1743. *July 5.* LORD ERSKINE *against* ——.

[Elch., No. 4, *Sasine.*]

A CHARTER from a subject bore a clause of union of several tenements into one, and appointed a particular place where sasine should be taken of them all, dispensing with taking sasine upon every particular tenement; and, accordingly, the precept of sasine directs the sasine to be given at that particular place. As the Lords had found that no subject had the power of union and dispensation of that kind, it was thought proper, as several of the tenements lay very discontiguous, one of them particularly in another county, to take infeftment upon each parcel of land by itself.

It was objected against this infeftment,—That it was null, as being disconform to the precept, which directed sasine to be taken at a certain place for the whole lands.

To this it was answered,—That, if the precept had only directed sasine to be given, without any thing more, there was no doubt but the sasine taken thereupon was valid: that the dispensation which is added, is always understood to be in favour of the vassal, and a privilege which he may use or not. Which the Lords sustained.

1743. *July* 21. MARY M'WHIRTER *against* ROBERT MILLAR.

[Kilk., No. 3, *Service, &c.*; C. Home, No. 247; Elch., No. 18, *Husband and Wife.*]

HERE there were two questions: 1*mo*, Whether possession, in this case, was equal to a confirmation; 2*do*, Whether, upon the supposition that it were so, there was any evidence here that the son had possessed his mother's third of moveables, or if the father's possession, considering that the son was minor, and he his administrator-in-law, could be accounted the son's possession.

As to the first, the Lords, upon a hearing in presence, found, by a great majority, that there was no necessity for a confirmation, and that the possession was sufficient. But, that the decision may not be thought to apply to every case, the circumstances of this case are well to be considered: 1*mo*, The subject-matter in dispute was household furniture and plenishing; there were no *nomina debitorum*, which it was allowed required confirmation to their transmission, because of them, as being *jura incorporalia*, there could be no possession. And it seemed to be the opinion of the majority, that, even if the debtors made payment, the sums would not be transmitted, and they might be obliged to pay over again to the next nearest of kin making up his titles. 2*do*, It was a continued possession for many years, and not a momentary one; but, as to the disposal of the moveables, the decision did not seem to rest upon that, and it would have gone the same way if there had been only possession. 3*tio*, There

was only one nearest of kin at the death of the brother, who entered into possession; so that, if there had been two or more, and one, without consent of the rest, had laid hold of the goods, the decision would have probably gone otherways. Actores, Andrew M'Douall and Alexander Lockart.

1743. *July* 25. ——— *against* ———.

[Elch., No. 9, *Inhibition.*]

Reduced an inhibition at the instance of the heirs of a marriage against a father, who, by the contract of marriage, had bound himself to settle his estate upon himself and wife in conjunct fee and liferent, and upon the heirs of the marriage in fee; notwithstanding of which provision, the father remained fiar, and the children only heirs of provision; and though they were creditors, in so far that the father could not make any voluntary or gratuitous alienations to their prejudice, yet the inhibition following thereupon could go no farther than the obligation which was the foundation of it, and therefore could not bar onerous alienations.

This was found, unanimously, upon the report of Lord Elchies.

1743. *July* 25. ——— *against* ———.

A charge of horning against a husband upon a decreet obtained against his wife, before marriage, and to which he was noways a party, was sustained, in respect of the general practice, though, regularly, the husband ought to have been first decerned for his interest, before he was charged.

1743. *November* 9. Ouchterlony *against* Hunter.

[Kilk., No. 9, *Bill of Exchange*; Elch., No. 32, *ibid.*]

It was the opinion of the Lords, that there was no difference betwixt a payer *supra* protest and porteur protesting for not-payment or not-acceptance. As to the third point, some were of opinion that the porteur did not lose his recourse, unless the drawer could qualify some damage by the neglect of due intimation. Others, particularly Lord Elchies, thought that the *onus probandi* should lie upon the porteur, who ought to show that the drawer had suffered no damage, otherwise to be barred in recourse; but the generality of the Lords seemed inclined to establish a universal rule, by which the porteur, if he ne-