

No. 47. ever, expressed great doubts whether, even independent of the specialty, it had any foundation in law.

The Lords unanimously refused the bill.

Lord Ordinary, *Stonefield.* Act. *Maitland.* Alt. *Arch. Campbell, jun.* Clerk, *Menzies.*
R. D. *Fac. Coll. No. 204. p. 487.*

No. 48. 1797. *January 20.* ROSS *against* AGLIANBY.

A widow having accepted a conventional provision out of landed property in England, found not entitled to claim a terce out of her husband's lands in Scotland.
Fac. Coll.

* * * This case is No. 120. p. 4631. *voce* FOREIGN.

1798. *June 13.*

JOHN MAKGILL and his CURATOR AD LITEM, *against* MRS. AGNES LAW, and Others.

No. 49.

Where an entail excluded the terce, and prohibited the heir in possession from giving a higher annuity from the estate to his widow than one fourth of the free rent of it, or to give larger provisions to younger children than three years free rent of it, it was found that a widow could not claim the terce; and an heritable bond granted to her by her husband, and provisions to younger children, above what were allowed by the entail, were restricted in terms of it, though it was not recorded.

Fac. Coll.

* * * This case is No. 62. p. 15451. *voce* TAILZIE.

1805. *March 7.* BOYD *against* HAMILTON.

No. 50.

The widow's terce is a preferable burden upon the lands, even in the hands of a singular successor, affecting his right from the date of the purchase.

Spencer Boyd having succeeded to his brother James, as proprietor of the estate of Penkill, sold part of the lands to Hugh Hamilton of Pirnmore, in November, 1801.

On searching the records, an inhibition on a dependence was discovered, at the instance of Elizabeth Boyd, residing in America, widow of James Boyd of Penkill, dated 23d August, 1792.

Upon this, Mr. Hamilton consigned a third part of the price, till he should be relieved of any demands on account of this claim of terce.

On investigation, it was found, that the summons on which this step of diligence was taken had never been called in Court.

A multiplepinding was brought by Mr. Boyd, in the name of the consignee; when it was contended, that the inhibition was void and null, and could afford no proper exception against payment; because the summons, though executed, never was called in Court, so that in fact it never became a depending process.

Besides maintaining, that as this inhibition stands upon the record, he is entitled to have this incumbrance removed, before he can be called upon to pay the price, Mr. Hamilton also

Pleaded: The widow's terce is a burden upon the ancestor's lands preferable over every deed contracted by the heir. The right extends to a third of the husband's lands in which he died infest. His sasine is the measure of her right. Only such debts as constitute an heritable burden upon the lands, prevail over the terce. No personal claim against her husband, not even any *mortis causa* deed executed by him, can affect her right. The marriage is, in fact, considered as a life-rent charter and sasine of the third of the husband's heritable estate at the time of his death. It is plain, therefore, that no alienation by the heir can cut off this right. It cannot be affected by any of the feudal casualties incurred by the heir; Craig, L. 2. Dieg. 22. § 27, 35, 37, 38; Stair, B. 2. Tit. 6. § 12. & B. 2. Tit. 6. § 18; Bankt. B. 2. Tit. 6. § 13, 16; Ersk. B. 2. Tit. 9. § 45, 49. The widow's terce is not a personal right; so that the infestment upon the disposition by the heir will not be sufficient to exclude it, which nothing but a discharge from the widow can do.

Answered: Until the widow has obtained a service under the brief of terce, her right is only personal against the heir: Against him it acts retrospectively, but cannot possibly affect singular successors. She has no title of possession till she be served; and she cannot, before that form has been gone through, compel the tenants, or intermeddlers with the rents, to pay her a third of them; Stair, B. 2. Tit. 6. § 13.; Bankt. B. 2. Tit. 6. § 16.; Ersk. B. 2. Tit. 2. § 50. The claim of terce is originally in the state of a personal right, and a service is exactly analogous in its effect to an infestment. Without a service, it does not become a real right, or operate as a real incumbrance on the estate in a question with singular successors. If it were otherwise, as such claims do not appear from any register, a purchaser would be able to obtain much less security from searching the records, than at present it is the boast of this country to afford.

The Court "find the respondent entitled to retain a part of the price, during the subsistence of the right of terce, which is a preferable claim."

Lord Ordinary, *Craig*.

For Boyd, *Thomson*.

Agent, *J. Anderson, W. S.*

Alt. *Cathcart*.

Agent, *A. Crawford, junior, W. S.*

Clerk, *Mackenzie*.

F.

Fac. Coll. No. 205. p. 460.

Whether Terce excludes Ward, Forfeiture, Non-Entry, Liferent-Escheat, &c.?
See under these several heads.

What Action the Tercer has upon Serving, upon Kenning, &c.? See TITLE
TO PURSUE.

Whether the Tercer has Right to Coal, Wood, &c.? See LIFERENTER.

From what Term the Terce takes place? See TERM LEGAL AND CONVENTIONAL.

See PERSONAL AND REAL.

See IMPLIED DISCHARGE AND RENUNCIATION.

See APPENDIX.