

coming, the goods already disposed of cannot be recalled; but, as Craig offered L.200, the executor must be liable to that extent.

COVINGTON. The law of Scotland has received greater alterations in the matter of executry than in any other particular. The law *now* vests the subjects in the executor, and the necessity of confirmation *ad male apprehiata* has been in many cases got over. If action is competent, to any creditor afterwards, Why not at the very time of the executor taking possession? In some cases a creditor would not be entitled to force a roup, as in the case of family pictures and jewels.

PRESIDENT. I imagine that the commissaries have erred by regarding ancient practice too much. Nothing is more consistent with mutual justice than to estimate goods according to the value which the creditor offers to hold them at. The commissaries ought to have waited till the parties were in the field, and they ought to have taken the value upon oath. As to the distinction made by Lord Covington with respect to family pictures and jewels, the law, in my opinion, knows no such distinction. The creditors have a right in them, and they cannot be obliged to hold the estimate value as the real amount.

KAIMES. Land itself, the most precious of all goods, must go till the creditors are once paid, even the family estate. Confirmation *ad male apprehiata* is a very imperfect remedy. Here the woman confirmed *qua* relict, at a presumptive value. Had the creditors stood by and said nothing, that value would be held the just value as to goods of which she had disposed.

On the 7th March 1777, "The Lords remitted to the commissaries, with this instruction, that they find the relict accountable at the value of L.200, which Craig offered for the goods."

Act. A. Crosbie. *Alt.* D. Græme.

Reporter, Monboddo.

1777. June 13. ROBERT DOWNIE, and OTHERS, *against* MARION ALEXANDER.

IMPLIED ASSIGNATION.

Disposition of an area in liferent found to include a tenement afterwards erected upon it.

[*Faculty Collection*, VII. 412; *Dict.*, *App. I.*, *Implied Assign.*, No. 1.]

KENNET. The disposition is not accurately worded, but the meaning is apparent: it was intended that the woman should have the liferent of the upper story; for, as the under storey was reserved, she could not profit from the upper space if not built on.

COVINGTON. Here there is nothing but personal creditors. In a competition between the man's heirs and the woman, the woman would be preferred, and this case is not more favourable.

KAIMES. Although the debt had been contracted for building, it would

have made no difference, for still the creditors would have had no preferable right.

BRAXFIELD. The father conveyed an area, and the husband was to provide his wife in a liferent; this means, of a building to be erected on the area. The only question is, Whether any challenge can lie on the head of fraud? There is none, for the provision was reasonable when the husband made it.

PRESIDENT. It is plain that the father meant to secure his daughter in a liferent, as she was accordingly infeft without delay. This is good against creditors.

On the 13th June 1777, "The Lords preferred the woman to the maills and duties for her liferent."

Act. A. Elphinston. *Alt.* J. Morthland.
Reporter, Ankerville.

1777. June 17. JOHN RAMSAY *against* WILLIAM ROSE.

PART AND PERTINENT.

Mills carried by a disposition of the lands with parts and pertinents.

[*Faculty Collection, VII. 410; Dict., App. I., Part and Pert., No. 2.*]

BRAXFIELD. The objection is, that the claimant had no right to the mill, which is a *separatum tenementum*. Two questions may arise,—1st, Whether any part of the valuation ought to be stated to the mill? 2dly, Whether the complainer has right to the mill? If he has, the first question is unnecessary to be determined. The general rule certainly is, that a mill does not pass as part and pertinent; but I doubt as to the application of it to this case. All such questions are *quæstiones voluntatis*. So, in the case of teinds, whenever it appears to be the intention of the disponent to convey teinds, they will be held as disponent,—See *Dunning against Creditors of Tullibol*, in Falconer's Decisions. If once a mill is established as a distinct tenement, it cannot be conveyed as part and pertinent: but here it does not appear that this mill was ever considered as a distinct tenement. Here the proprietor conveyed just what was in his own titles.

On the 17th June 1777, The Lords sustained the complaint, and ordered the claimant to be enrolled.

Act. R. Blair. *Alt.* A. Elphinston.