

That he could not make her assignee, quia fuit inter virum et uxorem quod prohibitum est de jure. It was answered, That quamvis donatio inter virum et uxorem prohibita sit de jure, tamen morte confirmatur; and so was found by the Lords. No. 153.

*Colvil MS. p. 420.*

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1615. *January 25.* LA. of ELPHINSTON *against* \_\_\_\_\_.

No. 154.

In an action pursued by the Laird of Elphinston as donatar to the escheat of one Russel, who had tack set to him of certain lands by the Laird of Airth, which tack was set to himself, excluding assignees of any higher degree than himself;—the Lords found, that the tack ought to pertain to the donatar, notwithstanding that he was of higher degree.

*Kerse MS. p. 103.*

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1626. *July 8.* TURNBULL *against* SCOT.

No. 155.

Turnbull of Howdon annailzies his lands of Howdon to Turnbull of Philiphaugh, under reversion, and receives back again a tack from him for payment of a duty, and retains thereby the possession of the land wadset. After that the said Turnbull of Howdon dispones the said lands to Scot of Hartwood-myres and Scot of Aikwood, who receives also possession of the said lands from their said author; and they being pursued by the said Turnbull of Philiphaugh, for payment of the fore-said tack-duty of certain by-gone years, and to find caution to pay the same in time coming; the Lords sustained the action against the said two Scots, albeit they alleged that they were not bound to pay the said tack-duty, and that they were singular successors to the alleged tacksman, and who could not be subject in that, wherein he was obliged, by the tacksman's self; and his heirs were only astricted thereto, and not they; especially seeing they bruiked not the said lands by virtue of that tack, but by virtue of their heritable right acquired from their author; which allegiance was repelled by the Lords, and they were found to be debtors to the pursuer, seeing their common author could give to these defenders no other right nor possession than he had himself; and he being denuded in favours of the pursuer, of his heritable right, and accepting a tack, by virtue whereof he might only bruik, seeing no other right consisted in his person, he could not thereafter do any deed in prejudice of the pursuer, to invert the right of that tack, and duty thereof; and the defenders could not be in any better case than their said author, and so could not ascribe their possession to any other right, than that by virtue whereof their said author could only lawfully bruik; and so the action was sustained against them, albeit they were singular successors to the tacksman.

An assignee to a tack is personally liable to pay the by-gone tack duties due by his cedent, which is founded upon the general principle of mutual contracts, that the tacksman or his assignee cannot take the benefit of the contract without performing on their part.

*Act. Stuart.*

*Alt. Cunninghame & Scot.*

*Clerk, Gibson.*

*Fol. Dic. v. 2. p. 424. Durie, p. 212.*