

* * 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 decreet 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 decreet against Hamilton of Peill, and his tenants, before the commissary of Hamilton, decerning the tenants to make the

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to a wadset.

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ter, because
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restment.

farms addebted by them to the said Hamilton of Peill, their master, of the crop 1631, forthcoming, for payment of a debt owing by him to the said Warnock; and the tenants suspending that sentence, compeared in the suspension, one Anderson, who by contract had acquired the heritable right of these lands from Peill, before the arrestment execute by Warnock; which contract contained a back-tack set to Peill by Anderson; likeas, before the arrestment upon the said contract, a charter was also subscribed, and albeit sasine thereon was not expedite while after the arrestment, and albeit the sasine was also after the terms of payment, yet he *alleged*, he ought to be preferred to the arrester, in the farms controverted, so far as concerns the back-tack duty, contained in his heritable contract foresaid, seeing the sasine ought to be drawn back to its own cause, viz. to the contract and charter, and the intervening arrestment can be no impediment thereto, no more than an inhibition intervening before the sasine execute by another creditor, would have derogate to the validity of the right and sasine subsequent to the inhibition, the said sasine depending upon a cause anterior to the inhibition, which sasine he could not take the time of the contract and charter, seeing the lands held ward; and before he purchased the superior's confirmation, he could not adventure to take sasine; therefore he *alleged*, that he ought to be preferred to the arrester in the farms, in so far as his back-tack duty did extend unto; for, by the tack foresaid, the tenants were, in effect, become his tenants, and the arrestment could not affect the back-tack duty, which pertained to this party excipient, and not to Peill the arrester's debtor; notwithstanding whereof, the LORDS preferred the arrester to the wadsetter, in respect the sasine, which was the only ground of a complete real right of the land, was after the arrestment, and in prejudice of the said arrestment, it could not give him right to that year's farm, and albeit a creditor's inhibition could not have hindered the party to perfect his heritable right, which had a true and real preceding cause, yet the arrestment was not alike, which behoved to work upon an existent body, which then fell not to be claimed, but by an heritor infert; and therefore Anderson's allegiance was repelled, for the duty of the back-tack acclaimed.

Act. ———.

Alt. *Gibson.*

Clerk, *Gibson.*

Fol. Dic. v. 1. p. 179. Durie, p. 693.

No 32.

An arrester
of the mails
and duties was
preferred to
another credi-
tor who had
a disposition
of the lands
for security
of his debt,
but without

1642. *June 24.*

Lo. FORRESTER *against* CASTLELAW:

IN a double pointing betwixt the Lord Forrester, and one Castlelaw, where Castlelaw having arrested in the tenant's hands, the farms addebted by them to the Laird of Grange their master, for satisfying of a debt owing to Castlelaw by their master; and the Lord Forrester claiming to be preferred to the said Castlelaw, because before the arrestment, the lands, for most onerous causes, were disponed to him, conform whereto he is in possession, by holding of courts. Castlelaw *answered*, That the disposition ought to have no respect, no real right