

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 dispoise 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.

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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 dispoinee, 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