

No 56.

to any person his author pleased to nominate; *Ita est*, he hath assigned the right to the defender, so that it is a real burden affecting the land, even against this singular successor, and included in his author's infestment. The pursuer *answered*, That albeit it be in the infestment, yet it is no part of the infestment or real right, but expressly an obligation to pay without any clause irritant, or without declaring that the disponder's infestment should stand valid, as to the right of that sum:

The which the LORDS found relevant, and repelled the defence, but superceded execution, until some time that the defender might use any means he could for making this sum to affect the land.

*Fol. Dic. v. 2. p. 66. Stair, v. 1. p. 207.*

No 57.

Lands were disposed with a provision in the disposition and infestment, that a sum of money should be paid by the receiver of the disposition to the disponder or any he should name, and in case it should not be paid, the right should be void. It was found that the clause and provision were effectual against singular successors.

1666. November 7.

CUMING against JOHNSTON.

SOME lands in Dunbar being disposed by one Adamson in favours of Johnston, with a provision contained in the disposition and infestment, that a sum of money should be paid by the receiver of the disposition to him, or any he should name; and in case it should not be paid, the right should be void; and the said lands being thereafter appraised, it was found against the complainer, that the said clause and provision were real; and that the person named, and having right to the sum and benefit of the said clause, though before declarator he could not pursue a removing, yet he has good interest to pursue for the mails and duties for payment of the said sum; and being *in possessorio*, to retain the mails and duties for payment of the said sum *pro tanto*; and that the said provision, and such like, are effectual against singular successors. It was *urged* by some, That all that could be done upon that clause was, that a reduction of the right might be pursued thereupon; but it was *answered*, that it being *actum*, that the lands should be burdened with that sum, and if nothing more had been exprest, but that it is provided that the said sum should be paid, the said provision being real, would have furnished the said action and exception, for payment of the said sum out of the mails and duties; and therefore, the subjoining the resolute clause, being *ad majorem cautelam*, could not be prejudicial nor retorted in prejudice of the disponder nor his assignee. This question was hinted at but not decided in the said debate, viz. If the declarator should be pursued upon the said clause for annulling the right, if it should operate in favours of the assignee, the lands not being disposed to him but in case of contravening, being to appertain to the disponder and his heirs, in case the right should be rescinded? It is thought, that the provision being assigned, the whole benefit and consequence of the same are disposed; and consequently the assignee, in the case foresaid of annulling the right, may pursue the heirs of

the disponent and receiver of the right and his successor, to denude themselves of the right of the said lands.

No 57.

Reporter, *Newbyth*.

*Fol. Dic. v. 2. p. 66. Dirleton, No 42. p. 16.*

\* \* \* This case is also reported by Newbyth, under the names of Canham against Adamson.

1666. *July 10.*—THOMAS CANHAM having comprised a tenement of land in Dunbar, from Joseph Johnston *in anno* 1662, and being thereon infest, and as heritor of the said tenement, warned James Adamson, possessor of the said land, to remove at Whitsunday 1662. Whereupon, in June 1664, he obtains decret of removing; and now having intented action of violent profits of the said tenement, being the double avail within burgh since the warning, in which process this defence is proponed, viz. That he cannot be liable for the mails and duties, because in the disposition of the said tenement by George Adamson to Joseph Johnston, one from whom the pursuer comprised, there is an express provision, that the said Joseph Johnston and Christian Adamson shall pay and deliver to the said George Adamson, or his assignees, under the pain of annulling of the said disposition, the sum of L. 600, whereunto the defender is made assignee. Whereunto it was *answered*, That the foresaid provision in the said disposition, is only a ground of a personal action against Joseph Johnston, seeing they are only obliged to make payment thereof personally, and cannot meet the compriser. *2do*, The foresaid provision cannot be a ground for returning the mails and duties, seeing it is not of the nature of an annualrent, or right of property, otherways it would have defended in the removing, where it was proponed and repelled. And, although it were of the nature of an annualrent, as it is not, he cannot brook the mails and duties by virtue thereof, unless he had pursued a pointing of the ground, and *habili modo*, had affected the lands therewith. *3tio*, The defender is a violent possessor, and so cannot be in a better condition than if he had removed, *quo casu* he could never have retained the mails and duties, but would have been liable to the violent profits. THE LORDS repelled the defences, in respect of the replies and clause contained in the disposition, which is found only a ground of declarator; and therefore decerns, reserving the defender's action of declarator as accords.

1666. *November 7.*—In the action mentioned 10th July last, Canham against Adamson, for mails and duties, it was farther *alleged*, That the reservation contained in the disposition being likewise contained in the sasine, must likewise affect the tenement; so as albeit the right pass through a thousand hands, it must always be with the burden of the reservation. THE LORDS found, That, albeit it was only personal, being contained in the disposition, yet being likeways in the infestment, the same behooved to be real; and that the

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. Infestment 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 infestment, and upon a provision, neither action nor pointing 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 infestment 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 disposed 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 pointing 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