1739. *December* 12. JAMES WINRAM, Commissary Clerk of Lauder, *against* COMMISARIES of Edinburgh.

THIS case is shortly noticed in Lord KILKERRAN'S reports, p. 314. The following note of what passed on the Bench, is written upon one of the papers.

"*December* 12, 1739.—Found that the Lords had jurisdiction to appoint an interim commissary in case of a vacancy, and appointed accordingly.

"It having been observed by some of the Lords, that in all cases where they exercise such jurisdiction, it is *ex necessitate* for explicating their own jurisdiction. Thus, they appoint *interim* sheriffs, on application of parties that want to have inventories registered of their predecessor's effects, being to serve *cum beneficio*; which they could not do till a clerk be appointed, whose office fell by the sheriff, his constituent's death, &c. To which it was answered, that though here there is no private party applying for immediate relief, yet there is an application; and it is as necessary there be a commissary, who may confirm the moveables of defuncts, as that there should be a sheriff in the county; for without such confirmation, the effects cannot be transmitted from the dead to the living; nor poinded for the debts of the person who may have right to make up titles. And as it was unnecessary to put every private party to an application to have an officer appointed for his case only, so upon such application, the sheriff, or other officer, is not appointed for the particular end for which he is applied for, but is appointed to continue in such office till recalled, or another be appointed in his room, for the service of all the lieges that then have, or thereafter may have, occasion for him. And as to the alleged practice of the commissaries, not any one instance came up to the case. True, there was a probability that in some of these instances, the commissaries had confirmed the testaments of persons dying within another commissariot during a vacancy in that other commissariot; but, *quid inde?* It's believed the commissaries will hardly refuse to confirm any man's testament where applied for. Let the applier see to that, whether it be the proper commissariot; and, therefore, no regard could be had to instances as evidence, unless it could be said that application had been made to the commissaries of Edinburgh, setting forth that the commissary of such and such a district being dead, and no new one appointed, whereby the testament of such a person dying within such commissariot could not be got confirmed there, and praying the commissaries of Edinburgh to do it, which cannot be pretended. Wherefore, as it was true there was no instance wherein the Lords of Session had named an interim commissary, so there was really no proper instance of the commissaries of Edinburgh confirming in such a case; and that it was plain they had no such power by the law, their powers being defined by the Act of Parliament. It was farther observed, that had the commissaries been in use to appoint an interim commissary, which had been a more regular method of increasing their supereminent jurisdiction, the Lords would probably not have meddled with it. But as that was not pretended ever to have been practised, and that for the reason above, this was to be considered as a new case, wherein there was no certain evidence that the commissaries had been in use in such case, to confirm the testaments of persons not within their own district; at least, on that account that the

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