

1748. November 2. LADY KELHEAD against JOHN WALLACE, &c.

SEVERAL creditors of Sir John Douglas of Kelhead, having arrested his rents of Kelhead, were called in a multiplepinding, where compearance was made for the Lady Dowager of Kelhead, claiming preference, by virtue of her infestment, for security of a liferent annuity of 2000 merks; and containing an assignment to the rents, with her husband's personal obligation to pay her the said annuity. Hitherto she had not been in possession of the land, having depended upon the personal obligation for her payment; and she had not attempted a pinding of the ground.

The arresters arguments for preference were these: A right of property carries the rents as an accessory, which therefore may be demanded from every intromitter. An infestment of annualrent does not, *per se*, carry the rents more than the land itself; though it is a means of acquiring both by a decree of pinding the ground. An infestment of annuity is of the same nature with an infestment of annualrent: they are not rights of property, but only servitudes upon land; and the infestment *per se* is not a title to levy the rents, more than to enter into the natural possession of the land itself. And thus says Lord Stair, tit. Infestment of Annualrent, § 6. speaking of the several sorts of rents known in the law of England: 'Rent-charge is that which not being by *reddendo*, yet is so constitute that the annualrenter may, *brevi manu*, pind the ground therefor. We have no such annualrent, for we admit of no distress without public authority; but all execution must proceed by decret and precept.' And, in a case similar to the present, observed by Durie, Gray *contra* Graham, No 1. p. 565. it being pleaded for the annualrenter, that though he had a right to pind the ground, he was not thereby deprived of his right to the rents, and that it was in his option to take himself either to the one or to the other; and it being answered, That the naked infestment gives not an action against the tenants for their rents, but only an action for pinding the ground; the COURT preferred the arrester to the rents, seeing the annualrenter had not a pinding of the ground. Nor can the creditors find a contrary decision upon record; for, in the case observed by Durie, Guthrie *contra* Earl of Galloway, No 4. p. 567. where a process was sustained at the instance of an annualrenter even against intromitters with the rents, a decree of pinding the ground had passed, which was the *ratio decidendi*; for the LORDS were of opinion, that by taking possession upon a decree of pinding the ground, the rents became the property of the creditor, and might be claimed from every intromitter. This certainly was a stretch, and which has not been followed in practice; but the creditors are not concerned, as it does not touch their case. One case more shall be cited from Fountainhall, Kinloch *contra* Rothead, No 7. p. 569. which stands thus: An infestment of annualrent is no sufficient title whereupon to pursue a personal action for rents, unless an assignment to the

No 3α.  
Right in security by infestment preferred before arresters of the rent.

No 30.

rents be contained in the annualrent-right ; but an annualrenter, after obtaining a decree of pointing the ground, finding her execution disappointed by the goods being privately carried off the ground, the LORDS, in a new process for the rents, found the tenant liable personally for them to the extent of the goods that were upon the ground at the time of the citation in the pointing of the ground ; because the subject was thereby rendered litigious.

These things being premised, it was *urged* for the arresters, That the Lady must found her preference either upon her real right of annualrent, or upon the assignment to her of the rents ; if, upon the latter, the arrestment must be preferred, unless the assignment had been intimated before the date of the arrestments ; if, upon the former, a right of annualrent, without a decree for pointing the ground, so far from being a ground of preference, is not even a title to levy the rents.

The Lady, upon her annualrent-right, might as well pretend to compete with adjudgers of the land, as with arresters of the rents. She has no title either to the land or to the rents, but by a decree of pointing the ground ; when she proceeds to this execution she will be preferable as to both ; but without it, she has no better title to the rents than to the land.

‘ THE LORDS unanimously preferred the annuitant.’

Elchies did not distinguish a right of property from a right of annualrent ; *contending*, That by a right of annualrent, all that grows on the ground is the property of the annualrenter, to the extent of his debt ; and that a pointing of the ground does not bestow any new right, being only necessary, like a process of mails and duties to a proprietor, to force the tenants to pay ; because neither can force payment *brevi manu*. Arniston added, that according to the doctrine laid down by the arresters, an annualrenter is not in safety to take payment voluntarily from the tenants, but must insist in a pointing of the ground, which would make an infeftment of annualrent a very troublesome security, because of the many informalities that this execution is generally attended with.

Elchies further *observed*, that in the competition of the creditors of Naughton, there were several annualrenters, some of whom had a disposition of the property, some not, and that all were preferred to the arresters.

The seeming difficulty of this judgment is, that upon an annuity or annualrent-right an action of mails and duties is not competent against the tenants, unless they have agreed to pay their rents to the creditor. And if so, what title has the annuitant to compete with the arresters about rents to which she has no right ? To this the solid answer is, that though she cannot claim the rent directly, yet she can point the tenant's goods to the extent of the rent, for payment of her annuity ; and in this situation it would be unjust to oblige the tenants to pay their rents to the arresters, unless they should be warranted against the pointing of the ground.

\* \* D. Falconer reports the same case :

No 30.

PART of the horses belonging to St George's regiment of dragoons having been grazed, for the summer season 1746, in Sir John Douglas's parks of Kelhead, arrestments of the grass mail were used by his creditors in the hands of the officers, who, upon their departure, consigned L. 180 Sterling in the hand of the Sheriff-depute. And other arrestments being laid on, he raised a multiplepoinding, in which compearance was made for Dame Helen Erskine, the Lady Dowager, craving preference on an infeftment of annuity for 2000 merks Scots; she having also a personal obligation therefor, with an assignation to the mails and duties to that extent; but no decret of poinding the ground, nor any possession of the lands.

*Pleaded* for the arresters, The Lady must found her preference, either upon her infeftment, or her assignation to the mails and duties; and upon neither can she affect the arrested rents. An infeftment of annualrent, or of annuity, which is similar to it, is not a title of possession, nor yet of an action of mails and duties, but singly the foundation of an action of poinding the ground, by means whereof the debt may be recovered, but without which the rents cannot be touched; Gray against Graham, No 1. p. 565. And the Lady cannot claim preference on her assignation to the mails and duties, unless it had been intimated prior to the arrestments.

*Pleaded* for the Lady, An annuity differs from a right of annualrent, in that it implies a liferent of the lands to the extent thereof; but, even in an annualrent, the infeftment gives a preference upon the estate, and rents of it; and, the only necessity of poinding the ground, is to force payment, if the tenants are refractory, but without it the preference may be determined, and payment taken, if it can be got.

THE LORDS preferred Lady Douglas on her infeftment.

Reporter, *Tinwald.*

For the Arresters, *H. Home.*

Clerk, *Kirkpatrick.*

*D. Falconer, No 1. p. 1.*

## SECT. V.

### Arresters with Disponees.

1633. November 22.

WARNOCK against ANDERSON.

ONE Warnock having obtained decret against Hamilton of Peill, and his tenants, before the commissary of Hamilton, decerning the tenants to make the

No 31.  
An arrester  
was preferred  
to a wadset.