

a sequestration to be just like a pointing. The Duke is not bound to accept of a renunciation : he will still be a creditor for rent and for claim of damages, but only a personal creditor.

COVINGTON. The law has given the proprietor a privilege *contra communis juris regulas*, to the extent of one year's rent, but for no more. The Duke does not plead on his hypothec *here*, but on a common law right, from the terms of the contract : this cannot give a real preference.

MONBODDO. I do not doubt that a pointing would be good ; but a sequestration differs from a pointing.

JUSTICE-CLERK. The factor was *in cursu* before Whitsunday 1780, and he was vested in the subjects : this has the same effect as a pointing. The Act of Parliament orders goods pointed, within 30 days of sequestration, to be returned under the sequestration : Thus the Act equiparates sequestration to any other diligence.

ELLIOCK. The goods are vested in the factor, subject to the hypothec claim of the landlord.

On the 21st June 1780, "The Lords refused the bill."

*Act. J. M'Laurin. Alt. Ilay Campbell. Reporter, Hailes.*

*Diss. Monboddo. Non liquet, Kaimes.*

1780. June 22. Captain DAVID MITCHEL *against* DANIEL MORGAN.

*PACTUM ILLICITUM.*

Action denied for breach of a Smuggling Contract.

[*Supp. V. 533.*]

MONBODDO. The mandatory is not bound to perform a mandate like this.

BRAXFIELD. There is no question here as to point of honour or honesty : the great hurt to honest men, is when rogues are true to each other.

ALVA. I deny that there was any smuggling contract here.

JUSTICE-CLERK. It is extraordinary to say that there was no smuggling contract, when such contract is confessed by the parties themselves.

HAILES. This case is not strait, as others which have been determined by the Court. For some time a distinction was attempted between *malum in se* and *malum prohibitum*, and smuggling in general was said to be merely a *malum prohibitum*. I never could relish the distinction, and the Court at length disregarded it. *Here*, however, the *malum in se* is obvious, for Captain Mitchel was under covenant to serve faithfully, and the goods could not be smuggled on shore without bribing the custom-house officers : this is fairly admitted. Now, this is subornation of perjury in a moral sense of the phrase, and consequently the contract is founded on a *malum in se*, incapable of being the foundation of any action in a court of justice.

WESTHALL. There was clearly a smuggling contract *here*, but there was an agent employed; and I see no decision which denies action against such agent.

On the 22d June 1780, "The Lords found that no action lies;" altering Lord Westhall's interlocutor.

*Act.* W. Nairne. *Alt.* G. Buchan Hepburn.

*Diss.* Alva, Westhall.

1780. June 23. Mrs ELIZABETH GRAHAM *against* JAMES ERSKINE, Esq. and OTHERS.

MINOR.

A female, just twelve years of age, to whom her mother, and several other persons, had, by her father, been named curators, at liberty, in opposition to the latter, to accompany her mother to a foreign country, with the purpose of residing there.

[*Dict.* 8934; *Supplement*, V. 635.]

COVINGTON. Curators are named for the administration of effects. A minor is *sui juris* as to the disposal of his or her person, and no court of justice can interpose.

GARDENSTON. Minors have power to marry, and consequently have all lesser powers regarding their persons.

KAIMES. If the age of puberty was not defined, I should have difficulty: the right of marrying at twelve is monstrous in our climate: yet so stands the law.

JUSTICE-CLERK. The only meaning of the father was, to give curators to the children for the management of their effects. Where there is eminent danger to the person or morals of the minor, the Court may interpose by its *nobile officium*; but *here* there is no occasion for any such interference.

[He added a declamatory eulogium on the character of Mrs Graham, who he called *Mrs Crawford*, an eulogium which *might* be very just, but which was nothing to the purpose, as there was no question respecting her character.]

BRAXFIELD. The father did not mean to prolong the term of pupillarity, neither could he: the curators might object to any thing that might occasion extraordinary expense, but that is not said here.

MONBODDO. I am sorry that the law cannot interpose.

On the 23d June 1780, "The Lords repelled the reasons of suspension, and removed the interdict."

*Act.* A. Crosbie. *Alt.* Ilay Campbell. *Reporter*, Braxfield.