

No. 8. 1747, Jan. 9, 10, 24. CREDITORS of WHITEHAUGH, *Competing*.

THE question was, Whether when there were several different classes of annualrents or adjudications after an inhibitor, but whose claim of preference upon his adjudication is after them,—Whether the inhibitor's payment must be taken proportionally out of all the posterior annualrents or adjudications, which has been the practice hitherto ever since the creditors of Nicholson, or if the whole loss must fall upon the last? The papers are very full both as to the precedents and as to the reasons of the thing and principles of law.

This case was argued yesterday at the bar, and this day very fully argued upon the Bench. Kilkerran first spoke short for Lithgow,—next Dun against him,—also Drummore very full and long,—then Tinwald for him pretty long,—next Minto short,—then I spoke short against him for the other creditors,—last of all the President for Lithgow. My reasons were chiefly because of the decision in the case of Nicolson, and 50 years custom of the Court upon it; that it was not true that an infertment cannot be prejudged by subsequent contractions, for if the debtor die, his heirs' debts will not be affected by inhibitions against the predecessor, and therefore these inhibitions must affect the infertments of annualrent granted by him, and not those by his heir; and it was admitted, that debts contracted before the inhibition, but less preferable than the annualrent, would have the same effect. 2d, If we alter the rule in this case, I see no reason why we should not alter the rule likewise in the case of infertments in different subjects, for the reason of the thing, the equity of the case, is the same in both. 3d, There is no necessity for altering the rule, because a creditor lending money to a person already inhibited, and taking infertment or annualrent, he can secure himself against subsequent contractions by using inhibition. 2dly, They can secure themselves against both prior and posterior debts who had not a prior infertment by a particular infertment of warrandice. By the President's casting vote, it carried that the infertments must not be burdened proportionally, but the last must be burdened.—*Pro* were Minto, Kilkerran, Monzie, Tinwald, and Shewalton. *Con* were Drummore, Strichen, Dun, Murkle, *et Ego*. 24th We adhered,—and Arniston was for it, though, as he observed, a second or third or last annualrenter purchasing the inhibition would have been safe.

## No. 9. 1749, Nov. 24. CREDITORS of CHARLES GRAY.

IN the competition of the arresting creditors of Charles Gray, Baird and Company being on the priority of their arrestment preferred for payment of a bill accepted by the said Charles Gray and James Gray his brother, Miller and Company, the creditors postponed, insisted that Baird and Company should assign the bill against James Gray. Answered, Not bound to assign, because they knew that James was truly no more than cautioner. Then compearance was made for James, and a proof allowed him, and proved pretty convincingly by the Company, the creditors in the bill, that it was given as security to them for relief of their engagement for Charles for a bargain of victual, which they were forced to pay;—but the question recurred, Whether a proof by witnesses was competent? However, as this claim of assigning is only a claim in equity, that proof was sufficient not

to oblige them to assign,—and I quoted the case 24th February 1708, Kennedy against Vans. (Dict. No. 24. p. 3370.) However, Miller may, as creditor to Charles Gray, yet confirm his right of relief.

No. 10. 1750, June 13. COMPETITION, DEMPSTER and LADY KINLOCH.

SEE Note of No. 13, *voce* FORFEITURE.

No. 11. 1751, Jan. 23, June 12, 13. CREDITORS of FULLERTON, *Competing*.

CAPTAIN HUGH FULLERTON in 1723 granted heritable bond for 8000 merks on some tenements and burgh-lands to Mr James Murray, whereon he was infeft April 1724, and in 1726 the Captain disposed the tenement and burgh-lands for love and favour to his second son, Samuel, with absolute warrandice. 22d December 1730 Murray executed inhibition, and 18th February 1732 adjudged his debtor's whole estate. After the inhibition, the Captain sold the lands of Ackerley to Thomas Bain;—and he, on distress on the inhibition, paid Murray, and got assignation. 5th January 1742, after his death, his son John succeeded;—and his creditors adjudged both estates, and were all within year and day of the first effectual one, dated 7th June 1743, and pursued a sale of both estates, which is now carried on by Bain in right of Murray's debt. Samuel's creditors, who were infeft in the tenements and burgh-lands for sums near the value, insisted that they ought to be preferred, for that the Captain being bound to warrant Samuel's right against Bain's debt, Bain was obliged upon payment, or if he drew his payment out of their debtor's estate, to convey his infeftment and diligence to them, which was preferable to the whole of the other creditors. On the other hand, the creditors of John insisted that he ought to assign to them. But the Court, 23d January last, found that he was not obliged to assign to the creditors of John,—but that if he was ranked on the estate of Samuel, he was bound to assign to his creditors. And yesterday, on petition and answers, they adhered, *quibusdam renit*. My only difficulty was, that had it not been for the warrandice in Samuel's disposition, he or his creditors would not have been entitled to relief of that debt; and though on any question with the Captain that clause would well have entitled Samuel to relief and to an assignation on payment,—yet I thought it hard, that in competition of real creditors, that personal latent obligation that entered no record, should have as strong an effect in favour of Samuel and his creditors, against the creditors of the Captain or his heirs, as if Samuel had had an infeftment of relief, or as if Murray's diligence for his debt had been used by Samuel upon his warrandice.

No. 12. 1752, Feb. 14, June 26. YORK-BUILDINGS COMPANY *against* The DUKE of NORFOLK.

IN 1727, certain trustees were infeft in the York-Buildings Company's estates in Scotland, for security of certain annuities for lives, and the bonds granted for them all contained in a schedule annexed to the disposition, which schedule mentioned the annuitants' names, and sums payable to them severally, but not the names of the nominees during whose lives the annuities were payable, whereof some were persons different from the annuitants who had right to them,—the annuitant choosing whomsoever he pleased. In 1730 the Duke of Norfolk became creditor to the Company by a lease he gave them of