commissariot of the district wherein the defunct died, was vacant. The Lords, therefore, sustained their own jurisdiction.

"ARNISTON took a particular *crotchet* in this case; though he voted with the majority for the Lords' jurisdiction, yet he proposed a second vote, whether the Lords should in this case exerce it? And it also carried they should. Few entering the reason of his difficulty, for which he gave no other, but that they had not done it this hundred years."

1739. *December* 22. And other dates—CAMPBELLS *against* CAMPBELL.

FOR an account of the circumstances of this case, and the different points of law involved in it, vide *Kilkerran*, 456, *(Mor.* 6849;*) Fol. Dict.* 1—211, and 2—290; *(Mor.* 3195, 4076, and 13,004;*) Elchies Arb. boni viri*, No. 2; Ibid. *Jurisdiction*, No. 20; Ibid. *Mutual Contract*, No. 14; *Fol. Dict.* 1—53 and 465, *(Mor.* 674 and 6849.*)*

Lord KILKERRAN gives the following detail of the proceedings, and of the opinions delivered.

"*Nov.* 28, 1738. Appoint this case to be heard in presence, upon the 14th of December next; and recommend to parties to give in a note of the decisions they should found upon, on the import of such clauses of conquest, some days before the hearing. At this time the Lords reasoned but very little upon the case, only the Lord Reporter having put the question to the reduction on death-bed, by what method the children were to have made up their titles, supposing no such deed as that now under reduction had been made by the Colonel? To which this answer was made him—That it was a question, if the children had any occasion to serve at all; but supposing they were to serve, it could be no other than a general service to carry the provision of conquest, which, when carried, they might thereupon pursue for the several shares of the subjects. But such service could never carry the right to any particular subject, which could only be where a particular subject was provided, and not where, as in this case, there was only a general provision of conquest.

"ARNISTON, on the whole of the case, gave it as his opinion, that such general provisions of conquest, as that in question, entitled not the children to any particular share; but that the obligation was fulfilled by the father by taking the rights in such manner as by law to devolve on the issue of the marriage; and that the subjects would belong to such of the issue, as by law had right, by the conception of the security; *e. g.* the eldest son to such parts of the conquest as were taken to heirs, and the younger children to such parts of it whereof the rights were taken, so as to fall to executors; and that however the securities were taken, if they devolved to the issue of the marriage, the contract was implemented, and the intention of parties answered. At the same time he thought, that supposing the father to burden the heir (in whose favour all the securities had been taken) even on death-bed, with provisions to the younger children, that the heir could not quarrel such provision as on death-bed, because of the obligation the father was under to the bairns, which comprehended the whole, however

giving the subject to any of them was implement. He further thought, that in this case, if the two noble Lords, Argyle and Isla, would not interpose, the Lords might as *boni viri.* So much was just said by *Arniston,* and at this time not contradicted by his brethren, who were of a different opinion, the hearing having, as said is, been appointed.

"*Dec.* 14, 1738. Upon a hearing this day, a very different scheme was established, from that above advanced by *Arniston,* as per (the following) interlocutor, which *Arniston* and *Dun* opposed, few more agreeing with them.

"*Dec.* 15, 1738. The Lords having heard parties procurators, and considered the debate, find that Colonel James Campbell being bound by his contract of marriage with Mrs. Margaret Lesly, to secure the sum of 40,000 merks, and to take the securities thereof to himself and his future spouse, and the longest liver, in conjunct-fee and liferent, and to the bairns to be procreat of the marriage in fee; and further bound to employ and bestow, all lands, heritages, annualrents, debts, sums of money, goods, gear, heritable or moveable, he should conquest or acquire during the marriage, and take the rights and securities thereof to himself, and the said Mrs. Margaret Lesly, his future spouse, in conjunct-fee and liferent, and to the bairns to be procreat of the marriage in fee; that each of the children are entitled to a share in the said special sum, and conquest so provided, and that the said Colonel's taking his whole land estate, and disponing his whole moveables to his eldest son, one of the children of the marriage, was not a legal implement of the above provisions contained in the contract. But find, that the Colonel, the father, had a power of division of the sum and conquest so provided amongst his children, in such manner as might be found rational; and therefore, find that he might lawfully acquire a land estate, and take the right thereof to his eldest son, and might also dispone his moveable estate to him, with the burden of rational provisions to his children; and find, that as the Colonel had himself the power to settle and determine the extent and proportions of the provisions to be paid to the younger children, he might likewise give and commit that power to any other person in whom he confided. And find, that the Colonel having by his bond of provision of the 10th January, 1713, obliged himself and his heirs, in the event of his wife's not accepting of the special provision made to her by a separate deed of said date, but adhering to the total liferent provided to her by her contract of marriage, to pay to his younger children such sum as the Duke of Argyle and the Earl of Ilay, or the survivor of them should appoint, that power and faculty given to the said Duke of Argyle, and Earl of Ilay, was a lawful power, and does still subsist: And in respect the Duke of Argyle and Earl of Ilay have not as yet exerced said power and faculty, nor declared their will not to exerce the same, they supersede further proceeding in this cause till the fifth day of June next to come; that in the meantime, either party may make proper application to the said Duke of Argyle and Earl of Ilay, to determine and appoint what sum shall be paid to the younger children, or declare their non-acceptance of that power committed to them."

"This interlocutor was framed out of four distinct votes, stated upon the case; 1*mo,* Whether giving the whole to one implements the obligation upon the father? Yeas, only *Dun* and *Arniston.* 2*do,* Had the father a power of division or not? *Arniston solus* that he had not, in consequence of the former vote. 3*tio,* Has the

father a power to give the land estate to one, and burden it with provisions to the rest? Unanimously, that he had. 4*to*, Has the father a power to delegate this power of burdening? Unanimously, that he had.

"*Elchies* and *Kilkerran*, who only spoke of the side of the above interlocutor, spoke to this purpose: That it is the nature of such obligation *pluribus*, to constitute all of them creditors, *in capita*. Such plainly should be the import of the like obligation in favours of the bairns of another man. Why, therefore, should not the like obligation in favours of one's own bairns have the same effect, unless either some principle in law to the contrary, or some great inexpediency could be alleged resulting from it, neither of which could be alleged; for, as to what had been said, that, supposing the bairns creditors *in capita*, let a father acquire what conquest he would, he behoved to give each their share, and could not lay the foundation of a family; it was answered that such consequence, did it follow, should indeed amount to an argument in law; wherefore certain such could be no man's intention at entering into his contract of marriage: but that by no means it did follow, because, at the same time the bairns were creditors *in capita*, that credit in them was still subject to the father's power of division. And whereas it had been said that there could be no power of division if the children were creditors *in capita*, ANSWERED,—That this was no new notion, for it was the uniform doctrine of our decisions, elder and later, that the children were creditors *in capita*, subject to the father's power of division. So much was *in terminis* found in *Doway's* case, *January* 1728; the like in *Rankin's* case, *February* 1736. And upon the more general point that the father could not give the whole to one, in implement of the contract, the case of *Christian Stenhouse* was observed to be in point. Also the case of *Stuart*, 29 *January*, 1678. And as to the case of *Cairns of Torr*, in *February* 1719, and of *Cumin* and *Kennedy*, 7 *July*, 1698, from Fountainhall, quoted of the other side from the record in the first case, and from the case itself, as marked by Fountainhall, both appeared to proceed on specialties; particularly in that of Cumins and Kennedy which was next insisted on, that the daughter had in her contract of marriage accepted a sum in satisfaction. Now, if such be the uniform doctrine of our decisions, every man must be supposed by the like clauses in his contract, to have had the same meaning, as such clauses are explained in the decisions.

"The Lords were of opinion that provisions in contracts of marriage to heirs or bairns receive their construction, not from the terms used, of heirs or bairns, but from the nature of the subject; if land, then, whether the provision be to heirs or bairns, it is the heir of the marriage who is understood creditor in the provision; if a tenement in burgh, or money to be laid out and secured, whether to heirs or bairns, as in these cases the continuance of a family is not supposed to have been in view, the whole children are creditors *in capita*, though upon this there was no particular vote or judgment given."

1740. *February* 13. DOOLY *against* DICKSON.

THE Lords differed upon the question, whether an adjudication upon a special charge, carried bygone rents due between the predecessor's death and the date of the adjudication.