

- 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.*

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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 infeft; 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. Lermouth.

Clerk, Hay.

*Durie, p. 317.*

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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