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

No 12.
moveables, and then his lands by the reservation.

duties, it would have been sufficient; or if the daughter had apprissed from the father *omne jus*, and he had thereafter burdened it by infeftment or annualrent for 5000 merks, the son might justly have said, that by the prior bond, tack, or assignation, the faculty was in so far exhausted, and the posterior burden could only be effectual *quoad reliquum*. It was *replied*, that here is only a personal bond for money, without any relation to the reservation, and though the intent of the father should be considered, and his conjectured will expiscated, it cannot be thought he meant to burden his son, but only his executry, because it is offered to be proven, that he had an executry far exceeding this bond, the time he granted it.

THE LORDS found, that the presumed will of the father by this bond was, that it should burden his exccutors in the first place, and the son's estate in the second.

Fol. Dic. v. 1. p. 291. Stair, v. 2. p. 527.

*** Dirleton reports the same case:

THE Laird of Torsonce having disponed his estate to his eldest son for love and favour, with a provision contained in the disposition, that it should be lawful to him to burden the saids lands by wadsets of the same, or annualrents furth thereof, for the sum of 5000 merks redeemable by his son, and having thereafter granted a bond to a daughter of a second marriage, of 1000 merks, who did pursue the Representatives of the son, for the said sum, it was *alleged* for the defender; That he could not be pursued personally; but if there were any ground of an action, it would be only for a declarator, that the lands are liable to the said debt. 2*do*, That there could be no ground of declarator, in respect the disponer had not made use of the said faculty, nor granted a wadset for the said sum; and that the defunct had a personal estate and executry; and in so far as he had not, conform to the said faculty, secured the pursuer out of the said lands, he had declared his intention, not to make use of the said faculty.

THE LORDS found, that the pursuer ought to discuss the executry, and any other estate belonging to the disponer; and if the said sum could not be recovered out of the personal estate, that he might have recourse against the said lands; which was found by the LORDS, upon these considerations, viz. That the right made by the father being for love and favour, the said reservation ought to be interpreted *benigne*, and it was to be considered *quid actum*; the father's intention being to have a power to contract as much debt as might amount to the said sum; and *eo ipso* that he did grant the said bond, he did burden the said lands virtually, and in his own time they might have been comprised for the said sum; and therefore may be now affected and comprised. 2*do*, The father's end being to have power to burden with the said sum, the *modus* and way was insert *ex stylo* by the writer; that which is mentioned in the disposition being the most ordinary, and therefore to be understood demonstrative but not taxative. 3*tio*,

No 12.

Though some of the LORDS were of opinion, that the pursuer may immediately, as other creditors, have recourse against the estate; yet it seemed to be reasonable, that in this case, the reservation being in the terms foresaid, and the bond whereupon the security was founded, not relating to the same, the executry should be first discust, seeing by the common law the executry was ever first liable; and though, by the LORDS practice, creditors may pursue either the heir or executor, yet there being such a speciality in this case, and the defender not representing personally the grandfather, as heir, or otherways by progress, his representatives ought to be first discust, and the said lands to be liable only *in subsidium.—In præsentia.*

Act. *Sir George Mackenzie, & Robert Stewart.* Alt. *Lockhart & Pringle.* Clerk, *Gibson.*
Dirleton, No 457. *p.* 221.

1679. *December* 16.
The CHILDREN of MOUSWALL *against* The CREDITORS thereof.

No 13.
Found in conformity with No 11. p. 4102.

THE Laird of Mouswall having disponed his estate to his eldest son in his contract of marriage, reserving to himself to affect or burden the same with 18,000 merks for his children's provisions and other affairs, whereupon he did grant bond to his many younger children for 9,000 merks, without a clause that the deceasing portion should belong to the survivors, so that by the death of the children there remained 5,000 merks due with annualrent, since the date of the bonds; the eldest son being infeft upon the contract of marriage, renews several bonds granted by his father to his creditors, who thereupon apprised the estate from another son, as representing his brother, and thence arose a competition betwixt these creditors and the children, which was disputed, and interlocutors thereon, on the 11th instant, whereby the Children were preferred. It was now further *alleged* for the Creditors, That this reservation to the father to burden, could import only an obligation upon the son, and could not be effectual against singular successors, especially seeing it was not exprest in the son's sasine, but only *secundum provisiones in dicto contractu contentas;* which if it were sustained sufficient, it would destroy all creditors, and evacuate the security by registration of sasines. 2*do*, Though such a clause could be real and effectual against singular successors, yet it being but a faculty to burden, that faculty could not be exerced, but *legitimo modo*, viz. by a valid infeftment in favours of the children; but here there is only a base infeftment, never clad with possession; and therefore the Creditors' public infeftment is preferable thereto. It was *answered* for the Children, That there may be obligements in infeftments merely personal, as the obligement to warrant; but where an infeftment is granted with a burden *transit cum suo onere*, always to singular successors, which is most ordi-