

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

the Strontien mines, in consequence whereof he adjudged for great sums of money. As these annuities were assignable, many of them were assigned; and the assignees many of them gave up the old bonds to be cancelled, and took new bonds in their own names, and in many of these the persons for whose lives the annuities were to subsist were changed. The Duke pursued reduction of the trust-infertment, and of the annuities, and objected to these new bonds granted after the infertment. Drummore, Ordinary, gave several interlocutors;—against which the Duke reclaimed;—which brought on a hearing in presence, on which we pronounced the following interlocutor, that was this day signed:—

“ Find, that by the laws of Scotland, the creditors annuitants can have no real right in virtue of the trust-infertment in the Company's lands and estates in Scotland, for payment or security of bonds granted by the Company after the date of the said infertment; but in respect of the circumstances of this case, and that it appears that several of the creditors, unacquainted with the laws of Scotland, have erroneously given up to the Company the old bond, for security and payment of which the said trust-infertment was granted, and which bonds had been duly assigned to them, and have in place thereof taken new bonds for the same annuities, in the names of the said assignees, in belief that their real right and security in the said lands and estates in Scotland was not thereby hurt or impaired, and as the pursuer, whose debt was contracted before making the said exchanges, has suffered no prejudice thereby, so he ought not to take any advantage by that error;—therefore find that the said annuitants who have delivered up old bonds prior to the date of the infertment, upon getting new bonds in their own names, ought to be preferred and ranked upon the Company's estates in Scotland, as if they were still possessed of the said old bonds entire and uncanceled; but find that where the persons during whose lives the annuities in the old bonds were to subsist were different from the persons during whose lives the annuities in the said new bonds are granted, that in such cases, the annuities in the new bonds must cease and determine by the death of the persons named in the new bonds, and that neither the Company, nor their estates in Scotland, are liable for the same, albeit the persons named in the said old bond shall be still living;—but find that the said preference upon the Company's lands and estates in Scotland does cease and determine by the death of the persons during whose lives the said annuities were granted by the old bonds, although the persons named in the new bonds shall happen to survive them, and remit to the Lord Ordinary to proceed accordingly.”—

This interlocutor was agreed to unanimously;—and I mentioned to them two precedents for it pretty parrallel, (but which were not mentioned by the Bar;) the first observed by Dirleton, decision 240, February 5, 1675, Binnie against Scott; and 24th July 1713, Creditors of Achlossin competing. And the reason of the last part of the judgment, whereof the annuitants complained heavily, was that the Company could not be bound longer than they had bound themselves to the defenders, that is, for the lives of the nominees in the last bonds. No doubt, several of these must be already dead, and the annuity thereby at an end before this dispute happened; and we could not make these revive, though the nominees in the first bonds were still alive; and on the other hand we could give them no preference but upon the footing of the first bonds, or as it is expressed in the interlocutor, as if they were still possessed of the old bonds; and upon the footing of these bonds they could have no preference after the death of the nominees in them.

26th June 1752, The Lords after long reasoning altered, and found these new bonds cannot be ranked upon these estates, as the old bonds would have been.

No. 13. 1753, July 27. CREDITORS of CAMPBELL *against* EARL of LAUDERDALE.

NOVEMBER 1713 the then Earl of Lauderdale sold Glassery to Sir James Campbell, but being advised not to represent his predecessors, the method devised was, that Sir James should purchase certain diligences by adjudication and other debts affecting the lands, after the said debts should be adjusted between the Earl and the creditors; and these rights being conveyed to Sir James, thereby to have right to the lands for ever, without being quarrelled by the Earl, his heirs and successors,—who was also to cause John Corse renounce some adjudications that he had right to, but truly in trust to the Earl, and to cause the Countess his mother and the Countess his Lady renounce their infestments. The price of the lands was ascertained, and Sir James was to pay the half at Whitsunday 1714, which was declared the term of his entry to the lands, and was to give security for payment of the other half at Martinmas 1715; and if the price exceeded the sum to be paid to the creditors, whose rights Sir James was to purchase, then the surplus was to be applied for payment of the other creditors to be named by the Earl, or to be paid to the Earl himself,—and a contract was executed between them in these terms.—19th June 1714 The Earl granted Sir James an obligation, bearing that Sir James had acquired rights and diligences to the full value of these lands,—therefore he obliged him, his heirs, &c. never to quarrel or impugn directly or indirectly the rights and diligences acquired by him, or that he should acquire, for securing to him the said lands, but that he and his heirs may enjoy them for ever. Notwithstanding this last deed there still remained a balance of the price unpaid, as appeared by Sir James's creditors many years after; but it did not appear what that balance was. In the ranking of Sir James's creditors, Earl of Lauderdale craved to be preferred upon the price.—Answered: By the law of Scotland a seller after he is denuded has no security or hypothec for the price, and the Earl was denuded by the diligences acquired by Sir James and the Earl's obligation never to quarrel them, which was equal to a ratification.—Answered: John Corse's adjudications are preferable to the diligences acquired by Sir James, and although on payment of the price the Earl was obliged to cause Corse renounce them, yet he cannot be obliged to perform his part of the contract till Sir James or his creditors perform theirs; and quoted our decision 5th December 1746, Graham against Creditors of Trail, (No. 7. *hujus tituli*.)—Answered: That that decision cannot apply: The question there was, Whether Trail's back-bond was not a good defence against Graham's obligation of warrandice, which doubtless it was, or 2dly, Whether a personal disposition by Graham's wife with his consent and taking burden on him for his wife, whereon no infestment either did or could follow, would carry two infestments of annualrent afterwards purchased by Graham as *jura supervenientia auctori*, and which he purchased agreeable to the covenant of parties, whereby the purchaser was to retain part of the price till the incumbrances were purged; and the Court there thought that an infestment of annualrent could not accresce to a personal disposition, which does not apply to this case. The creditors do not