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

No. 150.
Right of the landlord to shell-marle found within the farm, and to work such marle during the lease.

Patrick Jervice possessed the lands of Incharvie under a lease from Mr. Bethune, by which the tenant had liberty " to win lime-stone upon any part of the said lands where they could be most conveniently had."

During the currency of the lesse, a bed of shell-marle was discovered on this farm. The landlord, being interrupted in working it by his tenant, brought a declarator of his exclusive right to this marle, and to the working of it during the lease.

In this action, the Lord Ordinary found, " That the property of the marle in question belongs to the pursuer, and that the defenders have no right or title to work, use, or dispose, of the said marle: That the defenders did wrong in interrupting the pursuer in working the said marle, and in working and using thereof themselves."

Pleaded for the tenant in a reclaiming petition, 1*mo*, That he had right to lay this marle on the lands of the farm for their improvement:—Admitting, that he had no title to carry the marle off the farm, or to use it in any other way.

The contract of lease implies a right in the tenant to this extent, over all natural manures found within the grounds. Marle is only to be considered as a richer species of soil; the tenant must be allowed to mix this soil, as a manure, with any other, for the better cultivation of the lands, in the same manner as he mixes a sandy with a clayey soil for that purpose.

If the tenant attempts to abuse this right by laying on too much marle, or by over-cropping after it, the landlord has the same remedy as against over-liming, mislabouring, or any other kind of husbandry pernicious to his property. But the possibility of mismanagement is not sufficient cause for excluding the tenant altogether from so useful a mean of improvement, and would equally apply to exclude the use of lime or marle purchased from a third party.

In this case, the tenant having a special power to win lime-stone, the inferior right of spreading marle is implied.

2*do*, Though the landlord were entitled to the exclusive property of this marle, he cannot work it, nor cut the ground with roads for that purpose during the currency of the lease.

The landlord insisted, 1*mo*, That he had the exclusive right to all shell-marle found within the farm. The lease imports only a temporary right to the yearly fruits of the soil, and extends not to minerals, or any substance found in beds or mines different from the soil; Stair. B. 2. p. 9. § 31; see No. 131. p. 15253.

Shell-marle is a substance as distinct from the soil as coal or lime-stone, and found, like these, in a separate bed. Being no part of what is let to the tenant, he can no more work these substances for purposes within the farm, than for those without it. If he needs them for the use of his lands, he must purchase them from the landlord, whose exclusive property they are.

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.

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