*** The ſame caſe is thus reported by Dirleton:

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1676. *February* 22.

THE LORDS ſuſtained a declarator, at the inſtance of a creditor, to hear and ſee it found, That certain ſums, provided by a father to his children, after the contracting of the debt, ſhould be liable and ſubject to execution for their debt; and that they ſhould be liable themſelves *in quantum lucrati*, though there was not a reduction intented of the ſaid rights, upon the act of Parliament 1621; which the Lords were moved to do, not only becauſe they thought, that the ſaid declarator is a reduction upon the matter, but the rather that the ſummons were offered to be proven by the defenders own oaths: And in effect, as to the moſt of the ſums, they were not a ſubject of reduction; ſeeing the debts were not all aſſigned to the children; but the bonds being blank in the creditors name, the father had filled them up in the name of the children; and as to ſuch as were aſſigned, for the moſt part, they were renewed in the name of the children; the former bonds being given back, with aſſignations to the ſame.

1676. *July* 6.

THE LORDS found, That a father having aſſigned certain bonds, for proviſion of his children, the creditors have not only an action of reduction competent to them, but a perſonal action to refund the ſums uplifted, upon the bonds, if the aſſignation ſhould be found to be fraudulent: But did reſerve to the defenders to debate, whether the ſame was fraudulent; the defenders having alleged, that the ſame were granted by their father, having a plentiful fortune for the time, ſo that he might lawfully provide his children.

Reporter, *Newbyth*.

Dirleton, No 344. & 373. *p.* 164, & 182.

1677. *January* 5. & 6.

EARL of QUEENSBERRY *againſt* LADY MOUSWELL and HER CHILDREN.

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In a reduction upon the act 1621, at the inſtance of prior creditors, of bonds of proviſion granted to children; this defence was found relelevant, that the father had ſufficiency of eſtate at the

IN a multiplepoinding raiſed at the inſtance of the tenants of Mouſwell, againſt the Earl of Queenſberry and other Creditors, as having right by compriſings to the eſtate of Mouſwell; and the old Lady Mouſwell, as being infeft in her liferent of a yearly annuity of 1000 merks, for which ſhe had obtained a decreet *in foro contradictorio*, and thereupon had compriſed and was in poſſeſſion; whereupon ſhe craved preference, both as to the reſting bygones and in time coming. It was *alleged* by the creditors, That, by a minute ſubſcribed, he Lady had reſtricted her annuity to 800 merks yearly, and could crave no preference. And, as to the decreet, it could not militate againſt them, becauſe it contained a ſpecial reſervation to the creditors, to prove, that within a juſt and competent time,

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time of granting these provisions, to satisfy both them and his former debts.

they had taken order with the debts of the family, and so they had fulfilled their part of the minute, and thereby the Lady's restriction became obligatory.—It was *answered* for the Lady, That she oppones her decreet *in foro*, whereby the Lords, after consideration of the minute, finding, upon the death of her husband, she being tutrix to her grandchild, had restricted herself upon that particular consideration of the standing of the family, and that she should have intromission with the rents, and pay the annualrents yearly to creditors; which having failed by the death of the grandchild, after which she had never any meddling, but with her own annualrents, for which she had comprised the estate falling to his uncle, who was major, and suffered the creditors to take away his whole fortune by expired compriſings; and, as to agreement with creditors by friends named in the minute; albeit there was a reversion, upon payment, with (within) a competent time, yet they have never yet instructed that it was performed; but, on the contrary, they only did diligence for their own debts, and suffered several other creditors to comprise for theirs; with whom the Earl of Queensberry having transacted, and agreed with the young Lady for her liferent, he hath thereby gotten the undoubted right to the whole estate.——THE LORDS did prefer the Lady to 1000 merks yearly, as they had done formerly by their first decreet.

Upon the 6th January 1677, the preference betwixt the said prior creditors, and the eight children of old Mouswell, besides the heir, was advised: And it being *alleged* for the creditors, That they ought to be preferred, because any right the children had, was but a mere faculty reserved to their father to give them provisions; and the bond granted by him for that effect, obliging his son, being both after the father's being debtor to the creditors by bonds, whereupon they had comprised, and charged the superior to infeft; their right became public, and so ought to be preferred to the children whose infeftment was only base, being granted by the son to be holden of himself, but was never cled with possession.—It was *answered* and *alleged* for the children, That, notwithstanding, they ought to be preferred; because the infeftment granted by the father to his eldest son and apparent heir, being expresly with the burden of their provisions of 18,000 merks, and consented to by the Earl of Queensberry, who was superior; that right (became) public, and by consequence their provisions which did affect the same: And the heir having been in possession, made their right public; so that the creditors comprising long thereafter, and after they were infeft by the apparent heir, they could not comprise the fee of their estate, but with the burden of their provisions; which being so small, that in place of 18,000 merks reserved, he did only grant bond for 9,500 merks to eight children; it were against all law and reason totally to frustrate them thereof. 2*do*, The pretence of being prior creditors to the contract of marriage, can be no ground to take away their right, because their provisions being no private nor latent deed, but secured by a public infeftment of the fee of the lands, the creditors having not only right to reduce the fee, by the act of Parliament, granted to the appa-

rent heir, but likewiſe to affect heritable ſums of money, which did exceed 20,000l., they never having done diligence, cannot take away the ſmall proviſions appointed for the children. No 80.

THE LORDS did long debate in this caſe among themſelves, as being of a general concernment to all prior creditors, and of all younger children who had ſecurity by contracts of marriage; and at laſt did find, that probation ſhould be led of the true condition of the eſtate, if it were ſufficient for ſatisfying all prior creditors, if they had done diligence; and that by the diviſion granted to the children, the father, who was debtor, did not thereby become inſolvent; which being proven, they did prefer the children to the prior creditors. But I having urged myſelf, that the reſervation in the contract of marriage, not only bearing to provide children, but likewiſe to contract debt for his other neceſſary affairs, that the payment of true debt to prior creditors, gave them the benefit of that clauſe; as well as the children for their proviſion; and therefore that they ought to come in *pari passu* with them, in caſe the eſtate, or a great part thereof, was abſorpt and taken away by other creditors who did prior diligence, ſo that the remainder ſhould be divided notwithſtanding.

THE LORDS did prefer the children if it ſhould be found, that the time of their proviſion, the debtor had enough of eſtate to ſatisfy them and his creditors, if they had done diligence againſt him or his ſon.

Gosford, MS. No 932.

*** Stair reports the ſame caſe thus:

THE Laird of Mouſwell having diſponed his eſtate to his eldeſt ſon by his contract of marriage, in which there is a clauſe, 'giving power to the father to burden the eſtate diſponed, with 18,000 merks for proviſion of his children, and doing of his other affairs;' ſhortly thereafter he grants a bond of proviſion to his eight children, relative to this power, of 8500 merks, containing a precept of ſaſine, whereupon they were infeft; and ſhortly thereafter he died. His ſon grants bond of corroboration to the father's creditors, whereupon they appriſe from the ſon's brother and heir, and are publicly infeft, and raiſe reduction of the bairns right, as being in defraud of creditors, in reſpect that at the granting of their proviſions, the father had only his liferent reſerved of a part of his eſtate, and this power of burdening the ſame; and offered to prove, that his debts did far exceed the L. 1000 Sterling. 2*do*, This faculty reſerved, bearing to be for his other affairs, allowed him to contract debts, or apply the ſum to his anterior creditors. *Ita est*, His ſon, who was his lucrative ſucceſſor, having granted bonds of corroboration to his father's creditors, hath in effect applied the ſum reſerved to them; and the ſon might have declared againſt the father, that this faculty was exhauſted by his anterior debts, and that no part of it could be applied to the children. 3*tio*, The creditors craved preference; becauſe, albeit the chil-

No 80. dren's infeftment was prior to theirs, yet a poſterior public infeftment upon creditors diligence, is always preferred to baſe infeftments, eſpecially to children whoſe proviſions are ambulatory at their parents diſpoſal; and even poſterior creditors are preferable thereto, much more prior creditors.—It was *anſwered* for the children to the *firſt* allegeance, That there is no law to hinder parents to provide their chidren, but on the contrary, the law of God and nature obligeth them to provide for them: It is true, they cannot provide them but out of their own, and cannot prejudge or exclude lawful creditors *ab ante*; yea if the bonds of proviſion be undelivered, and ſo in the parents power, their contracting of poſterior debts doth ſo far recall or retrench them, and prefer poſterior creditors, if the father hath not an eſtate ſufficient for both: But here the childrens bonds of proviſion are ſecured by an infeftment regiſtrated, and ſo are noways in the parents power, neither are they latent, but are a real burden on the ſon's public infeftment, which neither the ſon nor any creditor could diſappoint, or otherwiſe this preparative would ruin all children; this being the moſt ordinary method to provide them, that when the eldeſt ſon is put in the fee of his father's eſtate, it is with the burden of portions to the other children, as the father ſhould affect the eſtate; and that their proviſions were without fraud or prejudice to anterior creditors. It was offered to be proven, that at the time of this contract, burdened with this faculty, the father had a ſufficient eſtate, far exceeding his debts and their proviſions, viz. Lands worth 4000 merks yearly, and L. 20,000 of money; and it is without all pretence of reaſon, that the ſon's granting of bonds of corroboration was equivalent, as if the father had applied this faculty to the anterior creditors. And as to the reaſon of preference of poſterior public infeftments to prior baſe infeftments, it holds, when the baſe infeftments are latent or fraudulent *retenta poſſeſſione*; but in other caſes, prior infeftments, (though baſe) have been frequently preferred, even where there was no poſſeſſion, as when the public infeftment intervened before the firſt term, at which the baſe infeftment might attain poſſeſſion, or if there were poſſeſſion upon the infeftment, wherewith the baſe infeftment, or the ground thereof was burdened; but in this caſe, there is no latency or retention of poſſeſſion, but the bairns infeftments are founded upon a real burden of the ſon's public infeftment; neither are the two infeftments in competition, granted by the ſame common author, or proceeding from him; for the childrens infeftments proceed from the father, but the creditors infeftments are upon apprifings deduced againſt the ſon, upon bonds of corroboration granted by the ſon, and not upon the father's bonds; and ſo proceed only as creditors to the ſon: And it is beyond queſtion, that no deed by the ſon, or againſt the ſon, upon his own bonds, could evacuate the real burden in the ſon's own infeftment, which being appriſed from the ſon, it muſt *tranſire cum ſuo onere*; and albeit the ſon's bonds be corroborative of the father's, yet that will not ſtate the appriſers, as if they had appriſed from the father upon his bonds; for then both infeftments had been from the ſame common author: But it is undeniable, that the father's bonds remain mere perſonal rights, and can have no effect, by

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way of competition or preference, but by way of reduction upon defraud of creditors.—It was *answered*, That the father's reservation can only import the standing of his own infeftment in fee, *ad hunc effectum*, to give infeftments to his children or creditors, for L. 1000 Sterling; and therefore the children's infeftments being base, would be excluded by a more effectual infeftment granted by the father, though posterior; and therefore the creditors, by their apprisings, carrying the son's public infeftment of fee, do proceed from the father, as the same common author. 2*do*, And if need be, it is offered to be proven, that the father, at the time of these bonds of provision, had not a visible estate to pay his debts, and these provisions.—It was *replied*, That this faculty was not founded upon the father's infeftment, but is a part and burden of the son's public infeftment; for, if this faculty had been conceived in favours of a stranger, who never was infeft, an infeftment granted by him conform to the faculty would be real and effectual.

The Lords found, That the childrens infeftment, albeit base, without possession, yet being a burden upon the son's public infeftment, was preferable to the infeftments of the apprisers, apprising from the son upon his bonds of corroboration, though for the father's debt, and not proceeding upon the father's bonds; but found the reason of reduction relevant for the creditors, that the father had not sufficiency of estate at the time of granting the childrens provision, to satisfy both his debts and their provisions; and found the fee of his estate disponed to his son, was to be accounted as a part of his father's estate, either being burdened with the father's anterior debt by law or paction, and that the creditors could not exclude the bairns provisions, seeing they might affect the fee disponed to the son, unless that were insufficient. And whereas the defence of a sufficient visible estate was a contrary allegeance, and positive, the Lords admitted to the childrens probation, the father's estate the time of the provision, and to the creditors probation the burdens of the estate, and the father's anterior debts.

Stair, v. 2. p. 486.

*** Dirleton also reports this case:

James Douglas of Mousewell, by contract of marriage betwixt his eldest son James Douglas, and —— Lawrie, did dispone to his son the fee of his estate, reserving his own liferent; and with a provision to be contained in the infeftment, that it should be lawful to him to take on and burden the estate with the sum of 18,000 merks, for the provision of his other children, and for doing his other affairs: And accordingly the said James did provide, to eight children, 9000 merks out of the said estate, by a bond granted within a year after the said marriage, and infeftment thereupon.

Both the father and the son, the fiar being deceased, and the son having left only one son of the marriage, an infant, there followed a contract betwixt Agnes Rome, grandmother to the child, and Janet Lawrie, the mother, and certain friends of the family, whereby it was agreed that the grandmother should quit

No 80. 200 merks of her liferent yearly, and the mother 400 merks of her liferent; and that the grandmother ſhould confirm her huſband's teſtament, for payment of his debts; and for the ſuperplus of the debt, the friends ſhould undertake the ſame; and upon payment, having taken right thereto, ſhould ſupercede perſonal execution until the child were major; the annualrents being in the mean time paid by the grandmother, as tutrix to her grandchild. The grandchild having deceaſed, while he was yet an infant, both the creditors and the friends, and the relict, did take a courſe to affect the eſtate by compriſings; and, upon their infeftments and rights, having purſued the tenants, ſo that they were forced to raiſe a multiplepoinding, it was *alleged* for the creditors, That the grandmother her liferent ought to be reſtricted, conform to the ſaid contract, whereby ſhe had diſcharged the ſaid 200 merks yearly. Whereunto it being *answered*, That *res devenerat in alium casum*; and that the ſaid reſtriction was in favours of her grandchild, and for the ſtanding of the family, and in contemplation of the undertaking, and obligement foreſaid of the friends, which they had not done, and *cessante causa cessat effectus*; and the eſtate being altogether ruined, ſhe ought to be in her own place.

And albeit it was thereto *replied* by the creditors, That, whatever might be pretended to be the impulſive cauſe, yet the ſaid reſtriction being once granted, doth continue, notwithſtanding of the pretence foreſaid; ſeeing there is no reſolutive clauſe or proviſion, that the caſe above-mentioned falling out, the grandmother ſhould be in her own place; but, on the contrary, it appears by the contract, that the death of the child was then under her conſideration, in reſpect, it is provided expreſsly, that if the child ſhould die, the reſtriction of the mother's liferent ſhould ceaſe, and ſhe ſhould be in her own place; and ſo the proviſion foreſaid being only in favours of the mother, and not of the grandmother, *exceptio firmat regulam in non exceptis*: It being conſidered likewiſe, there was not the ſame reaſon for the grandmother, in reſpect, by the deceaſe of the child, the mother's intereſt in the eſtate did altogether ceaſe, whereas the heir who did ſucceed to the child, was the grandmother's own ſon: And, as to the pretence that the friends had not fulfilled their part of the contract, it was *answered*, That the contract being in effect in favours of the family, both the relict and the creditors were thereby obliged, and might yet be urged to fulfil their obligements: And though they ſhould both fail, the family could not be prejudged; and that the friends, accordingly as they were obliged, they had taken courſe with the debts; and though it was pretended that they had not done it *debito tempore*, the ſaid pretence was of no moment, ſeeing no time is limited by the contract.

Nevertheleſs the Lords reponed the relict againſt the ſaid reſtriction.

In the ſame cauſe, there being a competition betwixt ſome of the creditors whoſe debts were contracted by the grandfather Agnes Rome's huſband before his ſon's contract of marriage; and betwixt the children who were infeft, as ſaid is, upon the bond of proviſion, granted by their father, conform to the faculty foreſaid:

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It was *alleged* for the creditors, That they ought to be preferred, in reſpect, that upon bonds of corroboration granted by the ſon, the fiar, they had compriſed and were infeft by public infeftments; at leaſt they had charged the ſuperior, ſo that their right being public, and for a true debt anterior to the children's proviſion, they were preferable to the children, their infeftment being baſe.

The Lords found, That the children ſhould be preferred, in reſpect the comprifings were againſt the ſon, and the comprifers could be in no better caſe than the ſon himſelf, whoſe right was affected with the ſaid faculty in favours of the children; ſo that neither he nor any having right from him, could queſtion the right granted by virtue of, and conform to the ſaid faculty.

This deciſion, being by plurality, ſeemed hard to ſome of the Lords, who did conſider, that the foreſaid faculty was not only in behalf of the children, but of ſupervenient creditors, if the father had thereafter contracted any debt, and if the father had given ſurety to the ſaid ſupervenient creditors by baſe infeftments, and if his anterior creditors, before the ſaid contract, had compriſed and had been infeft, they would have been preferred to the ſaid poſterior creditors having only baſe rights, and *multo magis* to the children.

They conſidered alſo, that the eſtate being, by the ſaid contract, diſponed ſimply to the ſon, with a reſervation only of the father's liferent and the ſaid faculty; and the ſon not being obliged to pay the father's debts by the ſaid contract, if there had been 18,000 merks of debt anterior to the contract, anterior creditors might have purſued the ſon for the ſame, not only becauſe he was apparent heir and *ſucceſſor titulo lucrativo*, but becauſe he was obliged by the contract, at leaſt his eſtate burdened for the ſaid ſum; and the anterior creditors might either have taken that courſe, or might have compriſed the intereſt competent to the father by the ſaid faculty: And ſeeing the ſon might have been forced in manner foreſaid to ſatisfy the ſaid creditors, he might have granted bonds of corroboration, whereupon they might have compriſed; and having compriſed, and having gotten public rights, they are preferable to the baſe right of the children.

In the ſame cauſe, the creditors did *allege*, That they ought to be preferred to the children, becauſe their proviſion was after their debt, and was without an onerous cauſe: And, nevertheleſs, the Lords found the defence for the children relevant, *viz.* That their father, the time of the granting of the ſaid bond, for their proviſion, had a ſufficient eſtate beſides, out of which the creditors might have been ſatisfied.

This deciſion being alſo by the major part, ſeemed hard to others, who thought that a debtor could do no deed in prejudice of his creditors, without an onerous cauſe: And though the father might be looked upon, the time of the granting of proviſions to children, as in a good condition, and therefore the creditors to be ſecure and needed not to do diligence; yet, if thereafter he ſhould become inſolvent, the loſs ought to be upon the children, and not the creditors: And that

No 80. it being a principle, *that a debtor can do nothing in prejudice of his creditor, without an onerous cause*, it is certainly both fraud and prejudice, that he ſhould not pay his debt, but ſhould give away to his children, that part of his eſtate which the creditors might have affected: And inhibition being only in theſe terms, *That the party inhibited ſhould do no deed in defraud of the creditor*; it might be pretended, by the ſame reaſon in reductions *ex capite inhibitionis*, that the party inhibited did nothing in defraud or prejudice of the purſuer, in reſpect the time of the granting the bond or right craved to be reduced, he had effects and ſufficiency of eſtate beſide. *See* FACULTY.

For Queenſberry and other Creditors, *Lockhart, &c. Cunningham, Anderſon, & Mackenzie.* For the Children and Relict, Clerk *Gibſon. In præſentia.*

Dirleton, No 418. *p.* 205.

No 81. 1679. *February* 7. HAMILTON of Pardowie, *againſt* Mr ANDREW HAY.

BONDS of proviſion ſuſtained, though the fathers be under burden, if ſolvent, and he have another viſible eſtate, as found in the caſe of Mouſwell's Creditors, No 80. p. 961.)

Fol. Dic. v. 1. *p.* 71. *Fountainhall MS.*

No 82.

A wife was provided to the liferent of her huſband's whole means. She reſtricted herſelf to a half, and renounced the remainder in favour of her children. The children were poſtponed to creditors whoſe debts were before the contract of marriage. There was no other fund of payment during the relict's life.

1679. *December* 23. ERSKINES *againſt* CARNEGIES & SMITH.

JOHN ERSKINE having adjudged certain tenements in Edinburgh, upon a debt due by Alexander Carnegie, purſues Janet Smith, relict of the ſaid Alexander, as poſſeſſor of the maills and duties. Compearance was made for James and Elizabeth Carnegies, who craved preference for the half of the rents of theſe tenements, becauſe, by contract of marriage betwixt the ſaid Alexander and the ſaid Janet Smith, 'ſhe was provided to the liferent of the ſaids whole tenements, but in caſe there were children ſurviving, ſhe reſtricts herſelf to the one half, and renounced the ſame in favours of the children;' ſo they being the only children of that marriage, have right to that half.—The purſuer *anſwered*, That this was a fraudulent contrivance, to prefer children to creditors, preceding the contract, which, if ſuſtained, would be of pernicious conſequence; for, though a mother may reſtrict in favours of children, where there remains to the father a ſufficient free eſtate to ſatisfy his debt; but here the purſuer was an anterior creditor, and the defunct's whole means and eſtate was liferented by his wife, his tenements being worth 1800 merks, or 1000l.; and the tocher alſo liferented by the wife, being 5000 merks; ſo that the liferent was exorbitant, and the conſtituent had nothing unliferented.—It was *replied*, That beſide the tocher, he had 1000l. to be paid at his good-father's death, with the property of the houſes and the tocher.

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