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.'

No 19.

The reservations in favour of Mary Crawford are repeated in the procuratory of resignation, precept of sasine, and likewise specially inserted in the instrument of sasine.

Of the same date with the contract, Hugh Hill granted his obligation, reciting, that it was communed and agreed betwixt Mary Crawford, his mother, and him, that the said Mary Crawford should have power reserved to her to burden in manner above expressed, with the payment whereof the said lands, as well as Hugh Hill and his heirs and successors therein, should be burdened. Then follows this clause: And 'it being reasonable, that I should grant this 'personal obligement, in terms of the said communing, in corroboration of, 'and but prejudice to the heritable security therefor, by the contract of mar-'riage; therefore I hereby bind and oblige me, my heirs, &c. to pay to the 'said Mary Crawford, her executors, legatars, or assignees, the foresaid sum of '8000 merks Scots money, in such manner and proportions as shall be appoint-'ed by her, by a writ under her hand, at any time hereafter, *etiam in articulo* '*mortis*; and, failing of such destination, assignation, or testament, to the 'nearest of kin of the said Mary Crawford, equally amongst them, and that 'upon the first term after her decease.'

In 1733, Mary Crawford executed a testament, appointing her seven daughters, therein named, to be her executors and legatars, leaving to her said daughters, equally, all goods, gear, &c. which should belong to her at her death; 'together with whatever sum or sums of money, with the burden 'whereof I disponed certain lands to my son Hugh Hill; declaring hereby, 'that whether the said disposition be actually burdening the said lands, or 'whether the same be reserving a faculty to me to burden the same, I do 'hereby actually use and exerce my right thereof, and do hereby dispose of 'the said sum, to the full extent thereof, to and in favour of my said daughters 'above named, equally in manner above mentioned; willing and ordaining 'these presents to be a full and absolute conveyance of the said subjects, as if 'conceived in the most ample manner.'

In 1737, Mary Crawford executed a disposition, proceeding upon the narrative of the reservation in the marriage-contract, and of the obligation granted by Hugh Hill relative thereto; and disponing in favour of her said seven daughters, equally among them, the foresaid 8000 merks, 'wherewith the lands of Gaibraid are burdened, in manner contained in my son Hugh Hill's contract of marriage, and which is also contained in the said personal obligation granted by my son to me, with annualrents and penalty competent thereon; together with the said contract of marriage, and the said personal obligation, and all other rights in my person, for recovering the said 8000 merks, annualrents, and penalties foresaid.' She also assigns to them all goods, gear, and sums of money that should belong to her at her death.

Mary Crawford died in 1748, leaving eight surviving children, viz. Jean, Helen, Hugh, Margaret, Laurence, Anne, Mary, and Isabel.

No 19.

Mary Hill, the only child of Hugh Hill, on his death, succeeded to the lands of Gairbraid.

Some years ago, Laurence, Jean, and Margaret, obtained themselves confirmed executors, *qua* nearest of kin, to their deceased sisters Anne, Mary and Isabel, and gave up, in inventory, the proportion of the foresaid sum of 8000 merks, which belonged to them in consequence of the deeds before narrated. But Laurence Hill having afterwards been advised that this confirmation was erroneous, for that the 8000 merks, in consequence of the clause in the marriage-contract, making the same a real burden upon the lands of Gairbraid, fell to be considered as an heritable debt, descendible to the heirs of the creditors; he therefore made up titles to the shares of his younger sisters, Anne, Mary, and Elizabeth, by obtaining himself served heir of conquest to them; and, upon that title, the present action was brought in his name, before this Court, against Mary Hill, the only daughter and heir of the said Hugh Hill, the debtor, concluding for payment of three sixth shares of the 8000 merks which belonged to the said Anne, Mary, and Elizabeth Hills, to which they had right by their mother's settlement, as aforesaid; and which, upon Laurence Hill's decease, was insisted in by James Hill, his son and disponee.

Pleaded, in defence: That the debt was not an heritable subject, but moveable, and descendible to executors; for that the reservation in the marriage-contract was only a reservation of a power and faculty to burden the lands with the foresaid sum of 8000 merks, but does not, *de præsenti*, burden the same therewith; besides, in the case, the creditor in whose favour the the burden was to be imposed, was altogether uncertain; and that, therefore, unless that faculty had been properly exercised by a deed, charging the debt expressly as a burden upon the lands, it would be no more than a mere personal debt, descendible to executors, and not to heirs.

Answered, The right reserved by Mary Crawford over her estate, when she disponed the same to her son in his marriage-contract, does not fall to be considered as a mere faculty, to create a burden upon the land, which she was uncertain whether she could exercise or not, but as a debt really created at the time against the disponee, and with which it is expressly declared that the lands shall be burdened; and that, for that end, the reservation should be inserted in the procuratory, &c. and which was done accordingly; so that an after infeftment granted by her, in consequence of her reserved powers, became altogether superfluous. No more remained to be done upon the part of the disponer, than to point out the person or persons to whom the 8000 merks were payable, and which she might execute in any form she inclined, and which was accordingly done effectually and properly by the relative bond, which (as the marriage contract itself, containing the powers, fell to be in the hands of the disponee) she, of the same date with the contract, took from her son, payable to such persons as she should appoint; and failing her appointment, equally among her nearest of kin, or, in other words, her own children, who, in fact,

from the beginning, were creditors for that sum; and though Mary Crawford had not made use of the power belonging to her by any new nomination, their right remained intire. No 19.

The relative bond being only conceived in the form of a personal bond, does not in the least weaken the pursuer's plea; as no more remained or was necessary, than to take from the debtor a personal obligation for payment of the debt, ascertaining and pointing out the creditor to whom the same was payable.

And if the marriage contract, and the relative bond of the same date, are considered as *partes ejusdem negotii*, (which is the proper light in which they fall to be viewed) it is plain that both the sum and the creditor are defined; for, failing a particular nomination to be made by herself at any time of her life, the sum is to be given to her own children: and being evidently a real burden affecting the lands, in that view it is an heritable debt, descendible to heirs, and not to executors.

Replied, The reservation can never of itself create the burden; and it is a decided point, that, if the person who has the power of burdening dies without exercising it, the faculty is of course at an end. So the Court found very lately, in a case which seemed to be attended with a good deal of hardship, the younger children of M'Lean against their brother. See APPENDIX. The argument on the other side carries a contradiction in the bosom of it; for how can it be supposed that Mary Crawford, in the same deed, should be both burdening and reserving a power to burden? If she had understood the burden to be already created, the reservation of a liberty or faculty to create the burden, would have been altogether proposterous.

And the words laid hold of by the pursuer, 'with the payment whereof the 'said lands, and others hereby disponed, shall be burdened, as well as the said 'Hugh, his heirs and successors therein;' it is evident, are not inserted for the purpose of creating an immediate faculty to burden by the disposition then granted, but are consequential of the faculty reserved to burden; and the purport of them is to declare, that the faculty to burden the lands being exercised in a habile manner, the said lands should then be liable, as well as the person of the disponee, to make good the payment to those in whose favour it was conceived; but it could never be the meaning of this part of the clause to contradict the former, and to establish that the lands should be burdened, although the faculty should never be exercised, or although it should be exercised in a manner inhabile to create a real burden.

Again, the relative bond had no doubt the effect of creating a personal obligation against Hugh Hill; but still this personal bond did not lay any burden upon the lands; it did not enter the register of sasines in any shape. It was not in its nature heritable, nor meant any such; nor had Mary Crawford, at that time, resolved in whose favour she was to exert the right. No singular successor in the lands would have been bound to pay the least personal regard to this bond; and the only thing he could possibly see, from the infeftment upon the

No 19. contract, was, that Mary Crawford had a faculty reserved to burden the lands, as well as the person of the disponee, with the payment of 8000 merks; but, he could not see that she had actually exercised it, far less in favour of whom, or in what manner.

A faculty or power to burden land, must be exercised in a manner consisent with the feudal principles, and the security of the records, otherwise it can have no effect against third parties, or to constitute a real charge. The law has appointed no record for bonds granted in pursuance of reserved powers; and, therefore, if such powers could be exercised by mere personal bonds, without infeftment, so as to affect the lands, and to be good against singular successors, the greatest embarrassment would ensue. Accordingly, from the Decisions, *voce* FACULTY, it will be seen, that this Court has never, at any period, sustained a personal bond referring to a faculty, as sufficient to constitute a real burden upon lands; 8th July 1760, the younger children of James Henderson against the Creditors of Francis Henderson, No 27. p. 1441.

The Judgment pronounced by the Lord Ordinary, and which was afterwards adhered to by the Court, was as follows:

"FINDS, that the 8000 merks Scots, disponed by Mary Crawford to her daughters, were moveable *quoad* the said daughters, and descended to their nearest of kin, and not to their heirs; and, therefore, sustains the objections to the pursuer's title, assoilzies the defenders, and decerns; reserving to the pursuer to insist in a proper process against the defenders for such share of the said sum as belongs to him, as one of the nearest of kin to his deceased sisters".

Act. *Macqueen.* Alt. *Hay Campbell.* Clerk, *Tait.*

Fol. Dic. v. 4 *p.* 65. *Fac Col. No* 120. *p.* 321.

SECT. III.

Paction by Declarators, Back-bonds, &c. relative to Personal rights; when real; when personal?

1630. *March* 24. MAXWELL *against* LORD HARRIES.

No 20.
A singular successor to the creditor in a bond, was found not subject to a

THE LORD HARRIES being bound to one Maxwell by an heritable bond, in a sum of money, and to be paid upon requisition, which requisition was expressly contained in the bond, ought to be made by the advice of persons therein named, and no otherwise; this bond being comprised by a creditor of the said Maxwell, who required the Lord Harries to pay him, as compriser, succeeding