

estate even while their father is in life. Which was well decided; because it is presumed to be bought with the father's means.

See *Mascardus de Probationibus, verbo, Bona conclusione, 221.*

*Act. Cunyghame.*

*Alt. Lockhart.*

*Advocates' MS. folio 59.*

1668. *February 4.*

Anent WARDHOLDINGS.

As vassals of ward-lands may feu their lands without their superior's consent, so they who hold lands ward of subjects may do the same; albeit, the act of Parliament be only express as to lands holding ward of the king.

*Act. Wallace.*

*Alt. Lockhart.*

*Advocates' MS. folio 59.*

1668. *February 4.*

Anent COMMONTIES.

THE Laird of Haining being infeft in the lands of Haining, with its parts and pertinents, *cum pascuis et pasturis*, but not *cum communi pastura*; holding feu of the king; and the town of Selkirk, by their charter of erection, granted to them by the king, being specially infeft in the muir, as the commonty of their town: and both pursuing molestations against others,

The Lords found that Haining being infeft *cum pascuis, &c.* and in possession of pasturage past memory of man, he had right to pasture there, but not to cast feal and divot. But if he had been infeft *cum communi pastura*, and so in possession, The Lords declared, that having right of pasturage, the right of casting had been included; because *major servitus includit minorem*: and that *cum pascuis, &c.* in Haining's charter, did relate to the lands, but not to the commonty.

*Act. Wallace.*

*Alt. Wedderburne.*

*Advocates' MS. folio 59.*

1668. *February 24.*

HENDERSON *against* HENDERSON.

HENDERSON having dispooned some tenements of land to another, so called; in the narratory part of the which disposition, the consideration of his mortality, and his going off the country are the impulsive causes of the right: and it had the common style of a testament; but thereafter, in the body of it, he assignees him to the mails and duties, and gives him power to dispone thereon; and contains

a procuratory to resign, and warrandice. It was doubted if this was *habilis modus*, to convey heritage, or if it was a testamentary disposition.

The Lords found it had the force of a disposition, but withal it was revocable by the disponent: and because this right was made when he was going off the country, they found that his heir proving that it was in his hands, after his return, the same was a tacit revocation thereof, and so found it to belong to the heir; and yet they found it probable by witnesses, that he gave warrant to deliver it to the defender.

*Act. Sinclair.*

*Alt. Lockhart.*

*Advocates' MS. folio 59.*

1667, *January 31*, and 1668, *February 24*. LADY MILNETOUNE *against*  
The LAIRD.

1667. *January 31*.—The Lady Milnetoune being married to Maxwell of Calderhall, her second husband: who disagreeing with her, she sells her liferent to her step-son, Sir Walter Whytford of Milnetoune: and he having before that disposition fallen in adultery, she pursues a divorce, and gets it, upon the probation of one single witness, and a number of concurring pregnant presumptions; wherein there was compearance, and witnesses adduced. Which decret being thereafter called in question before the Lords, it was

ALLEGED,—That one single witness could not prove. *2do*, That the witnesses adduced were bribed, and got money to depone; so the question was, If *singularis testis*, in crimes, might prove. *2do*, If witnesses once adduced and received in judgment without any exception or objection *in prima instantia*, may be quarrelled *in secunda*, as to reduce the decret.

The Lords found, that one single witness, with the presumptions, was relevant; and the rather, because it was known that Calderhall was a most vicious man; and as to the witnesses, they found it not competent now to make that a ground of reduction, but reserved reprobator to them on that head. *Vide infra 24th February, 1668*, thir same parties.

It may seem hard that when objections are omitted against witnesses which were not competent *in prima instantia*, being *noviter veniens ad notitiam*, that they should not be received *in secunda*.

But the notoriety of the thing induced the Lords thus to decide, and that the poor gentlewoman was reduced to great poverty.

*Act. Cunyghame.*

*Alt. Lockhart.*

*Advocates' MS. folio 57.*

1668. *February 24*.—The Lady Milnetoune having got a divorce from her husband upon adultery, which was proven by witnesses who were alleged to be bribed by the Lady; this common objection against witnesses being omitted in the divorce, there is a reduction raised of this decret on this ground, that the witnesses were corrupted; and the action was a reprobator of the witnesses upon whose deposition divorce