1674. *December* 2. CRANSTON *against* BROWN.

No 10.

A special legacy of an heritable bond being left in a testament, in which the testator's heir was named executor and universal legatee, the legacy was sustained; for it implied a *non repugnantia*, so that he could not quarrel the legacy, and at the same time take the benefit of the testament.

Fol. Dic. v. 2. *p.* 309. *Stair.*

*** This case is No 15. p. 8058. *voce* LEGACY.

1698. *December* 15. STRAITON *against* WIGHT.

No 11.

A GRATUITOUS bond granted by a minor being reduced by his heir, the creditor insisted for an equivalent out of the executry, upon this footing, that the bond implied a legacy, which the minor could grant, minors being *testamenti capaces*. *Answered*, The bond being reducible by the granter himself, it can infer no warrandice against him or his goods, neither can it have the effect of a legacy; for whatever might have been the granter's intention, he has not expressed the same either by word or writ, *et sic quod voluit non fecit*. THE LORDS found they could not transubstantiate the bond into a legacy, and therefore assoilzied.

Fol. Dic. v. 2. *p.* 308. *Fountainhall.*

*** This case is No 10. p. 10326. *voce* PERSONAL AND TRANSMISSIBLE.

1711. *July* 20.

ISOBEL MONCRIEFF, and her HUSBAND, *against* CATHARINE MONYPENNY, Relict of GEORGE MONCRIEFF of Sauchop.

No 12.
A written testament reduced for informality, not sustained as a nuncupative legacy.

IN the process at the instance of Isobel Moncrieff, as nearest of kin to George Moncrieff her brother, against Catharine Monypenny his relict, the LORDS, 14th July 1710, *vide* TESTAMENT, having reduced the testament; which sentence was, upon the relict's appeal, affirmed in the House of Peers, Isobel Moncrieff and her husband pursued Catharine Monypenny for her intromissions with her husband's effects.

Alleged for the defender; The written testament, though reduced, must subsist as a nuncupative testament to the extent of L. 100 Scots to each legatary, 7th July 1629, Wallace *contra* Muir, No 9. p. 1350.; because, the defunct's

No 12.

endeavouring *ob majorem cautelam* to have his will declared by writ, that he might have the greater freedom of disposing of his means, can never evacuate the nuncupative will, which is clear and formal in every respect; as the Lord Dirleton signed the last settlement of his estate, not only with his own hand, but also before two notaries and four witnesses, that if the holograph subscription had not been good, the writ might subsist by the notorial attestations, *et e contra.*

Replied for the pursuer; The written testament produced cannot subsist as a nuncupative; because one who declares his intention to make his will in writ, excludes all nuncupative wills, though the writ should be null for want of the legal solemnities, as effectually as the written testament, had it subsisted, would have left no place for a nuncupative will. Qui testamentum facere opinatus est, nec voluit quasi codicillos id valere, nec codicillos fecisse videtur, ideoque quod in illo testamento scriptum est, licet quasi in codicillis poterit valere, tamen non debetur. Whence the lawyers conclude, Si testator voluit facere testamentum in scriptis, et omiserit aliquas solennitates in eo requisitas, quæ tamen sufficiunt ad nuncupativum, ne quidem valere ut tale, quia quod voluit, in scriptis scil. testari, non potuit, et quod potuit, scil. nuncupare, non voluit. Quia una species non potest contra voluntatem constituentis in aliam converti. Perez. ad Codicem Lib. 6. Tit. 23. N. 19. Voet. in Pandect. Lib. 28. Tit. 1. N. 10. And though writs for sums above L. 100, subscribed by one notary and two witnesses, will be sustained for L. 100, it doth not follow, that a null written testament should subsist as a nuncupative, which is vitiosa transitio de genere in genus. But to run the parallel close, as in the foresaid case, it being the granter's will the writ should subsist for a greater sum than law allowed the same should be sustained for the sum allowed by law; so a nuncupative testament for L. 200 Scots, might *a pari* be supported for L. 100, because of his inclination *testari nuncapative,* which cannot be pretended in this case.

THE LORDS found, That the testament could not be sustained as a nuncupative legacy.

Fol. Dic. v. 2. p. 308. *Forbes, p.* 531.

No 13.
A letter is not sufficient revocation of a bond revocable at pleasure, though it is sufficient to stop an annuity payable during pleasure.

1753. *February* 15.

PATRICK HALDANE of Bearcross, Esq; one of his Majesty's Solicitors, *against* ARCHIBALD Duke of DOUGLAS.

THE Duke of Douglas, in 1718, granted bond to his sister, Lady Jean Douglas, for the sum of 30,000 merks Scots, bearing annualrent, but containing a power to his Grace to revoke the same at pleasure.