No 179. out of the rents and annualrents, and denied to be tutrix or protutrix, so that the money being merely her own, and her children having died before her, she might warrantably alter the bond.

The Lords found, That the mother could not alter the bonds taken in favour of her children from a debtor, being of the tenors above written, wherein she was naked liferenter of the one, and had not so much as a liferent of the other, and that the sums were rather presumed to be of the bairns means than her own, seeing they had no tutor, and any meddling with their means was by herself, and that their executrix could not now be put to instruct what means they had, or be accountable thereupon.

Fol. Dic. v. 2. p. 149. Stair, v. 1. p. 724.

1674. *December* 22. Marquis of Douglas *against* Somervels.

No 180.
A father acquiring a rental or feu to his son, an infant, his agreement to give it up was found valid, while it was in his hand, without being perfected by possession.

The Marquis of Douglas did grant a tack of the lands of Redschaw to Mr William Somervel, and thereafter gave a tack of rental of the same to William Somervel, Mr William Somervel's son, then an infant, and, after both, he gave a feu thereof to Mr William Somervel. Mr William Somervel set a tack to the possessors; and there being now a competition for the mails and duties, it was *alleged* for the Marquis, That he ought to be preferred, because the rental granted to William Somervel was procured by Mr William, as likewise was the feu surreptitiously by fraud under trust by Mr William, who was the Marquis's chamberlain, and upon that account Mr William had delivered up the feu, and had agreed to deliver up the rental also. 2*do*, The rental taken in the name of the son, being an infant, is presumed to be by the father's means, and so must be affected with the father's anterior debt, as hath been frequently found in other cases; whereupon the Marquis hath raised reduction and declarator upon prior debts due to him by the father. It was *answered* for William Somervel, That he ought to be preferred, 1*mo*, Because the rental being granted to him by the Marquis, could not be excluded by any deed done by his father; who, though he might have acquired for his son, yet could not take away any *jus acquisitum* to his son, he being only his tutor and lawful administrator, who can do nothing prejudicial to pupils, but only perform necessary and profitable deeds. 2*do*, All pretence of fraud in procuring the rental is excluded, because it is acknowledged there was a prior rental to the father, which was given up to the Marquis, and the like rental in all points renewed to the son, which could have no pretence of fraud; and as to the agreement to deliver up the rental, it had taken no effect, and was only probable *scripto vel juramento*; as to the Marquis's reduction or declarator upon anterior debts, whatever might be competent to third parties, that could not be competent to the Marquis, who granted the rental, and, if there was any fraud thereby, was partaker thereof,

and at least is presumed to have burdened the rental granted to the son with the father's prior debts. It was *replied*, That albeit a father cannot prejudge a right acquired to his son by any deed of his after the right is established, yet, if the manner of acquiring be fraudulent, and founded upon the acquiring by the father, it is relevant against the son; or before the right is perfected in the son's person, so long as the right is in the father's hand, which he hath voluntarily acquired, and might destroy his agreement to give up the same, is relevant against the son; and, in this case, the son's rental hath never taken effect by possession; for the father sets a tack to the possessors in his own name, without mention of the son's right, or as administrator to him; and as to the manner of probation of agreement to give up the tack, witnesses *ex officio* were desired to be examined, who were persons above all exception. No 180.

THE LORDS found, That the allegeance for the father, that he had a prior rental of the same import, did exclude the allegeance of fraud in the acquiring of the son's rental; but found that the son's rental acquired by the father, and remaining in his hand, without attaining possession, and the father's agreement to give it up, was relevant against the son; but found that it was only probable *scripto vel juramento;* but ordained the father to depone in presence of, and to be confronted with, such persons as the Marquis did allege to have been witnesses to the agreement for giving up the tack; and the Lords sustained the Marquis's declarator for any debts due by the father to affect the son's rental, being anterior thereto.

This point did also occur to the Lords,—Whether the acquiring an heritable right after the rental did import a passing from the rental, as an inconsistent more ignoble right, so that the feu being given up to the son, he could not make use of the rental, unless it had been expressly reserved by communing; as to which, the Lords were of different opinions; but it not being debated by the parties, they ordained them to be heard thereupon.

Fol. Dic. v. 2. *p.* 148. *Stair, v.* 2. *p.* 296.

1677. *July* 5. The KING'S ADVOCATE *against* FORBES.

No 181.
Found in conformity to Grant against Grant, No 176. p. 11497.

THE King's Advocate pursues Forbes of Tolquhon for the avail of the marriage of John Lesly, in respect that Isobel Cochran died infeft in the lands of Tolquhon, and left John Lesly her apparent heir minor and unmarried, which avail being *debitum fundi*, it did affect the estate of Tolquhon, now belonging to Sir Alexander Forbes. The defender *alleged*, Absolvitor, because Isobel Cochran was denuded in her own time, in so far as her infeftment was upon an apprising deduced upon a bond due by Caskiben as principal, and Philorth and Tolquhon as cautioners, whereby all their estates were apprised; and there is