place of Courton, and so could extend to no other, unless they proved an union, dispensation, or erection, into a barony; and which was found relevant. No 60.

1687. *November* 23.—THE Lord Ballenden's reduction against Dundass of Arniston, Stobs, and John Preston's other creditors, mentioned 16th February 1686, was reported by Edmonston; and the LORDS thought the reason relevant on the act of Parliament 1621, that Arniston could not assume personal creditors before Ballenden, nor prefer any debts paid by himself since the disposition, but only those to which he had right at that time; and therefore preferred Ballenden, who had inhibited, the rest, though his inhibition was found null *quoad* one of his debts. There was cited for Ballenden, this decision from Stair, Newman, No 2. p. 880.; and Crawford, No 234. p. 1196. The words of the interlocutor were: The Lords found that Arniston by his back-bond could not prefer one creditor of Preston's to another but conform to their diligence; but that as he might have received payment of all his own sums, so he might prefer himself as to all debts due to himself at the time of the disposition of the lands of Preston, or at the time of the disposition of the lands of Auchindinnie, which were both anterior to his back-bond; and therefore sustain the reason of reduction at my Lord Ballenden's instance against Stobs, and the other creditors therein called, founded upon Ballenden's prior diligence; and in respect thereof prefer him to them, notwithstanding of the preference given to them by the foresaid back-bond; and ordain the Lord Ballenden to be ranked accordingly.

Fountainhall, v. 1. *p.* 322. 376. 403. & 481.

1687. *June* 14. BAILIE MARJORIBANKS CREDITORS, Competing. No 61.

IN the case of Alexander Chaplain writer, and Bailie Charles Charters, and other creditors of Bailie Marjoribanks, it was debated, that a clause in a disposition of a tenement of land, bearing in the procuratory of resignation, that it was with the burden of his other children's provisions, was only personal, and not real; to which opinion the President inclined: Yet many of the Lords thought what was in any of these three clauses, viz. the dispositive clause, the procuratory of resignation, or in the precept of sasine, became a part of the real right: And accordingly the LORDS found it to be real, from the conjecture of a posterior clause, making it with the burden of any farther augmentation or provision to his bairns.

Fol. Dic. v. 2. *p.* 65. *Fountainhall, v.* 1 *p.* 456.

*** Sir P. Home reports this case.

1687. *July.*—JOHN MARJORIBANKS having disponed his estate to Joseph Marjoribanks his eldest son, with this provision, that his son should make payment

No 61. to the children of the particular sums contained in their bond of provision, made to them of the date of the disposition, and reserving power to him, at any time during his lifetime, to burden his son and the lands disponed, with the payment of any further sums he should destinate for the provisions of his children, by bond, testament, or otherwise, or to change, alter, or innovate the disposition as he thought fit; and in a competition amongst the creditors for the rents of the lands, it being alleged for Bailie Charters, who had acquired right from the children to their bonds of provisions, that he ought to be preferred to other creditors, who had adjudged the lands after John Marjoribanks' decease, in respect that the disposition being burdened with the childrens' provision, they did really affect the lands, and so being a conditional real quality that affected the fee, it was effectual against singular successors and personal creditors that had done no diligence against the father the time of the granting the disposition; and in the case of the Creditors of Mowswell, No 11. p. 4102., where a father having disponed his estate to his eldest son, reserving power to himself to burden the lands with a sum to his other children, and having given them infeftment for security of their provisions, the LORDS found the childrens' right preferable to posterior public infeftments; much more in this case where the provision is not only the conditional quality of the right, but expressly inserted in the provision of resignation and sasine following thereupon. *Answered*, that all clauses contained in dispositions and infeftments following thereupon, are not real burdens affecting singular successors, such as clauses of warrandice and of that nature; as also, if the infeftment bear a provision, that the person infeft should pay a sum, or perform certain deeds to a third party, this will import only a personal obligation upon the granter of the right and his heirs, and will not be sustained against singular successors; but much more in this case, seeing the particular sums is not exprest; and the case of the Creditors of Mouswell does not meet this case, because their right was expressly burdened with the childrens' provisions; whereas in this case the disposition did bear only, that the son should make payment to the children of their provisions, which did import only a personal obligation upon the son to pay the children, but was not a real burden affecting the lands. *Replied*, that whatever may be pretended in the case of personal provisions, such as clauses of warrandice and others of that nature, even in real rights, that these should not affect singular successors; but it is otherways when lands are disponed with an express quality and condition, for payment of a debt, or performing of a deed to a third party, in which case such causes do really affect the lands, and are effectual against singular successors, and are equivalent as if the lands had been expressly disponed with the burden of the same, and was decided Cuming against Johnston, No 57. p. 10234. THE LORDS preferred Bailie Charters, and found, that the clause in the disposition, for payment of the childrens provisions were real, and did effect the lands in prejudice of a singular successor.

Sir P. Home, MS. v. 2. No 936.

No 61.

*** Harcarse reports this case:

1687. *February.*—BAILIE MARJORIBANKS having disponed his estate to his eldest son, with a provision in the procuratory of resignation, that he, the son, should pay the younger childrens' bonds of provision; the children having done no diligence against the eldest son, nor the father's estate, within three years after his decease, the son's creditors adjudged. It was *alleged* for the children in a competition, That the clause in the procuratory made the provisions a real burden and security upon the lands.

Answered, The clause being personal, obliging the son to pay, and not burdening the disposition or lands disponed, cannot be considered as real to prefer the younger children to the son's creditors, or the father's other creditors; and it is ordinarly to cast in personal obligements in a procuratory of resignation.

THE LORDS found the clause not real, or burdening the disposition, and preferred the son's creditors.

It was thereafter *alleged* for the children, That by a posterior clause it was provided, that the disponer might further burden the lands with another sum, which imported, that the former provision was looked upon as a burden, upon which the interlocutor was stopped. And in June the contrary was found, viz. that the clause made the childrens' provision a real burden.

Harcarse, (ALIENATION.) *No* 147. *p.* 31.

1714. *June* 30.

The CREDITORS of ROBERT Ross of Auchlossin, Competing.

No 62.
The Lords preferred debts, with which a disposition and infeftment of an estate were burdened, to all debts upon that estate, contracted by the receiver of the disposition; but preferred the preferable creditors among themselves, according to their respective diligence.

THE deceased Robert Ross of Auchlossin, having in the year 1702, disponed his estate to his eldest son Captain Francis Ross, with the burden of all just and lawful debts, whereupon the son was infeft; and in the year 1707, several Creditors of both father and son, having adjudged his estate; in a ranking and sale thereof, pursued by Robert Gordon, merchant in Bourdeaux, the Creditors of the father were preferred to the son's Creditors, in respect the disposition, charter and infeftment by the father, in favour of his son, is expressly burdened with the father's debts. But in a competition among the father's own Creditors, the LORDS found the Creditors who had adjudged preferable to those who had not:

Albeit, it was *alleged* for the Creditors who had not adjudged, That those who had used diligence, could not affect the said estate by their adjudication, but, as it stood in the son's person, which was, with the burden of all the father's debts, which being real, must still affect the fee and right, as it stood in the person of the son, though it went through never so many hands. And *quorsum*