in the firſt deed, which had been duly publiſhed and inſerted in the publick records of the kingdom.

Judgment, 14 July, 1713. After hearing counſel, *the queſtion was put "whether the ſaid "interlocutory ſentences, or decrees ſhall be reverſed," it was reſolved in the negative :* (*a*)

Ordered and adjudged that the petition and appeal be diſmiſſed, and that the interlocutory ſentences or decrees, therein complained of, be affirmed.

(*a*) Nothwithſtanding the form of this judgment, it is not therefrom to be underſtood (as I believe,) that the judgment had been oppoſed; this is the common form of putting the *queſtion* on every judgment on appeal.

Caſe 22. George Lockhart Eſq; - - - *Appellant;*
John Cheiſly of Kerſewell, Writer in Edinburgh, Margaret Pow, William Montgomery, Walter Cheiſly, and William Bertram, - - - - - *Reſpondents.*

7th *May* 1714.

Non-entry.—A Superior having obtained a general declarator of non-entry, his agent in a ſubſequent ranking reſtricts the ſuperior's intereſt ſo as to be ranked poſterior to annual renters. On a reduction by the ſuperior on the head of leſion and as being *abſens reipublicæ cauſa*, the ranking is ſuſtained.

Ranking and Sale.—It is not relevant to reduce a decreet of ranking, that poſterior to the date of the decreet the intereſts of certain creditors were produced, and ranked, and yet no new decreet put up in the minute-book.

JOHN CHEISLY deceaſed, late huſband of the reſpondent Mrs. Pow, was vaſſal in the lands of Kerſewell, of which the appellant was ſuperior; and he was alſo indebted to the appellant.

Theſe lands being much incumbered, Mr. Cheiſly's ſon and heir, the reſpondent John, did not enter as heir to him and there being ſeveral creditors upon the ſaid eſtate who claimed by different titles, an action of ranking and ſale for determining the preferences of the creditors, and for ſelling the lands for their ſatisfaction, was brought before the Court of Seſſion.

Pending this action, the appellant brought a declarator of non-entry againſt the reſpondent, the heir, before the Court of Seſſion, but he did not call the creditors as parties. The court in that action pronounced an interlocutor declaring that the ſaid lands had been in non-entry, and in the hands of the appellant ſince the death of the laſt poſſeſſor, and were to continue in the appellant's hands till the entry of the heir, and that thereby the rents, duties, and profits of the ſaid eſtate, from the 18th of January 1702-3, did belong to the appellant. But afterwards the appellant, having ſundry ſums due to him and thoſe under whom he claimed, by adjudication upon the ſaid eſtate, agreed and conſented in his action of declarator to reſtrict his claim ſo far as only to remain a ſecurity for payment of the ſeveral ſums due to him, he being firſt paid; and after making this reſtriction the Court gave judg-

ment accordingly on the 1ſt of January 1709, and in theſe terms decree was extracted.

Afterwards, however, in the proceſs of ranking and ſale, Mr. Montgomery, ſince deceaſed, then the ſecond huſband of the reſpondent Margaret Pow, who was entruſted with the ordinary management of the appellant's affairs, as his agent, and held his factory, conſented and agreed on behalf of the appellant, when the preferences came to be adjuſted, that the appellant's claims as a creditor by adjudications ſhould be preferred to the adjudications of all perſonal creditors, but poſtponed to the claims of the creditors *annual-renters*, or creditors by voluntary real ſecurity. And accordingly the decree of ranking was pronounced on the 7th of February 1710-11, whereby the reſpondents, Pow, Montgomery, Walter Cheiſly, and Bertram, amongſt others as annual-renters, were preferred in payment to the appellant: This decree alſo was extracted.

The reſpondent Pow's title was by her marriage ſettlement, whereby ſhe had 50*l. per annum* ſecured to her by her ſaid former huſband, John Cheiſly, deceaſed, payable out of the ſaid lands of Kerſewell. The reſpondent Montgomery's claim out of the ſaid eſtate was for arrears of the ſaid reſpondent Pow's jointure, accruing in the lifetime of her laſt huſband Mr. Montgomery, whoſe repreſentative the reſpondent Montgomery was.

The claims of the other reſpondents, Walter Cheiſly and Bertram, were likewiſe as annual-renters or creditors by real ſecurity on the ſaid eſtate.

The appellant afterwards brought an action of reduction before the Court of Seſſion, of the ſaid decreet of ranking, as being pronounced while he was *abſens reipublicæ cauſa*, and when he ought to have been decreed the firſt creditor as being entitled thereto, by his decree in the declarator of non-entry; and that though the perſon who appeared for him in the ranking did not claim the preference due to him, yet he had no ſpecial mandate for ſo doing, eſpecially ſince that perſon had particular advantage by ſuch neglect; and alſo that the ſaid decree ought to be reverſed becauſe though it bears date the 7th of February 1710-11, yet ſeveral creditors had their titles determined, though not produced till after the 7th of February.

On hearing theſe reaſons of reduction the Court on the 21ſt of January 1714 "repelled the reaſons of reduction that poſterior "to the decree of ranking, the intereſts of Muir, and the Box-"maſter of Leith were taken in and ranked, and yet no new "decreet was put up in the minute book, in reſpect that "by the taking in and ranking of the ſaid intereſts there was "no new ſcheme or claſs made in the ſaid ranking, but the ſaid "intereſts were only joined unto the claſſes of the creditors that "were formerly ranked poſterior to the appellant; as alſo ſuſ-"tained the defence of *res judicata* againſt the appellant, in re-"ſpect it was not now competent for the appellant upon the "ſaid production made for him in the decreet of ranking to "crave of new a perference to the ſaid creditors that were pre-

" ferred to the appellant in the ſaid decreet of ranking." The appellant reclaimed, but the Court on the 27th of February thereafter, adhered to their former interlocutor.

Entered 5 March, 1713-14.

The appeal was brought from " an interlocutor of the Lords " of Council and Seſſion of the 21ſt of January 1714, and the " affirmance thereof," and from " ſeveral orders whereby the " appellant is excluded from a preference to receive his juſt " debt."

Heads of the Appellant's Argument.

By the decree of declarator of non-entry the appellant had an undoubted title, to all the rents and profits of the lands during the non-entry of the heir preferable to all other creditors, which would have amounted to much more than what he claimed, as due to him by adjudication; but the appellant reſtricted his large claim and uſed it only as a ſecurity to prefer him for his juſt debts. And though this decree had been extracted, yet in the action of ranking and ſale, while the appellant was in London, attending the ſervice of the Houſe of Commons, and commiſſion of accounts, and though he had not waved his privilege they proceeded in the ſaid matter, and the decree of ranking was extracted before the appellant was in the leaſt made privy to it. The appellant, then, being very much prejudiced by the decree in the ranking, and it being during his abſence, the ſame ought to be reduced, and the appellant found to be entitled to the preference due to him by the decree of declarator.

Though the perſon entruſted with the ordinary management of the appellant's affairs, did neglect or rather wilfully omit to claim the juſt preference for the appellant which he had right to, yet that fault of his ought not to prejudice the appellant, ſince he had no ſpecial mandate from the appellant ſo to do.

It is plain, too, that the agent had his own private intereſt in view by thus neglecting the intereſt of the appellant. For he himſelf being a creditor upon the eſtate by an heritable right, and his wife having a jointure of 50*l. per annum* out of the eſtate, had he claimed the juſt preference for the appellant, he would entirely have ſunk his own demand and endangered his wife's jointure. To ſave this, he gave a preference to all the creditors who claimed by a like title with his own to the appellant.

The decree under reduction cannot be looked upon as *res judicata*, becauſe though it bears date the 7th of February 1710 11, yet three or four creditors are preferred in that decree, who do not ſo much as compear and produce their rights till ſome time after the date thereof; but it is impoſſible that creditors can have preference by a decree bearing date before their compearance or production of their rights.

Heads of the Reſpondents' Argument.

Suppoſing the declarator of non-entry ſo well fixed, that the ſame were unexceptionable, yet the reſpondent Pow, will be preferable to the ſuperior on account of her jointure; for it is *triti juris* that the terce excludes non entry, as well as the courteſy of

of the huſband, theſe being *uſufructus* conſtituted by law, which do not require for their eſtabliſhment the conſent or deed of the ſuperior, *quia ex jure publico deſcendunt.* The privilege of wives to terce remains with them, as to their conventional proviſions, at leaſt in ſo far as the ſaid proviſions do not exceed the terce. There is no law for depriving wives of the legal ſecurity for their conventional proviſions, being within the limits of their terce as it is in the preſent inſtance.

But the appellant never proceeded further than a general declarator of non-entry, which is not ſufficient to found a preference of debt; *and that general declarator was in this caſe obtained by colluſion between the ſuperior and the heir of the deceaſed vaſſal.* To that ſuit the reſpondents were neither ſummoned nor did they appear therein, and therefore the ſame cannot operate againſt them, nor create or found a preference to the appellant in their prejudice without the allowance of the reſpondents the creditors. For, had theſe reſpondents known of this ſuit it would have been very eaſy for them to have rendered the ſame ineffectual, by tendering to the appellant the arrears of the rents and ſervices due to him as ſuperior. And in June 1713, he got payment of, and gave a full and ample diſcharge, and acquittance for all the rents and ſervices that were due to him as ſuperior of the ſaid lands, which was a plain paſſing from that decree.

The appellant in fact was not *abſens reipublicæ cauſa*, when the ſuit firſt began, which continued for ſome years. And he was in Scotland ſeveral times during the continuance of that ſuit, and when the decree was extracted: but though he had been abſent, yet that can be no objection, becauſe he appeared by his agents in the ſaid ſuit, and was party to it throughout. His ordinary lawyers were employed in that affair, and inſiſted in Court upon his titles, which by the law of Scotland implies a letter of attorney or mandate, and is equal to a perſonal appearance. And Mr. Montgomery had alſo a letter of attorney from the appellant, to act in all his affairs as if perſonally preſent.

The intereſt of Mr. Montgomery his agent to the reſpondent Mrs. Pow's jointure was only a temporary concern, determinable as to him, either by his or her death, and it is her this decree of ranking principally concerns, and ſhe has only got the preference to which ſhe was legally intitled: for ſhe was not only preferable as life-rentrix, upon her prior infeftment but upon this ſeparate ground, that her jointure did not exceed her terce, which would have ſuſtained her infeftment againſt the declarator of non-entry.

The objection to the decree, that ſeveral creditors thereby have their rights and titles determined, though not produced till after the date thereof, is *jus tertii* to the appellant. The decree was obtained at his ſuit, and the error in date, if any was, is but an error ariſing from the extract or copy, taken from the record at his own charges, and upon his application. Upon a review and examination of the charges expended by Mr. Montgomery, in obtaining this decree, the appellant in Montgomery's book of accounts, gave him a full and ample

acquittance thereof. And he has ever ſince grounded his title in ſeveral ſuits upon that decree, according to his preference therein and has alſo received ſeveral ſums of money thereupon; and now becauſe in the event he gets not full payment, it is hard he ſhould require the ſame to be reverſed, which would occaſion a new ſuit among the creditors, after it has been ſo long acquieſced in, nor is there any error in the date; for though theſe titles were produced after the 7th of February, and determined accordingly, yet that could be no ground to reverſe the decree, becauſe there was thereby no alteration made therein, and they are only thereby ordered to be added to the other creditors who had right by adjudications, and all poſterior to the appellant, and they were included in the decree of ranking before the Court allowed the appellant to extract the ſame. Thus, none of the creditors were thereby any ways prejudiced, and the date is regulated by an expreſs order of the Court.

Judgment, 7 May 1714.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the interlocutor, and orders, therein complained of be affirmed.*

For Appellant, *Rob. Raymond. Thos. Lutwyche.*
For Reſpondent, *P. King. John Pratt.*

John Cheiſly the heir put in no anſwer to the appeal.

Caſe 23. Michael Ruſſell of London, Merchant, - *Appellant;*
John Cochran of Waterſide Eſq; - - *Reſpondent.*

12th *May* 1714.

Preſumption.—A bond is granted for a partnerſhip debt to an individual creditor by one partner; the ſame partner afterwards executes an aſſignment of the partnerſhip funds to the creditors in general, bearing to be in full payment and ſatisfaction of the partnerſhip debts; this was recited in a power of attorney granted by the creditors; though the aſſignment was not executed by the other partner, it extinguiſhed the bond to the individual creditor.

THE reſpondent, and James Home, Merchant in London, deceaſed, being co partners in trade, bought and purchaſed ſeveral quantities of goods from Michael Ruſſell the appellant's father deceaſed; and became debtors to him in ſeveral ſums of money.

After the diſſolution of the ſaid co-partnerſhip, the reſpondent on the 21ſt of December 1689, executed a bond to the appellant's father, reciting that there was due to him by the reſpondent and the ſaid James Home a ſum of 695*l.* 13*s.* 5*d.* ſterling, and it being moſt reaſonable that the appellant's father ſhould be fully and completely paid, without being put to any charge in proſecuting for the ſame, or any further trouble than to lend his name for recovering the ſame out of the partnerſhip eſtate, therefore the