doubt as to its application with respect to the partial payments in controversy. The question is as to indefinite payments; they must be applied to the prior debt, that is, within the three years. The application, by our law, goes upon the presumption of what would have been the application, that is, to the eldest debt, and of which the prescription is nearest run.

BRAXFIELD. If it is admitted that the account was actually due at some prior period to the three years, the indefinite payment falls to be applied to the elder debt; but that is not the case. Yet still I have doubts: it is pleaded, that the payments made were of a former account. Now, suppose this were the case of a house possessed from year to year for a long time,—that payments have been made indefinitely:—I bring an action for three years' rent. Says the tenant, Here are receipts. The just answer would be, You was tenant before, and the indefinite payments must go to the payment of rents of former years.

PRESIDENT. By the short prescriptions, the debt is not prescribed. It is only the mode of proving that is limited. I must consider things in the state that they were in at the time.

JUSTICE-CLERK. Candidly gave up his opinion.

On the 29th June 1779, "The Lords found that the payments made within the three last before citation, must be imputed to the eldest of the debts not prescribed at the dates of those payments;" altering the interlocutor of the Lord Justice-Clerk.

Act. J. Dickson. *Alt.* J. M'Laurin.

1779. *June* 30. MRS FRANCIS BELCHER *against* ANDREW MOFFAT and CHARLETON PALMER.

TERCE.

No terce due from Collieries.

[*Faculty Collection, VIII.* 159; *Dictionary,* 15,863.]

BRAXFIELD. It is a point well established in our law, that there is no terce out of mines and minerals. The only question here arises from this, That there is a creditor having right both to the coal and the land, who is willing to hold by the coal, and to leave the land to the tercer. Thompson is a catholic creditor; he is not entitled to betake himself solely to the one subject or the other: he must draw rateably and proportionally out of both. A creditor in his situation must only rank for the annualrents: if he were preferred also for the principal sum, hard would be the case of widows, for what estate is there that may not have heritable debt on it?

JUSTICE-CLERK. It is absurd to suppose that a lady-tercer should have right to mines and minerals, which are *pars soli.* I do not think that it was the intention of the law of Scotland that heritable creditors should have it in their power to draw payment of principal sums to the prejudice of the terce.

KAIMES. Thompson is certainly preferable to all the world; but I would not allow him to operate payment to the prejudice of any creditor rather than another.

COVINGTON. The right of terce is ancient in our law, and its extent limited. The tercer may enter into possession at her own risk: if the rents fall short, she has no recourse. The death of the husband is the term of the commencement of the right of terce: this right hurts not creditors, because whoever lends his money, knows that he lends it with the risk of the terce. Nothing can impair the terce but an infeftment denuding. It is not in the option of creditors to enlarge or diminish the right of terce. Thompson's right is a right in security only; the husband could not give him a power to disappoint the right of terce.

MONBODDO. I approve of Lord Covington's principles: If Thompson was to possess for payment of principal as well as interest, the widow would be secluded from her terce altogether. I do not think that a catholic creditor can draw emulously to the hurt of others. He must draw rateably and proportionally.

On the 30th June 1779, "The Lords found that the widow is not entitled to the terce of the coal; that she has right to her terce of lands out of the rent current at the husband's death, and in time coming; that half of Thompson's interest must be drawn out of the rent of the coal and half of the rent of the lands, and that the widow must draw her terce from the remainder of the rent of the lands."

Act. T. Swinton. *Alt.* A. Elphinston.

1779. *July* 14. MARY BAIRD *against* LADY DON.

MASTER AND SERVANT.

Omission to give Warning.

[*Faculty Collection, VIII.* 165; *Dictionary,* 9182.]

HAILES. It is plain that Lady Don did not call for the inventories and dismiss her housekeeper till after the term. This is certainly irregular: it is said that servants sometimes leave their masters at the term without giving any warning, and that the masters do not bring any action against such servants, either for damages or to oblige them to fulfil their service. The observation is true, but the inference is not just; servants who so conduct themselves are not worthy of their masters giving themselves any trouble about them, and the masters are in general well rid of them.

GARDENSTON. Lady Don gave no warning till after the term, and therefore wages and damages are due. What is there that should hinder this? "That she went away pleasantly." The contrary is proved, "that she gave up her