

ANNUALRENT, INFESTMENT OF.

Whether an Annualrent-Right be a foundation for
Mails and Duties ?

1626. March 24.

GRAY *against* GRAHAM.

IN the action betwixt Gray and the Tenants of Fairniflat, whereof mention is made 2d March 1626, No 108. p. 562. one Andrew Graham compeared, and *alleged*, That the farms of the mains of Fairniflat ought not to be made forthcoming for the crop 1625, which was controverted to Gray the arrefter; because William Graham of Fairniflat, the arrefter's debtor, and for whose debts the faids farms were arrested, was denuded of the right to the lands, in favours of the faid Andrew, by contract in May 1624; annaizieing the faids lands to him, and charter and fafine following thereon, in July 1624, and real poffeffion had, conform thereto, by holding of courts and uplifting of the farms the faid year 1624, from these fame tenants, who became his tenants. Likeas, they acted themselves to pay their farms to him of the crop 1625; which is now controverted; and so the tenants cannot be conveyened therefor by the pursuer, as if the farms pertained to his creditor, who was denuded of his right to the lands before the arrestment, as faid is.—It was *replied*, That the tenants behoved to be repute tenants to his debtor, notwithstanding of the excipient's right; because the fafine alleged by the excipient was not registrate within 60 days after the date thereof, conform to the act of Parliament, and so was null, and cannot therefore give him real right to the land; but the heritor remained master to the tenants, and they are debtors to him of their farms, and consequently to this arrefter.—THE LORDS, notwithstanding of this answer, found the exception relevant, notwithstanding of the not registration of the fafine within 60 days, because *quoad* Graham of Fairniflat, the right was sufficient, and he could never allege that nullity; and this excipient also could not obtrude the same, who had no lawful right to the land, but only a personal right from his debtor, of a sum of money owing to him by obligation: And the act of Parliament provides, that this nullity may only be proponed by a third party, who hath acquired a perfect right of the land, which is not alleged in this case.

In this same process, another compearing for his interest, who had acquired an heritable right of an annualrent out of other lands, whereof the farms were also arrested, and craved to be made forthcoming the same crop 1625. Which infestment of annualrent was granted also before the arrestment; by virtue where-

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Annualrents of old had no effect but by pointing of the ground, and produced no personal action for mails and duties.

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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 saids farms, albeit they were not yet liquidate: The annualrenter was preferred, his right being before the pursuer's