

1636. February 24.

OLIPHANT *against* OLIPHANT.

No 24.

Payment of a term's annual rent of a bond, upon which *safine* did not follow till after the payment, found not to make it public in competition with an *apprifer*.

PATRICK OLIPHANT pursuing to hear the ground of the lands of ——— pertaining to Sir James Oliphant, to be poided for an annualrent of 250 merks yearly, which he had out of the said lands, by virtue of these titles, viz. a bond granted to him by Sir James in December 1631, of the principal sum of 2500 merks, payable at Whitfunday thereafter 1632, containing an obligement to infest, and containing therein a procuratory; the bond bearing an obligation to infest by two infestments, one to be holden of himself, and the other of the King; conform whereto he was infest in June 1632, and it was registrate in the secretary's register the same month; and the said bond bearing, as said is, To be holden of the King, was confirmed in July 1632. And having also received a term's payment of the said annualrent, but before the *safine*, for the term intervening betwixt the obligation and the term of taking the *safine*, viz. for the term betwixt Martinmas 1631 and Whitfundry 1632; in respect whereof he claimed the ground to be poided, as affected with that annualrent; and John Oliphant of Bachiltoun *alleging* that the ground ought not to be burdened therewith, because he stands heritably infest in these lands, and by virtue thereof in possession, by virtue of a public right depending upon comprisings; and albeit he be posterior, yet being public, and clothed with possession, as said is, it should give him preference. THE LORDS preferred the defender to the pursuer's prior right, albeit the pursuer's debt was anterior to the defender's debt, whereupon his comprising and public infestments followed; and albeit the pursuer's *safine* was also prior to the denunciation of the defender's comprising, and that the same was also registrate in the public register, and confirmed by the King, before the defender's infestment; which two acts the LORDS found made not the pursuer's right public; neither had the LORDS respect to the term's payment made to the pursuer after the bond before his *safine*; for that payment they found could not corroborate the infestment, as the same would have done in law, if it had followed the infestment, and had been paid before the defender's public right; for they found that the same payment could not be drawn to the *safine*, nor the *safine* to it, as the pursuer alleged it ought to be in reason; which the LORDS repelled: Neither did they respect, that the pursuer had done most exact diligence upon his infestment, seeing he had shortly after the term of payment of the first term of his annualrent, by that whereof he was paid, as said is, before his *safine*, intended action upon his right for poiding of the ground, which has ever been depending since in plea and question, betwixt him and the creditors of the common debtor: Likeas his infestment was known to the defender long before his right and infestment, and comprising whereon it proceeded; so that it cannot be repute a base and obscure right, which was not known to the party, and which might make him excusable to have taken any right wherewith to clothe himself for freeing him of that burden; as might have been in two contrary deeds, done by one author, contrary to

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.

Aēt. 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