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-

culty coming to burden him only *ultimo loco et subsidiarie*, if his other estate fell short; in which case they behoved to assign him to their diligence, for his relief of what they got from him. No 14.

Fol. Dic. v. 1. *p.* 291. *Fountainhall, v.* 2. *p.* 5.

*** Dalrymple reports the same case:

SIR WILLIAM BLAIR of Kinfawns having no heirs-male of his own body, married his eldest daughter to Mr Alexander Carnegy, the Earl of Northesk's son; and by the contract of marriage the Earl of Northesk was obliged to pay L. 40,000 to Sir William, to be employed for defraying the debts of the family; and Sir William dispones his estate in favours of his daughter and her said spouse, in conjunct fee and liferent, and to the daughter's heir male of that marriage, and to her other heirs of tailzie therein mentioned, with this provision, That albeit there should be heirs-male procreate of the marriage, yet, if the said Mr Alexander Carnegy should survive, and contract marriage with another wife, it should be lawful for him to burden the said lands and estate, and hail heirs of tailzie, with the sum of 20,000 merks in favours of a second wife, and the heirs of a second marriage, and that the said lands and estate should stand really affected and burdened with the said sum, until it were paid.

Sir William's daughter deceased, leaving a son of the marriage, and Mr Alexander Carnegy entered into a second contract with Margaret Nairn, with whom he got a portion of L. 20,000, and became obliged to secure her in a suitable liferent, and to add L. 40,000 of his own means, and to employ the hail sum of L. 60,000 to himself, and the heirs male of the marriage.

The said Mr Alexander having deceased, leaving a son of the second marriage, without fulfilling the obligements of the second contract, either in favours of his Lady, or the heir of the marriage; the relict, for her liferent-right, and the son of the second marriage, as heir of provision, adjudged the estate of Kinfawns, and particularly the faculty to burden the same with 20,000 merks, in implement of the foresaid contract of marriage; and thereupon they raised two several actions, one of mails and duties, and another for payment of the said 20,000 merks, to which they alleged the heir of Kinfawns is liable by the quality of the tailzie.

The defender *alleged;* That neither he, nor his estate was liable for the sum libelled; because he was heir to his mother, and his father had never exercised the faculty; for, albeit he had entered into a second contract, containing provisions in favours of the wife and heirs of the marriage, yet he had no ways burdened the heir, or estate of Kinfawns, nor so much as made mention of the faculty; so that the same was not exercised by the second contract.

It was *answered;* That the defunct having reserved a faculty to burden the heir and estate of Kinfawns, in favours of the wife and heirs of a second mar-

No 14. riage, the entering into a second contract was a sufficient exercise of the faculty, though the faculty was not mentioned expressly; because contracts of marriage are *uberrimæ fidei*, and the defunct did oblige himself, and all his heirs, whereby he must be understood to have done every thing in his power to make the contract effectual, and thereby to have obliged the heir of Kinfawns. And, in general, a right to lands being made with a reserved power and faculty to burden, *eo ipso* that posterior debts are contracted, the faculty is understood to be exercised, unless there be another estate sufficient to pay these posterior debts; and so it was understood, 21st June 1677, Hope-Pringle against Hope-Pringle, No 12. p. 4102., as is observed both by the Viscount of Stair and Sir John Nisbet.

It was *replied;* The said decision was in the case of a disposition by a father to a son, which is naturally reckoned a representation; whereas the defender succeeds to his estate by his mother. 2*do*, The same point hath been decided in the contrary, both before and after, particularly 12th July 1671, Lermont against Earl of Lauderdale, No 9. p. 4099., where a disposition being made to a son with a faculty to burden the estate with a sum of money, and the disponer having thereafter granted a bond, declaring that the same should be a part of the sum, wherewith he had a faculty to burden the estate; yet the donatar of the son's forfeiture was not found liable as intromitter, nor the estate really affected; and lately in the case of Urie against Scot, (*See* APPENDIX), 'the LORDS found, that a father having disponed his estate to his son, with a faculty to burden it, that the contracting of posterior debts was no exercise of the faculty' much less can the defender's person or estate be liable; seeing he doth no ways represent his father, nor derive right to his estate from him.

It was *duplied;* The decision betwixt Lermont and the Earl of Lauderdale meets not this case; because there was no question that the heir or the estate would have been liable; but the privilege of a donatar of the son's forfeiture was the only point pleaded and determined. 2*do*, As to Urie's case, the practique is not marked; but there was speciality in the conception of the faculty; for the disponer reserved power to contract debt, and grant wadsets therefor; so that the power to contract debt was always connected with the granting of a real security for that debt, and there was not a faculty to burden the son with the debt personally, but the estate really; whereas here the faculty is to burden the heir of the tailzied estate, in favours of the wife and children of a second marriage only, whereby, albeit the heir succeeds to his mother in the tailzied estate, yet he is to be considered as representing his father, in so far as concerns the sum in the faculty.

'THE LORDS found, that the entering into the second contract of marriage was a sufficient exercise of the faculty to make the heir of tailzie liable *subsidiarie*, if the defunct had no other sufficient estate to make the obligement in the contract effectual; the pursuer upon payment assigning to the defender the

obligements in the contract, with the diligence following thereupon, in so far as he pays.' But the Lords did not determine in the mails and duties. No 14.

Dalrymple, No 2. p. 2.

1708. *December* 16.

JAMES DAVIDSON of Tullimorgan *against* The TOWN of ABERDEEN.

No 15.
Faculty to burden or contract debt, reserved in a disposition by a father to his son, was not sustained to make a bond granted by the father without infeftment, real, in prejudice of a posterior disposition granted by him to a third party, altho' the bond narrated the faculty to burden the son's right, and that the granter had actually burdened the same with the debt in the bond.

ANDREW SKENE, who purchased the lands of Rutherstane, having taken the right to himself in liferent, and to his son Robert in fee, with a faculty to Andrew to burden, contract debt, to sell or otherways dispose at his pleasure; Andrew Skene in the year 1670, granted a bond of corroboration to Tullimorgan of some debts he formerly owed him, narrating the faculty to burden, and that the granter had burdened the fee with these debts; in the which bond Robert accepted the debt upon him, and as a burden upon the fee, but no infeftment appeared to have followed thereon. In anno 1673, the Town of Aberdeen got the said lands disponed to them by Andrew Skene, and were infeft. There arose a competition for the mails and duties betwixt the Town and Tullimorgan, who had adjudged the lands for his debt, and claimed to be preferred upon this ground, that the bond of corroboration was a real burden upon the lands, and an exercise of the reserved faculty, which the Town was bound to know might have been exercised, as it truly was; and a disposition with the burden of the father's debts, was sustained to make these debts real, so as they could not be prejudiced by the son's subsequent deeds, Ballantine against Dundas, *voce* PERSONAL and REAL. Again, had the son truly paid Tullimorgan's debt, and taken renunciation from him, it would have been hard to allow the father to prejudice his son by a posterior voluntary disposition. And in the case of the Creditors of Kinfawns, No 14. p. 4106., a father's exercise of a faculty in favours of his son of a second marriage, not extant the time of making the disposition, was found real in favours of the son, and preferable to posterior creditors contracting.

Answered for the Town; The father's reserving to himself a power to contract debts and burden the estate, was not designed to make every exercise of the faculty, a real burden upon the estate; but only to be effectual against the fiar, so as he could not hinder the father to burden really when he thought fit to do it. For that can be no real burden, which afterwards may be, or may not be; and every one is at freedom to contract with him who has only a faculty to burden, till interpelled by some record or diligence known in law; seeing none could be sure of what latent personal debts might have been contracted. Law has determined real burdens to be only such as are to be found in the registers of sasines, hornings, and inhibitions; or are contained in the bosom of the author's right; or which are real of their own nature, as servitudes; under none of which Tullimorgan's bond falls. 2*do*, Though where a father dispones a