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 debs; 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 disponer and his tailzie.

Fol. Dic. v. 1. *p.* 518. *Fountainhall, v.* 1. *p.* 811.

1699. *January* 26.

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

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.

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

* *See* APPENDIX.

No 39. the right King Charles I. had to it was not *qua* King, but as heir served and retoured to Queen Anne, his mother; and so King James being nearer both to his grandmother, Queen Anne, and his father King Charles I. than King William is, he can never be heir to Queen Anne or King Charles I. so long as King James is alive, and consequently it neither being in his patrimony *jure coronæ*, nor *jure privati* he can set no valid take thereof. *Duplied*, Though Dunfermline's tack be expired, yet my Lord Tweeddale bruiks *per tacitam relocationem* till he be interrupted by some having a better right. As to King William's tack, although it be not fit to debate by what title Princes set tacks, or grant other rights to their subjects, yet it is difficult to comprehend if Queen Anne's lineal heir has abdicated the Crown, how he retains the right of his private patrimony; for then King James might still claim the emoluments of the Post Office, Admiralty, and lands he had in Ireland; but these being two nice points, Sir David can never obtrude that Queen Anne's nearest of kin stand in the property of these teinds, unless he derived right from her, or some bruiking by her right; otherwise it was *jus tertii* to him to quarrel and impugn my Lord Tweeddale's right. THE LORDS repelled Sir David's defence, unless he produced some right derived from Queen Anne, or some possessing by her right.

Fol. Dic. v. 1. *p.* 521. *Fountainhall, v.* 2. *p.* 38.

No 40.
In mutual declarators of the right of a salmon fishing, the one party produced a right of the subject of a very old date, but not well connected for many of the intervening years, and the other produced a charter of a much later date. Found, that the latter had no interest to object the nullity or the want of midcouples to the former, unless he derived right from his author.

1701. *December* 3. FORBES of Waterton *against* UDNEY of Auchterallan.

THE mutual declarators between Forbes of Watterton and Udney of Auchterallan, anent their rights of salmon fishing upon the water of Eythan, were this day debated and advised. Waterton's right was derived from the Master of Kaithness, and Ogilvie of Deskford, the present Earl of Findlater's predecessor, about the 1474, near 230 years ago, and down by progress to Bannerman of Waterton in 1606, and so to this pursuer. Auchterallan's right was a right granted by his Majesty in 1603, to Annand, then of Auchterallan, containing expressly cruives and salmon fishing, and a connected progress ever since. And he *objected* against Waterton's right, 1*mo*, That there is no sort of connection of their rights from the 1474, at which they begin, till 1567, for near 100 years; and from the 1567, till 1653, there is no real right produced, which is near the space of 90 years; and then an adjudication is obtained by Forbes of Waterton against the Earl of Findlater, on a renunciation and *cognitionis causa*, for implement of Ogilvie of Deskford's obligement to denude in favour of Waterton's authors; long before which adjudication, Auchterallan had a formal complete right by charter and sasine, viz. from the year 1603, and so is preferable. *Answered* for Waterton, Whatever defects his progress laboured under, the objecting thereof was no wise competent to