

soil and grass : the tenant cannot be permitted to annihilate the ground under, with the view of getting at the marle. If he has the privilege of digging, why may he not sell it as well as he does crop ?

JUSTICE-CLERK. I would not discourage tenants in the common course of husbandry, but I do not think that a tenant can destroy any part of his farm. It often happens that marle is unexpectedly discovered : if the tenant was to have the use of it, he would gain an exorbitant profit by a mere casualty, while the master would suffer loss by being deprived of the profits of the subject.

On the 10th February 1778, " The Lords found that the property of the marle in question belongs to the pursuer, and that the defender has no right or title to work, use, or dispose of it ; and that the defender did wrong in interrupting the pursuer in working the marle, and in working and using thereof ;" adhering to Lord Elliock's interlocutor.

Act. Ilay Campbell. *Alt.* G. Wallace.

1778. February 12. MARY NASMITH *against* THE COMMISSARIES OF EDINBURGH.

EXECUTOR.

Right of the Executors to have part of the Effects confirmed, though the whole are inventoried and appreciated.

[*Faculty Collection, VIII. 26 ; Dictionary, 3918.*]

COVINGTON. It is decided that the commissaries cannot compel any one to confirm, or to confirm more than he inclines. I do not think that the circumstances of the inventories and appreciation can take this case out of the general rule.

BRAXFIELD. The doctrine of the commissaries is just to bring back the law to what it was before the 1690. Formerly the commissaries got the goods of defuncts into their possession under the pious pretence of securing them for the behoof of heirs and creditors. They could compel universal confirmation, and even appoint their own fiscal to confirm, and exact a *quot*. This was the very thing which the statute 1690 meant to rectify. If the goods are once in the possession of the court, there is reason that the commissaries should exact the dues of Court, as to what is in the hands of the Court ; but that is not the case here.

GARDENSTON. I can discover no difference between this case and that of the commissary of Murray. The appreciation was a proper measure, to satisfy all persons concerned ; but it did not place the subjects in the hands of the court, and therefore does not vary the case.

On the 12th February 1778, " The Lords remitted to the commissaries,

with an instruction that they admit the confirmation, as offered ;" altering the interlocutor of Lord Auchinleck.

Act. Ch. Hay. *Alt.* A. Murray.

1778. *February* 14. ANDREW WELSH *against* JAMES WELSH and OTHERS.

TUTOR AND CURATOR.

Curators removed as suspect.

[*Faculty Collection, VIII. 27; Dictionary, 16,373.*]

COVINGTON. Where there is a wrong, there must be a remedy. Perhaps the pursuer may not have a right to apply to have the curators removed ; but you may declare him free from his cautionary obligation ever since the date of his protest and requisition.

BRAXFIELD. Seeing the case to be as it is, we cannot leave this minor in so bad hands.

KAIMES. I would relieve the cautioner, ordain the curators to find a new cautioner, and, if they do not, remove them.

On the 14th February 1778, " The Lords found the cautioner relieved, from the date of his requisition, appointed the curators to find a new cautioner in ten days, with certification that, if they failed, they should be removed as suspect."

Act. G. Ferguson.

Reporter, Hailes.

1778. *February* 18. JAMES CAMPBELL and OTHERS *against* JANET SOMERVILLE.

BANKRUPT.

A postnuptial Provision by a Husband, *obæratu*s, on his Wife, how far good against Creditors ?

[*Faculty Collection, VIII. 29; Dict. 1000.*]

KAIMES. This liferent is not a provision in a marriage-contract, but a donation revocable at pleasure : it is without an onerous cause, and creditors