Since the Dispositions of a testament have their effect by the will of the testator, which is in place of a Law, It is only from this will that they have their force. And if a testator, instead of Chusing and Naming his Executor himself, had said in his testament, that his will was that such a one should be his Executor whom a Certain person whom he should name should Chuse and call to his succession, this Institution would be Lame and have No effect. For it would want the Character that is essential to a testament, of Containing the proper will of the testator who has the right to Dispose of his estate and not that of Another person l. 32 pr. ff de hered. Instit. who may after the testators death abuse in several Respects the Confidence put in him. But in Spain it is permitted to every one to name a person to whom he gives power to make his testament for him, whom they Call Cometido a Fazer testamento Les Loix Civiles &c. Tom. 1 part. 2 Liv. 3 Tit. 1 Sect. 1 Art. 6.

There are two ways of Making a testament testamentary, viz. in writing, and Without Writing.

A Written testament is that which at the Making thereof is put down in Writing. If it is Necessary in all sorts of Acts that they should have some Formallity to prove their truth in Order to give them the effect which they ought to have, there is as Much or More Necessity that an Act so serious and of so great Importance as is a testament, should be Accompanied with proofs of the Will of the testator, which May Not only Remove all suspicion of the forging Another will than his, but which may give also his testament the Character of a Will Well Consented, by the firmness and Authority of Which the peace and quiet of the families that are Interested in it may be established. It was upon these Considerations that in the Roman Law it was ordained, that a testament Could Not be Made without the presence of Seven Witnesses §3 Inst. de Testam. Ordin. Which usage is preserved in the provinces of France governed by the Written Law: Tho in other provinces only two Witnesses with a Nottary publick, or two Nottaries without other Witnesses are Required to a testament Les Loix Civiles &c. Tom. 1 part. 2 Liv. 3 Tit. 1 Sect. 3 pr. The Canon Law sustains a testament made before the Parish Presbyter and two Witnesses can. 10 X de Testam. In England the Number of Witnesses Required to a testament is only two when it Contains the Disposition only of personal estate. But all Devises and Bequests of any Lands or tenements must be in Writing, and signed by the party so Devising the same or by some other in his presence and by his Express Directions, and

and must be attested and subscribed in the presence of the said Devisor by three or four Credible Witnesses or else they are utterly void and of no effect. Swinb. of Testaments P. 1 §10 Stat. 29 Car. 2 Cap. 3 §5 Yet in England Women are allowed to be to be good Witnesses to a Will Swinb. Ibid. Part. 4 §21. John Cowell's Institutes of the Laws of England Book 3 Tit. 12. pag. 354. With us a Written testament must be either holograph, all written and signed with the testators own hand, without Witnesses if he can Write, or by a Nottary and two Witnesses if he Cannot write. So favourable is our Law to a testator who cannot write that a Nottary and two witnesses may subscribe for him even in a Matter of great Importance Stair lib. 3 Tit. 8 §34 Because often there is not Copia Notariorum & testium: Tho in ordinary Writs of Importance two Nottaries and four Witnesses are Required Act 80 Par. 6 Jam. 6. And a Minister is Authorized by his Character to officiate as a Nottary in testaments act 133 par. 8 Jo., tho not in Any other Writ. Because ministers are ordinarily ... dying persons at their death. A fathers testament Naming tutors to his Children was sustained tho the testator, who not being able to subscribe gave warrand to two Ministers to subscribe as Nottaries for him, died before they subscribed 1st January 167. & Gray contra Laye. Balleger. o. Being the making a testament among the Romans was very Difficulty because of the Number of Witnesses, and other formalities Required to it, and those who made their testaments with the greatest Exactness might be Deceived in them, an expedient was thought on to supply the Want of formalities and substantiate ... by adding to the testament a Codicillary Clause, whereby they ordain, that if their will cannot be valid as a testament, it may be valid as a Codicil, or otherways in the best form that it can be Valid. L. 29 §1 ff qui testam. fac. poss. But this Codicillary clause is not used, nor is there any Occasion for it in testaments made either in England or Scotland: Where the Law is so favourable to support the Last wills of dying persons, that it allways presumes an Earnest Desire in the testator, to have his will to take effect in some Manner or other, if not as a testament, yet as a Codicil or testamentary Schedule, altho such his desire be not expressly Mentioned in the Will. A Testament Made in England or in any forein Nation according to the solemnity of the place (tho different from What our Law prescribes) is sustained to transmit Moveables in Scotland. But a forein testament Altering the Substantials of our form of Conveyance is not Regarded here Stair lib. 3 Tit. 8 §35 Vid. Sup. pag. 565. 566.

A testament Made Without Writing called a Nuncupative testament, is when the testator doth by word of Mouth only declare his Will. The Roman Law §ult. Inst. de Testam. Ordin. And the Law of England 29 Car. 2 Cap. 3. 4 & 5.

Anne