No 20.

mind to secure provisions to his children, or a fund for creditors; yea, even for after transactions, there are many ways to do it other than the one that has been here followed. To point out only one, why may not the father burden the estate with a special sum, payable to himself, or to any person he thinks fit; and then, of course, he has the power of dividing and applying it to what uses he pleases? which would be consistent with the principles of law, and remove every difficulty.

The Lords found, that the bonds, granted in pursuance of the faculty, were only personal, and not real burdens affecting the lands.

Fol. Dic. v. 1. *p.* 293. *C. Home, No* 58. *p.* 100.

1784. *December* 24.

No 21.

A power in favour of one person to burden an estate, may be annexed by the proprietor to a disposition and infeftment in favour of another.

Daniel Anderson *against* Messrs Young and Trotter.

Katharine Innes purchased an heritable subject from William Dowie. The disposition, however, was taken in favour of a third party, 'David Hill, in 'trust, and for behoof of Katharine Innes;' and under this proviso: 'reserving power to the said Katharine Innes herself, without the consent of her said 'trustee, to burden, sell, dispone, or give away the whole or any part of the 'subject disponed, for onerous causes.'

After the trust conveyance was completed by infeftment, Katharine Innes, without the concurrence of her trustee, did accordingly burden the subject, by granting to Anderson, for an onerous cause, an heritable security over it, containing a precept of sasine; on which he too was infeft.

Posterior to this deed, Katharine Innes, together with the trustee, executed another similar security, in favour of Young and Trotter; who having taken an infeftment upon it, objected to that of Anderson as premature and invalid, not having proceeded from the trustee, who was still undivested of the property. For Anderson it was

Pleaded; Katharine Innes was proprietrix of the subject, which she held by her trustee. If she had incurred forfeiture for high treason, it would have comprehended this as well as her other property. For it has been found, in the cases of Lord Lovat, 10th Dec. 1754, *voce* Writ, and of Lord Pitsligo, 9th March 1756, *voce* Forfeiture, that when a true or a substantial right, and one that is purely nominal, subsist together relative to the same subject, it is the former which is affected by forfeiture. In fact, there was a faculty in Katharine Innes, amounting to the full powers of property. It makes no difference whether this faculty be contained in a deed flowing from another, or reserved in one granted by the party himself. In either case, the feudal right stands in the person of another; but still the infeftment of that other must be construed as an infeftment for behoof of the person in whom the faculty is created or reserved, if it appear on the face of the records, that it is merely a trust in the nominal

disponee. Here it was expressly declared, that David Hill's infeftment was for behoof of Katharine Innes, and that she was to have right to burden, sell, or dispose of the subjects. His infeftment is, therefore, in the sound construction of law, 'her infeftment.' And that this doctrine does not infringe upon feudal principles, appears from Dict. of Decis. *voce* FACULTY. Nay, in the late case of Lord Lauderdale *contra* Lord Eglintoun, No 86. p. 2864.; it was found, that a right of patronage, though still nominally in the person of one of the claimants, might, nevertheless, be exercised by the other, as being vested with the true or substantial title. No 21.

Answered; No doubt Katharine Innes is proprietrix; Hill is her trustee; and, were she to incur forfeiture, the subject in question would go along with her other property. But to suppose his infeftment to be on that account the same with hers, is to contradict one of the least doubtful rules of our law, which has been exemplified in the immemorial usage of denuding trustees. Some rights, it is true, are nominal, and others substantial; yet sure that is not a reason why a feudal right, when created in the person of a trustee, should pass into that of the true proprietor, without any transference at all. It was by delivery of a subject, that the present trustee was vested with his right; and without redelivery he cannnot be divested. And as to the faculty reserved from the original conveyance to him, it seems a singular argument, that this could render his infeftment equal to that of Katharine Innes; for it supposes the right to be both transferred to the trustee, and reserved from him at the same time. Certainly if reserved, it was not included in his infeftment; and how then could that be equivalent to an infeftment taken by Katharine Innes herself? The judgment in the case of Lord Eglintoun, were it such as is stated on the other side, would perhaps be the first of the kind; but it is the reverse, having proceeded on the principle, that the nominal right ought to be previously annulled, and on the presumption *post tantum temporis*, that it had been so in fact.

Observed on the Bench; There is not any doubt, that a power in favour of one person to burden an estate by an heritable security and precept of sasine, may be tacked by the proprietor to a disposition and infeftment in favour of another person. A common mandate or commission, indeed, would be sufficient for that purpose. Accordingly, it is usual for great landed proprietors to appoint commissioners, who, without infeftment, enter vassals, grant charters, with precepts of sasine, and sell lands, all which acts are effectual in law.

The Court, therefore, sustained the security obtained by Anderson. And

The Lord Ordinary having preferred Young and Trotter claiming under the posterior deed.

THE LORDS altered that interlocutor, and preferred Anderson.

Lord Ordinary, *Kennet.* For Anderson, *C. Hay.* Alt. *Wilson.* Clerk, *Home.*

S. *Fol. Dic. v. 3. p. 204. Fac. Col. No 192. p. 302.*