1670. *July* 13.

The DAUGHTERS of SOUTRAY *against* The ELDEST DAUGHTER.

No. 7.

Testament may subsist without nomination of an executor.

Null, if the executor's name was filled up after the testator's death.

A disposition of land in a testament is ineffectual.

The Laird of Soutray having granted a writ in favours of his eldest daughter, beginning in the stile of a testament, and, after a blank, disponing his lands of Soutray, and his whole moveables, to the said eldest daughter, with the burden of 10,000 merks to be paid to the remanent daughters; the said remanent daughters pursue a declarator of the nullity of the writ; *first*, In so far as being a testament, it contains a disposition of the lands; 2*dly*, In so far as the eldest daughter is nominated executrix and universal legatrix, because, by ocular inspection, that part of the writ was blank, and is filled up with another hand, which is offered to be proved to have been done since the defunct's death, so that the executor and legatar not being filled up by the defunct in his own time, and these being the

No. 7.

essentials of the testament wanting, the whole falls, even as to the disposition of the moveables. The defender answered, That the testament was valid, albeit the name of the legatar and universal executor were filled up after the defunct's death; yet it is offered to be proved, that the defunct, when he subscribed the testament, did nominate his eldest daughter as executrix and legatrix, and gave warrant to the notary to fill up the name, which though he neglected then, and has done it since, it ought not to prejudge her. It was answered, That our law allows of no nuncupative testaments, or nominations of executors or legatars, unless the testament be perfected in writ; and therefore, if the executor or legatar be not filled up by the defunct, the testament is not perfected in writ, albeit the defunct has subscribed the same, as he might have done in a blank paper, and given warrant to the notary to fill up his testament upon such terms as could not subsist, though the notary and witnesses should astruct the same, as not being done, *habili modo*.

The Lords found the testament null as to the nomination of the executor and legatar, and also as to the lands; but they found it valid as to the disposition of the moveables, with the burden of the 10,000 merks; and found, that the want of the nomination of the executor or universal legatar did not hinder but that the defunct might in any way dispone his moveables, in testament, or on death-bed, which would stand valid as a legacy, which, by our law, might consist without nomination of executors, but would extend to that part of the moveables only the defunct might legate.

Stair, v. 1. p. 693.

*** Gosford's report of this case is No. 38. p. 6375. *voce* IMPLIED CONDITION.

1680. *November* 20. STUART *against* SMITH.

No. 8.
A testament subscribed by notaries on blank paper, and filled up after the defunct's death, found null, and the notaries deposed.

Stuart having a gift of bastardy and *ultimus hæres* of ——— Creichton, pursued declarator, libelling, "that the defunct was holden and reputed bastard, which was sustained, without condescending upon the father or mother." It was further alleged, that the defunct made a testament, and named Wardlaw executor and universal legatar to her, upon his having maintained her many years. It being answered, That the testament being subscribed by two notaries is false, the defunct never having given command to subscribe it, nor heard it read, but that a blank paper was subscribed by the notaries, and was filled up *ex post facto*, after the defunct's death; which being found relevant, and the notaries and witnesses being examined, they did depone, that the notaries subscribed a blank paper, and that the defunct was not sensible, nor able to speak, but that her hand was lifted up by another to touch the pen, and that the testament was not filled up till some days after her death.