

hinder him ; and though it cannot be positively proven, that he abstained from infefting himself merely on the account of defrauding his wife of her terce, that being *actus animi*, and not a positive subject of probation, yet it is a presumptive dōle, *et nemo debet ex suo dolo lucrari* ; and Craig says, *Si pater mariti filium suum investiri obligatus sit, licet maritus durante vita sua investitus non sit, relicta tamen actionem habebit pro tertia* ; and Stair, *lib. 2. tit. 6.* gives sundry cases where a terce is due when the husband dies not infeft, especially where a father disposes his lands to his eldest son in his contract of marriage, and the son for several years does not infeft himself, his omission will be presumed fraudulent, and will not prejudge the wife of her terce. *Answered*, There is no definite time betwixt and which a husband is obliged to infeft, that being an act of administration ; that the want of money, the superiors demanding too great an entry, and many other accidents, may delay without any design of fraud ; and the cases instanced by Craig and Stair are in contracts of marriage, where there is a virtual *jus quæsitum* to the wife, and where she is not otherwise provided, which is not the case here, she having a competent terce in lands wherein he died infeft.—THE LORDS thought the case deserved farther consideration, and ordained it to be heard in presence.

1706. *January 29.*—In the action mentioned 11th December 1705, between Carruthers and Johnston ; the LORDS having heard it in presence, and advised the debate, they, by plurality, found no terce due in lands wherein the husband was not infeft, and that it would be too arbitrary to go upon presumptions and designs, that he lay out of purpose to deprive her ; and it was much safer to hold by the rule, and would ascertain the lieges better what they had to expect ; especially, seeing if he had designed to exclude her from a terce, he had no more to do but to have given her a bond of provision effeiring to the 350 merks she now has, and which, by the act of Parliament in 1681, anent terces, would have been in satisfaction ; only it would have been in her option either to have accepted or repudiated it, and taken herself to her legal provision ; and jointures now have come to be so burdensome to estates, that they need rather diminution than encouragement. *See TERCE.*

*Reporter, Lord Tillicoultry.*

*Fol. Dic. v. 1. p. 143. Fountainball, v. 2. p. 298. & 320.*

1761. *November 14.* KIRK SESSION OF DUNDEE *against HACKNEY.*

No 3.

THE LORDS found, that the kirk-session had no title, on any acts of Parliament, to pursue for fines of a clandestine marriage, although, when regularly imposed by the Judge of the jurisdiction, the kirk-session is entitled to a share.

*Fol. Dic. v. 3. p. 123.*

*See POOR.*

*See APPENDIX.*