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

No 181. produced a renunciation by the said Isobel of the apprising in favour of Philorth, and a back-bond by Philorth, bearing, that he stood in the right of the apprising of the estate of Caskiben by Dr Guild, and obliging himself to apply the benefit thereof, and of all subsequent rights he should acquire of the estate of Caskiben, for the use and behoof of Caskiben's eldest son, and for the weal and standing of the house; and therefore, Cochran's apprising acquired thereafter by Philorth being to the behoof of Caskiben's eldest son, who was *in familia*, and having no means or estate to acquire the same, law presumes that it was acquired by the father's means, which the Lords have ordinarily sustained, and declared estates so acquired subject to the father's debt, by apprising or adjudication, as if it stood in the father's person; so that if Cochran's apprising be declared to be in the same case as if it were in Caskiben's person, who was principal debtor of the sum apprised for, the apprising would be extinct; for it is without doubt, that apprisings are not like other infeftments requiring resignation and new infeftment; but whatever way they be satisfied, by intromission or payment, they are extinct *ipso facto*. It was *answered*, That whatever hath been extended in favour of creditors, yet this presumption was never sustained against the superior. It was *replied*, *Multo magis* against a donatar; for if the superior were craving a marriage by the death of Caskiben or Tolquhon, upon Isobel Cochran's apprising, the superior replying upon satisfaction by the means of the principal debtor, he would recover the marriage of the debtor's heir; and therefore cannot justly claim the marriage of both the debtor and the cautioners upon an apprising extinct by satisfaction.

The Lords found the defence relevant, that Philorth had right to the apprising, and declared it to the behoof of the principal debtor's eldest son, while in his family, which was presumed to be upon payment by his father.

Fol. Dic. v. 2. p. 148. Stair, v. 2. 533.

No 182. Where a party had disponed his estate, to free himself from the rigour of the law regarding field conventicles, found he might cancel the disposition, the cause of granting it being done away.

1706. *July* 26. Lady Bradisholm *against* James Muirhead of Bradisholm.

Rose Fincham, Lady Bradisholm, and her son, pursue James Muirhead elder of Bradisholm, her father-in-law, for exhibition of a disposition made by him in 1686, in favour of his deceased son, her husband, and a sasine following thereon; and having referred the having to his oath, he deponed, That being imprisoned in the late times, and not taking the test, he was advised by his lawyers to make a disposition of his estate, both fee and liferent, in favour of his eldest son, a boy then of twelve years old, for preventing all hazard, and that sasine was taken thereupon, but never registered; and afterwards, King James VII. not resolving to press the test, he retired the same, and, after search,