

1666. *January 27.*

JEAN CRICHTON and MR. JOHN ELEIS her Husband, *against* MAXWELL of Kirkhouse.

Jean Crichton being served to a terce of certain lands belonging to her first husband ——— Maxwell of Kirkhouse, pursues for mails and duties. It is alleged *absolvitor*, because the pursuer hath a competent jointure, more than the third of her husband's estate, as then it was, and a provision of conquest; and albeit it be not expressly in satisfaction of the terce; yet it is but a minute, bearing to be extended, and there is a process of extension thereof depending, and therefore it ought to be extended with such clauses as are ordinary in such cases, and this is most ordinary, that competent provisions used to be in satisfaction of the terce, It was answered, That the extension could not be with alteration of any substantial point, such as this, but only as to procurators of resignation, precepts of sasine, &c. And to show that it was not Kirkhouse's meaning, that the infestment should be in satisfaction of the terce, the infestment itself produced, being extended in ample form; does not bear to be in satisfaction.

The Lords repelled the defences, and found the terce competent in this case.

Stair, v. 1. p. 344.

No. 25.

Right of terce not affected by an infestment in life-rent, not bearing in satisfaction of the terce.

1666. *December.* WILLIAM YOEMAN *against* MR. PATRICK OLIPHANT.

William Yoeman having apprised the lands of James Oliphant, son to Sir James Oliphant, and Mr. Patrick Oliphant having also apprised the same, William insists on this reason, that Mr. Patrick's apprising was satisfied by intromission within the legal. Mr. Patrick alleged that his whole intromission could not be countable to satisfy his apprising, because the two parts thereof did only belong to his debtor, and the third part to Dame Geils Moncrieff, who had right to a terce thereof, and to whom Mr. Patrick was only liable and accountable, and for a part of the years he was her tenant, and had right from her. It was answered, That the tercer had no complete right, till she was served, and kened to her terce, which, being done after the years in question, the fiar might have possessed the whole till her service, and might have forced the possessors to pay him; so the appriser entering in possession of the whole, upon his apprising, cannot pretend the right of the tercer, and his taking tack of her was unwarrantable till she was served, and done of purpose, that his apprising might not be fully satisfied, and so the legal might expire, which is most rigorous and unjust; and offered presently to satisfy the tercer of her third. It was answered that the service whensoever done, is drawn back to the husband's death, and doth but declare, and not constitute the wife's right, like the service of an heir.

No. 26.

Effect of service to the terce.

No. 26.

The Lords found that Mr. Patrick could not clothe himself with the tercer's right, to cause the legal expire, but found the offer relevant; for, besides the favour of the cause, the case is not alike with an apparent heir, whose right, though not declared, yet he continues in his predecessor's possession, and none other hath any interest; but the fiar might possess the whole, and exclude the tercer till she were served.

Stair, v. 1. p. 417.

1667. February 9. MONCRIEF *against* TENANTS of NEWTON.

No. 27.

The relict by her terce has no right to the teinds, unless where there is an infestment of the teinds by erection; and therefore in a pursuit against a tenant who paid a duty jointly for stock and teind, a fourth part was deducted as the worth of the teinds, and the relict got the third of the remainder.

In the same case, alleged, That as the manor-place belonged to the fiar without division, so behoved the close, orchards, yards, &c. The Lords, in respect nothing was alleged or instructed that there was a tower, fortalice, or manor-place having a garden or orchard for pleasure rather than profit, found no necessity to decide what interest a tercer would have in such; but these being let by appearance as grass-yards, they repelled the allegiance, and found the tercer entitled to a third part of the rent paid upon that account.

Fol. Dic. v. 2. p. 450.

* * This case is No. 129. p. 15733. *voce* TEINDS.

1675. February 2. BARCLAY *against* SCOT.

No. 28.

A terce was found no sufficient title to defend against removing upon apprising against the husband's heir.

John Barclay being infest in the Barony of Cullernie, upon an apprising, pursues the tenants to remove. Compearance is made for Dame Marion Scot, who alleged that she had right to a terce of this Barony, as having been relict of the deceased Laird of Cullernie, and so having right with the pursuer *pro indiviso*, she will not suffer the tenants to remove. It was answered, That she produces no interest, unless her terce were kened.

The Lords repelled the allegiance, and decerned, reserving her right of terce as accords, and found that she could not make use thereof till it were kened.

Stair, v. 2. p. 315.