1738. *July* 17. SIR RODERICK M'KENZIE *against* CHRISTIAN MONRO.

THIS case is reported in Fol. Dict. 1—70, (*Mor.* 958.) where the facts are stated. Lord Kilkerran's note of the decision is as follows.

"The Lords were of opinion, that where a wife was provided to an annuity, &c. by her contract of marriage, the husband thereafter granting her an infeftment on a subject, though bearing love and favour, and no way referring to the implement of her contract, but, as here, expressing that it was over and above, or besides it, that the husband could not revoke it, and consequently his creditors not reduce it, it was used by her as a security for the provision in her contract of marriage, in other words, that she might retain it for security of the provisions in her contract, and on that ground found it as above, not reducible.

"To this only one of the Lords moved an objection in the reasoning. Should a personal creditor in a ranking, who had, subsequent to his personal debt, obtained an heritable right, for love and favour, insist upon such heritable right in security of his personal debt, he could not be heard; and the case was similar. But the answer was, that the cases were very different, for that in all provisions in contracts of marriage, there was, if not expressed, which was usual, there was implied an obligation upon the husband to secure such provision to the wife; wherefore, every security thereafter granted, however the husband should think fit to express it, might, by the wife, be applied to the security of the provision in her contract of marriage.

"The Lords pronounced a new interlocutor (for the ground on which it was laid by the Ordinary was not to the case), and found the wife's infeftment not reducible."

1738. *June* 13. ANDREW ROWAND *against* WILLIAM LANG.

THE circumstances of this case, and the arguments on both sides, are stated in the report of it, by C. Home, (p. 148, *Mor.* 11,041.) It is also reported by Elchies, (*Cautioner*, No. 8.)

Lord KILKERRAN'S note is as follows:—

"The case of Hunter and Muir was just this: Samuel Muir, as principal, and John Muir, his father, as cautioner, granted bond, 21st May, 1701, to Mr. John Thomson, schoolmaster at Kilmarnock, for 3000 merks. James Hunter, as assignee to 800 merks of that sum, pursued Robert Muir, as representing his father, the cautioner, upon the passive titles. Against which process Robert propones his defence on the act 1695. ANSWERED Hunter, that within seven years of the date of the bond, viz. the 2d May, 1708, the same was registrate in the town court books of Air; and on the 19th of said month, two days within the seven years, a charge was given to the now deceased cautioner by a town officer; by virtue of a precept on the registrated bond, which perpetuate the obligation for what fell due within the seven years; which the Lord Ordinary sustained, and the

Lords affirmed, after two reclaiming bills, both refused without answers. The last is January 6, 1718.

"There was another case in the 1718. William Stuart of Castle Stuart, as principal, and Patrick Coltrain of Drumovans, as cautioner, granted bond for 500 merks, to Andrew M'Ormock, on the 14th of March, 1711. The creditor obtained decreet in 1717, against John Coltrain, son of the cautioner; but this decreet was both a *non suo judice*, viz. before the Commissary of Wigton, and wholly in absence. On this decreet the creditor having arrested, and pursued a furthcoming, compearance being made for the principal debtor, he objected the act 1695, anent principals and cautioners, which the Lord Fountainhall sustained, but which the Lords, on a reclaiming bill, altered, and repelled the defence.

"The argument in that petition was, 1*mo*, From the intention of the law, which was to prevent the frequent bad consequences of men's facility in becoming bound cautioners; to effectuate which, it statutes, that they should be no longer bound than seven years. But by no means was it intended that any alteration should be made in the nature of the obligation, with respect to what fell due within that time, more than the statute had never been made.

"And so the words, agreeable to this intention, are, without prejudice to the cautioner's being bound, conform to the terms of the bond, within the seven years, as before the making of this act. There is, indeed, a second provision, that what legal diligence by inhibition, &c. But as this is a clause not in favour of the cautioner, but of the creditor, it cannot put the creditor in a worse case than he would have been by the preceding clause, without it. The statutory part is, the cautioner shall not be bound longer than seven years:—two provisos, That as to what falls due within seven years, he shall be in the same case as if no such act had been made. Had the act stopped here, the cautioner could have nothing to say; for thereby, as to what fell due within seven years, it was of the nature of a prescription. But then it goes on to an ampliate in favour of the creditor, (unnecessary, it is true,) but shall it make the creditor worse? Next, it was argued, as here in the minutes, that by the contrary doctrine an inhibition should be of no use. 2*do*, Should any diligence be inchoate against a cautioner within seven years, and he defend, the debt should be lost, unless completed in his time; for the creditor could not follow it furth, but behoved to begin afresh with his heir."

"The Lords also, in this case, repelled the defence.

"It is certain that, at the time of the above two former cases, the notion the Judges had was, that as to what fell due within the seven years, the Act of Parliament had introduced a proper prescription, which was to be interrupted as any other prescription; but that as to what fell due after the seven years, it was not at all a prescription, but an *ipso jure* liberation. This is distinctly remembered to have been the very language of the Bench at that time, agreeable to the observation above made, in that case of Castle Stuart and Coltrain,—that as to what falls due within the seven years, the cautioner is in the same case as if no such act had been made.

"But though this was argued by some of the Lords at advising the present case, I cannot say the decision was laid upon it. For another observation seemed to have weight with others, viz. that a charge given within the seven years, which

was a diligence that could be followed furth, and so remained effectual in terms of the last clause in the statute; though neither was this expressed as the *ratio decidendi*, for, as said is, the interlocutor went in general repelling the defence."

1738. *June* 15. JOHN PHIN, Wigmaker in Edinburgh, and OTHERS, *against* HENRY GUTHRIE, Writer in Edinburgh.

THIS case is reported by Elchies, (*Legacy*, No. 5.) Lord KILKERRAN'S note of it is as follows:

"It was observed by ELCHIES, that here was an ingenious distinction between legacies, which, *de solemnitate*, require writ to their constitution if above L.100 Scots, and *fidei comisses*, whether they can be proved by oath when above L.100 Scots, though legacies cannot; or, in other words, legacies are void if without writ, when above L.100 Scots, although the executor should acknowledge he heard them left; and the question is, whether the law is not the same as to *fidei comisses;* and as this case was to be advised *ex parte*, it was said this was a delicate point to determine *ex parte*.

Nota.—"The interlocutor reclaimed against here was wrong, because the defender was not only executor, but was intromitter and general disponee; and, therefore, no doubt the action was competent to the legators, and all the question was upon the relevancy. It was observed, that whatever was the case of legacies, yet where a general disponee had promised to pay such and such sums to certain persons, there could be no doubt but that such promise might be proved by oath.

"ELCHIES *et alii* would not enter on the argument, but thought the point of consequence; and as the reason given by the defender was, that as the subject did not exceed the special legacies, he was safe whether the interlocutor was altered or not; I say, as this was the reason why the case was advised *ex parte*, he moved, that without determining the above general point, the case should be remitted to the Ordinary. But the PRESIDENT, not seeming to apprehend the difficulty, moved that the Court should find, &c. *ut infra;* and no other scrupling but ELCHIES and K. who only wanted the point to be farther heard, they having declared they would not vote, the interlocutor was pronounced without a vote, and is in these words:

"The Lords having heard this bill, and no answers, they, in respect of the acknowledgement on oath of the executor, who, by the will, hath right to the residue of the effects, if any be, after payment of the legacies, that he understood it to be the will of the defunct that he was to account to the legatees, proportionally to their several legacies, for the remainder of the effects, after payment of the legacies, and a reasonable gratification to himself, Find him liable to account; and remit to the Ordinary to proceed accordingly.

"I own my present opinion is for the interlocutor."