

the tenor of the act of Parliament, which cannot militate in this cause betwixt two creditors doing diligence : Which answers were all repelled, and the defender was preferred.

No 24.

Act. Cunninghame. •

Alt. Oliphant.

Clerk, Hay.

Fol. Dic. v. 1. p. 89. Durie, p. 796.

1642. February 11.

MONTEITH against L. WEST-NISBET.

No 25.

WILLIAM MONTEITH pursuing pointing of the ground against the Laird of West-Nisbet, for an annualrent wherein he was infest, by a base infestment, and other creditors of West-Nisbet, who were infest by public infestments upon comprisings, but posterior, some years after this pursuer ; alleging, that all the creditors should come in *pari passu* in such a case, as concerned so many persons heavily prejudged by West-Nisbet, who was become bankrupt ; whereas, if any which were prior should be preferred therefore, that would overthrow many others who were wracked thereby ;—THE LORDS preferred Monteith in respect of the priority of his real right, notwithstanding that it was alleged, that the same was but base, holden of the granter, and that the King's confirmation thereof made it no more public, but would save the same only from forefaulture, or recognition, and such accidents ; and that their infestments were public, holden of the King ; and also, albeit it was *answered* to the reply of possession, That the same ought not to be respected, because the same was only clad with payment, made by the debtor of the annualrent for his money, which could not corroborate that right, the possession not being out of the land, nor made by the tenants ; notwithstanding whereof the reply was sustained, seeing he offered to prove, that the payment was made conform to his infestment, at the date of the which right it was lawful to the pursuer to contract with his debtor, he neither being then bankrupt, nor inhibit, nor at the horn ; and whatever was his case thereafter, that ought not to prejudge him, who had dealt with a responal party, when he contracted with him.

Found in conformity with No 23. p. 1293.

Clerk, Hay.

Fol. Dic. v. 1. p. 89. Durie, p. 892.

1667. July 23.

SIR HARIE HUME against TENANTS of Kello, and SIR ALEXANDER HUME.

No 26.

SIR HARIE HUME having comprised the lands of Kello, compearance is made for some annualrenters, who craved preference, because their infestments of annualrent were before the apprising : It was *answered*, That the infestment of annualrent was base, never clad with possession : It was *answered* for the annualrenter, That he produced an *antapocha*, bearing the receipt of a discharge grant.

The receipt of a small sum, far within a term's annualrent, was found to validate a base infestment of

No 26.
annualrent; though the infestment was not specified; and though more than the sum of annualrent was due, upon a personal bond, before the date of the infestment.

ed by the debtor of the annualrent, which did instruct the annualrenter was in possession before the apprising, by uplifting the annualrent from the debtor: It was *answered*, That the sum was of fourcore merks, which was far within a term's annualrent, and that it related only to the personal bond, and not to the infestment, and that there was more than this sum due of annualrent by the personal bond, before the date of the infestment, to which only it behoved to be imputed: It was *answered*, That the receipt being general in part of payment of the annualrent, he that paid the sum might impute it to what term he pleased, and so would impute it to a term after his infestment: It was *answered*, That, before that discharge, the pursuer's apprising was led, though no infestment thereon, after which so small a part of the annualrent could not be impute to any but the first annualrent due, and could not validate the base infestment.

THE LORDS found it sufficient to validate the base infestment, notwithstanding of what was alleged on the contrary.

Fol. Dic. v. 1. p. 89. Stair, v. 1. p. 480.

1669. January 14.

CLARKSON against MILNE.

No 27.
Payment of a term's annualrent of a bond, whereupon sasine did not follow till after the payment, was found to make it public, *quoad* a donatar of liferent escheat, whose right was posterior.
See No 24.
P. 1294.

ROBERT MILNE, as donatar to the liferent escheat of Hamilton of Bathgate, whereupon he had obtained a decret of special declarator: There is a reduction raised at the instance of John Clarkson and his children, upon this reason; that they were infest in an annualrent out of the said lands, long before the rebellion or gift; and their right, albeit base, was clad with possession; for instructing whereof, they produced a discharge granted to Bathgate, of a term's annualrent preceding the sasine taken upon the heritable bond, and before the liferent escheat fell.—To which it being *answered*, That the discharge being for a term preceding the sasine, could only be ascribed to the personal bond, and did not make the infestment public. *2do*, The discharge was most suspect, and could not instruct payment, being written by Clarkson himself, and his son being one of the two witnesses, who was fiar of the annualrent.—THE LORDS, before answer, ordained Clarkson to prove by some other witness, that the money was truly paid by Bathgate, and the discharge delivered to him, *et quomodo* Clarkson had recovered the discharge out of his hands.

February 6. 1669.—THE reduction mentioned on the 14th January being again called, and a condescence given in by Clarkson, bearing that he offered to prove by witnesses the true delivery of the annualrent by Bathgate, and the delivery of Clarkson's discharge at the very same time.—THE LORDS did sustain the same as relevant to make Clarkson's base infestment clad with possession, albeit it was for a term before the sasine, seeing the sasine was before the donatar's gift; for a sasine of an annualrent, is a good right to pursue a pouding of the ground for all preceding annualrents, after the heritable bond, whereupon the