

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 infestment 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 infest, nor the legal expired, the relict compearing, and producing her service to a terce, and craving preference ; it was alleged for her, *1mo*, 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 infest as of fee : In this case the husband died so, therefore she ought to have the terce. *2do*, As it is reasoned by the Lord Stair on the point, If an apprising without an infestment 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. *3tio*, Nothing excludes the relict, but such a right as a relict would have a terce of, and consequently nothing but a right whereon infestment 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, *1mo*, 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 infest, *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 inhererant, non autem cum personalibus." Now, an adjudication is a real burden, specially after a charge. And the

Lord Stair is of that opinion, L. 3. Tit. 2. § 19. and says, That an apprising led before the husband's death excludes the wife's terce, and cites a decision, No. 5. p. 15836: Nor is there any difference here whether expired or not; because even during the currency of the legal, an adjudication is a real burden till payment. *2do*, The analogy of law also favours the creditors; for a wife's terce is not founded on any right stated in her own person, but arises to her from the right that the husband had at his decease, and those real burdens that then affect the fee, and will debar the heir, ought likewise to be a proportional burden upon the terce: For the husband's infestment was in effect no infestment in prejudice of the adjudication. And with us a charge is equivalent to an infestment. Lastly, the relict's terce and *jus relictæ*, are upon the same footing *quoad* creditors: And any personal debt excludes the relict, therefore so must a real debt the terce. The Lords found the adjudication, with the charge against the superior, excludes the terce.

No. 33.

For the Creditors, *Isla*Alt. *Boswel*.*Mackenzie*, Clerk.*Bruce*, p. 60.1725. *January 22.*SARAH CARLYLE, Widow of Easter Ogle, *against* The CREDITORS of Her HUSBAND.

In a competition betwixt Sarah Carlyle, pleading a terce upon her husband's estate, and his creditors adjudgers, it was pleaded for them, that her claim of terce ought to be disregarded, because most of their adjudications were deduced before their debtor's marriage with her: That soon thereafter several charges against the superior were used upon these adjudications, and that the estate had been sequestrated upon an application from them some time before his death, and they in actual possession of it by their factor.

It was urged, that an adjudication, with a charge against the superior, was declared by the statute 1661 to be equiparant to one on which infestment had followed, because an adjudger had, by the charge, declared his inclination to have his diligence completed, and had done all that was in his power towards obtaining infestment: That adjudications with a charge were so far looked upon as sufficient real rights, that they had been sustained as titles in reductions to force production of rights by infestment, and likewise good titles in processes of sale, which are declared by statute to be only competent at the instance of real creditors: Therefore such adjudications ought to be found sufficient to exclude the terce, especially considering that after adjudications are deduced, the debtor cannot grant any voluntary right in prejudice of the adjudgers, though he may alienate his whole estate to the disappointment of the terce, or the wife's legal provision.

There were three decisions cited for the creditors; the first observed by Hope, *Crichton* against *Comiston*, No. 5. p. 15836. where an apprising with-

No. 34.
Found the
reverse of the
above.