

said tutor, and the said John, her husband : which husband did marry her without her father's consent ; and there was no contract of marriage. *2do.* Albeit the dispositions and rights had been granted by the contract of marriage, or *intuitu matrimonii*, yet, notwithstanding thereof, she still would be liable as successor ; the said rights being granted for love and favour, and for her provision : And the defunct being debtor to the pursuer, could not dispone his own means to his daughter, who was to succeed ; who, at least in so far as she had got benefit, might be liable to the pursuer, a most lawful and favourable creditor.

The Lords, before answer, ordained the contract of marriage to be produced ; and found the defences proponed for the other heir-portioner,—*viz.* that the pursuer was debtor to her for her aliment,—relevant, and appointed count and reckoning ; but the main question was not decided till afterwards.

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1665. *January 28.* CHARLES STEWART *against* The VISCOUNT of KINGSTOUN.

MR Thomas Turnbull, sometime minister at Morham, by a tack, dated the 30th October 1637, did set the teind-sheaves of the parish of Morham to Charles Stewart, grandchild to Francis, Earl of Bothwell, for Mr Thomas his lifetime, and 19 years thereafter, for payment of 600 merks of yearly duty. To which tack, Francis, Lord Stewart, father to the said Charles, consents, as patron, though he was not patron ; and Charles, pretending right, in manner foresaid, ratifies a prior tack, dated in November 1633, whereby Mr Thomas had set to Bearford both parsonage and vicarage teinds of certain lands therein contained, for Mr Thomas his lifetime, and five years thereafter ;—Bearford paying yearly to the parson, 282 merks yearly. The ratification is dated the 12th December 1640, which is seven years after the date of the tacks so ratified. Sick-like Charles, upon his foresaid right, makes a short minute of agreement with Beinstoun, upon the 1st December 1642 ; whereby it is condescended that the parsonage teinds of Mainshill, within the said parish, shall be rated yearly to be £60, which was to be paid to the said Charles Bearford. And Beinstoun, pretending right to the said teinds, by the foresaid agreement and tacks, pursues the Viscount of Kingstoun for spuilye, of their teinds, for the crop 1664.

The Lords would not sustain the spuilye, but restricted the same to a wrongous intromission ;—notwithstanding it was alleged, That the tack set to Charles Stewart, was null, not being subscribed with consent of the lawful patron ; Francis Stewart not being lawful patron, in regard his father was forefault, and the forefaulture disponed to the Earl of Buccleugh : and that the tack was null, being set by a parson for nineteen years after his decease, which he could not do ; and therefore the tack is null, *opeatione exceptionis vel replius*, by 4th Act Parliament 22 James VI.

Which tacks and agreements the Lords would not take away *in hoc judicio possessorio* ; and therefore decerned as aforesaid.

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