No. 32.

A relict was found entitled to a terce, notwithstanding her defunct husband had disponed the lands to his eldest son in the eldest son's contract of marriage, reserving his own liferent, who was thereupon infeft base, holding of the disponer; such dispositions being understood fradulent, in order to disapoint the terce.

1711. *December* 1. The MARQUIS of ANNANDALE *against* SCOT of Gillesby.

The lands of Gillesby holden ward of the Marquis, falling in minority, he pursues a declarator of the ward and marriage, wherein the minor having no other lands, nor estate, an aliment was modified to him, conform to the act, King James IV. Then compearance is made for the relict, who had served herself to a terce, and craved preference, at least to come in *pari passu* with the superior, her right being constituted by law. Alleged, There was no room for kenning her to a terce; because her husband was denuded of the fee of the ward-lands in favours of his eldest son, and he infeft therein, and in possession during his father's life-time; and if this had been objected to the inquest, they could never have found that clause of the brieve, that the husband died *ultimo sasitus et vestitus in feodo*, there being no terce due where the husband dies not last vest and seised. And though this disposition was never confirmed by the superior, yet the Lords have even found base infeftments sufficient to exclude a terce, as was decided 27th January 1669, Bell *contra* Rutherfurd, No. 2. p. 1260. It was answered, that it was *jus tertii* to the Marquis to found upon that infeftment of the son's, whereunto he pretended no manner of right; and the superior cannot both claim the casualty by the husband's death, as he who stood last infeft (the son's right not being owned nor confirmed by him,) and yet at the same time to exclude his relict from a terce, because her husband died divested and not infeft; for that were both to approbate and reprobate the same right And the case of the decision cited *toto cælo* differs from this; for the Lady Rutherfurd was a creditor for a most onerous cause, and a stranger, and so her infeftment was found to exclude the widow's terce, but here the disposition is from a father to a son, gratuitous and without any onerous cause, which conveyances the law has ever suspected of simulation; whereas her terce is founded on her contract of marriage, where she brought a considerable tocher, and provided for her security by a specific clause, that he should do no deed prejudicial to her right, which must as well militate against the superior as her husband. And Craig, Lib. 2. Feud. Dieges. 22. thinks a disposition to a son will not debar the relict's terce; and so does Spottiswood, Tit. FATHER AND SON; and Dirleton, in his Doubts and Questions, *voce* TERCE, *Quæst. penult.* Neither does such a disposition to an apparent heir infer recognition; then much less the forfeiting poor wives of their terce. Replied, It was not *jus tertii* to the superior; for, except the vassal's *dominium utile*, the superior is proprietor of the fee: Nothing elsee xcludes him, and *quoad* his casuality the father died last infeft, because there was none standing confirmed in the fee by the superior but him: And it makes no difference whether the disposition be to a son, or a stranger, onerous, or lucrative; the superior not being concerned in these varieties, and is bound to enquire no farther but that her husband was denuded. And she, in her contract of marriage, and its prohibitory clause, binding up the husband, has nothing but an action of warrandice against her son, the husband's heir. And Craig,

L. 2. D. 22. requires the husband's dying infeft, to habilitate the wife's terce. The Ordinary in the cause did the find husband's being denuded by the son's base infeftment, and completed with possession in the father's lifetime, did exclude the terce, and prefer the Marquis. This interlocutor being reclaimed against to the Lords, by a bill containing the foresaid grounds, they thought the case new, and ordained it to be heard in their own presence.

No. 32.

The Lords, after a hearing in presence, by a plurality of six against five, preferred the widow's terce to the superior's casualty.

Fountainhall, v. 2. p. 681.

*** Forbes reports this case:

In a process at the instance of the Marquis of Annandale, superior of the lands of Gillesby, against the tenants for mails and duties, as having right thereto by reason of the minority of Jean Scot, apparent heir to Robert Scot her grandfather, the pursuer's vassal last publicly infeft in these lands; compearance was made for Janet Scot, relict of the said Robert Scot, who craved to be preferred to a terce, to which she was served.

Alleged for the Marquis: Janet Scot can pretend to no terce, because her husband was denuded of the lands in his lifetime in favours of his son, by a disposition thereof in his contract of marriage whereupon the son got a base infeftment holden of the disponer.

Answered for Janet Scot: As a father's disposition to his son and apparent heir (though clothed with a public infeftment) doth not infer recognition; because the son in that case only represents the father *præceptione hæreditatis;* so neither could it wrong the relict of her terce. Far less could the son's base infeftment stand in her way; seeing that did not hinder the ward to open to the Marquis upon the death of the father who survived the son, till which time the superior could have no access. So it is clear from Craig, Feud. Lib. 2. Dieg. 22. Spotiswood, Husband and Wife, p. 157; Stair, B. 2. T. 6.; Dirleton, Doubts and Questions, Tit. Terce, *Quæst. penult.*; that a base infeftment granted by one to his son without an onerous cause, doth not hinder the granter's relict from a terce of the lands disponed, which is called *rationabilis tertia*, and much favoured in law.

Replied for the Marquis: Law doth not distinguish whether a disposition be gratuitous or for onerous causes, as to the excluding the relict from a terce, except where it is granted out of a fraudulent, or at least a presumed dssign to disappoint her of her terce; which is the case where the Lord Stair and Craig observe, That such a disposition by a father to his son doth not exclude the disponer's relict from a terce. And the Lords allow terces to relicts whose husbands had only simple dispositions, without infeftment in their persons, only where the husbands *dolose* omitted to infeft themselves, to prevent that which by law would have fallen to their surviving wives; whereas a father's disposition of the fee of his estate to his son in his contract of marriage, (as in this case) being a just and reasonable deed, cannot bear a fraudulent construction.

No. 32.

The Lords found, That the Marquis, as superior of the lands in question, hath not right to the mails and duties thereof in prejudice of the relict's terce, notwithstanding the apparent heir's infeftment in the property of the said lands; and preferred the relict to her terce.

Forbes, p. 587.

1715. *January* 28.

The CREDITORS of HUNTER of TOWNHEAD, *against* MARY DOUGLAS, his Relict.

No. 33.
An adjudication with charge against the superior found to exclude the terce

In the process of mails and duties at the instance of the adjudgers of the deceased Hunter of Townhead's lands, who had charged the superior, but were not infeft, nor the legal expired, the relict compearing, and producing her service to a terce, and craving preference; it was alleged for her, 1*mo*, That the relict is in the rule; for as a terce is defined by the Lord Stair, it is the third of the tenements in which the husband died infeft as of fee: In this case the husband died so, therefore she ought to have the terce. 2*do*, As it is reasoned by the Lord Stair on the point, If an apprising without an infeftment can exclude a relict from her terce, (which he says it should not, L. 2. Tit. 6. § 17.) even though there were a charge against the superior upon an apprising, it would not exlude him from the ward, non entry and relief; so nether should it exclude a relict from her terce, unless she had a conjunct fee or liferent: For the terce, excluding the superior from the rule, *qui vincet vincentem*, it should also exclude the appriser. 3*tio*, Nothing excludes the relict, but such a right as a relict would have a terce of, and consequently nothing but a right whereon infeftment had followed, or an irredeemable disposition: And though an expired apprising might plead preference, yet one not expired never can, being but a personal right, which did neither dissolve the defunct's title, nor would hinder his heir to serve; and therefore cannot exclude the relict from her terce.

Answered for the creditors: That they are favoured by the opinion of our greatest lawyers, and by the analogy of law; for, 1*mo*, The Lord Dirleton, upon the word Terce, proposes a question, thus; "A peron having disponed lands *bona fide*, but being prevented by death before the buyer was infeft, *queritur*, If the relict will have right to a terce?" and argues thus, That the heir being liable to implement, the relict should be in no better case than he; amd therefore has right only to a terce of lands not disponed, and the words in the above cited definition ought to be understood *civiliter*. And in another query, "Whether a comprising after the husband's decease will militate against her?" he makes a difference betwixt a comprising whereupon the superior is charged, and where there is no charge; and in the present case there is a charge. And Craig, L. 2. P. 312. (Edition 1655.) says, "Sed hoc jure utimur, ut omnibus hereditariis oneribus quæ debita fundi dicimus, pro suo triente pro rata trientis tenatur: Nam triens transit cum oneribus realibus, quæ tempore mortis defuncti, rei inherebant, non autem cum personalibus." Now, an adjudication is a real burden, specially after a charge. And the