

1773. June 26. JEAN MONTIER *against* MARGARET BAILLIE.

TERCE.

[*Dictionary*, 15,859.]

COALSTON. No debts can affect the terce which are not heritably secured and affect singular successors. Here three things are necessary: *1st*, That the obligation be special as to the creditor; *2d*, Special as to the sum; *3d*, Ingrossed in the infeftment. The first and second requisites occur in this case; the third is wanting.

JUSTICE-CLERK. When the father reserved a liferent, and a power to burden the lands with a certain sum, this could give him no greater rights than the son would have had upon the fee being transmitted to him without any burden whatever. Had the fee been without burden, the son could not have charged the lands against the tercer by a simple bond, without infeftment: therefore the father could not execute the faculty against the tercer but by infeftment.

AUCHINLECK. In this case the reserved faculty only put the father in the same situation as if he had not disposed the estate: How can his personal creditor compete with the tercer, who is an onerous creditor, and, by a fiction of law, a creditor infeft?

KENNET. The sums first paid can never be a real burden, for they were paid without any reference to the faculty. The only question, then, would be as to the remaining L.50, which is settled with a reference to the faculty. But here the reasoning of the Justice-Clerk is solid.

On the 26th June 1773, "The Lords found that the debt due to Margaret Baillie is not a burden upon the terce."

*Act. Ch. Hay. Alt. R. M'Queen. Reporter, Stonefield.*

1773. June 29. ROBERT MAXWELL of Glenarm *against* WILLIAM BURGESS.

PROOF—TACK.

[*Faculty Collection*, VI. 134; *Dictionary*, 12,351.]

COALSTON. The proof allowed by the Ordinary was as to the condition of the houses. It is material to have the facts cleared up, both as to the time of building the dwelling-house and building the dikes. As to the clause in controversy, if taken by itself, it does not imply an obligation to build new dikes or houses; yet we ought to examine what followed upon it; as tending to explain the meaning of the parties.