1778. *February* 10. DAVID BETHUNE of BALFOUR *against* PATRICK JERVICE.

TACK.

Right of the Landlord to Shell-marle found within the Farm, and to work such Marle during the Lease.

[*Fac. Coll., VIII.* 20; *Dict.*, 15,267.]

WESTHALL. It is admitted that a tenant may mix the sand of one part of his ground with the clay of another, and *vice versa*, and so also as to moss. I do not see the distinction as to marle.

COVINGTON. A tenant cannot open quarries for building and inclosing, although beneficial to the farm: the master must judge of that, not the tenant. Here the marle is of small extent. If the tenant is permitted to use *it*, the marle will be exhausted. There are many liberties which a master would not refuse, but which a tenant cannot take, as when there is a very great quantity of marle in the ground, more than the master can find use for. The case of clay laid on sand does not come up to the present case, for *there* the subject is not taken away; but *here* the marle is exhausted, and ceases to be, in a very few years. The tenant's right is merely *superficial*: how then can he dig for marle, which is *consumed* in using? When a moss is let, the master cannot cast peats for sale; neither can the tenant destroy the moss, to improve the soil.

BRAXFIELD. Had the marle been known at the date of the lease, I am entitled to presume that the master, on giving the use of it to the tenant, would have increased the rent. If the tenant is allowed marle, he will have a great advantage not thought of or intended. The general proposition is, that the right set to the *colonus* is a right to the surface,—*glebam vertere*: he is not entitled to limestone without paction. I do not think that a tenant can lay clay on sand, or sand on clay, any more than cast feal to make an earth dunghill.

GARDENSTON. Unless it be a matter *innoxiæ utilitatis*, a tenant cannot take clay from one part of the land and lay it on another: he has merely a superficial right. He may be debarred from using sod for the purpose of making earth dunghills. This was a very prevalent mode in the north of Scotland, and has been justly checked. The people in that country have an uncivil proverb,—"Mack-feal and nobles are the curse of the land."

KAIMES. The nature of a lease is a right to the surface; yet the tenant may carry one sort of soil from a particular spot to mix it with soil of a different nature. This is most judicious and profitable husbandry. The tenant has no privilege as to any thing below the surface: the very liberty to dig for limestone is a proof of this. Here there is a bed of shell-marle neither known nor bargained for: it was not in the view of parties, and consequently the tenant paid no additional rent. Marle may chance to be covered with rich

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,