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,

the Lords found, that the purchaser's right could not be affected by this entail; but, in an action at the instance of Margaret Young, the substitute, they found that James Young was obliged to re-employ the price and take the security in terms of the entail, because he had contravened the prohibition not to sell, and, therefore, was liable for reparation of damage to the substitute, in whose favour the prohibition was conceived. But, if the prohibition had been only to alter the order of succession, the Lords were all of opinion that selling was no contravention of that prohibition, the only effect of which was to hinder an alteration of the destination of succession.

1761. *November* 17. M'KENZIE of REDCASTLE *against* ——.

A GENTLEMAN in the country gave a commission to a certain person to sell some victual for him, which accordingly he did, and took the bills for the price in his own name. After that a creditor of the gentleman arrested both in the hands of the factor, who had sold the victual, and of the buyer who had granted bills to him. In the forthcoming the factor appeared and pleaded that he must have retention, out of the sums in these bills, of a debt which the gentleman owed him; but it carried, by a division of eight to six, that he had no retention. It was admitted, that if the money had been paid to him he would have had retention, even against the arrester; but, as the money was not paid, the majority of the Lords thought there was no subject of retention, because the money was truly due to the constituent, so that if he had sued the debtors in the bills he could have recovered payment from them in competition with the factor; therefore the factor had nothing in his person that could be the subject of retention, neither the money nor the *nomen*; and, besides, Lord Alemore observed, that he had no warrant from his constituent to take the bills in his own name: perhaps, indeed, he had a power to do so, but, by doing so, he could not have a power to create a security to himself, which it does not appear his constituent had any intention to give him.

24th *February* 1762,—This decision altered unanimously.

1761. *November* 20. LORD NAPIER *against* CAPTAIN LIVINGSTON.

There were here two questions of considerable moment to our feudal system, which were debated among the Lords *in abstracto*, and shall be stated here in the same manner. A lady had a personal right to lands by precept and procuratory unexecuted: these lands held of a subject superior, and she made a strict entail of them, by granting procuratory for resigning them "in favour of herself and husband, and longest liver of them two in liferent and conjunct fee, for her husband's liferent use allenarly, and to A and his heirs male." She died, and A, without making up any titles to her, infeft himself upon the precept in the disposition to