1737. *June* 15, *and July* 13. CHRISTIAN STENHOUSE *against* JEAN YOUNG.

This case is reported by C. Home, (p. 96. *Mor.* 11444.) where the facts and argument are stated; also by Elchies, (*Mutual Contract*, No. 6.)

Lord KILKERRAN'S note is as follows:—

"Had the father implemented the contract of marriage, there was no doubt made but that the father might have made an unequal division, which is the shape in which the answer to the bill puts the case. But it is really not the case; the father has made no division of his effects, only he has taken his estate in the common way to heirs and assignees whomsoever.

"It was further observed, that the petitioner had not put his case upon the proper foundation, collation having nothing to do in the matter, but from the fact itself as stated, this occurred to the Bench, that by the contract of marriage the children were creditors to their father in the stipulated sum of 6000 merks, so that there being but two daughters, each was creditor in 3000 merks; and that the father having given 2000 merks to Christian in the name of tocher, the same must impute in her 3000 merks in which she was creditor. If there was any residue over the 6000 merks, it would divide between the daughters.

"Interlocutor.—Find that Alex. Young being bound by his contract of marriage, to secure in land, or other sufficient security, the sum of 6000 merks to himself and spouse, and longest liver in liferent, and to the bairns of the marriage in fee, Find that the two daughters, Jean and Christian, were by the said contract, creditors upon the said 6000 merks; and 2000 merks, being stipulated to be secured to James Stenhouse, husband to the said Christian, in name of tocher, upon the tenement in Liberton's Wynd, Find that the said 2000 merks ought to be imputed *pro tanto*, in payment of the said Christian's share of the said 6000 merks; and that, after deducting the said 2000 merks, there remains only 1000 merks due to Christian, and the pursuer, her daughter, as her share of the said sum; and find that Jean Young, the other sister, remains still creditor to her father in the other 3000 merks; and that the free estate of Alexander Young must, in the first place, be applied for payment of the said respective sums of 3000 merks, and 1000 merks; and that the remainder falls to the said Jean Young and Christian Stenhouse, equally betwixt them; and refuse the other points of the bill; and remit to the Ordinary to proceed accordingly."

1737. *June* 22. BELL of Blackwood-house *against* JOHN GARTSHORE, Merchant in Glasgow.

THIS case is reported by Lord Kaimes (*Rem. Dec.* 2—16; *Mor.* p. 2848.) and by Clerk Home, (*Mor.* p. 2853.) The circumstances are fully stated in these two reports, to which reference is therefore made.

Lord KILKERRAN makes the following observations upon the question which the case involved.

"1*mo*, I have ever held it as a point, that he who first completes the real right, or in other words, he who first denudes the person last infeft, has the preferable right to the lands; and herein lies the mistake of the advocates for Bell, that they still speak of denuding of the personal right, when truly that is not the question. For the personal right is not the subject of competition; it is the real right to the lands. What else is the personal right but an obligation on the person last infeft, and a power given to the disponee to denude the granter by a procuratory or precept; and the only question is, who denudes him first; not who gets the first transmission of that power?

"2*do*, I have ever held this as another principle, that where I purchase a right transmissable by infeftment, the moment I infeft myself, I am as safe from all challenge from any antecedent personal right as if I had first infeft my author, upon purchasing from him, and infeft myself thereafter; and what sense can there be in the contrary doctrine? It is admitted, that if one have a disposition, with procuratory or precept, when I intend to purchase from him, I, before he grant me a right, take care that he be infeft, though but an hour before my purchase, then I am safe from any antecedent personal deed of his; but if I take disposition from him, without infefting him, though next hour I should infeft myself, his anterior personal deed will affect me. What sense can there be in that? As there is no good sense in the distinction, whether the purchaser from one having personal right, first infefts his author, or infefts himself, after his purchase, as it is admitted he is secure, by first infefting his author; that of itself is a demonstration that the author was not denuded by his former personal conveyance; for how could he be infeft on the precept, or resign on the procuratory, had he been before denuded? but do what he can, is it not a consequence that he can empower a second assignee to do the same thing?

"3*tio*, Suppose the second assignee to the personal right infefts and conveys, that purchaser is safe *ex concessis*. But upon what foundation can that be true, if his author derived his right *a non habente?* It is no answer, that the purchaser from one infeft is safe because he purchases upon the faith of the records; for I know no statute that provides that a purchaser on the faith of the records is safe: no law has said so. Certain deeds are not effectual against purchasers, if not recorded. But if any deed be of its nature effectual, which the law has not required to be recorded, it will remain effectual, and be a gap in our security from the records: so I take the consequence of the doctrine to be unavoidable, that the purchaser from the second assignee infeft cannot be safe, and consequently our records are no longer a security. The distinction that is put between purchasing from one infeft, and from one not infeft, resolves just in this, that we will stop short, and not contradict the principles of law, in that case also, when disposition is from one infeft; for in reality there is nothing in the distinction.

"4*to*, A plain circle is the consequence of this denuding doctrine; for should the second assignee of the personal right, infefting, be postponed to the first assignee, yet he will be preferable to a second assignee from the common author; yet a second assignee from the common author, first infefting, will be preferable to the first assignee of the personal right.

"*5to*, I take the reason why, in personal rights, the first intimation prefers, to be, because it makes the first complete right, and that infeftment in real rights is just what intimation is in personal rights.

"As to the decisions, no argument from them for two reasons: ***First***, Not to be followed if they have fatal consequences which cannot be prevented. This is not like the case, determining a disputed point, whereby one may regulate the pleas in time coming; for the inconvenience cannot be avoided.

"*Second*, So far as the decisions are in the case of adjudications, they do not meet, for an adjudication makes the subject litigious.

"*Third*, As many decisions the other way; at least, that back bonds granted by one having a personal right, do not affect his singular successor infefting before the competition, ***Brockdolean*** against ***Margaret Ferguson***; and the principle is the same."

1737. *December* 15. MR. ARCHIBALD DENHAM *against* ALEXANDER DENHAM.

"FOUND that the simple contracting of personal debts, on which no diligence followed against the estate, does not infer an irritancy of the contractor's right.

"This I note only as an instance that lawyers will argue any thing.

"It does not appear that ever before this time it was pretended that the contracting of personal debts did infer an irritancy of the contractor's right to his estate: nothing could be more absurd; but what gave rise to the act of Parliament was this, viz. it was much agitated among the old lawyers how far clauses irritant and resolutive could, by law, bar an apprising, and its that the first instance of this point being determined was that of the taillie of Stormont in 1675. Notwithstanding of which decision, lawyers remained divided in their opinion: *ratio dubitandi*, an apprising, with infeftment, is a real right which cannot be prejudged by such clauses, which are merely personal. On the other hand, an apprising can only carry the debtor's right such as it is, and therefore as it is affected by these clauses; and it was to settle this question that the act of Parliament, 1685, was made, which, agreeable to that decision in the case of the taillie of Stormont, statutes that it shall be lawful to his Majesty's subjects to tailzie their lands and estates, and to affect the said tailzies with irritant and resolutive clauses, whereby it shall not be lawful to the heirs of tailzie to sell, &c. or contract debt, or to do any other deed whereby the samin may be apprized, &c. By the argument in this information, the not purging a debt contracted before the succession devolved, nay, the omission of it for an hour, should be an irritancy.

"It surprised much to hear the President, notwithstanding of all this, declare himself against this interlocutor. But what shall one say? ***Bonus quandoque dormitat Homerus.***"