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

No 18. his person, the question occurred, If these disponees were liable to the personal debts of their father, contracted before existence of the faculty to burden? The sons *pleaded*, That they were singular successors; and that, after their dispositions, their father retained sufficient fund for the payment of all his debt, so that they could neither be liable as heirs, nor upon act 1621; and as to the faculty to burden, whatever benefit that might afford the debts contracted after the existence of the faculty, which might be interpreted as an exercise thereof, anterior creditors cannot plead upon it. It was *answered*, That the defenders, according to the form of their rights, are indeed singular successors; yet, from the nature of them, are liable equally as if, in the strictest sense, they were heirs of provision. For when a father dispones to his children with such reserved faculties, he is not understood to have any other intention but to save the trouble and expense of service; the disponees, by acceptance, are understood to have subjected themselves personally to all the disponer's debts, so far as the subjects disponed do reach; and therefore, in the eye of law, are, to all intents and purposes, considered as if they were heirs of provision.——THE LORDS found the children of the second marriage liable as heirs of provision.—*See* APPENDIX. *Fol. Dic. v. 1. p. 292.*

*** Edgar reports the same case:

1725. *February* 19.

IN the marriage-contract between Hugh Blair and the eldest daughter of William Macguffog of Rusco, William disponed his estate of Rusco to Hugh, and the heirs-male of the marriage. Of this marriage Hugh had only William his heir; and, having entered into a contract with a second wife, he thereby 'obliged himself to provide and secure to the eldest son, and remanent bairns 'of that marriage, the sum of 50,000 merks, whereof 30,000 to the eldest son, 'and the remaining 20,000 to the younger children.' Of this marriage he had two sons, David and James Blairs, designed of Borgue and Senwick.

In the year 1695, when children of the second marriage were procreated, and when the son of the first was entering into a marriage-contract, the father Hugh therein disponed to William, and to the heirs-male of the marriage, certain lands, which he obliged himself to warrant to be of yearly value 8000 merks of free rent, and to burden other lands not therein disponed, with making up the deficiency, if any should happen to appear; at the same time he took William bound, by a separate clause in the said contract, to consent to such dispositions as he the father should thereafter make of his other lands.

On this contract, no infeftment was taken till January 1706; neither was it founded on till the year 1707, after the death of Hugh; for, between the signing of the contract, and the celebration of the marriage, the father and son had entered into a new transaction, by which Hugh disponed to William some other lands besides these named in the contract, and some of his moveables;

and, on the other hand, William undertook the payment of his father's whole debts: Upon this the father, with consent of William, granted two dispositions, one to David of the lands of Borgue, and the other to James of the lands of Senwick, mentioning the same to be in implement *pro tanto* of his obligation in their mother's contract of marriage; but 'reserving his own and his wife's life-'rent, and full power and faculty to himself, as well in health as sickness, & 'etiam *in articulo mortis*, to alter and innovate, and contract debts and grant 'securities therefor upon the said lands as he should think fit, without consent 'of his two sons, as fully and freely, in all respects, as if the entire fee of the 'lands were in his person, and his younger sons nowise provided thereto.' No 18.

These dispositions remained in the custody of Hugh the granter till within a few weeks of his death in the year 1706, when infeftment was taken on them for behoof of the disponees.

In the year 1705, David, the eldest son of the second marriage, had been married to Grizel Blair; and, in their contract of marriage, Hugh, the father, and he joined in disponing 'the lands of Borgue (with consent of Margaret 'Dunbar, spouse to Hugh, and mother to David) to the children to be pro-'create of the said marriage, and granted a jointure of 500 merks yearly out 'thereof to Grizel Blair, and an annuity of 800 merks *per annum* to her and 'her husband: Reserving to Hugh the father, and his spouse, their liferents, 'except in so far as they had denuded themselves by that contract; and con-'form to the particular reservation contained in the disposition of the foresaid 'lands granted by the father Hugh to his son David.'

In the year 1707, after the death of Hugh, William his heir, in order to get free of the transaction which had intervened between the signing of his contract of marriage, and the celebration thereof, took infeftment on the precept in the contract, and raised reduction of the two dispositions in favours of David and James, to which he was consenter: The exent of which was, that David and James were assoilzied; though it is otherwise observed by Forbes, 28th of January 1709, *voce* Parens Illicitum; for the interlocutor mentioned by him was altered, on advising a reclaiming bill and answers.

Several years after the death of Hugh, who had left very considerable debts, his creditors led adjudications against William his heir, not only of the lands disponed to him, or to which he succeeded as heir-male and of line, but also of the lands which were disponed to David and James; and the creditors of William did at the same time lead adjudications of the same lands for their debts; and, upon a joint application, they obtained a sequestration of the whole estate, and insisted in a process of ranking and sale.

The defences common to the children of David, then deceased, and to James Blair, were, *imo*, That supposing they were heirs of provision, yet the heir of line behoved to be first discussed, and that the estates provided to them were only liable *subsidiarie*. 23d July 1723, the Lords found, 'that, by the adjudication and sequestration, the heir of line was sufficiently discussed, to subject the

No 18. estate of the children of the second marriage to a ranking and sale, at the instance of the creditors of the father.' 2*do*, They *contended*, that they were not heirs of provision, nor the representatives of Hugh, but just and lawful creditors to him by his contract of marriage with his second wife, whereby Hugh did not oblige himself to take rights of land or securities for money to himself alone, or to himself and spouse in conjunct fee and liferent, thereby, as often happens, to create a hope of succession; but, by the contract, David, the eldest son, was made directly creditor in the special sum of 30,000 merks, and the younger son James in 20,000; not under the quality or denomination of heirs, but under the particular description and designation of eldest and younger son or child of the marriage; that therefore the dispositions of the lands in their favours were truly onerous, and from the date of their infeftments must be preferred to all posterior infeftments, though proceeding on adjudications for payment of prior personal debts, such as the pursuers adjudications were. In support of this, it was argued, that they being secured by Hugh's contract of marriage with his second wife, they were in the same case with that of the Creditors and Children of Mowswell, observed by Dirleton and Stair*, where the Lords 'preferred the children upon their prior infeftments on bonds of provision to the creditors posterior apprisers;' and of the Daughter and Creditors of Easter-Ogle, in which, on the 24th January 1724†, the Lords 'preferred the daughter upon the clause in the contract of marriage, of which she was a child, *pari passu* with the creditors, according to their several diligences,' agreeable to two decisions quoted in that case by the collector. 3*tio*, The defenders insisted, that though they had not had the particular obligation in Hugh's contract of marriage to found upon as an onerous cause of the dispositions in their favours, and though nevertheless these dispositions were taken or construed to be merely gratuitous, yet nevertheless they would be as effectual to them as they could have been to strangers, unless the creditors could show that the disponer, at granting of them, was insolvent, or thereby became insolvent, so as to found them in a reduction on the act of Parliament 1621, which the defenders alleged the creditors could not do; the fact being, that, at the time of granting the dispositions, Hugh the disponer had a sufficiency of estate, and a considerable residue after payment of all his debts, over and above the lands disponed to them; and that an eventual insolvency, even though it had happened during the disponer's life, could not invalidate the dispositions; much less could an insolvency arising after his decease by the negligence or taciturnity of the creditors, which was the present case, have that effect.

It was *answered* for the pursuer; That however directly the obligation might be conceived in Hugh's contract of marriage with his second wife, in favours of the children of that marriage, and however far such obligation might be distinguished from a hope of succession, so as to be the foundation of an adjudication for preferring the children, if any such diligence had followed; or however far the said obligation might be an onerous cause for a disposition actually denud-

* No 80. p. 961. † *Voce* Provision to Heirs and Children.

ing Hugh of the fee and faculty of burdening the lands disponed; yet since no such adjudication had been led by the children, and since the dispositions granted, and now founded on, had not divested Hugh of the fee, at least not of the full power and faculty to alienate, alter, affect, or encumber, the lands disponed, but on the contrary had reserved to them such ample powers and faculties, and also had remained latent and in his custody until within a few weeks of his death, nothing could be inferred from it in favours of the children but a mere hope of succession as heirs of provision, subject to all Hugh's debts contracted before or after these dispositions: Thus, in the decisions cited for the defenders, the children were not preferred on the simple obligations in the contracts of marriage, nor on precarious dispositions loaded and evacuated by reserved powers and faculties; but, in the first of these cases, on a direct and absolute infeftment, and, in the other, on a timeous diligence by adjudication: And besides, the terms of payment in these cases were fixed, and might have existed during the life of the father, and become effectual obligations against him, and independent of him, which the present dispositions could not be. The pursuers furthet insisted, that their case was more similar to that of the Creditors of Tulloch, decided 18th February 1719*, than to either of the above two; for there the father, in his second contract of marriage, had been bound to purchase lands, and to take the securities to himself and spouse in conjunct fee and liferent, and to the heir-male in fee; and, in implement of the said obligation, had actually purchased certain lands, after a son of the marriage had existed, and taken the rights thereof, in terms of the obligation, to himself and spouse in conjunct fee and liferent, and to the son *nominatim* in fee: And yet the LORDS found 'the said lands affectable, and affected by the diligence of the father's creditors, both such as were prior and posterior to the acquisition.' They likewise cited a parallel case, Erskine against Reynolds, observed by Stair, 16th June, and by Dirleton, 22d of February 1676, No 79. p. 960. No 18.

THE LORDS, upon the 21st of July 1724, found the children of the second marriage liable as heirs of provision, and repelled the defence of there being sufficiency of fund at the time of Hugh's decease for payment of his debts, in respect of the eventual insolvency.

The above interlocutor was reclaimed against, and upon advising petition and answers, 18th of November 1724, the LORDS found the younger children's estate liable to the creditors, in so far as the estate of the heir of line was not sufficient for payment of their debts.

There was afterwards a separate defence pleaded for the relict and children of David Blair of Borgue founded on his contract of marriage, in which Hugh his father was a consenter, as above taken notice of, and from it the relict *pleaded*, that Hugh's consent could not but secure her, because it had the effect of an actual exercise of the reserved faculty with respect to her: And for the children it was *contended*, that their grandfather's consenting to the disposition made

* Not reported. *See* APPENDIX.

No 18. in their favours was a virtual renunciation of the faculty, since there was no new reservation of any faculty to burden, &c.

It was *answered*, That Hugh's consent could not prejudge his prior creditors, because by the contraction of their debts the reserved faculty was *ab ante* exercised *quoad* them; and as David had been found liable to the creditors as heir of provision to his father, so David's children being heirs of provision to him, were of consequence liable to Hugh their grandfather's debts. And *2do*, The clause reserving Hugh his liferent, &c. appears to refer to the former disposition by him to his son David, and therefore did preserve the effect of the reserved faculty.

December 18, 1724.—The Lords found the reservation in the contract was only a reservation of the liferent, but not of the faculty in the original disposition granted by old Rusco to David his son of the second marriage, and preferred the relict on the contract and infeftment to the creditors of old Rusco; and found old Rusco's consent to the contract was a renunciation of the faculty; and remitted to the Lord Ordinary to consider the effect of the debts contracted by old Rusco before his consent to that contract.

It was in the last place *argued* for David's children, that the Lords having found, that Rusco's consent to their father's contract of marriage was a renunciation of the reserved faculty contained in his disposition to their father, the consequence must be, that the fee of the lands disponed became absolute at the date of the contract; and therefore David's infeftment preferred him and his children to all the personal creditors who had adjudged since that time.

Answered, *1mo*, That supposing the consent was a renunciation of the reserved faculty, yet it could not be any otherwise than *salvo jure quæsito* to the prior creditors, the contracting of whose debts was an actual exercise of the faculty *quoad* them; so that Hugh could only renounce so much of the faculty as was not exercised. *2do*, David being only an heir of provision, his receiving such a renunciation made him lucrative successor *post contractum debitum*, and was a *præceptio hæreditatis*, which subjected him and his heirs of provision to the payment of Hugh's debts. *3tio*, The renunciation was a latent gratuitous deed, which could not prejudge the creditors who had contracted *bona fide*. *4to*, The implied renunciation could not be construed to void the faculty, and render the right a simple conveyance in the person of David; for the consent from which it was inferred was not in David's favours, but in favours of his children, who were only *nascituri*; and therefore the fee, which was still in the person of David, remained qualified with the faculty. It might indeed be a question, how far the consent would have operated a renunciation of the faculty after the right came into the person of David's heirs, but before that time the adjudications upon the bonds granted by Hugh, which the Lords had found were an exercise of the faculty, were led; and it did not appear that even as yet there was any real right or title to the estate in the person of David's heirs.

Replied for the children, 1*mo*, That Hugh's contracting of debts was only a virtual exercise of the faculty, but was not such an actual one as directly to affect the estate: so that the creditors, properly speaking, had no *jus quæsitum* upon the estate, but only a power of affecting it by diligence, which if they had used before David's infeftment, might have given them a preference, but which they had not done: The personal bonds granted in virtue of the reserved faculty could not have been better than if Rusco had retained the right himself, in which case these personal bonds could not have been obtruded to a singular successor infeft. The reserved faculty, being only a personal right, was taken off by a simple renunciation, whereby the disposition became absolute; and the subsequent infeftment in the person of the disponee was effectual, and conveyed an absolute fee, in the same manner as if the disposition had never contained any faculty to alter; so that these personal bonds could never compete with a real right perfected by infeftment before any adjudications were led upon them. 2*do*, The disposition to David was granted in implement of the provision to which he was entitled by his mother's contract of marriage; so that it was to him actual payment, and therefore could never be considered as a *præceptio*. He had already got the fee, only it was qualified by the faculty, but the renunciation made it absolute: If the father had destroyed the former disposition, and granted a new one to David, when he was married, in name of his patrimony; that could not have subjected him the disponee to the payment of his father's debts, as heir of provision, because he was not heir in the subject. 3*tio*, The renunciation being in David's contract of marriage was not a gratuitous deed. 4*to*, Since the father's consent imported a renunciation of the faculty, and made the fee absolute, and since the fee was in the person of David, the benefit of the renunciation, *necessitate juris*, accresced to David for the behoof of his creditors. No 18.

THE LORDS, on the 26th January 1725, found the children of David Blair were not liable, as heirs of provision, for debts contracted by Rusco before his consenting to his son David's contract of marriage; without prejudice to the creditors to insist upon the act of Parliament 1621, or any other ground of law. To which interlocutor they adhered, 19th February 1725.

Reporter, *Grange*. Act. *Ja. Graham*, sen. Alt. *And. Macdowal* & *Dun. Forbes*. Clerk, *Mackenzie*.

Edgar, *p.* 176.

1724. *December* 23. ISABEL SINCLAIR *against* SINCLAIR of Barrack.

LAURENCE CALDER having purchased certain lands from the Earl of Breadalbane, he took the disposition thereof to himself and wife in liferent, and to James Calder his son in fee, with and under this condition and provision, That it should be lawful to the said Laurence at any time in his life, without consent No 19. A person took disposition to lands to himself and his