

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

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* GRIEVE, *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