the infeftment shall be of no effect to the son during the father's life, so that the son's right takes only effect at the father's death, and the infeftment is *præceptio hæreditatis*, the son being but a nominal fiar during the father's life. No 16.

'THE LORDS found the defender liable *in valorem* of the subject disponed.'

Dalrymple, No 164. *p.* 229.

1719. *February.*

Competition betwixt THOMAS ROME, Merchant in Antigua, and the CREDITORS of Provost Graham in Dumfries.

No 17.
A person having purchased an estate, took the same to himself and to his son in fee, reserving to himself power to dispone, wadset, &c. He granted a personal bond without relation to the faculty, on which the creditor adjudged the estate, not only after the death of the father his debtor, but after his son was denuded, and a purchaser from him infeft. The Court found the adjudication would have been valid, while the estate remained in the son's hands; but it could not affect a singular successor.

IN the year 1629, George Rome purchased the lands of Clowden, and took the disposition to Thomas Rome, his son, in fee, and to himself in liferent; with power to him, the father, to dispone the lands irredeemably; wadset them, or any part of them; or grant annualrents one or more to be uplifted out thereof, notwithstanding of the fee's being taken to the son. In the year 1635, the said George Rome granted bond to one Ballantine, for which adjudication was obtained of the lands of Clowden, at a time when not only was the debtor dead, but the estate conveyed from the son into the person of an onerous purchaser; and the adjudication by progress coming into the person of Thomas Rome, merchant in Antigua, a competition arose betwixt him and the Creditors of Provost Graham, standing then in the right of the said lands.

And it was *alleged* for these Creditors, That Mr Rome's right flows *a non habente*, George Rome, the granter of the bond upon which the adjudication was led, being only liferenter of the lands of Clowden; and though he had an express power by the disposition, to sell, dispone, burden, &c. the lands without reserve, not having specifically exerced that power, by granting any infeftment upon the land, his personal bond could not affect it, unless Ballantine the creditor had adjudged the faculty from him during his own life; which he did not, but after his death, when the faculty was expired; after which, the debt could not become real upon the lands by any adjudication. And here it was observed, that the fee flowed not from the father reserving to himself a liferent, but from a third party, which made rather a stronger case: In a disposition with a reserved liferent, and faculty to burden, &c. it may be thought that the fee is truly reserved, in so far as the faculty reaches; but, where the fee is disponed to one, and a faculty to burden to another, there the faculty is merely personal, and not the consequence of a fee.

It was *answered* for Mr Rome; 1*mo*, He who has a liferent, with a power to dispone, burden, impignorate, *&c.* is in the eye of the law *really* fiar, his liferent is an *usus fructus causalis*, and his debts affect the subject, as much as the fee had been *formally* stated in his person. This seems to be an unquestionable principle; and, for that reason, a creditor needs do no more, but adjudge these

No 17. lands from his debtor having a power to dispone; and, from that moment, the adjudication is a real right upon the lands, as much as he had been formally invested in the fee: Nor has it ever been thought, that such an adjudication gave the creditor right only to the faculty *to burden;* for, upon that supposition, the adjudication could not be effectual upon the lands, without some new deed in exercise of the faculty, such as granting an heritable bond or wadset to himself; but that has never been dreamed or practised by any creditor in such a case, for that plain reason, because a liferenter having a power to burden, is always considered with regard to his creditors, as fiar; and the right of a son, in whose name the fee is expressly taken, does in such a case resolve in a conjunct fee with the father, and he understood to be conjoined for no other reason, but to save the trouble of a new conveyance, and to exclude the superior's casualties that may fall due by the death of the father. It makes no difference, that the fee was never in the father, but the faculty disponed to him by a third party, who at the same time disponed the fee to the son: A father disponing in favours of his son, reserving faculties, conveys the fee just as much, and in as strong a manner, as a third party, who gives the father the liferent with such faculties, and the son the fee; and the third party in that case very plainly gives the father as much, as he himself reserves: If, indeed, the faculty were only given to the father, without any infeftment of liferent, perhaps there might be more ground for looking upon that as personal; but, where a father is infeft in liferent with such faculties, it is equivalent as he had reserved the liferent with the same powers; in both cases that liferent has the same effect with a fee, except only that it does not transmit to heirs, where the heir of line is different from the person who is made fiar by the disposition. *2do*, Even taking the matter upon the footing of a simple faculty, a person having a power to dispone or burden lands, his contracting debts, is looked upon as a sufficient exercise of that faculty in favours of the creditor, although he do not specifically grant an infeftment for that debt; and there is a very good reason for this, not only in equity, but according to the subtilest reasoning *in apicibus juris;* because, whoever grants a personal bond, puts it in the power of the creditor to make that debt *real* upon the land by diligence, as effectually as if he granted a disposition for security of that debt. Accordingly, nobody doubts but an adjudger has just as strong a right to lands, from the consent of the debtor, as he who obtains a voluntary disposition; and therefore our practice in this matter is most rational, that he who hath a faculty to burden lands, does effectually exercise that faculty according to the strictest rules, when he contracts a debt; which debt, by the forms and disposition of law, can be made a burden upon the lands, without any further deed or consent of his. *3tio*, Allowing the granting a personal bond no exercise of the faculty in favours of the creditor, and allowing that faculty to have died with the father; still the adjudication in equity must be sustained against the son, though led after the father's death: Our law has always been favourable to creditors in competition with heirs and

children, especially such of them as are purely gratuitous successors. The father had a power to make his debts real upon his son's estate; the son when he got the disposition, laid his account with being burdened accordingly; and if the father neglected to do what was in his power for the satisfaction of his lawful creditors, his son the donatar ought not to reap benefit thereby: It is enough in material equity, that the father had a faculty to burden; and when the law supplies his neglect, and authorises adjudications to be led after his death, the son is in no worse case, than if the father had exercised his faculty in favours of his creditors; which was a piece of justice he ought not to have refused them. And upon this foundation the Lords have all along walked in their decisions; *See* 21st June 1677, Hope-Pringle *contra* Hope-Pringle, No 12. p. 4102.; and a famous case, 16th December 1698, Elliot of Swineside *contra* Elliot of Meikledale, No 22. p. 4130.; where the debt was even contracted before the debtor's faculty to burden, and therefore could not be understood as an exercise thereof; and yet the LORDS found in terms, 'That the pursuer's debt being anterior to the faculty, did not put it in a worse condition than if contracted thereafter; and found, that the creditors of a father having a faculty to burden, have the benefit of that faculty *eo ipso* that they are creditors, unless another estate can be condescended upon, which may effectually operate their payment; and therefore found Meikledale liable for the debt libelled, as being far within the value of the sum wherewith the father had a faculty to burden his fee: And resolved to follow the same rule in all such cases that might occur.' Here, upon the same footing of equity, the son was even made personally liable, though he had not any way undertaken the debts: For, since he possessed the fund out of which they were payable, it was no great extention to make him personally liable, for what might be drawn from him at any time by the circuit of an adjudication. And accordingly the precise same thing was found, 18th January 1717, Abercromby of Glasshaugh *contra* Graeme of Bucklivy, No 161. p. 4110. No 17.

Replied to the *first*, If it should be allowed that the father was far, and the son only conjunct with him, it will have no weight in the argument; for the difficulty still recurs, how shall one's personal debts be made real upon lands, once indeed in the debtor's person, but now alienated, and no longer in his person, or that of his heir? With George Rome the father's life, his interest in the lands of Clowden *fuditus* ceaseth, so that they did not even remain in his *hæreditas jacens*; his son Thomas Rome became thereby absolute proprietor: But upon what *medium* he could be made liable more than any other singular successor, is not seen; not certainly as *heir*, for he did not represent his father; not as *successor titulo lucrativo*, nor upon the act of Parliament 1621; for his succession was anterior to the contraction of the debt. In a word, taking the matter upon this footing, the father was like one of more proprietors *pro indiviso* in any subject; such a proprietor, during the continuance of his property,

No 17. can burden the common subject with his debt; but, whenever that ceases, by his death or otherwise, there is no longer access for his creditors, that have not already established to themselves an interest in the subject, independent of their debtor. To the *second*, *replied*, One having a faculty to burden, when he contracts personal debt, all that can possibly be implied, is an assignation of that faculty, in so far as it may be a necessary *medium* to establish the debt upon the subject; or in other words, a mandate from the debtor to lead an adjudication: Nor need even this be granted; in a personal bond, there is nothing implied or expressed but a simple obligation to pay; and when an adjudication is led thereon, it is not from any implied consent, but by the justice of the law; which supplying the want of will in the debtor, disposes upon his goods for payment of his debts. In any view, contracting personal debts can never be interpreted an exercise of a faculty to burden; were it so, the consequence would be, that the simple personal debt must be an effectual burden upon the subject, which can never be maintained; and yet, there is no evading the consequence, if it be evident, that the *exerting* a faculty to burden, must *produce* an actual burden. If then, the simple contracting of personal debt, can infer nothing more, but a mandate or assignation of the faculty; that mandate or assignation must fall whenever the faculty is extinct, by the death of the person in whom it subsisted; and the case then becomes the same, as it never had been granted. *Replied* to the *third*, There are no sorts of adjudications known in our law, but against debtors, or their *hæreditates jacentes;* to neither of which can the present adjudication be reduced; whatever favour onerous creditors may have in our law they can never be indulged in demands directly in the face of principles; and it is against all principles, that one's estate which is his own without any burden, should be torn from him for the personal debt of another.

It was *pleaded* in the *second* place for Provost Graham's creditors, Allowing the contracting of personal debt to be such an exercise of the father's faculty, that the estate could have been affected as long as it was in the son's person; now, that the estate is conveyed to onerous purchasers, without the burden of the bond, there is no longer place for affecting the estate in their persons.

Answered for Mr Rome; A faculty to dispone or burden is truly a burden established upon the fee, and as such, good against singular successors; and whenever the faculty is exercised by contracting even personal debt, it is in consequence of the faculty that the creditor has it in his power at any time, and against any proprietor, to make the same real upon the estate; nor has the purchaser whereof to complain, since he purchases with the burden of a faculty engrossed in the very conveyances, which gives him a full notification of his danger.

Replied for the Creditors, It is acknowledged that a faculty to burden, is good against singular successors, so as, if exercised in any proper way, will be effectual to burden the estate in whose-ever hands; but it will not follow that per-

sonal bonds, which in no proper sense are exertions of the faculty, will thus effect the estate; for, however it be pleaded, from considerations of equity, that they may be made effectual upon the estate as long as remaining with the son, to whom the estate was purchased by the father's money, personal considerations of that or any other nature can have no place against successors for onerous causes, who are in quite different circumstances. In a word, when the father died, the faculty to burden died with him; the fee became thereby absolute even in the person of the son, and conveyed in the same absolute manner to the purchaser: While the estate remained with the son, if it should be granted that the law, upon the account that some personal considerations of favour and equity, would indulge the father's creditor in a power of affecting it for his debt, and so make an adjudication once led, good against singular successors; since the creditor neglected that opportunity, *sibi imputet;* the purchaser who acquired an absolute right is safe, for against him these personal considerations cannot militate. No 17.

'THE LORDS found the bond granted by George Rome to John Ballantine, in the year 1635, a good ground, whereupon the creditors might affect the said Thomas Rome, son to George the obligant, and the heirs of the said Thomas: But found that the bond cannot affect the singular successors of the said Thomas in the lands of Clowden.

Fol. Dic. v. 1. *p.* 293. *Rem. Dec. v.* 1. *No* 16. *p.* 31.

1723. *January* 17. The CREDITORS of RUSCO *against* BLAIR of Senwick. No 18.

A FATHER having disponed lands to his children of the second marriage, reserving a faculty to contract debt, and grant securities therefor, did contract some personal debts, for which adjudications were led against the lands after the debtor's death. It being questioned, 1*mo*, Whether the simple contracting of a personal debt was a sufficient exertion of the faculty, without granting real security therefor? 2*do*, Whether adjudications for these debts could be led after the debtor's death, when his faculty was extinguished with him, and the lands not in his *hæreditas jacens?*——THE LORDS found, that the granting personal bonds was an exercise of the faculty; that, even after the death of the granter, adjudications might be led by the creditors in the bonds against the children of the second marriage, of subjects disponed to them with the reserved faculty. *See* APPENDIX.

Fol. Dic. v. 1. *p.* 291.

1724. *July* 21.—A father disponing to his sons of the second marriage several parcels of lands, reserving to himself full power and faculty to alter and innovate, and to contract debt, &c. as fully and freely as if the entire fee were in