

The Lords found not only the testament null, as being blank, and filled up after her death, but false, and without warrant; and deposed both the notaries, and gave warrant to the Sheriff of the shire to send both their persons to Edinburgh, to be set upon the cock-stool, with a paper upon their brows.

No. 8.

*Stair, v. 2. p. 804.*

1688. *February.*

The CHILDREN of WALTER YOUNG *against* HENRY ANDERSON.

No. 9.

An assignation of moveables, annual-rents, made by one *in articulo mortis*, found null, in respect it was proved by the witnesses inserted, that the assignation was not read to the cedent before he signed it.

*Harcarse, No. 123. p. 24.*

1694. *December 4.* LADY ARBUTHNOT *against* SIR THOMAS BURNET.

No. 10.

The Lords advised the debate in the reduction raised by the Lady Arbuthnot and her children of her husband's nomination of tutors, *contra* Sir Thomas Burnet of Leys, and the other tutors thereing named. The reasons were; *1mo*, It was written without his warrant and order; *2do*, It was not read to him. The Lords repelled these two reasons, in respect of the answers, *viz.* That they offered to prove a mandate given, and that he had a testament of the same tenor made by him seven years before, and he caused renew it, with some alterations; *2do*, Offered to prove, that it was either read to him at the time of subscribing it, or the substance and import of it was repeated to him, or he thereafter recapitulated the heads of it to himself: Both which answers were found relevant, and admitted to the defender's probation.

A testament was reduced, because the order for drawing it was in May, but it was not signed sooner than August, and not then read over to the party.

The *second* reason of reduction was, That he was in a raging fever when he subscribed the testament, and had a *deliquium* that same day. Answered, They offered to prove acts of reason and judgment both before, at, and after subscribing, and *probatis extremis præsumentur media consimilia*. The Lords, in such a case, would not determine a precise relevancy, but allowed a conjunct probation to either party, to prove in what condition the defunct was about the time of signing this nomination, to expiscate the truth, before answer. There was a *third* reason of reduction found relevant, *viz.* That the tutors had taken out the writs, and meddled with the same before making of inventory; which, by the late act of sederunt, is declared to be a ground of removing tutors as suspected.

1695. *February 8.*—At advising the probation in this reduction, the Lords found it clearly proved, That he was then of sound judgment, and not delirious, as was

No. 10. alleged; *2da*, It appeared the order he gave for drawing his testament was in May, and it was not signed by him till August; and though we do not observe that subtilty of the Roman law, that it should be *actus continuus et unico contextu*, yet it was too great an interval, unless it had been read at the subscribing; which was acknowledged by the witnesses not to have been done; nor the tenor and substance of it recapitulated, nor that he afterwards resumed the heads of it, farther than that he signed it, and told some of his friends he hoped they would be faithful in the trust he had reposed in them; and though the witnesses deponed on the scroll of a former testament, from which they copied this new one, yet that scroll did not appear; but what was produced in place of it was a former principal testament, margined, scored, and interlined in sundry places; and though the witnesses said it to be done by John Clerk's servant, yet that testament appeared to have been written by John Clerk himself; so that the Lords, on the whole matter, reduced the testament, and found it not a legal probative writ.

*Fountainhall, v. 1. p. 647. & 667.*

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1699 November 16. CHALMERS against TAYLOR and HAY.

No. 11.

Reduction of a testament as appointing a person universal legatee without due evidence that the testator had so meant.

Helen Chalmers pursues a reduction of James Chalmers her brother's testament, whereby, after many legacies left to sundry persons, he nominated Doctor Chalmers, his physician, to be his executor and universal legatar: The reasons were, that he was *in articulo et agone mortis* when he signed it, having died within a quarter of an hour thereafter; that, though there was a fashion of reading it, yet he was then neither capable to hear nor understand it, nor give any consent to the notary's subscribing for him, &c. The Lords, before answer, having allowed the notary and instrumentary witnesses to be examined anent his condition, and the steps of the matter of fact, the notary's deposition to vindicate his own behaviour does fully confirm the testament in every point; but the two witnesses deponed, that the Doctor having pressed the defunct to make his testament, he shifted and delayed him for some time, but at last yielded to his importunity; and the Doctor, out of the defunct's mouth, wrote down the names of the legatars and quantity of their sums, and when he intended only 500 merks for his sister, now pursuer, the Doctor persuaded him to make it 1000 merks; and that he having asked the defunct, whom he was to trust to see all this done and performed, to be his executor, he answered, None but yourself; but heard no mention of making him universal legatar, and that they knew not whether he heard or not, but he commonly answered, I, [Yes] to what was asked, and that he could not hold the pen well, and died within a quarter of an hour after. It was contended for the Doctor, that the testament was fairly carried on in all the parts of it, and the legacies copied from the testator's own dictating, and this pursuer owes her own legacy to the Doctor, and it was truly read to him. The Lords considered that testaments made on the suggestion of parties in their favours were much to be suspected, especially where a physician having no relation imposed on a dying man; and