no place when the debtor is out of the question by his bankruptcy. When this is the case, another principle of equity takes place, that the catholic creditor must act impartially, and forbear to benefit one secondary creditor by oppressing another. No 17.

The following objection touched some of the Judges. Laying aside the Master of Ross, the arresters would be secure of their payment; for if the Earl chose to levy the interest for his payment, they would be entitled to demand from him an assignment to the principal sum. And it was thought that the arresters could not be hurt by the conveyance to the Master of Ross of the principal sum, after their arrestments were laid on. But the answer to this was obvious, that the security taken by the Master of Ross, in the course of commerce, was lawful; and that, in adjusting matters betwixt him and the arresters, with regard to the being entitled to an assignation, priority is no plea, they being *in pari casu* with regard to every equitable consideration; that is, being equally *certantes de damno evitando*, they are equally entitled to an assignation from the catholic creditor; their claim being founded upon equity, and not upon strict law.

This case was reviewed upon a petition for the Master of Ross, who *pleaded* a new point, which I thought without foundation, viz. That Lord Cranston's infeftment of annualrent was totally conveyed to Lord Cassillis, and that nothing remained with the disponer but a personal reversion, which could not be affected by arrestment. The Court, 4th February 1755, altered and preferred the Master of Ross to the arresters; whether upon this new point, or upon what was formerly pleaded against the arrestments, as informally laid on in the hands of the purchaser of the estate, I cannot take upon me to say. I can only say, that there was no intention to alter the above interlocutor, which is certainly well founded, supposing the arrestments effectual to carry the bygone interest of the heritable bond. But the arresters having afterwards reclaimed, the Court, upon their petition, with answers for the Master of Ross, adhered, 9th July 1755. In advising this petition and answers, the Court lost sight altogether of the principles of equity above set forth. They adhered to their last interlocutor, upon this footing, That Cassillis was bound in law to take payment of the interest *primo loco*; that this was his duty, even after the arrestments were laid on; and, therefore, that Cassillis having done nothing arbitrarily, was not bound to grant an assignation to the arresters; nor could he justly grant it.

Sel. Dec. No 59. *p.* 77.

1760. *August* 7. Younger Children of HENDERSON *against* CREDITORS.

No 18.

A RESERVED faculty to burden with a certain sum, in a disposition of lands by a father to his eldest son, being exercised afterwards by way of legacy or

No 18. provision to the younger children; the son having contracted debts, his creditors adjudged the lands, and one of them completed his right by charter and infeftment. In a competition after the father's death, the younger children, who also adjudged, insisted for a preference, on this ground, that the eldest son's right was qualified, and that the adjudications against him could not carry the reserved right in the father, which was neither *in hæreditate jacente* of him, nor disponed to his eldest son. *Answered*, A personal deed of the father, the disponer, is not entitled to compete with creditors or purchasers who stand infeft by the proprietor. The father, in virtue of his reserved faculty, could not have a greater power than if he had reserved a part of the fee; and as, in that case, his personal deeds could not affect the lands, nor compete with real rights granted by the heir after his own fee is at an end; so it is equally inconsistent to suppose, that a personal bond or legacy granted by one who has a reserved faculty should affect the land. Such deed cannot be discovered from any record; and it would be putting lands *extra commercium* to give it the effect pleaded for by the legatees.—THE LORDS found, that the younger children were only preferable for their provision according to their diligence. See APPENDIX.

Fol. Dic. v. 4. p. 64.

No 19.
A faculty to burden, to the extent of a certain sum, being reserved in a disposition by a mother to her son, who, of even date, granted a relative personal obligation therefor; whether that sum was thereby made a real burden *de præsenti?*—Whether the faculty was exercised *habili modo*, by after deeds of the mother executed with that view?

1774. *July* 5. JAMES HILL *against* MARY HILL.

MARY CRAWFORD, proprietor of the lands of Gairbraid, did, after the decease of her husband, dispone the same to her eldest son, Hugh Hill, in his contract of marriage, and to the heirs-male of the marriage; whom failing, to the said Hugh Hill's nearest heirs and assignees, with the burden of an annuity to his wife; and reserving Mary Crawford's own liferent, with liberty to dispose of the coal and wood thereupon, during her life, as she should please.

The said contract reserves to her full power and faculty, at any time in her life, *etiam in articulo mortis*, to burden and affect the foresaid lands disponed with the sum of 8000 merks Scots money, to be destinated and provided by her, either in favour of her other children, or such person or persons as she shall think fit, and in what manner she shall think proper, to be paid at the first term next after her decease, 'with the payment whereof the said lands 'shall be burdened, as well as the said Hugh Hill, his heirs and successors; 'and which reservation and provision shall, for that end, be inserted in the 'procuratories and instruments of resignation, and precepts and instruments of 'sasine to follow hereon, in time coming, during the lifetime of the said Mary 'Crawford, and until the said Hugh Hill, or his foresaids, be duly discharged 'of the foresaid 8000 merks.'