

situated within the bailiary of Cuninghame and county of Ayr, a description which applied to the parish of Dalry, but could not well apply to the right of patronage, which, being a right incorporeal, could not be said to lie in any bailliwick.

The Lords altered their interlocutor, and found that Hamilton Blair had right to the teinds of the pursuers' lands as titular.

TERCE.

1776. *February 17.* The RELICT of JOHN CAMPBELL *against* GABRIEL CAMPBELL.

THE husband's sasine, says Mr Erskine, *B. 2, tit. 9, § 46*, is the measure of the wife's terce: thus, neither an heritable bond, nor a disposition of lands granted by the husband, if death has prevented him from giving sasine to the creditor or disponee, can hurt the terce; and so the Lords found, "In respect that the deceased John Campbell was not, at the time of his death, denuded of the subject within mentioned by infertment, but only by a title which remained personal; therefore find, that Katharine Waddell, his relict, is entitled to a terce of said subjects, and not to a third part of the price thereof."

See HERITABLE AND MOVEABLE, and JUS MARITI.

THIRLAGE.

1776. *June 25.* SCOTT of BAVELAW *against* CALDERWOOD of POLTON.

THE tenants of Buteland were, by their tacks, thirled to the mill of Bavelaw: this had been the case for a very long period *successive*.

The proprietor of Bavelaw sold the lands of Buteland to Calderwood, with absolute warrandice against all burdens, &c. in common style, but without mention of thirlage, further than assigning to the tacks in which it was contained. In an action against the purchaser and his tenants, for abstracted multures, the Lords found that the thirlage took place during the currency of the present tacks, but assoilyed *quoad ultra*.

Thirling tenants by their tacks, is no proper manner of constituting thirlage, so as to make it a real servitude, and binding on singular successors; see Erskine, *B. 2, tit. 9, § 21*. It is considered as any other personal burden on the tenants, and expires with their tacks.

1776. *July 3.* BELL of GRIB *against* GIBSON.

EVERY presumption is in favour of liberty. It has however been argued that thirlage to the mill of a barony was more easily to be presumed than in other cases, or, at least, more slender evidence of it sustained; and, in support of this, has been quoted, *17th July 1629, Laird of Newliston*, observed by Durie. But this is a single decision, and was never so found again. On the contrary, see *12th July 1621, Douglas*; and *13th July 1632, E. of Morton*. By these decisions it is established, that there is no general presumption in law of the lands in a barony being thirled to the mill thereof, without any constitution of a thirlage whatever. So argued.

And in a reclaiming petition and answers for the same parties, — August 1776.

TITLE TO PURSUE.

It has been often contested, how far burgesses have a title to pursue the Magistrates of a royal burgh, to account in a general way for mismanagement of the revenue of the burgh. (It was for this reason that a process at the instance of Burns and other burgesses of Kinghorn, against the Magistrates for malversation and mismanagement, was dismissed. It resolved into a general count and reckoning, and fell properly, in terms of the statute 1535, to be discussed in Exchequer.) But three things seem clear, *Primo*, That, if the burgh is not a royal burgh but a burgh of barony or regality, their title is undoubted, because the law, which seems to point out a different method in royal burghs, does not extend this to other burghs; and, *Secondly*, That where there is any particular dilapidation of the heritable subjects of the burgh, there the burgesses have a title to reduce the transaction, by an action before the Court of Session; see *Johnston against Magistrates of Edinburgh, anno 1735, 1 New Coll., 3d July 1752, and 30th June 1754*. And even, *Thirdly*, the same is competent where any particular dilapidation of the revenue of the burgh is condiscended on, though not of its heritage. Of this last an instance occurred,