1760. *July* 8.

WILLIAM, JAMES, PATRICK, and HENRY HENDERSONS *contra* CREDITORS of FRANCIS HENDERSON.

No 27.
A reserved faculty to burden with a certain sum, in a disposition of lands by a father to his eldest son; being afterwards exercised by way of legacy to younger children, these legatees were found to have no preference to the disponee's other creditors, but entitled only to compete according to their diligence.

JAMES HENDERSON, in the contract of marriage of his eldest son, disponed to him the land of Grange, 'reserving to himself power and faculty at any time 'of his life, even *in articulo mortis*, to burden and affect the said lands with the 'sum of 8000 merks to any person he should think fit.' The said James Henderson, in his latter will and testament, legated the said 8000 merks to his three younger sons; and appointed the same to be uplifted and paid at the first term of Whitsunday or Martinmas following his death.

In a ranking of the creditors of the eldest son, preference was claimed by the three younger sons for payment of their legacy. And the Court being of opinion that, in the disposition by James Henderson to his eldest son, the property was reserved to the extent of 8000 merks, they for that reason preferred the younger children.—(Afterwards altered, *see* below.)

Sel. Dec. No 165. *p.* 227.

*** The same case is reported in the Faculty Collection.

JAMES HENDERSON having purchased the lands of Grange of Barry from David Brisbane, disponed the same, in 1738, to Francis Henderson his eldest son, in his contract of marriage; reserving his own liferent, and a faculty to burden them, at any time in his life, *etiam in articulo mortis*, with the sum of 8000 merks to any person or persons he should think fit.

James Henderson, whose right was only personal at the time of his son's contract of marriage, did, in 1749, expede infeftment upon his author David Brisbane's disposition; but the son never was infeft.

In 1750, James Henderson executed a testament, in which he legated and bequeathed to his three younger sons the foresaid sum of 8000 merks, in virtue of the power reserved in the eldest son's contract of marriage.

The father died in 1753; and Francis the eldest son having contracted several debts, his creditors adjudged his estate in the years 1752, 1753, and subsequent years; and one of them obtained a charter under the great seal in 1756, and was thereon infeft. The adjudications proceeded upon special charges to enter heir to the father, and adjudged also the disposition by him to his son, and procuratory therein contained.—His younger brothers likewise obtained decreet against him in 1754, for payment of the 8000 merks in terms of the father's testament; and upon this decree they adjudged the lands of Grange of Barry in 1755.

In a ranking and sale of the estate, the younger brothers *insisted* for a preference to the other creditors of Francis, upon the following grounds:

No 27.

1*mo*, In common equity, the debts and deeds of a predecessor are entitled to be preferred to those of the successor. An heir naturally takes nothing by the death of a predecessor, but what remains over and above satisfying his debts and legacies; and the creditors of an heir ought to be in no better case than himself. This is agreeable to the Roman law, whereby a *separatio bonorum* was allowed in case of the insolvency of an heir, both to the creditors and legatars of the predecessor; *L.* 6. *pr. ff. De separationibus.*

2*do*, The reserved faculty of James Henderson the father, after he was infeft upon the precept of sasine in Brisbane's disposition, became a right of property in him, in the same manner as if a particular part of the lands had been excepted from the disposition to his son; and therefore, whether that right of property shall be considered as *in hæreditate jacente* of him, when the creditors of the son adjudged the estate upon a special charge to enter heir, or as already disposed of to his younger children, by the exercise of this reserved faculty; in either case, these younger children fall to be preferred, in virtue of their adjudications, to the creditors of the son. For if it shall be supposed, that the 8000 merks, at the time the adjudications were led against the son, was an estate *in hæreditate jacente* of the father, in the same way that a reserved property would have been, then the creditors of the father, or any claiming in his right, are preferable by act 24, Parliament 1661, to the creditors of the apparent heir; because, in terms of that statute, they have done diligence within three years after the father's death. If on the other hand, this reserved estate shall be considered as given away by the father in his own lifetime, it could not be carried by an adjudication led against the son, upon a special charge to enter heir to his father; and therefore still remained with the younger children, notwithstanding such adjudication.

3*tio*, The adjudications led by the creditors could not carry the reserved right in the father, which was neither *in hæreditate jacente* of him, nor disponed to his eldest son. All that they could carry, was the personal right to the lands, with the exception of the reserved right, for the son had only a personal right to the lands by the father's disposition; and accosdingly the adjudications specially mention and adjudge that personal right. And therefore, taking the matter in this light, there seems to be no doubt, that the younger children are preferable, for the 8000 merks, to any deriving right from the son to the disposition granted to him by his father, as the power to burden with that sum was expressly contained in the disposition. The creditors derive right from Francis, as legal assignees to the father's disposition, and they saw that it was burdened with this faculty. If, indeed, Francis had made up titles to his father, by serving heir in special to him, as infeft and seised in the lands, creditors and purchasers might have been in safety to contract with him, upon the faith of this simple and unlimited right appearing in him upon record; but the present case is different; for they saw, that he had only a personal right by the disposition, clogged with a reserved faculty.

Answered for the Creditors; It is plain, from the whole tenor of the act 1661, that it applies only to the case where the estate is left *in hæreditate jacente* of the defunct, not disponed away by him during his life, and where it is necessary for the heir to make up titles by service. In such case, the law has given the creditors of the deceased three years, during which they may establish a preference to themselves by real diligence upon the estate. But if he disponed away the estate in his own life, either to his apparent heir, or to any other person, the case does not fall within the statute; nor does it make any difference, whether, in disponing his estate in his lifetime, he reserved any powers or not. The extraordinary privilege given by the statute, applies singly to the case where the property of the estate was left *in hæreditate jacente*. No 27.

Besides, supposing the estate had really remained with James Henderson, the younger children could have taken no benefit from the act 1661; because they cannot qualify themselves to be his creditors; for he came under no obligation whatever to pay them any sum of money. The only ground of their claim is, that he left them a legacy of 8000 merks, with which he had a power to burden the estate. Upon this legacy the younger children brought a process against their brother, and obtained a personal decree against him for payment. By this decree they became creditors, not to their father, but to their brother; and they adjudged his estate along with his other creditors.

Neither is there any ground in common law, upon which this preference can be established. One of the great advantages we enjoy in this country, is the security arising from the records. Supposing a proprietor should express his intention in the clearest manner, to subject his lands to a burden; yet, if it is not so conceived, that it can appear from the record, who are the parties entitled to claim under that burden, the law will not allow it to be effectual. Such is the case of dispositions and infeftments. It is inconsistent with feudal principles, and with the security of the records, that a real right or burden should be established in persons unknown.—The same thing holds with regard to faculties reserved by disponers. Such faculty imports no more than a power in the disponer to burden, or perhaps to alienate, the lands; but that power must be exercised in a manner consistent with feudal principles, and the security of our records; otherwise it can have no effect against third parties, who have properly established a right to the lands, whether by voluntary or legal titles. He may indeed grant infeftments in exercise of the faculty; and these will be good against the disponee, or any person deriving right from him; but if no infeftment appears, and after the disponer's death, when the faculty is at an end, the disponee sells, or contracts debt, or his creditors affect the lands, a personal deed of the disponer will not be entitled to compete with creditors or purchasers infeft by the proprietor.

No man can, by a reserved faculty to burden lands, 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

No 27. 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 personal act or deed cannot be discovered from any record; and therefore it would be putting lands *extra commercium*, to give it the effect pleaded for by the younger children. The general rule is, That the preference must be determined by the priority of infeftment; and if no infeftment appears when the faculty is expired, the lands are subject to the deeds of the proprietor, without any restraint. Agreeable to these principles, many decisions have been pronounced; Davidson against the Town of Aberdeen, No 15. p. 4109; Rome against the Creditors of Provost Graham, No 17. p. 4113; Sinclair *contra* Sinclair, No 91. p. 4123; 26th June 1735, Daughters of Robert Ogilvie of Coull, No 20. p. 4125. And the case of the Creditors and Children of the Laird of Mouswell, 6th January 1677, observed by Lord Stair, No 80. p. 961, does not contradict these principles. For it was not there found, that the father's personal bond would have been a real burden upon the lands, or could have competed with the apprisers; on the contrary, it was supposed in the argument, that it could not, and that the preference of the children was owing to their prior infeftment.

Replied, None of these decisions apply to the case of a singular successor only in a personal right.—Besides, the three first of them relate to the case of a father's making a purchase to his son in fee, and to himself in liferent, under certain faculties; which is different from the present, where the father, having been *ab ante* fiar, must be considered still to remain full proprietor, by the reservation of that faculty, so far as the same extends.

'The Lords found, That the respondents were only preferable for the 8000 merks, according to their diligence,'

For the Children, *Da. Graeme.* For the Creditors, *Lockhart* & *Ferguson.* Clerk, *Gibson.*

I. C. *Fac. Col. No* 266. *p.* 495.

See Provision to Heirs and Children.

See Clause.

See Appendix.