

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