The Court unanimously " repelled the objection in point of form to the notary's docquet to the last will and testament in favour of the petitioners." No. 75.

Lord Ordinary, *Monboddo.* Act. *R. Hamilton.* Alt. *D. Cathcart.*
Clerk, *Pringle.*

R. D. *Fac. Coll. No.* 136. *p.* 310.

1799. *December* 18. ROSINA STODDART and Others, *against* JAMES ARKLEY.

No 76.
Act. 1579. C. 80.

Deeds of a testamentary nature need be signed by one notary and two witnesses only, where the granter cannot write.

It is not necessary that the notary's docquet should bear, that the deed was read over in his presence.

Diana Kerr, wife of James Arkley, having died without surviving issue, Rosina Stoddart and her other nieces made a claim against her husband for a portion of the goods in communion, as nearest of kin to the deceased.

In bar of their claims, he produced a deed, bearing: " It is contracted, agreed, and matrimonially ended between the parties following, to wit, James Arkley, tenant in Muirburn, in the parish of Kirkliston, on the one part; and Diana Kerr, his spouse, on the other part; that is, although the said parties have for several years been married, yet there has been no contract of marrage, or other deed, hitherto entered into by them, so as the succession to their means and effects might have been regulated upon the dissolution of the said marrage by the death of either party; therefore, to supply that defect, they have mutually agreed to enter into and execute these presents, in manner following: The said James Arkley, for the love, favour, and affection he has and bears to the said Diana Kerr, his spouse, hereby gives, grants, dispones and makes over, to and in favour of himself, and the said Diana Kerr, his spouse, in liferent, and the child or children that may happen to be procreated of the said marrage, in fee; whom failing, to the longest liver of him and his said spouse, and to the heirs, executors, and assignees of the said longest liver, all goods, gear, debts, and sums of money, household furniture, and every other species of executry funds, (heirship-moveables included), that shall pertain and belong to him at his death," &c.; with power " to do any act and deed that any executor nominate can do by the law of Scotland."

Diana Kerr, by the deed, settled her moveables on her husband, precisely on the same terms.

It was added: " For which purpose they hereby nominate and appoint the survivor of them two the sole executor, universal legatar and intromitter with the goods and gear of the predeceased," &c. " And further, it is hereby agreed to by both parties, that whatever heritable property may be acquired by both parties during the standing of the marriage, the rights thereof shall be taken and conceived in favour of them two in liferent, and the child or children of the marrage in fee; whom failing, to the longest liver of themselves two, and the heirs and disponees of the said longest liver whatsoever."

The deed was subscribed by Arkley, and by a notary, in presence of two witnesses, for Diana Kerr, (the docquet bearing), " who declares she cannot write, and she having delivered the pen to me."

The parties acquired no heritable property after executing the deed, and, at the date of it, they had a lease of a house and three acres of ground granted in favour

No. 76.

of both, and longest liver. They had likewise sunset a small farm for a surplus rent *. Diana Kerr survived above two years; during which time, as alleged by her husband, she had the custody of the deed.

In a reduction and count and reckoning, raised by Rosina Stoddart, &c. they

Pleaded: 1*mo*, The statute 1579, C. 80. enacts, "That all contracts, obligations, reversions, assignations and discharges of reversions, or eiks thereto, and generally all writs importing heritable title, or other bond or obligations of great importance," shall be subscribed by two notaries, before four witnesses, if the party cannot write.

The deed in question, as being a contract relating to heritable rights, (29th June 1725,) No. 64. p. 16842. as conveying irrevocably the whole property of the parties, and consequently of much importance, is struck at by the above-quoted enactment. In practice, the statute is applied to all deeds importing obligation, even to provisions to children above £.100 Scots; 13th November 1623, Marshall against Marshall, No. 40. p. 16830. 16th January 1668, Anderson against Tarbet, No. 52. p. 16838.

The deed is in all events ineffectual as to heritable property, and it cannot be partially supported. The clause with regard to heritage may have been the inductive cause of the wife's consent.

2*do*, The docquet of the notary ought to have borne, that the deed was read over in his presence, as the deceased could neither write nor read writing; 3d July 1792, Ross against Aglianby, No. 74. p. 16853.

Answered: 1*mo*, The deed, though clumsily expressed, is substantially not a contract, but of a testamentary nature, and consequently exempted from the enactments of the statute; Erskine, B. 3. Tit. 2. § 23. Either party might have revoked it; and if it had been irrevocable, this would not have prevented it from being a testament, at least third parties could not have objected. The clause with regard to heritage was quite unnecessary, as neither had any prospect of acquiring any, and is not founded on; and it cannot prevent the effect of the deed as to moveables; 30th June 1758 Ferguson against Macpherson, No. 70. p. 16848. 21st June 1765, Gordon against Murray, No. 72. p. 16851.

2*do*, In the case of Ross, the granter of the deed was blind; but where he is possessed of all his faculties, and desires the notary to subscribe, it is not necessary that the deed should be read over in his presence; 2d December 1794, Yorkston against Greive, No. 75. p. 16856.

The deed was considered by the Court as a testament, and on that ground, upon report of Lord Probationer Hermand, the Lords (10th July 1799) repelled the reasons of reduction; and upon advising a petition, with answers, unanimously "adhered."

Lord Ordinary, *Meadowbank*. Act. *Cathcart*. Alt. *Dickson*. Clerk, *Gordon*.
D.D. *Fac. Coll. No. 150. p. 336*

*** See Straiton against Robertson, 19th January 1710, No. 22. p. 8344. *voce* LITIGIOUS.

* The precise terms of this sublease did not appear from the papers; but the husband had right to the surplus rent, independent of the deed.