the land itself, or the singular successors into whose hands it may come. This is perfectly well settled law. It follows, indeed, of necessity from the rule laid down in the case of *Coutts* "that words must be used in the conveyance which express or plainly imply that the subject itself is to be affected, and not the grantee and his heirs alone, and that these words must be inserted in the sasine which follows on the conveyance." Accordingly, it has been so held in a variety of cases, of which perhaps the *Duke of Argyle* v. *The Creditors of Barbreck*, 1730, M. 10,306, is one of the best examples, where a superior had granted a feu-right with certain prohibitory clauses which were engrossed at full length in the charter, but not in the precept of sasine nor in the sasine itself otherwise than by a general reference, viz., "with and under the provisions and conditions particularly mentioned in the charter." It was found that this general reference was not sufficient against creditors or singular successors. It is unnecessary to cite other cases. The soundness of the comment made by Professor Menzies on that of the *Duke of Argyle* cannot be disputed when he says—"It is quite certain that nothing but full insertion in the sasine will suffice." But there cannot be a better illustration nor a clearer recognition of this rule of our law than the provisions of the recent statutes for relaxing its severity. Under the Lands Transference Act the necessity for full insertion is limited to the first sasine, and if the conditions have once entered the record in an instrument of sasine or of resignation *ad remanentiam*, it is made sufficient to refer to them as contained in such instrument, which, however, must be described by the name of the party in whose favour it was passed, the record in which it was registered, and the date of the registration. There are similar provisions in more recent statutes, including the Acts of 1868 and 1874, but by all these statutes prior to 23 and 24 Vict. c. 143, it is required that the reference shall be made to the real burdens as set forth at full length in a duly recorded instrument of sasine forming part of the progress of titles. By the last-mentioned Act, which provided that a conveyance recorded in the Register of Sasines should be equivalent to sasine, such reference is allowed to be made to a duly recorded conveyance, but it is still indispensable that the burden shall be expressed in a deed, that enters the infeftment, and that the deed from which conditions are imported by reference into subsequent titles shall be sufficiently identified, and that the register in which it is recorded and the date of registration shall be specified. All the conditions therefore upon which real burdens are now allowed to be imported into dispositions by reference are disregarded in this contract of ground-annual. Mr Lees observed quite justly that these recent statutes do not apply to the present case. But that is only saying in other words that at the time when the contract of ground-annual was executed there was no authority for importing real burdens by reference from another deed, instead of engrossing them at full length in the disposition and the instrument of sasine, and it seems to me that the terms of the enactments for amending the older rule suggest a very forcible argument against the contention that before any of these were passed it was competent to impose burdens upon lands by general reference to the conditions of a deed which did not form part of the progress of titles at all, and without even identifying that deed in such a manner that it could be traced on the register in which it happened to be recorded.

It was urged in an argument, which I confess I was unable to follow, that the agreement was made by the Magistrates of Glasgow for the benefit of the community. I cannot see that that makes any difference. It is not more competent for the magistrates of a burgh than for anybody else to impose restrictions upon property by documents which do not satisfy the rules of conveyancing. The conclusive answer to every argument about the purpose and intention of the agreement is to be found in the Lord President's opinion in the *Magistrates of Arbroath* v. *Dickson*, 10 Macph. 630—"A burden upon lands . . . is not a thing to be spelt out of a deed; it must be distinctly found there. We are not to construe a deed of this kind as we construe a will for the purpose of arriving by all means, and even by something like conjectural means, at what the intention of the testator is. We must have something a great deal more than that."

For these reasons I am of opinion that the first question should be answered in the negative, and if so I presume that the second question does not require an answer.

The LORD PRESIDENT and LORD M'LAREN concurred.

LORD ADAM was absent

The Court answered the first question in the negative.

Counsel for the First Parties—Guthrie, K.C.—Younger. Agents—R. & R. Denholm & Kerr, S.S.C.

Counsel for the Second Parties — Lees, K.C.—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Tuesday, March 18.

SECOND DIVISION.

[Lord Pearson, Ordinary.

DOWNIE'S EXECUTRIX *v.* DOWNIE.

Succession—Jus Relictæ—Heritable Securities—Debt Due to Wife out of Deceased Husband's Estate not Payable out of Heritable Securities until Moveables Exhausted—Titles to Land Consolidation Act 1868 (31 *and* 32 *Vict. cap.* 101), *sec.* 117.

A husband died leaving estate amounting to £2100, whereof £1600 was invested in heritable securities, and the remain-

der was moveable for all purposes. It was admitted that the widow was entitled to payment of £637, being the amount of a donation to her husband which she had revoked. *Held* that this sum must be paid *primo loco* out of the estate other than the heritable securities, with the result that, as that part of the estate was thus exhausted and *jus relictæ* was not payable out of heritable securities, there was no estate available to answer the widow's claim for *jus relictæ*.

This was an action of multiplepoinding raised by Mrs Helen Campbell or Downie, executrix-dative *qua* relict of the deceased James Downie, in which the fund *in medio* was the executry estate, and claims were lodged (1) by Mrs Downie as an individual, and (2) by the heirs *in mobilibus* of the said James Downie.

The facts of the case and the pleas of parties sufficiently appear from the opinion of the Lord Ordinary (PEARSON) which was as follows:—"The fund *in medio* in this multiplepoinding is the executry estate of the late James Downie. He died in 1899 without issue and intestate, survived by his widow who has been appointed his executrix-dative. His next-of-kin are his two brothers and two sisters and the family of a predeceasing sister.

"The deceased left estate valued at £2141, 5s. 7d. Of this a sum of £1640 was invested in bonds and dispositions in security over various heritable subjects. The remainder consisted of shares in limited companies of the value of £485, and of small sums of interest accrued to the date of death.

"The widow claims her legal rights of terce and *jus relictæ*. But further, and in the first instance, she claims to have made good to her out of the estate certain sums amounting to £637, being the proceeds of two deposit-receipts for £400 and £230, which belonged to her at or immediately after the marriage, and were endorsed by her to her husband. These claims, so far as made good out of the moveable estate, would reduce the fund out of which her *jus relictæ* is payable. It is therefore her interest to have these claims satisfied as far as possible out of the heritable estate.

"As to the sums of £400 and £230, the next-of-kin, who have the opposing interest, state that they are satisfied that these sums, with interest, were Mrs Downie's property, and that 'they were prepared to admit that there was donation of these sums,' and that she is entitled to revoke the donation. The result, however, of satisfying this claim out of the moveable estate would be to exhaust that estate, and there would be no fund left out of which *jus relictæ* is payable.

"Accordingly, the widow does not accept this admission of donation. She claims that the proceeds of the deposit-receipts should be made good to her out of the heritable and the moveable estates proportionally, so far as these consist of investments made since the marriage. Her averments, on which this conclusion depends, are these:—(1) That a few months after the marriage she endorsed each deposit-receipt 'and handed it to her husband, who uplifted it, with the interest accrued thereon'; and (2) that these sums, amounting to £637, 'were immixed by Mr Downie with his own funds, and invested by him as part of his own estate.' It was explained at the discussion that in her view these sums in the hands of her husband were held in trust for her, and that the investments which resulted from his management of the mixed estate must be regarded as belonging to her *pro tanto*. This, however, involves matter of fact as to the footing on which the deposit-receipts were delivered by her to her husband, and as to that she makes no averment whatever. She does not aver that they were handed to him in trust, or for custody, or for investment, nor that he did wrong in immixing the proceeds with his own funds, or investing them as part of his own estate. All the averments which she makes on the subject (other than those which amount to pleas-in-law) are just as consistent with donation as with trust. Accordingly, it is not easy to see what object would be gained by a proof on this head, even if parties had moved for it. But as both parties urged that the case should be decided without it, I think the best I can do for Mrs Downie is to take her opponents' admission as it stands, and hold this to have been a revocable donation.

"If so, it follows, in my opinion, that it gives rise (on its being revoked) to a claim against the estate for restoration of the sum of £637, and that this will be satisfied *primo loco* out of the moveable estate, which will thereby be exhausted."

On 31st July 1901 the Lord Ordinary pronounced this interlocutor:—"Finds that, having regard to the averments of both parties in the competition, the sum of £637 (consisting of the sums of £400 and £230 therein mentioned, with interest thereon as condescended on) must be held to have been gifted by Mrs Downie to her husband, and to be subject to her right to revoke the same; and that upon her exercising her right of revocation the same falls to be paid to her out of the general estate of her deceased husband, and *primo loco* out of the moveable estate: Finds that the said sum of £637 being more than the net amount of the moveable estate of the deceased, no fund remains in that event to answer Mrs Downie's claim for *jus relictæ*: . . . Grants leave to reclaim."

The Titles to Land Consolidation Act 1868, sec. 117, enacts—"From and after the commencement of this Act no heritable security granted or obtained either before or after that date shall, in whatever terms the same may be conceived, except in the cases hereinafter provided, be heritable as regards the succession of the creditor in such security, and the same, except as hereinafter provided, shall be moveable as regards the succession of such creditor, and shall belong after the death of such creditor to his executors or representatives *in mobilibus*, in the same manner and to the same extent and effect as such security would,

under the law and practice now in force, have belonged to the heirs of such creditor: . . . And further, provided that all heritable securities shall continue, and shall be heritable *quoad fiscum*, and as regards all rights of courtesy and terce competent to the husband or wife of any such creditor, and that no heritable security, whether granted before or after marriage, shall to any extent pertain to the husband *jure mariti*, where the same is or shall be conceived in favour of the wife, or to the wife *jure relictæ*, where the same is or shall be conceived in favour of the husband, unless the husband or relict has or shall have right and interest therein otherwise."

Mrs Downie reclaimed, and argued—The £637 was a debt payable out of the executry of the deceased, and by sec. 117 of the Act of 1868 heritable bonds were declared to be moveable *quoad* succession, *i.e.*, they fell into executry. The claimant was therefore entitled to insist that a proportionate share of the debt should be paid out of the bonds, and she had a clear interest to do so; otherwise the moveables would be exhausted and her claim to *jus relictæ* defeated.

Argued for the claimants, the next-of-kin—The Lord Ordinary was right. The sum claimed by the widow was simply an ordinary debt, and as such payable primarily out of the moveable estate, which must be exhausted before the heritable estate could be trenched upon. Moreover, sec. 117 expressly provided that heritable securities should not be liable for *jus relictæ*.

At advising—

LORD JUSTICE-CLERK — In this case it appears that the estate of the deceased on which Mrs Downie makes her claim consisted of £500 in moveables and about £1600 invested on heritable securities. The widow has a claim as creditor of the estate for a sum of £637, and there is a deficiency of moveable estate to meet this debt, so that it is necessary to trench on the heritably secured funds to meet the balance.

In that state of matters, there is no estate of the deceased on which she can make a claim for *jus relictæ*, for although in any question of succession the sums standing on heritable securities are moveable upon statute and decision, they are not funds liable to meet a claim of *jus relictæ*, but only a claim of terce.

I am of opinion that the Lord Ordinary has rightly decided the case, holding that ordinary debts of the deceased must be set against the moveables left by him, and only on their proving insufficient can the heritably secured portions be trenched upon. If that be done in this case, the fund which might be available for *jus relictæ* is entirely wiped out. I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD YOUNG concurred.

LORD TRAYNER — [who was absent at advising, and whose opinion was read by the LORD JUSTICE-CLERK]—I agree with the Lord Ordinary. The estate of the deceased amounted to about £2100. This consisted of moveables to the extent of £500, while something over £1600 was heritably secured. The deceased's widow has been found entitled to payment out of the estate of a sum of £637, a sum for which she was creditor on that estate under the circumstances explained by the Lord Ordinary. There is not free moveable estate sufficient to meet this claim, and accordingly part of, what I may call for convenience the heritable estate, must be taken to do so, as the whole of the deceased's estate, of whatever nature, is liable for his debts. But the moveable estate is primarily liable for ordinary debts, which cannot be burdened on the heritage until the moveable estate is exhausted. Accordingly the whole free moveable estate being here exhausted on payment of the deceased's debts, there remains no estate of which the widow can claim a part *jure relictæ*. The whole estate which remains after payment of debts is heritably secured, and of this (although moveable *quoad* succession)—31 and 32 Vict. cap. 101, sec. 117; *Rossborough's Trustees*, 16 R. 157—no part pertains to the widow *jure relictæ*. She has a claim of terce in respect of such estate, but nothing more. It was argued for the widow that the debt due to her should be paid rateably out of the heritage and moveables — roughly speaking, two-thirds from heritage and one-third from moveables—and that thus a certain proportion of the moveable estate would be left subject to her *jus relictæ*. But this, I think, cannot be allowed. The moveable estate must, as I have said, be exhausted before ordinary debts can be charged on heritage. That being done here, there is no estate out of which *jus relictæ* can be claimed.

LORD MONCREIFF—Notwithstanding the ingenious proposal that the sum (£637) found due to Mrs Downie from her husband's estate should be paid rateably out of the proceeds of the heritable bond and the moveable estate, I am of opinion that the Lord Ordinary's judgment is sound.

That sum, which is simply an ordinary debt, falls to be paid primarily out of the moveable estate; and if this is done it exhausts it, leaving no fund to satisfy Mrs Downie's claim to *jus relictæ*.

The statute which makes heritable bonds moveable *quoad* succession of the creditor (Consolidation Act, 1868, sec. 117) specially excepts the right of a widow to terce and *jus relictæ*; *quoad* those rights such securities continue heritable.

I am therefore for affirming.

The Court adhered.

Counsel for the Claimant and Reclaimer Mrs Downie—Campbell, K.C.—Constable. Agent—J. H. Dixson, W.S.

Counsel for the Claimants and Respondents the Heirs *in Mobilibus* — M'Clure—Forbes. Agents—Archibald Menzies, S.S.C. —J. A. Graham Miller, W.S.