affect or burden the lands agreeable to what they had done, December 16th or 18th 1724, Isobel Sinclair against Sinclairs of Barrack, and they were moved by that decision, and the other in the case of M'Lellan of Barclay's creditors, because where the creditors are not named in the reservation, no purchaser can discover them from the records. *Vide* 21st June 1737, when the Lords adhered.—(26th June 1735.)

This reclaiming bill against the interlocutor 26th June 1735 was delayed from time to time, partly till the then question between these parties upon the relict's consent to the disposition to Gardener were likewise reported, and partly because of the importance of the point of law, viz. the effect of a reserved faculty to burden where either the creditor or the sum was indefinite, that is, where either it was not with the burden of a particular debt already existing, or then created. Kilkerran's difficulty was, that the debts were not real; yet if the faculty was real, which he thought it was, the bonds might be made real by diligence and would be drawn back to the date of the faculty, and he thought this was a reservation of a part of the fee to the extent of this sum. Arniston seemed to think the faculty real, and that this was a reserved estate effectual against singular successors; but then he thought that if he did not exercise it during his life by granting infeftments, the bonds granted by him could only be preferred to singular successors of the son according to the dates of their diligence, and therefore was for adhering. I agreed that it was a reserved estate but not a reserved fee, or part of the fee of the lands, since the whole fee was in the son, who was the only vassal, and that reserved estate was no stronger than the like estate created, (if the father was not before proprietor) as in the case of the Sinclairs and of the Romes, quoted in the papers, (and in this Arniston agreed with me) for both of them might grant infeftments, but these infeftments would be preferred only according to their dates with the creditors or singular successors of the son the fiar: That if the faculty was real, any exercise of it after the father's death was inhabile, at least could only be preferred according to their dates, otherwise they behoved to be preferred to all singular successors, *quandocunque* the creditors in them should adjudge. At last without a division the Lords adhered. But as to the other question now reported by Lord Balmerino, the Lords unanimously found that the relict of Dr Ogilvie by consenting to Gardener's disposition, containing expressly the burden of that faculty reserved to the father, excluded from competing with the children of Robert Ogilvie the father; for if such a faculty had been of new created to the father by that disposition, it would have been a *jus quæsitum tertio*, and binding upon the relict who consented, though no faculty had been reserved in the father's disposition to their debtor.

No. 2. 1737, June 28. BORTHWICK *against* TRADES MAIDEN HOSPITAL.

THE Lords altered the Lord Ordinary's interlocutor and preferred the Hospital. The most of us thought that the reserved faculty to burden being limited to the husband's consent she could not burden after his death;* 2*do*, that a faculty to burden did not give power totally to alter. *Vide* the Informations, where the general question is treated of faculties and prohibitions, whether *majori inest minus aut e contra*; and the decision Hopeton against Keith concerning a tailzie is mentioned.

* Read in the text here, "with" not "without." The same contraction in the manuscript is sometimes used for the one, sometimes for the other of these words.