

No. 34. principal sum of £.1000 Scots secured by infestment; and preferred her for the said terce to the hail other creditors adjudgers.

For the Creditors, *Alex. Hay, Ja. Graham, sen. & H. Dalrymple, sen.*
 Alt. *Ja. Boswell & Ch. Arskine.* Clerk, *Dalrymple.*

* * Determined upon a hearing in presence.

Edgar, p. 152.

* * Lord Kames' report of this case is No. 15. p. 147. *voce* ADJUDICATION.

No. 35.

The relict of
 a nominal fiar
 not entitled
 to a terce.

1756. *February 10.* CHRISTIAN CUMMING *against* KING'S ADVOCATE.

Mr. Adam Hay, *anno* 1692, purchased the lands of Aslied, and took a charter to himself in liferent and to his son Andrew in fee, which was completed by infestment. But power was reserved to the father to contract debt, and to sell and dispose of the lands at his pleasure. He accordingly, in June 1726, after the death of Andrew the nominal fiar, exercised his reserved powers and faculties by disposing the estate to his grandson Adam Hay. Adam Hay having joined in the Rebellion 1745 was forfeited, and his estate was surveyed as belonging to the Crown. A claim was presented for Christian Cumming, relict of the said Andrew Hay, insisting for a terce out of the lands of Aslied, in the property of which her husband died infest. It was objected in behalf of the Crown, That her husband was a nominal fiar only, and that the substantial property was in the father Mr. Adam Hay. Andrew held the estate for behoof of his father, and was in effect but a trustee for his father; and therefore his relict is entitled to no terce.

“ The claim was dismissed.”

1756. *July 23.*—Mr. Adam Hay, proprietor of the lands of Aslied, executed a settlement of the same, 1692, in favours of himself in liferent, to Andrew Hay, his son in fee, and the heirs male of his body; which failing, his heirs whatsoever; “ Reserving always to the said Mr. Adam Hay, power and faculty at any time of his life *et etiam in articulo mortis*, to contract debts upon the said lands, and to sell or dispose thereof in whole or in part, without advice of the said Andrew or his foresaids,” &c. Upon this settlement charter and infestment followed in favours of Andrew the fiar. Andrew Hay died in 1722, leaving a son Adam. Mr. Adam Hay died in the year 1727; and the said Adam Hay his grandson having been attainted of high treason, and the lands of Aslied surveyed by the Barons of Exchequer, a claim of terce was entered before the Court of Session by Christian Cumming, relict of the said Andrew Hay, who, as said is, died infest in the lands of Aslied. It was objected for the Crown, That the fee in the said Andrew Hay, being merely nominal, and revokable by his father, no terce could arise to the claimant through his decease. It was answered, That a fee granted under the reservation of powers to another, is still a proper fee, and must be attended with all its proper consequences, if it be not evacuated by the exercise of those powers.

“ The Lords found, That the terce does not take place in this case, and dismissed the claim.” The *ratio decidendi* follows :

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If Andrew Hay had survived his father, the claim for the terce must have been sustained ; because the father's death would have been a discharge of his liferent, and of all his faculties, and the full property would have been in Andrew. But while the father lived, Andrew's fee was nominal ; and was so at his death, because he died before his father. Now a nominal fee does not entitle the relict to a terce, more than where the fee is purely a trust. The case of Rome *contra* Creditors of Provost Graham, February, 1719, No. 17. p. 4113. was urged on behalf of the claimant. But there was no sort of resemblance. There was this material difference, that the son, the nominal fiar, survived his father, by which the fee originally nominal was now made absolute. The father had exercised his faculty by granting a personal bond ; and had adjudication been deduced upon the bond while the father was alive, and the son only nominal fiar, the adjudication must have been effectual. It must also have been effectual after the father's death, while the property remained with the son. But unluckily the adjudication was not led till the lands were sold by the son, and the purchaser infest. In these circumstances the adjudication was void, being led against the debtor after he was denuded of the estate. All that this decision in effect proves, is, that a personal bond due by the vender, or the vender's predecessor, cannot be effectual against an onerous purchaser. It was further considered, that if the circumstances of this case had been the same with that of Rome, the terce no doubt would have been effectual. But as Andrew Hay never had any better right than a nominal fee, which gave him no power to dispoise or to contract debt in prejudice of his father's reserved faculty, it would be absurd that the law should give his relict a terce, when it was not in his power to settle upon her the smallest liferent out of the lands.

Sel. Dec. No. 13. p. 141. & 159.

* * The report of this case as in the Faculty Collection, is No. 57. p. 4268. *voce*
FIAR.

1769. November 15. MARGARET PARK *against* WILLIAM GIB.

Margaret Park, widow of James Gib, several years after her husband's death, purchased a brieve, in order to be served before the Sheriff of Renfrew, to a terce of an old tenement in the borough of Paisley, in which her husband James Gib had died infest.

William Gib, the son and heir of James Gib, opposed this claim ; to which he offered several objections, which the Sheriff repelled. William Gib advocated the cause ; and the Lord Ordinary, before whom the advocation came, repelled the reasons of advocation and, remitted the cause *simpliciter*.

Pleaded in a petition to the Court for William Gib, *1mo*, Terce is not due out of burgage-tenements ; *2do*, The subject in question is a burgage-tene-

No. 36.

Terce due from tenements in boroughs of barony.