

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 imprestable* 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.

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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 concurrence 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 decret was in absence, the suspender having been in England during the dependence of the process; and although a procurator appeared

for him who denied the libel, yet the same was altogether ultroneous, he having given no mandate or order to the Procurator for that effect. *2dly*, In this case there was no injury committed; nothing but a few idle words having dropt from him, *ex calore iracundiæ*, without any *animus injuriandi*, which, in verbal injuries, ought to be plainly proved. *3dly*, Six days after committing the offence, the private parties injured disclaimed all process of scandal, either at their own or at the Fiscal's instance, against the suspender; as appears from the disclamation now produced. *4thly*, The Fiscal could not, after the private parties had remitted the injury, *per se*, insist *ad vindictam publicam*; seeing, from the nature of his office, he had no power to prosecute private delicts, being only a Procurator appointed originally by the Bishop to take care of confirmations and quots of testaments.

To the *first* reason of suspension, it was ANSWERED,—That a regular execution was produced before the inferior court against William Chatto; after which, a Procurator appeared for him, who denied the libel; in consequence whereof, several diets were appointed for examining the witnesses: so that neither Judge nor Fiscal hastened matters, in order to take any undue advantage. *2dly*, The expressions libelled were very injurious; consequently, it was no ways material whether they were spoken in a passion or not. And as to the design of injuring, that can only appear from the expressions. Neither is there any necessity of proving the *animus injuriandi*, where the words used can bear no other meaning. With respect to the *third*, the private parties injured appeared in Court personally several times, supplicating for justice; so that, although the disclamation bears date before the commencement of the process, yet that can afford no reason of suspension, as it was not produced nor pled upon before the inferior Judge. *4thly*, Granting the disclamation were to have its full force, or that the private parties had appeared personally before the Commissary, and judicially disclaimed the process; still that could not have barred the Fiscal from insisting; seeing, as *vindictor publicus*, he has an interest to prosecute crimes without the concurrence of the private party. And, as the Commissaries are vested with a power of punishing scandalous expressions, there is no reason why the Fiscal should not have such fines, as a perquisite of his office; though, in the present question, the sum charged for is only applicable to the use of the poor.

The Lords suspended the letters *simpliciter*.

*No. 52. page 87.*

1737. *July 22.* Competition, JAMES GRANT, &c. with ROBERT SUTHERLAND.

WILLIAM SHAW, drover, having died in England, his son Robert intromitted with his effects; and in the year 1728, he gave in a petition to the Commissary of Inverness, acknowledging, That, after all deductions, there was L240 Sterling of his father's money still in his hands: on which the Commissary decerned him executor to his father. After this, he died before any confirmation was expedited. Whereupon the said James Grant, &c. being creditors of William Shaw, applied to have Robert's repositories searched; that so the money, which he owned belonged to his father, might be secured for their behoof; but upon a search being made, there was only found L126, so that there was wanting L114.