life-rent of the whole lands over and above the special provision. The Lords found the claimant entitled to a terce No. 44.

Fac. Coll.

*** This case is No. 91. p. 6457. *voce* IMPLIED DISCHARGE.

1792. *May* 18. STEWART *against* HOOME.

No. 45.

The terce found to be excluded by the husband's debts declared to be burdens on the heir, and appointed to be ingrossed in the infeftments.

Fac. Coll.

*** This case is No. 11. p. 4649. *voce* FOREIGNER.

1795. *November* 24. Mrs. JEAN GIBSON *against* CHRISTIAN KERR REID.

No. 46.
The terce may be excluded by an express clause in an entail, even altho' it should not contain irritant or resolutive clauses.

By the entail of the estate of Hoselaw, it is declared, that it shall not be lawful for the heirs of entail " to sell, annailzie, or dispone, dilapidate, or put away the said lands and estate, or any part thereof, to whatever person or persons for whatever causes, onerous or gratuitous, nor to grant tacks thereof, or any part of the samen, for any longer space than the lifetime of the granter; nor shall it be lawful for them to contract or take on debts thereupon, nor to grant wadsets thereof, or annual-rents, or annuities forth of the samen, nor to do any other act and deed whatsoever, directly or indirectly, whereby the samen, or any part thereof, may be adjudged, apprised, or otherwise affected, burdened or evicted, except allenarly, in so far as is hereby specially after reserved, viz. reserving power and liberty to each of the said heirs of tailzie, in the order of succession aforesaid, to provide a liferent jointure in favour of their wives out of said estate, by way of locality only, not exceeding the sum of 400 merks Scots money of yearly rent, subject to a proportional part of the Parliament taxes, Ministers, and Schoolmasters' fees, stipends, and other incumbent duties; which liferent locality so to be provided to wives, is hereby declared to be in full satisfaction to them of all they can ask or claim of the law in name of terce: Declaring also, that albeit it shall happen any of the heirs of tailzie above specified to fail in providing their wives conform to the above written reservations to that effect, yet the said wives shall have no manner of right to the terce, or any other legal provision upon or out of the said lands and estate, notwithstanding any law or practice to the contrary."

The entail contains a general resolutive, but no irritant clause.

Robert Kerr succeeded as heir of entail of Hoselaw, and afterwards married Jean Gibson.

They had executed no contract of marriage, and he died suddenly, without making any provision for her.

No. 46. She afterwards brought an action against Christian Kerr Reid, the succeeding heir of entail, a collateral relation of the deceased, in which she claimed £. 100 *per annum* for her aliment. The defender declared his willingness to give her the 400 merks allowed by the entail.

After hearing parties *viva voce*, the Court ordered memorials, and on advising them, and the pursuer having made an amendment on her libel, concluding for her terce out of the lands, a hearing in presence was ordered on the general question, how far the widow's right to the terce can be excluded by an express clause in an entail?

The pursuer pleaded: The widow's right of terce is at least coeval with the feudal system; Balf. p. 683. Reg. Maj. B. 2. C. 16. § 2, 3, 4, 5. It originally extended over those lands only in which the husband was infeft at the constitution of the marriage; Ersk. B. 2. Tit. 9. § 45; these, however, it continued to affect, even after they had passed into the hands of a singular successor; and although it might be limited to less than a third of the rents, it could not be further extended even by positive agreement; Reg. Maj. Lib. 2. C. 16. § 6, 7.

In order to make good her right, the widow has only to establish, that she was "repute and halden" married to the deceased; 1503, C. 77; and that he died infeft in the fee of the lands out of which she claims it; and accordingly, by the brief issued from Chancery to the Sheriff, his inquiry is restricted to these two points. She possesses the lands neither as creditor to her husband, as his disponee, nor as his representative; not as creditor, because her right is made effectual without diligence againt the heir, and if the full rents of her third are not paid her, she cannot affect the property of the lands to his prejudice, but must bring an action against the possessors for the deficiency; Ersk. B. 2. Tit. 9. § 50; not as disponee, because her right is completed without charter or infeftment, and she is liable in no feudal casualties to the superior which would not have been effectual against her husband; Craig, L. 2. D. 22. § 37; Stair, B. 2. Tit. 6. §17; and at her death the subject over which it reaches passes to his heir without a new infeftment; nor does she possess as her husband's representative, because she is not liable for his personal obligations: Ersk. B. 2. Tit. 9. § 44, 46. In short, she continues the right of her husband to the extent of one third of the lands; but her title to do so is derived from the act of the law, and is altogether independent of his consent; Craig, B. 2. D. 20. § 24. D. 22. § 25.

From these circumstances, it is evident that the terce cannot be excluded by an entail. At common law, entails were effectual against heirs and substitutes, but not against third parties. Prohibitory clauses had no effect till inhibition was used on them. Even then they were not good against onerous deeds, and gratuitous ones were reducible only on the act 1621, as being *in fraudem* of the substitutes; Stair, B. 2. Tit. 3. § 59. Mackenzie, v. 2. p. 487. Bankt. B. 2. Tit. 3. § 139. Ersk. B. 3. Tit. 8. § 23. The onerous right of the widow to her terce could not be reduced on that ground; and irritant and resolutive clauses never were supported in opposition to onerous deeds till the case of No. 5. p. 13994. The

propriety of that decision, however, was doubted at the time; Stair, B. 2. Tit. 3. § 58. See also Mackenzie's Remarkable Pleadings, No. 2. Law Tracts v. PROPERTY. Even then they were held to strike only against onerous rights voluntarily created, and not against their remote consequences. They could not be opposed to the common law of the land; for example, to the right of the public, in payment of taxes, or other public burdens; to the forfeiture of the heir, on his being guilty of treason, nor to the right of the superior to his casualties, although arising from a voluntary omission on the part of the vassal; nor, for the same reason, to the right of terce. Indeed, such clauses are inapplicable to this right. A clause prohibiting the heir from marrying, or irritating the contract after it was formed, would be set aside as *contra bonos mores;* and if the marriage be supported, the right to terce can only be defeated by the voluntary act of the claimant; and a resolutive clause can only operate where there is room for a declarator of irritancy against the contravener; but this cannot be the case with regard to the terce, which does not affect the estate till the death of the husband. No. 46.

Accordingly, so much was it understood that the terce could not, at common law, be excluded by an entail, that there is no instance of its being attempted before the act 1685. The exclusion of it by an entail, is not enumerated among the modes by which the right of terce may be defeated; Craig, Lib. 2. D. 22. § 27. 35. Balf. Pract. P. 111. C. 24.; and although it was the interest of the public that the revenue of the Crown should be kept entire, the terce was, at common law, held to be due, even out of it; 1466, C. 2. Mackenzie's Observations.

The act 1685, C. 22. ascertained the legality of irritant and resolutive clauses, but it did not alter their nature, nor extend the range of their application; Mackenzie's Inst. B. 3. Tit. 8. Treatise on Tailzies, v. 2. p. 489.; It applies only to those deeds by which the lands may be "apprised, adjudged, or evicted;" but the widow's claim to her tierce can be the source of none of those consequences.

It is true that it has become common, since the date of the act, to insert in entails a clause excluding the terce; but, owing to the frequency of conventional provisions, and the circumstance that entails often allow the heir to give an aliment to his widow equivalent to the terce, the effect of such clauses has never before been tried.

Answered: The right of terce may be modified at the pleasure of the parties; it may be renounced; it may be defeated by a sale, or heritable security; by conventional provisions, or by the dissolution of the marriage within year and day; and as its extent is measured by the husband's sasine, it cannot be due where the sasine expressly excludes it; Erskine, B. 2. Tit. 9. § 46. A person bestowing an estate may dictate the terms of the donation. He may give a liferent only, or he may give a fee, so limited as to exclude the terce; upon the same principle, that, although it was once disputed how far the husband could renounce the *jus mariti*, it never was doubted, that a third party might exclude it as to a subject bestowed by himself; 4th March, 1774, Annand and Colhoun against Chessels, No. 58. p. 5844; Bank. B. 1. Tit. 5. § 84.

No. 46. Although, therefore, it is sufficient for the maker of an entail simply to declare that no terce shall be paid out of the estate, there can be no difficulty in applying irritant and resolutive clauses to the right of terce. To prohibit a person, in general terms, to contract debt, would be equally absurd with the prohibition to enter into a contract of marriage; but the contracting of debt, to the effect of evicting the estate, may be prohibited; Scot, No. 72. p. 3673. and so may the contracting of marriage, the irritant clauses striking not against the debt, or the marriage, but against their effects on the estate; and surely it is not more the natural and legal effect of marriage to create a right of terce, than for the contracting of debt to create a right of adjudging. Nor is it any objection to the application of a resolutive clause, that the terce does not take place till after the death of the husband. It is not necessary that the resolutive clause should actually be carried into effect; it is sufficient that it appears in the deed, and might be applied, if necessary. Indeed, the same plea might be urged in favour of any debt, upon which no diligence had been done during the lifetime of the debtor, or which was not made payable till after his death; besides, the right of terce might be considered as attaching conditionally during the subsistence of the marriage, and resembling an adjudication in security of a conditional debt.

The right of the wife is surely weaker than that of an onerous creditor, and accordingly it is excluded by an heritable security. By the case of Stormont, however, No. 5. p. 13994. irritant and resolutive clauses were found effectual, at common law, even against creditors; and it would be strange if an entail could exclude the stronger but not the weaker right. Indeed, whatever was the case in questions with creditors, the validity of such clauses in all questions *intra familiam* was never disputed. Accordingly, it was not unnusual to exclude the terce in entails executed prior to the act 1685, as in the entail of the family of Roseberry, executed in 1673; in that of Kinnaird, executed in 1679; and in that of Libberton, in 1682.

Further, the act 1685 is of itself conclusive of the question; for it clearly applies to the case of terce, as it occasions a partial eviction of the subject; and it might as well be said that an heir of entail might create a total life-rent, as a terce, out of an estate, the entail of which expressly excludes it.

Accordingly, although perhaps a third of the landed property in Scotland is now entailed, and a clause excluding the terce and courtesy has become a matter of common style in entails, it is admitted that its validity was never before disputed, which can only have proceeded from a conviction of its legality; otherwise every heir of entail would have given his widow a terce out of the estate, as the only way in which he could exert any power over it after his death; Bankton, B. 2. Tit. 6. § 18.; 26th July, 1715, Anderson against Wishart, No. 50. p. 13570. Indeed, were such exclusion ineffectual, this singular consequence would follow, that the widow of an heir of entail would be more secure of obtaining her terce than that of an unlimited fiar.

Observed on the Bench: The character of widow and the right to terce are not inseparable. The latter may be renounced, either expressly or by implication; and, like the *jus mariti*, it may be excluded by the terms of the grant, which are strictly obligatory on the widows and children of the substitutes, without irritant and resolutive clauses. The terce and courtesy are precisely in the same situation. They are merely a distribution of the estate, taking place only in those cases where there is no positive agreement of parties; and both are excluded by the uniform style of entails. No. 46.

The Lords (9th June) found, "That the pursuer is effectually excluded from her claim of terce by the entail, under which her husband possessed the estate of Hoselaw."

Upon advising a reclaiming petition, and answers, they unanimously adhered.

Act. *Solicitor General Blair, R. H. Cay.* Alt. *M. Ross, Neil Ferguson.* Clerk, *H.*

D. D. *Fac. Coll. No.* 186. *p.* 447.

1796. *February* 24.

DAME MARY MEAD *against* ARCHIBALD SWINTON, Common Agent in the Ranking of the Creditors of the late Sir Samuel Hannay.

No. 47.
Where there are two mansion houses on an estate, has the widow a right to the second, as an appendage of her terce?

Sir Samuel Hannay died infeft in the lands of Kirkdale, on which there was an old mansion-house, where he and his family resided. A few years before his death, he built, close by it, a more commodious house, where he proposed to have lived, but he died before it was completed.

Lady Hannay claimed the old mansion-house, as an appendage to her terce, on the ground, that where there are two mansion-houses, the widow is entitled to the second; Craig, L. 2. D. 22. § 29.; Ersk. B. 2. Tit. 9. § 48.; 29th June, 1773, Montier, No. 38. p. 15859.

She was opposed by the common agent in the ranking of Sir Samuel's creditors, who stated, in the *first* place, That in point of law, it seemed extremely doubtful, if in any case the widow had right to the second mansion-house, no mention being made of such right either by Balfour or Stair, nor any decision finding her entitled to it; *2dly*, That at all events there was no room for such a claim here; it being plain, from Sir Samuel having built the new house within a few yards of the old one, that he must have intended either to have taken it down, or to have converted it into offices.

The question first came before the Sheriff of Kirkcudbright, who having found that "Lady Hannay had no claim upon either of the houses," she complained of the judgment by bill of advocation.

The Lord Ordinary on the bills took the case to report.

The Court went on the specialty stated by the common agent, on which they were clear that Lady Hannay's claim was groundless. Some of the judges, how-