1760. *November* 18. JOHN SHANKS *against* JOSEPH YULE.

IN this case the Lords unanimously found that the tutor was entitled to annualrent of money laid out by him upon his pupil's affairs, from the date of the advance, and not from the commencement only of the action which he brought for recovery of it,—upon this principle, that the tutor is entitled to be indemnified; so that the annualrent was here given *nomine damni.*

1760. *March* 19. DAVID MONRO *against* MRS GORDON of KILGOUR.

IN this case it was held to be established law, that the obligation in a contract of marriage, in favour of the heir of the marriage, may be implemented by performance to the presumptive heir of the marriage during the father's life, and, though that heir should die before the father, the next will have no claim. This was decided, January 7, 1737, *Traill* against *Traill.*

1761. *January* 17. GRAEME *against* SEATON.

[Kaimes, No. 185.]

A DEBTOR had only a personal right to a land estate by a disposition, upon which he was infeft, but the sasine was found to give him only a liferent right, so that his right of fee was only personal, and it was the same case as if there had been no infeftment at all.

The first adjudger of this right neither charged the superior nor was infeft; the second adjudger charged the superior, but was not infeft; and the third was infeft by the superior, having got from him a charter upon an adjudication which he led against the common debtor, supposing him to have the feudal right of fee in his person. The question was, Which of these adjudications was the first effectual adjudication?—And the Lords, by a considerable majority, found the last adjudication the first effectual one; the consequence of which was, that they were all brought in *pari passu.* The Lords proceeded upon this principle,—that no feudal right to lands can be completely vested in any singular successor, whether disponee or adjudger, unless by infeftment, agreeably to the decision in the 1737, in the case of a voluntary disponee; by which decision the Lords altered their former consecutive decisions and returned to the old law established by a decision mentioned in Lord Stair.

This point, too, of the adjudger was so determined in a case mentioned in the *Dictionary of Decisions,* Vol. I. p. 18, *Dewar* against *French,* 1695.

Several of the Lords were of opinion that the charge signified nothing, as the debtor was not infeft; but, as the two last adjudgers were in concert together, the point of their preference was not much debated.

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*