have the possession; the two parts always drawing the third part with them. To the *2d* reason it was answered, That, notwithstanding of the adjudication, and infeftment following thereon, she ought to remove; because she having possessed the tenement continually since her husband's decease,—the possession whereof exceeds the annualrent,—she is satisfied of her annualrents by her possession, and so could not adjudge for the byruns of the same.

The Lords found, That the two parts should draw the third, and therefore decerned the tercer to remove; but, if she was willing to take the house of the pursuer for the rent, he should prefer her to any other, she finding caution for the two parts of the house-mail.

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1665. *January* 28. THOMAS AIKENHEAD *against* JANET and MARION AIKENHEADS and their HUSBANDS.

UMQUHILE Alexander Aikenhead, uncle to Thomas Aikenhead, and tutor nominated and confirmed to him, and having granted the receipt of several bonds granted to umquhile Mr Thomas Aikenhead, and assigned by him to his son Thomas; the said Alexander, having received payment of the said sum belonging to his said pupil, the said pupil pursues Janet and Marion Aikenheads, only daughters and children to the said Alexander, as heirs and executors to their father, and upon the rest of the passive titles, and their husbands for their interests; the said Thomas, the pupil, insisting against the said Janet Aikenhead and her husband, as successor by the lucrative title, *post contractum debitum*, in so far as her father disponed to her certain tenements of lands and other heritable sums or rights.

It was ALLEGED for the defenders, That she could not be liable as successor, 1*mo*. Because, *hoc dato*, that her father had disponed to her any heritable sums or tenements for love and favour, and for her provision; the pursuer behoved to pursue reduction thereof, *via ordinaria*, upon the Act of Parliament. *2do*. She could not be liable, because any dispositions made to her and her husband were for onerous causes, *intuitu matrimonii*, by contract of marriage, or otherwise. And the said rights cannot be quarrelled, nor fall under the compass of the Act of Parliament; as was found in the case betwixt Simpson and Liddile.

To which it was REPLIED by the pursuer, That the defender's father being both tutor and debtor to him, and thereafter making disposition and assignation to the defender's own daughter, one of the apparent heirs-portioners, and who was *alioqui successura;* the disposition granted for love and favour, without any onerous cause, must make her liable as successor; at least, she and her husband must be liable to the pursuer *in quantum lucrati sunt*, which will exceed the debt, acclaimed by the pursuer; who, in all law, is most favourable; his tutor having intromitted with his means, which the said tutor could not dispone to his own daughter and apparent heir; but she must be liable, *ut supra:* and there is necessity for the pursuer to reduce the said rights, seeing he insists against his upon the passive title, as successor.

To the second, it was ANSWERED, 1*mo*. The dispositions and rights whereupon she insisted as successor, were not made by the contract of marriage betwixt the

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. Sicklike 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 spuilyie, of their teinds, for the crop 1664.

The Lords would not sustain the spuilyie, 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, *opecatione 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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