were *filius ante patrem*; consequently, it seems absurd that any infeftment flowing from Gordon can be effectual, of a date prior to his own; of course, they must all be preferred equally, as if granted of the very date of the common author's infeftment. See *L.* 11. § 2. *De pign. et hypoth. Voet. tit. Qui pot. in pign.* B. 3. t. 2. § 2. No 23.

THE LORDS found, that the creditors ought to be ranked according to the priority of the dates of their infeftments, notwithstanding that their author was not infeft.

C. Home, No. 111. *p.* 179.

*** See Lord Kames's report of this case, No 99. p. 2895, *voce* COMPETITION.

1742. *December* 10. PATERSON *against* KELLY.

No 24.

WHERE two infeftments proceeded from the same author, who himself was not infeft, the said author being thereafter infeft, his infeftment was found to accresce so as to validate the first infeftment; notwithstanding it was argued, that the two infeftments having been validated *eodem momento*, they ought to be preferred *pari passu*.

Kilkerran, No 1. *p.* 321.

*** C. Home reports the same case:

JOHN GIRDWOOD purchased some lands from David Aikman in July 1732, the disposition to which contained a procuratory and precept; and in September thereafter, he, upon the narrative of being heritable proprietor, granted an heritable bond thereon to Kelly. In January 1733, Girdwood granted another heritable bond, upon the same narrative, to Robert Paterson, containing procuratory and precept; upon which Paterson was infeft in November 1734, sasine recorded the 17th December thereafter. *Anno* 1735, Girdwood granted another heritable bond to Kelly, which contained procuratory and precept.

In April 1737, Kelly discovered that his debtor Girdwood was not infeft, whereupon he applied to him to do him justice, who accordingly delivered him his disposition to the said lands from Aikman; whereupon he obtained himself (upon his two heritable bonds above mentioned) and author infeft in April 1737.

Robert Paterson having raised a process of mails and duties on his heritable bond, Kelly appeared and craved to be preferred upon his two heritable bonds to the pursuer, in respect the common author's infeftment was attained by him, and at his expense, which therefore could only operate in his favours; at least, that he should have a *pari passu* preference with the pursuer, in re-

No 24. gard that the infeftments of both competitors were null until the common author was infeft, and, from that time only could their validity be dated.

The substance of the arguments for Kelly were, that no man can give an infeftment who is not infeft himself, and that if the question were only with the author himself, the successor's infeftment would be held good; not that it is so intrinsically and in fact, but because no man is allowed to plead a defect in his own title. *2dly*, Where an apparent heir grants procuratory or precept, or where a disponee who is not infeft is the granter, their posterior infeftment will accresce to validate the infeftment taken by the purchaser. And supposing no mid impediment, the case will come out to be the same as if the author had been infeft before granting the procuratory and precept. The successor first infeft will have a good title to the subject, in competition with one deriving right from the author, after the author's own infeftment. The reason is, that an infeftment flowing from an author not infeft is null, and therefore the purchaser ought regularly to take a precept or procuratory from the author after he is infeft. But as it is a good practical rule, to avoid multiplying expense, where it can be done without prejudice to the security of the records, the second infeftment has been remitted in our practice; and the infeftment already taken is considered as granted after the author's infeftment; or, in other words, the author's infeftment is, *fictione juris*, drawn back to the date of the purchaser's infeftment, in order to validate the same from its date. It is a consequence from this rule, that any right derived from the author, after his own infeftment, will be ineffectual, in competition with the purchaser's infeftment, though proceeding from the common author, before he himself was infeft. This purchaser's infeftment, which is validated by the author's, though posterior, becomes a mid impediment after which the author can grant no new infeftment to his prejudice.

Let us now view the interest of third parties, and what effect the *jus superveniens* may have in a competition with them. Suppose two infeftments granted by an author not infeft, while matters stand in this shape, neither of the purchaser's infeftments are good for any thing. It is equally clear, that upon the author's being infeft, both are validated, *ipso facto*, for the *jus superveniens* must operate equally in favours of both; if it saves the one purchaser the trouble of a new procuratory, &c. it must save the other the same trouble; consequently, both ought to come in *pari passu*. The fiction of law therefore, which makes the author's infeftment of the same date with his competitors, is well founded in a question betwixt themselves; but in a competition with third parties, there is no ground for bestowing so valuable a privilege upon the competitor first infeft. *Lastly*, suppose the case, that an apparent heir grants an heritable bond, and the creditor is infeft, thereafter, the apparent heir is charged to enter heir in special by another creditor, whereupon adjudication is led, and infeftment follows, and last of all, the apparent heir makes up his title by service and infeftment, no body can doubt the adjudger

will be preferred, notwithstanding of the annualrenter's prior infeftment. See 16th January 1663, Tenants of Kilchattan, No 19. p. 7768.; 21st June 1671, Neilson, No 20. p. 7768.; 28th February 1708, Alison, No 22. p. 7773. No 24.

Answered for the pursuer, if the common author's infeftment accresces at all to the prior rights granted by him, it must accresce according to their dates, were it otherwise, they must all remain null, as *a non habente*, and the infeftments granted by the author, after he himself is infeft, must be preferable. If, indeed, any of the creditors obtains himself infeft by his own diligence, before the common author is infeft, his infeftment must stand good, and be preferable to the prior infeftment granted by the common author not infeft; whose subsequent infeftment cannot, in that case, draw back to validate the first infeftment; the intervening infeftment of the other is a mid impediment; for thereby the common author is effectually denuded, so far as concerned the infeftment procured by the other party's diligence; and this is a sufficient answer to the case of the apparent heir last put. See the competition amongst the Creditors of Kirkconnel, *anno* 1738, No 23. p. 7773.

THE LORDS repelled the exception to the pursuer's infeftment, and found the infeftment, in favour of the common author, operates *retro* to the date of the infeftment in favours of the pursuer; and therefore found him preferable to the competitor Mr Kelly, according to the date of his infeftment; but found the pursuer liable in a proportion of the expence debursed by the competitor, in procuring the common author infeft, effeiring to the lands in question, in proportion to the other lands contained in the other infeftment.

Fol. Dic. v. 3. *p.* 566. *C. Home, No* 218. *p.* 359.

Whether *jus superveniens* holds in the case of consenters; see IMPLIED DISCHARGE and RENUNCIATION.

See APPENDIX.