

No. 43.  
burgh, and  
contained in  
the charter  
of erection,  
if held not in  
burgage, but  
in feu, of the  
town.

His widow having been served to her terce of these subjects, the service was challenged in an action of reduction at the instance of his heir, who

Pleaded: It is incontrovertible, that no terce is due out of burgage tenements, Craig, Lib. 2. Dieg. 22. § 34; or, as it is expressed by Lord Stair, "tenements within burgh, or holden burgage." Nor is there room for distinguishing between tenements within burgh, though, like those in question, held of the town in feu, and those holden burgage, as if the terce were more exigible out of the former than out of the latter. Brieves of terce are not competent before Bailies of royal burghs; but, if the terce had been understood to be due from such feus, this could hardly have been the case. Not a single instance has been pointed out of any terce in such circumstances.

Answered: The exemption of burgage tenements from terce, if a part of our law, is one for which no good reason has been assigned. In the case of a burgh of barony, or of regality, it was disregarded by the Court, Park against Gibb, 15th November, 1769, No. 36. p. 15855.

But, at any rate, the exemption is to be strictly confined to burgage tenements, such as are held by burgage tenure; whereas the defunct was infeft under a feuholding. That rule is laid down by Sir Thomas Hope, Min. Prac. Tit. 9. § 16. and by Mr. Erskine, B. 2. Tit. 4. § 9.

The Court were unanimously of opinion, That the rule excluding burgage-tenements from the claim of terce, was applicable only to those held by burgage tenure, and

The Lords repelled the reasons of reduction.

Reporter, *Lord Stonefield.* Act. *Wight, et alii.* Alt. *Lord Advocate, et alii.* Clerk, *Menzies.*  
S. *Fac. Coll. No. 104. pt. 194.*

1791. *November 29.*

JANKOUSKA, *alias* GRIEVB, *against* ANDERSON.

No. 44.  
Clause of  
Act 1681.  
C. 10. re-  
specting the  
terce.

Mr. Grieve, possessed of various funds both in Russia and England, and a landed estate in Scotland, executed a settlement, giving his wife in the event of her survivance, a large annuity out of his Russian property, a house in England, and the life-rent of the price of his Scots estates when sold. The last part of his settlement became ineffectual, owing to the form of the deed. The widow having claimed a terce from the Scots estate, the heirs of the husband objected the clause of act 1681. C. 10. which statutes, that wherever there is a particular provision in favour of the wife, she shall have no claim of terce, unless it is specially declared, that the provision is granted over and above the terce. Answered, Wherever it appears to have been the husband's intention, that the widow should enjoy both the provision and a terce, the statute is inapplicable; but here it was evidently the husband's intention, that she should enjoy much more than a terce, even a

life-rent of the whole lands over and above the special provision. The Lords found the claimant entitled to a terce No. 44.

*Fac. Coll.*

\* \* \* This case is No. 91. p. 6457. *voce* IMPLIED DISCHARGE.

1792. *May* 18. STEWART *against* HOOME.

No. 45.

The terce found to be excluded by the husband's debts declared to be burdens on the heir, and appointed to be ingrossed in the infestments.

*Fac. Coll.*

\* \* \* This case is No. 11. p. 4649. *voce* FOREIGNER.

1795. *November* 24. MRS. JEAN GIBSON *against* CHRISTIAN KERR REID.

By the entail of the estate of Hoselaw, it is declared, that it shall not be lawful for the heirs of entail "to sell, annailzie, or dispone, dilapidate, or put away the said lands and estate, or any part thereof, to whatever person or persons for whatever causes, onerous or gratuitous, nor to grant tacks thereof, or any part of the samen, for any longer space than the lifetime of the granter; nor shall it be lawful for them to contract or take on debts thereupon, nor to grant wadsets thereof, or annual-rents, or annuities forth of the samen, nor to do any other act and deed whatsoever, directly or indirectly, whereby the samen, or any part thereof, may be adjudged, appraised, or otherwise affected, burdened or evicted, except allenary, in so far as is hereby specially after reserved, viz. reserving power and liberty to each of the said heirs of tailzie, in the order of succession aforesaid, to provide a liferent jointure in favour of their wives out of said estate, by way of locality only, not exceeding the sum of 400 merks Scots money of yearly rent, subject to a proportional part of the Parliament taxes, Ministers, and Schoolmasters' fees, stipends, and other incumbent duties; which liferent locality so to be provided to wives, is hereby declared to be in full satisfaction to them of all they can ask or claim of the law in name of terce: Declaring also, that albeit it shall happen any of the heirs of tailzie above specified to fail in providing their wives conform to the above written reservations to that effect, yet the said wives shall have no manner of right to the terce, or any other legal provision upon or out of the said lands and estate, notwithstanding any law or practice to the contrary."

No. 46.  
The terce may be excluded by an express clause in an entail, even altho' it should not contain irritant or resolute clauses.

The entail contains a general resolute, but no irritant clause.

Robert Kerr succeeded as heir of entail of Hoselaw, and afterwards married Jean Gibson.

They had executed no contract of marriage, and he died suddenly, without making any provision for her.