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.

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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.

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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

as in two different papers, no good reason can be assigned. The Lords assoilzied from the reduction.—See APPENDIX No. 15.

*Fol. Dic. v. 2. p. 459.*

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1735. *November* 15. PETRIE *against* LITHGOW.

No. 16.

A testament was reduced, it having been proved by the writer's oath, That it was not read over to the defunct at signing, nor was there any evidence, save the writer's own assertion, that he got any instructions from the defunct in what terms to draw the testament, so that the whole resolved upon the writer's faith alone. At the same time it was proved, That the defunct, some few hours before the testament was executed, had dictated a scroll of the particulars of her will, which differed in many articles from the testament.—See APPENDIX.

*Fol. Dic. v. 2. p. 460.*

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1735. *December* 4. BRAND *against* BRAND.

No. 17.

A testament being executed *in liege poustie*, with the common preamble usual in such deeds, nomination of an executor, burden of debts, &c. the following clause is adjected: "Which several debts and expenses of my funerals, I hereby appoint the said Sarah Brand to pay out of the first end of her intromissions as executrix; and for the better enabling her so to do, I hereby make, constitute, and ordain her, her heirs and donatars, my cessioners and assignees in and to the principal sum of £.500 Sterling, heritably secured upon the estate of Bransfield." In a reduction of this testament by the heir, in so far as concerned the heritable subject, the defence was, That nothing hindered a testament and assignation *inter vivos* to be upon the same paper. Answered, Where the deed is principally intended to be a disposition or conveyance *inter vivos*, it will be effectual, though a nomination of executors or other testamentary clause be adjected. But where the deed appears to be a formal testament, there a conveyance of heritage is inept, if fixed law and practice is to be the rule. And one reason is, That a testament, at whatever time executed, has no effect but as being the last will of the defunct; it is therefore construed in law to be the deed of the latest minute, equally as if it bore that date; and so testaments, from the nature of the thing, must be ever subject to the law of death-bed. It is otherwise in deeds *inter vivos*, which, though not delivered, are understood to be valid of their date, subject indeed to revocation or alteration; and if valid of their date, they must be safe from the challenge of death-bed, where executed *in liege poustie*. The Lords sustained the reason of reduction.—See APPENDIX.

*Fol. Dic. v. 2. p. 459.*