

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

the question here was asked by the Doctor himself, whom he would have to execute the testament? and he answering, "who but yourself;" imported the giving him the office of executor, but nothing was spoke of his being universal legatar; and he seems to have been insensible at the reading and the notary's signing the testament for him; therefore the Lords annulled and reduced the testament, and ordained John Anderson the notary, to be cited to appear before them, to answer for malversation in his trust, and to deter others from imposing on people when dying and insensible.

1699. *December 2.*—Mr. Anderson, the notary, who made James Chalmers' testament now reduced, and cited to attend the Lords, in order to punishment (*supra*, 16th November 1699,) did this day present himself; and, after hearing him, the Lords rejected his excuses, and fined him in 100 merks to the poor, for his compliance in such a matter, and sent him to prison, there to lie during their pleasure. Some of the Lords, who thought his fault and malversation grosser than the rest, did vote, "deprive;" but the milder opinion prevailed. Some moved the imprisoning him in Aberdeen, as more exemplary, the thing happening to be done there, and on his return he might deny he met with any censure here.

1704. *February 19.*—James Chalmers of Oldcruives, having in his testament named Dr Chalmers his executor and universal legatar, William Taylor, as having a right from the nearest of kin, raises a reduction of this testament, on this ground, that he was then *in extremis*, having died within less than an hour thereafter; that he gave no warrant for the universal legacy, and it was not read to him: And on this process, Anderson the notary, with Shaw and Hay, the two testamentary subscribing witnesses, being examined, on advising their testimonies, the Lords found there was no warrant given by the testator, and so reduced the testament, as mentioned *supra*, 16th November 1699. Dr Chalmers having a jealousy of the integrity of the witnesses, protested for a reprobator against them before their deponing; and now getting more information of the alleged bad practices used by the said William Taylor pursuer, to instigate Hay and Shaw, the two witnesses, to depon what he himself knew to be false, (though the Lords thought it unfavourable and dangerous for physicians to get themselves either named executors or legatars by their sick patients, who readily will yield to any thing at that time, as Lewis XI. of France did to his physicians), he raises a declarator of falsehood, corruption, and bribery, against Taylor, Hay, and Shaw; Taylor, as the promiser, seducer, and corrupter; and the other two, as they who were so tempted and corrupted by him: And for qualifying of it, offered to prove that Taylor said to Shaw, (who was but a poor man), "If this business go right as I would have it, and the testament fall, you shall get Bessie Chalmers, (one of the defunct's nearest of kin), to whom the goods would accresce when the testament was once out of the way, and £.1000 of tocher with her;" and that Hay was heard brag that he would be kind to them who were kindest to him, and by his swearing he would

No. 11. make any executor he pleased : And craved a term to prove these qualifications. Answered, this was upon the matter a reduction of that decret reductive of the testament, and concluded repayment of the sums and goods intromitted with by the nearest of kin since they reduced the testament, and tended to make it revive, and yet the said decret is not so much as called for, nor in the field ; and though it aims to annul the deposition of the witnesses, yet they are nether called for nor produced : So this process of declarator is altogether wrong laid, seeing it should only be by way of reduction ; and even these reductions upon reprobaters are very rare and singular, and have taken small effect in Scotland, and may tend to discourage witnesses from telling the truth : And the words libelled are but *verba jactantia*, and they do not subsume that the parties accepted of the bribe offered, otherwise they cannot be said to be corrupted. Replied, though reprobaters be an extraordinary remedy, yet it cannot be called new, for all our lawyers mention them ; as Stair, Book 4. Tit. 43. and Lord Craigie in his Repertory, *voce* REPROBATERS ; and our decisions sustain their opinion, as is to be found in Dury, 26th June 1623, and 5th March 1624, Cochran, No. 212. p. 12099 ; 7th July 1632, Renton, No. 224. p. 6787 ; 30th July 1668, Lady Milton against Sir J. Whiteford, No. 216. p. 12104 ; and 14th July 1671, and 20th February 1672, *inter eosdem*, No. 217. p. 12105. marked both by Stair and Dirleton, with their judicious reasoning thereupon ; and Paterson against Johnston, No. 219. p. 12114. Duplied, pregnant qualifications a re required, and the idle story of offering him a lass with £.1000 is not to be regarded. The Lords found a declarator was not the formal way to bring in this trial and expiscation, and therefore found no process till a reduction were raised, and the production of the original depositions of the witnesses were satisfied ; before which they could not be forced to debate, and in case any of them died *medio tempore*, their heirs could not be called to the effect of any punishment to be inflicted on them who were not guilty of the prevarication ; but only for annulling the decret.

*Fountainhall, v. 2. p. 67, 70, & 225.*

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1704. November 4.

MR. JOHN BUCHANAN and Others, *against* MR. THOMAS PATERSON.

No. 12.

A Wife's disposition to her husband reduced by the nearest of kin, on account of symptoms of an intention to revoke it.

Mr. Thomas Paterson being married to Janet Wright, the marriage dissolved within year and day ; but she made three several dispositions of the greatest part of her means, in favours of her husband, whereof the last was signed a few hours before her decease.

The defunct's nearest of kin, and Mr. John Buchanan, who was married to her sister, pursue a reduction of that disposition ; and there being a probation before answer, it did appear, that the disposition was framed by the defunct's order, and duly signed and delivered to the defender ; but, at the same time, the defunct de-