

1777. *March 4th.*—COVINGTON. I cannot consider this clause as the result of any corrupt bargain; nor would I, on account of it, reduce the decret *in totum*. I should be inclined to allow the parties to be heard *tanquam in libello*, were it not that this might in effect reduce the decret-arbitral.

PRESIDENT. The consequences would be fatal, were arbiters to be allowed, without consulting the parties, to award a sum to themselves; but still I would not set aside the whole decret-arbitral.

ALVA. It is but a guess whether this was innocent or not. We cannot see into people's hearts.

JUSTICE-CLERK. I was not present when the former interlocutor was pronounced; but I saw that it proceeded from a just sense of the dangerous consequences arising from such practices in arbiters. Yet I think that the words of the interlocutor go farther to ruin the characters of three men of business, and to deprive them of their livelihood. I cannot say that this was a corrupt bargain, when it does not appear that the arbiters meant to take any undue advantage.

KAIMES. This part of the decret-arbitral cannot stand: the question is, Whether the rest can subsist? I would presume in favour of the decret-arbitral, but I would allow the other party to object, as against the sentence of an inferior judge.

JUSTICE-CLERK. When arbiters determine on questions altogether distinct from the subject submitted, the practice of the Court has been to reduce *that* part, leaving the rest to stand.

On the 4th March 1777, The Lords altered their interlocutor of the 18th December 1776, and returned to the interlocutor of the Lord Hailes, Ordinary, with this addition, that the decerniture was *illegal*, and that it did not appear that the arbiters had acted corruptly, or from bad motives.

*Act.* J. Boswell, A. Crosbie. *Alt.* B. W. M'Leod, Ilay Campbell.

1777. *March 7.* JAMES CRAIG *against* ANNE RATTRAY.

#### EXECUTOR.

An executor found liable for a greater sum than the amount of the valuation put upon the defunct's goods in a judicial inventory, a creditor having offered that higher value.

[*Faculty Collection, VII. 402; Dictionary, App. I., Executor, No. 1.*]

BRAXFIELD. As to the form of confirming *ad male appretiated*, Whatever might have been the rule *formerly*, it is not absolutely necessary *now*. The creditor has a direct action against the executor to account: the value put on the goods at the appreciation is no more than a presumptive value: the fair way is to sell by public roup. Whenever there is an appearance of a short-

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