

S E C T. III.

Where one pays another's Debt, without intention of benefiting him.

No 14.
In an action
at a tercer's
instance for
a third of the
mails and du-
ties, no de-
duction was
allowed for
factor fee.

1634. March 24. LADY DUMFERMLINE *against* EARL DUMFERMLINE.

THE Lady Dumfermline pursuing the Earl her son, and his curators, for payment of her terce duties of his lands, whereto she was kened, in consideration of certain defalcations, which the defender's curators desired to be taken off the terce; the LORDS having heard the parties upon the said defalcations, there being a defalcation alleged, that the umquhile Earl husband to the Lady had burdened the land, whereof the Lady was conjunct-fiar, with a pension of L. yearly to be taken out thereof; and albeit by the warrandice contained in the Lady's infestment of conjunct-fee, her umquhile spouse had obliged him, and his heirs, to warrant the lands to her, from all rights, &c. whereby the heir stands obliged to warrant the conjunct-fee lands, that they could not be burdened with the said pension; yet seeing the same was a real right, affecting these lands to the pensioner, the said pensioner has recourse to other lands pertaining to the Earl, whereof the Lady has no conjunct-fee right, which other lands being so affected with the said real right of pension, and so a burden thereupon, behoved in law to defalk so much of the terce of the lands acclaimed by the pursuer; this allegiance was repelled, and the said pension found to be no burden so to affect the lands, as that thereby the Lady's terce should be defalked in any part for the same; *Item*, The Lady being provided by her umquhile husband to the right of some teinds, with warrandice also, and there being an imposition of a burden for the minister's stipend, laid on upon those teinds yearly, more than she was subject to by the right made to her by her husband, and according to the law and procedure by the general commission, now supervening since the making of her right, and she craving the heir to warrant the said teinds from that burden; the LORDS found, notwithstanding of the clause obligatory of warrandice contained in her right, that she had no action of warrandice therefor, and that the heir was not held to warrant from any supervenient law, which was a public law, which could not strike against parties, to draw them to warrant from facts imprestable; also defalcation being craved for the third part of the fee, paid by the defender to the chamberlain, who intromitted with the third and the Earl's two parts promiscuously, there being no separation, nor distinction, whereby the one was known from the other; for she receiving payment of the third, the Earl alleged, that she ought to allow to him, who in-gathered the same, seeing she could not have received the same, if she had had the managing thereof herself, without expenses, charges, and furnishing, to her servants, who should collect the same; this allegiance and defalcation was refused, and no allowance given to the chamberlain for his fee, which might diminish any part of the Lady's full third.

Act. Stuart, Advocatus & Nicolson.

Clerk, Hay.

Fol. Dic. v. 2. p. 318. Durie, p. 717.