1712. *June* 18. JACOB MOOR, and his Factor, *against* SIR ALEXANDER MAXWELL of Monreith.

IN the pursuit, at the instance of Jacob Moor, as creditor to the deceased William Houstoun of Cutreoch, against Sir Alexander Maxwell, for payment of William Houston's debt, upon the passive titles,—the Lords found the defender not liable as vitious intromitter; albeit he had intromitted with the defunct's goods and gear: in respect he had, after intromission, before citation at the pursuer's instance, confirmed the subject intromitted with, which purged the former vitiosity: notwithstanding that the Act 20, Parl. 1696, statutes, that the intromitters with the moveables of any defunct, who are not executors confirmed to them, nor have right from the executor-creditor before intromission, shall be liable as vitious intromitters, though there is a third party confirmed executor in a particular debt or subject: because, in the present case, the defender himself is confirmed executor-creditor to the defunct, before citation in the pursuer's process, though after the intromission; and so falls not within the verge of that statute.

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1712. *June* 19. SIR JOHN MALCOLM of Innertiell, and MICHAEL MALCOLM of Balbedie, *against* HER MAJESTY'S ADVOCATE and SOLICITORS.

JOHN MAITLAND of Eccles having, in anno 1661, obtained from King Charles the Second, a gift under the Privy Seal, of the feu-duties and other emoluments of the ministry of Scotlandwell, and some other chaplainries and altarages, during all the days of his lifetime, and after his decease, to Maitland, his son:—This gift was conveyed by progress, from John Maitland to Sir John and Michael Malcolms, who pursued the feuars of Scotlandwell for bygone feu-duties.

Compearance was made for the Queen's interest, by her Majesty's Advocate and Solicitors, who ALLEGED,—1. That the gift was prescribed, never having been clothed with possession by John Maitland, the obtainer, or his assignee, in the cedent's lifetime: And any possession since his death, cannot come *in computo* to hinder prescription;—seeing the gift died with the cedent, the blank therein not being filled up by him who only had power to do it. 2. *Et separatim*, this gift being expede through the registers, and at the Privy Seal, in favours of John Maitland of Eccles, and after his decease, to Maitland, his son, the name of no particular son of Eccles's could be thereafter filled up therein. 3. *Esto*, the recording of the gift blank, did not take away Eccles's son's right, this son is presumed in law to be the eldest son and heir living at the date of the gift. Now, the said eldest son having died before the father made the assignment, and the father having never filled up another son's name, the blank right, which neither the presumption of law, nor Eccles's election doth supply, is determined and expired. 4. Suppose the blank could imply a power in favours

of Eccles to insert any son therein he pleased, that power of election fell with him, and is not competent to his assignee.

ANSWERED for the pursuers,—Prescription is sufficiently interrupted by the assignee's possession. 2. The second objection would have some weight, if the blank in the gift were an absolute blank, without any designation to demonstrate the person; but the person being demonstrated by the character of son to such a man, it is most probable, that seeing Eccles had several sons at his obtaining the gift, the king intended, by leaving the son's name blank, to have the grant pass to the longest liver of the sons. 3. Albeit the right of primogeniture prevaileth in succession, it hath no prerogative in grants of this nature. 4. The assignee, as *procurator in rem suam*, hath the same power to fill up the blank with the name of any of Eccles's surviving sons, as the cedent might have done.

The Lords found, That any possession by Maitland of Eccles, or his assignee, within forty years, interrupts prescription. And found, That the gift in favours of Maitland of Eccles, and his son, became not extinct by the father's death, without filling up the blank; but subsisteth in the person of the son now alive.

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1712. *July* 9. BARBARA FEA, Spouse to PATRICK TRAILL of Ellness, *against* Her Husband.

IN the process, at the instance of Barbara Fea, against Patrick Traill, her husband,—The Lords found the defender obliged to aliment the pursuer, according to his fortune: Albeit it was alleged for the defender, that it was the duty of a wife to follow and live with her husband; and if the pursuer would come to Ireland, where the defender resides at present, he would entertain her according to his quality and fortune: In respect it was answered for her, that if the defender would tell her in what particular place of Ireland he is, and advance money to defray the expense of her journey, she was content to repair to him; but since he declines to let her know where he may be found, and to furnish her money to enable her to come to him, his offer to aliment her in Ireland is but a mere sham and amusement: especially considering that she had formerly gone in quest of him to London, who, finding her there, maltreated her; and then, deserting the place for her sake, retired she knows not whither. But he having a land estate in Orkney, she ought to have an aliment out of that in the mean time.

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1712. *July* 9. ELIZABETH GRANT, Spouse to JAMES KENNEDY, Periwig-maker in Edinburgh, *against* PATRICK GRANT of Dunlugas.

ROBERT GRANT of Dunlugas, having, in anno 1687, disponed his estate to Patrick Grant, his eldest son in his contract of marriage, with the burden of 6000