No 160.
of marriage, obliging the husband 'to 'satisfy and 'pay to his 'son already 'procreated, 'and to his 'other sons 'that shall 'exist, the 'sum of '18,000 'merks, to-'gether with 'half of the 'conquest,' imports only a provision of succession.

'or to be procreated of the marriage, the following provisions, viz. to the son 'already procreated, and to him and the other sons, in case others shall exist 'of the marriage, the sum of 18,000 merks; together with the just and equal 'half of all sums of money, goods and gear, whether heritable or moveable, 'which the said James Strachan should happen to conquest and acquire during 'the said marriage; and the said James Strachan became bound to satisfy and 'pay these provisions at the first term following his death, and that of Katha-'rine Dunbar his spouse, with annualrent and penalty,' &c.

James Strachan having died insolvent, his only son Ludovick Strachan adjudged the estate for security of the said sum of 18,000 merks; and, in a ranking and sale, it was objected by the other Creditors, that he could draw nothing till his father's debts were paid.

"THE LORDS found, that the clause imported only a provision of succession."

It was *observed*, That the words 'to satisfy and pay' seemed to be improperly applied in this contract. With regard to the conquest to which they are applied, as well as to the liquid sum, they cannot be taken in their proper sense; but must mean only a provision of succession. And if the words must be confined to this sense with regard to one of the articles, a Judge cannot take upon him to give them a more extensive sense with regard to the other; especially where the consequence of such interpretation would be to put a gratuitous creditor upon an equal footing with one for a valuable consideration.

Fol. Dic. v. 4. *p.* 188. *Sel. Dec. No* 64. *p.* 84.

*** The Faculty report of this case is No 105. p. 996., *voce* BANKRUPT.

1771. *January* 23.

JAMES CHALMERS, Writer to the Signet, *against* ROBERT HAMILTON of Bourtriehill.

No 161.
Provisions to children executed in consequence of a reserved faculty, and inserted as a burden on an heritable bond granted by the father to one of his creditors, found effectual against personal creditors.

HUGH MONTGOMERY of Broomlands granted a bond of provision, dated 18th February 1727, obliging himself, his heirs, &c. to pay to his spouse for her liferent, and to the heirs and bairns of the marriage in fee, 10,000 merks Scots.

Three daughters, Jean, Elizabeth, and Mary, and a son Charles, existed of this marriage; and by a deed, dated 24th July 1751, Broomlands gave and appropriated 2,000 merks of the said sum to his daughter Elizabeth, and the like sum to his daughter Mary, in satisfaction of all they could claim through his death.

By a deed, dated 10th June 1763, Broomlands disponed to his son Charles his whole estate, reserving his own liferent, the burden of his debts, a liferent provision to his wife, and the burden of making payment of 2,000 merks to each of his daughters Jean and Elizabeth, and the like sum of 2,000 merks to

Mary and Elizabeth Dicksons, his grandchildren by his daughter Mary; and which were declared to be in satisfaction to them of their interest in the bond of provision above mentioned. No. 161.

Charles the son, in 1764, made a purchase, from Hamilton of Bourtriehill, of lands in Jamaica to the amount of L. 5,000; for which it was agreed that Broomlands the father should grant an heritable bond. Upon the 25th March 1764, he accordingly, with consent of his son, granted an heritable security over his lands of Broomlands, &c. but under the condition that the said security should not affect the rents during his life, nor prejudice the annuity to his wife, nor be any bar or hinderance to his providing Jean and Elizabeth his daughters in 2,000 merks Scots each, and Mary and Elizabeth Dicksons his grandchildren in the like sum between them; 'all of which should be consi-'dered as prior and preferable to the said heritable security, and infeftment to 'follow thereupon.'

Hugh and Charles Montgomery died. The estate was brought to judicial sale, and purchased by Bourtriehill at the price of L. 4220; who understanding that the above provisions to the daughters and grand-daughters were preferable debts, paid them up and took assignations. A ranking having ensued, Bourtriehill produced the heritable security, dated 14th June 1764, with the interests of the daughters and grand-daughters, and assignations from them, and claimed to be preferred.

Compearance was at the same time made for James Chalmers as assignee to a personal bond, of date 14th October 1751, by Hugh Montgomery of Broomlands, for L. 30 Sterling; and thereon he insisted he was entitled to be ranked preferably to the children's provision upon the sum reserved for that purpose.

THE LORD ORDINARY pronounced the following judgment: "Having considered that the debts secured by infeftments upon the lands of Broomlands would exhaust the price thereof—though the 6000 merks Scots claimed by the common debtor's daughters and grand-daughters were laid out of the question, and that the whole debt of L. 5000 Sterling contained in the heritable bond granted by the common debtor to Robert Hamilton is admitted to be an onerous debt, and preferable to the debt founded on by James Chalmers, and that the exception in the said heritable bond is personal in favour of Hugh Montgomery's daughters and grand-daughters—repels the objections pleaded by James Chalmers against the said heritable bond; and finds that his debt is not entitled to be ranked upon or preferable to any part of the sums secured by the infeftment following upon said heritable bond."

In a reclaiming petition, Mr Chalmers *pleaded*:

The necessary effect of granting the bond of provision mentioned, and of executing the heritable bond with the reserved faculty, was to convey to the children and grand-children the 6000 merks so excepted. This was a gratuitous alienation in favour of conjunct and confident persons, to the prejudice of

No 161. prior onerous creditors, and was therefore liable to challenge upon the act 1621.

The objection maintained, that the bonds of provision were granted in implement of the obligation in 1727, was not sufficient. That obligation was general, and gave no *jus crediti* to the children; they could not, in consequence thereof, have compelled their father to grant these special bonds of provision; but as they must have made up their titles to this sum by serving heirs of provision, they would of course have been postponed to all his onerous debts, whether prior or posterior.

The bond to Mary and Elizabeth being granted in July 1751 was no doubt prior to the date of the petitioner's debt; but as it was not pretended that it had been then delivered, it must still be held a posterior deed; it being a fixed rule as to bonds of provision, that they could only be considered as effectual from the time that the actual delivery shall be proved. 14th November 1676, Inglis *contra* Boswell, No 236. p. 11567. 24th July 1701, Christy, No 239. p. 11571. And as to the bond to Jean the eldest daughter, as it was mentioned for the first time in the general disposition in favour of the son, 10th June 1763, it was several years posterior to the petitioner's debt.

The objection, that it was the granting of the heritable security for L. 5000, and not the bonds of provision, which rendered Broomlands insolvent, was equally ill founded; for although these bonds were executed before granting the heritable security, yet they were not at that time effectual debts against the granter, who might have destroyed them whenever he had a mind. The heritable security contained reservations in his favour more than sufficient to pay all his anterior debts; and it was only by trenching upon these, and allowing the bonds to become effectual debts, by keeping them uncancelled by him till his death, that his insolvency was created.

The ground, that the exception in the heritable bond was personal in favour of the daughters and grand-daughters, was not founded in law. The whole of the reservations contained in the heritable bond were at the father's disposal, and under his power; he was virtually to have possession of the fund of 6000 merks during his life; he was to have the entire disposal of it, by granting bonds of provision, or revoking them at pleasure; and after his death, if he chose, it was to descend to his children and grandchildren. This reservation therefore was a faculty with which the father was substantially vested; and it was an established principle of law, confirmed by a train of decisions, that no right or reservation whatever could be taken by a person either in his own favour, or in favour of his children, to take effect after his death, and subject in the mean time to his disposal, which was not affectable by the diligence of creditors. For example, an heir's right of challenge upon deathbed—the right to reduce on minority—of revoking a donation *inter virum et uxorem*—a faculty to burden with debts; which were all as much personal as any right that could be conceived; 9th February 1700, Liberton *contra* Countess of Rothes, No

87. p. 971. Holding reservations, such as the present, to be merely personal in favour of those who were mentioned in the reserving clause, and not attachable by the granter's creditors, would be productive of the most dangerous consequence. A person might thereby hold the possession of an estate during his life, have the power of disposing of it to his children, or any of his relations, after his death, or of providing younger children in the most liberal manner, whilst his lawful creditors, after his death, would in that way be totally excluded. No 161.

Independent of the legal challenge upon the act 1621, as the bonds of provision were undelivered, and not payable till after the father's death, the children had nothing more than a *spes successionis*, which must of course be subject to all the father's deeds and onerous debts. By delivering a bond of provision, and making it payable upon a day certain, the father might no doubt have conferred upon the children a real *jus crediti*, which would have entitled them to compete with onerous creditors that were not prior; but this had not been done; and the point had been decided, 2d July 1754, Creditors of Strachan *contra* Strachan, No 160. p. 13053.

The last objection, that a faculty of this kind was understood to die with the person who reserved it, and that the petitioner had taken no steps to make his right effectual during Hugh Montgomery's life, was easily answered. It was a fixed point, that the bare contracting of debt was an effectual exertion of a reserved faculty such as the present, though not expressly referred to; and it had also been found, that a faculty, upon being reserved, accrued *ipso jure* to prior creditors, and entitled them to take the benefit of it, in the same manner as if they had got bonds bearing an express reference to that power. 16th December 1698, Elliot *contra* Elliot, No 22. p. 4130. 19th February 1725, Creditors of Rusko *contra* Blair, No 18. p. 4117.

Mr Hamilton *answered*;

The provisions, in the present case, could in no view be considered as fraudulent alienations posterior to the contraction of the petitioner's debt; they had all an existence as far back as the 1727; and those to the two married daughters had been completed by the deed 24th July 1751, four months prior to the existence of the debt claimed. This last deed being in favour of daughters married and forisfamiliated, was to be presumed to have been delivered of its date; so that the decisions referred to, which related to children *in familia*, did not apply. Though the settlement 10th June 1763, and heritable security in 1764, by which these provisions were reserved, were posterior to the petitioner's debt, yet they were merely deeds in implement of provisions already granted; no new conveyance or alienation in defraud of a prior creditor; so that the provision to the unmarried daughter Jean, though not ascertained till the 10th June 1763, must equally with the two former, as in implement of the bond 1727, be drawn back, and considered as of a prior date to the debt in competition.

No 161. Though provisions to children might, in certain cases, be reduced at the instance of prior creditors upon the act 1621, yet this could only take place where the insolvency of the granter, at the time of making these provisions, was fully proved. There was no insolvency in the present instance at the time alluded to; nor had it been created by these provisions, or existed, till the separate transaction. The granting of the heritable bond in 1764, by which the estate was carried off, in preference to the the latent personal debt due to the petitioner, though not to the provision, made a special burden upon that transaction.

It had been found by the Lord Ordinary, that the petitioner was at any rate excluded by the heritable security for debts beyond the value of the subject, and that the exception in that security was personal in favour of the daughters. The petitioner's argument on this head was founded on the assumed principle that the destination of this subject in favour of children did not hinder creditors from affecting it, every right and subject being liable to their diligence. But this was not a just description of the nature of reserved faculties, and was confounding two things extremely different, viz. an indefinite reserved power to burden with a certain sum of money, without saying for what purpose, and a reservation for certain specific purposes. In the first case, there might be room for a creditor to claim upon the implied exercise of the faculty by contracting debt; but where a special purpose and destination was expressed, there was no room for implying any other thing than what was set forth in the transaction. This distinction, and that a faculty such as the present was merely personal, was well explained, 12th July 1699, Creditors of Kinfawns *contra* Relict and Children, No 21. p. 489. See No 14. p. 4106.

The faculty, therefore, in the present instance, being special and personal, was such of course as no other creditor could derive any advantage from. Independent also of its being incompetent for the petitioner to claim the benefit of this exception, it was *jus tertii* for him to challenge its being made in favour of the children. He was, at all events, cut out by the preferable debts; and hence, though he should prevail in such challenge, it would do him no good, as the only effect it could have would be to make the whole subjects go to the creditors, as if no such exception had been contained in the bond. The dangerous consequences figured were chimerical. If a person executed a deed, and reserved very ample powers, the radical interest was still in him. If, on the other hand, he reserved only certain powers, such as to provide wife or children, creditors and others contracting with him could see what they had to trust to; and if they contracted with one who was totally denuded of his estate, they had themselves alone to blame.

The petitioner's remedy, if he ever had any, was now at an end; he had never insisted for any exercise of this power in his own favour during the life of the person in whom the quality was inherent. A quality of this kind could not

transmit to heirs; and, for the reasons already suggested, there was no room for the implied exercise by the simple contraction of debt. No 161.

The last argument by which the right of challenge upon the act 1621 was abandoned, and the proposition maintained, that the children had but a *spes successionis* to their father, and must be postponed to his onerous debts, had no legal foundation. By these bonds of provision, the children were creditors not only *ex figura verborum*, but in substance and effect. The term of payment being suspended did not hinder them from being creditors; they had no occasion to make up any title by service or otherwise, in order to draw their provisions; so that the circumstance upon which the petitioner's proposition was assumed, did not exist.

THE LORDS refused the petition, and remitted *simpliciter* to the Ordinary.

Lord Ordinary, *Kennet.* For Chalmers, *Blair.*
For Hamilton, *Ilay Campbell.* Clerk, *Tait.*

R. H. *Fac. Col. No 65. p. 193.*

1794. *November 26.* CANNAN *against* GREIG.

No 162.

A WIFE having, in a postnuptial contract of marriage, disponed lands to her husband in liferent, and to the heirs of the marriage in fee, a clause was subjoined, granting power to the husband, 'if he shall see cause, to sell the lands, 'or burden them with debt at his pleasure, in every respect as if he had been 'unlimited fiar, on condition that he granted security to provide the heir in 'L. 2000, payable at his death.' The disponee contracted debts beyond the value of the estate, and died without granting bond or security for the L. 2000 to his heir. THE LORDS found the heir preferable for that sum to all the onerous creditors of the disponee.

Fol. Dic. v. 4. p. 188. Fac. Col.

*** This case is No 60. p. 12005. *voce* PROCESS.

See Cunningham against Cunningham, No 139. p. 13024.

Provisions to children, how far safe against a reduction upon act 1621. See BANKRUPT.

Bond of provision not effectual until delivery or death. See DELIVERY.

Not presumed delivered of the date. See PRESUMPTION.

When understood delivered. See PRESUMPTION.