No 7.

personal obligement, but a real right to the superior, to poind the ground for his feu-duties. It is true that annualrenters, who in their infeftments of annualrent have an implied assignation to mails and duties, may, by a personal action, recover the whole bygone annualrents due to them from one who hath had but one year's intromission with the rents of the burdened lands; but it is not easy to conceive, how a superior can pretend to have such an assignation to mails and duties implied in his right of superiority.

Replied for the pursuers; Seeing the rents of lands are liable to be poinded for all bygone feu-duties resting owing, intromitters with these, which are the subject of the superior's payment, should be personally liable; as annualrenters may, by a personal action, recover their whole bygone annualrents from any one who hath intromitted with as many of the rents of the burdened lands, March 15th 1637, Guthrie *contra* E. Galloway, No 4. p. 567. For however feus be generally now constituted by charter and sasine, or a writ flowing only from the superior, without any formal contract signed by both parties; there is yet a mutual obligation implied in the constitution of every feu, importing mutual prestations both upon the superior and vassal. And the superior as *dominus directus*, hath a more direct title to mails and duties, than any annualrenter; especially in feu-holdings, which are generally considered only as *emphyteuses*, and the vassal as *emphyteuta*, or a kindly tenant.

THE LORDS found, that the defenders are not personally liable, though it were instructed, that they had intromitted with as much of the rents as would satisfy the bygone feu-duties acclaimed.

Forbes, p. 584.

1738. *July* 13. BIGGAR *against* SCOTT.

No 8.
Personal action, for payment of feu-duties, against a tenant, falls upon the tenant's removal.

THOUGH personal action be competent to the superior for his feu-duties, not only against the original feuer and his heirs *ex contractu*, but against their singular successors, the property being truly reserved in as far as relates to the superior's casualities, and therefore all intromitters being liable for the feu-duties, yet, in a process at the instance of the superior against the tenant of the vassal, the LORDS found, 'That the tenant being removed before the process was raised, there lay no personal action against him at the superior's instance for payment of the feu-duty.'

The reason given was, that the personal action could only lie where the tenant's goods were attachable by action of poinding the ground, which they are not after his removal: Several of the Lords dissenting, who thought the distinction imaginary; for that if once action lay, it remained while the tenant was debtor in the rent to his master the vassal.

Fol. Dic. v. 1. *p.* 296. *Kilkerran,* (FEU-DUTIES.) *No* 1. *p.* 188.

*** C. Home reports the same case:

No 8.

JAMES BUCHANNAN being debtor in the sum of L. 19 Sterling, by bill, to the said John Scot, set to him some grass-grounds, of which he was proprietor; and, by the agreement, Scot was to discount L. 6 Sterling, as the rent thereof, from the said bill. In consequence of this bargain, Scot entered to, and possessed the land, from October 1735, to Whitsunday following, when he removed. And, in July thereafter, the said Anna Biggar, as assignee from the superior of the ground, brought an action against Scot for payment of 100 merks, as the feu-duty, payable out of the said land, from Whitsunday 1735 to Whitsunday 1736.

It was *pleaded* for Scott; That the rent, due to him by Buchannan, was compensated by the bill he owed to him, which, being equivalent to payment, would have been a good defence against Buchannan the proprietor, had he been pursuing for the rent; consequently, it must be as available against his superior, insisting in a personal action against the tenant, for payment of the feu-duty. In support whereof, it was observed, that, as the law stood anciently, the only remedy competent to a superior, whereby he could recover his feu-duties from the natural possessors, was, by the brief of distress, which entitled him to poind goods belonging to the tenant, for the proprietor's debts, notwithstanding they exceeded the term's mail; but this, being considered as a grievance, was rectified by the act 1469. But still the superior is entitled, so far as the tenant's rent does extend, to force payment, by poinding his effects, even before the term of payment of the rent; so that the current rent seems hypothecated to the superior for security of his feu-duties, and which he is entitled to exact from the tenant, even before the term falls due; the reason whereof seems to be, that, as the feu-duty is a real burden affecting the ground itself, and payable out of the fruits, consequently it subjects the intromitters personally, and the tenants, or natural possessors, are considered as the intromitters with the fruits, so long as the term of payment of the rent to the proprietor is not come; because, before that, they are not properly debtors to their master in the rent; therefore, if the superior, by his real right, does evict the same from the tenant, before the term of payment of the rent, so soon as it comes, he ceases to be debtor to the master, payment to the superior being full exoneration to the tenant: Whereas, on the other hand, if the superior lies by till after the term of payment, the tenant becomes debtor to the master, and the superior loses any action, real or personal, which he had against him for the last term's rent; in lieu whereof, the superior comes to have a preference upon the next term's mail; so that, in a word, it is the current mail for which the tenant is liable to be distressed for the feu-duty. Now, as the superior, in this case, did no diligence until after the term of payment of the rent, nor till after the tenant had

removed; therefore, as payment to the proprietor would have been good, compensation must be equally available, as it operates, *in ipso jure*, extinction of the debt. No 8.

It was *answered* for the pursuer; That compensation can only take place where there is a *concursus inter easdem personas*, and after it is proponed; consequently, as neither Buchannan, nor any in virtue of a title from him, are insisting against the defender, compensation does not apply to this case. Neither is it to the point, that the defender was creditor to Buchanan *ab ante*, whereby the rent, as is alleged, was no sooner due than paid; since there is nothing plainer in our law, than that compensation does not operate *ipso jure*, but upon being proponed. Now, to this day, there has been no clearing betwixt the defender and Buchannan, nor no discharge granted by Buchannan to him; neither has he proponed compensation against Buchannan; so that it is impossible the bill, which is prior to the defender's possession, can be reckoned a discharge; and, as it was never proponed against Buchannan, it could be no bar to him to demand his rent, until the defence was made; much less can it operate against the pursuer, who is not obliged to take notice what debts were betwixt them two, since no legal discharge of the tack appears. Besides, as a tenant ought to know his master's title, and what affects the fruits, he should not pay till he is sure such burdens, as could affect him, are cleared.

At advising this cause, the LORDS found, 'That John Scott, the tenant, being removed before intenting of this action, he is not liable to a personal action at the superior's assignee's instance for payment of the feu-duties.' As this interlocutor was founded on a point not formerly insisted upon, therefore the pursuer reclaimed, setting forth, That a personal action was competent to a superior for payment of his feu-duties, of the same nature and kind that is competent to a proprietor for payment of his rent. To enforce this it was *pleaded*, That it was not a just conception of the nature and propriety of vassalage, to consider the superior's casualties as a burden upon the vassal's property, seeing the matter lay directly the other way; for the radical right remained with the superior, and the vassal's interest was nothing else but a burden on the property; hence, supposing his title any how annihilated, the superior's right, like air compressed, expanded itself over the whole, and the superior thereby became absolute proprietor, just as he was before the vassalage had a beginning. On the other hand, this reasoning would not apply to the vassal's interest, which is limited, and would not turn out more extensive, even though the superiority was supposed to be annihilated. That this is the just conception of the matter, is evident from this, that a simple renunciation, or, which is no better, a resignation *ad remanentiam*, totally sopites the vassal's title, no more being necessary to extinguish a burden, real or personal; but, as a discharge, or renunciation, operates no conveyance, these can signify nothing in the case of property; unless another, at the same time, be invested; hence it is, that a renunciation, or resignation, *ad remanentiam*, of the superiority in the vassal's hands, is of no

No 8. avail. The law so standing, it is evident, that the property itself remains with the superior, unless so far as limited by the burden imposed upon it in favours of the vassal; and therefore every single casuality of the superiority ought to be considered in no other shape than as acts of property, which the superior is entitled to exerce *qua* proprietor of the lands; because, so far as these go, his property is not limited, which now leads directly to the case in hand; for the feu-duty, payable to the superior, is, by our law, understood to be a branch of his property as much as any other casuality; consequently, with regard to the feu-duties, he can exert every act of property upon the subject, in the same manner he could have done before the feu was constituted. Upon this footing it is, that all our writers agree the superior has right of hypothec upon the rents for security of his feu-duties. *See* Craig, lib. 2. dieg. 9. § 11.; Sir George M'Kenzie, b. 2. tit. 6. § 12.; Stair, lib. 2. tit. 4. § 7. which demonstrate the superior's property in the rent: And, when the precedents are looked into, it will be found, the personal action for payment of the feu-duties is very different from the real one of poinding the ground, both with regard to its foundation and effects; nor does the personal action depend upon, or is consequential of the real one, for poinding the ground, they having very different effects in law, as the one may be competent where the other is not: *e. g.* A singular successor may be liable, upon a poinding the ground for feu-duties 40 years backward; but, if he had not possessed for above a year, he cannot be liable for more than a year's feu-duty; just so, an adjudger, an assignee to mails and duties, or any other intromitter with the rents of the lands not in the natural possession, cannot be reached by a poinding; but it was never disputed that he might be affected by a personal action *qua* intromitter.

Answered for John Scot; Whether the vassal's right is a burden on the superiority, or *vice versa*, is quite immaterial to the point in issue, seeing the feu-duty is a proper burden upon the vassal's title, for the payment of which he is not only personally bound by the feu-contract, but it is likewise a real debt affecting the fee itself as a condition and quality of the vassal's right. This being the case, it would seem to have been a stretch of the law to give the superior a personal action for his feu-duty against a third party who was not bound in the contract; whereas the real action being incorporated with the right itself, does follow the property wherever it goes, and was anciently made effectual by the brief of distress, whereby not only the proper goods of the vassal, but those pertaining to poor tenants, were liable to be poinded *in infinitum*, directly contrary to the principles of justice. However, since the act correcting that abuse, the practice has gone to allow the superior even a personal action against the tenant, from the same equitable consideration, that, in as far as he was still liable to real diligence by poinding, he should likewise be obliged to answer, in a personal suit to that extent; therefore the real action, or brief of distress, seems the solid foundation of the personal one introduced by practice; which, of course, can never be more extensive than the one on which it is founded:

Wherever the real one would be available, the personal will likewise ly; but, where the effect of the real one is lost, *quoad* the tenant, as it undeniably is by his removal from the grounds, the personal action can no longer subsist, nor is in this in the least prejudicial to the superior. Had the tenant remained in the possession, he could only have been liable to the extent of his term's mail; and, as the succeeding tenant becomes liable to the same suit, for the like extent, the superior loses nothing of his former security; his real right is as entire as before, the vassal remaining still personally liable, and the immediate possessor is subject both to the real and personal diligence, to the extent of his term's mail. Further, if the tenants were personally bound to pay the superior's feu-duty, from the single fact of their having possessed the ground, How is it possible they could ever liberate themselves therefrom, but by actual payment to the superior? And yet it cannot be disputed, but that, if the tenant had paid his rent to his own master, the vassal, he would be no longer liable to the personal suit at the superior's instance; which is demonstration that he is not properly debtor to the superior, nor bound, in a personal action, farther than he is liable to the real distress. Besides, the establishing the pursuer's doctrine would be attended with several inconveniencies; one of which would be, that no tenant could safely pay his rent, until such time as his master produced full acquittances from the superior of his feu-duties, &c. No 8.

THE LORDS adhered.

C. Home, No 96. p. 150.

1739. *June* 29. WALLACE *against* FERGUSON.

No 9.

THE vassal, by accepting of a feu-charter, containing the clause *reddendo inde annuatim*, becomes thereby liable personally for the feu-duties, whether the charter is granted to him originally, or if he is a purchaser from the original vassal; and therefore, a feu-vassal was found personally liable for the feu-duties, even after he had sold his land, and the purchaser in possession, by a minute of sale, but without getting a charter from the superior. *See* APPENDIX.

Fol. Dic. v. 1. p. 297.

*** Kilkerran reports the same case:

FOUND, That a vassal is by the feu-contract personally liable to the superior for the feu-duties, and that he remains so, even after he has sold the lands, until the new purchaser shall be received by the superior.

Nor was there occasion to give judgment on an argument pleaded for the vassal, viz. That a vassal may, by our law, liberate himself by abandoning his right; for suppose the law stood so, where the vassal possesses *per alium*, it is the same to the superior as if he possessed himself.

Kilkerran, (FEU-DUTY.) *No 2. p. 189.*