No 29.

'It was *pleaded* in the *last* place, There are no *termini habiles* here for an assignation; for, in so far as the factor shall make payment to the annualrenters, the annualrent-rights are in so far extinguished, without a possibility of being assigned.

Answered; The sums paid by the factor to the annualrenters, do properly belong to the liferentrix, which indeed by paction she is bound to communicate to them; but if they go about to uplift as in their own rights, her liferent right stands in the way; and if they again offer to subsume upon her consent, the answer will be, that the consent establishes not the annualrenters in an *ipso jure* preference, it means no more, than if the liferentrix had obliged herself to communicate to the annualrenters what she should uplift by virtue of her preferable right, till they were satisfied and paid; or more compendiously, allowed them in her name to intromit; which intromission can never operate an *ipso jure* extinction of the annualrent-rights, since these rights are not the title of the intromission, but a power derived from another; much less will the factor's payments operate an extinction, for the factor pays in name of the Lady; and payments in this shape are of the nature of cautionary payments, upon which assignation is always competent; therefore, as from the nature of the transaction, the creditors are involved in a reciprocal obligation of assigning to the liferentrix upon payment, she is well entitled, both in strict law and equity, to stand in the way of their intromissions or payment, unless they will perform their part, by granting assignations.

'THE LORDS, in regard both the heritable creditors and the Lady (supposing she had given no consent to their preference) would have been preferable to the other creditors, found, that in so far as the creditors, to whose rights the Lady is consenter, prejudge and hinder her to draw her full provision out of the subject and price thereof, that she is preferable to the hail other creditors, to whose rights she is not consenting, because of the priority of her infeftment, for the deficiency of the said liferent provision.'

Here the preference was directly granted, without the circuit of an assignation, according to the rule, 'That in competitions every right is held as made up, which actually made up would found a preference.'

Fol. Dic. v. 1. *p.* 226. *Rem. Dec. v.* 1. *No* 94. *p.* 185.

1729. *January.*

No 30.
A preferable creditor, in particular circumstances, found not bound to assign.

CREDITORS of RUSCO *against* RELICT and CHILDREN of BLAIR of Borgue.

IN the year 1685, M'Guffock of Rusco, heritor of the lands of Borgue, granted an heritable bond for the sum of L. 2000 out of the said lands, in favour of Irvine of Logan, whereupon the creditor was infeft the same year. Thereafter, the said Rusco granted a disposition of the lands of Borgue in

favour of his second son David Blair, reserving a faculty to alter, but which faculty he afterwards renounced in his son's contract of marriage. M'Guffock of Rusco being overcharged with debt, his estate, in the year 1727, was brought to a sale, and the said Irvine of Logan, who had adjudged all his debtor's lands for the above-mentioned debt of L. 2000, was ranked as a preferable creditor; and, upon his drawing payment, it was demanded by the other creditors, that he should assign them to his infeftment upon the lands of Borgue. This was opposed by the relict and children of Borgue, upon this medium, That by Rusco's disposition to his second son, and after consent in that son's contract of marriage, he became bound to warrant the said lands, the consequence whereof was, that had Irvine of Logan drawn his whole sum out of their lands, they must have been entitled to demand assignation against Rusco, bound to them in warrandice.—*Answered*, Rusco was never bound to warrant against Logan's debt; the disposition was under a reserved faculty to contract debt, alter, and dispose of the estate, &c.; and supposing the son had paid the debt, he could never have distressed his father for the same; and consequently, an assignation would have been fruitless and ineffectual; nor did the father's after consent in his son's contract of marriage, which implied a renunciation of his faculty, alter the case: For this would not be drawn to import an obligation upon the father to warrant or relieve his son of the foresaid debt.——THE LORDS refused the assignation.

No 30.

Fol. Dic. v. 1. *p.* 224.

1729. *June* 13. MR HENRY RAMSAY *against* THE BANK of SCOTLAND.

No 31.
A purchaser of an estate who had purchased a preferable debt, affecting both that estate and another, was found to have no claim on the separate estate, but that the debt was extinguished *confusione*.

A CREDITOR, ranked in the second place, did, after the ranking, purchase in the preferable debt, and having these two rights in his person, he became purchaser of the estate at a public sale, and gave bond for the price, payable to the creditors as they were ranked; the preferable debt purchased in by him, as said is, did not only reach over the lands purchased by him at the public roup, but also over a separate subject belonging to another. The fact was, that the price of the lands, sold publicly, was but sufficient to answer the preferable right; and therefore, the purchaser, willing to bring his secondary claim within the price, craved payment of his preferable right, entirely out of the separate subject; which the LORDS refused, and found, That the said debt, being in the person of the purchaser of the lands, upon which it was ranked *primo loco*, which purchaser granted bond for payment of the price to the creditors as ranked, the said debt became *eo ipso* extinguished *confusione*, and could not revive to be a charge upon the separate subject. *See* APPENDIX.

Fol. Dic. v. 1. *p.* 224.