1666. *January* 27.

JEAN CRICHTON and MR. JOHN ELEIS her Husband, *against* MAXWELL of Kirkhouse.

No. 25.
Right of terce not affected by an infeftment in life-rent, not bearing in satisfaction of the terce.

Jean Crichton being served to a terce of certain lands belonging to her first husband ——— Maxwell of Kirkhouse, pursues for mails and duties. It is alleged *absolvitor*, because the pursuer hath a competent jointure, more than the third of her husband's estate, as then it was, and a provision of conquest; and albeit it be not expressly in satisfaction of the terce; yet it is but a minute, bearing to be extended, and there is a process of extension thereof depending, and therefore it ought to be extended with such clauses as are ordinary in such cases, and this is most ordinary, that competent provisions used to be in satisfaction of the terce, It was answered, That the extension could not be with alteration of any substantial point, such as this, but only as to procurators of resignation, precepts of sasine, &c. And to show that it was not Kirkhouse's meaning, that the infeftment should be in satisfaction of the terce, the infeftment itself produced, being extended in ample form, does not bear to be in satisfaction.

The Lords repelled the defences, and found the terce competent in this case.

Stair, *v.* 1. *p.* 344.

1666. *December.* WILLIAM YOEMAN *against* MR. PATRICK OLIPHANT.

No. 26.
Effect of service to the terce.

William Yoeman having apprised the lands of James Oliphant, son to Sir James Oliphant, and Mr. Patrick Oliphant having also apprised the same, William insists on this reason, that Mr. Patrick's apprising was satisfied by intromission within the legal. Mr. Patrick alleged that his whole intromission could not be countable to satisfy his apprising, because the two parts thereof did only belong to his debtor, and the third part to Dame Geils Moncrieff, who had right to a terce thereof, and to whom Mr. Patrick was only liable and accountable, and for a part of the years he was her tenant, and had right from her. It was answered, That the tercer had no complete right, till she was served, and kenned to her terce, which, being done after the years in question, the fiar might have possessed the whole till her service, and might have forced the possessors to pay him; so the appriser entering in possession of the whole, upon his apprising, cannot pretend the right of the tercer, and his taking tack of her was unwarrantable till she was served, and done of purpose, that his apprising might not be fully satisfied, and so the legal might expire, which is most rigorous and unjust; and offered presently to satisfy the tercer of her third. It was answered that the service whensoever done, is drawn back to the husband's death, and doth but declare, and not constitute the wife's right, like the service of an heir.