1665. *June* 12. SWINTON *against* NOTEMAN.

A WOMAN being left tutor to her children, and thereafter marrying, and so losing her tutory, her husband behaves himself as tutor and administrator: The minor thereafter convenes him for count, reckoning, and payment, not only of what he intromitted with, but for his omissions, and what he might have intromitted with; and so contended to make him liable in every thing as a tutor, even for his neglects in desperate debts; for which the civil law was adduced.

The Lords found him not liable to count but for what only he did intromit with, and for what he might have done upon that subject of intromission, but no farther, and not for his omissions in any other thing belonging to the minor. But they made an Act of Sederunt for the future, that pro-tutors should be liable in *omissa* and *commissa*, as well as other tutors, in all time coming.

Act. Wallace. *Alt.* Lockhart.

Advocates' MS. folio 54.

1655. *June* 20. LORD LOUTHIAN *against* The TOWN OF JEDBURGH.

THE Lord Louthian against the Town of Jedburgh, and they against him: there being mutual declarators by other of thir parties against others, to hear and see some lands lying contigue to the said town, belonging in property to my Lord, as a part of his barony of Ancrum, declared free of any jurisdiction the town could pretend over them: And, on the other hand, the town contending they belonged to their jurisdiction, in so far as it was offered to be proven that, in their charter of erection, they have all the privileges of a free burgh royal, granted to them within their town, and parts and pertinents thereof; and it is offered to be proven that thir lands now controverted are parts, &c. of their town, in so far as they have been in use to hold courts, fine and imprison the inhabitants of these lands, as burgesses; likeas the whole inhabitants thereof are burgesses, and enjoy the hail privileges of burgesses, and the crafts and merchants dwelling there have been in constant use to subject themselves to the town deacons; and in all things, either active or passive, competent to burgesses of burghs royal, they have enjoyed them these 40 or 50 years: All which is sufficient in law to induce a right of jurisdiction over them.

ANSWER,—Thir lands being a part of his barony, wherein he stands infeft, holden of the king, and the inhabitants being his tenants, he has been in possession of jurisdiction there, by virtue of his infeftment, past memory of man; and any use or possession his tenants have had of making themselves burgesses there, and subjecting themselves to their jurisdiction, cannot prejudge him, nor yet can his connivance at that subjection hinder him to seek this declarator for the future against the said town; especially seeing thir lands do not hold burgage of the burgh, nor are they expressed in their charter of erection. And it is inconsistent both with law and reason that Jedburgh should have jurisdiction when they have neither property nor superiority; which is in effect to make *accidens sine subjecto*, since *imperium inhæret territorio*.

ALLEGED,—It is no new thing to see a burgh royal have jurisdiction where they have neither property nor superiority; and a burgh of barony and royal are consistent, as in Dysart. This was to be heard *in presentia.*

Act. Cunyghame. *Alt.* Lockhart and Wedderburne.

Advocates' MS. folio 54.

1665. *June* 24. —— *against* EDGAR.

THERE is a bond granted by one Edgar to his daughter, wherein he ties himself to pay her 4000 merks at her complete age of 18, with annualrent thereafter, she being married and provided to a jointure by her husband; and this sum falling to her after the marriage, by the decease of some of her brethren, to whom this sum was payable at their 18, and failyieing of them by decease, to accresce to the rest surviving: Thereafter her husband dying, his executors convene Edgar, son and heir to the father, to pay the sum.

ALLEGED,—That this being an heritable sum, and no particular assignation made thereof by the widow to her husband, *stante matrimonio*, they cannot have right thereto.

ANSWER,—It was moveable, for though the bond being prior to the act of Parliament 1641, was heritable, bearing annualrent after the time, yet the intervening act of Parliament made it cease to be heritable *quoad* the executors, but to stand in its own nature heritable *quoad fiscum et relictam;* and she having fallen that sum *stante matrimonio*, and before her husband's decease, there was *jus quæsitum* to the husband thereto as to a moveable sum, and so it belonged to his executors. ANSWER,—That grant the act 41 made sum moveable, *quoad* the executors, yet the subsequent act 1661 declared the husband from all benefit or right thereto, where the bonds are made to the wife, and the wife, where the bonds are made to the husband; which act is retrotracted to the year 1641. ANSWER,—The act of Parliament 1661 does not derogate to the act 1641, but only declares the estate of man and wife, after their respective deceases, in relation to bonds made to man and wife *separatim;* but this being a sum moveable fallen to the wife *stante matrimonio*, before the husband's decease, there was *jus perfecte quæsitum* to the husband, and so to his executors. Which the Lords found true.

Act. Sinclar and Cunyghame. *Alt.* Lockhart.

Advocates' MS. folio 54.

1665. *June*

THE Lords found, that in a sentence given against a party, wherein the defender declares he shall be satisfied with the probation of one witness singly, to