1747. *January* 24. CREDITORS of WHITEHAUGH, *Competing*.

No. 8.

THERE being an inhibition and three infeftments of annualrent all posterior to it, and then an adjudication on the inhibition; the question was, whether the annualrents should be first preferred and ranked in their order, and then the inhibitor to draw proportionally from each of them, which has been the general practice for 50 years? or, if the inhibition must be ranked first, and next the annualrenters in their order, so as all the deficiency shall fall on the last annualrenter. By the President's casting vote this last carried, after long pleadings at the bar and reasoning on the bench Adhered to. John Lithgow was the first annualrenter. *Vide* M'Gill, No. 1. *supra*. *Vide* Hope's Creditors, 2d February 1750, *voce* INHIBITION. (See DICT. No. 101. p. 2896.)

1749. *November* 24. CREDITORS of CHARLES GRAY.

No. 9.

COMPETITION of arresters,—the arrester preferred his debt being a bill accepted by two persons, viz. the common debtor and another; the creditor postponed, insisted that the said bill should be assigned to him against the co-obligant. Answered, He could not in equity assign, because that other person was truly only cautioner for the common debtor. Of this there was no written evidence; but as the foundation of the debt was a bargain of victual, a proof before answer was allowed by witnesses, and a pretty convincing proof was brought; and therefore, though we doubted whether it was competent to prove by witnesses that one of two acceptors of a bill is only cautioner, yet as this claim to have the bill assigned was only a claim in equity, we found the creditor preferred not bound to assign.

1750. *June* 13. COMPETITION DEMPSTER and LADY KINLOCH.

No. 10.

IN Dempster's case, mentioned *voce* FORFEITURE, Dempster being preferable on his heritable bond to Lady Kinloch, because his sasine was first registrated, the Lady objected that he could not be preferred for the whole L.20,000, but only the L.8735, the sum then advanced, and that he was not at all creditor, far less a real creditor, for the remainder till December

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 infeftments 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 infeft in 1724; and in 1726 the Captain disponed 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 infeft 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 disponed 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 infeftment of warrandice, or had used the most complete diligence on that obligement; for had it not been for that warrandice, the disposition for love and favour would have been understood with the burden of the prior infeftment.