

1624. *November 25.* SEMPLE *against* CRAWFORD.

Terce is subject to the third part of heritable burdens, and may be appraised with the two parts; but if the terce allenary be comprised for an annual-rent, the lady tercer will have relief against the proprietor, according to the proportion of the debt; and this may be extended as well to the by-runs of the annual-rents, as to the principal sum, whereupon the same is redeemable.

A woman being cognosced to a terce, not only the duties of the said terce are due to her for the time coming, but are drawn back to the decease of her husband, so that she will recover the by-gone mails taken up by whatsoever person.

Moreover, no creditor can prejudge her by diligence, though she start not so soon as he.

Spottiswood, p. 335.

* * Durie reports this case :

In a double poinding pursued by certain tenants against Crawford and Fleming, the one being heritor of the lands, who had obtained decree against the tenants, suspenders, for payment of the duties of the lands to him as heritor, the other being lady tercer served and kened, the Lords found, That, notwithstanding of the heritor's decree, the lady tercer ought to be answered of her terce of the duties of the said lands, and that not only of those years subsequent to her service and kenning, but also of all years preceding her kenning and service, from the time of the decease of her husband; to the time of whose decease, the Lords found, as in all the like cases, that the service ought to be drawn back, and that so she ought to be answered of all years by-gone foresaid, especially seeing the farms are yet extant in the tenants' hands, unuplifted.

Act. *Lawty.*

Alt. *Aiton.*

Clerk, *Gibson.*

Durie, p. 153.

1627. *July 20.* COUNTESS OF DUMFERMLINE *against* Her SON.

Terce is due out of all wherein the husband died vest and seased, lands, or teinds, which a man is heritably infest in.

Spottiswood, p. 336.

1627. *November 22.* EDGAR *against* EDGARS, &c.

In the action pursued by Margaret Edgar, relict of umquhile David _____, and Walter Cant, her spouse, for his interest, against the bairns of the said um-

No. 7.
Terce carries
by-gones,
whatevertime
the kenning
be.

No. 8.

No. 9.

- No. 9. quhile Edgar, executor confirmed to him, and David Johnston and Edward Edgar, their tutors, it was found, That an assignation made by the defunct, on his death-bed, of certain sums of money addebted to him by Mr. William Maxwell of _____, debtor to the defunct, whereupon the assignee comprised the debtor's lands, to the behoof of the defunct's bairns, that the assignation being proved to have been made *in lecto ægritudinis*, should nowise prejudge the relict of her just part of the sum, or the assignee who had comprised the lands to the bairns' behoof should make her assignee to the said part of the comprising.

Auchinleck MS. p. 236.

1627. November 31. TENANTS of EAST-HOUSES *against* HEPBURN.

No. 10.
Terce carries
bygone.

In a double pointing at the instance of the tenants of East-Houses *contra* Hepburn and others, the relict of an husband, who died in September, pursuing for the duties of her terce, whereto she was kenned, the Lords found, That she had right to her terce of that term preceding Martinmas, before the which the husband died, (the husband having deceased in September before, as said is); and the terce was of an annual-rent, wherein the husband died infest; the terce of the which term was found due to the relict, albeit the husband died before the Martinmas, and so before the expiring of that term whereof the annual-rent was acclaimed; and albeit the relict was not served to her terce sundry terms after her husband's decease, yet the same was drawn back to the time of his decease. Here the question was betwixt the heir and the tercer; but if the executor had acclaimed the term, there might have some question been moved with her; albeit I think she would have been preferred to the executor, seeing the heir had rather right to that term than the executor.

Act. Hay.

Alt. Lermant.

Clerk, Hay.

Durie, p. 317.

1628. January 18. _____ *against* M'KENZIE.

No. 11.
Action of removing at the tercer's instance.

In a removing betwixt _____ *contra* M'Kenzie, the pursuer desiring removing from her terce, whereto she was kenned and served; and the defender alleging, that he bruiked the two parts with the third *pro indiviso*, and he could not know what was the pursuer's third, to the effect he might remove therefrom, seeing all the whole lands were mountains, and grass-ground, and not arable lands, whereby the terce could be known by itself, which cannot be in this case, where all is grass and pasturage; the Lords repelled the exception foresaid, of occupying *pro indiviso*; but the Lords found, That if the defender would offer obedience to remove from the third, that then they would grant commission, either to the