Refused a reclaiming bill, desiring that the sum might be divided betwixt the man and woman's heirs, and gave it solely to the survivor's heirs.

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1739. *June* 23. ROBERT GORDON *against* CREDITORS of BROUGHTON.

[Elch., No. 2, *Personal and Real;* Kilk. No. 2, *ibidem;* C. Home, No. 120; *Rem. Dec.* No. 10.]

THE case was this.—A father disponed his estate to his son, and burthened the resignation with his haill debts, contained in a particular list subscribed by both, and ordained that this burthen should be insert in the infeftment following thereon; which was accordingly done. The list referred to was registered in the register of the Council and Session, but was not inserted either in the disposition or infeftments following thereon. *Quere,* Were these debts real debts?

The Lords found, unanimously, that they were not; but they differed as to the *ratio decidendi.* Arniston thought that the words in the disposition did not imply a real burthen upon the estate, but only imposed a personal obligation upon the disponee; that the father could never mean to make his debts real which were before personal, but only to bind his son, who had got his estate, to relieve him of his debts.—And it was upon this he founded the decision. But the rest of the Lords were of opinion, that the words, in themselves, did impose a real burthen, but that, in this case, as the debts were not inserted in the disposition or sasine, nor the list referred to registered in the register of sasines, therefore there was no real burthen; because, if it were otherwise, the lands would, in some measure, be exeemed from commerce, and the records rendered useless as to them, because it would be impossible to discover from them what burthens affected the lands; so that no purchaser could safely buy them, nor creditor lend upon the faith of them.

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1739. *June* 26. JOHN NEIL *against* SHERIFF of PERTH and PROCURATOR-FISCAL.

[Elch., No. 5, *Wrongous Imprisonment.*]

THE fact was this: There was a *fama clamosa* against this John Neil, as being accessory to burning a minister's house. Two or three people had informed the Sheriff of this, but had refused to sign their information, because, as they said, they were afraid of this John Neil and Kairnmuir, who was suspected to have instigated him to burn the manse. Upon this refusal, the Sheriff ordered his procurator-fiscal to sign an information against John Neil; and, in consequence of this information, he gave a warrant, and apprehended him. He was kept in prison a considerable time, and transported from the prison of

Perth to another about 20 miles distant, without any apparent necessity. At last he was released by application to the Circuit Lords, and now insists in an action of wrongous imprisonment and oppression against the Sheriff and his fiscal. The Lords found, That, in respect there was here a signed information, this case did not fall under the Act 1701. Kilkerran was of opinion that there was no signed information necessary, and that a warrant expressing the cause of the commitment was sufficient.

Elchies thought, that, if there was an information, it ought to be signed, but doubted whether any information at all was required. But the majority seemed to be of opinion that an information, and a signed information, was necessary.

Drummore was even of opinion, that, in this case, there was properly no information; and that to order his fiscal to sign an information, was the same thing as if he had signed it himself. But the majority thought otherwise. However, they were almost all of opinion that this was a very dangerous practice of the Sheriff, and might open the way to abuses which, if not prevented, might in a great measure defeat the intention of the law. They thought that, in this case, the Sheriff ought first to have taken a precognition upon oath, which would have been the best and most legal information he could have had; and if he had been afraid that the guilty person might in the meantime make his escape, he should have ordered him to be brought before him for examination, (which he could easily have done, the person being present,) and, according as the facts came out, committed him or not.

They therefore sustained the process for oppression, and remitted to the Ordinary to inquire into the facts.

N.B.—They were likewise of opinion, that a Magistrate might commit without any information at all, if the crime consisted with his particular knowledge, as if he had seen it, provided that were expressed in the warrant for commitment.

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1739. *June* 26. M'KENZIE *against* TUACH.

[*Vide* C. Home, No. 122; Elch., No. 12, *Arrestment.*]

THE Lords found, That the money consigned was not arrestable for the debt of the reverser. Dissent. Elchies. They seemed to be of opinion, that in case the declarator did not proceed, that then the arrestment would be effectual; because, in that case, the money, without dispute, would belong to the consigner: But this was not decided, nor was it necessary.

N.B.—The arrestment, in this case, was laid on before the summons of declarator was raised.