1706. *January* 29.

JANET CARRUTHERS and JAMES MAXWELL of Barncleugh, her Husband, *against* GAVIN JOHNSTON of Elshishiels.

No. 31.
No terce due to a relict out of lands wherein her husband died not infeft.

In the action at the instance of Janet Carruthers, relict of Alexander Johnston of Elshishiels, and her present husband for his interest, against Gavin Johnston of Elshishiels, for cognoscing and declaring in favours of the said Janet a terce out of the lands of her former husband the defender's father;

The defender alleged, There could be no terce granted except out of lands wherein her husband died infeft, and she is already served to a competent terce out of these.

Replied for the pursuer, That a relict has right to a terce of lands wherein her husband might and should have been infeft, before his death, as well as of such wherein he died actually infeft; because, 1*st*, The old laws of the Majesty point more at the defunct's right to lands than his infeftment; for that wives *jure communionis bonorum* have right by natural equity after dissolution of the marriage to the equal half of what then belonged to both, which, being restricted by our custom to the life-rent of a third, called the "Widows' Terce," ought to be most amply and favourably interpreted, without any other limitation than what is put on moveables, whereof relicts have the net half or third, according to the family's circumstance; especially considering, that the ground for introducing terces ariseth from the obligation upon a man to provide for his relict, and these are reckoned the same in the analogy of law with the legitims of children; and though personal estates were not so frequent of old, when the brieves of terce were contrived, the like reason extends a declarator to them now. When a reverser redeems wadset lands out of which a relict is served to a terce, she has right to a third of the annual-rent of the money as the *surrogatum* in place of her husband's heritage. Again, The relict of one who disponed his heritage before his decease would have no terce, though her husband died last infeft: *Ergo a contrario*, the receiver of a disposition dying uninfeft transmits a right of terce to his relict. 2. Our ancient and best lawyers teach, that si pater mariti eum investire obligatus sit, licet maritus, durante vita, non sit investitus, relicta actionem habebit pro tertia; for this probable reason among others, that during the marriage there being no action competent to the wife for compelling her husband to infeft, law presumes his omission fraudulent; and as in most cases, *lata culpa dolo equiparatur:* so here the pursuer's deceased husband's design to defraud his wife of the benefit of a competent terce was manifest, by his declaring that she should never have any thing by his death, that he could keep from her; which was as much as if he had owned that he had abstained from taking sasine industriously to prevent her right of terce.

Replied for the defender: There is no communion betwixt man and wife of heritage during the marriage, nor division upon dissolution thereof; but a wife's terce seems to be much of the same nature with the husband's courtesy, she being

adopted into her husband's family, and thereby *finis et caput suæ familiæ*, her right as relict is a kind of succession *qua filia familias:* As among the Romans we find a succession *pro uxore* for a certain share, even when there were children existing; which interest of relicts our predecessors have wisely qualified: The brieve of terce restricts it to subjects *in quibus maritus obiit ultimo vestitus et sasitus.* By the law of the Majesty, Lib. 2. Cap. 16. N. 5, 9. a wife had no terce except of what her husband possessed the time of her marriage; and she was obliged in this as in all other things consistent with her duty to God, pleasantly to obey him, Ibid. N. 15. A base infeftment without possession, or an apprising without infeftment, have been found to exclude a terce; it extends not to tacks that are rights more real than a disposition, nor to burgage lands, though infeftment hath followed; nor yet to superiorities, patronages, or other indivisible rights; and the act 1681 excludes it in the case of any voluntary provision. If a terce took place where the husband was not actually infeft, the ordinary clauses of the third of conquest would be useless; and that there are now more personal estates by heritable bonds or dispositions or adjudications not clothed with infeftment than formerly, is so far from being an argument to extend the terce to such, that it pleads the contrary; lest second husbands reap too much of the first's inheritance, while personal debts run on to the ruin of his heirs; and the terce by swelling too high, cease to be *rationabilis tertia.* 2. It is a wild imagination to advance that the husband's simple omission to infeft himself in a part of his estate, was either *dolus* or *culpa*, especially seeing she did not dispone the fee at least of her own property to the children of the marriage; for such a negative fraud can have no civil effect, more than common charity, or particular provisions to unprovided second children, can be forced. In the civil law there is no remedy to creditors when the insolvent debtor prejudged them by no positive deed, but only by omitting to establish in his person an heritage or legacy fallen to him; nor yet had they any remedy in our law till the old statute concerning charges to enter heir in heritage, and the late act about moveables: Dolus non præsumitur, et culpa caret qui jure suo utitur, nullique facit injuriam: And therefore, whether the husband forbore to take infeftment, because the superior refused to receive him, or that he wanted money, or intended to sell again and assign the procuratories and precepts; or thought his wife had sufficiency for a terce besides, &c. his omission cannot be termed in a legal sense either fraud or fault; especially considering, that a debtor's deed, and much more his omission, falls not under the act 1621, where a sufficient fund is left for the creditors' payment. Our lawyers (my Lord Stair, B. 2. T. 6. § 16. and Craig, L. 2. D. 22. do indeed set down two special cases, in which they think a terce takes place without infeftment, but these meet not the present case, and only *firmant regulam.*

No. 31.

The Lords found no terce due, and assoilzied from the declarator.

Forbes, p. 88.

*** This case, as reported by Fountainhall, is No. 2. p. 2253. *voce* CLANDESTINE MARRIAGE.