

Replied for the children, *imo*, That Hugh's contracting of debts was only a virtual exercise of the faculty, but was not such an actual one as directly to affect the estate: so that the creditors, properly speaking, had no *jus quæsitum* upon the estate, but only a power of affecting it by diligence, which if they had used before David's infestment, might have given them a preference, but which they had not done: The personal bonds granted in virtue of the reserved faculty could not have been better than if Rusco had retained the right himself, in which case these personal bonds could not have been obtruded to a singular successor infest. The reserved faculty, being only a personal right, was taken off by a simple renunciation, whereby the disposition became absolute; and the subsequent infestment in the person of the disponent was effectual, and conveyed an absolute fee, in the same manner as if the disposition had never contained any faculty to alter; so that these personal bonds could never compete with a real right perfected by infestment before any adjudications were led upon them. *2do*, The disposition to David was granted in implement of the provision to which he was entitled by his mother's contract of marriage; so that it was to him actual payment, and therefore could never be considered as a *præceptio*. He had already got the fee, only it was qualified by the faculty, but the renunciation made it absolute: If the father had destroyed the former disposition, and granted a new one to David, when he was married, in name of his patrimony; that could not have subjected him the disponent to the payment of his father's debts, as heir of provision, because he was not heir in the subject. *3tio*, The renunciation being in David's contract of marriage was not a gratuitous deed. *4to*, Since the father's consent imported a renunciation of the faculty, and made the fee absolute, and since the fee was in the person of David, the benefit of the renunciation, *necessitate juris*, accresced to David for the behoof of his creditors.

THE LORDS, on the 26th January 1725, found the children of David Blair were not liable, as heirs of provision, for debts contracted by Rusco before his consenting to his son David's contract of marriage; without prejudice to the creditors to insist upon the act of Parliament 1621, or any other ground of law. To which interlocutor they adhered, 19th February 1725.

Reporter, Grange. Act. Ja. Graham, sen. Alt. And. Macdowal & Dun. Forbes.
Clerk, Mackenzie.

Edgar, p. 176.

1724. December 23. ISABEL SINCLAIR against SINCLAIR of Barrack.

LAURENCE CALDER having purchased certain lands from the Earl of Breadalbane, he took the disposition thereof to himself and wife in liferent, and to James Calder his son in fee, with and under this condition and provision, That it should be lawful to the said Laurence at any time in his life, without consent

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A person took disposition to lands to himself and his

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 wife in life-
 rent and his
 son in fee,
 under the
 condition of
 burdening
 without
 his son's con-
 sent to a cer-
 tain extent,
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 to daugh-
 ters. This
 found no real
 burden on
 the son's e-
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 singular suc-
 cessors.

of his son, to burden the said lands with competent provisions to his daughters, or to contract debts for an onerous cause within the half of the value of the lands; which condition and provision was ingrossed in the precept of sasine. In pursuance of this disposition there was a charter granted, and James the son infeft, and the sasine duly registrate; in which charter and precept therein contained, the foresaid faculty to burden was likewise ingrossed. Thereafter the father granted bonds of provision to his daughters, particularly one to his eldest, proceeding on a narrative of the foresaid right and disposition, and of the clause contained in it and in the charter and sasine.

To this bond Isabel Sinclair having right by progress, raised process against James Calder, whose right was burdened with the foresaid provision; and having obtained decret, she raised adjudication of the said lands; in which process compareance was made for Sinclair of Barrack, who had purchased the lands from James Calder, and produced his disposition and infeftment thereon, long prior to the intending the process of adjudication; he repeated a declarator, that the lands should be found free of the said provision, and that the adjudication should stop.

It was *alleged* for Mrs Sinclair, That the power and faculty of burdening the lands was a real burden on the son's right, which could not be neglected by any purchaser, being so anxiously repeated in the disposition and charter, and expressly inserted in the precept of sasine, and sasine itself on record, whereby it became both real and public so as to have interpellated purchasers, who seeing this burden on record, could not *bona fide* purchase in exclusion of these provisions. *2do*, It was *alleged*, That Barrack's own right was burdened with these provisions, in so far as the narrative of it refers to them; for after deducing several clauses in James Calder's right and infeftment, there follows this one, 'With and under the burden of the several provisions contained in the right granted by the Earl of Breadalbane to the said James Calder and his father, prestable by them to him;' and ends with these words, 'As the said disposition containing the above clause, and several others more fully bears.' Whereupon it was *urged* for Mrs Sinclair, That Barrack was subjected to these very obligations by the tenor of the foresaid clause in his own right.

It was *answered* for Barrack, That the faculty as exercised could never affect the lands: The father might indeed, in virtue of that faculty, have granted real rights upon the lands, which would have been effectual against a singular successor as a real burden upon the subject; but as he only granted a personal bond, which no purchaser was bound to notice, or presumed to know, the right must remain personal till real diligence be done upon it. As to what was alleged from the above clause, that even Barrack's right was burdened with these provisions, it was *answered*, that the clause related only to the obligations which Barrack's author lay under to the superior; and the meaning could be no other than that the purchaser should be liable to the superior for the whole duties and prestations for which his author stood bound.

THE LORDS found, that the debts or bonds of Laurence Calder to his children are no real burden upon the lands, to affect a singlar successor; and found the disposition by James Calder to Barrack does not transmit the lands with the burden of these debts, &c.

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Decisions cited for Barrack : Thomas Rome against the Creditors of Graham, February 1719, No 17. p. 4113. ; The Town of Aberdeen against Davidson of Tillymorgan, 16th December 1708, No 15. p. 4109.

For Mrs Sinclair: Pringle against Pringle, 21st June 1677, No 12. p. 4102. Children of Mouswell against the Creditors, 16th December 1679, No 13. p. 4104. Creditors of Coxton against the Laird of Dipple, *see* APPENDIX; Creitors of Carnegie against Carnegie, No 14. p. 4106.

For Barrack *Jo. Sinclair.*Alt. *Ja. Graham, sen.*Clerk, *Justica.**Fol. Dic. v. 1. p. 293. Edgar, p. 136.*1737. *June 21.*

Competition MARGARET and AGNES OGILVIES, &c. with MARION TURNBULL,
Widow of DR OGILVIE.

ROBERT OGILVIE of Coul disposed his estate to Dr John Ogilvie his eldest son, reserving to himself a faculty to burden it with 5000 merks, in favour of whatsoever person he pleased, whereupon the Doctor was infest; and, in consequence of the faculty, his father thereafter granted bonds to his own children to the extent of the sum reserved. Posterior to this, the Doctor intermarried with Marion Turnbull, whom he provided in an annuity of 800 merks, upon which she was infest; and afterwards he disposed the lands to John Gardener, with Marion's consent, who conveyed them to Thomas Ogilvie merchant in Dundee, under the burden above-mentioned; and he having, by a multiple-poining, called the children of Robert Ogilvie, claiming the 5000 merks granted to them in virtue of the reserved faculty, and the Doctor's widow, who craved to be preferred for her annuity upon her infestment, a competition ensued betwixt them, wherein this question occurred, Whether the 5000 merks was a real burden upon the estate, or if it was only personal?

The arguments for the Children were; That, at the time Robert Ogilvie granted the disposition to his son with this reserved faculty, such clauses were generally believed to import a real burden at least; so Lord Stair, tit. COMPETITION, p. 647. (669) says; his words are, 'If an infestment be granted with the burden of a sum, it makes the sum a real burden; and therefore a purchaser proceeds upon his own hazard, if he buy without sight of his author's infestment;

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One disposed his estate to his eldest son, reserving to himself a faculty to burden the same with 5000 merks, in favour of whatever persons he pleased; thereafter he granted personal bonds for that sum to his wife and children, referring to the faculty. After his decease, a competition arising betwixt the creditors in these personal bonds, and the son's real creditors infest in the estate, the Lords found