No 57. defender might either pursue for the same, reserved to him in the disposition and sasine, or otherways retain the same, *contra quodcunque*.

Newbyth, MS. p. 70. and 82.

*** Stair also reports the same case:

1666. *July* 10.—THERE was a disposition of some tenements in Dunbar, containing this provision, that the buyer should pay such a sum of money to a creditor of the sellers, under the pain and penalty, that the said disposition should be null. Infeftment followed upon the disposition, and the land is now transmitted to singular successors, who pursuing for mails and duties. It was *alleged* for the creditor by the reservation, that this reservation being a real provision, the creditor must be preferred to the mails and duties, ay and while the sum be paid. It was *answered, first*, That this provision was neither in the charter nor sasine, and any provision in the disposition could only be personal, and could not affect the ground nor singular successors, seeing no inhibition nor other diligence was used on it before their right. *2dly*, Albeit it had been a provision in the investiture, yet it could have no effect against the grounds; which cannot be affected but by an infeftment, and upon a provision, neither action nor poinding of annualrents, nor mails and duties could proceed. It was *answered*, That real provisions must necessarily affect the ground, and there can none be more real than this, not only being a condition of the disposition, but also containing a clause irritant.

THE LORDS having first ordained the infeftment to be produced, and finding that the sasine proceeded upon the precept in the disposition, without charter, being within burgh, the LORDS found that the provision could give no present access to the mails and duties, until the clause irritant were declared; or that it were declared, that they should have like execution by virtue thereof against the lands, as if it were in the hands of the first buyer, which the LORDS thought would operate, but had not the occasion here to decide it. See the sequel of this case, No 53. p. 2727.

Stair, v. 1. p. 394.

No 58. If a procuratory of resignation is disponed by a father to his apparent heir, with the burden of provisions in favour of the rest of the children, whereupon the heir is

1673. *February* 20.

DAVID MORISON, Second Son the Laird of Dairsie, *against* HIS CREDITORS Comprisers.

IN a double poinding raised at the instance of the Tenants against the said David and his father's creditors; it was *alleged* for the said David, That he ought to be preferred to other creditors, because the lands and rights which they had comprised were affected with his debt of 10,000 merks, in so far as the disposition of the lands of Dairsie, bearing a procuratory of resignation made to Sir George his father who was common debtor, was assigned by him to his

No 58.
infeft, the children will be preferred to all comprisers for debts contracted thereafter.

eldest son, with express provision, that the fee in the son's person who was apparent heir, should be burdened with L. 40,000 to the rest of the children; likeas, the said procuratory, by a charter under the Great Seal, bearing expressly, that burden and provision; for fulfilling whereof, he had granted bond to the said David for 1000 merks, as his part of this provision in favours of the rest of the children, whereupon he had comprised. It was *alleged* for the rest of the comprisers, That they ought to be preferred, because the said David's right was founded upon a resignation, which did only bear a power to burden the said estate with the sums above written, which was but *mera facultas*, reserved to the father to burden or not as he pleased, and the father having contracted debts before he did grant any particular infeftment upon his obligement, he could not exercise that faculty thereafter to their prejudice, especially as to the father's liferent, which was expressly reserved out of the father's right and assignation made to his eldest son, containing the power to burden the estate in favours of his children, whereof he was never denuded before the creditors' comprising. It was *replied*, That it being lawful for fathers to provide for their children, and their provisions not being latent deeds, the same can never be reduced at the instance of any creditors for debts contracted thereafter. But so it is, that the father Sir George, when he had only right by a disposition and assignation, did assign the same in favours of the eldest son, with the burden of the provision to the rest of the children; and accordingly, this eldest son was infeft under the Great Seal, which was never *nuda facultas*, or a latent deed, but did affect the infeftment of fee, which was never in the person of the father, but in the son's, only affected as said is. THE LORDS did prefer the said David, and found, that the infeftment made by the father to his eldest son was not, by a naked reservation, to burden, in which case, before that faculty was exercised by giving of a real infeftment, the creditors having comprised for lawful debts, would have been preferred; but the assignation and infeftment made to the son being *per verba de presenti*, and a present binding of the fee, they found that it gave a right to the children for their provisions. But in respect that the father's liferent was reserved, both out of the fee made to the apparent heir, and the provisions made to the rest of the children, they did prefer the rest of the comprisers during the father's lifetime.

Fol. Dic. v. 2. p. 66. Gosford, MS, No 579. p. 322.

1676. *December* 13. INGLIS *against* INGLIS.

No 59.
Although a right was granted in consideration of undertaking to pay

MR CORNELIUS INGLIS having granted a bond to Mr John Inglis, for a sum due to himself, and for his relief of cautionries for the said Mr Cornelius, whereby he was obliged for his surety to infeft him in certain lands to be possessed by him, in case of not payment of the annualrent due to himself, and the report-