

1698. January 12. LORD BALLENDEN *against* The EARL of ANNANALE.

No 38.

THE Lord Ballenden *contra* the Earl of Annandale, for payment of 9000 merks contained in his bond. The defence was, that this and the other sums left you by the deceased Lord Ballenden are expressly tailzied, so as you can neither alienate, assign, nor contract debts; but in case of uplifting, you are expressly obliged to re-employ the same, that the *sors* and principal sum may be preserved entire to the next heir of entail; and so the debtor is not *in tuto* to pay, except the Lords appoint some to see it re-employed. *Answered*, This is *jus tertii* to the debtor, who will be sufficiently warranted by a sentence of the Lords; but if the next heir of entail compeared, he might crave to see it re-employed; and, in a former case, between Ballenden and the Lord Drumcairn, in 1688, the LORDS found the debtor not concerned in the re-employment of the money.* Some moved, that it should be uplifted at the sight of some to be named by the Lords, but the plurality thought this was to entail a trouble and slavery on the debtors, and to make the Lords curators to Ballenden; and, therefore, they repelled the defence, and found, since his son, the next heir, did not reclaim, the debtor could not stop uplifting under pretence of seeing it re-employed. But this evacuates the design, both of the disponder and his tailzie.

Fol. Dic. v. i. p. 518. Fountainball, v. i. p. 811.

1699. January 26.

MARQUIS of TWEEDDALE and LORD YESTER *against* SIR DAVID THOIRS of Inverkeithing.

PHILIPHAUGH reported the Marquis of Tweeddale and Lord Yester against Sir David Thoirs, advocate, who being charged for L. 7 Scots *per annum* as the teind of some acres of land he had inclosed in an orchard there, he suspended on this reason, that he being patron of the kirk and parish of Inverkeithing, by the act of Parliament 1690, abolishing patronages, he had right to the teinds of the parish. *Answered*, That declaratory act does not alter the state of the teinds; but any who had a right prior to the act stand unprejudged; and so it is, my Lord Tweeddale has comprised the Earl of Dunfermline's right to these teinds, which was a tack set to him by King Charles I. in 1639, for several 19 years, as also has a new tack from King William. *Replied*, No regard to Dumfermline's tack, for it is expired; and as to King William's, it can never compete with Sir David, for the Lordship of Dunfermline belongs not to the King's of Scotland *jure coronæ*, but as the nearest descendents of Queen Anne, to whom that Abbacy was disponed in a morning gift by King James, her husband, at Upslow in Norway, and confirmed in Parliament; and

No 39.

A defender was found not entitled to plead in a removing, that the pursuer had no sufficient title flowing from the original proprietor, since the defender did not derive right from that proprietor.

* See APPENDIX.