No. 48. tended there was the same parity of reason for both, that the heir is bound to aliment her, ay till her own life-rent provision begin, yet the true reason why he is obliged to entertain her to the next term is, because it is reputed still to be the husband's family, as if the *paterfamilias* were yet alive, and the servants cannot be sooner dismissed; which reason does not militate after that term. As to the 2*d* article, The daughter can have no modification of an aliment, since he offered to take her home to his own house, and now *de facto* she stays with him; and as for her aliment before, it must be presumed to have been *ex pietate parentali*. To the 3*d*, Oppones the obligation, where there is no mention of the teind, which being no *feudum separatum*, is not carried under the denomination of lands. Replied for the pursuer, That *quoad* those terms intervening between her husband's death and the commencement of her jointure, it must be understood as if she were left to the legal provision of a terce, to which she restricts it. And to the 2*d*, There can be no presumption of a donation here; for the mother's jointure was mean, and her assignee intimated his intention to claim it, by raising this process; which sufficiently takes off the foresaid presumption. And *quoad* the 3*d*, Though paction alters law, in some cases, yet it is plain here the parties meant to give her the subject out of which stipends are payable, seeing they burden her with the same. The Lords found the heir no farther liable to aliment the widow but to the next term; and would allow no aliment against the brother, but from the time he was interpelled by the citation in this process for aliment; and found all preceding furnished *ex pietate*, seeing the mother and grandfather are liable *in suo ordine*, as well as the brother; and assoilzied him since his offer to take her home: And found it has been the design of parties, that she should have right to the teinds of her jointure-lands, though not expressly mentioned, in respect of the quality and burden imposed upon her by the clause of the right, obliging her to pay the Minister's stipend.

Fol. Dic. v. 2. p. 433. Fountainhall, v. 2. p. 8.

1708. *January* 8.

The REPRESENTATIVES of MAJOR CHIESLY, of Dalry, *against* SIR ALEXANDER BRAND.

No. 49.
Nature of a tack of teinds.

By a minute of sale of the lands of Dalry betwixt Major Chiesly, and Sir Alexander Brand, the Major being obliged to give Sir Alexander a sufficient right to stock and tiend, and Sir Alexander having afterward questioned the Major's right to the teinds as not sufficient; both parties in May 1700 submitted to the Duke of Argyle what right the Major should give of the teinds sold to Sir Alexander. The arbiter considering that the Major had only right by progress to a tack of the teinds of Dalry, granted by the commendator of Holyrood House in September 1598, to James Ballenden of Burghtoun, during the life time of himsel fand heirs therein mentioned, and nineteen years after the decease of the last of

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these heirs; did, upon a mistaken supposition that the late Lord Ballenden was the last heir, ordain Major Chiesly to grant to Sir Alexander a sufficient disposition of the said tack for the said Lord Ballenden's lifetime, and nineteen years after his decease, and to purchase from the commission a prorogation thereof for two nineeten years further in favours of the said Sir Alexander, who was ordained upon performance, to discharge any thing he could crave in relation to these teinds.

The representatives of the Major finding upon inquiry, that the Lord Ballenden was none of the heirs mentioned in the tack, and that the nineteen years after the failure of the last heir were expired before pronouncing of the decreet arbitral, so that the tack could not be prorogated; took a new tack from her Majesty, as come in place of the Bishop of Edinburgh, who was titular of the teinds of Dalry, for four nineteen years, commencing from Lammas 1707; and offered the same to Sir Alexander as an equivalent to a decreet of prorogation in the terms of the minute; and insisted against him for payment of the price of the land.

Alleged for the defender: 1*mo*, The decreet arbitral must be implemented in the precise terms thereof, and not by an equivalent; 2*do*, The tack offered is not so sufficient as a judicial prorogation of the former would have been; because, a purchaser might safely rely on a decreet of prorogation, which could not be quarrelled, the authors of the former tacks being therein called; whereas a tack of teinds granted by her Majesty may happen to be excluded by some others pretending a better right, it being *in dubio* if the Queen has right to the said teinds; and though she had right as come in place of the Bishops, she cannot grant a tack for a longer space than they could have done.

Answered for the pursuers: The Queen having now all the right to these teinds which the commendator had, a tack from her Majesty for four nineteen years, must be thought at least as good and sufficient a right as the other's for three nineteens only. And seeing to implement the decreet *in forma specifica* is absolutely imprestable, not through any fault of them or their author, but by the tacks being expired before the date of the decreet; *loco facti imprestabilis subit damnum et interesse*. 2*do*, King Charles the First having acquired these teinds, and annexed them to the Bishoprick of Edinburgh, and the Queen by the suppression of Bishops having come in their place, her right to set tacks cannot be doubted; for she may *jure coronæ* dispose of such absolutely at her pleasure; as *de praxi* she has not only granted long tacks, but even heritable rights to severals; she being restrained in that matter by no such law, as the Bishops were.

The Lords found, that the tack of teinds offered by Major Chiesly's representatives, was equivalent to the right decerned to be given by the decreet arbitral, and that Sir Alexander ought to accept thereof as such.

Forbes, p. 220.