

No. 10.

1743. Answered : He was creditor, and a real creditor for the whole sum from the date, only Sir James was creditor to him by his counter obligation, and numberless such transactions are daily made both in sales, in wadsets, and infestments of annualrent. The Lords by the narrowest majority preferred Dempster, but on a reclaiming bill, they altered and preferred the Lady as to all but the L.8735 advanced.

1751. *Jan. 23, June 12.*

CREDITORS of FULLERTON of CARLETON, *Competing.*

No. 11.
In what case is there an obligation to assign ?

CAPTAIN FULLERTON of Carleton in 1723, gave Mr John Murray an heritable bond for 200 merks on some tenements and burgh-acres, whereon he was infest in 1724 ; and in 1726 the Captain disposed these tenements and burgh-acres for love and favour to his second son Samuel, with absolute warrandice. In December 1730 Murray used inhibition, and in February 1732 adjudged his debtor's whole estate. The Captain, after the inhibition, sold Auchinlay to Thomas Bain, who on distress was forced to pay the debt in the inhibition and to take right to it. John Fullerton succeeded the Captain, and his creditors adjudged both estates, that is, both John's and Samuel's, and were all within year and day of the first effectual adjudication, dated 7th June 1743, and pursued a sale of both estates, which is carried on by Bain in right of Murray's debt. The creditors of Samuel, who were infest in these tenements and burgh-acres for sums near their value, insisted that Bain ought to draw his whole payment out of John's estate, being preferable to all the creditors ; or if he were also ranked on Samuel's, or if he should draw any part of his payment out of that estate, that he was bound to assign to them against John's estate, because the Captain had disposed these tenements with absolute warrandice. On the other hand, John's creditors insisted, that it was a debt on these tenements and acres before they were conveyed to Samuel. But the Lords found, 23d January 1751, that if Bain was ranked on Samuel's estate, he must convey to his creditors, and thereby draw his whole payment out of John's estate, and 12th June 1751 they adhered. My difficulty was, that this was giving as strong an effect to a personal clause of absolute warrandice that entered no record, and that in competition of real creditors, as if Samuel had an infestment of warrandice, or had used the most complete diligence on that obligation ; for had it not been for that warrandice, the disposition for love and favour would have been understood with the burden of the prior infestment.