

tion of his predecessor's deed *ex capite lecti*, nor the apparent heir himself, unless he were served heir.

No 99.

Gosford, MS. No 854. p. 540.

1698. January 6.

HALL and ANSTRUTHER *against* BLAIR.

HALL and Grizel Anstruther having an infeftment of annualrent upon some tenements in Perth, belonging to the deceased Robert Conqueror, they pursue Jean Blair his relict, liferentrix of these houses, who had suffered them, for want of repair, to fall ruinous, either to find caution to uphold them in terms of the act of Parliament 1491, c. 25. and 1535, c. 15. or else to cede the possession to them, upon their finding caution to pay the rent, after deduction of the annualrent of the sum to be expended by them in rendering them habitable. *Alleged*, Such an action is only competent to fiars and heritors of lands, as appears by the tenor of the acts founded on, so that creditors having only a servitude cannot pursue the same till first they adjudge, which gives them a right of property. *Answered*, This action is not only founded on the statutes, but also on the common law, where *ususfructus est jus utendi fruendi salva rei substantia*, and there is *cautio usufructaria* exacted to preserve it from destruction or embezzlements; and it were strange, where apparent heirs lie by, if creditors to the value of the lands had no remedy against a liferentrix suffering houses to decay, rather than be at the expense of upholding them. THE LORDS found the annualrenters had a sufficient title to pursue this action, though they be not expressed in the act of Parliament cited; yet found the relict liable on the grounds of the common law.

Fol. Dic. v. 2. p. 79. Fountainhall, v. 2. p. 809.

No 100.

A liferenter was pursued by creditors on the estate, who had infeftments of annualrent, but had not adjudged, to uphold the houses in terms of the statute 25th 1491, and 15th 1535, or cede possession. Process sustained, tho' creditors are not expressed in the acts of Parliament.

1699. July 12.

CREDITORS OF KINFAWNS *against* HIS RELICT and CHILDREN.

No 101.

A PARTY marrying an heiress, and bringing with him a stock of money into the family, in contemplation whereof, her father, in the contract, allows a faculty to his said son-in-law, to burden the estate with a certain sum, as a provision to a second wife and children; and he having accordingly exercised that faculty, which the LORDS found he had sufficiently done by marrying again and begetting children; in a competition for the sum betwixt his Creditors and the Relict and Children, the LORDS found the faculty personal, and therefore preferred the Children to the Creditors, there being here a *jus quasitum* to the children of the second marriage.

Fol. Dic. v. 2. p. 80. Fountainhall.

\*\* This case is No 21. p. 489, voce ANNUALRENT.