No 63.

tioned therein; because debtors, when they crave restriction, they are presumed as provident men, to uplift the rest for satisfying the apprising, or their other debts, or for their subsistence; and so being introduced wholly in their favour, it cannot be extended in favour of the donatar to their prejudice: For if the appriser possess all, the superplus will satisfy the apprising; whereas, if the donatar uplift the superplus, the debtor will be hugely prejudged, neither the apprising, nor any other debt of his being satisfied thereby, nor his heir entertained therewith.

THE LORDS found, that this clause could not be extended to a donatar; and that there could not be a waird, both by the decease of the appriser and debtor.

The donatar further *alleged*, That the apprising was satisfied by intromission within the legal, which did extinguish the apprising, as to all effects and purposes, as if it had never been, and all parties return to their rights, as they were before the apprising; and so, consequently, the superior and his donatar have the ward-duties, during the apparent heir's minority, after the apprising is extinct; for the apprising being but a collateral security, like an infeftment for relief, it is *jus resolubile*, and doth not fully divest the debtor, who needs not be reseased, as he would be in the case of a wadset holden public; but the debtor's own infeftment revives and stands valid, and the apparent heir must be infeft as heir to the defunct, which cannot be till he be *legitimæ ætatis*, after the ward. It was *answered*, That the allegeance is not relevant, unless the apprising had been satisfied in the defunct's life, for then his infeftment would have revived; but if any thing remained due, the apparent heir hath the right of reversion, as apparent heir, and intromission thereafter cannot revive the defunct's infeftment.

THE LORDS found, that, so soon as the apprising was extinct, whether before the defunct's death or after, the ward took effect, and the donatar had right.

Fol. Dic. v. 2. *p.* 78. *Stair, v.* 1. *p.* 761.

*** A similar decision was pronounced, Murray against Earl of Southesk, No 7. p. 3477. *voce* DILIGENCE.

1672. *January* 3. LADY BINNIE *against* HUGH SINCLAIR.

No 64.
Found, that a tack, with power to subset, could not be assigned, assignees not being mentioned in it.

THE Lady Binnie having set a tack of her liferent lands to Hugh Sinclair, pursues to find caution for the mails and duties, or else to remove; it was *alleged*, That the libel was not relevant, unless it had been libelled, that, at least two terms of the tack-duty had been unpaid the time of the citation; but there is neither law nor custom obliging every tacksman to find caution, in case of his poverty, or to forefault his tack. It was *answered*, That the only ground

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inducing that custom, that, upon failure of payment of the tack-duty, the tacksman should find caution, or remove, is for security of the masters of the ground, that they suffer not tenants to possess, of whom they can get no payment, and not upon any paction of parties; so that, wherever that ground holds, the custom should be extended, especially in this case, where the tacksman is known to be bankrupt, and in prison for his debt. It was *answered*, That the custom having now passed into a law, that, upon several terms failzie, the tacksman should find caution, or remove, it neither doth appear, nor are we to enquire what were the motives introductive of it; it is sufficient that it was never libelled, or sustained, that, because the tenant was poor, that he should find caution, or remove, though he pay exactly at his terms; and this would forefault most tacks, for few would get caution for a yearly tack-duty, if considerable, and for many years, as in this case it is; and, therefore, custom hath justly astricted it to a year's failzie; because, masters of the ground have a hypothec, and privilege upon the fruits and tenants goods, for a year's rent, which no arrestment of creditors can prevent; and so they are secure for a year, if the land be plenished, which even extends to the goods of sub-tenants; and, therefore, custom hath justly stated this certification to a year's failzie, that so, if more years come upon the crop and goods, the tenant shall find caution to remove.

THE LORDS found, that the libel was not relevant, unless there were a year's duty remaining, either at the time of the citation, or now; they found also, that the tack not bearing to assignees, albeit it bore sub-tenants, that there was no place for assignees.—*See* TACK.

Fol. Dic. v. 2. p. 75. Stair, v. 2. p. 34.

*** Gosford reports this case:

LADY BINNIE having set a tack of her liferent lands, during her lifetime, to Hugh Sinclair, for payment of 2000 merks, at two terms in the year, did pursue the said Hugh to find caution for payment of the yearly duty, or to remove from the lands. It was *alleged*, That there not being a year's duty resting owing of all bygones, nor the clause irritant committed, bearing, that if two terms run, the third unpaid, the tack should be void, no such action could be sustained by our law. It was *replied*, That the defender being denounced at the horn, his escheat gifted, and he incarcerated, and lying in prison for debt, for which all right he had was comprised, there was more reason that he should be decerned to find caution, or remove them; when a tenant, simply upon that ground, that he hath not made payment, may be pursued and decerned, as said is.——THE LORDS did sustain the defence, unless that the time of the interlocutor there was a full year's duty resting; in which case, they decerned, conform to the libel, albeit the time of the citation there was but a term due; but found, that, until a full year's duty was due, no such action could be sus-

No 64. tained against a tacksman.—Thereafter it was *alleged* for Alexander Kennoway, That he was assignee to the tack, and responsal; and no such action could be sustained against him, but a declarator of circumvention might be pursued. It was *replied*, That, by the said tack, the said Hugh had no power to assign, it being granted to him and his sub-tenants, of no higher degree than himself.—THE LORDS did repel the allegeance; and found, that the tack being conceived, as said is, could not be assigned.

Gosford, MS. No 431. *p.* 222.

1673. *January* 29. OGILVIE *against* KINLOCH.

No 65.
One who disponed certain lands to be holden of himself, by 'the disponee, his heirs and assignees,' was found obliged to receive and infeft the assignee.

DAVID KINLOCH having, by a minute betwixt him and Andrew Wadder, disponed certain lands to Wadder, to be holden of Kinloch feu; Wadder assigns the minute to Mr James Ogilvie, who pursues for extension and implement of the minute to him as assignee. The defender *alleged*, That, by the minute, he having disponed to Wadder, so as to remain his own vassal, whom he had chosen; Wadder could not, without his consent, force him to accept of another vassal; much less of Ogilvie, who was not in the terms of friendship with him. It was *answered*, That the pursuer oppones the minute, whereby the lands are disponed to Wadder; and albeit neither the heirs nor assignees are expressed, yet, in a subseqnent clause, it is expressed, that the lands are to be holden of the disponer by Wadder, his heirs and assignees; and it is commonly known, that, albeit superiors be not obliged to receive the singular successors of their vassals, by resignation or confirmation, even though the vassal's right be expressly granted to heirs and assignees; yet the inserting of heirs and assignees operates this, that, before infeftment be taken by the first acquirer, he may effectually assign his disposition or precept to any other, whom the disponer must receive.

THE LORDS found the defenders obliged to receive the assignee, in respect the minute did mention assignees.

1673. *December* 23.—BANDOCH having obliged himself to grant a feu to one Wadder, of a piece of land, Wadder obtained decreet, and charged him. He suspended, and the charger having assigned the bond to Mr James Ogilvie, he insists in the charge, for granting the feu to him as assignee. It was *alleged*, That the obligement being in favour of Wadder to be his vassal, he could not obtrude a stranger, who was not in friendship with Bandoch; 2*do*, Bandoch having consigned a disposition in favour of Wadder, it was in the same case as if Wadder had been infeft; and then Bandoch could not be forced to enter his assignee, without a year's rent, for the entry of a singular successor.

THE LORDS repelled both these reasons; and found, that the obligement being in favour of Wadder, his heirs and assignees whatsomever, he might assign