1743. *June* 9. WILLIAM GRAHAM, Senior, *against* JOHN COLTRAIN.

This case is reported by C. Home, p. 381. (*Mor.* p. 13010.) Lord Kilkerran's note of it is as follows:

"*January* 5, 1743.—On report of the Lord Arniston, the Lords repel the objection to the pursuer's title, and find that John Stewart, the maker of the entail, could not settle the estate provided in the contract of marriage, to the heirs of the marriage, so as to prefer his own daughter Elizabeth, and her issue, to Agnes Stuart, the heir of line of the marriage, and therefore sustain the reasons of reduction of the deed of entail, and reduce and decern."

"On advising this case, some of the Lords gave it as their opinion, that it was in the father's power to prefer his second son, deceased, notwithstanding that by his contract of marriage his estate was provided to the heirs of the marriage. But as others did not concur in that opinion, so there was no occasion for an interlocutor upon it; all agreeing that the father could in this, not prefer his own daughter, or his other extraneous heirs male, to his eldest son's daughter, and which by the deed under reduction, he was considered to have done purely by his own act, the substitution of his daughter, the defender's mother, and of the other substitutes being guarded by prohibitory and irritant clauses, which were not in the power of his son, whom he had instituted, to alter. The interlocutor was pronounced as above, to avoid determining with respect to the father's power of preferring his surviving second son to the daughter of the elder deceased."

1743. *November* 23. THOMAS WATSON *against* THOMAS GLASS.

THIS case is reported by Elchies, (*Provision to Heirs, No.* 7, *and Notes.*) Lord KILKERRAN'S note of it is as follows:

"I am stumbled a good deal upon the legal construction of daughters and heirs female, yet still, if, in obligations daughters and heirs female are exegetic, would not such obligations comprehend the son's daughter, when heir of line, which would be absurd?

"ARNISTON,—That difficulty is removed, when it is adverted to that the person must, according to the deed, be a daughter as well as an heir female, which excludes the son's daughter, who though heir female is not daughter; and as to the leading proposition, that daughters and heirs female should be deemed exegetic, it may be asked why heirs female should be exegetic of daughters, more than daughters should be held exegetic of heirs female? It is true, a case may happen, where circumstances may determine the granter's meaning to be different from what the general construction of the words might import. But if none such occur, then the words are to be taken in their proper construction, and therefore, supposing none such to occur in the present case, then as daughters and heirs female are two different characters, that of daughters more limited, and the meaning of which cannot be misunderstood; that of heirs female more extensive, comprehending daughters it is true, yet, comprehending also persons who are not daughters; now where the words require both characters to concur, as in this

case daughters and heirs female, if there are not circumstances to show the contrary, why should not both characters concur, ere the person be entitled to claim the provision? But the matter does not rest here; the reason of the thing, which is the strongest of all circumstances, concurs to support the natural construction of the words; for though it must be owned, the deed itself tailying a trifle in this way was foolish and unreasonable, yet still the most irrational thing of all would have been, to burden his son with 10,000 marks to a daughter, whereas the burdening the extraneous heir male in it, in case of his succession, was the only case in which in common sense any one would have given such a provision to a daughter.

N. B. The interlocutor was adhered to as above, on these grounds, 1*mo*, that the heir male burdened, plainly comprehended the son, as well as the other heirs male. 2*do*, The general disposition of all moveables, as well as heritage to the heirs male."

1743. *November* 26. GARDEN *against* RIGG.

MR. THOMAS RIGG, advocate, being pursued by Garden of Troup, as assignee by Mr. John Arrat, for certain bills accepted by him, payable to Arrat; objected the nullity, that they bore interest from the date, with a fifth part as penalty.

The Lords found, "That the defender being, at the date of the bills, Mr. Arrat's ordinary lawyer and adviser, he was thereby barred from proponing the objection." *Kilkerran*, p. 382.

1743. *December* 13. KATHARINE THOMSON *against* GILBERT LAWRIE.

THIS case is reported by C. Home, (No. 229, *Mor.* 6142.) Lord KILKERRAN'S note of it is as follows:

"On report, the Lords repelled the defence by the President's casting vote; for sustaining, Arniston, Dun, Monzie, Leven, Balmerino, Kilkerran; for repelling, Royston, Drumore, Haining, Strichen, Elchies, Murkle.

"The reasoning was to the following purpose: The taxative words, 'by and through the decease of the said Gilbert Lawrie,' were no doubt very straitening; and it is no less true, that Judges are not to allow themselves the liberty of judging from intention, except where there are words to found that argument; and here the above taxative words do rather exclude the intention which the defender here pleads for.

"On the other hand, there are here other words, which in their proper meaning do directly respect the case that has happened; viz. these words, 'and all others, she, her executors, or nearest of kin could claim;' and all the question is, whether these words are to be in effect left out, because of the following words, by or through, &c.; which, as they stand, are taxative of all that went before; or if these words, she, her executors, or nearest of kin, &c., must still have their effect, notwithstanding