1801. *June* 10.

The REPRESENTATIVES of RICHARD LOWTHIAN *against* The REPRESENTATIVES of SARAH AGLIANBY.

No 2.
A person who had levied money on a title which was afterward set aside, found liable for interest upon it.

THIS was a sequel of the case, of which two branches are already reported, under the dates 3d July 1792, No. 73. p. 16853.; and 20th January 1797, No. 120. p. 4631.

The judgment of the Court of Session, finding that Mrs. Lowthian was barred from claiming her terce, having been reversed by the House of Lords, (15th December 1797 *,) a question arose, whether it was due out of a part of the estate of Netherby, in which Mr. Lowthian died infeft.

The rental of the whole estate of Netherby exceeded £1000 a-year. Although this estate lies at a considerable distance from Dumfries, yet above one half of it holds of this burgh by burgage-tenure; and Mr. Lowthian's representatives having disputed his widow's right to a terce out of that portion of it, her representatives

Pleaded: The only reasonable ground which can be assigned for the terce not being due out of burgage-tenements, is, that they seem to be reserved for the heir's residence, and not easily to admit of division. This is the cause assigned by Mr. Erskine, B. II. Tit. 9. § 49.; and both Lord Stair, B. I. Tit. 4. § 21. and Bankton, B. II. Tit. 6. § 11. seem to confine the exclusion of the terce to tenements within burgh. Perhaps, indeed, passages in these writers might be referred to, which would bear an opposite construction; but where, as in this case, there is no express decision on the point, those opinions of our institutional writers should be followed, which rest on the soundest principles; and there seems to be no reason why lands in the country should be excluded from the terce, when held burgage, more than when held by any other tenure.

Answered: It is not the local situation of either lands or houses, but whether they are or are not held by burgage-tenure, which determines their exemption from, or liability to the terce, 20th June, 1612, A. *contra* B. stated in Dict. No. 6. p. 15836, from Haddington MS. 15th November 1769, Park, No. 36. p. 15855. Stair, B. II. Tit. 6. § 16.; Erskine, B. II. Tit. 9. § 49. These authorities prove the fact, and the defenders are not bound to account for its reception into our practice. With regard to this, as well as many customs derived from high antiquity, we must be content with the brocard, *Non omnium quæ a majoribus constituta sunt ratio reddi potest.*

The Lords found, "That the terce did not extend to lands holding bur-
"gage."

In the interval between 1784, when Mr. Lowthian died, and 1792, when his settlement was set aside, Mrs. Lowthian had not only levied rents and interest of money from his estate to a large amount, but also various principal sums due to him at his death.

* See APPENDIX, PART I. *voce* FOREIGN.

Mrs. Lowthian's representatives contended, that she was to be viewed in the right of a *bona fide* possessor, at least till she was cited in the action of reduction; and therefore, that she ought not to be liable in any interest till the date of citation, and afterward for interest only at the rate of 3 *per cent.* No. 2.

Mr. Lowthian's representatives, on the other hand, insisted, 1*st*, That the defenders should be accountable for the same interest, on the principal sums which Mrs. Lowthian had uplifted, as they bore when in the hands of her husband's debtors; 2*dly*, That the rents and interest levied by her, should be turned into a capital as at the first term after they respectively fell due, bearing interest at 5 *per cent.* from that period; 3*dly*, That from 10th June 1794, when the judgment of the Court of Session setting aside Mr. Lowthian's settlement was affirmed by the House of Lords, the whole sums, whether consisting of principal or interest then in Mrs. Lowthian's hands, should be converted into a capital bearing the legal interest, because at that date, the whole funds ought to have been delivered up by her to the proper owners.

In support of the two first of these propositions, the pursuers founded on the following authorities: Acts of Sederunt, 31st July 1690, and 18th February 1730; 1701, Creditors of Carden, No. 52. p. 515; Stair, B. I. Tit. 6. § 19.

The Lords found "the defenders liable to account to the pursuers for interest on principal sums from the time the same were uplifted by Mrs. Lowthian, at the rate of 5 *per cent.*; and found them also liable in interest, at the same rate, for the interests and rents uplifted by her, or which ought to have been recovered by her, and that from and after one year after the said rents and interests became due, or might have been recovered."

A reclaiming petition for Mrs. Lowthian's representatives was refused, (2d July 1801,) without answers.

Lord Ordinary, *Glenlee.* Act. *Monypenny.* Alt. *H. Erskine.* Clerk, *Menzies.*

R. D. *Fac. Coll. No. 236. p. 582.*

*** See APPENDIX, PART I. *voce* TERCE.

1801. *July* 7.

SIR FRANCIS FORD and GEORGE SMITH, Assignees of WALTER BOYD, *against* WILLIAM RIDDELL.

No. 3.
An infeftment in relief, entitles the cautioner to rank preferably, not only for the principal sum and interest paid

THE estate of Craigdarroch, belonging to Alexander Fergusson, having been brought to judicial sale in 1785, it was concerted among some of Mr Fergusson's friends, that a considerable portion of it should be purchased, for behoof of himself and his family.

William Riddell accordingly purchased lots amounting nearly to £15,000, in which, although he held them in trust for Mr. Fergusson's family, he was infeft on titles *ex facie* absolute.