1676. *February* 18. TROTTER *against* M'KELLO.

No 99.
Reduction on death-bed found not competent to the creditors of a *deceased* heir apparent, unless he had been infeft in his life, or that the creditor had been infeft on apprising or adjudication against him.

THERE was a reduction intented at the instance of the creditors of umquhile John M'Kello and his apparent heir, of a disposition granted by him on death-bed. The apparent heir being now dead, the creditors insist in the reduction. It was *alleged* for the defender absolvitor, because the privilege of reduction *ex capite lecti*, is proper to the heir, and now there is no heir insisting. It was *answered*, That the creditors have good interest to found upon the heir's privilege if he neglect the same, that the disposition being reduced, they may affect the lands, as was found in the case of the Creditors of the Lord Couper and Balmerino, (*supra*); and the Creditors of Morton-hall, (See GENERAL LIST). The defender *replied*, That theirs was only sustained at the instance of the creditors of the defunct, and which might be sustained at the instance of the proper creditors of an apparent heir during his life, yet if he die *hæreditate jacente*, the creditors having not apprised nor adjudged from him, they have no interest to reduce, because they cannot affect the defunct's lands for the apparent heir's debt, unless it be done during his life, and here the debts are the proper debts of the apparent heir, and he deceasing without infeftment either to him or his creditors. It was *duplied*, That there is another apparent heir concurring.

THE LORDS found, That the concourse of another apparent heir could not sustain this summons, and that the creditors had no interest now to reduce upon the apparent heir's proper debt, unless he, or they in his right, had been infeft before his death.

Fol. Dic. v. 2. *p.* 79. *Stair, v.* 2. *p.* 418.

*** Gosford reports this case:

IN a reduction at the instance of the Creditors of William Brown of Burnsbank, and of his apparent heir, of a right and disposition made by his father to John Home of Kello *ex capite lecti*, there being a term assigned to satisfy the production and certification craved, it was *alleged* that there could be no process, because William Brown, the apparent heir of the disponer, was dead, and his creditors could have no interest, because they had no diligence by charging the apparent heir for adjudging or comprising his right of the lands, which could only give them a title to reduce his predecessor's deeds. It was *replied*, That the creditors having once intented action, and concurred with the apparent heir, might now insist in their own names, especially the apparent heir of William Brown their debtor having now given warrant to concur with them. THE LORDS did find, that the creditors of an apparent heir doing no diligence against him to settle his right in their person, cannot pursue a reduc-

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.

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.

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 usufructus 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.

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 exerced 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 quæsitum* to the children of the second marriage.

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

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