return is used, no more but a substitution is meant; and, where that is omitted, it is not the less a return, having the same effects as if the word had been expressed. Neither can it be admitted, that a person, disponing land to another and his heirs, with a substitution of return to his own, means to put the disponee under any restriction; as, in the construction of law, he is understood to have left him the free disposal of the subject; for, if he had otherwise intended, he could have explained his meaning by a proper clause. In some instances indeed the defender's doctrine may hold, where there are special circumstances that demonstrate this to be the intention: but, in others, where no speciality occurs, as in the present question, the grantee must be supposed left at liberty; otherwise every substitution would end in a tailyie.

As to the instance of mutual tailyies, the decision *Sharp* contra *Sharp*, and that of obligations in contracts of marriage; they do not in the least concern the point in dispute; seeing the ground-work of these cases is not simply onerosity, but an express stipulation for that effect, by which the other party is bound *ex pacto:* but, where the institute is put under no limitation, surely a prohibition to alter ought not to be implied. And, as to the decisions quoted, they can have no influence here, seeing they are all grounded on special circumstances that take them out of the general rule.

The Lords found the pursuers entitled to the legacy, in respect the legator survived the term of payment of the legacy.

No. 13. *page* 29.

1736. *June* 25. GEORGE MONRO of Lemlair, *against* GUSTAVUS MONRO of Culrain.

UPON the death of Lady Westertown, George Monro of Culrain, who was her heir, imagining he was likewise her executor, took possession of her silver plate, watches, rings, &c.; however, he granted a receipt, wherein he obliged himself to be accountable for the same to those having the best right, without specifying the weight or value.

After this, Lady Lemlair was confirmed executrix to her sister Lady Westertown. But she having likewise died soon thereafter, the said George Monro, as having right from her, made an eik to Lady Westertown's testament, wherein he gave up the plate, &c. at L536 Scots value; and then brought a process against Culrain, in which he was decerned to deliver to the pursuer the *ipsa corpora* of the foresaid goods. Soon after which, the defender died; whereupon the process was transferred against his brother, the present Culrain: and the question that occurred betwixt them was, What rule should be followed, in order to ascertain the value of the goods in the receipt, seeing the late Culrain had disposed thereof?

For the pursuer it was CONTENDED,—That the estimate given up in the eik to the testament was a sufficient proof, especially as it has now become impracticable to have the value ascertained any other way.

On the other hand, the defender URGED,—That no weight could be laid on the values in the testament: seeing that was purely the pursuer's assertion; and, if that was to be the legal rule, this absurdity would follow, that if he had given up the values at a much higher rate, the law would be the same. It is true, that in confirmations, the valuations are usually very low; especially when the executor is accountable to others. But it is not to be supposed this pursuer would err on that side; as he is accountable to nobody. Possibly the values, as given up in the testament, would have been held as evidence against the late Culrain *in pœnam* of his contumacy for not delivery: but such a proof, being of a penal nature, ought not to affect the heir, who cannot be presumed contumacious in not exhibiting what he never had access to see. Therefore, as it is a *factum imprestabile* as to him, all that can be demanded at present, is the *damnum et interesse*, when proved in a habile manner: which may easily be done, by appointing silversmiths to examine inventory; who, upon comparing the highest and lowest sizes of each species, might strike a medium, whereby a value near to the true one would come out.

To this it was ANSWERED for the pursuer,—That the narrative of the testament bears the same was faithfully given up; which being probably known to the late Culrain, it must have been a good proof against him, who did not exhibit the goods; of consequence the same ought likewise to be sustained against the heir, who does not perform what his predecessor was liable to. And the defender mistakes the case when he considers it as of a penal nature, seeing the action is the same against him as against the late Culrain, viz. That he should be decerned in the just value of the goods abstracted by his predecessor. As to the proposal anent silversmiths being appointed to appreciate according to a medium, that is now impracticable, as no man without seeing them can form any notion of the value.

The Lords found that the value in the confirmed testament is the presumed value, unless otherwise proven.

No. 26. *page* 46.

1737. *February* 11. The PROCURATOR-FISCAL of the Commissary Court of Kelso, *against* WILLIAM CHATTO, Saddler there.

WILLIAM CHATTO having uttered some scurrilous expressions, such as thief, whore, &c. against James Barie and his wife; they, with concourse of the said Procurator-Fiscal, brought a process against him therefore before the Commissary of Kelso: who, upon the fact's being proved, decerned the defender to make an acknowledgment of his fault before the congregation, as the form is in such cases; and likewise to make payment of L50 Scots, the one half to the party injured, the other to the Fiscal, for the use of the poor. Who having charged for the L25 Scots payable to himself, Chatto suspended the same upon the following grounds.

First, Because the decreet was in absence, the suspender having been in England during the dependence of the process; and although a procurator appeared