

No 62.

a preference to one of the father's Creditors, before another, seeing they were all equally secured by the son's infestment :

In respect, it was *answered* for the father's Creditors who had adjudged, That they ought to be preferred to such as have done no diligence; because, the charge in the disposition, being only a restriction upon the son's right, and making no real right in favour of the father's Creditors, but only producing a personal action against the son, and that he could do no deed in prejudice of the said burden; but it leaves the father's Creditors among themselves, as if no such burden had been, to be ranked conform to their diligence; and this will be clear from a parallel instance, viz. the Creditors of the defunct, by the act of Parliament 1661, have a legal hypothec upon his estate, in preference to the Creditors of the apparent heir, provided the defunct's Creditors do diligence within three years; yet, nevertheless, if some of these should adjudge, and others not, the Creditors adjudgers would undoubtedly be preferred, and carry off the estates.

THE LORDS gave this instruction to the Clerks, that bonds wherein Members of Parliament are co-obligants, may be registered in common form.

*Fol. Dic. v. 2. p. 68. Forbes, MS. p. 72.*

1719. July —. The CREDITORS of COXTON *against* DUFF.

No 63.

A DISPOSITION of lands being granted, with and under the burden of the payment of all the lawful debts; it was contended, that this was only a personal clause, burdening the acceptor of the disposition, with payment of the debts, but not designed to make a real burden upon the lands. *Answered*, It is not presumed of any disponent, that he intends different things, when he says, with the burden of debts, and with the burden of payment of debts; it is not disputed, but the first makes a real burden, and so must the other. THE LORDS found it a real burden. See APPENDIX.

*Fol. Dic. v. 2. p. 66.*

1729. February 18. GEDDES *against* YOUNGER.

No 64.

IN a disposition by a father to a son, the question arose, if the father's debts were a burden upon the right, so as to be good against singular successors, or only a personal burden upon the disponent and his heirs? In the dispositive part, the clause was worded thus, "likeas, by acceptation hereof, the said George binds and obliges him, and his foresaids, to make payment to my lawful creditors of all my just debts;" and in the procuratory of resignation, "and the said George shall to obliged to pay to my creditors, my just and lawful debt, &c."

But in the clause of warrandice, it stood thus, " which right, I bind and oblige me to warrant from my own proper fact and deed, with the burden of my debts;" and in the precept of sasine, " under the reservation of my own liferent, and with the burden of my just and lawful debts." The father's debts were here found a real burden upon the subject disposed; and good against singular successors, though it was argued to be most express in the dispositive clause and procuratory, that this was a personal burden only upon the acceptor, and that the subsequent clauses must be understood of the burden, as described at large in the foregoing principal clauses of the writ; a personal burden being as truly a burden in its nature as a real burden. See APPENDIX.

*Fol. Dic. v. 2. p. 67.*

No 64.

1730, July —. CREDITORS OF CALDERWOOD Competing.

CLAUSES burdening the subject disposed with the granter's debts in general, without mention of any particular debt, whether these debts become thereby real, debated, but not determined.

But thereafter it having been found in an appeal to the House of Peers, that such general clauses create no real burden; the LORDS ever since have been in use to determine according to the judgment of the higher Court. See APPENDIX.

*Fol. Dic. v. 2. p. 67.*

No 65.

1731. February 12. BARCLAY against GEMMIL.

A FATHER disposed his estate to his son, with the burden of 5000 merks to his creditors, " conform to bonds granted to them." After he was denuded, he contracted several debts, for which he granted infestments of annualrents, upon the lands formerly disposed to his son. In a competition betwixt a personal creditor for 1000 merks, prior to the disposition, and these annualrenters; it was *pleaded, 1mo*, That, by the son's infestment, the father was denuded, and had it not in his power to lay any new burden upon the estate, over and above what he had laid upon it in favours of his creditors, existing at the time of the disposition; and if the debts did not amount to 5000 merks, it was so much gain to the son. *2do*, Supposing this clause could be understood as a faculty, empowering the father to grant new securities upon the estate, so far as the 5000 merks was not exhausted by prior debts, still the debts, such as were existing before the disposition, were made real burdens upon the estate, equally as if they had been specially mentioned in the infestment, which must prefer them to all posterior debts, though made real upon the estate by infestment.

No 66.