THE LORDS found, that the debts or bonds of Laurence Calder to his children are no real burden upon the lands, to affect a singlar successor; and found the disposition by James Calder to Barrack does not transmit the lands with the burden of these debts, &c. No 19.

Decisions cited for Barrack: Thomas Rome against the Creditors of Graham, February 1719, No 17. p. 4113.; The Town of Aberdeen against Davidson of Tillymorgan, 16th December 1708, No 15. p. 4109.

For Mrs Sinclair: Pringle against Pringle, 21st June 1677, No 12. p. 4102. Children of Mouswell against the Creditors, 16th December 1679, No 13. p. 4104. Creditors of Coxton against the Laird of Dipple, *see* APPENDIX; Creitors of Carnegie against Carnegie, No 14. p. 4106.

For Barrack *Jo. Sinclair.* Alt. *Ja. Graham, sen.* Clerk, *Justice.*

Fol. Dic. v. 1. *p.* 293. *Edgar, p.* 136.

1737. *June* 21.

Competition MARGARET and AGNES OGILVIES, &c. with MARION TURNBULL, Widow of DR OGILVIE.

No 20.
One disponed his estate to his eldest son, reserving to himself a faculty to burden the same with 5000 merks, in favour of whatever persons he pleased; thereafter he granted personal bonds for that sum to his wife and children, referring to the faculty. After his decease, a competition arising betwixt the creditors in these personal bonds, and the son's real creditors infeft in the estate, the Lords found

ROBERT OGILVIE of Coul disponed his estate to Dr John Ogilvie his eldest son, reserving to himself a faculty to burden it with 5000 merks, in favour of whatsoever person he pleased, whereupon the Doctor was infeft; and, in consequence of the faculty, his father thereafter granted bonds to his own children to the extent of the sum reserved. Posterior to this, the Doctor intermarried with Marion Turnbull, whom he provided in an annuity of 800 merks, upon which she was infeft; and afterwards he disponed the lands to John Gardener, with Marion's consent, who conveyed them to Thomas Ogilvie merchant in Dundee, under the burden above-mentioned; and he having, by a multiplepoinding, called the children of Robert Ogilvie, claiming the 5000 merks granted to them in virtue of the reserved faculty, and the Doctor's widow, who craved to be preferred for her annuity upon her infeftment, a competition ensued betwixt them, wherein this question occurred, Whether the 5000 merks was a real burden upon the estate, or if it was only personal?

The arguments for the Children were; That, at the time Robert Ogilvie granted the disposition to his son with this reserved faculty, such clauses were generally believed to import a real burden at least; so Lord Stair, tit. COMPETITION, p. 647. (669) says; his words are, 'If an infeftment be granted with the bur-
'den of a sum, it makes the sum a real burden; and therefore a purchaser pro-
'ceeds upon his own hazard, if he buy without sight of his author's infeftment;

No 20.
the bonds granted in pursuance of the faculty were only personal, so as to affect the heir, but not real burdens affecting the lands.

'or, if one get but right as a creditor, that party having right to the sum bur-'dening, will be preferred as an anterior real creditor, and not personally only.'

From which passage, it is plain, the learned author thought an infeftment, granted with the burden of a sum, even though it did not mention the name of any particular creditor, made the same a real burden; and that the party who had right thereto would be preferred, seeing upon it he might adjudge: So that, by our law, it makes no difference, whether a particular creditor is mentioned, or if the faculty is in favour of persons under the collective denomination of children, or if the creditors are altogether uncertain; because the disponer, in whose favours the faculty is conceived, being truly creditor, it may be affected for his debts, or he may dispone to the extent thereof, and when the creditors do appear, they come in place of the party who reserved the faculty; considering the question therefore in this view, it removes all the difficulties or inconveniencies that may be alleged to follow the uncertainty attending the creditors who have right to such faculty.

Neither is it easy to see how the widow's annuity can any ways compete with the children, as her liferent is constituted by the son, whose title was subjected to this burden. Besides, the rendering such faculties ineffectual, may be productive of many inconveniencies. Thus it may often happen, that, for the good of a family, a father cannot decline putting his son in the fee of his estate; at the same time, he may have other children and creditors, whose provisions and debts he is willing to have secured, preferable to the son's fee; it may be inconvenient for him to determine the extent of these provisions, or to divide them among his children, by immediately granting heritable bonds, whereupon they may be infeft; would it not be hard, if there was no way, in our law, to answer such reasonable intentions, by which no other person can be prejudged? And yet, it is believed, it will be difficult to point out any other method than the one that has been followed here.

On the other hand, it was *argued* for the relict; That a reserved faculty was no more than reserving the fee in the disponer, in so far as extends to the power of charging the estate with the sum mentioned in the faculty; of course, it can never be stronger than the fee itself. Now, no fiar can, by granting a personal bond, make the same a real burden, without a clause of infeftment, or diligence, by adjudication.

2*do*, It is inconceivable how a debt can be a burden on a fee before it exists, or that the power to make it a burden should make it real, where nothing is properly done to charge it upon the land; 3*tio*, It is inconsistent with our land-rights, that any sums in general should be a real burden upon lands, where either the extent of the sums, or the creditor, cannot be known by any thing that appears in the right pretended to be burdened. And, as to the arguments urged for the children, it was *answered*, None of our lawyers ever held such faculties to be agreeable to law. The passage from Lord Stair, if it proves any thing, tends to support the contrary doctrine; because it is probable, he there means

a sum having a particular creditor; and that he had no other view, is obvious from the following words, viz. 'That a purchaser proceeds on his own hazard, 'if he buy without sight of his author's infeftments;' which points out that he is speaking of a case where the purchaser may be secure, if he sees his author's infeftment; a doctrine that agrees to the question, where an infeftment is burdened with a particular sum to a particular creditor; but which does not apply, where the burden is general, either by not expressing the extent of the debt, or the name of the creditor. No 20.

But the distinction betwixt a debt contracted with a certain creditor, and a debt that hath no creditor, is so plainly founded on common sense, that it needs no authorities to establish it; seeing, where the creditor is certain the infeftment points out the burden, one knows what it is, and where it is; but, where there is no creditor, or no sum actually contracted, but only a power to do it, there is truly no burden affecting the subject at the time; it is a burden may be, or may not be; such as no purchaser can know or have any security against. It is true, that it has been often found such indefinite burdens are real; but, in a late case, viz. in the competition among the creditors of Maclelan of Barclay*, the Court, upon considering the inconveniences that followed therefrom, found, that such clauses did not import a real burden upon land; but, abstracting from particular cases, it seems inconsistent with principles, that any debt, contracted in consequence of a faculty, should be real, unless he that hath the faculty make it so, by charging it upon the estate; and, until that is done, it must remain only a personal burden affecting the disponee. Neither is it so obvious how a debt, not contracted, perhaps, for many years after an infeftment, should be a real burden thereon, so as to overhale immediate rights; or that a power to make a debt real, does, *ipso facto*, produce that effect by the contraction, more than that every fiar's debts are real, because he has the power to make them so.

It is said, that creditors may adjudge such faculties; but, when they have done it, still they get no more than a power to secure their own debts, by making them real; but this does not prove that personal debts, contracted in virtue of such a faculty, are real, as from the date of the infeftment burdened, so as to exclude other creditors. Neither is there any thing in the observation, that the bonds, granted in virtue of the faculty, should be preferable to the liferent-infeftment; as it was constituted by the son, whose right was subjected to this burden; because the widow founds her plea upon this, that her infeftment is real, flowing from the fiar before the debts contracted, in consequence of the faculty, were real; nay, that they are not so to this day. And it can have no influence, that the son's title was burdened; *i. e*, that he was personally burdened, unless the debts, to which he was subjected, had been real, previous to her infeftment. *Lastly*, As to the inconveniences alleged would follow the rendering such faculties ineffectual, they are quite imaginary; because, if a father has a

* *See* General List of Names.

No 20.

mind to secure provisions to his children, or a fund for creditors; yea, even for after transactions, there are many ways to do it other than the one that has been here followed. To point out only one, why may not the father burden the estate with a special sum, payable to himself, or to any person he thinks fit; and then, of course, he has the power of dividing and applying it to what uses he pleases? which would be consistent with the principles of law, and remove every difficulty.

The Lords found, that the bonds, granted in pursuance of the faculty, were only personal, and not real burdens affecting the lands.

Fol. Dic. v. 1. *p.* 293. *C. Home, No* 58. *p.* 100.

1784. *December* 24.

No 21.

A power in favour of one person to burden an estate, may be annexed by the proprietor to a disposition and infeftment in favour of another.

Daniel Anderson *against* Messrs Young and Trotter.

Katharine Innes purchased an heritable subject from William Dowie. The disposition, however, was taken in favour of a third party, 'David Hill, in 'trust, and for behoof of Katharine Innes;' and under this proviso: 'reserving power to the said Katharine Innes herself, without the consent of her said 'trustee, to burden, sell, dispone, or give away the whole or any part of the 'subject disponed, for onerous causes.'

After the trust conveyance was completed by infeftment, Katharine Innes, without the concurrence of her trustee, did accordingly burden the subject, by granting to Anderson, for an onerous cause, an heritable security over it, containing a precept of sasine; on which he too was infeft.

Posterior to this deed, Katharine Innes, together with the trustee, executed another similar security, in favour of Young and Trotter; who having taken an infeftment upon it, objected to that of Anderson as premature and invalid, not having proceeded from the trustee, who was still undivested of the property. For Anderson it was

Pleaded; Katharine Innes was proprietrix of the subject, which she held by her trustee. If she had incurred forfeiture for high treason, it would have comprehended this as well as her other property. For it has been found, in the cases of Lord Lovat, 10th Dec. 1754, *voce* Writ, and of Lord Pitsligo, 9th March 1756, *voce* Forfeiture, that when a true or a substantial right, and one that is purely nominal, subsist together relative to the same subject, it is the former which is affected by forfeiture. In fact, there was a faculty in Katharine Innes, amounting to the full powers of property. It makes no difference whether this faculty be contained in a deed flowing from another, or reserved in one granted by the party himself. In either case, the feudal right stands in the person of another; but still the infeftment of that other must be construed as an infeftment for behoof of the person in whom the faculty is created or reserved, if it appear on the face of the records, that it is merely a trust in the nominal