

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.

No. 40. out of that part of the rent payable for the coal. Having afterwards settled matters with the pursuer, he dropped his opposition; but the other creditors of Belschier, who had adjudged the lands after the death of their debtor, appeared, and

Objected to the widow's claim: *1st*, By the statute 1681, C. 10. it is enacted, that, where a particular provision is granted by the husband to the wife, "either in a contract of marriage, or in some other writ, before or after marriage," the wife shall be thereby excluded from her terce, unless there be an express provision in the deed to the contrary.

The pursuer's husband, by the disposition 1750, provides her in a life-rent of the lands burdened with his debts.—As she took infeftment on this disposition, and founded on the infeftment in her service to the terce, she must be held as having accepted of that special provision, and cannot insist for a terce.

2d, It is a fixed principle, that the husband's infeftment regulates the widow's terce; and, whatever debts or deeds exclude his right at the time of his death, must likewise be preferable to the terce. By the disposition which Belschier granted to Thomson, he was effectually denuded of the whole estate; and Thomson was infest and in possession of it previous to Belschier's death.

It is of no consequence that this right in favour of Thomson was redeemable. As the subject was not actually redeemed, the granter's infeftment was effectually excluded at the time of his death by the infeftment of the disponee; and that is sufficient to exclude the terce; Craig, L. 2. Dieg. 22. § 25. Balf. Pr. T. Of DOWRIE and TERCE, C. 7.; Stair, B. 2. T. 6. § 17.

Neither will it avail the pursuer that Thomson abstains from insisting in his preferable right to exclude her terce.—He suffers no loss by taking this course, except a delay of payment.—But the other creditors are entitled to insist, that he shall not give up his preferable right, but shall hold possession of the whole estate until he is completely paid, not only of interest, but of principal.—They will suffer a material prejudice, and their fund of payment must be, *pro tanto*, diminished, if these rents, which ought, of right, to be applied in extinction of the preferable debt, are gratuitously given away to the widow, and the preferable debt so much longer kept up against the estate.

III. But, although the widow were entitled to claim a terce out of the lands, *1mo*, There is no terce due for that part of the rent which is given for the coal; so it has been found, Lady Lamington against her Son, 14th February, 1782, No. 4. p. 8240.; Bankt. B. 2. T. 6. § 11.—Coal does not, like land, yield a perpetual rent.—It is part of the subject itself; and the lease of it is, in effect, a disposal of the property, in so far as the coal is worked and carried off by the lessee.

2do, The rents both of lands and coal are, in the *first* place, liable for the current interests of the preferable debts before any terce can be claimed. But, further, the preferable creditor cannot take the whole coal-rent for payment of his interests, in order to found the widow in a claim for her full terce out of the lands. The

land-rent and the coal-rent, in this case, are to be considered as different estates, over both of which Thomson is preferable.—He must draw proportionally out of both; for it is an established rule, that, when a creditor is preferable on different subjects belonging to his debtor, he cannot use his preference arbitrarily, by favouring one creditor more than another, where his own interest is not concerned.

Answered for the widow: I. The object of the act 1681, was to provide against an error common in marriage-contracts, of omitting to declare, that the special provision secured to the wife was in place of the terce. But the disposition 1750 did not secure any provision to the wife, as it was burdened with the husband's debts, and the settlement on her alterable at his pleasure. Had a settlement of this kind, which the husband could disappoint at pleasure, been inserted in a mutual contract, it would not have had the effect to bar the widow from insisting for her terce, if she preferred the legal to the conventional provision. But, as it was only provided in a deed by the husband, to which the wife was no party, nothing but an express acceptance of that settlement, in place of her terce, could have this effect.

In this case, there was no acceptance. The infestment on the disposition gave her no security that the settlement would be made good. Neither was the production of that infestment to the inquest on her service an acceptance of the deed; it was only produced in order to ascertain the subjects in which her husband died infest, and not the extent of her demand. On the contrary, she claimed the terce, and rejected the provision.

II. Thomson acquired nothing more by the disposition in his favour, than a right over the estate in security of his debt; and, therefore, his infestment on that deed is consistent with the granter's infestment of property. Dispositions of the lands themselves in security, are, by the present custom, inserted almost in every heritable bond. But such dispositions are not to be held an alienation of the property; they only burden it. The pursuer's terce, therefore, is not excluded by Thomson's infestment in security; the rents must, no doubt, be first applied to pay the yearly interests of the debt heritably secured. But it is an established rule, that the widow's claim for her terce out of the residue, is preferable to that of the creditor for the capital sum. In as far, therefore, as the rents exceed the payment of the yearly interest of Thomson's debt, terce is due by law; consequently, the plea of the defenders, that the preferable creditor has it in his power, and therefore ought to apply the whole rents to payment of his debt, both principal and interest, is evidently groundless.

III. The doctrine that coals cannot be the subject of terce, is only supported by a single decision. Lord Stair, who enumerates the various exceptions to the terce, takes no notice of coal-rent as an exception; Stair, B. 2. T. 6. § 16. But, at any rate, the preferable creditor is at liberty to take payment of his interests from the rent of coal, if he chooses; and other creditors, who are merely per-

No. 40. sonal, have no title to insist on his taking payment of these from any other subjects.

The judgment of the Court was, "Find, that Mrs. Belschier's terce does not affect the rents or profits of the coal, but only those of the lands and teinds in which her husband died infest. Find, That Thomson, as well as any other real creditor, annual-renter, or annuitant, whose debts and annuities did really affect the estate, both land and coal, at the time of Mr. Belschier's death, must take such annual-rents and annuities proportionally from both, and cannot lay the whole upon any particular subject, leaving out the other, in prejudice either of the terce or posterior creditors; and, further, that their principal sums cannot be brought *in computo*, so as to hurt or diminish the terce; therefore find the widow's terce to be one third part of the free rent of lands and teinds, after deduction of the above proportions of the interest of the real debts and annuities, if any be, affecting the same; and that such terce commenced and took place for the term's rent that became due at the next Whitsunday or Martinmas after the husband's death."

Note. By this judgment, the Court found, that the teinds of the lands were subject to the terce, though this point was not argued by the parties, but only suggested by the Court at the time of deciding the cause.

Lord Ordinary, *Kames.* Act. *Swinton.* Alt. *Elphinstone.* Clerk, *Campbell.*

Fac. Coll. No. 83. p. 159.

1783. July 29.

DOUGLAS HERON and COMPANY, *against* MARY CANT.

No. 41.

The delivery, *sine arbitris*, of a bond of provision, by a husband to his wife, found not to preclude her from claiming her legal provision of terce.

Fac. Coll.

* * * This case is No. 139. p. 11461. *voce* PRESUMPTION.

1788. July 10. JAMES MACCULLOCH *against* AGNES MAITLAND.

No. 42.
Not excluded by a disposition from the husband, followed with actual possession of the lands, but not with infestment.

Hugh Macculloch sold his lands of Grange, and the purchaser entered into possession, but did not take infestment. After Hugh Macculloch's death, his widow, Agnes Maitland, insisted to be kened to her terce. James Macculloch, the eldest son, objected; and

Pleaded: Even at a time when feudal ideas were much more prevalent than at present, some of our most eminent lawyers were of opinion, that where a husband had sold his lands, his widow, after his death, could not claim a terce. The consequence of this would be, to disappoint the purchaser, without benefiting her, as