SECT. IV.

Reserved faculties, if they operate in favour of prior creditors?—Reserved faculties are *stricti juris*.

1698. *December* 16.

ELLIOT of Swineside *against* ELLIOT of Meikledale.

No 22.
A debtor having a faculty to burden, his anterior creditors have the benefit thereof, as well as those he contracts with afterwards.

IN the case betwixt the same parties, mentioned 16th November last, (*voce* PASSIVE TITLE,) the Lords allowed the parties to be heard on this point, viz. Whether the debt libelled, due by the deceased Elliot of Meikledale, should burden the fee of the lands of Meikledale, in respect of the defunct liferenter's faculty to burden the estate, to the value of the third part thereof, notwithstanding that the father did no special deed expressing or exercising the faculty, and that the debt was anterior to the reserved faculty.

It was *alleged* for Meikledale; That he could not be liable by virtue of the reserved faculty; 1*mo*, Because the words of the faculty run *in futuro*, that it shall be leisom to the father to burden, &c.; therefore it was not the design of parties that any debt already contracted should lie as a burden upon the fee, but that it should be lawful by posterior debts or deeds to burden the same; 2*do*, The father's faculty is to burden the said lands with any debts or deeds, &c.; but so it is, that the simple contracting of debt can lay no real burden upon the land, and so cannot be reckoned any exercise of the faculty.

It was *answered* for Swineside; That the favour of creditors in competition with heirs or children, ought always to procure them preference, in so far as it was in the power of the father to prefer his lawful creditors; and therefore, a father having a faculty to burden his son's fee, is understood to do the same effectually, *eo ipso*, that he contracts debts, whereby the son becomes liable *in valorem* of the father's faculty, without any more special exercise thereof, with this caution only, that there appears no other sufficient estate to pay the debt; and so it was found 23d June 1698, John Carnegie againt Blair, *alias* Carnegie of Kinfauns, No 14. p. 4106.; 2*do*, The same ground of law operates equally, whether the debt be prior or posterior to the faculty; because the father is as much bound by prior debts as posterior, and the presumption is as strong in favour of prior as posterior creditors, that the debtor wills and desires them to be effectually secured.

It was *replied* for Meikledale; That being noways liable as heir, neither can be recalled by the faculty, unless it be exercised in the express terms, and conform to the quality thereof, which cannot be subsumed; for, if it was the will of the father to secure the creditor by the faculty, why was it not so expressed

when the faculty was framed? But the truth is, neither creditor nor debtor reflected on, or noticed the faculty. And, as to the case of Kinfauns, it differs; for there the faculty was specific, that it should be lawful for the father to burden, in favour of the heir of a second marriage. And the contracting of a second marriage might justly be reckoned an exercise of the faculty, unless the father were found to have a sufficient estate *aliunde*. But, in the case of Mr Alexander Urie against James Scot, (Appendix), the Lords, upon debate *in præsentia*, found expressly, 'That the father's contracting of debt was no exercise of a faculty to burden, unless the faculty had been expressed or adjudged by the creditor in the father's life-time.' No 22.

'The Lords found, That the pursuer's debt being anterior to the faculty, did not put it in a worse condition than if it had been contracted thereafter; and found, That the creditors of a father having a faculty to burden, have the benefit of that faculty, *eo ipso*, that they are lawful creditors, unless another estate can be condescended upon, which may effectually operate their payment; and therefore found Meikledale liable for the debt libelled, as being far within the value of the sum, wherewith the father had a faculty to burden his fee, and resolved to follow the same rule in all such cases that might occur.' *See* Passive Title.

Fol. Dic. v. 1. p. 291. Dalrymple, No 6. p. 8.

*** Fountainhall reports the same case:

November 16.—In the process, Elliot of Swyneside against Elliot of Meikledale, a creditor quarrelling a right made by his debtor to a son of the second marriage in prejudice of his debt; it was contended this falls not under the act of Parliament 1621, because he was not bankrupt at the time of his making of this right; but he offers to prove he had a moveable estate more than would have paid all his debt, which he referred to the pursuer's oath; and it had been constantly found by the Lords sufficient to sustain a right, though gratuitous, if he had at the time a visible estate *aliunde* able to pay all his debt, 22d June 1680, Grant, No 8. p. 100.; 10th November 1680, M'Kell, No 47. p. 920.; 11th December 1679, the Children of Mouswall, No 60. p. 934.—*Answered*, *Non relevat*, unless you say it is still extant, so as I may affect it; for it is not enough that he had it at the time he gave the disposition, or even at the time of his death, unless it can be effectual now, especially seeing the condescendence is not upon a land or heritable estate, but only on a moveable, which is subject to squandering, concealing, and a thousand accidents; and however the decisions run, yet it appears from Dirleton, in his notes on the Practique, Clerk *contra* Stuart, No 46. p. 907. that himself and others of the Lords differed in their judgment on this point, and thought a sufficient estate not relevant against a creditor, and that it was more reasonable that conjunct persons who had got

No 22. such rights, be at the trouble and expense of enquiring and expiscating such other estates, and affect them towards their satisfaction, than to put lawful creditors to such scrutinies and expiscations. On the other side, this would bar all commerce and freedom of bestowing any gratification upon friends and relations, if they were quarrellable, though never so responsal and solvent at the time, when *ex eventu* a creditor came to want.——THE LORDS abstracted from this point; and found him liable for the debt as an heir of tailzie and provision.

December 16.—IN the debate betwixt Elliot of Swyneside and Elliot of Meikledale, it fell to be argued, how far a reserved faculty by a father, in his son's right of fee, allowing the father to burden the lands with such a sum, accresced to a creditor whose debt was contracted before that faculty.——THE LORDS were generally clear, that *quoad* debts subsequent to that reserved power, the contracting thereof was a presumptive exercise of the faculty, though not expressly mentioned to be in right and by virtue thereof, as was found on the 23d of June 1698, betwixt Blair of Kinfauns and his Sister, No 14. p. 4106. though there was a contrary decision instanced betwixt James Scot and Mr Andrew Ury in 1692, (APPENDIX), which required a specific application; otherwise found the faculty personal and extinct, unless either applied or affected by diligence. But the LORDS were so far from regarding this in Elliot's case, that they found it accresced even to an anterior creditor, though he could not lend his money on the faith of that faculty, which was not then in being; but the LORDS thought reasonable to subject these faculties to all their debts, whether prior or posterior. *See* 21st June 1677, Hope-Pringle *contra* Hope-Pringle, No 12. p. 4102.

Fountainhall, v. 2. *p.* 15. & 26.

1739. *January* 2. ANDERSON *against* ANDERSON.

No 23.

IN a disposition to an eldest son, the father having reserved a faculty to burden the disponee with the sum of 4000 merks in favour of a younger son, to be paid at the first term after the father's decease, or the younger son's marriage, did, many years after this younger son was married, exercise the faculty in his favour, by granting him a bond of provision, obliging his eldest son to pay the said 4000 merks, with interest *retro* from the said marriage. The eldest son objected to the clause of annualrent; and insisted, That there was no debt till the same was created by the father's exercising his faculty, consequently no annualrent *retro*, which would be *accidens sine subjecto*.——THE LORDS found no annualrent but from the date of the deed in exercise of the faculty. *See* APPENDIX.

Fol. Dic. v. 1. *p.* 293.