1739. *December* 23. CHILDREN of COLONEL JAMES CAMPBELL *against* CHILDREN of his ELDEST SON.

[Elch., No. 2, *Arbitrium Boni Viri*, and No. 20, *Jurisdiction*; Kilk., No. 4, *Prov. to Heirs.*]

This case we mentioned before, December 1, 1738.

The question now was, Whether the Lords could sustain themselves judges of the provisions for the younger children, in place of the arbiters named by the father, who declined to give any judgment?

The Lords found they could not, agreeably either to the civil law, *p.* 1, *Inst. de Empt.*, or their own decisions, *Corsan* against *Barncleugh*, *February* 21, 1734. And in this point the Lords were unanimous; but Arniston and others were of opinion that the settlement might be sustained, as if the father, by settling all his estate upon his eldest son, had only exceeded his power, and not done a deed altogether out of his power. For put the case, that the father had made provisions to his younger children, but that these provisions were irrational and incompetent; in that case the younger children could not reduce the settlement *in totum*, but would only have an action in supplement of their provisions. But the majority were of the contrary opinion, and thought that though it was in the father's power to restrict the provisions of the younger children, yet it was not in his power to dispone all his estate to his eldest son, these being deeds of a very different nature; and that the father could not be said properly to exceed his power, but to do a deed which he had no power at all to do.

1739. *December* 23. CHARLES CAMPBELL *against* GABRIEL NAPIER.

THIS was a competition about a superiority which fell to the Crown by the forfeiture of the Viscount of Kilsyth.

Kincaid, proprietor of the lands, and vassal of Kilsyth, took the benefit of the clan-act, at least in so far that he presented a signature to the Exchequer, within the six months, upon which Balquan, his disponee, was infeft some time after; but both he, and his author, Kincaid, omitted to give in their claim to the trustees for the forfeited estates, as they were enjoined by Act of Parliament, notwithstanding this superiority was rentalled with the rest of Kilsyth's estate, and so surveyed and seized by the trustees in terms of the statute. Afterwards the Barons of Exchequer, by virtue of the Act of Parliament 1726, vesting the remainder of the forfeited estates that were not sold, in the crown, for the use of the public, and authorising the barons to sell them for that use, put up this superiority to roup, and Gabriel Napier was the purchaser, betwixt

whom and Charles Campbell, deriving right from Balquan, the question now comes.

The Lords found, That, as there was no claim given in to the trustees, in terms of the Act of Parliament, the benefit of the clan-act could not here be claimed; and therefore this superiority fell under the Viscount's forfeiture, and was in the person of the king, not *jure coronæ*, but as trustee for the public; for which reason the Barons of Exchequer were authorised to sell it, by the foresaid Act 1726, as well as the rest of the forfeited estates that remained unsold; and therefore preferred the purchaser from them, Gabriel Napier.

N.B. It was supposed, in this debate, that, if Kincaid had used the benefit of the clan-act, as he might have done, then the superiority in question would have been no part of Kilsyth's forfeiture, and so could not have been sold by the barons.

1740. *January* 8. DUKE of HAMILTON *against* EARL of SELKIRK.

[Elch., No. 3, *Heritage and Conquest;* Kilk., *ibid.* No. 2.]

THIS was a question about the succession of the late Earl of Selkirk, betwixt the Duke of Hamilton, his heir of conquest, and the Earl of Selkirk, his heir of line, and successor in the honours and titles. As the subject of this controversy was very valuable, and the question itself of great importance and general concern, the Lords ordained a hearing in presence, which lasted three days. The debate was branched out into several heads. The first consisted of three questions, which, by reason of their connexion, were pled on and decided altogether, *viz.*:—

Whether incomplete rights to lands, heritable bonds whereon infeftment had followed, and those whereon infeftment had not followed, went to the heir of line or the heir of conquest?

1*mo*, For the heir of line it was pled, That, by the rules of the law of Scotland, succession in heritable subjects always descends, either by order of generation, as from father to son, or by order of birth, as from the elder brother to the younger: that, contrary to these rules, another kind of succession was introduced in conquest, by which, instead of descending, it ascended, and went to the elder brother in place of the younger. This novelty was introduced by a particular statute made mention of in the *Quoniam Attachiamenta*, where it is said *statutum est, &c.;* and referred to in the statutes of Robert III., in these words, *prout in dicto statuto continetur.* By this statute the heir of conquest gets only *terræ et tenementa in quibus defunctus obiit sasitus.* Now, all statutes correctory of ancient custom, and introducing any thing contrary to the common rules of law, ought to be strictly interpreted; *quod enim contra rationem juris introductum, ad consequentias non producendum. l.* 16, *de Leg.;* so that *terræ et tenementa* can never be understood to compre-