No. 150.

Shell-marle being a substance different from the soil, it could have no effect on this question, though the tenant had a right to mix one soil with another. But, even in that case, if the landlord can qualify a beneficial interest in the preventing of it, and his objection is not emulous, it may be contended on sound principles, that the tenant would not be allowed to transport one soil to lay upon another.—Shell-marle is a substance *in commercio* as much as lime or coals. It is, therefore, not emulous on the part of the landlord to oppose the tenant's depriving him of this beneficial property.

The power of winning lime-stones, given by the lease, implies no right to work marle, which is a different substance.

2*do*, The landlord having the right to the marle, must be entitled to work it during the lease, on paying the tenant's damages for the roads, &c. though there be no reservation to that effect in the lease; as was expressly found in the case of a coal-mine, Hamilton, 21st June, 1768, No. 149. p. 15226.

Observed on the Bench: Clay-marle, and shell-marle, are of a different nature. The latter is as much a separate substance from the soil as a quarry of lime-stone, and the tenant has no right, in virtue of his lease, to take and use it without a special power for that purpose. Whether he may take clay-marle, or any part of the soil, and put it upon another, without the landlord's consent, it is not necessary to determine in the present question.

The Court adhered.

Act. *Ilay Campbell, John Anstruther.* Alt. *Geo. Wallace.*

*Fol. Dic. v.* 4. *p.* 326. *Fac. Coll. No.* 9. *p.* 20.

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1802. *December* 10. NISBET'S and COMPANY'S TRUSTEE, Petitioners.

No. 151.

The landlord is a preferable creditor over the effects of his bankrupt tenant, for all arrears of rent prior to the sequestration, even when the right of hypothec does not apply.

Cumberland Reid of Gogar-Bank, let the mill of Balerno to Nisbet, Macniven, and Company, for the space of fifty-seven years from Whitsunday 1788. The Company having become bankrupt, their estate was sequestrated, (11th July, 1799), and Robert Cameron was appointed trustee.

At the Whitsunday preceding, one year's rent was due to the landlord, for which he he did not insist till another year's rent became due, when he brought an action of removing before the Sheriff of Edinburgh, who decerned in the removing accordingly, (29th October, 1800.)

The cause was removed by advocation to the Court, when the Lord Ordinary, considering, among other circumstances, that the landlord did not claim the arrears sooner, and that certain creditors of the bankrupts had made claims, as having, previous to the bankruptcy, obtained assignations to tbe lease, and likewise, that

a claim was made by the Crown, in virtue of a writ of extent, found, (11th March, 1802), that " under all these circumstances, there is no sufficient ground for finding that the defenders have incurred an irritancy of the tack, but that, upon payment of two years rent due to the landlord, they are entitled to be assoilzied." No. 151.

The landlord reclaimed to the Court, who remitted to the Lord Ordinary, (10th December, 1802) to assign a day for the trustee to pay up the whole arrears now due to the landlord, with expenses of process.

His Lordship, accordingly, (16th December, 1802), assigned the first sederunt day in February for this purpose. Against this appointment the trustee reclaimed, and

Pleaded: Tenants are not the proper description of persons whose estates are capable of sequestration; leases, therefore, do not usually fall under the management of a trustee; but lands let to a manufacturer for the purpose of erecting machinery are in a different situation, and unquestionably fall under the bankrupt acts; and a landlord thus virtually subjects himself to the regulations of these statutes for the division of the bankrupt's effects, reserving to each creditor any preference which previously existed in his favour. To the extent of his hypothec, accordingly, the landlord, by an ancient consuetudinary law, is preferable; but beyond that he can only be considered as an ordinary creditor for the rent. He is bound to claim and make oath accordingly, and abide the course of the sequestration, where prior to the sequestration he has taken no judicial steps whatever. In Baird and Fraser against Brown and Gordon, No. 70. p. 6271. *voce* HYPOTHEC, it was found, " That the sequestration by the Sheriff, (at the landlord's instance for his rent,) after the sequestration from this Court, was improper, but that the master's right of hypothec remains entire." Again, where the landlord's sequestration was prior to the other, this last, it was found, could not interfere with the former; Buchan against Nisbet, No. 72. p. 6273. *voce* HYPOTHEC. In Dickson against Watson, No. 270. p. 1246. *voce* BANKRUPT, a sequestration of a subtenant's crop had been obtained for the arrears of rent. When he became bankrupt, the factor on his estate sold the crop, paying the rent to the principal tenant; and the Court sustained the objection, that these debts were paid without being claimed and proved in terms of the statute. For the arrears of rent at the time of the sequestration, then, the landlord must claim, and make oath, and rank like any other creditor. As to the rents subsequent to the sequestration, he will receive them when he pleases, as these are debts contracted by the trustee during his management; and the statute does not require the ceremony of a claim and oath for such.

On the other hand, the landlord was held to be a preferable creditor for the whole rents due, as well prior as subsequent to the sequestration, as the trustee for his creditors comes exactly into the situation of the tenant, and must therefore fulfil all the conditions of the lease. The trustee is no other than the legal assignee, who cannot stand in a better situation than a voluntary assignee, who becomes liable, by accepting it, to pay all by-gone arrears. The forfeiture of the lease is incurred on falling into an arrear of two years rent, and the creditors of

No. 151. the tenant cannot be relieved from this irritancy at an easier rate than the tenant himself. Prior to the act of sederunt 1756, which introduced this irritancy, in the case of feu-rights, the creditors of the vassal, on adjudging his property, could only be saved from the casuality of forfeiture *ob non solutum canonem*, by paying the whole arrears due. Till then, the subject is not theirs, nor subject to their claims. The case of Baird was thought to have been wrong decided, and at all events it occurred under the bankrupt act 1772.

It was further observed on the Bench: It is a mistake to say, that the landlord must claim under the sequestration as a common creditor for the arrears. The trustee cannot take the benefit of the lease for his constituents, without paying the arrears, and purging the irritancy.

The Court refused the petition without answers.

Lord Ordinary, *Cullen.* For Petitioner, *Morison.*
Agent, *Robert Cameron.* Clerk, *Ferrier.*

*F.* *Fac. Coll. No.* 70. *p.* 160.

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1804. *November* 21. RONALDSON *against* BALLANTINE.

No. 152.
A tenant is not entitled to prevent his landlord from hunting upon his farm.

John Ronaldson possessed the farm of Castlehill, the property of Patrick Ballantine, upon an improving lease for twenty-one years. The farm is situated within two miles of Ayr. The lands are inclosed; the tenant is bound to keep the fences in a state of repair, and to observe a rotation of crops. His landlord having hunted on horseback over the ploughed fields of his farm, Ronaldson presented a petition to the Sheriff, "to prohibit and discharge the said Patrick Ballantine, Esq; and all others, from hunting on the lands possessed by him, and thereby destroying the fences, hedges, and grounds, in all time coming, during the petitioner's tack."

The Sheriff assoilzied the defender, reserving to the pursuer an action against him for whatever damage he might be able to qualify. Upon this Ronaldson presented a bill of advocation, which was refused by the Lord Ordinary; but afterwards, in consequence of an application to the Court, the bill was passed. The pursuer

Pleaded: By granting a lease of a farm, the landlord relinquishes his right to the surface for a limited period, and transfers the possession to the tenant for a just equivalent. So far as relates to the use of the surface, and the enjoyment of the annual produce, the tenant, during the period of his lease, comes in the place of the proprietor. And as the landlord has unquestionably the right of preventing all persons from hunting upon his grounds; Marquis of Tweedale against Dalrymple, No. 3. p. 4992. *voce* GAME; Earl of Breadalbane against Livingston, No. 6. p. 4999. IBIDEM; in granting a lease for the purpose of agriculture, he must be held as conveying to his tenant this right, which is necessarily connected with the advancement of agricultural operations. It makes no difference to a tenant, whether this right of ranging over his fields is exercised by his landlord, or by