*** Kilkerran reports the same case: No 23.

A FATHER having, in the disposition of his estate to his eldest son, reserved to himself a faculty 'to burden him with 4000 merks to be paid to a younger son, 'at the first term of Whitsunday or Martinmas after the father's death, or the 'marriage of the said younger son, which of them should first happen;' and having, several years after the said younger son's marriage, exercised the faculty, and made the said 4000 merks payable at his father's decease with annualrent *retro* from the said younger son's marriage, the LORDS found, 'That the father could not subject his son to annualrent sooner than the date of the deed in exercise of the faculty.'

Kilkerran, (FACULTY TO BURDEN.) *No* 1. *p.* 186.

1739. *November* 14.

MRS HELEN CUNNINGHAM *against* The CREDITORS of HENRY CUNNINGHAM of Boquhan.

No 24.
When a faculty to burden understood to have been exercised so as to be good against the personal creditors of the disponee, or against singular successors.

WILLIAM CUNNINGHAM of Boquhan, in his son Henry's contract of marriage, disponed to him the estate of Boquhan, reserving (amongst other powers) a faculty to burden the same with 10,000 merks payable at his decease, which clause was repeated in the procuratory, precept, and sasine that followed thereon. And William, in a contract of marriage with his second spouse, exercised this faculty, by burdening the said estate with that sum to the bairns of that marriage, conform to the reservations, powers, and faculties reserved in his son's contract, and thereafter William assigned and disponed to Mrs Helen Cunningham, his daughter of the second marriage, the said 10,000 merks, and which disposition was registrated in the Sheriff-court books of Stirling.

Henry contracted several personal debts after his father's decease; and, in a sale of the estate, the question occurred in the ranking the Creditors, Whether the reserved faculty as to the 10,000 merks exercised in manner foresaid, was a real burden upon the estate, preferable to all the debts of Henry Cunningham the disponee.

Pleaded for Mrs Cunningham; That her father, old Boquhan, was a real creditor in the faculty, to the extent of the said sum, whenever he pleased to exercise the same; this conditional credit competent to him against his son upon the subject disponed, did as much affect the fee, and could as little be defeated or voided by the deeds of the son, as if it had been a pure and unconditional debt. It has indeed been often disputed, how far general burdens could be effectual against singular successors in the subject, though even conceived in a real manner as a burden thereon, and always given in favours of the gene-

No. 24. ral burdens, till of late that the consideration of the lieges' security from the records might not be impaired, has made the Court reverse these judgments. But these later precedents cannot affect this question; for here the precise sum is ascertained, as likewise the creditor in the faculty, who was Boquhan elder himself. It is true, this faculty might have been exercised in favours of persons unknown, and whose right could not be discovered from the records, which are intended to certiorate the lieges, viz. that of sasines and reversions, and consequently the registration of Mrs Cunningham's right in the Sheriff-court books cannot be much relied on. But the argument proves too much, and so is of little avail; for, had this been an actual reserved sum of 10,000 merks to old Boquhan, it might have been assigned to any person whatever, by a mere personal deed, and be effectual to the assignee; and consequently, the assignee's right could not appear upon the record of sasines and reversions, more than that of the person in whose favours this faculty is exercised. In short, the nature of this reservation is such, that it would seem no more was requisite for converting the faculty to a real burden, but such deed as appears in old Boquhan's contract of marriage, declaring, that he burdened the lands with that sum; it would have been altogether inept if Boquhan elder had granted an infeftment of annualrent, or the like security upon the land, after he was denuded of the estate, and his son publicly infeft, and which was the intention when the faculty was reserved; so that the meaning could not have been, that he was to dispone the lands in security, or an annualrent out of them, corresponding to the 10,000 merks, established by a sasine lawfully executed; he was already denuded, without power of revocation, of the fee of the estate, by an actual deed lodged in the son, which therefore he could not affect in that manner.

On the other hand, it was *argued* for the Creditors, That the reserved faculty in the son's contract was indeed a real burden upon, or power reserved to the father over the estate disponed, whereby he might have granted warrants for infefting any person he pleased, in the same way he could have done if he had remained proprietor in full fee of the whole estate, or in the same way he could have done if he had been infeft over the whole upon an heritable bond for the sum in the faculty; but, in all these cases, the father must have proceeded in the known regular manner of granting infeftments by procuratory, &c.; for no declaration in writing, or assignation in favour of a third person, without these, can produce a real and preferable right upon lands to such third party, whether the granter of such declaration or assignation be infeft in the estate as proprietor thereof, or as creditor by heritable bond, or as having a faculty to burden it. It is true, that Mrs Cunningham, as a personal creditor to her father, or as his assignee by personal deed, had it in her power, by adjudication proceeding on the said personal deeds, to have attained infeftment upon the estate, valid to the extent of the faculty, and preferable to other rights affecting the same, according to its order of time; exactly as any man's personal creditors or dis-

ponees by personal deeds, wanting procuratory and precept, may attain, by a proper course of diligence, valid infeftments on the estate, or real rights in which their debtors or authors stand infeft; but it is quite inconsistent with the nature of our real rights, to admit that any real or preferable right on lands can be established or conveyed unto the person of a third party, either in virtue of a faculty, or of a right of property, or real credit, without actual infeftment recorded in the proper register in favour of such person. Besides, this faculty did not import a reservation of any part of the estate whereof the fee was conveyed to the son, which could, with any propriety, be called a separate estate in the father different from that which was conveyed to the son, so as to remain unaffectable by the son's creditors; but imported only a power in the father to affect the estate with real rights to the extent of 10,000 merks in virtue of the faculty, as well as the son might affect it in virtue of his fee; so that it might have been affected by either of them, if the same had been done in the proper form of constituting real rights; but that being neglected, it could not be affected by the deeds of either, otherwise than by a course of legal diligence, in which the rule of preference would be *prior tempore potior jure*. And as to the notion, that the faculty was assignable by personal deeds of the father, so as to establish the right in the assignee, the creditors conceive that to be altogether inconsistent with the forms made essential by our law for the transmission of real rights. No 24.

THE LORDS preferred Mrs Cunningham to the personal creditors of her brother.

Fol. Dic. v. 3. p. 204. C. Home, No 134. p. 228.

*** Kilkerran reports the same case:

A FATHER having disponed his estate to his son, reserving a faculty to himself to burden and affect the lands with L. 10,000 Scots money; and having, in his second contract of marriage, upon the narrative of the said reserved power, *provided* the said sum to the issue of the marriage, and *declared* that he burdened and affected the lands with the payment thereof to the bairns of the marriage, in terms of the reservation in his son's contract, and *assigned* them in and to the said faculty; and, by another disposition, proceeding upon the narrative of his said contract of marriage, disponed to the child then procreate of the marriage, the said sum, and assigned her to the faculty reserved in the disposition to his son;—in a competition between the said child of the second marriage, and the personal creditors of the son, upon the price of the lands due by the purchaser thereof, at a judicial sale carried on by the said child of the second marriage, as apparent heir to her brother the disponee to the estate, the LORDS 'found the said child of the second marriage, in whose favour the faculty was exercised, preferable to the son's personal creditors, who had done no diligence to affect the estate.

No 24.

In this the Lords were not unanimous. It was *observed*, That a century ago, all such faculties were quite ineffectual, unless exercised specifically by burdening the lands by infeftment; in so much, that even no personal action lay against the disponee, to the personal creditor of the granter. In process of time, the Lords did, it is true, *ex æquitate*, so far remit this rigorous construction of such faculties, as to give personal action; but to give the personal creditor of the disponer a preference, appeared to be without foundation, as it was without precedent. An assignation of the faculty by a personal deed is no exercise of the faculty: It may have been intended as such by the granter; but an intention is nothing when not habilely executed, and such assignee is still no more than a personal creditor. Now, had the Lords found that the granter's bare contracting debt was an exercise of the faculty, and thereupon found even the personal creditors of the granter preferable to infeftments from the disponee, the ground of the decision might have been understood, though not approved of; but this middle way of finding the faculty exercised to the effect of giving preference to the disponer's personal creditors, and not also to his real creditors, was what several of the Lords could not approve.

'It is an agreed point, that a faculty to burden, or a faculty to alter, is a real right; but it is quite a different question, What rights granted in consequence of such faculty are real? Now, as such faculty is a real right, it follows, that no infeftments granted by the disponee can defeat the granter's power to burden or alter: Yet, this is to be understood with a limitation; for, though an infeftment at any time in the granter's life will be preferable to an infeftment by the disponee, though prior, and an infeftment from the granter, though not taken upon his precept till after his death, will be preferable to an infeftment from the disponee, if posterior thereto, yet, if at the granter's death, there is no infeftment from him on record, the creditor or singular successor of the disponee, obtaining infeftment on the faith of the record, will be preferable to any infeftment that may afterwards be taken upon the granter's precept, which lay latent at his death; and were it otherwise, the security by the records would be wholly frustrated.

And upon this ground it was, that in the case of Ogilvy of Coul, No 20. p. 4125. the Lords preferred an infeftment by a son of the disponee, to the creditor of the father adjudging after the father's death, though the son's disposition was with the burden of a faculty to the father to contract debt to the extent of the said creditor's debt. In like manner, *anno* 1737, a bill of suspension being presented by the purchaser of the estate of Scotscraig, against the creditors, on this ground, that he was not *in tuto* to pay the price, for that by a reserved faculty in his author's right to burden the lands with a certain sum, he might be in hazard of eviction; the Lords, in respect his author was then dead, and no exercise of the faculty on record 'remitted to the Ordinary to refuse the bill.'

Kilkerran, (Faculty to Burden.) *No* 2. *p.* 186.