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.

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.
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 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; 1*mo*, It was written without his warrant and order; 2*do*, 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; 2*do*, 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.

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 præsumuntur 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