

in Contracts of Marriage, which are *uberrime fidei*, may not only be proved by *Scripta*, but also by *Presumptions* arising from the *Meaning of Parties*. This Controversy is now determined by a Law made in the Year 1601 (16 Jac. 3. Ch. 2.) ordaining, that any Provision granted thereafter by a Husband to his Wife the never so small should exclude her from a Terce not reserved. Which Law was calculated to support his Family and secure it against the Inportunty of Wives: And these additional Reasons may be for it. 1<sup>o</sup> A voluntary Provision and a Terce are incompatible; for *visio hominis tollit provisionem legis*. 2<sup>o</sup> The denying the legal Provision a Wife already provided by her Husband, seems agreeable to our old Law. *Mag. Lib. 2. Cap. 16. n. 6 & 10. Calyouse Dratt. Tit. the Wife's Dowrie* (Craig Lib. 2. Tit. 22. §. 9.) And to the Laws of other Nations, particularly the French with whom it is an ordinary Brocade, that a Wife having *dotalium* *presumunt* not claim *dotalium* or *lege et consuetudinarium*. *11 Kenzie Observ. on Act. 10. Ch. 2.* 3<sup>o</sup> As a Legitimate or Alimont cannot be claimed by Children that are provided: So neither can a Wife that has a jointure pretend to a Terce. True it the Civil Law allows a Supplement to the Legitimate; But our Law declares a Wife having a voluntary Liferent, tho' far within the legal Provision, secure to her the Quantity of a reasonable Terce; the Reason whereof, is because she was first content therewith *Arg. Reg. maj. Lib. 2. Cap. 16. n. 9.*

By the English Law Widows guilty of any publick atrocious Crime, as Murder or Witchcraft, tho' they be restor'd by *modum gratiae* and obtain living their Husband's Memory and Posterity *Craig Lib. 2. §. 12. vers. amittendi*, *Stair Lib. 2. Tit. 6. §. 17. Vers.* By the Custom of England. But whether the Lord's Session would so decide, I shall not be positive, having never met with any Account in the Matter. This is plain that our Law cuts off a Wife from the Benefit of Terce for committing Adultery, or wilful Desertion of her Husband *Craig Lib. 2. Tit. 6. §. 17. Vers.* *Ratio enim non permittit ut ex matrimonio illo contra quod peccavit mulier commodum accipiat: Et frustra leges beneficii implentur qui in legem peccat.* A Terce takes no Place if the Husband dies within a Year and Day, leaving no Child of the Marriage, or if he be fairly denuded by forfeiture or Recognition, tho' not declared before his Death, *Stair Lib. 2. Tit. 6. §. 17. pr.* The Executor's Forfeiture or Recognition by Gift or Composition, should not be the Terce's; upon Payment of her Proportion of what was given for it, her Provision being for an onerous Cause, which implies Warrandice.

Terce is excluded by the Ward, Relief, or Nonentry of the Husband's immediate Superior carrying the Rent of the Husband's Estate *Craig Lib. 2. Tit. 6. §. 17. pr.* Because a Widow cannot be in a better Condition with Respect to her Terce than her Husband if alive would have been in the whole Fee. But a Terce is not barred by Ward, Nonentry or Liferent Escheat of the Husband *Stair Lib. 2. Tit. 6. §. 17. in fin.* Nor by his Heir's Ward or Relief *Craig Lib. 2. Tit. 4. §. 36. vers. Ward et alii*

restrained. Or Nonentry *Craig Lib. 2. Tit. 6. §. 23. pr.* A Terce being introduced and effectual by Law without the Superior's Consent; Thus a Relict was preferred to a Terce out of her Husband's Ward-Lands, to the Superior claimer; Mails and Dutys by Reason of the Minority of the Husband's apparent Heir 15 Feb 1712 *M. Annandale contra Scot Lady Gillieby*. In short, as there is no Terce regulariter of what the Husband died not in feft in: So the same is burdened proportionably only with *debita funeri*, and his heritable Debt, cur'd by Infeftment Spotswood & Dratt. Tit. Terce *Craig Lib. 2. vers. In autem nec h. h. Stair Lib. 2. Tit. 6. §. 18.*

Sir James Stewart's Answers to Divul. Doubts tit. Terce, is of Opinion that a Charge against the Superior without Infeftment at the Instance of an Appriiser, doth bar a Relict from her Terce of the Subject appriised. But the Lord Stair *(Lib. 2. §. 17. pr.)* thinks, that a Charge should not hurt her, more than it would hinder a Superior from his Casualties by the Husband's Debt or Relict; unless she is otherwise provided in a conjunct Fee or Liferent equivalent to a reasonable Terce. Thus a Widow was not excluded from her Terce or Third of the Lands where her Husband died in feft, by an Infeftment of these Lands with a Charge against the Superior, at the Instance of her Husband's Executor 9 Feb. 1725 *Craig Lib. 2. Tit. 6. §. 17. pr.* *Carlyle contra Creditors of Lyon of Dalrymple*. A Terce of wadset Lands is effectual, tho' the Husband required and raised for the Sums, upon Payment whereof the Lands were redeemed: In Regard he died indebted by Redemption or Renunciation 16 Feb. 1642 *Veitch contra Veitch of Dawick*. For such Sums continue heretabably secured even after an Order of Redemption is used and Confignation made, till either the Reverer obtain a Decreet of Redemption upon his Order, or the Wadsetter renounces: Seeing the Order might be afterwards passed from by the Wadset, and perhaps be rejected by the Lords as informal 21 June 1626 *Murray contra Dunnington and Scot*. Yet it was found that his Heir might elude the Relict's Terce out of these Lands by renouncing the Wadset, even without a Declarator of Redemption, for that the Renunciation depended upon a preceding necessary Ground of Resorption 16 Feb. 1642 *Veitch contra Veitch*. But then she will have the Use of a Third of the Money paid at Redemption, as *Surrogatum* in Place of the Wadset, upon finding Caution to make it forthcoming to the Heir after her Decease, *Craig Lib. 2. §. 10. pr. Stair Lib. 2. §. 17. in fin. Stewart Lib. 2.* When a Person having disposed Lands *bona fide* is prevented by Death, before the Buyer gets Infeftment, the Disposer's Relict will have Right to a Terce of the Lands disposed, without Respect to the Disposition more than to the Disposer's Debt *Stewart Lib. 2.* A Terce was found due to a Relict in which her Husband stood last publicly in feft, notwithstanding of a base Infeftment granted to his son and apparent Heir, upon a Disposition in his Contract of Marriage 15 Feb. 1712 *M. Annandale contra Scot Lady Gillieby*. But a base Infeftment to a Creditor, tho' not clothed with Possession, was found to exclude a Terce of the Grantor's Relict