"The pursuer then prayed, that since I was to report one point, I might not divide the cause; and so far I complied, as not to conclude the pursuer on the point which I had determined; but for reporting it, it never once came into my thought. For I look upon it as a point fixed as any can be, that a provision in a contract of marriage of a sum of money to heirs of the marriage, is nothing different from a provision to the children of the marriage, for that heirs or bairns in such provisions receive their construction from the nature of the subject provided. If it be a land estate, then, whether the provision be to heirs or bairns, the heir is creditor in the provision. If it is a sum of money to be laid out upon land, or even a tenement in burgh, that is provided, then, whether the expression be heirs or bairns, the whole children are creditors.

"The question, therefore, which I report to your Lordships is, what I stated in the last interlocutor, as the father has exerced his power of division, if it is in your Lordships' power to vary that division on the head of its being an irrational division? And *2dly*, If it be in your power, whether it is to be thought irrational in the circumstances of the present case? And *3dly*, If it be thought irrational, what alteration you will make upon it?"

[Here Lord Kilkerran's Report ends.]

"*November* 16, 1756.—The Lords, upon report of the Lord KILKERRAN, find the reasons of reduction neither relevant nor proven, and therefore assoilyie the defenders,"—and this interlocutor was afterwards adhered to, on advising a petition and answers.

In a reclaiming petition against this interlocutor, the pursuer, besides urging his former arguments, maintained that at any rate he had still a claim for legitim which he had never discharged, and of which his father could not deprive him by a gratuitous deed *mortis causa.*

In answer to this claim, the defender cited the case *Stirling* against *Lukes*, 17*th* June, 1732.

1757, *January* 28.—Lord KILKERRAN says; "as the whole estate and conquest was provided by the contract of marriage, there is no place for the legitim; and all did agree in this. And as for the interlocutor itself, the Lords adhered."

1757. *February* 8. CREDITORS of HEPBURN of HUMBIE, *against* his CHILDREN.

THIS case is reported in the Faculty Collection, (*Mor.* 15,507,) where the facts, and the different points which occurred in it, are stated;—also by Kames, (*Sel. Dec. No.* 146. *Mor.* 15,605.) Lord Kilkerran's Note of it is as follows:

"I have been so long accustomed to think, that it is grown up with me into a settled opinion, that by the law of Scotland it is in no man's power, even by the most express declaration of his intention, to incapacitate his heir of entail to affect the estate with debt, unless he at the same time irritat, or to speak more properly, resolve the heir's own right in case of contravention; for that were to impose a condition contrary to law, that a man should at the same time be fiar,

and yet not have power to affect the fee. I say its grown up with me into a sett'ed opinion, that such is the law of Scotland, nay, that it is the statute law of Scotland, and I have yet heard nothing that moves me to be of a different opinion.

" It is well known how much the great men a hundred years ago, were at a loss how to contrive a settlement, whereby the estate might be unalienable and unaffectable by creditors. They were far from thinking that a simple prohibition to contract debts, or alienate the estate was enough for this. Though in some cases there were limitations of the fee, yet they were but personal, and did not affect third parties creditors; they knew the Roman law well. I am sorry to say it, they looked more into it than we do now; but they could get no help from it; they well knew the difference between simple fees and limited fees, fees simple, and fees granted under conditions; but then so far as they could learn from the civil law, these limitations were only personal upon the heir, but did not affect third parties creditors; the Roman law admitted no restraint upon property effectual against creditors, other than by real burdens, such as the *jus hypothecæ;* they gave no personal provision or obligation that effect; they knew nothing of perpetuities, in so much that a man could not even substitute to his own heir; and for that reason it was that *fidei commissa* were introduced, but which had no other effect than to give a personal action against the *hæres fiduciarius.*

" And indeed, to say no more upon the general head, what a low opinion must we have of the lawyers of former times, who I may, without offence, say were inferior to none that came after them, if no more was necessary to devise a settlement to be effectual against singular successors and creditors, than a simple prohibition to alien or contract debt irritating the debt and deed of contravention, which seems to be the argument for the heir of tailyie in this case; but they thought very differently.

" And at last a device was fallen upon to remove the difficulty, which, like all other inventions, are thought obvious when they are discovered. The difficulty was how to save the estate from being aliened or evicted, which could not be saved when the contravener's right subsisted, and the device was to provide that by the contravention, the contravener's own right should be irritate and resolved. This, we are told by Sir Thomas Hope, was a new form found out, probably contrived by himself; and indeed it must effectually cut the knot, for thereby the difficulty was removed which arose solely from the contravener's right being allowed to subsist.

" But when he has said this, he still speaks with modesty and diffidence, puts many questions, and leaves some of them answered by a *cogitandum.*

" At last, this new form of his came to be tried before this Court, when it was found effectual, in the case of the creditors of Annandale, when, as Lord Stair observes the decision, the Lords, in respect of the clause resolving the right of the heir, found that the debts could not affect the estate.

" But even this did not quiet men's minds; many lawyers doubted of the justice of that decision. But I still must observe, that the doubt lay not in favour of the heir of entail but in favour of the creditors.

" And to remove the doubt, and quiet men's minds, the act 1685 was made, which does not so properly enact that an entail with prohibitory, irritant, and resolutive clauses shall defend against creditors and singular successors, but rather supposes it to be the law, which is rather stronger than if it had enacted it, which might

have been pled to have no retrospect, but supposes it, and upon that supposal enacts, that even such clauses shall not save against creditors and purchasers, unless these clauses be insert in the procuratories and precepts, and recorded in a particular register. But what have we pled for the heirs of entail in this case, that no such clauses are necessary at all? How is it possible to hearken to that inconsistency with the statute?

" As for the decisions in 1707 and 1712, they both proceed upon the same principle as the decision in the case of the creditors of Annandale proceeded, and which the statute supposes to be law.

" An absolute proprietor of land makes an entail, disponing his land estate without reservation to himself, or to his eldest son, &c. titles are made up in common form by service, and the estate descends from father to son as it was in the entailer, *i. e.* the full property descends without reservation or annihilation of any part. The tenant in tail is restrained from alienation, &c. not by the limited nature of his right, but by personal restraints, accepting, for example, the estate, under the condition not to alien. This equivalent to a direct promise or obligation not to alien.

" Whether such personal limitations can be good against creditors is the next question.

" A statute will make them good; because a statute can overturn the common law. But, abstracting from a statute, the following points are clear. 1*mo*, That creditors, or other third parties, are not bound by such conditions that are personal to the heir. 2*do*, By the common law, every subject belonging to a debtor, personal or real, must lie open to be attached for payment of his debts, and, if the debtor be proprietor, the property is transferred to his creditor.

" Hence the necessity of a resolutive clause. The effect of this clause is to deprive the debtor of his property, after which it no longer lies open to be attached for payment of his debts.

" The Roman law knows no limitation upon property that can be effectual against creditors, otherways than by real burdens, a hypothec for example. Personal provisions and obligations were allowed no such effect. So far otherways, that a man settling his estate upon his heir could not even make a substitution; he could not name an heir to succeed to his heir. This made fidei commissary settlements necessary, which had no other effect but to furnish a personal action against the *heres fiduciarius* to restore the heritage to the *heres fide commissarius*.

" English entails are founded on statute, and in England a tenant in tail is not proprietor of the land; he has only an estate in the land, called an estate tail, which differs little from a liferent among us. Hence no necessity of prohibitive or resolutive clauses.

" In Scotland, a tenant in tail is proprietor of the land, and hence the necessity of a resolutive clause, because a debtor's estate, till the moment he is divested, must lie open to be attached by his creditors.

" *February* 3, 1758.—After this cause had been heard in presence, where many learned arguments were pled for the heirs of entail from the Jewish law, the Roman law, the feudal law, and English law; I shall take no notice of the learned arguments from the Jewish law, which was a particular constitution,

that can apply to no other people in the world; nor from the Roman law, which was *toto cœlo* different from ours, as their lands were all allodial; nor from the feudal law, whereby the superior was the proprietor, whereas by our law, the vassal is proprietor; nor from the English law, whose particular statutes do no way concern us; but what is more, neither do I think there is any occasion, in order to the decision of this case, to how even the law of our own country stood before the statute 1685; that is what I fairly own might be very difficult to determine, as the lawyers who lived at that time were as much divided about it as the Cassiani and Sabiniani were divided about certain points in the Roman law. It is enough to say, as many of the lawyers of that time were of opinion, that creditors could not be barred by the most express declaration of the maker's will, without a clause resolving the heir's right in the case of contravention. The act 1685 adopted this notion; it proceeded on the supposal that this was our law, which is rather stronger than if it had only then enacted it, as it is declaratory how the law stood before the act; and proceeds on that supposal, (to statute) that such tailyies only shall be allowed, wherein clauses resolutive and irritant are contained in the procuratories and precepts, and insert in the particular register appointed for that end; after which, how can any pretend to maintain that a tailyie shall be effectual wherein there is no resolutive clause at all? Suppose the Lords should this day, by a judgment, sustain this entail, and that such judgment should be reduced into the form of a clause to be added to the statute, what a figure would such a statute make? &c.

"*February* 8, 1758.—Upon report of the Lord Prestongrange, and having considered the debate, Find, that as the tailyie in question was executed and completed by infeftment, before the statute 1685, there was no necessity of recording it in the register of tailyies appointed by that statute: Find that the clause in the said tailyie, annulling the debts contracted, or deeds granted by the heirs of tailyie, contrary to the prohibitions and conditions of the tailyie, extends to all debts and deeds in general: Find that the prohibition in the said tailyie, to annalyie, dispone, wadset, or burden the estate, imports a prohibition to sell the tailyied estate: Find that the conditions, limitations, and irritances, are properly inserted in the said deed of tailyie; and therefore repel the foresaid objections made to the tailyie; but find that the tailyie contains no resolutive clause, forfeiting the right of the heirs of tailyie, who should contravene the prohibitions and conditions thereof; and therefore find that the said tailyie cannot be effectual against the onerous debts and deeds of the heirs of tailyie in possession, nor bar the creditors from proceeding in the present action of sale of the tailyied estate; and remit to the Lord Ordinary to proceed in the sale accordingly."

1757. *March* 3. MINISTER and KIRK-SESSION of Inveresk *against* KIRK-SESSION of Tranent.

THIS case is reported in *Fac. Col.* (*Mor.* 10,571.) Lord KILKERRAN'S note of it is as follows:—