No. 12. law, *Si quis aliquem testari prohibuerit*, which was founded on the twelve tables, *Uti paterfamilias legasset rei suæ, ita jus esto.* Answered, Her calling for it was not to destroy it, but only to have it read before her friends; and Mr. Paterson's refusing it was not simple and absolute, but only that it might not fall into Mr. John Buchanan's hands. Yet the Lords finding, by the testimonies of the witnesses, that the defunct complained it had some cleeck in it, and was stolen from her by a trick, they thought he had forfeited his right *ut indignus*, conform to that title in the common law, for refusing to give it back to review and reconsider it, that she might be fully satisfied anent it; and by plurality found the last disposition null *quoad* him, and that he could reap no benefit by it, but prejudice of what might be said for the other legacies therein.

The next question was, If the two former dispositions she had made, subsisted, or fell in consequence with this last? If it had been sustained as valid, there is no doubt but it would have been a formal innovation and revocation of all preceding rights; but being declared null, the debate arose whether they stood in force; the hearing whereof was continued to another day, that the lawyers might be prepared thereon.

Fountainhall, v. 2. p. 193. & 237.

1710. *July* 15. MONCRIEFF *against* MONYPENNY.

No. 13.
A testament reducible upon this ground, that the witnesses did not see the testator sign his name and sirname without assistance, but only his name and the half of his sirname, he being assisted by the writer's leading his hand to finish the other half.

George Moncrieff of Sauchop, finding himself very weak in November 1707, gives order to one Watson to draw his testament, and within a quarter of an hour after subscribing it he dies, without any children: In it he nominates his wife, Catharine Monypenny, Pitmillie's sister, his sole executor, with the burden of some legacies; his moveables being of a great value, near to £.2,000 Sterling, in ships, tickets, &c. Isobel Moncrieff, his sister-german, and Brown her husband, raise a reduction of this testament on sundry grounds, that it was not read to him, and he was then insensible, and his judgment decayed. The Lords allowed a conjunct probation to either party, to prove the way and manner in which it was subscribed, and what condition he was in at the time; and the instrumentary witnesses, with several others, being examined, the Lords advised the probation this day; and it being alleged, 1*mo*, That *non constat* it was read to him, and he behoved to be in a great confusion, being so near death; it was answered, That the witnesses deponed it was read in his presence; neither is their not hearing it read to him relevant, seeing it might be done ere they were called in. And as to the solidity of his judgment, his disease not being a fever, which is sometimes accompanied with a delirium, but a consumption, it is known that such keep their judgment and senses to the very last. 2*do*, Alleged, by the 5th act of Parliament 1681 witness are required to see the party subscribe, but here none of the witnesses but one declare their seeing him sign the whole, because he did it in his

bed, and there was a great throng and crowd in the room, that they could not get near the bed side, to look to him when he subscribed. Answered, They oppone the testimonies, bearing, that they saw him take the pen in his hand, and begin the writing of his name; though, by his slow writing, and other accidents, they did not see him frame every letter; neither is that necessary, nor can the act of Parliament be taken in that strict judaical sense; for there is not a writ of twenty where the witnesses supervise the forming of every letter of the subscriber's name; but it is sufficient that they see the pen in his hand, and when they come to sign, they see his subscription finished: What if one go betwixt me and the party, and so intercept my view, if that would annul the writ, most of the deeds in Scotland might be questioned and convelled on that pretext. The *third* reason of reduction was, That it appears from the depositions, that, through weakness, after with great difficulty he had signed "GEORGE" and "MON," he there stopt, as unable to proceed any farther; and whereas they should have called two notaries to sign for him, as *scribere non valens ob infirmitatem*, Watson, the writer, (though no notary) boldly took him by the wrist, and led his hand till he added "CRIEFF," the last syllable of his sirname, and which differs from his other subscriptions, being more Watson's writing than his. Answered, No law obliges any to write out their full name, there being nothing more ordinary than to make the first letter of our Christian name to stand for the whole, as J. or A. to stand for *John* and *Andrew;* yea, the subscribing by the initial letters of both name and sirname has been sustained by the Lords, as appears in 20th January, 1631, Houston, *voce* WRIT; and 14th February, 1633, Grierson, IBIDEM; Now, the case here is much stronger, having writ George at full length, and "Mon" as the first syllable of his sirname, which was sufficient to attest his enix will and intention, though he had proceeded no farther, seeing G. and M. would have been sufficient alone; and as to the assistance given him in finishing the last part of it, the same is of no moment, for it is most customary to assist one troubled with the palsy to fix his hand, and yet this was never quarrelled; and they may as well say the laying a book under the paper is an unwarrantable and undue practice; and of all writs, testaments are the least to be scanned and restricted to such niceties, for they are the most favourable of all deeds. By the common law, uti quisque legassit ita jus esto; and by L. 1. C. De sacrosanct. eccles. nihil magis hominibus debetur quam ut supremæ voluntates, (postquam jam aliud velle non possunt) liber sit stylus, et licitum quod iterum non redit arbitrium; and it is the interest of humanity *voluntates defunctorum effectum sortiri*; and therefore holograph testaments with us are valid, and a Minister may supply the place of a notary, though the act 80 Parl. 1579 requires two notaries: Minors may test without consent of their curators, even as an interdicted person without his interdictors, and a wife without the concourse and authority of her husband. Replied, It is not sufficient to make a testament subsist, that he declared his will and inclination, unless the same be legally perfected, law *nil credit actum* (with Cæsar in Lucan) *quamdiu quid restat agendum*; and the Roman law is clear on this point, L. 12. *C. De fide instrum.*

No. 13.

No. 13. they must be *subscriptione partium roborata*, and L. 15. *C. De contrah. empt.* they must be *instrumenta completa et absoluta*; and Huber. *De testamentis*, tells how the Senate of Frizeland annulled a testament, where the greatest part of the name was finished *tramula manu*, and then *in medio defecit*, just as Sauchop did here; and if a deed is by us reputed on death-bed, unless he live 60 days after, so *a paritate rationis* a testament should precede the testator's death some time; and Julius Clarus tells us, by the statutes of Milan and some other principalities of Italy, no testament is valid with them unless subscribed a day or two before his death; whereas here he expired within a quarter of an hour after his signing; and in sober sadness, is not this to expose men to the restless importunity of designing people about them, who (as Craig observes) come always best speed; and what shall he do, when his mind is fixed on things of utmost consequence in view of eternity, but succumb to their solicitations to die with ease, the burden of the disease on his body, by reason of the strict union, mightily affecting and impressing his poor soul; so that, to redeem his trouble, he complies with any thing that is demanded, or rather extorted by these fraudulent and ungrateful importunities; the preventing whereof is one of the great interests of mankind: And as to the allegeance that initial letters have been sustained, that is only where they cannot subscribe their full names, and have been in use formerly to affix two letters, as Sir T. Wallace, Lord Craigie, observes in his alphabetical law-repertory; and to think his writing "George and Mon" would have been sufficient is a chimerical dream, for that might apply to Moncur, Monteith, Montgomery, and twenty other sirnames as well as to Moncrieff. And as to the pretence, that the fixing his arm could not direct his fingers, whose motion only frames the letters, they oppone the witnesses' depositions, that he could not have perfected the subscription without that; for he began to stagger, and the syllable "Mon" is downright scribble; so that last part was not his, but Watson's, who was too busy to finish this testament *quovis modo*, and to gratify the wife, his employer; and on the like ground, the Roman law wisely discharged testamentary liberalities to be given to physicians, because of their great access and impressions; and if supportation be forbid in going to kirk and market, for validating a deed on death-bed, is not the presumptuous moving and leading a dying man's hand in his subscribing as criminal as to the effect of making the deed null?—The Lords having advised the depositions and debate, sustained the reasons of reduction foresaid, and found them both relevant and proved, and therefore reduced the testament; some called this testament an abortive *embrio*, that never arrived to maturity nor perfection.

N. B. The defender gave in an appeal.

Fountainhall, v. 2. p. 587.

*** The judgment was affirmed.

*** This case is reported by Forbes:

No. 13.

Isobel Moncrieff, as nearest of kin to George Moncrieff her brother, pursued reduction of a testament alleged to have been made by him November 19, 1707, in favours of Catharine Monypenny, his relict, upon this ground, That contrary to the act 5th Parliament 1681, the instrumentary witnesses did not see the testator sign his whole name, but only "George Mon," and the writer observing his hand to waver through faintness, took him by the wrist, and assisted him to make the motion of his hand toward the writing the rest of his name, and he died within a quarter of an hour thereafter; whereas the law requiring witnesses to see the party subscribe, is not satisfied by seeing an inchoated subscription, but they must see it completed, which is consonant to the civil law, *L.* 17. *C. De Fide Instrumentorum*, *L.* 15. *C. De contrah. Empt.* Now, "George Mon" might be applied to other names, as to "George Monro," &c. as well as to "George Moncrieff."

Answered for the defender: Our law requires no more to sustain a testament, than a sufficient indication of the defunct's mind in writ, it being sufficient with us that one notary, or a Minister, sign for a party that cannot write, notwithstanding the act 80, Parl. 1579; and minors, wives, and interdicted persons, can *per se* make a testament, though they can do no other deed, unless authorised by their proper consenters; besides, our law allows of subscriptions by the initial letters of name and sirname, January 20, 1631, Houston against Houston, *voce* WRIT; February 14, 1633, Grierson against Grierson, IBIDEM; which is not so good as the subscription in question. How can the leading of the fainting testator's hand be considered as unwarrantable, when it is ordinary to assist the arms and hand of paralytic persons, who, without being settled by some outward assistance, could never be able to subscribe their name? And "George Mon" in this testament beginning with these words, "I George Moncrieff, &c." can no more be applied to "Monro" or any other name, than it could be applied to "Montalto" or "Montmorancy."

Replied for the pursuer: Albeit testaments once made are favourably interpreted, the laws of all nations are careful that the solemnities devised for obviating fraud, be nicely observed: And if we have but few testamentary solemnities, they should be more exactly noticed. 2. If the testator was not able to finish his subscription, without assistance, he was *scribere nesciens ob infirmitatem*, and therefore could only sign by a notary and witnesses specially required; the officious leading his hand in such a case, was a very criminal imposition, at least must have the same effect in law to annul the subscription, as supportation used to have for taking off the allegeance of *liege poustie*, by going to kirk and market, in reductions *ex capite lecti*. 3. The imperfect subscription quarrelled, cannot be thought so good, as subscription by initial letters, which is perfect in its kind; seeing in this case, the defunct's stopping before he finished what was intended, might have happened through a change of his mind.

No. 13. The Lords found the reason of reduction relevant, That the testament was not subscribed in the terms of the act of Parliament 1681, and finished by the defunct himself without assistance.

Forbes, p. 421.

*** It appears from the report of a subsequent branch of this cause, No. 12. p. 13307. *voce* QUOD POTUIT NON FECIT, that this judgment was affirmed upon appeal to the House of Lords. See No. 15. p. 13409.

1728. *December.* MARY HOPKINS *against* DUKE of ATHOLE.

No. 14. One Hopkins intending to dispose of his effects to his relict, upon death-bed caused write out a testament, but after it was read over to him in usual form, he became so weak as not to be able to subscribe more than the three first letters of his name; however, the witnesses having subscribed, and given their affidavits upon the true matter of fact in support of the writ, the will was approved of in the prerogative court of Canterbury, and the relict appointed executrix, administratrix, &c. Upon this title having pursued for a debt owing to her husband in Scotland, the Lords refused to sustain the testament for above £.100 Scots.—See APPENDIX.

Fol. Dic. v. 2. *p.* 461.

1733. *July* 11. DOUGLAS *against* ALLAN.

No. 15. A person *in liege poustie*, made a total settlement of his estate by disposition, whereby he conveyed in general all his effects heritable and moveable in favours of his wife in life-rent, and of his grand nephew in fee. In the same deed he conveys his whole moveables in favours of his wife, in case she should survive him, and names her sole executrix. After this he leaves several legacies, and lastly reserves to himself a power to alter; and there is a clause dispensing with the not delivery. In a reduction of this deed at the instance of the heir, it was alleged to be null, in so far as concerns the heritable subjects, because it was a deed of a testamentary nature, since the wife was named executrix in it; and, according to the opinion of my Lord Stair, deeds by testament, though done *in liege poustie*, have no more effect than on death-bed. Answered, The deed is nowise of a testamentary nature, nor nowise a testament, in that part of it which conveys the heritable subjects, but is a plain disposition *inter vivos*, made *in liege poustie;* and there is nothing in law to hinder the adjecting of a clause naming an executor in the most formal disposition of lands, yea, it has been known done in a contract of marriage; and why a disposition and a testament may not be in one paper, as well