

Sheriff, or to some Ordinary Judge, either to stent the whole lands, and the holding thereof, that the pursuer might have the third part of the sowms, and the right of pasurage upon the lands proportionally, conform to the relation of the two parts, so that the defender should hold no more goods thereon but according to the two parts of the sums whereto the whole lands should be extended, that the pursuer might have liberty, as said is, to pasture according to the proportion of her terce; or else, that the whole lands should be mett and measured by the said Judge, and that the third part thereof should be laid apart to the pursuer, for her terce, to be used by her at her pleasure, and that the defender should have no more but the quantity of the two parts of the lands, being justly mett, as said is; and which trial the Lords found might be taken in this same action of removing, if the defender did offer therein obedience to remove.

Act. *Gibson.*Alt. *Mowat.*Clerk, *Gibson.**Durie, p. 330.*

No. 11.

1628. January 31. LADY DUMFERMLINE *against* Her SON.

In an action of the Lady Dumfermline's *contra* the Earl, her son, for payment of the third of the duties of the lands whereof she was served to a terce, the whole duties being uplifted by the defender, it being controverted, if she, as lady tercer, before a warning or interruption used upon her terce and service, might seek any greater duties for her terce but according to the terce of that duty which was paid to her umquhile husband immediately before his decease,—the Lords found she had good right to seek her terce of that quantity, which was uplifted by the defender for the duties of the lands, and that she ought not to be restricted to the quantity paid in her husband's time, but might justly seek her third of that which was actually received by the defender for the duties of the whole lands, seeing the force of her service, giving her right, from the death of her husband, to all terms, behoved to give right for the duty of that part of the lands proportionally which was uplifted by him, who had no right but to the two parts, and none to her terce; but if the tenants had been convened therefor, who had never paid any duty since the decease of her husband, they had reason to have excluded the pursuit for any greater quantity than they were used to pay to the husband before: So that the reason of the decision was, because the defender had uplifted and received payment of this duty, and therefore ought to pay back that which he really received, and had no just reason to retain it.

Act. *Aiton & Stuart.*Alt. *Hope & Nicolson.*Clerk, *Hay.**Durie, p. 336.*

No. 12.
Terce carria
bygone.