

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 producit, 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

of P.; and also in heritable infeftments of tailzie, the first in the infeftment, albeit he be an extranean to the rest of the tailzie, may dispone the tailzied lands frae the rest.—The perseuer *answerit*, That albeit the father may defraud his lawful son whom he has *in sua potestate*, and that he may dispone that thing whilk he has preparit for his son, the like is not betwixt the father and his bastard son, *qui extraneus reputatur intuitu patris naturalis: Igitur*, as to the similitude of the heritable infeftments of tailzie, cannot be drawn to this present question of liferent tacks, for he that is seased heritable may freely dispone, be the practic; albeit it is otherwise be the law, either civil or municipal; but he that has right for his ain lifetime, is more like to ane wha has his right for certain years, as five, six, seven, or nine years tacks, whereof the havers may not make langer right, nor can endure langer nor the said years be past.—THE LORDS fand the reply verie good, and in respect repellit the defender's exception, and ordainit the assedation to be delivered the perseuer, *cum effectu et omni causa quod inde sequi potuit. See REMOVING.*

*Fol. Dic. v. 1. p. 300. Colvil, MS. p. 231.*

1627. June 22. LIDDERDALE of St Mary's Isle against ———.

IN an action of spuilzie at the instance of L. Isle against some defenders, a tack being set of the teinds therein contained, to the pursuer's father, and to the pursuer his son, and to the longest liver of them two, and their heirs; the LORDS found, That the tack being of the tenor foresaid, the father and the son were conjunct and equal tacksmen, and that the benefit of the teinds therein contained should divide equally betwixt them, so long as they lived together; and after the decease of any of them, the whole right thereof pertained to the survivor, being set to the father, and to the son, and to the longest liver of them two, and their heirs, as said is; and therefore, because this pursuit was moved at the son's instance, for certain years owing before the decease of the father, which the son acclaimed, as appertaining to him; the LORDS found, That he had only right to the half of the saids teinds of the years wherein his father lived; and that his father had right to the other half, and consequently, that the same pertained to his executors; and found that the father, all the years wherein he survived, had not right by virtue of the foresaid tack, to the said whole teinds, but to the half allenary, he being conjunct tacksmen, in respect of the tenor of the tack, and that after the decease of the father, the benefit of the whole tack pertained to the son pursuer.

Act. *Lawrie.*

Alt. ———.

Clerk, *Gibson.*

*Fol. Dic. v. 1. p. 300. Durie, p. 298.*

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No 39.

A tack of teinds was set to a father and his son, and longest liver of them and their heirs. They were found to be conjunct tacksmen, and that the profits divided betwixt them during their joint lives, and after the death of the one, that the whole belonged to the survivor.