No 7. that would be not to homologate, but to alter the deed; and, as it contains no discharge of any of the reservations in favour of the donor, they behoved to remain with her after the homologation.

The Lords preferred the Hospital.

C. Home, No 62. p. 108.

SECT. III.

Faculties when effectually Exercised.—Effect on Heirs.—Effect on Singular Successors.—Competition of Creditors claiming under Reserved Faculties.

No 8.
An heiress infeft her son upon resignation, reserving to herself a faculty to dispone an yearly annualrent out of the land to her daughters. She executed a charter in favour of her daughters, containing precept of sasine, but neither delivered it nor infeft them. The Lords found the subscribing the charter to be a sufficient exercise of the faculty.

1624. *June* 29. Hamilton of Silvertonhill *against* His Sisters.

Francis Hamilton of Silvertonhill younger, being infeft in the lands of Provand in fee, upon his mother's resignation, who was heretrix thereof, with special provision contained in his infeftment, that it should be lawful to his mother to dispone in her own lifetime an annualrent of 800 merks yearly out of the said lands to her daughters, for the help of their marriages, redeemable upon 8000 merks; whereupon she having made and subscribed a charter to them, after the said fee granted to her said son, but no sasine being taken thereupon while she lived; after her decease the daughters pursue the said Francis, whose fee was affected with the said provision, to give them a precept, whereby they might take sasine, conform to the foresaid charter made by their mother in their favour. This action was sustained against the said Francis, and he was ordained to grant and subscribe a precept of sasine in their favour; albeit it was *alleged* by him, That the provisions foresaid, contained in his fee, reserved a liberty to his mother to provide the said daughters; which liberty not being used in her lifetime, nor the deed perfected by her, which she might have perfected, if it had been her intention to have made a complete and profitable security to them, which she hath not done, and so hath not clad her with that liberty which she had; for a charter, whereupon no sasine followed in her lifetime, it is not a valuable right; specially seeing she lived by the space of nine years after the date of the charter, during the which space no sasine was taken, but the charter remained beside herself; whereas, if she had intended valuably to have secured the pursuers, she would have delivered the charter, and given sasine to them while she lived; which not being done, the action becomes extinct, and the defender cannot be compelled to fulfil the

same.——This allegeance was repelled, in respect the LORDS found, That this subscribing of the charter by her, was sufficient to give to the daughters that right which was reserved to her; and the not taking a sasine thereupon was not her deed; for, by the charter containing precept therein, she was denuded, and the sasine might be taken when the daughters pleased; which not being taken while she lived, the said charter being now in the pursuer's hands, was a sufficient ground to compel the defender to make a precept, whereby they might be seased. No 8.

Act. *Cunninghame.* Alt. *Hope.* Clerk, *Scot.*

Fol. Dic. v. 1. *p.* 290. *Durie, p.* 131.

1671. *July* 11.

LEARMONTH and Her SPOUSE, *against* The EARL of LAUDERDALE.

No 9.
A father having reserved a faculty to burden his estate with wadsets or infeftments to a certain extent, and having granted a personal bond referring expressly to the faculty, this was found not a real burden, nor effectual against a singular successor.

LEARMONTH being assigned to 2000 merks of a bond of 14000 merks, granted by Sir John Swinton the father, and John his son, to the Laird of Smeiton, did pursue the Earl of Lauderdale, *super hoc medio*, that the fee of the estate of Swinton was disponed by the father to the son, with an express power and reservation to burden the same with bairns provisions or debts extending to the sum of 54000 merks, but so it is, that he had granted the bond to Smeiton, and declared it to be a part of the said 54000 merks contained in the reservation; and therefore concluded, that the Earl of Lauderdale, being donatar to the forfaultry of the son, whose estate was so affected, ought to make payment, or the estate declared liable in that sum. It was *alleged* for the defender, that the reservation and power to burden the estate being only *nuda facultas*, which never took effect by any real infeftment given to the debtor for the said sum, it did not burden the estate but the forfaulter, the King and his donatar had right thereto free of that debt; seeing where base infeftments are given by the vassal, which were never confirmed before, forfaulture does not prejudge the King or his donatar, *multo magis*, in this case, where the lands are disponed with a personal reservation, which never took effect by infeftment. THE LORDS having considered the contract of marriage, wherein the barony of Swinton was disponed, with the reservation foresaid, which did only bear a power to grant wadsets or infeftments of annualrents for the sum of 54000 merks, which was never done by infeftment, did sustain the defence, and found that neither the donatar was personally liable, nor the lands forfeited; for they found a difference betwixt lands disponed with the burden of debts contracted by the disponer, or to be contracted, in which case there needs no new infeftment, and land disponed with a reservation to grant infeftments for security of debts, in which case they cannot be affected without infeftment.

Fol. Dic. v. 1. *p.* 292. *Gosford, MS. No* 374. *p.* 183.