

bairns of the marriage ; which failing, to the disponder's heirs and assignees, was found to belong to the wife, and that she was fiar. See APPENDIX.

No 36.

*Fol. Dic. v. I. p. 300.*

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DIVISION II.

In questions between parents and children, who understood to be fiar.

SECT. I.

Right taken conjunctly to parent and child.

1566. November 30.

DOUGLAS against GRAHAM.

IN an action of ejection movit be John Douglas in Waldstoun, against Robert Graham of K., the said John lybellit that he had tack and assedation of the said lands of Waldstoun, the time of his ejection, for diverse years to run.—Robert Graham *ansrit*, That the tack was given to him and his mother, whairfore he could not seek the hail profits, but the half of the ejection only ; because the tack appertained to him but for ane half allenarlie, in respect his mother was in possession of the tack for her part, be virtue of the assedation, as well as the said John was.—The perseuar *replied*, That he was first in the tack with his mother conjunctly ; and in such cases he that is first in the assedation has the hail for his lifetime, *quia duo in solidum non possunt possidere eandem rem simul et semel*, except a man and his wife ; and also it was daily seen, that the father being first in the tack with the son, that the father bruiks the hail during his time.—It was *answerit*, It was not alike in the father and son as in other persons ; for in respect that the father is presupponit to prefer himself to his lawful son, and also the son lawfullie gotten to warrand the father's deed ; so is not the mother to the son, nor he to her, nor brother to brother, nor no kind of person that are estimate extranean in the law to other, neither to prefer themselves in mak-

No 37.

Although a tack, set conjunctly to a father and his son, is understood to import the father liferenter of the whole, and the son to succeed to him after his decease ; yet the Lords found, that this takes place in no other persons to whom a tack is conjunctly set, however near their relation be.

No 37.

ing or taking such assedations, nor yet in the warrandice thereof; *sed unusquisque possidet pro sua parte pro indiviso*; and attour, albeit the ane of such persons as are extraneans to others, that is to say, all others except the father and son lawfully begotten, and air, abstain frae the uptaking of the profits of such assedations, yet it is in their wills to middle therewith at their pleasure, be virtue of the same assedation, which gives them both, or all, equal right and title to the effect foresaid; for the ane of them conjunctly intitulate, taking possession, is as sufficient as if they had both taken possession, in respect that the ane, after the other's decease, intromits but farther solemnitie requisite thereto. The quhilk the LORDS admittit, and absolvit frae the half of the profits, in respect of the exception; and fand such assedation to make equal right to them that are conjunctly named in the same, except the father and the son lawfullie begotten, or aires.

*Fol. Dic. v. 1. p. 301. Maitland, MS. p. 227.*

No 38.

A tack set to a father and his natural son conjunctly, and longest liver of them two, and their assignees, may not be disposed by the father in prejudice of the bastard, but for his lifetime, and for his own part.

1570. March 24.

GRAY against ROLLOCK.

IN ane action perseued be Mr Thomas Gray against Mr David Rollock, for production and deliverance to him of ane liferent tack, made be the Abbot and Convent of Scone, to umquhile Sir Hew Gray, father to the said Mr Thomas, and to the said Mr Thomas conjunctly, and to the longest liver of them two, of the lands of ———; the tack being productit, the said Mr David *allegit*, That the said tack sould not be deliverit to the said perseuer, because the said umquhil Sir Hew, father natural to the perseuer, who had obtained and conquest the said tack, the said Mr Thomas then being an infant, and also the said Sir Hew being first in the said tack, whilk buir in effect thir words, 'to Sir Hew Gray, and Thomas Gray his son, the langest liver of them two, and their assignees;' whilk words made the said Sir Hew, being first in the assedation, title to annalzie and dispone thereupon at his pleasure, in respect that it buir to their assignees; and so thereby he analziet the said assedation to the said Mr David, who thereafter obtained an heritable infestment of the said lands acclaimed in feu-farm, whairfor the said Mr Thomas could have no right to the said lands, albeit the said assedation were deliverit and restorit to him again; and thairfore could have no interest neither to acclaim the assedation, nor yet the lands contained therein.—The perseuar *replyit*, That the said umquhil Sir Hew could not dispone the said tacks and lands langer nor for his ain lifetime, because he could pretend no title thereto be the said assedation, except for his ain time, and that for the ane half only, *quia pater naturalis atque filius partes fecisse ab initio arbitrantur dispositionis*.—The defender *answerit*, That the tack being set in such manner to the father and the son, the father may dispone the same for the son's lifetime, as was practicate in an action of removing, intentit be the Laird of Drumlaw against N. Abercromby, for removing frae the lands