Ja. III.; Act 19, Parl. 1641; Act 35, Parl. 1, c. 2.* *2do*, Were there any ambiguity in the word freeholder, it is sufficiently explained by other words in the statute, wherein mention is made of mines found within *their own lands and heritages*, and *within the lands pertaining to any subject of this realm*; of the *Lord*† *of the ground*, (which, by Skene, under the word *Feodum*, is rendered proprietor of the ground,) and *Owner of the ground*. So that the question comes to be, Whether Sir Alexander Murray's lands belong to himself, or to the Duke, his superior? *3tio*, By the preamble of the Act, it appears to have been intended for the benefit of all the lieges who should undertake to discover and work mines within their grounds, and is not alone calculated for the benefit of superiors.

The Lords found that the word freeholder denotes any proprietor of lands. Dissent. *Preside.*

N.B. The narrative of the Act 1592 bears, That all mines belong to his Majesty; which contradicts Act 12, Ja. I., and is either erroneous or relates to ancient times, before Malcolm II. feued out the lands of Scotland.

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1739. *December* 11. WILKIE *against* ———.

The question here was, Whether a sasine given within burgh, by the bailies, with the town-clerk subscribing as notary, to a singular successor upon a disposition and resignation, was of itself a good foundation of a possessory judgment, without any adminicle whatsomever, such as a disposition, procuratory of resignation, or precept of sasine?

The Lords found that it was; upon this principle, that any sasine whatsomever, though wanting adminicles, is so. It is probable that the Lords would sustain a sasine within burgh without adminicles, to be good *in petitorio* as well as *in possessorio*, as resting upon the faith of the bailies and town-clerk; which distinguishes it from sasines in landward. See Dec. *Wilson* against *Stuart*, *July penult.* 1629, (reported by Durie,) and the decision there quoted.

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1739. *December* 11. CREDITORS of BALQUAN *against* MISS CUNINGHAM.

[Elch., *Faculty*, No. 5; Kilk., *ibid.* No. 2; C. Home, No. 134.]

IT being established by decisions, that a reserved faculty of burdening an estate inserted in a disposition would not create a real right upon the estate

* In the inscription of Parliament 7th, Ja. I., there are mentioned *libere tenentes, qui de rege tenent in capite.*

† This is the meaning of the word *Lord* in several statutes, Act 126, Ja. I., Act 18, Ja. II.

unless it were exerced *habili modo*, *i. e.* in a way proper to create a real burden upon the estate; the question here came to be, Whether a personal creditor of the disponer, in consequence of this reserved faculty, was not preferable to the personal creditors of the disponee? It was argued for the negative, That this was making a new sort of creditors, unknown in our law: that their Lordships had already found, and with the greatest reason, that a creditor of the faculty was no real creditor, unless he stood infeft in the estate; and to find now that he was preferable to the personal creditors of the disponee, was to make him neither a real nor a personal creditor, but something betwixt both. To this it was ANSWERED,—That the reason why such creditors were not brought in among the real creditors, was, that creditors, or purchasers, contracting upon the faith of the records, might not be deceived, since from them it could not appear whether the faculty was exercised or not. But, as in this question the faith of the records was out of the question, as the creditors of the disponee had rested upon his personal credit, and done no diligence against the estate, it was highly reasonable that Miss Cuningham, the creditor in virtue of the reserved faculty, should be preferred to them, especially as the reservation of this faculty was a quality of the right, a *modus* under which it was given: that preference among personal creditors was no new thing: among the Romams, *qui in funus crediderunt* were personal creditors, and yet preferable to all creditors whatsomever. Here it may not be improper to observe the progress of the law in the matter of reserved faculties. It was first doubted whether the faculty was at all exercised by the personal deeds of the disponer, even so as to make the disponee personally liable. But this was determined in the affirmative; and the Lords went so far as to find that the simple contracting of debt was virtually an exercise of that faculty, *23d June* 1698, *Alexander Carnegie of Kilfauns;* nay, they found that the reserved faculty accresced to a creditor whose debt was contracted before the faculty, *Eliot* against *Eliot*, *December* 16, 1698.

After that they went a step farther, and found, That the faculty, though exercised only by a personal deed, was a real burden upon the estate. But this they have altered of late years, and found that such an exercise of the faculty gave only a personal right; but by this decision they have made it a personal right preferable to other personal rights.

With respect to the foregoing decision about the reserved faculty, there is one case which seems yet to be doubtful, *viz.*:—The disponer exerts this faculty *habili modo*, by granting an infeftment upon the estate; but this is not done till after the disponee has burdened the estate with real debts, or totally alienated it. *Quære*, If, in that case, the creditor of the disponer, by virtue of the faculty, would be preferable to the creditors of the disponee or the purchaser? Lord Elchies, in the debate, said, that in that case the infeftment in virtue of the faculty would be drawn back to the date of the faculty.