

No. 40. sonal, have no title to insist on his taking payment of these from any other subjects.

The judgment of the Court was, "Find, that Mrs. Belschier's terce does not affect the rents or profits of the coal, but only those of the lands and teinds in which her husband died infest. Find, That Thomson, as well as any other real creditor, annual-renter, or annuitant, whose debts and annuities did really affect the estate, both land and coal, at the time of Mr. Belschier's death, must take such annual-rents and annuities proportionally from both, and cannot lay the whole upon any particular subject, leaving out the other, in prejudice either of the terce or posterior creditors; and, further, that their principal sums cannot be brought *in computo*, so as to hurt or diminish the terce; therefore find the widow's terce to be one third part of the free rent of lands and teinds, after deduction of the above proportions of the interest of the real debts and annuities, if any be, affecting the same; and that such terce commenced and took place for the term's rent that became due at the next Whitsunday or Martinmas after the husband's death."

Note. By this judgment, the Court found, that the teinds of the lands were subject to the terce, though this point was not argued by the parties, but only suggested by the Court at the time of deciding the cause.

Lord Ordinary, *Kames.* Act. *Swinton.* Alt. *Elphinstone.* Clerk, *Campbell.*

Fac. Coll. No. 83. p. 159.

1783. July 29.

DOUGLAS HERON and COMPANY, *against* MARY CANT.

No. 41.

The delivery, *sine arbitris*, of a bond of provision, by a husband to his wife, found not to preclude her from claiming her legal provision of terce.

Fac. Coll.

* * * This case is No. 139. p. 11461. *voce* PRESUMPTION.

1788. July 10. JAMES MACCULLOCH *against* AGNES MAITLAND.

No. 42.
Not excluded by a disposition from the husband, followed with actual possession of the lands, but not with infestment.

Hugh Macculloch sold his lands of Grange, and the purchaser entered into possession, but did not take infestment. After Hugh Macculloch's death, his widow, Agnes Maitland, insisted to be kened to her terce. James Macculloch, the eldest son, objected; and

Pleaded: Even at a time when feudal ideas were much more prevalent than at present, some of our most eminent lawyers were of opinion, that where a husband had sold his lands, his widow, after his death, could not claim a terce. The consequence of this would be, to disappoint the purchaser, without benefiting her, as

she must, at any rate, be sufficiently compensated by the proportional increase of her share of the moveable effects. Besides, in this manner the terce would, contrary to the opinion of all our lawyers, become a burden on the moveable estate, the purchaser having retention of the price of the lands, which goes to executors. Accordingly, in a competition between a compriser, who is a judicial disponee, and a widow claiming her terce, it was found, although the compriser was not infest, that she was excluded. And in the same manner it has been determined, that an adjudger, after a charge given to the superior, was preferable to the widow claiming this legal provision; Dirleton, *voce* TERCE; Sir Thomas Hope, *voce* LIFE-RENT; Dictionary, *voce* HERITABLE AND MOVEABLE, TERCE.

No: 42.

Answered: The husband's sasine is the measure of the wife's terce, and no proceeding which has not the effect of completely denuding him, can preclude her right. Even where the husband dies in bankrupt circumstances, and adjudications have been led, or where he has granted dispositions in security containing clauses of infestment; still, if infestment has not actually followed, it is now firmly established, that she is entitled to be kened to her terce, the only two questions which the jury are called upon to determine upon being—1st, Whether the widow was lawful wife to the deceased? and, 2^{dly}, Whether the husband died seised in the lands specified in her claim? The determination of the case, in which it was found, that an adjudication, followed with a charge against the superior, was sufficient to exclude the terce, has since been justly departed from, this form, however effectual, by virtue of an express statute in the case of competing adjudications, being of no consequence in any other; Stewart's Answers to Dirleton's Doubts; Craig, B. 2. Tit. 22. § 38; Stair, B. 2. Tit. 6. § 18; Bankton, B. 2. Tit. 2. § 16; Erskine, B. 2. Tit. 9. § 46; 12th December, 1677, Lady Fraser, No. 3. p. 233; 9th February, 1725, Sarah Carlyle against Creditors of Easter Ogle, No. 34. p. 15851.

The Sheriff having cognosced Agnes Maitland, the widow, to her terce, James Macculloch, the heir, preferred a bill of advocacy.

The question was reported on memorials, by the Lord Ordinary on the bills, when the Court were unanimously of opinion, that the judgment of the Sheriff was well founded.

“The Lords refused the bill.”

Reporter, Lord Swinton.

Act. Cha. Hay.

Alt. Fraser-Tytler.

Fac. Coll. No. 31. p. 50.

1790. January 26. MRS. ELIZABETH ROSE against MRS. ANNE FRASER.

Mr. Rose of Kilravock died infest in certain subjects situated within the royalty of the burgh of Nairne, and comprehended in its charter of erection, but which were held of the Magistrates in feu.

No. 43.
Due out of
lands situated
within the
royalty of a