1769. *November* 15. [MARGARET PARK *against* WILLIAM GIB.

TERCE.

Terce due from Tenements in Burghs of Barony.

[*Faculty Collection, IV.* 354; *Dictionary*, 15,855.]

AUCHINLECK. The question is, Whether terce due out of a tenement in the burgh of Paisley? Paisley is not a royal burgh: the lands there pay cess with the county, and the tenements there are rural tenements; so that the rule laid down by our lawyers, as to terce not being due in royal burghs, does not apply.

KAIMES. My difficulty is, that the subject in question is a house not fit for division, and not capable of a terce, nor liable in it.

MONBODDO. I consider this burgh as a burgh of barony holding of a religious house. The burgesses of a burgh of barony hold their lands of the Crown, as much as the burgesses of a burgh-royal, in burgage.

HAILES. I never heard till now that the burgesses of a burgh of barony hold their tenements of the Crown by burgage-holding: they hold feu of their superior. They are not liable to watching and warding by their tenure; though, for their own private conveniency, they may watch within their burgh. Even in the grant by Charles II., on which the defender principally founds, there is not any vestige of a burgage-holding.

COALSTON. Burghs of barony do not hold burgage: they hold feu of the superior. There is a great distinction between a burgh-royal and a burgh of barony. Summary arrestment is authorised by the statute in the one, but not in the other.

JUSTICE-CLERK. Of the same opinion. Heirship moveable extends to burgesses of a burgh-royal, who are therein put upon the footing of barons; but this right was never extended to burghs of barony. There is an obscurity in thelaw, which excludes terce of burgage tenements; but so the law has been understood. Here we ought to draw the line: it would be dangerous to go farther. There are many burghs of barony more considerable than royal burghs: By including them, we might make a convulsion of settlements of which we are not aware.

PITFOUR. The question is, Does this subject hold burgage? Burgesses in burghs of barony are burgesses within the burgh; because the Baron has a power of naming magistrates who may name burgesses; or he has a power of naming burgesses. But, as to the rest of the kingdom, and as to the operation of the law, they are not burgesses. There are many burghs of barony dormant;—that is, barons have a power of erecting such whenever they think fit: it would be dangerous to extend the law which relates to burgage tenements. As to the supposed difficulty in dividing a house, in order to ascertain the terce, the same difficulty occurs as to mills, which yet are divided.

PRESIDENT. The privilege must not be extended. If there is in practice any anomalous right, a holding without a reddendo, which may be the case here, I would not extend the privilege to such anomalous right.

On the 15th November 1769, "the Lords found the claim of terce relevant;" and adhered to Lord Gardenston's interlocutor.

Act. R. Sinclair. *Alt.* Ilay Campbell.

1769. *November* 16. WILLIAM LORD HALKERTON, and OTHERS, *against* JAMES SCOT of Brotherton.

SALMON FISHING.

Construction of Cruive and Cruive-dyke.

[*Faculty Collection, IV.* 185; *Dict.* 14,293.]

MONBODDO. I am clear as to adhering as to the placing of the cruives. (All the judges agreed in this.) As to the causeway, it must not remain as at present; but there is a method proposed which may tend to secure the dyke, without hurting the superior fishings; and to this I would listen. We may admit an equivalent for what is not ordered expressly by law, but is only ordered by the interlocutor of the Court. As to the number of cruives, the original grant refers to use and wont; and, therefore, the number of seven must continue according to use and wont. We cannot fix any other rule than that. If Brotherton may insist to keep but three cruives, he may, upon the same principle, insist to keep but one; which would be rendering his cruive-fishing elusory, in order to benefit his coble-fishing.

HAILES. I have a suspicion of the equivalent proposed. I doubt whether it is consistent with the pretended cause of it—the security of the dyke. If there are to be so many grooves or channels, the causeway will be much impaired. I doubt whether the plan is practicable. The question as to the number of cruives is difficult; but I think that we can find no rule but possession. Brotherton and his authors, while they seriously occupied the cruive-fishing, did immemorially use seven cruives. We must therefore presume that seven cruives are necessary for occupying the cruive-fishing in the most beneficial way that he is entitled to exercise it in. If Brotherton uses fewer cruives, it is with the view of benefiting his coble-fishing at the expense of his cruive-fishing, and to the hurt of the superior heritors.

PITFOUR. The ancient immemorial usage must be the rule, unless in things unlawful or indifferent.

GARDENSTON. As to the number of cruives, immemorial possession is nothing; because immemorial possession has been disregarded in the other parts of this cause.