

1770. January 17. MRS JEAN HAMILTON *against* MRS JEAN WOOD.

COMPETITION—TERCE.

Competition between an Adjudication and the right of Terce.

[*Faculty Collection, V. p. 27 ; Dictionary, 15,858.*]

PITFOUR. A right of terce is of the same nature with a liferent locality. A localist, if she lays out, loses the rents in time past, and so does a tercer. She can only obtain payment of bygones by adjudging upon the implied warrandice.

COALSTON. The two claims of terce and locality are precisely similar ; consequently, each has a right to levy rents *in medio*. I think, further, that the creditor-adjudger has not right to more than two-thirds ; and that the other third belongs to the widow as terce.

AUCHINLECK. Till a woman is kened in her terce, the subject is in the *hæreditas* of her husband, and is affectable by his creditors.

KAIMES. The wife is preferable ; but still, if she does not, the creditors may, as less preferable creditors are received when more preferable do not claim.

On the 17th January, 1770, “ The Lords found the widow entitled to the rents *in medio*, in payment of terce, from her husband’s death, but not to rents levied by the adjudger ;” varying Lord Monboddo’s interlocutor.

Act. Ilay Campbell. Alt. J. M’Claurin.

1770. January 26. ALEXANDER BOWER, and OTHERS, *against* RACHEL, &c. BROWNS.

CLAUSE—HERITABLE AND MOVEABLE.

A Deed containing dispositive words, held to be a Disposition and not a Testament : but the words, “ Means and Effects, Heritable and Moveable,” in said Deed, found insufficient to convey a proper heritable subject.

[*Faculty Collection, V. 32 ; Dictionary, 5440.*]

AUCHINLECK. This deed is so devised as to carry every thing belonging to the deceased. Means and effects will comprehend a house.

HAILES. I doubt as to that. Means and effects cannot, in propriety of speech, comprehend any thing but moveable subjects, and *nomina debitorum*. The

words do not, even in vulgar speech, comprehend subjects strictly heritable. No man ever reckons his house among his effects of any kind. *Means*,—from the French, *moyen*,—is no more than that whereby one is enabled to acquire a house or lands; but never implies the acquisition itself.

MONBODDO. Here are words of style, well known, and commonly used. They do not apply to lands or to houses.

COALSTON. The deed will not carry lands: Had that been the purpose of it, it would have begun with lands. I should have doubted of the deeds carrying the adjudication, were it not for the case *Marshall Wade's Succession*, which seems in point.

PITFOUR. There is no doubt as to heritable bonds and adjudications being carried; for the deed mentions heritable and moveable,—and, without prejudice of the generality, a bond of L.2800. I doubt as to land property being disposed. It is a maxim, “that, in virtue of general clauses, heritage is not understood unless expressed.”

KAIMES. One thing to intend, another to operate, especially where the deed executed is a donation to the prejudice of the heir. “Heritable means and effect” is not a clause of style. It might, however, comprehend the house, had there been any previous words from which the clause could have been explained.

GARDENSTON. The purpose was to convey his whole estate, and I think there are words sufficient to convey the whole,—the house as well as the adjudication.

On the 26th January, 1770, the Lords found, that Dr Brown's settlement included the heritable bonds and the adjudication,—but not the house.

Act. R. M'Queen. Alt. D. Rae.

Reporter, Justice-Clerk.

Diss. As to house, Auchinleck, Gardenston.

1770. January 31. DUKE of BUCCLEUGH *against* The OFFICERS of STATE.

PRESCRIPTION.

The right of Superiority of Lands, held by an erroneous tenure, being found to be established by Prescription in the Crown; the right to the Feu-duties found to be vested in like manner in the Crown, and the vassal accountable for a retrospective period of forty years.

(*Faculty Collection, V. p. 36; Dictionary, 10,751.*)

MONBODDO. Here no prescription as to feu-duties: the feu-duty is not simply payable to the King, but to those having a right for the time being. This cannot be a title of prescription to the Crown.