same.——This allegeance was repelled, in respect the LORDS found, That this subscribing of the charter by her, was sufficient to give to the daughters that right which was reserved to her; and the not taking a sasine thereupon was not her deed; for, by the charter containing precept therein, she was denuded, and the sasine might be taken when the daughters pleased; which not being taken while she lived, the said charter being now in the pursuer's hands, was a sufficient ground to compel the defender to make a precept, whereby they might be seased. No 8.

Act. *Cunninghame.* Alt. *Hope.* Clerk, *Scot.*

Fol. Dic. v. 1. *p.* 290. *Durie, p.* 131.

1671. *July* 11.

LEARMONTH and Her SPOUSE, *against* The EARL of LAUDERDALE.

No 9.
A father having reserved a faculty to burden his estate with wadsets or infeftments to a certain extent, and having granted a personal bond referring expressly to the faculty, this was found not a real burden, nor effectual against a singular successor.

LEARMONTH being assigned to 2000 merks of a bond of 14000 merks, granted by Sir John Swinton the father, and John his son, to the Laird of Smeiton, did pursue the Earl of Lauderdale, *super hoc medio*, that the fee of the estate of Swinton was disponed by the father to the son, with an express power and reservation to burden the same with bairns provisions or debts extending to the sum of 54000 merks, but so it is, that he had granted the bond to Smeiton, and declared it to be a part of the said 54000 merks contained in the reservation; and therefore concluded, that the Earl of Lauderdale, being donatar to the forfaultry of the son, whose estate was so affected, ought to make payment, or the estate declared liable in that sum. It was *alleged* for the defender, that the reservation and power to burden the estate being only *nuda facultas*, which never took effect by any real infeftment given to the debtor for the said sum, it did not burden the estate but the forfaulter, the King and his donatar had right thereto free of that debt; seeing where base infeftments are given by the vassal, which were never confirmed before, forfaulture does not prejudge the King or his donatar, *multo magis*, in this case, where the lands are disponed with a personal reservation, which never took effect by infeftment. THE LORDS having considered the contract of marriage, wherein the barony of Swinton was disponed, with the reservation foresaid, which did only bear a power to grant wadsets or infeftments of annualrents for the sum of 54000 merks, which was never done by infeftment, did sustain the defence, and found that neither the donatar was personally liable, nor the lands forfeited; for they found a difference betwixt lands disponed with the burden of debts contracted by the disponer, or to be contracted, in which case there needs no new infeftment, and land disponed with a reservation to grant infeftments for security of debts, in which case they cannot be affected without infeftment.

Fol. Dic. v. 1. *p.* 292. *Gosford, MS. No* 374. *p.* 183.

No 9.

*** Stair reports the same case:

SIR Alexander Swinton having disponed his estate of Swinton, to John Swinton his son, in his contract of marriage, there is a clause therein, on these terms, that it shall be leisome to the said Sir Alexander, to affect and burden the estate with infeftments of wadset or annualrent, for the sum of fifty-four thousand merks, for his creditors and bairns; thereafter Sir Alexander grants a bond of 14000 merks to the Laird of Smeaton, and declares it to be a part of the fifty-four thousand merks, whereof 2000 merks being now in the person of Robert Learmont, he pursues the Earl of Lauderdale, as now come in the place of John Swinton by his forefaulture, to pay the sums, or at least, that the land is, or may be burdened therewith; because the forefault person's infeftment being qualified with the said reservation, it is a real burden affecting the estate, and Swinton's infeftment being public, and thus qualified and burdened, was as to this point the creditor's infeftment, and his being forefault could not prejudge the creditors, as to this real burden in a public infeftment granted by the King. The defender *alleged*, that the libel was not relevant, for the reservation being a mere power of burdening by infeftment, it cannot be pretended that the forefault person's infeftment is sufficient therefor; but seeing Swinton made no use of that power, albeit it might have been sufficient against Swinton the contractor, or his heirs, it cannot militate against the King or his donatar, to whom the fee returns by forefaulture without any burden but what the King has consented to by public infeftments or confirmations; and though old Swinton had given the pursuer a base infeftment, it would have fallen by the forefaulture not having been confirmed, much more when there is no infeftment.

THE LORDS found the libel not relevant, and assoilzied.

Stair, *v.* 1. *p.* 752.

1673. *February* 15.

DAVID GRAHAM *against* His BROTHER, the LAIRD of MORPHIE.

No 10.
A father disponed his estate to his eldest son in his contract of marriage, reserving to himself a power to burden the estate with a certain sum of provi-

THE said David, as having right by assignation from Alexander his brother, and Helen Graham his sister, to their proportional parts of twenty-five thousand merks, provided by their father to his six younger children in their elder brother's contract of marriage, did pursue Morphie for payment of their proportions. It was *alleged* for Morphie, that the provision in his contract of marriage could furnish no action, because it was conceived in the terms of a naked reservation only, to burden the estate with the foresaid sum in favour of the rest of his children, which being *nuda facultas*, unless the power reserved