

“ 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.

No. 36. ment, situated in the borough of Paisley, the proprietors of which hold bur-
gage.

Upon the first point, it was contended, that every writer on the law of Scot-
land had laid it down as established law, that no terce was due out of burgage-
tenements; and reference was made to a number of authorities, to show that
such was the law.

But the determination of the question seemed to turn chiefly upon the second
point stated for William Gibb, that the subject out of which the terce was de-
manded was a burgage tenement. And upon this point he argued, that, though
Paisley was not a royal borough, yet it was a borough erected by the King,
founded upon special grants, with ample privileges, and holding of no subject-
superior. The proprietors of tenements within the borough hold them *in capite*
of his Majesty, by that species of holding called burgage, and are entered and
seised by the magistrates, acting as the King's bailies, in the same manner as
practised in royal boroughs.

In 1488, the town of Paisley was, by a charter from King James IV. erected
into a free borough of barony, in favour of the then Abbot of Paisley, with very
ample liberties and privileges. In 1496, the Abbot and Convent granted a char-
ter to the magistrates, burgesses, and community of Paisley, of the said borough
of Paisley, and whole lands and subjects thereof, with sundry rights and privi-
leges. Upon the Reformation, the superiority of this borough returned to the
Crown, by the act of annexation 1587; and, in 1665, William Lord Cochran,
lord of erection of the abbacy of Paisley, and William, master of Cochran, his
son, together with the magistrates, council, and community of the borough,
granted procuratory for resigning the borough in the hands of the Crown, for
new infeftments to be granted by his Majesty to the magistrates, town-council,
and community, and their successors in office; and upon this resignation, a char-
ter was granted by King Charles II. granting and disposing, “*dilectis nostris*
balivis, thesaurario, consiliariis, et communitate burgi de Pasleto, suisque suc-
cessoribus, totum et integrum burgum et villam de Pasleto, cum acris burgalibus,
croftis, tenementis, domibus, &c. cum foris, nundinis, privilegiis, aliisque qui-
buscunque pertinen. ad dictum burgum; cum potestate faciendi, eligendi, reno-
vandi, et mutandi præpositum, balivos. burgenses, officarios, aliaque membra
dicti burgi de Pasleto;” with fairs, markets, tolls, customs, and a variety of other
privileges.

In terms of these charters, the magistrates have immemorially exercised the
same jurisdiction that is competent to magistrates of royal boroughs, *secundum*
statuta et leges burgorum; they receive resignations of the burgage lands, give
sasine the rein, *ut mos est inburgo*; they enter heirs by hasp and staple, in the same
manner as is practised in royal boroughs; the borough is the King's vassal; the
burgesses hold immediately of the Crown; the magistrates, in receiving resigna-
tions and giving infeftments, act as the King's bailies; they have every character-
istic of a borough, holding courts, creating burgesses, self-government, &c. all

which privileges are, by their charters given them, adeo plenarie, integre, et honorifice ut burgi de Dumferling, Newburgh, et Aberbrothock : And though they do not send a delegate to the convention of royal boroughs, or a representative to Parliament, that cannot annihilate or take away the privileges of the borough. Lands may hold burgage in other boroughs, as well as in royal boroughs. It never has been doubted, that the lands and tenements within the liberties of the borough of Paisley are burgage. The burgesses are called out to watch and ward for the protection of the borough, under the authority of the magistrates, and are, in every respect, considered as burgesses ; nor can any instance be pointed out wherever a terce was so much as claimed by the widow of a burges of Paisley.

Answered for Margaret Park : It cannot be denied, that the writers on the law of Scotland have laid it down as a fixed maxim, that terce does not extend to burgage tenements ; but it is remarkable that none of them have been able to assign any reason for such maxim being received in our law, which, as appears from the Regiam Majestatem, and Leges Burgorum, and Balfour's Practicks, was not antiently the law of this country, but which it is, in this case, unnecessary to insist upon, as the tenement in question is not a burgage-tenement, Paisley not being a royal borough. A burgage-tenement or burgage-holding applies only to a tenement in a royal borough, or that kind of holding peculiar to royal boroughs, and cannot be extended to boroughs of regality or barony, no more than summary arrestments, or other privileges peculiar to royal boroughs. Paisley is no more than a borough of barony ; so it appears from the charter of King James IV. in 1488, in favours of the Abbot of Paisley, and charter from the Abbot and Convent of Paisley in 1490, in favours of the magistrates ; and though, upon the Reformation, the superiority of this borough returned to the Crown, that made no alteration, as the borough must hold of the Crown, in the same manner it formerly held of the Abbots of Paisley ; and, as in the charters in favours of Abbots, it is described as a borough of barony, it must still remain such : Neither will it alter the case, that, in this borough, heirs are entered in the same manner as in royal boroughs : Such is the case with Musselburgh, and other boroughs of barony ; yet these boroughs cannot claim the same privileges with royal boroughs. Paisley stands not on the rolls of Parliament ; it sends no commissioner to Parliament, nor to the convention of royal boroughs ; neither does it pay any part of the supply as a royal borough ; from all which it is evident, that it is no more than a borough of barony ; and, as the restriction as to terce relates solely to royal boroughs, of consequence, a terce must be due in this case.

“ The Lords adhered to the Lord Ordinary's interlocutor, repelling the objections to the claim of terce.”

For Gib, *Ilay Campbell*,

For Park, *Robert Sinclair*.

A. E.

Fac. Coll. No. 99. p. 354.