1757. *January* 28. HOME *against* WATSON.

[Reported by Lord Kilkerran to the Court.]

"BY the contract of marriage between Andrew Home, surgeon in Wooler, and Isobel Watson his wife, wrote by a schoolmaster in 1704, he became bound to ware and employ 2000 merks which he got in tocher, with other 2000 merks of his own, extending in all to 4000 merks, upon land or other sufficient security, and to take the securities thereof to himself and promised spouse in liferent, and the heirs whatsoever of the marriage in fee; and then follows a clause, that in case he should uplift any part of this special sum, or of the conquest to be made, he should take the securities thereof in the same terms to the heirs of the marriage; and in the last place, the conquest is provided to the children of the marriage.

"Andrew Home died in 1742, leaving two sons and two daughters, after having made a settlement of his estate, which was then become pretty considerable for one in his low way, by three several deeds. By one he disponed his whole effects, except his household furniture and medicines in his shop, to his wife in liferent, and to James his second son in fee, with the burden of 4500 merks to each of his two daughters.

"By another he disponed his household furniture to his wife in liferent and to his daughters in fee.

"By the third he disponed the medicines and utensils of his shop to John his eldest son, worth about L.15 or L.16, on this narrative that he had already received of his means and effects a competent share, and that he had been forisfamiliat for many years, and in a good way of living by his employment, and it is admitted that he had before got L.70.

"The eldest son being displeased with this settlement, repudiated the disposition made to him, and brought the present process, which is a reduction of his father's settlement, and a declarator that he, as heir of the marriage, is entitled to the whole 4000 merks, which, by the contract, is provided to the heir whatsoever of the marriage, and to the fourth share of the conquest, as one of four children.

"I will not trouble your Lordships with the defences and replies that were made for the parties further than just to mention the interlocutors which I pronounced in this case.

"By the first I found that the children of the marriage were, by the said contract, entitled each to an equal share of the 4000 merks, subject nevertheless to the father's power of division; and that the father having, in the division of his effects amongst his children, allotted a part to the pursuer, in full of his claim by the contract of the marriage in question, and disponed the rest to his other children, find that the pursuer can have no further claim upon the said contract, unless he can allege the division made by the father to have been irrational.

"By the second interlocutor, I adhered to the former, on the import of the clauses in the contract of marriage, and so far refused the desire of the representation; but made avizandum to the Lords with this point, how far, in the circumstances of this case, the portion given by the father to the pursuer, out of his effects, was such a rational allotment to him as bars him from all further claim; and if not, to what farther extent he is still entitled to claim from the defenders.

"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,