This decision was upon a hearing in presence.

5th August 1761. The decision in this case was altered; but, this day, they returned to the first interlocutor by a considerable majority, upon this principle, that as all the adjudications were incomplete, being of a subject that was capable of infeftment and yet not completed by infeftment, or a proper charge, they were all to be brought in *pari passu*, like so many assignations not intimated, or so many decreets against an executor. But, on the other hand, if the subject adjudged had been a subject incapable, by its nature, of infeftment, such as a bond excluding executors, a reversion, or a tack, then the maxim would hold, *qui prior est tempore potior est jure;* and the first adjudger would be preferable, so as to exclude the rest, unless they were within year and day of it.

1761. *February* 28. CREDITORS of SIR WILLIAM GORDON of PARK *against* CAPTAIN JOHN GORDON of PARK.

THIS case was mentioned before, 19th November 1760, and this day it was decided upon a hearing in presence. The first point determined was concerning the rents of the estate during the period of the crown's possession,—whether out of these the annualrents of the tailyier's debts should not be deduced *primo loco*, so that only the residue of the rents should be considered as a divisible fund, or, in other words, whether the tailyier's creditors were not to be considered as preferable upon these rents for the annualrents of their debts, the rents being still *in medio*. It was said for the creditors of Sir William, that, though there be an obligation upon the heir of entail, and upon the crown, in this case, as coming in place of such heir, to keep down the annualrents of the tailyier's debts, yet the tailyier's creditors had no legal hypothec upon these rents, and could only affect them by diligence in the ordinary way, and, if they did not do so, they could have no preference upon them; and, therefore, as in this case there was no diligence done by either of the sets of creditors, they must be considered as a subject lying *in medio* betwixt them, upon which they were both entitled to an equal preference.

To this it was ANSWERED, though it was true that the tailyier's creditors had no legal hypothec upon these rents, and, therefore, Sir William might have spent them, or might have given them away to his creditors, or these creditors might have affected them by diligence,—yet it made a great difference that these rents were still *in medio* unaffected by any diligence; for, by this means, creditors are often found entitled to a preference who otherwise would have nothing to say, as in the case of the creditors of a defunct, who will be cut out if they allow other creditors to recover payment from the executor upon decreet; but, if they appear while the subject is yet *in medio*, they will get their share, or be preferred according to the nature of their debts, and this though they have no hypothec upon the subject, nor have done any diligence to affect it, merely because the subject is *in medio*, not affected by any preferable diligence, and they are entitled, by the nature of their debts, either to come in *pari passu* with the other creditors, or to be preferred. The creditors of the tailyier in this case have a title to be preferred on account of the obligation that every heir of entail is under to pay the annualrents of the tailyier's debts out of the rents *primo*

loco, and not to put them in his pocket, or, which is the same thing, give them away to his own creditors: and, in consequence of this obligation, the crown, in this case, if the creditors of Sir William had been seeking payment of their debts, could, and ought to have said, that they would first pay the annualrents of the tailyier's debts; because otherwise the crown would be liable to a demand, at the instance of the heir in remainder, if he should succeed, an event which has actually happened; for he would have had a very good claim that the crown should restore to him the estate in the same condition they got it, that is, free of the burthen of those growing annualrents: and, accordingly, the Lords so found by the President's casting vote. The consequence of which was that the creditors of Sir William could demand no assignation; because, if I take any payment out of a fund which is appropriated to me, and upon which you have no right, you can demand no assignation; which demand is only founded upon this principle of equity,—that if I take my payment out of a subject to which you have right, and thereby lessen your fund of payment, I should, in recompense, assign to you any right I may have to any other fund of the debtor.

The next question was, Whether the creditors of the tailyier might not draw payment of their principal sums and interests that fell due during Sir William's possession, proportionally, out of the subjects in Exchequer, without being obliged to assign to the creditors of Sir William. It was said, for these creditors, that this was precisely the case of a catholic infefter over two tenements, A and B, in one of which there is a secondary creditor, and in the other there is no secondary creditor, but a different proprietor, who is not debtor to the secondary creditor; and in that case the secondary creditor can demand a total assignment upon the other tenement, because he is contending *de damno vitando*, whereas the proprietor of the other tenement cannot be said to suffer any loss when he pays the debt with which his tenement is burthened.

It was said further, for Sir William's creditors, that there was a difference betwixt the principal sums and the annualrents. These Captain Gordon had a good claim in equity to be free of, because his brother, Sir William, was under an obligation to have paid them; but he was under no obligation to pay the principal sums, there being no clause in the entail to that effect; and there was neither law nor justice that he should be relieved of any part of them at the expense of his brother's creditors.

It was ARGUED on the other side,—That, taking the case, as put by the creditors of Sir William, of two tenements, one of which belonged to a different proprietor, who was not debtor to the secondary creditor upon the other, which appears to be precisely the case here, the secondary creditor upon the tenement belonging to the debtor has no claim, neither in law nor justice, for a total assignation, because against that the property of the one is as good a defence as the right of credit of the other; and the proprietor who contends that his property shall not be hurt by an overcharge of the debt, is contending as much *de damno vitando* as the other who pleads that his right of debt should not be impaired by the overcharge, and both have the same claim in equity, that the loss should fall equally on each of them. As to the distinction betwixt the principal sums and interests, there does not appear to be any foundation for it, because Captain Gordon, as proprietor of the estate of Park, is entitled to be relieved proportionally of the principal sums, as well as interests, out of any other fund which is subject to the payment of them, as, in this case, the sub-

jects in Exchequer undoubtedly are. And it will not alter the case, that he had no right of action against his brother for payment of these principal sums; because, in the case supposed, of the two tenements, one of which belongs to a proprietor who is not the debtor of the secondary creditor upon the other, it is not necessary to suppose that the proprietor of that tenement should have an action against the debtor of the secondary creditor for relieving him of the debt; for, put the case that a debtor grants infeftment over two tenements belonging to him, A and B, upon the tenement A there is a secondary creditor, the tenement B the debtor sells with the burthen of the catholic infeftment, and upon condition that the purchaser shall take his hazard of the debt, and shall not sue him for relief of it,—when the catholic creditor comes to draw his payment, would not the proprietor of the tenement B be entitled to say that he must draw proportionally out of both tenements, notwithstanding the proprietor of B had no action against the debtor for relief of the debt. This is precisely the case here: Sir William Gordon was debtor for these principal sums, which have a preference over two tenements; the funds in Exchequer, which may be called the tenement A, and the tailyied estate, which may be called the tenement B; Sir William's own creditors are the secondary creditors upon the tenement A, and Captain Gordon is the proprietor of the tenement B, who has no action of relief against Sir William, the debtor: What reason is there that on that account he should be denied the privilege of an equitable relief and a proportionable allocation of the preferable debt upon both subjects? As to the seeming injustice, that Captain Gordon should be relieved of any part of these principal sums, at the expense of his brother's creditors, it is to be considered that Sir William was debtor in these sums as well as he, and, if so, there is no reason why this common debt should not be paid proportionally out of both their estates. This last point carried too by the President's casting vote.

By this decision there is a general rule of very great consequence established in ranking, viz. That wherever there is a catholic debt, having a preference over two tenements, upon each of which there is a secondary creditor, or, what is the same thing, a proprietor distinct from the debtor, the secondary creditor will not be allowed to demand a total assignation unless he can show that the other secondary creditor or proprietor is his debtor in the debt. For, if he can show that it is just that he should have every security which the catholic creditor who draws his payment out of his subject can give him,—and it is the same thing whether the catholic creditor is preferred upon one of the subjects to all the other creditors, which happened in the case of Lord Buchan's creditors, where the creditors of the tailyier were preferable, by the adjudication of the liferent, to the creditors of the heir, or whether he comes in *pari passu* with the other creditors upon that tenement, as in this case, the creditors of the tailyier come in *pari passu* with the creditors of Sir William upon the Exchequer fund; for he must still draw proportionally, and the only difference will be that, if he does not draw the proportion allocated for him upon one tenement, by reason of the concourse of other creditors, he will draw what he wants of that proportion out of the other tenement besides the proportion that falls to its share.

The interlocutor which the Lords pronounced, and which is now final, is in these words:—" Find that the rents of the tailyied estate which have become due since the forfeiture, and during the lifetime of Sir William Gordon, the forfeited person, and which are still *in medio*, make part of the divisible fund for payment of the

whole debts due to the creditors whose claims have been affirmed, as well those of the late Sir William Gordon as of Sir James Gordon, the tailyier; but find that these rents must, in the first place, be applied for payment of the annualrents of the tailyier's debts which have arisen during the foresaid period; and find, that the creditors of Sir William are not entitled to any assignation from the creditors of Sir James against the tailyier's estate, in so far as the interim rents shall be so applied for payment of the current annualrents of the tailyier's debts; and find, that the creditors of Sir James Gordon, *quoad* the residue of the debts due to them, are entitled to be ranked *pari passu*, and to draw their payment proportionally with the creditors of Sir William out of the price of the unentailed estate and other divisible funds; and that the creditors of Sir William are not entitled to demand assignations from the creditors of the tailyier, unless in so far as these last shall draw more than their just proportion of the last-mentioned funds; provided that such assignation, if granted, shall not bar the tailyier's creditors from being preferred for the residue of their debts on the tailyied estate; and remit to the Lord Ordinary further to hear parties' procurators on this point, viz. How far Captain Gordon can be ranked on the above mentioned divisible funds as a creditor for payment of the interest of the tailyier's debts which were incurred betwixt the period of the tailyier's death and the attainder of the late Sir William Gordon, and to determine or report as he sees cause." This interlocutor, so far as concerns the draught of the tailyier's creditors out of the common fund, is plainly not conformable to the pleadings, and proceeds, in my apprehension, upon a mistake; for, as the interlocutor is conceived, the creditors of Sir William reap no advantage by the tailyier's creditors having two funds out of which they may draw their payment, for Sir William's creditors could have drawn no less if the tailyier's creditors had had no other fund out of which they could have drawn except the fund in Exchequer. It cannot be supposed that they are in a worse condition than if the tailyier's creditors had been preferable to them upon this fund: in that case these last creditors must have drawn their payment proportionally out of both funds, that is, if the fund in Exchequer was as 1, and the tailyied estate as 3, which I believe is nearly the case, then they must draw out of the tailyied estate 3-4ths of their debts, and out of the other fund 1-4th; whereas, in the way that the Lords have ranked them, they will draw at least 1-3d out of the fund in Exchequer. But, then, it is to be considered that they have no preference, but are to be ranked *pari passu* upon this Exchequer fund, with Sir William's creditors; the consequence of which is, that of that 1-4th which is allocated upon that fund they may not draw 5s. in the pound, so that the deficiency must fall upon the tailyied estate.

1761. *November* 13. YOUNG *against* YOUNG.

JOHN Young settled his estate upon himself and wife in liferent, and upon his son, James, in fee; whom failing, Margaret Young, with other substitutions not necessary to be mentioned; and he prohibited James Young, and his other heirs of entail, to contract debt, sell, or dispone, with a clause irritating the deed of contravention, but not the right of the contravener. James Young having sold the estate,