

Lord Stair is of that opinion, L. 3. Tit. 2. § 19. and says, That an apprising led before the husband's death excludes the wife's terce, and cites a decision, No. 5. p. 15836: Nor is there any difference here whether expired or not; because even during the currency of the legal, an adjudication is a real burden till payment. *2do*, The analogy of law also favours the creditors; for a wife's terce is not founded on any right stated in her own person, but arises to her from the right that the husband had at his decease, and those real burdens that then affect the fee, and will debar the heir, ought likewise to be a proportional burden upon the terce: For the husband's infertment was in effect no infertment in prejudice of the adjudication. And with us a charge is equivalent to an infertment. Lastly, the relict's terce and *jus relictæ*, are upon the same footing *quoad* creditors: And any personal debt excludes the relict, therefore so must a real debt the terce. The Lords found the adjudication, with the charge against the superior, excludes the terce.

No. 33.

For the Creditors, *Isla*Alt. *Boswel*.*Mackenzie*, Clerk.*Bruce*, p. 60.1725. *January 22.*SARAH CARLYLE, Widow of Easter Ogle, *against* The CREDITORS of Her HUSBAND.

In a competition betwixt Sarah Carlyle, pleading a terce upon her husband's estate, and his creditors adjudgers, it was pleaded for them, that her claim of terce ought to be disregarded, because most of their adjudications were deduced before their debtor's marriage with her: That soon thereafter several charges against the superior were used upon these adjudications, and that the estate had been sequestrated upon an application from them some time before his death, and they in actual possession of it by their factor.

It was urged, that an adjudication, with a charge against the superior, was declared by the statute 1661 to be equiparant to one on which infertment had followed, because an adjudger had, by the charge, declared his inclination to have his diligence completed, and had done all that was in his power towards obtaining infertment: That adjudications with a charge were so far looked upon as sufficient real rights, that they had been sustained as titles in reductions to force production of rights by infertment, and likewise good titles in processes of sale, which are declared by statute to be only competent at the instance of real creditors: Therefore such adjudications ought to be found sufficient to exclude the terce, especially considering that after adjudications are deduced, the debtor cannot grant any voluntary right in prejudice of the adjudgers, though he may alienate his whole estate to the disappointment of the terce, or the wife's legal provision.

There were three decisions cited for the creditors; the first observed by Hope, *Crichton* against *Comiston*, No. 5. p. 15836. where an apprising with-

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Found the
reverse of the
above.

No. 34. out an infeftment was found sufficient to exclude the terce; the second observed by Bruce, *anno* 1715, Creditors of Hunter, (No. 33. *supra*) and the third, January 1719, Creditors of Logie Wisheart against his Relict, (See APPENDIX.) In the last two of which an adjudication with a charge was found to exclude the terce. See No. 15. p. 13570.

It was argued for the widow, that all lawyers agreed in the definition of a terce, that it was the third of the tenements in which the husband died infeft as of fee, provided by law to his wife; and thus the briefes of chancery bear as one of the heads to be inquired, If the husband died in fee of such tenements? In consequence of which the relict hath no right, by her terce, to any third of tacks, dispositions of lands, of heritable bonds, nor of any other kind of heritable right, which might have been the title of infeftment in the husband's person, unless sasine had followed in his life, even no right to a third of adjudications, though a charge against the superior had followed thereon; and agreeable to the rule and spirit of the law it follows, that as to what kind of rights the widow has no benefit by her terce, with such her terce ought not to be burdened, for she is only *oneranda* where she is *honorata*. The Lord Stair's opinion was adduced, p. 289 of his Institutions; Craig was likewise quoted, B. 2. D. 22. § 8. of Mr. Baillie's edition; as also Sir James Stewart: From all which it was contended, that as the wife's terce only reached subjects wherein the husband died invested, so nothing else could exclude it, but what would divest the husband of the fee, and invest the creditor in the lands.

It was answered to the creditors plea, That the act of Parliament 1661 was designed only as a regulation with respect to the adjudgers amongst themselves, and could not derogate from the ancient right of terce, which may be justly construed to fall under the exception in the act, "of annual-rents due upon infeftment and other real debts, or *debita fundi*; and if a charge against the superior was to be construed equal to an infeftment in all cases, it would exclude the superior from ward, which it does not: That though adjudications with a charge are titles to force production of rights clad with infeftment, yet even personal creditors, have, in many cases, that privilege, and inhibitors always: That adjudgers are allowed to pursue sales by express act of Parliament. An adjudication with or without a charge is indeed a real or heritable right, but not *jus in fundo*, nor an investiture in the lands; nor doth it divest the debtor of the right of fee, and is therefore conveyed by a general service: That though in the present case there was a sequestration, yet that was no divestiture of the fiar; neither had the creditors done all they could for completing their diligence, for they might have offered an year's rent to the superior, which if he had refused, they had access to the Crown, which refuses no body.

An adjudger, it is true, has more to plead against voluntary dispositions than a tercer, but the same privilege is given to an inhibitor; nay, in some cases, every personal creditor may be said to be preferable to a tercer; for the terce being only a right to the subjects in which the husband died infeft, and the wife having no power to restrain him in the administration during his life, she can quarrel no alienation if it is not plainly fraudulent; whereas the creditors are entitled by law to a present action.

The decision observed by Hope is not fully marked, has not been followed, sustains even a comprising without a charge, and is expressly condemned by my Lord Stair, B. 2. T. 6. § 17. The case of the Creditors of Hunter was but a mean one, and cannot make a rule in so general a question; and that of the creditors of Logie Wisheart was not finally decided, for while a reclaiming petition was in dependence, the creditors transacted with the relict.

Replied for the creditors: That if the clause in the act 1661 only concerned the regulation of apprisers among themselves, several absurdities would follow; for example, an adjudication with a charge is, by that clause, preferable to a posterior adjudication without the year upon which infeftment had followed, and yet it is certain that the infeftment would exclude the terce; and so the infester would be preferred to the tercer, and the tercer to the first adjudger with the charge, and yet that adjudger without year and day, though infeft: *2do*, An adjudication clad with infeftment is declared to have the same effect as to all other adjudications led within year and day of it, as if it had been deduced for the several sums contained in these adjudications; and yet, according to the tercer's argument, such infeftment could only protect the adjudication on which it followed: *3tio*, An infeftment of annual-rent posterior to all adjudications within year and day of the first effectual one, with a charge, would exclude the terce; and yet any of these adjudications would be preferred to the annual-renter, who was preferable to the tercer. The reason why the tercer exclude the ward is this, that it is a necessary legal consequence of the vassal's marriage, that his relict must have a terce; and so the superior's consent to it is presumed from his receiving a ward vassal, who may marry.

Duplied for the tercer, That though the law, in competition of apprisers, has given an effect to a charge against the superior, yet it has not confounded the nature of rights so as to make a charge have, in every respect, the effects of an infeftment: Thus a relict has no terce of lands adjudged, though there be a charge against the superior, unless infeftment also follow on it, because a charge is not equal to an infeftment; and for the same reason a tercer should not be prejudged by an adjudication with a charge; for it would be inconsistent to find the tercer prejudged by such an adjudication, because a charge is equivalent to an infeftment; and yet to find, that a tercer has no right to lands adjudged, where there was only a charge on the adjudication, because a charge is not equivalent to an infeftment on such adjudication.

N. B. In this case one of the creditors had an infeftment of annual-rent answering to the principal sum of £.1000 Scots.

The Lords found that the relict had a right to the terce or third of the lands wherein her husband died infeft, from the term of his decease, and in time coming during her lifetime, with the burden of the third-part of the annual-rent of the

No. 34. principal sum of £.1000 Scots secured by infestment; and preferred her for the said terce to the hail other creditors adjudgers.

For the Creditors, *Alex. Hay, Ja. Graham, sen. & H. Dalrymple, sen.*
 Alt. *Ja. Boswell & Ch. Arskine.* Clerk, *Dalrymple.*

* * Determined upon a hearing in presence.

Edgar, p. 152.

* * Lord Kames' report of this case is No. 15. p. 147. *voce* ADJUDICATION.

No. 35.

The relict of
 a nominal fiar
 not entitled
 to a terce.

1756. *February 10.* CHRISTIAN CUMMING *against* KING'S ADVOCATE.

Mr. Adam Hay, *anno* 1692, purchased the lands of Aslied, and took a charter to himself in liferent and to his son Andrew in fee, which was completed by infestment. But power was reserved to the father to contract debt, and to sell and dispose of the lands at his pleasure. He accordingly, in June 1726, after the death of Andrew the nominal fiar, exercised his reserved powers and faculties by disposing the estate to his grandson Adam Hay. Adam Hay having joined in the Rebellion 1745 was forfeited, and his estate was surveyed as belonging to the Crown. A claim was presented for Christian Cumming, relict of the said Andrew Hay, insisting for a terce out of the lands of Aslied, in the property of which her husband died infest. It was objected in behalf of the Crown, That her husband was a nominal fiar only, and that the substantial property was in the father Mr. Adam Hay. Andrew held the estate for behoof of his father, and was in effect but a trustee for his father; and therefore his relict is entitled to no terce.

“ The claim was dismissed.”

1756. *July 23.*—Mr. Adam Hay, proprietor of the lands of Aslied, executed a settlement of the same, 1692, in favours of himself in liferent, to Andrew Hay, his son in fee, and the heirs male of his body; which failing, his heirs whatsoever; “ Reserving always to the said Mr. Adam Hay, power and faculty at any time of his life *et etiam in articulo mortis*, to contract debts upon the said lands, and to sell or dispose thereof in whole or in part, without advice of the said Andrew or his foresaids,” &c. Upon this settlement charter and infestment followed in favours of Andrew the fiar. Andrew Hay died in 1722, leaving a son Adam. Mr. Adam Hay died in the year 1727; and the said Adam Hay his grandson having been attainted of high treason, and the lands of Aslied surveyed by the Barons of Exchequer, a claim of terce was entered before the Court of Session by Christian Cumming, relict of the said Andrew Hay, who, as said is, died infest in the lands of Aslied. It was objected for the Crown, That the fee in the said Andrew Hay, being merely nominal, and revokable by his father, no terce could arise to the claimant through his decease. It was answered, That a fee granted under the reservation of powers to another, is still a proper fee, and must be attended with all its proper consequences, if it be not evacuated by the exercise of those powers.