

No 140.  
his landlord,  
the building  
not taking  
place till after  
the lands were  
acquired by a  
purchaser.

Major Maxwell-Morison having brought an action against Patullo, for payment of that year's rent, the latter pleaded retention under the stipulation above mentioned. In this action, Captain Laird was afterwards called as a defender.

*Pleaded* for the pursuer, The building in question, posterior to the purchaser's right, served no other purpose but to benefit the lands; and of course the counter obligation must fall on the present proprietor, and not on the former, after his connection with them has ceased. It is clearly such an obligation as affects singular successors; and indeed the bargain was highly advantageous for the landlord. The circumstance of the defender's having in his hands a rent belonging to the pursuer is plainly immaterial; so that there is no ground for the plea of retention. Accordingly such was the decision of the Court, in the case of Arbutnot *contra* Sir James Colquhoun, (*supra*.)

*Answered*, It is not sufficient that the purchaser was to reap the benefit of the building; this might equally have been said, though it had been prior to his right. The obligation respecting the allowance of deduction from the tenant's rent was personal to the former proprietor, and does not devolve on the present. In conformity to this plea, the Court decided the case of Macdowal *contra* Macdowal, 17th December 1760, *voce* TACK.

The LORD ORDINARY found, "That the defender, David Patullo, had a right to retain the foresaid sum of L. 50 from the rents of the premisses contained in his lease, for building the house in question." But

The Court altered that interlocutor, and repelled the plea of retention.

Lord Ordinary, Swinton. Act. Abercromby. Alt. Wight. Clerk, Home.  
S. Fol. Dic. v. 4. p. 75. Fac. Col. No 306. p. 473.

1789. January 29.

TRUSTEES of ALEXANDER WEDDERBURN *against* Mrs MARGARET COLVILLE.

No 105.  
It is optional  
to a substi-  
tute heir of  
entail, to avail  
himself of an  
irritancy in-  
curred by the  
heir in pos-  
session, so  
that it is not  
an adjudge-  
able faculty,  
or such as  
devolves any  
right to the  
husband of a  
female sub-  
stitute, under  
the *jus mariti*.

MRS COLVILLE, a married woman, prevailed in a declarator of irritancy of the right of an heir of entail in possession. During the dependence of that process, which, under her mandate, was carried on by certain creditors of her father's, they entered into an agreement with herself and her husband, by which she engaged to pay to those creditors two-thirds of the rents of the estate, during her incumbency; she, on the other hand, being to enjoy the remaining third, and her husband's *jus mariti* being excluded.

The creditors of the husband having arrested these rents as falling under the *jus mariti*, and raised a process of forthcoming, they

*Pleaded*, By means of the right arising to Mrs Colville, through the irritancy of the entail being incurred, an estate, the rents of which were to belong to her

husband during their joint lives, devolved on her. Of this liferent right it was not in her power to disappoint him; for he alone, even without her consent, would have been entitled to institute the declarator. This power or faculty then was a competent subject for his creditors to adjudge; Stair, b. 3. tit. 2. § 16; Ersk. b. 2. tit. 12. § 6; Bankt. b. 3. tit. 1. § 35. 38.: Stewart's Answer to Dirleton, *voce* ADJUDICATION; and of that *jus quæsitum*, the agreement in question cannot deprive them. Nor is it of any importance, that the irritancy was not then actually declared; for the same *jus quæsitum* arises in a contingent right of property as in one already vested.

No 105

*Answered*, Irritancies, such as this, are of a highly penal nature; and there is no authority for asserting that an heir is in any respect bound, contrary to his will, to avail himself of the right which thence results to him. The defender then could not have been compelled, either by her husband or by creditors, to institute the declaratory action. It was entirely in her option, whether to exercise her right, or in what manner; and consequently in this matter she is not to be controuled, although the effect of the present demand were not, as it is, to deprive her of bread. Besides it may be said, that the creditors, by bearing the expense of the process, have purchased the right which they acquired.

THE LORD ORDINARY reported the cause, when the Court seemed to be moved by the first part of the above argument for the defender, and

“ Found the arrestments used by Lord Loughborough, and the other trustees of Mr Wedderburn of St Germain, ineffectual for attaching the rents *in medio*; and preferred the factor for behoof of Mrs Margaret Colville, her husband, and creditors thereupon.”

Lord Reporter, *Stonefield*.— Act. *Wight, G. Ferguson*.— Alt. *Macnochie*.— Clerk, *Gordon*.  
S. Fol. Dic. v. 4. p. 76. Fac. Col. No 56. p. 100.

Cautionry obligation, whether binding on heirs; *see* CAUTIONER.

Liferent offices, whether adjudgeable; *see* ADJUDICATION.

Officer's half-pay, whether assignable; *see* PRISONER.

Rentals, whether assignable; *see* IRRITANCY.—TACK.

Compensation, whether proponable by creditors; *see* COMPENSATION.—  
RETENTION.

Legal steps inchoate, whether they fall by death, or transmit to and against heirs; *see* DEATH.

*See* APPENDIX.