No 9.

*** Stair reports the same case:

SIR Alexander Swinton having disponed his estate of Swinton, to John Swinton his son, in his contract of marriage, there is a clause therein, on these terms, that it shall be leisome to the said Sir Alexander, to affect and burden the estate with infeftments of wadset or annualrent, for the sum of fifty-four thousand merks, for his creditors and bairns; thereafter Sir Alexander grants a bond of 14000 merks to the Laird of Smeaton, and declares it to be a part of the fifty-four thousand merks, whereof 2000 merks being now in the person of Robert Learmont, he pursues the Earl of Lauderdale, as now come in the place of John Swinton by his forefaulture, to pay the sums, or at least, that the land is, or may be burdened therewith; because the forefault person's infeftment being qualified with the said reservation, it is a real burden affecting the estate, and Swinton's infeftment being public, and thus qualified and burdened, was as to this point the creditor's infeftment, and his being forefault could not prejudge the creditors, as to this real burden in a public infeftment granted by the King. The defender *alleged*, that the libel was not relevant, for the reservation being a mere power of burdening by infeftment, it cannot be pretended that the forefault person's infeftment is sufficient therefor; but seeing Swinton made no use of that power, albeit it might have been sufficient against Swinton the contractor, or his heirs, it cannot militate against the King or his donatar, to whom the fee returns by forefaulture without any burden but what the King has consented to by public infeftments or confirmations; and though old Swinton had given the pursuer a base infeftment, it would have fallen by the forefaulture not having been confirmed, much more when there is no infeftment.

THE LORDS found the libel not relevant, and assoilzied.

Stair, *v.* 1. *p.* 752.

1673. *February* 15.

DAVID GRAHAM *against* His BROTHER, the LAIRD of MORPHIE.

No 10.
A father disponed his estate to his eldest son in his contract of marriage, reserving to himself a power to burden the estate with a certain sum of provi-

THE said David, as having right by assignation from Alexander his brother, and Helen Graham his sister, to their proportional parts of twenty-five thousand merks, provided by their father to his six younger children in their elder brother's contract of marriage, did pursue Morphie for payment of their proportions. It was *alleged* for Morphie, that the provision in his contract of marriage could furnish no action, because it was conceived in the terms of a naked reservation only, to burden the estate with the foresaid sum in favour of the rest of his children, which being *nuda facultas*, unless the power reserved

had been put in excercise by the father in his own lifetime, and infeftments given to the children for their security out of the estate; neither can Morphie be personally liable, not being heir to his father, nor his estate burdened so as he ought to make payment of the debt for relieving thereof, and this point was lately decided, betwixt the Duke of Lauderdale and Learmont and her Spouse, No 9. p. 4099. It was *replied*, that the defence ought to be repelled, and Morphie decerned to make payment notwithstanding; because, in a former action pursued at the instance of the Creditors of Henry Graham, one of the six children, the LORDS had decerned the defender to make payment upon the very same ground and clause of provision which is the ground of the action. It was *duplied*, that that decision was upon another point of law than what is now contraverted, which was not then alleged, viz. that the provision reserving power to the father to burden the estate with the sum of 25000 merks, to be divided, being left blank and never filled up by him what should be their proportions, could not be done after his death, and so it was not obligatory against his eldest, which allegeance hath no affinity with that now proponed; and therefore the defender craved an interlocutor *in jure* upon this defence now alleged. THE LORDS having considered the former decision, at the instance of another brother, did find in that case, that this allegeance was not proponed; as likewise having considered that reservation contained in the contract of marriage, did find, that imported nothing but a reservation to burden, but did not at all affect the disposition itself made to his son; and therefore they did consider and debate much amongst themselves upon their interlocutor to be given as to this point, and did at last find, that Morphie was liable to payment notwithstanding of this allegeance and the foresaid practick, which they did find did not meet this case, because the ground of that decision was, that in the foresaid case, the power reserved to the father was to contract debts, and borrow sums of money, for which he might grant infeftments to the creditors, which not having done in his own lifetime, a stranger buying these lands for the full value, could not but think himself *in tuto* to make a purchase thereof, there being no infeftment to be found in any register, and therefore the creditors who lent their money, and not taking infeftment, could only have personal action against the disponer and his heirs, but could not make a stranger who had purchased the lands liable to that burden, it being their own fault that they did not secure themselves when it was in their power; whereas, in this case, Morphie did know and consent that his father should grant these provisions in favours of his younger children, which being but mean, and such as he knew the estate might bear, with other debts, he could never quarrel the same as being a stranger, and ignorant thereof: And the saids provisions, and his fee of the estate being *in eodem corpore*, and done at the same time, the children were most favourable creditors for their portions; and unless Morphie had renounced the said disposition, and not acknowledged the same, it ought to

No 10.
sions to his younger children. This clause was found to produce action to the younger children against their elder brother, the father having died without exercising the faculty.

No 10. give them as good right to their portions, as him to the fee of the estate; seeing, if he had entered heir to his father, and miskenned the disposition, he would undoubtedly have been liable, the said provision, importing a constitution of debt for the children's provisions, which, in law, would bind heirs or executors, and importing no less than in so far as the disposition made to the eldest son was lucrative, they might have reduced it upon the act of Parliament, as done *in fraudem creditorum*; and therefore the reservation, as it was but *nuda facultas*, not being exercised, and taking effect, did prejudge them of their real security, as it was found in that other case, but did not make the obligation void and null for their portions against Morphie, upon the foresaid grounds of law.

Fol. Dic. v. 1. *p.* 291. *Gosford, MS. No* 575. *p.* 316.

1677. *January* 6. CREDITORS of MOUSEWELL *against* CHILDREN.

No 11.

ONE having disponed his estate to his eldest son, reserving a faculty to affect or burden the same with a certain sum for provisions to his children, the son's creditors did diligence against the estate, and were infeft upon their apprisings. Thereafter the father exerced this faculty in favours of the children, by granting them heritable bonds referring to the faculty, upon which they were also infeft. In a competition THE LORDS preferred the children in virtue of the above faculty, though the creditors' infeftments were prior. *See* No 13. p. 4104.

Fol. Dic. v. 1. *p.* 292. *Stair, Dirleton, Gosford.*

*** *See* this case, No 80. p. 961.

1677. *June* 21. HOPE-PRINGLE *against* HOPE-PRINGLE.

No 12.
A person having disponed his estate to his son, reserving power to himself to burden it to a certain extent, and thereafter granting a bond to his daugater without mention of that power, the bond was found to affect first his

HOPE-PRINGLE having disponed his whole estate to his eldest son with reservation to him to burden it with a liferent to his second wife, or with wadsets or annualrent to any person, not exceeding 5000 merks, he had thereafter a daughter of the second marriage, to whom in *anno* 1636 he granted a bond of 1000 merks, who now pursues the heir of the eldest son for declaring it to be a burden upon the estate disponed with the reservation foresaid. It was *alleged*, that this bond could not burden, because the reservation being only a faculty, and in a specific form, the same was never exercised, for neither doth this bond relate to that reservation, nor hath it any obligement to infeft, but only a personal obligement to pay annualrent, as well infeft as not infeft. It was *answered*, that the specific way of burdening was not taxative; and if the father had granted this daughter a tack redeemable by this sum, or an assignation to the