

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.

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 infeft. 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

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

No. 38. ther, and was thereon infeft without a particular recital in his sasine, of a faculty reserved by the father to charge the lands with a provision to his daughter, not exceeding a fixed sum therein specified, found not to be affected by a claim that arose to the daughter for one sum, which the father and son thereafter bound themselves, in the daughter's contract of marriage, to pay to the husband, without any reference to the faculty; and for an additional sum, in consequence of the father's after personal obligation to his daughter, declaring his intention to exhaust the faculty, and assigning the same to her, as not being a debt properly constituted heritable.—The widow is entitled to the terce of the mansion-house and garden.

Baillie my son's consent, to contract and burden the lands above disposed, with any sum I shall think fit, as a provision to Margaret Baillie, spouse to John Borland of Allanshaw, my daughter, or her children; not exceeding the sum of £.200 Sterling, payable at the first term of Whitsunday or Martinmas after the decease of me and my spouse, but with no sum to any other person whatsoever."

John Baillie, the younger, was infeft, in virtue of this disposition; and his sasine was recorded, 25th April, 1739.

By a post-nuptial contract of marriage, entered into October 12, 1743, between John Borland, on the one part, and Margaret Baillie, with consent of her said father and brother, on the other part, it is declared they had then paid to the said John Borland £.75 Sterling money; and John Baillie, elder and younger, bound themselves, conjunctly and severally, to pay to John Borland, his heirs, &c. the equal sum of £.75 Sterling, in name of tocher, with the said Margaret Baillie, at the first term after the death of John Baillie, the elder.

John Baillie last mentioned, by deed, of date 12th October, 1758, upon a recital of the disposition to his son, and contract of marriage, did, in virtue of the aforesaid reserved power, bind himself, and his said son John, and their heirs, &c. to pay Margaret Baillie the sum of £.50 Sterling, to complete the foresaid sum of £.200 Sterling, against the first term after the death of the longest liver of him and his wife. And, in regard he was not possessed of the foresaid disposition, he therefore declared, that it was his true meaning and intention that the foresaid sum of £.200 Sterling, including the sums provided in the contract of marriage, should be completed and paid to his daughter: And, for that end, assigned to her every faculty and claim contained in the foresaid disposition granted by him to his said son, whereby the said sum is or may become due and payable.

On the death of John Baillie the elder, who liferented the lands, a question arose between Margaret Baillie, his daughter, who made up her title to the lands, as heir of her brother John, then deceased, and Jean Montier, the widow of the latter; 1mo, Whether the debt due to Margaret Baillie (Mrs. Borland) can have the effect of diminishing the terce claimed by Jean Montier? 2do, Whether such terce comprehends a third of the mansion-house and garden?

Upon the *first* point, argued by the pursuer: A widow claiming a terce is precisely in the same situation with an onerous purchaser from her husband. The husband's sasine is the measure of the wife's right; and nothing can affect it, except heritable debts, properly constituted, and appearing from the records.

To apply these principles to the case in hand: It is very true that, by the disposition to the husband, there is a faculty reserved to John Baillie the elder, to charge the lands with £.200 to his daughter; but without his having actually exercised that faculty, by granting an heritable bond in consequence thereof, and whereon sasine had been taken and recorded, the pursuer's right could not be affected.

As this deed at present stands, the law cannot hold this to be a properly constituted heritable debt; otherwise, the security of the records would be destroyed at one blow. The husband's sasine is totally mute as to this reserved faculty; and as that sasine is the measure of the pursuer's right, it is a clear consequence, that she cannot be affected by the deed executed in consequence of that reserved faculty, unless a sasine had followed upon it, and that sasine had been put upon record.

The clause in the deed in question does not carry the matter so far, as to declare, even in the disposition itself, that the fee is burdened with the particular sum; it only reserves power to the granter, afterwards, to burden the disponee with payment of such a sum as he shall think proper, not exceeding the sum therein mentioned. As, therefore, it does not appear from the records, either that the reserved faculty was ever exercised, or to what extent, it cannot affect either an onerous purchaser or a tercer.

This doctrine was clearly established in a case reported from the Remarkable Decisions, Rome, No. 17. p. 4113.; and again, in the year 1737, another case, exceedingly similar to the present, is collected by Clerk Home, Ogilvie against Turnbull, No. 30. p. 4125.

Pleaded by the pursuer: It is plain that, by the deed 1758, John Baillie, the elder, did make over to his daughter all the right and security that was in his power to give her, in consequence of the reserved powers contained in the disposition granted by him to his son.

There can be as little doubt, that the reserved faculty, or power of providing his daughter to the extent of £.200 Sterling, was a real burden upon the son's right. It could never be the intention of the father, when denuding himself of his estate, in favour of his son, under certain reserved powers in favour of his daughter, who was altogether unprovided, that his son should have it in his power, by contracting debts, or selling his estate, to disappoint his daughter of her provision altogether. He certainly intended, that the same should not only be effectual against the son personally, but should really affect the lands, and be a burden against every singular successor.

Such, indeed, is the nature and import of powers and faculties reserved by the proprietor when disposing his estate. When a man disposes his estate, reserving a power to alter, no more is vested in the disponee than a resolvable fee, which can be vacated at pleasure by the disponer; and it would not deprive him of his reserved power of alteration, that the disponee alienated the estate to a third party, even for the most onerous cause. And, in like manner, when a disponer reserves any lesser power over the estate, such as charging it with a sum of money in favour of himself, or any other person, this reserved power will be effectual, not only against the disponee, but likewise against onerous purchasers. And as the father did, in this case, exercise the foresaid reserved faculty, in the most express terms, and as the same would have been good against an onerous singular successor, as a real burden affecting the lands, it must necessarily follow, that the £.25 Sterling

No. 38. in question, payable to the defender in consequence of that faculty, must affect the claim of this pursuer.

The pursuer's plea, that she cannot be affected by this reserved faculty, as her husband's sasine makes no mention of it, and that her husband's sasine must be the measure of her right, does truly resolve into an objection to her husband's sasine; and which sasine, if set aside, would be fatal to her claim altogether. It is plain, that the reserved faculty was a burden upon the right of the pursuer's husband, and which ought to have entered into his infestment; and, if so, it cannot hurt the reserved right of the disponent, that the disponent, in taking infestment, took no notice of it in the sasine. On the contrary, it is an objection to the sasine, that it was not taken conform to its warrant. But both the precept and the sasine bear an express reference to the disposition, and are given "with and under the conditions, provisions, power, and reservations, therein mentioned."

II. Upon the second point, the defenders contended, That the mansion-house and garden are not the proper subject of division between the heir and relict; and not one instance of such division has been cited. As few houses could admit of a division, so a mansion-house has always been understood to be an indivisible subject.

The law intended, in the general, that, in the case of the succession of heirs-portioners, the strictest equality should be observed among them; and yet it has been always understood, that the eldest was entitled to the principal messuage, and that the other heirs-portioners could not insist for any share thereof. This was founded in reason, and the nature of the thing, viz. that a mansion-house was never intended for the accommodation of more than one family at a time; and that it was so far an indivisible subject, that a division of it could not be made without rendering it, in a great measure, useless to all the heirs. And it is now an established point, that the eldest heir-portioner is entitled to take the mansion-house and garden, without giving any recompense therefor to the younger; because these are subjects which, in their nature, were not intended to yield a rent or profit. The reason of the law does hold in every respect in the question between the heir and the relict respecting her claim in virtue of her terce.

This subject is treated of by Balfour, p. 109. Cap. 16.; Bankton, vol. 1. p. 659. § 11.; and Erskine, B. 2. T. 9. § 48.; and it appears to be the opinion of all these lawyers, that the mansion-house is considered as an indivisible subject, which goes wholly to the heir; and that the widow, in virtue of her terce, cannot insist to have any part of it appropriated to her.

Pleaded by the pursuer: In the case of heirs-portioners, the plea of indivisibility has no doubt been listened to; and, for this reason, that as the eldest heir-portioner has the family-name to support, and the rights of hospitality to maintain, she is therefore entitled to the mansion-house and garden of the estate. But this has not been extended to other cases; and accordingly, in a recent case, Cathcart against Rocheid, the Court found, that there lay no claim for *præcipuum* in the case of

daughters succeeding to an estate in consequence of a disposition : And our greatest lawyers have given their opinion, that, in this very case of a terce, a widow has right to the third of the mansion-house, gardens, and office-houses, &c. ; Craig, Lib. 2. Dieg. 22. § 28. ; Stair, B. 2. Tit. 6. § 15. ; and their opinion is also confirmed by sundry decisions, particularly in a case observed by Stair, January 26, 1665, Logan against Galbraith, No. 24. p. 15842.

“ The Lords find, That Mrs. Borland’s debt cannot affect the terce ; and find, that the widow is entitled to her terce of the mansion-house and garden.”

Act. *Cha. Hay.* Alt. *M’Queen.* Reporter, *Stonefield.* Clerk, *Ross.*

Fac. Coll. No. 77. p. 186.

No. 38.

1778. *March 6.* THOMSON *against* M’CULLOCH.

M’Culloch having left a free estate of £.240 a year, after deducting the interest of all his debts, but being infest only in such parts, as yielded a terce of £.40 to his widow, the Lords found her entitled to a yearly aliment, for 19 years, from the heir.

Fac. Coll.

No. 39.

* * This case is No. 70. p. 434. *voce* ALIMENT.

1779. *June 30.*

FRANCES BELSCHIER *against* ANDREW MOFFAT and Others.

In the year 1750, William Belschier having purchased the lands of Grange, including a valuable coal, disposed them to his wife Frances in life-rent, and himself in fee, and the heirs-male of the marriage ; but reserved power to sell the estate, or to burden it with debt, and to alter the destination at his own pleasure, without his wife’s consent.—Infestment was taken in name both of husband and wife on this disposition.

Belschier contracted considerable debts to George Thomson ; and, for his security, disposed to him in 1769 the lands and coal of Grange, redeemable on payment of the debts. Upon this disposition, Thomson was infest, and entered into possession. Afterwards a lease of the whole estate and coal, was granted by Belschier and Thomson jointly to Messrs. Caddels, by which the rent was made payable to Thomson, until redemption of the lands.

Belschier died during the currency of this lease. His widow having expedite a service on a brief of terce, brought a process against Caddels, the tenants of the lands, for a third part of the rents since her husband’s death, and in time coming. Thomson appeared in this process, and objected to her getting any terce

No. 40.
No terce due
from collieries.