

- No. 9. quhile Edgar, executor confirmed to him, and David Johnston and Edward Edgar, their tutors, it was found, That an assignation made by the defunct, on his death-bed, of certain sums of money addebted to him by Mr. William Maxwell of _____, debtor to the defunct, whereupon the assignee comprised the debtor's lands, to the behoof of the defunct's bairns, that the assignation being proved to have been made *in lecto ægritudinis*, should nowise prejudge the relict of her just part of the sum, or the assignee who had comprised the lands to the bairns' behoof should make her assignee to the said part of the comprising.

Auchinleck MS. p. 236.

1627. November 31. TENANTS of EAST-HOUSES *against* HEPBURN.

No. 10.
Terce carries
bygone.

In a double pointing at the instance of the tenants of East-Houses *contra* Hepburn and others, the relict of an husband, who died in September, pursuing for the duties of her terce, whereto she was kenned, the Lords found, That she had right to her terce of that term preceding Martinmas, before the which the husband died, (the husband having deceased in September before, as said is); and the terce was of an annual-rent, wherein the husband died infest; the terce of the which term was found due to the relict, albeit the husband died before the Martinmas, and so before the expiring of that term whereof the annual-rent was acclaimed; and albeit the relict was not served to her terce sundry terms after her husband's decease, yet the same was drawn back to the time of his decease. Here the question was betwixt the heir and the tercer; but if the executor had acclaimed the term, there might have some question been moved with her; albeit I think she would have been preferred to the executor, seeing the heir had rather right to that term than the executor.

Act. Hay.

Alt. Lermanth.

Clerk, Hay.

Durie, p. 317.

1628. January 18. _____ *against* M'KENZIE.

No. 11.
Action of removing at the tercer's instance.

In a removing betwixt _____ *contra* M'Kenzie, the pursuer desiring removing from her terce, whereto she was kenned and served; and the defender alleging, that he bruiked the two parts with the third *pro indiviso*, and he could not know what was the pursuer's third, to the effect he might remove therefrom, seeing all the whole lands were mountains, and grass-ground, and not arable lands, whereby the terce could be known by itself, which cannot be in this case, where all is grass and pasturage; the Lords repelled the exception foresaid, of occupying *pro indiviso*; but the Lords found, That if the defender would offer obedience to remove from the third, that then they would grant commission, either to the

Sheriff, or to some Ordinary Judge, either to stent the whole lands, and the holding thereof, that the pursuer might have the third part of the sowms, and the right of pasurage upon the lands proportionally, conform to the relation of the two parts, so that the defender should hold no more goods thereon but according to the two parts of the sums whereto the whole lands should be extended, that the pursuer might have liberty, as said is, to pasture according to the proportion of her terce; or else, that the whole lands should be mett and measured by the said Judge, and that the third part thereof should be laid apart to the pursuer, for her terce, to be used by her at her pleasure, and that the defender should have no more but the quantity of the two parts of the lands, being justly mett, as said is; and which trial the Lords found might be taken in this same action of removing, if the defender did offer therein obedience to remove.

Act. *Gibson.*Alt. *Mowat.*Clerk, *Gibson.**Durie, p. 330.*

No. 11.

1628. January 31. LADY DUMFERMLINE against Her SON.

In an action of the Lady Dumfermline's *contra* the Earl, her son, for payment of the third of the duties of the lands whereof she was served to a terce, the whole duties being uplifted by the defender, it being controverted, if she, as lady tencer, before a warning or interruption used upon her terce and service, might seek any greater duties for her terce but according to the terce of that duty which was paid to her umquhile husband immediately before his decease,—the Lords found she had good right to seek her terce of that quantity, which was uplifted by the defender for the duties of the lands, and that she ought not to be restricted to the quantity paid in her husband's time, but might justly seek her third of that which was actually received by the defender for the duties of the whole lands, seeing the force of her service, giving her right, from the death of her husband, to all terms, behoved to give right for the duty of that part of the lands proportionally which was uplifted by him, who had no right but to the two parts, and none to her terce; but if the tenants had been convened therefor, who had never paid any duty since the decease of her husband, they had reason to have excluded the pursuit for any greater quantity than they were used to pay to the husband before: So that the reason of the decision was, because the defender had uplifted and received payment of this duty, and therefore ought to pay back that which he really received, and had no just reason to retain it.

Act. *Aiton & Stuart.*Alt. *Hope & Nicolson.*Clerk, *Hay.**Durie, p. 336.*

No. 12.
Terce carria
bygone.