

No 56.

given different judgments upon it in that case, is the present case taken notice of, in which it was so much considered as an established point, that a bill reclaiming against the Ordinary's interlocutor, was refused without answers; many of the Court, at the same time declaring, as likewise had been done in the said case of Frog, that but for the course of decisions, they should have been of opinion, that the son was not fiar, but fiduciary for his children.

Fol. Dic. v. 3. p. 210. Kilkerran, (FIAR.) No 2. 190.

1756. February 10.

CHRISTIAN CUMMING against His MAJESTY'S ADVOCATE.

No 57.

A father took a charter of lands to himself in life-rent, and to his son *nomi-natim* in fee. He reserved power of disposing the lands. On this charter infestment was taken. After the son's death, the father executed his reserved faculty, by disposing the lands to his grandson. The grandson was forfeited. The widow of the son found not entitled to a terce of the lands.

IN the year 1692, Adam Hay obtained a charter of the lands of Aslied, to himself in life-rent, and to his son Andrew in fee; whom failing, to certain substitutes.

By this charter there was reserved to Adam a power of contracting debt, and of disposing of the lands. Infestment was taken upon this charter.

Andrew died; and Adam, in the 1726, executed the reserved faculty, by disposing the lands of Aslied to his grandson Adam Hay; whom failing, to the substitutes contained in the charter 1692.

This Adam, after the death of his grandfather, engaged in the rebellion 1745, and was forfeited. His estate was surveyed for the Crown. Christian Cumming, the widow of Andrew, entered her claim for a terce of the lands of Aslied, in the fee whereof her husband had died infest.

Objected for his Majesty's Advocate; The property of the estate of Aslied must, in respect of the reserved faculty, be held to have been in Adam; his son Andrew was a nominal fiar only; and consequently his widow is not entitled to a terce.

Answered for the claimant; By the deed 1726, Adam meant to save his grandson the expense of a service to Andrew, not to recall the fee which had been vested in Andrew. Neither could he prejudice the right of the claimant which had already taken place by the predecease of her husband Andrew; at least no personal deed of his could be effectual in competition with his singular successor's deriving right from Andrew, or with Andrew's creditors infest. See the case, Rome against the Creditors of Graham, February 1719, No 17. p. 4113; and, by parity of reason, such deed cannot be good against the widow claiming a terce; for that a widow, as to her terce, is upon the same footing as a creditor with infestment.

'THE LORDS dismissed the claim.' See TERCE.

Reporter, Auchinleck.

Act. Burnet.

Alt. M^cQueen & King's Counsel.

D.

Fol. Dic. v. 3. p. 210. Fac. Col. No 185. p. 276.