DECISIONS

OF THE

LORDS OF COUNCIL AND SESSION,

REPORTED BY

ALEXANDER HOME, CLERK OF SESSION.

1736. *January* 15. —— *against* ——

OF this date, I find it marked in the day-book of interlocutors, that Lord Kilkerran reported the following objection to a bill, to wit, that it was addressed to two persons, the one as principal, the other as cautioner. The cautioner was charged, and made the objection.

The Lords found a cautionary obligation could not be constituted by a writing in form of a bill; and therefore found the bill null as to the cautioner.

N.B. Both had accepted simply. *No.* 7. *page* 20.

1736. *February* 13. JANET and MARY LOWIS, *against* JAMES LAURIE.

THE deceased William Laurie, tenant in Eastown of Dumsyrie, by his testament, nominated the said James Laurie (his brother) his executor and universal legator, with the burden of certain legacies; particularly, he left 2000 merks to his nephew, Robert Laurie, payable at his majority; and, in respect he was then a pupil, the testator appointed his executor to be tutor and curator to him; after which, the following clause is added: "And, notwithstanding of the legacy left by "me to him, I hereby ordain the same to return back to my said executor and

" his heirs, in case the said Robert decease without heirs lawfully procreated of his " own body." Upon William's death, Robert assigned the legacy to the said Janet and Mary Lowis; and then died, after surviving the term of payment. Whereupon they brought an action against the executor.

For James, the defence offered was, that the legacy, by the testament, is provided to return to himself, failing Robert and the heirs of his body; who, having died without heirs of his body, could not gratuitously dispose thereof to the defender's prejudice.

To which it was ANSWERED,—It is a rule in settlements, that a substitution of heirs, where the institute or prior substitutes are not tied down, by limitations, from altering the substitution to the prejudice of after substitutes,—is only considered as a naked destination of succession; and, notwithstanding thereof, it is competent to the fiar for the time, to dispose of the property to whom he pleases, the power of disposal being the very essence of property: for the law does not presume that a person, making a settlement, and therein calling a series of substitutes, means any more than that they shall succeed, in case the fiar does not make use of his power of disposal, by bestowing it on others: See *Scot* of *Tushielaw* contra *Balfour* of *Broadmeadows*.

REPLIED for the defender,—That a clause of return, in favours of the granter and his heirs, has, by law, a stronger effect than a common simple substitution; seeing, from the presumed intention of the testator, it implies the same thing as if an express prohibition to alter had been adjected; consequently, it excludes all gratuitous deeds done in prejudice of the right created to the person in whose favours the return is stipulated. To illustrate which, it was argued, that where one grants away either lands or a sum of money to another who is not his heir, with a clause of return in favours of himself or his heir, in case the granter should have no heirs of his own body; it is plain, the granter thereby intends to create a right to himself or his heirs, upon condition that the disponee have no children; which implies an obligation that he shall do no deed gratuitously, to disappoint the will of the donor: therefore there is no necessity to add an express prohibitory clause, in order to fix the return; for, if a prohibition is implied, the obligation not to alter is as strong as if it had been expressed in direct and formal terms, and really imports the same thing as if the substitution had been made for an onerous cause. Neither is this the only instance where the law gives the same force to an implied prohibition, that it does to an express one. Thus, for instance, constitutors of mutual tailyies can do no gratuitous deed to alter or evacuate the same; which is founded upon this principle, that mutual entails carry in them an implied obligation not to alter; *Lord Stair, tit. infeft. of property*, § 59; *January* 14. 1631, *Sharp*. In the same manner, substitutions, in a contract of marriage, in favours of the children of the marriage, is a bar to the father's doing any gratuitous deed in their prejudice; which arises not from any express clause containing a prohibition to alter, but from the presumed intention of parties: agreeable to which principles, it has been all along decided; as appears from the following decisions, *January* 14, 1679, *Drummond; February* 10, 1685, *Mortimer; February* 6, 1724, *Moffat*.

To which the pursuers DUPLIED,—That there is no difference betwixt a substitution of the granter or his heirs and a clause of return: for, where the word

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.