

No 22. such rights, be at the trouble and expense of enquiring and expiscating such other estates, and affect them towards their satisfaction, than to put lawful creditors to such scrutinies and expiscations. On the other side, this would bar all commerce and freedom of bestowing any gratification upon friends and relations, if they were quarrellable, though never so responsal and solvent at the time, when *ex eventu* a creditor came to want.—THE LORDS abstracted from this point; and found him liable for the debt as an heir of tailzie and provision.

*December 16.*—IN the debate betwixt Elliot of Swyneside and Elliot of Meikledale, it fell to be argued, how far a reserved faculty by a father, in his son's right of fee, allowing the father to burden the lands with such a sum, accresced to a creditor whose debt was contracted before that faculty.—THE LORDS were generally clear, that *quoad* debts subsequent to that reserved power, the contracting thereof was a presumptive exercise of the faculty, though not expressly mentioned to be in right and by virtue thereof, as was found on the 23d of June 1698, betwixt Blair of Kinfauns and his Sister, No 14. p. 4106, though there was a contrary decision instanced betwixt James Scot and Mr Andrew Ury in 1692, (APPENDIX), which required a specific application; otherwise found the faculty personal and extinct, unless either applied or affected by diligence. But the LORDS were so far from regarding this in Elliot's case, that they found it accresced even to an anterior creditor, though he could not lend his money on the faith of that faculty, which was not then in being; but the LORDS thought reasonable to subject these faculties to all their debts, whether prior or posterior. See 21st June 1677, Hope-Pringle *contra* Hope-Pringle, No 12. p. 4102.

*Fountainball, v. 2. p. 15. & 25.*

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1739. *January 2.* ANDERSON *against* ANDERSON.

No 23.

IN a disposition to an eldest son, the father having reserved a faculty to burden the disponee with the sum of 4000 merks in favour of a younger son, to be paid at the first term after the father's decease, or the younger son's marriage, did, many years after this younger son was married, exercise the faculty in his favour, by granting him a bond of provision, obliging his eldest son to pay the said 4000 merks, with interest *retro* from the said marriage. The eldest son objected to the clause of annualrent; and insisted, That there was no debt till the same was created by the father's exercising his faculty, consequently no annualrent *retro*, which would be *accidens sino subjecto*.—THE LORDS found no annualrent but from the date of the deed in exercise of the faculty. See APPENDIX.

*Fal. Dic. v. 1. p. 293.*

\* \* \* Kilkerran reports the same case :

No 23.

A FATHER having, in the disposition of his estate to his eldest son, reserved to himself a faculty ' to burden him with 4000 merks to be paid to a younger son, ' at the first term of Whitsunday or Martinmas after the father's death, or the ' marriage of the said younger son, which of them should first happen ;' and having, several years after the said younger son's marriage, exercised the faculty, and made the said 4000 merks payable at his father's decease with annualrent *retro* from the said younger son's marriage, the LORDS found, ' That the father could not subject his son to annualrent sooner than the date of the deed in exercise of the faculty.'

*Kilkerran, (FACULTY TO BURDEN.) No 1. p. 186.*

1739. November 14.

Mrs HELEN CUNNINGHAM *against* The CREDITORS of HENRY CUNNINGHAM of Boquhan.

WILLIAM CUNNINGHAM of Boquhan, in his son Henry's contract of marriage, disposed to him the estate of Boquhan, reserving (amongst other powers) a faculty to burden the same with 10,000 merks payable at his decease, which clause was repeated in the procuratory, precept, and sasine that followed thereon. And William, in a contract of marriage with his second spouse, exercised this faculty, by burdening the said estate with that sum to the bairns of that marriage, conform to the reservations, powers, and faculties reserved in his son's contract, and thereafter William assigned and disposed to Mrs Helen Cunningham, his daughter of the second marriage, the said 10,000 merks, and which disposition was registrated in the Sheriff-court books of Stirling.

Henry contracted several personal debts after his father's decease ; and, in a sale of the estate, the question occurred in the ranking the Creditors, Whether the reserved faculty as to the 10,000 merks exercised in manner foresaid, was a real burden upon the estate, preferable to all the debts of Henry Cunningham the disponent.

*Pleaded* for Mrs Cunningham ; That her father, old Boquhan, was a real creditor in the faculty, to the extent of the said sum, whenever he pleased to exercise the same ; this conditional credit competent to him against his son upon the subject disposed, did as much affect the fee, and could as little be defeated or voided by the deeds of the son, as if it had been a pure and unconditional debt. It has indeed been often disputed, how far general burdens could be effectual against singular successors in the subject, though even conceived in a real manner as a burden thereon, and always given in favours of the gene-

No 24.  
When a faculty to burden understood to have been exercised so as to be good against the personal creditors of the disponent, or against singular successors.