

No 16. to the day of the suspension; so that they cannot be excused to have enlarged the rebel at their own hands, without warrant.—And the Bailies further *answering*, That they had dealt with the Sheriff of Wigtoun to take the rebel again, who took him; and, since he was taken, he died in his company, at which time he was in that same state undeteriorate, as he was in when he was taken; all which being considered, should be enough to liberate the Bailies, who are but of a mean burgh, and ignorant of the strict points of law; the LORDS repelled the exception, and sustained the pursuit, seeing it was found, that they could not enlarge the party, once warded, at their own hands without warrant, specially when the debtor was three years at liberty after he was put out of ward, before he died. But the LORDS permitted the Bailies to say all which the party might say against the debt, if he were living, and to insist in the suspension.

Fol. Dic. v. 1. p. 516. Durie, p. 897.

1671. June 23. The LADY BALLAGAN *against* The LORD DRUMLANRIG.

No 17.

A wife, in her contract of marriage, accepted of certain lands in satisfaction of her terce. These lands holding ward, were found to fall to the superior on the death of her husband, though it was pleaded for the widow, that her right ought to be sustained to the extent of a terce, which excludes ward, and her renunciation of a terce was a private agreement with her husband, not intended to benefit the superior.

IN an action for mails and duties, pursued at the Lady's instance, as liferentrix of the lands of Birks; compearance was made for the Lord Drumlanrig, who *alleged*, That the said lands held ward of him as superior, and the pursuers liferent right not being confirmed, the rents did belong to him during the ward, which is yet running. It was *replied*, That the pursuer's liferent being constitute by a contract of marriage, bearing, that she accepted thereof in satisfaction of all further provision, terce, and third, that acceptation was only in favours of her husband's heirs, but not of the superior; so that, notwithstanding thereof, she might crave the benefit of a terce, as to the said ward lands, which she hath not renounced. *2do*, The superior, founding upon the contract of marriage, cannot quarrel the liferent of the lands of Birks, provided to her by that common brocard of law, *quod approbo non reprobo*. It was *answered* for the superior, That the acceptation of the liferent lands in full satisfaction, as said is, was a renunciation as to all persons whatsoever, that either had, or might have, a real interest in the fee and property; and that the Lady ought to have advised her security better, and obtained a confirmation from the superior of the ward lands, otherwise she might have her recourse against the heir to warrant the same, but cannot prejudice the superior. Likeas the said clause of acceptation, as it will undoubtedly seclude her from all third of moveables, so it ought from all terce; neither can that brocard of law be obtruded in this case, *quod approbo non reprobo*, which is only where in one instrument or writ, such as is a fitted account of debit and credit, or where a person grants, that as he hath right to any thing acclaimed, so he is liable himself to the performance of some other deed, or is debtor as well as creditor; whereas here, the question is only, whether or not the liferenter, by her contract of marriage,

wherein the superior is no party contractor, hath, in satisfaction of what would fall to her by law, after her husband's decease, accepted of a liferent of certain lands in place thereof.—THE LORDS did prefer the superior to the mails and duties; and found, that an acceptation of a liferent, in full satisfaction of all terce and third, was a clear renunciation; and that she not getting the confirmation from the superior, could never return to seek a terce, as falling to her by law, to which she could never be kened by an inquest, no more than crave the benefit of the third of moveables, in prejudice of the bairns' provisions, and portion natural; and therefore, that she had only right for relief against the heir, and that in satisfaction of all further provision, terce, third, or any other thing, could not be interpret that she accepted these lands of Birks as a part of her terce, and only renounced all further terce, which was the opinion of some of the LORDS.

No 17.

Fol. Dic. v. 1. p. 517. Gosford, MS. No 359. p. 174.

* * See Stair's report of this case, No 2. p. 605. *voce* APPROBATE and REPROBATE.

1707. February 13. MACKAY LORD REA against INNES of Sandsyde.

THE Lord Rea, as donatar to the ward and marriage of Sandsyde, pursues for having the avail of his marriage liquidated. *Alleged*, There can be no casualty of marriage, because his father did not die the Queen's vassal in the ward lands, but was denuded by an adjudication led by Thomas Crawford, who was publicly infest, and so came in place of the vassal. *Answered*, This is *jus tertii* to the apparent heir, to found on a third party's right, unless that person did compear and defend. *Replied*, He produced the sasine to instruct his allegiance, and had sufficient interest to propone it; for the avail of a marriage was not only a *debitum fundi* affecting the ground, but also made the heir personally liable to the single or double avail, if a suitable person was offered and refused.—THE LORDS found it was not *jus tertii*, but competent to the apparent heir to found upon it. Then it was *alleged*, No respect to the denuding, because the public instrument was not expedite in the last vassal's lifetime, but since his decease, and posterior to the pursuer's gift. *Answered*, *Nulla modo relevat*, unless the infestment had been taken after his declarator, which only put the defender *in mala fide*.—THE LORDS ordained the executions of the summons to be produced, that they might be compared with the date of the public instrument. *3tio*, *Alleged*, No respect to your adjudication and infestment thereon; because either paid within the legal, or led to the behoof of the apparent heir; and seeing the superior would have got the casualty of marriage by the adjudger's death, if after the legal, he cannot crave it likewise from the apparent heir; for that were to give it twice. The pursuer denying the allegiance, the

No 18.

Found competent to an apparent heir, in an action for liquidating the avail of a marriage, to plead, that his father had died not in the fee, being denuded by an adjudger.