

## S E C T. IV.

Clause giving the wife power of disposal.—Wife's heir first in the substitution.

No 34. 1676. *June 27.* EARL of DUMFERMLINE *against* EARL of CALLENDAR.

In a contract of marriage, the husband obliged himself to take the conquest to himself and wife in conjunct-fee and liferent, with an express power to the wife to dispone at her pleasure upon the half thereof. In this case the wife was found to be fiar of the half of the conquest; which was inferred not only from this power of disposal, but also because she had an opulent fortune of more value than her husband's.

*Fol. Dic. v. i. p. 300.*

\*.\* This case is reported by Stair, No 7. p. 294r.; by Dirleton, No 4. p. 4078.; and by Gosford, No 4. p. 4080.

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No 35. 1720. *July.*  
The CREDITORS of ELIOT NORTHSENTON *against* ELIOT of Borthwickbrae.

A WIFE having made a disposition of lands *nomine dotis* to her and her husband in conjunct-fee, and to the heirs to be procreated betwixt them; which failing, to the wife's heirs of any other marriage; which failing, to the husband's heirs of any other marriage; which all failing, to the husband, his heirs and assignees whatsoever; it was *contended*, That here the wife was fiar, because the subject came from her, and her heirs were first called in the substitution.—THE LORDS found, notwithstanding, the husband to be fiar. *See APPENDIX.*

*Fol. Dic. v. i. p. 300.*

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No 36. 1733. *June.* ANGUS *against* NINIAN.

A SUM assigned by a woman in her contract of marriage, in name of tocher, to herself and husband, and longest liver, in conjunct-fee and liferent, and the

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.