1774. *January* 14. ALEXANDER CRAWFURD *against* PATRICK CRAWFURD.

FOREIGN.

Testament executed abroad.

[*Faculty Collection, VI.* 258 ; *Dictionary*, 4,486.]

MONBODDO. This deed has a strong resemblance to the will in the civil law. *L.* 88, § *ult.* D. *de Legat.* 2. James Crawfurd desired that it might be valid either as a testament or as a partition among his children. He mentions the word *heirs*. We ought to give effect to this deed. The children cannot take the heritable subjects in Scotland directly, but they may, by a circuit, oblige the eldest son to make up titles and denude *pro rata*.

PITFOUR. It is impossible that this deed can be held as any thing else than a testament. It has no disponing words; it does no more than express Mr Crawfurd's intention at that moment. Heritable subjects in Scotland cannot be conveyed by a deed in form of a testament.

COALSTON. Our countrymen in foreign parts constantly fall into the snare of using *testamentary* words, when they should use *dispositive*. It may be wished that this nicety of our law were altered; but we cannot alter the law.

KAIMES. If heritable subjects in Scotland could not be carried by a Scottish testament, much less can they by a Dutch testament.

HAILES. I gave my opinion to the parties that the deed was a valid deed, as being executed in the form required by the law of the place. I doubted whether the heritable subjects in question were meant to be comprehended under the phrase ; but this doubt was removed by the opinion of Dutch counsel. As the pursuer sought not to take any thing by the deed, I considered it as ineffectual to convey heritable subjects in Scotland.

On the 14th January 1774, the Lords found that the deed in question could not convey heritable subjects situated in Scotland.

Act. Ilay Campbell, A. Lockhart. *Alt.* R. M'Queen.

Reporter, Hailes.

N.B. In the argument on this case the cases of *Barclay of Buenos Ayres*, *Lord Banff's Succession*, *Mary Gainer*, *Auchterlony*, were mentioned. I believe that none of them applied : they were talked of from memory.

1774. *January* 15. ELIZABETH MOODIE *against* ROBERT RHYND, &c.

EXPENSES.

IN this case the Lords repelled the objection that the account of expenses exceeded the sum libelled for in name of expenses.

It was observed that a pursuer could not know how far the litigiosity of his party might go, and that it would be inequitable to refuse him his just expenses because he had not concluded for them: That the case may be different as to damages; for every pursuer may know, at the time of raising his libel, what damage he has really suffered.

It was also observed, that the contrary had been found in the case of *Marshall* against *Carnieson;* but that, in a later case, stated by Lord Stonefield, at the foot of the table, the Lords repelled the objection.

Act. Ch. Hay. *Alt.* D. Rae. Concluded cause.

1773. *March* 10. JOHN CARR of Cavers *against* ALISON CAIRNS.

TAILYIE.

Import of a clause in a tailyie, that it shall be lawful for the heirs of entail to set tacks, the same being only for the lifetime of the setter, or for fifteen years, without an evident diminution of the rental, and, if made otherwise, to be void, and deemed a deed of contravention, and of a lease granted by one of those heirs for nineteen years, containing a clause of warrandice in common form, with an exception, that, in case the granter shall happen to die before the expiration of this tack, the obligation of warrandice shall not be extended any farther than what is consistent with the powers he hath by the entail with respect to granting tacks.

[*Faculty Collection, VI.* 286; *Dictionary,* 15,523.]

MONBODDO. The warrandice is for nineteen years, if Mr Carr lived; if he died after fifteen years, the warrandice ceased.

JUSTICE-CLERK. The clause in the tack only goes the length of secluding an action of warrandice. This is not an action of warrandice. The tenant says he desires to be continued in possession. The entail, not being recorded, is not good against singular successors. A tacksman has the benefit of a singular successor, because the entail is not recorded.

KAIMES. As the entail is not recorded, the proprietor is absolute proprietor, and the lease will be good to the end of the world. Cavers says, I can set for fifteen years, and no more; yet he sets for a longer space. *Quær.* Can the tenant, who is partaker of this legal fraud, derive any benefit from it?

AUCHINLECK. If the clause, mentioning the entail, were not here, there would be nothing in the plea on the part of the master, because the entail is not recorded. The plea is, The tenant is not entitled to found on the not recording the entail, because not a *bona fide* contractor. The tack provides that it shall only be effectual in so far as consistent with the entail.

GARDENSTON. I think the tack is good. Such prohibitions are odious, interrupting the most rational acts of administration. There is no direct prohibition here. The second point is conclusive. If the tack had been granted