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-

No 59.
certain debts, the creditors were found to have no real right, but only a personal action.

ing discharges from the creditors to whom he was engaged, and whereupon the said Mr John was infeft by a base infeftmen;

The said Mr Cornelius, in respect his son Mr Patrick had undertaken to pay his debts, did dispone to him his lands, whereupon the said Mr Patrick was infeft by a public infeftment.

The said lands being thereafter comprised from the said Mr Patrick, and there being a competition betwixt the said Mr John Inglis, and diverse other creditors of the said Mr Cornelius and his son Mr Patrick, who had comprised the said lands from the said Mr Patrick, the LORDS found, that Mr John Inglis was preferable to the said other creditors, in respect, though their infeftments upon their comprisings were public and the said Mr John his infeftment was holden of the granter, yet the said Mr John's right was public as to Mr Patrick, in so far as the said Mr Patrick had corroborated the same, and before the said comprisings, had made payment to the said Mr John, of certain bygone annualrents in contemplation of his said right, and had taken a discharge from him relating to the same; so that his right, being public as to Mr Patrick, was public as to those who had right from him; and infeftments holden of the granter, being valid rights by the common law, and by act of Parliament and statute invalid only as to others, who had gotten public infeftments, in respect of the presumption of fraud and simulation; the said presumption *cedit veritati*, and in this case is taken away in manner foresaid.

THE LORDS found, that notwithstanding that the right was granted to Mr Patrick, upon the consideration foresaid, and for payment of the debt therein mentioned, that the creditors mentioned in the same, had not a real interest in the said lands, but only a personal action against the said Mr Patrick, in respect the said right was not granted to him for their use and behoof, neither was it expressly burdened with their debts; and therefore the LORDS did find, that all the creditors, both of the said Mr Cornelius and Mr Patrick, who had comprised within year and day, should come in *pari passu*.

Dirleton, No 399. *p.* 195.

*** Gosford's report of this case is No 50. p. 2119.; *voce* CAUTIONER.

No 60.
A disposition bearing, both in the procuratory of resignation and precept of sasine, this clause, that the receiver should be obliged to pay all the

1685. *November.* 19. LORD BALLANTYNE *against* ROBERT DUNDAS.

THE Lord Ballantyne being creditor to the deceast Lord Preston in the sum of L. 10,000, he intented action of reduction against Robert Dundas of Arniston, of a disposition granted by ——— Preston, son and heir to the said deceast Lord Preston, wherein he did insist upon the reasons following, viz. That the disposition was granted by the said Preston, within year and day after the defunct's decease, to the prejudice of the pursuer, who was a creditor of the de-