

obligements in the contract, with the diligence following thereupon, in so far as he pays.' But the Lords did not determine in the mails and duties.

No 14.

*Dalrymple, No 2. p. 2.*

1708. December 16.

JAMES DAVIDSON of Tullimorgan *against* The Town of ABERDEEN.

ANDREW SKENE, who purchased the lands of Rutherstane, having taken the right to himself in liferent, and to his son Robert in fee, with a faculty to Andrew to burden, contract debt, to sell or otherways dispose at his pleasure; Andrew Skene in the year 1670, granted a bond of corroboration to Tullimorgan of some debts he formerly owed him, narrating the faculty to burden, and that the granter had burdened the fee with these debts; in the which bond Robert accepted the debt upon him, and as a burden upon the fee, but no infestment appeared to have followed thereon. In anno 1673, the Town of Aberdeen got the said lands dispooned to them by Andrew Skene, and were infest. There arose a competition for the mails and duties betwixt the Town and Tullimorgan, who had adjudged the lands for his debt, and claimed to be preferred upon this ground, that the bond of corroboration was a real burden upon the lands, and an exercise of the reserved faculty, which the Town was bound to know might have been exercised, as it truly was; and a disposition with the burden of the father's debts, was sustained to make these debts real, so as they could not be prejudiced by the son's subsequent deeds, *Ballantine against Dundas, voce PERSONAL and REAL*. Again, had the son truly paid Tullimorgan's debt, and taken renunciation from him, it would have been hard to allow the father to prejudice his son by a posterior voluntary disposition. And in the case of the Creditors of Kinfawns, No 14. p. 4106., a father's exercise of a faculty in favours of his son of a second marriage, not extant the time of making the disposition, was found real in favours of the son, and preferable to posterior creditors contracting.

*Answered* for the Town; The father's reserving to himself a power to contract debts and burden the estate, was not designed to make every exercise of the faculty, a real burden upon the estate; but only to be effectual against the fiar, so as he could not hinder the father to burden really when he thought fit to do it. For that can be no real burden, which afterwards may be, or may not be; and every one is at freedom to contract with him who has only a faculty to burden, till interpellated by some record or diligence known in law; seeing none could be sure of what latent personal debts might have been contracted. Law has determined real burdens to be only such as are to be found in the registers of sasines, hornings, and inhibitions; or are contained in the bosom of the author's right; or which are real of their own nature, as servitudes; under none of which Tullimorgan's bond falls. *2do*, Though where a father dispoones a

No 15.

Faculty to burden or contract debt, reserved in a disposition by a father to his son, was not sustained to make a bond granted by the father without infestment, real, in prejudice of a posterior disposition granted by him to a third party, altho' the bond narrated the faculty to burden the son's right, and that the granter had actually burdened the same with the debt in the bond.

No 15. right to his son with the burden of debts contracted, or to be contracted by him, none can contract with the son, but with the burden of these debts; yet the father's creditors with whom he contracted before or after, remain with respect to one another as personal creditors, till they rank and secure themselves by habile real rights or diligences, though they be real creditors as to the son's deeds, who hath no right but with the burden of the father's debts.

THE LORDS found, that the bond granted to Tullimorgan was no real burden upon the estate of Rutherstane, which could affect or prejudice the disposition in favours of the Town of Aberdeen.

*Fol. Dic. v. 1. p. 293. Forbes, p. 288.*

1717. January 17.

ABERCROMBIE of Glasshaugh *against* GRAHAME of Buchlyvie.

No 16.

A son accepting a disposition from his father, wherein was retained a faculty to burden, alienate, &c. was made personally liable for his father's debts, *in valorem* of the subject disposed.

GRAHAME of Buchlyvie being convened by Abercrombie of Glasshaugh, upon this special passive title, that the defender's father, who contracted the debt, had made resignation of his estate in favours of the defender his son, whereon the son was infeft, having reserved full power and faculty, notwithstanding of the son's right of fee, to sell and dispone the lands, contract debts, and grant real securities, &c.; and upon which infeftment, the defender did, upon the demise of his father, enter into the possession of the said estate; and therefore the pursuer *contended* that he should be liable for his debt *in solidum*, for these reasons:

*1mo*, That the deference belongs to our law above all others, in that the utmost care and provision is therein made for the security of creditors against the devices and frauds of debtors and their apparent heirs, and to obstruct apparent heirs their enjoying their predecessors' estates, without paying their debts; and several separate and distinct passive titles are with us introduced, which are not known in any foreign country.

*2do*, That an heir in general is either liable upon a service, or by an immixtion with the rents of his predecessor's estate, without regard to the extent thereof; and this from the rule in the common law, *Quod hæres est eadem persona cum defuncto*.

*3tio*, If a debtor should dispone to his apparent heir a branch of his estate to become effectual in the granter's lifetime, though there did remain with the granter an estate never so extensive, yet the receiver would be liable for the granter's debts contracted prior to the date of the disposition and infeftment; and whether the heir succeed by a conveyance, or *ab intestato*, law makes no distinction, but he is still liable, nor is the representation restricted *ad valorem*; and, though the passive title of successor *titulo lucrativo* is the most restricted of any; yet that restriction only takes place when the disposition takes effect