

1676. December 20. KER against HUNTER.

A PERSONAL action was sustained, upon a right of annualrent, against the tenants during their possession, for the mails and duties referring to the said annualrent.

Reporter, *Treasurer-depute.*Clerk, *Hay.**Fol. Dic. v. 1. p. 45. Dirleton, No 407. p. 200.*

No 6.

1701. July 5. KINLOCH against ROCHEAD.

DAME Magdalen Kinloch, relict of Sir James Rothead of Inverleith, being infest in an annuity of 3000 merks by year out of these lands, pursues a poinding of the ground against James Rothead her son, and Thomas Kay the tenant; but finding the effect of her poinding eluded by their carrying away the victual in the night time, and disposing on it, she raises a new libel against them, for making them personally liable, as intromitters with the mails and duties.—*Alleged,* Every right had its own proper action competent thereto; from a real right of property, whether redeemable or under reversion, there arose an action for the mails and duties of the lands; and from an infestment of annualrent did flow a poinding of the ground, as the habile action resulting therefrom; and so it was in the Roman law, *rei vindicatio, actiones ex empto, mandati, pro socio, directa et contraria tutela*; and if these were jumbled and applied to one another, it would make a great confusion.—*Answered,* Though the customary natural action upon an infestment of annualrent was a poinding of the ground, yet that was not exclusive of pursuing mails and duties against the intromitters therewith, it being *jus pinguis* to have all intromitters personally liable, than only to affect the ground, and fruits thereon, which may be easily frustrate by abstracting them to another place; and that the Lords had found so; Durie, 15th March 1637, Guthrie *contra* the Earl of Galloway, No 4. p. 567.; and Stair seemed to be of the same mind in his *Institut. lib. 2. tit. 5. §. 13.*—THE LORDS, by a narrow plurality, found, That an infestment of annualrent was not a sufficient title whereupon they could pursue an action for mails and duties for years to come, whatever effect it might have for bygones in their hands, at the time of the citation in the process for mails and duties; for they thought, if he had intended to have given her right to the mails and duties, in so far as extended to her annualrent, he would have inserted an express assignation to the mails and duties *pro tanto*; and if the poinding the ground on an annualrent was a lame or defective right, the same could be easily remedied by adjudging thereon, which would give them a plain and natural access to pursue mails and duties, and make all intromitters personally liable.

Afterwards the LORDS found him personally liable for the mails and duties in his hands, at the time of the citation.

*Fol. Dic. v. 1. p. 45. Fount. v. 2. p. 117.*

4 C

VOL. II.

No 7.

An infestment of annualrent, in order to be a sufficient title to pursue a personal action for mails and duties, must contain an assignation to them. An annualrenter, after obtaining decree of poinding the ground, and being disappointed by the goods being privately carried off, brought a new action, in which the tenants were found liable to the extent of the goods on the ground, at the citation in the poinding of the ground.