No 12.

Though some of the LORDS were of opinion, that the pursuer may immediately, as other creditors, have recourse against the estate; yet it seemed to be reasonable, that in this case, the reservation being in the terms foresaid, and the bond whereupon the security was founded, not relating to the same, the executry should be first discust, seeing by the common law the executry was ever first liable; and though, by the LORDS practice, creditors may pursue either the heir or executor, yet there being such a speciality in this case, and the defender not representing personally the grandfather, as heir, or otherways by progress, his representatives ought to be first discust, and the said lands to be liable only *in subsidium.—In præsentia.*

Act. *Sir George Mackenzie, & Robert Stewart.* Alt. *Lockhart & Pringle.* Clerk, *Gibson.*
Dirleton, No 457. *p.* 221.

1679. *December* 16.
The CHILDREN of MOUSWALL *against* The CREDITORS thereof.

No 13.
Found in conformity with No 11. p. 4102.

THE Laird of Mouswall having disponed his estate to his eldest son in his contract of marriage, reserving to himself to affect or burden the same with 18,000 merks for his children's provisions and other affairs, whereupon he did grant bond to his many younger children for 9,000 merks, without a clause that the deceasing portion should belong to the survivors, so that by the death of the children there remained 5,000 merks due with annualrent, since the date of the bonds; the eldest son being infeft upon the contract of marriage, renews several bonds granted by his father to his creditors, who thereupon apprised the estate from another son, as representing his brother, and thence arose a competition betwixt these creditors and the children, which was disputed, and interlocutors thereon, on the 11th instant, whereby the Children were preferred. It was now further *alleged* for the Creditors, That this reservation to the father to burden, could import only an obligation upon the son, and could not be effectual against singular successors, especially seeing it was not exprest in the son's sasine, but only *secundum provisiones in dicto contractu contentas;* which if it were sustained sufficient, it would destroy all creditors, and evacuate the security by registration of sasines. 2*do*, Though such a clause could be real and effectual against singular successors, yet it being but a faculty to burden, that faculty could not be exerced, but *legitimo modo*, viz. by a valid infeftment in favours of the children; but here there is only a base infeftment, never clad with possession; and therefore the Creditors' public infeftment is preferable thereto. It was *answered* for the Children, That there may be obligements in infeftments merely personal, as the obligement to warrant; but where an infeftment is granted with a burden *transit cum suo onere*, always to singular successors, which is most ordi-

No 13.

dinary for provisions of children, that fathers infeft their eldest sons with the burden of such sums to their children, which sums become *debita fundi*, and affect the same even against singular successors, and has been the ordinary security for children, never contraverted. It is true, anterior creditors might reduce the same as fraudulent, if the father had not a sufficient estate to pay all his creditors, and these provisions likewise, as was found in this case; but if he might lawfully and without fraud reserve such provisions, the same were effectual to the children, and no anterior or posterior debt of the father's could exclude the same, in the same way as if the father had then perfected a valid infeftment to his children; and as to the generality of the reservation, whatever it might import as to creditors contracting thereafter, being ensnared by such a generality, yet it can have no moment as to the creditors, prior to the reservation; and as the reservation would have been beyond debate, if the father had disponed to the son, with the burden of 9,000 merks to his children, the power to burden is as real when exercised; for though it would have evanished, if it had never been exercised, yet it being exercised, it is as effectual as if it had been at first special, burdening the land with such a sum to the children; neither is there any special manner in the clause of burdening; and therefore the faculty was sufficiently exerced by granting bonds of provision by the father, expressly relative to the faculty reserved; and here there is not only the bonds, but a sasine thereupon, which cannot be excluded by the creditors' posterior public infeftments, because it is founded on a real cause, viz. the reservation in the son's infeftment; which infeftment being clad with possession in the son's person, is thereby effectual *ad omnem effectum*, not only as to the son, but as to the children by the reservation exercised by the father: Although the creditors had apprised from the father the lands with this reservation *per expressum*, the LORDS have justly found, that he having a sufficient estate, both for his debts and their provisions, this faculty could not be exhausted by prior creditors, seeing it bears a power to take on and burden; much less can apprisings against the son, or the son's succcessors, for the father's anterior debts, renewed by the son, exclude the children's reservation.

THE LORDS found the reservation of the faculty to the father was not only personal, but a real burden upon the estate, so soon as it was exercised, and that it was exerced by the children's provision, and therefore preferred the children's provisions to the creditors' public infeftments upon their apprisings.

Fol. Dic. v. 1. *p.* 292. *Stair, v.* 2. *p.* 723.

*** Fountainhall reports the same case:

THE LORDS found the reserved faculty became real as soon as it was exerced by the father, and that his granting bond and infeftment following thereon

No 13. was a sufficient exercise and application of it, and that it could not be prejudged by the posterior diligence of creditors; and therefore preferred the children. *See* Appendix. *Fountainhall, MS.*

1698. *June* 23. Lady Kinfawns and her Son *against* Alexander Carnegy.

No 14.
A party marrying an heiress, it was provided in the contract, that the estate should go to the heirs male, but with power to burden, to a certain extent, in favour of heirs of a second marriage. The party married again, and bound his heirs for a sum to the heirs of this marriage. Found the faculty was exercised, but the heir-male to be only liable *ultimo loco*, failing separate estate.

Mersington reported the Lady Kinfawns and her Son against Alexander Blair *alias* Carnegy of Kinfawns. Mr Alexander Carnegy, son to the Earl of Northesk, having married Anna Blair heiress of Kinfawns; in the contract the estate is provided to the heirs-male, but with this quality and condition, that in case of his marrying a second wife, he shall have power to burden that estate with the sum of 20,000 merks, in favours of the heirs of the second marriage. Thereafter he marries Mrs Margaret Nairn; and, to her 30,000 merks of tocher, he adds 60,000 merks of his own, and obliges his heirs for the same. His relict, and son of the second marriage, pursue Kinfawns, the heir of the first marriage, for payment of the said 20,000 merks. *Alleged*, It was on a reserved power and faculty, which was never exercised nor made use of by him; and, so being merely personal, died with himself. *Answered*, These faculties need not be expressly exercised, neither require they a specific implement; but it is enough they be fulfilled *per æquipollens*, which was done here; for the power to burden is expressly to enable him to provide a second wife and her children; so his obligement in the second contract, to secure them in 60,000 merks, was a clear exercise of the faculty, and an application of it to the specific use for which it was destinate; for, though a general clause to burden it with 20,000 merks, did not require an implement *in forma specifica*, yet where it is specially destinate for a second marriage, the very entering into the second contract, and giving provisions therein, is a formal exercise of the power. The contracting of any debt would but do it, the more when it is applied to the same individual use; and was so found, 21st June 1677, Hope-Pringle *contra* Pringle, marked both by Stair and Dirleton, No 12. p. 4102. *Replied*, These faculties are *stricti juris*, and are never understood to be exercised, or to affect lands, but where they are expressly mentioned, and the exercise is applied to the faculty; as was found 12th July 1671, Learmont *contra* the Earl of Lauderdale, No 9. p. 4099; and lately in 1692, Urie *contra* Scot, *See* Appendix, and such faculties are servitudes *contra naturam dominii*, and *a potentia ad actum non valet consequentia*; for, whatever he might have done, we find he has not done it, and his other estate ought to be liable, and not Kinfawns who succeeds as heir to his mother. The Lords found the faculty sufficiently exercised by his entering into the second contract of marriage, and providing them to the sums therein contained; but found, if his other estate were sufficient to pay these provisions, then Kinfawns, the heir of the first marriage, was not liable, the fa-