

* * Harcarse reports this case :

1687. February.—BAILIE MARJORIBANKS having disposed his estate to his eldest son, with a provision in the procuratory of resignation, that he, the son, should pay the younger childrens' bonds of provision; the children having done no diligence against the eldest son, nor the father's estate, within three years after his decease, the son's creditors adjudged. It was *alleged* for the children in a competition, That the clause in the procuratory made the provisions a real burden and security upon the lands.

Answered, The clause being personal, obliging the son to pay, and not burdening the disposition or lands disposed, cannot be considered as real to prefer the younger children to the son's creditors, or the father's other creditors; and it is ordinary to cast in personal obligations in a procuratory of resignation.

THE LORDS found the clause not real, or burdening the disposition, and preferred the son's creditors.

It was thereafter *alleged* for the children, That by a posterior clause it was provided, that the disponent might further burden the lands with another sum, which imported, that the former provision was looked upon as a burden, upon which the interlocutor was stopped. And in June the contrary was found, viz. that the clause made the childrens' provision a real burden.

Harcarse, (ALIENATION.) No 147. p. 31.

1714. June 30.

The CREDITORS of ROBERT ROSS of Auchlossin, Competing.

THE deceased Robert Ross of Auchlossin, having in the year 1702, disposed his estate to his eldest son Captain Francis Ross, with the burden of all just and lawful debts, whereupon the son was infert; and in the year 1707, several Creditors of both father and son, having adjudged his estate; in a ranking and sale thereof, pursued by Robert Gordon, merchant in Bourdeaux, the Creditors of the father were preferred to the son's Creditors, in respect the disposition, charter and infertment by the father, in favour of his son, is expressly burdened with the father's debts. But in a competition among the father's own Creditors, the LORDS found the Creditors who had adjudged preferable to those who had not:

Albeit, it was *alleged* for the Creditors who had not adjudged, That those who had used diligence, could not affect the said estate by their adjudication, but, as it stood in the son's person, which was, with the burden of all the father's debts, which being real, must still affect the fee and right, as it stood in the person of the son, though it went through never so many hands. And *quorsum*

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The Lords preferred debts, with which a disposition and infertment of an estate were burdened, to all debts upon that estate, contracted by the receiver of the disposition; but preferred the preferable creditors among themselves, according to their respective diligence.

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a preference to one of the father's Creditors, before another, seeing they were all equally secured by the son's infestment :

In respect, it was *answered* for the father's Creditors who had adjudged, That they ought to be preferred to such as have done no diligence; because, the charge in the disposition, being only a restriction upon the son's right, and making no real right in favour of the father's Creditors, but only producing a personal action against the son, and that he could do no deed in prejudice of the said burden; but it leaves the father's Creditors among themselves, as if no such burden had been, to be ranked conform to their diligence; and this will be clear from a parallel instance, viz. the Creditors of the defunct, by the act of Parliament 1661, have a legal hypothec upon his estate, in preference to the Creditors of the apparent heir, provided the defunct's Creditors do diligence within three years; yet, nevertheless, if some of these should adjudge, and others not, the Creditors adjudgers would undoubtedly be preferred, and carry off the estates.

THE LORDS gave this instruction to the Clerks, that bonds wherein Members of Parliament are co-obligants, may be registered in common form.

Fol. Dic. v. 2. p. 68. Forbes, MS. p. 72.

1719. July —. The CREDITORS of COXTON *against* DUFF.

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A DISPOSITION of lands being granted, with and under the burden of the payment of all the lawful debts; it was contended, that this was only a personal clause, burdening the acceptor of the disposition, with payment of the debts, but not designed to make a real burden upon the lands. *Answered*, It is not presumed of any disponent, that he intends different things, when he says, with the burden of debts, and with the burden of payment of debts; it is not disputed, but the first makes a real burden, and so must the other. THE LORDS found it a real burden. See APPENDIX.

Fol. Dic. v. 2. p. 66.

1729. February 18. GEDDES *against* YOUNGER.

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IN a disposition by a father to a son, the question arose, if the father's debts were a burden upon the right, so as to be good against singular successors, or only a personal burden upon the disponent and his heirs? In the dispositive part, the clause was worded thus, "likeas, by acceptation hereof, the said George binds and obliges him, and his foresaids, to make payment to my lawful creditors of all my just debts;" and in the procuratory of resignation, "and the said George shall be obliged to pay to my creditors, my just and lawful debt, &c."