1773. *June* 26. JEAN MONTIER *against* MARGARET BAILLIE.

TERCE.

[*Dictionary*, 15,859.]

COALSTON. No debts can affect the terce which are not heritably secured and affect singular successors. Here three things are necessary: 1*st*, That the obligation be special as to the creditor; 2*d*, Special as to the sum; 3*d*, Ingrossed in the infeftment. The first and second requisites occur in this case; the third is wanting.

JUSTICE-CLERK. When the father reserved a liferent, and a power to burden the lands with a certain sum, this could give him no greater rights than the son would have had upon the fee being transmitted to him without any burden whatever. Had the fee been without burden, the son could not have charged the lands against the tercer by a simple bond, without infeftment: therefore the father could not execute the faculty against the tercer but by infeftment.

AUCHINLECK. In this case the reserved faculty only put the father in the same situation as if he had not disponed the estate: How can his personal creditor compete with the tercer, who is an onerous creditor, and, by a fiction of law, a creditor infeft?

KENNET. The sums first paid can never be a real burden, for they were paid without any reference to the faculty. The only question, then, would be as to the remaining L.50, which is settled with a reference to the faculty. But here the reasoning of the Justice-Clerk is solid.

On the 26th June 1773, "The Lords found that the debt due to Margaret Baillie is not a burden upon the terce."

Act. Ch. Hay. *Alt.* R. M'Queen. *Reporter*, Stonefield.

1773. *June* 29. ROBERT MAXWELL of Glenarm *against* WILLIAM BURGESS.

PROOF—TACK.

[*Faculty Collection, VI.* 134; *Dictionary*, 12,351.]

COALSTON. The proof allowed by the Ordinary was as to the condition of the houses. It is material to have the facts cleared up, both as to the time of building the dwelling-house and building the dikes. As to the clause in controversy, if taken by itself, it does not imply an obligation to build new dikes or houses; yet we ought to examine what followed upon it; as tending to explain the meaning of the parties.

ALEMORE. Tenants must take houses as they are, unless there is an express stipulation to the contrary. Any other rule would be dangerous.

ALVA. How can a corn-farm be possessed without a byre and a stable? The tenant is only bound to repair: therefore, all houses necessary must pre-exist.

KAIMES. The master is not bound to any *novum opus*.

KENNET. The circumstances of the case ought to be taken under consideration.

On the 29th June 1773, "The Lords found that the master was not bound, by the clause in the tack, to build any new houses;" altering, in effect, Lord Alva's interlocutor.

Act. A. Crosbie. *Alt.* G. Clerk, Ilay Campbell.

Diss. Pitfour, Alva, Kennet. [Hailes did not vote, because he desired to see a proof of facts, and inclined not to pronounce upon the meaning of a clause in the abstract.]

1773. *June* 29. MR WILLIAM WALLACE, Minister at Drummelzier, *against* WILLIAM, EARL of MARCH and RUGLEN.

STIPEND.

Construction of the Act 1690, c. 23.

[*Faculty Collection, VI. p.* 190; *Dictionary,* 14,812.]

MONBODDO. The Act 1690 gives nothing to ministers at all. There is an exception if the minister is in possession of feu-duties; but the minister here has a modified stipend, and the feu-duties are no part of that stipend. After the modification, the minister has no possession of the feu-duties: every thing beyond that modification is in the possession of the patron.

GARDENSTON. The noble lord plays for a small stake. I do not think that he should win it. There is an exception in the statute when feu-duties are part of the minister's stipend, or where the minister is in possession of them. How then can the patron claim?

PITFOUR. It matters not whether the stake be great or small. As far as the exception reaches, it is the same thing as if the Act 1690 had never been made.

ALVA. The minister's title still continues as it was before the modification.

AUCHINLECK. I thought, on examining this case, that the feu-duties were due to the minister, and that the argument from the Act of Parliament did not conclude. There is an exception where there is either modification or possession by the minister. In either case the patron has no right. The Act of Parliament has equiparated ten years' possession to a decreet of modification.

COALSTON. As to services, I was misled by the Act 1633, but which I now observe relates to lords of erection, not to beneficed persons.