

V. *anno* 1535, against Isobel Allan, liferenter of that same tenement, to entertain that tenement, in the case wherein she received the same, and to find caution to that effect; which charges being suspended by her, upon a reason founded by her, upon a posterior act of Parliament, Ja. VI. *anno* 1594, ch. 226, By the which act, it is provided, 'That such caution ought not to be found, 'while first a precognition had preceded, and been taken concerning the estate 'of the tenement;' so that nothing being done, which is prescribed by that act of Parliament, wherein the order which should be observed in such cases, in all time thereafter, is expressly set down, and the former acts are explained, whereby caution cannot be sought, nor found, while that be performed; likeas, by the said act, it is provided, 'That the heritor may enter to the said lands, in 'case of not finding of caution, and possess the same, he finding caution to the 'liferenter to pay to her the mails yearly, during her lifetime, as the land presently gives;' and she is content, conform to the act, that he enter, finding caution to her to that effect foresaid.—THE LORDS found the charges orderly proceeded against the liferenter, for causing of her to find caution, according to the foresaid first act of Parliament Ja. IV.; which act they found not to be prejudged by the said last act 1594 in any sort, but to be ratified thereby; and that any order therein set down, which appears to differ from the preceding acts, is appointed only for decayed and ruinous lands which are liferented, that the heritor may repair and big the same; which reparation cannot be made by a liferenter, nor she cannot be urged thereto, she only bruiking by a temporal right, *quo casu* the heritor entering to the same for that end, caution should be found by him to pay the mails to the liferenter, as that decayed land presently paid; and that act concerned not other land which was not ruinous, which the liferenter was holden by the preceding first act of Parliament to preserve in as good estate as it was when she entered thereto, of the nature whereof this tenement controverted was; for that last act was also in favours of the heritor, who thereby hath the privilege of reparation of burnt, ruinous, and decayed lands, given to him, in respect of policy had and to be kept within burgh.

Act. *Foulis.*Alt. *Burnet, minor.*Clerk, *Gibson.**Fol. Dic. v. 1. p 550. Durie, p. 196.*1635. *January 23.* YOUNG LAIRD OF CADDEL *against* DOUGLAS.

THE young Laird of Caddell having got, from his father, infestment of all his lands, by contract sets to his father the mains of Caddell, with the house, and manor place thereof, for all the days of his father's lifetime. Francis Douglas, brother-in-law to the old Laird, takes the gift of his escheat, and makes Stephen Boyd assignee to the said gift, for debts owing by the old Laird to Stephen Boyd. The young Laird of Caddell fiar, intents summons against Francis Dou-

46 D 2

No 33.

cautionem usufructuariam is not rescinded by the act 226th, Parl. 1594.

This last regards ruinous houses, which a liferentrix cannot be required to repair.

No 34.

The Lords extended the act which requires liferenters to find caution to uphold houses, to a person who had infest his son in his lands, and

No 34.
had taken
from him a
liferent tack
of the house,
mans. &c.;
and further,
they extend-
ed it even to
the King's
donatar, who
had taken a
gift of the
liferent tacks-
man's escheat,
and had as-
signed that
gift to a cre-
ditor of the
liferent tacks-
man.

glas, donatar to his father's escheat, and Stephen Boyd, assignee constituted to the said liferent, to hear and see themselves decerned to repair the said manor place of Caddell, and make it in as good estate as it was the time of their intronmission therewith, conform to the act of Parliament, Ja. IV. Parl. 3. cap. 25th. It was *alleged*, *imo*, That this act of Parliament was only conceived against liferenters and conjunct-fiars, who bruiked by infeftment; but the old Laird of Caddell was only but tacksman, who could not be drawn under the said act of Parliament more than any other tacksman, who, by this tack, cannot be holden to uphold his house set to them, especially houses of this kind, the upholding whereof will sometimes exceed the duty of the tack, except in the location they had been specially obliged thereto. To which it was *answered*, That the exception ought to be repelled, in respect of the quality of the tack set to the defenders, which bears but a small duty, or none at all, and so his case is equivalent as if, in the fee granted by the father to the son, the father's liferent of the house and mains had been reserved. *2do*, It was *alleged* for the donatar and assignee, That acts of Parliament are *stricti juris*, and this act cannot be extended to donations of liferents, in prejudice of the King, who cannot be compelled to uphold the rebel's house, no more than to pay the rebel's debts; but, however, the rebel may be pursued upon the act, yet the King and his donatar are free, except it had borne the same *per expressum*. To which it was *answered*, That the allegiance ought to be repelled, in respect of the act bearing liferenters, without exception; and the reason of the act being for maintenance of the policy, no liferenter whatsoever ought to be exeemed therefrom, except they had been exeemed expressly.—THE LORDS repelled both the exceptions, and sustained the summons against all the defenders, for repairing the house to that estate wherein it was the time of their intronmission with the same *respective*; and to find caution, and to uphold the same in time coming; and ordained commission to be given to the Sheriff to try the estate of the house the time of their intronmission with the same, and how much it is deteriorated since.

Fol. Dic. v. 1. p. 550. Auchinleck, MS. p. 123.

. Durie reports the same case :

THE young L. Caddell being heritor of the place and lands of Caddell, and having acquired his father's liferent thereof from him; and setting back tack again thereof to him during his lifetime, which contained no duty to be paid therefor; and the old Laird being year and day at the horn, and his liferent escheat thereby disposed to Steven Boyd, the young Laird pursues the old Laird and the donatar, upon the act of Parliament, to pay the expenses that would repair the house of Caddell, wherein it was in worse case than it was the time of the acquiring the said liferent, and to keep it in time coming in the like estate, when it shall be repaired. And it being *alleged*, That this action could

not be sustained, while there were a precognition first taken, for trial in what state it was the time of the acquiring of the defender's liferent tack, and what would repair the same; and also it being *alleged*, That this action could not be sustained against the liferent tacksman, seeing the act of Parliament, which is the ground of the pursuit, extends not to such rights, but only to conjunct fees, or such infeftments of liferent, and cannot be extended to tacks, for it is not proper against them; and any who conduces with an heritor to take a tack of lands or houses, ought not to be burdened with these burdens, the like whereof was never sustained; for a conductor can never be holden to this; but, on the contrary, a conductor more properly may have such action against the setter, especially this pursuer himself being full proprietor, and his property no ways affected with a liferent infeftment; attour he *alleged*, That such an action was never heard, neither pursued nor sustained against the donatar to a tacksman's liferent; for the King could not be in law holden to this reparation, and consequently not his donatar, no more than the King or his donatar are holden to pay the rebel's debts. These allegiances were all repelled, and it was found there needed no precognition; and also it was found, that a liferent tacksman was as well subject to this reparation as one infeft in liferent, seeing it was a tack granted by a contract, by the which the whole property was granted by the father to the son, and the son again grants a liferent tack to the father, without any payment therefor; and it was not as a tack set *inter locatorem et conductorem*, which had a competent duty to be paid therefor by the tacksman, in which case the argument had been more considerable; and also it was found, that the donatar to the liferent was subject, as well as the tacksman's self, to pay the charges which should be tried necessary to this reparation, in so far as it was worse now than it was at the time of the acquiring of his liferent escheat, and declarator thereupon; and that the said donatar should keep the same thereafter, as it should have been when it was repaired; which the LORDS found, either he should be holden to do, or else to quit his right, of either of which he had his option.

Act. *Advocatus, Nicolson, et Gibson.*Alt. *Stuart et Cunningham.*Clerk, *Hay.**Durie, p. 744.*

1663. June 18. MARGARET FLEMING *against* JAMES GILLES.

MARGARET FLEMING being infeft in an annualrent of 700 merks, out of houses in Edinburgh, in liferent, with absolute warrandice from all dangers, perils, and inconveniencies whatsoever, pursues declarator against the said James Gilles, as heritor, for declaring that her annualrent should be free of all public burden, since the rescinding of the act of Parliament 1646, whereby liferenters were ordained to bear proportional part of their annualrents with the

No 35.
The liferenter of an annualrent found liable in public burdens proportionally with the *fiar*.