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 inhibiter, but whose claim of preference upon his adjudication is after them,—Whether the inhibiter'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 infeftment 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 infeftments 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 infeftments 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 infeftment 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 infeftment by a particular infeftment of warrandice. By the President's casting vote, it carried that the infeftments 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