1669. *July* 10. GARDINER *against* COLVIL.

No 178.
A father having purchased lands to an infant son, and having also taken infeftment in the son's name, the father's creditor, who afterwards apprised these lands, was found to have no right.
See Stair's report of this case, No 48. p. 1314.

IN a reduction of a comprising led at Colvil's instance, as assignee by Ronaldson, in and to a bond of L. 68 Sterling, whereupon the lands of Ladykirk were comprised; which reduction was pursued at the instance of Gardiner's wife and children, as being infeft in the fee of the said lands before the comprising led against their father;—the assignation made to Colvil being produced, and bearing date *in anno* 1663, the pursuers offered to improve the same as being of a false date; and offered to prove, by the writer and witnesses, that it was truly dated *in anno* 1668. It was *alleged* for Colvil, That he had a true assignation dated *in anno* 1663, which being lost the time of the production, he did obtain this new assignation of the date of the former, and having since recovered the first assignation, he needed not make use of this last, but would take up the same. THE LORDS would not suffer him to take up the assignation, in respect it was judicially produced, and an act made thereupon. But, before they would sustain the improbation, they ordained the defender to declare, under his hand, upon what terms he would abide at the verity thereof, for the writing over of any writ and inserting the first date, not being done *animo decipiendi*, nor prejudging any party, will not amount to the crime of falsehood.

In the same process, the children's infeftment was not sustained to reduce the defender's right, who was a creditor, albeit it was *alleged*, that it was both prior and depended upon a contract of marriage, in respect that the father was only obliged by contract of marriage to provide the fee of his conquest to the children, and the infeftment given them was only base, the father retaining the possession during his lifetime; which the LORDS found could not hinder creditors to contract with him, and to comprise for their just debt.

Fol. Dic. v. 2. *p.* 148. *Gosford, MS. p.* 65.

*** Stair's report of this case is No 48. p. 1314., *voce* BASE INFEFTMENT.

1671. *February* 18.
AGNES DUNDAS *against* The LAIRD of ARDROSS and the LAIRD of TOUCH.

No 179.
A mother having lent her son's money, and taken a bond in his name, it was found to be the son's evident,

THE Laird of Ardross having granted bond to umquhile Mr Henry Mauld and his spouse, and their heirs, of 8000 merks, and, after his decease, granted a bond to the relict, bearing to have borrowed 2000 merks from her, and obliging him to pay the same to her in liferent, for her liferent use only, and, after her decease, to William Mauld, her son, and his heirs; and another bond, bearing him to have received from the relict 1000 merks, in name of Henry

No 179. though she retained it in her own custody, and afterwards discharged it.

Mauld her son, and obliging him to pay to the said Henry and his heirs; and after all, he granted a bond of 10,000 merks to the relict, her heirs and assignees, which was made up of what remained due of all the three; this bond the relict assigned to the Laird of Touch; who having charged Ardross, and he having suspended, there arose a competition betwixt Touch, as assignee, and Agnes Dundas, as heir and executrix to Mr Henry, William, and Henry Maulds, and thereupon a division of the sums betwixt the parties. Thereafter, Agnes Dundas pursues Ardross to make payment to her, as heir and executrix to William and Henry Maulds, of 2000 merks which he was addebted to the said William, and of 1000 he was addebted to the said Henry; whereupon he hath deponed that he was debtor by all the said bonds before related, and no otherways; and that, in the former decreet, by mistake, it was expressed that the 10,000 merks bond was made up of the 8000 merks bond and of 2000 merks of annualrent thereof; whereas, the truth was, it was made up by what was resting of the two bonds due to William and Henry; which he produced cancelled of the tenor foresaid. It was *alleged* for Agnes Dundas, The sums of these bonds behoved only to belong to her, as heir and executrix to William and Henry Maulds, and not to Touch, as assignee by the relict. It was *answered*, 1*st*, That the said Agnes had homologated the prior decreet and division therein made, by giving discharges accordingly, could not claim any more. 2*dly*, Another having taken a bond in the name of her two sons, being bairns in her family, might lawfully alter the same at her pleasure, there being nothing more ordinary than that fathers grant bonds of provision to their children, or take bonds from their creditors in their names, yet these being never delivered, the parents may dispose of them at their pleasure. It was *answered* for the executrix, That the allegeance of homologation is not relevant, because it is emergent by Ardross's oath that the 10,000 merks bond was not made up by the annualrent, but by the said two bonds, so that there could be no homologation of that whereof the executrix was excusably ignorant. To the *second*, That albeit fathers granting bonds of provision in name of their children, may alter the same at any time before delivery, yet where they lend out the sum to a creditor, and take him obliged to a child in fee, that cannot be altered; especially where the parent is a naked liferenter, and hath not reserved a power to lift and dispone; but whatsoever be in the case of a father providing his children, who can by no presumption be thought to have any means, yet, after the father's death, a mother taking a bond in the name of a bairn, it must be presumed to be the bairn's money, coming by the father or otherwise; and the mother having stated herself naked liferentrix in the one bond, and having no interest in the other bond, she could not recal or alter the same in prejudice of the children, especially seeing they were infants, and had not tutors to care for them. It was *answered*, That the mother had held count for the whole means of the father, and so had cleared any presumption that these bonds could be of his means; but she liferented the whole estate, and made up these bonds

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,