

No 1.

of he *alleged*, That he ought to be preferred to the arrester, for so many of the farms libelled as would satisfy his annualrent; and the arrester *answering*, That the infestment of annualrent could not meet this pursuit, which was made for the farms of the lands, which the annualrenter could never crave by virtue of his right, especially the same being for an annualrent of silver, and the farms being victual: Likeas, his naked infestment will never give him action against the tenants, as having right by virtue thereof to these farms, but will only produce action for pointing of the ground; which action remains entire to him, and is not prejudged by this process, albeit decreet were given to the pursuer; neither hath ever the excipient done diligence, nor intended any summons or action upon his infestment, so that the same, without any other diligence, can never exclude him who hath arrested, and pursued thereupon this action, to recover the farms from the tenants, so that the parties rights are not *circa idem*.—THE LORDS, notwithstanding of the infestment of the annualrent, preferred the arrester to the right of these farms, seeing the annualrenter might, notwithstanding of this sentence, point the ground, and the goods being thereon: And it being *alleged* for the excipient, That, by this sentence in favours of the arrester, the tenants would be greatly prejudged, who hereby will be obliged in the farms to the arrester; and also will have their goods pointed by the annualrenter; and so will be twice distressed for the farms and duties of one crop, whereof they will not be liberate by payment made to the arrester: And also it being *alleged*, That albeit he had a real right to point the ground for his annual, yet he was not thereby prejudged of his right to the farms *pro tanto*; and that it was in his option to elect any of these two actions and rights, as he pleased to claim the same, seeing he could not be urged to take him to the one, and forsake the other.—All this was repelled, and the arrester preferred *ut supra*; for the LORDS found, That in respect of the 36th act, 5th Parliament, James III. that the tenants were *in tuto* to pay to the arrester, and that their goods could not be pointed again by the annualrenter for these farms once paid, and so could not be distressed for that annualrent; but that the annualrenter might point his author's goods, or comprise the lands therefor, as the said act reports. But, by this decision, the right of the annualrenter is greatly prejudged, and he forced to seek the lands, which might be affected with other great burdens. (See REGISTRATION.)

*Fol. Dic. v. I. p. 45. Durie, p. 197.*

1629. July 15.

HAMILTON against His TENANTS.

No 2.

An annual-renter preferred, in a competition for the rents with the proprietor. The an-

SIR JOHN HAMILTON of Skirling, pursuing his tenants upon his heritable right, for the farms of some lands possessed by them, one who was infest in an annualrent of silver out of that land compearing, and desiring to be preferred to the heritor *pro tanto* out of the readiest of the said farms, albeit they were not yet liquidate: The annualrenter was preferred, his right being before the pursuer's

right, and the victual was ordained to be liquidate; but the annualrenter had obtained a decret for poinding of the ground *parte non comparante*, wherein this pursuer was called.

Clerk, *Gibson*.

*Fol. Dic. v. 1. p. 45. Durie, p. 462.*

No 2.  
Annualrenter had obtained a poinding of the ground, and his right was prior.

1633. July 20.

E. ANNANDALE *against* E. NITHSDALE.

THE Earl of Annandale being infest by the Earl of Nithsdale in an annualrent out of the lands of Glendinning, raises, upon his safine, arrestment; and arrests in the hands of the tenants, the mails and duties addebted by them for the saids lands, and thereupon pursues the tenants to make the same forthcoming to him, for satisfiing the said annualrent. And the tenants *alleging*, That such an action is a great novelty upon a safine of an annualrent, to convene the tenants personally to pay the mails, and to arrest the same, there never being any preceding sentence, neither against the ground to poind the same, nor against the heritor, nor no other pursuit, but this upon a naked arrestment, raised upon a safine, and against a third person who cannot be so convened, but are purchased *periculo impetrantis*, no party being heard nor cited thereto: Which allegiance was repelled, and the action sustained.

A&.

Alt. *Cunninghame*.

Clerk, *Gibson*.

*Fol. Dic. v. 1. p. 45. Durie, p. 668.*

No 3.  
Arrestment of mails and duties came to be sustained, laid on in the tenants hands, on the foundation of the annualrent right.

1637. March 15.

GUTHRIE *against* E. GALLOWAY.

RICHARD GUTHRIE being made assignee, by Doctor Lindsay and Christian Herriot his spouse, to the bygones of an annualrent of 300 merks yearly, wherein they were infest by John Achanay of Sorbie, and for which they had obtained sentence, to poind the ground of the lands of Sorbie, which were affected with the said annualrent, pursues the Earl of Galloway and his sons, as heritors of the saids lands, and as they who uplift the mails and duties of the saids lands from the tenants, occupiers thereof, to make payment to him of the said annualrent, for certain years bygone owing to them; during the which years the saids defenders were in possession of the duties, as said is; wherein the defenders *alleging*, That this action ought not to be sustained for a personal pursuit against the defenders, who are not authors of the pursuer's right of the annualrent libelled, nor heirs, nor apparent heirs to him; but the most the pursuer can obtain by the custom and practice of the country, is only action and execution against the ground, and against the tenants possessors thereof, for poinding of the ground,

No 4.  
A personal action was competent against all intromitters whatever, with the mails and duties.