

1770. *January 17.*JEAN HAMILTON, Relict of David Milne of Newmills, *against* JEAN WOOD.

No. 37.

Competition
between an
adjudication
and the right
of terce.

Jean Hamilton was married to David Milne, without a contract of marriage. Milne died abroad, having a small land estate, in which he was infeft; so that his widow was entitled to her terce. Jean Wood was a considerable creditor upon these lands by adjudication; and as, before going abroad, Milne had executed a disposition in his wife's favour, some communing took place betwixt her and Mrs. Wood as to her bringing the lands to sale for the benefit of all concerned upon that title; but which came to nothing.

Mrs. Wood, in the mean time, had obtained a decree of mails and duties, and for several years had uplifted the whole rents; but the pursuer having been served and kened to her terce, brought an action against the tenants and possessors, and against Mrs. Wood, for the rents of one third of the lands from and after the death of her said husband, and so forth yearly in time coming. The tenants brought a multiplepointing; and the Lord Ordinary preferred the widow "to the rents, mails, and duties, in the hands of the tenants, and in time coming during their possessions." Mrs. Wood represented; and founding upon her *bona fides*, contended, that her adjudication should be effectual as to every thing except the thirds falling due in time coming; and the Lord Ordinary found, "That the widow is entitled to her terce from the time of her husband's death; and repels the defence of *bona fides*." Mrs. Wood reclaimed to the Court; and memorials having been ordered, it was

Pleaded for the pursuer:

The right of terce drew back to the husband's death; and, of course, the wife had an unquestionable title to a third part of the rents from that period, whoever was in possession. This was a point established by all our lawyers; by Balfour, in his Practicks, p. 108, 109, 21st February, 1532, Crichton *contra* Hamilton, No. 1. p. 15835.; Spottiswood, *voce* TERCE; Craig, Lib. 2. Dieg. 22. § 33.; Lord Stair, B. 2. T. 6. § 15. 25th November, 1624, Semple, No. 7. p. 15837.; Bankton, B. 2. T. 6. § 15. Erskine says, that the widow's service to her terce is not what constitutes the right, but merely declares it; "and so entitles her to the third part of the rents *retro* from her husband's death, preferable to any rights that may have affected the lands in the intermediate period between that and her own service."

Nothing could exclude this right but an infeftment preferable to the husband; the tercer was entitled to uplift from all intermeddlers whatever; nor was there any distinction in that respect between the heir and a creditor. The subjects uplifted did not belong to the person in whose right they did uplift; and as the creditor of the husband could only attach what was *in hæreditate* of the husband, viz. the fee of the lands, together with two thirds of the rents, he must, if he has gone farther, account to those having right.

It was no good argument that the right of terce was unknown, and did not appear on any record: It was a right founded on the public law; could never be considered as latent; and it was the duty of every person to inquire into the condition of those with whom they contract, whether there may be a widow in the case, and upon what footing she stands.

No. 37.

Pleaded for the defender:

The present question depended upon the plain and indisputable principle of law—*repetitio nulla est ab eo qui suum recipit*. The pursuer's claim resolved into a *condictio indebiti* against the defender; but for which, on account of the above principle, there was no foundation, which even held *licet ab alio quam vero debitore solutum est*; L. 44. D. De cond. indeb.

The pursuer's argument was founded upon a misconception of the nature of her right. It was no real right which operated *ipso jure*, but a *jus ad rem*; a claim or power to the widow of uplifting, if she pleases, during her lifetime, a third part of the fruits of the lands in which her husband died infest. But although it had been a real right, and, in that respect preferable to the defender's adjudication, it never could be made out that she could lie by; and after the defender had, by legal process against the tenants, recovered a part of her debt, insist in a *condictio indebiti* to make her refund what she had received; March, 1684, Kerr *contra* Rutherford, No. 6. p. 2928.

The right of terce not being discoverable from any record, a purchaser or creditor, though willing to inquire, might not be able to get information whether there are such rights in existence or not; and hence, if such claims of repetition were sustained, the security of the records would in so far be destroyed.

The Court gave judgment as follows: "Find, That the widow being reserved to her terce, has a right to a third part of the rents, so far as the same are *in medio*, and in time coming: But remit to the Ordinary to hear parties with regard to the manner of the petitioner's obtaining his decree of mails and duties during the communings between the parties; and to do therein as he shall see cause."

Lord Ordinary, *Monbaddo*.
Clerk, *Home*.

For Hamilton, *Ilay Campbell*.
For Wood, *J. Maclaurin*.

Fac. Coll. No. 12. p. 27.

1773. June 29.

JEAN MONTIER, Widow of John Baillie, the younger of Woodside, *against*
MARGARET BAILLIE, Sister-German, and Heir-at-Law, to the said John Baillie.

In the year 1739, John Baillie of Woodside disposed his lands to John Baillie, his son, (who afterwards intermarried with Jean Montier), with the burden of the provision and reservation after mentioned, viz. That the said John Baillie, by his acceptation thereof, shall be bound to pay all the granter's debts; "provided also, That it shall be in my power, and I have full power, without the said John

No. 38.

The terce of lands, to which the husband had right by a disposition from his fa-