

1587. *August.*CHALMERS *against* MUNRO.

In an action between Mr. David Chalmers, one of the ordinary number of the Session, and Mr. George Munro, anent the proving of possession of the uptaking of the duties of the \_\_\_\_\_ of Ross, there were witnesses produced by Mr. David, and it was excepted against them, that by the space of 15 days before they had been kept by the said Mr. David in his house, in \_\_\_\_\_, and not suffered to pass furth of his house, the which was offered to be proved instantly at the bar, et sic fuerunt domestici familiares, que repelluntur a testimonio dicendo; to the which it was answered, that the party that summonses any witness is bound to find the expense, and especially to such as *de rebus et bonis propriis* might not well do the same, and whether it was given *ante productionem sive post*, provided it was not given *subornationis causa*. The Lords repelled the exception, and admitted the witnesses.

No. 20.

*Colvil MS. p. 148.*1589. *May.*ACHISONE *against* SINCLAIR.

Into the term of probation assigned by Alexander Achisone of Gosford, to prove against James Sinclair, there was a witness produced by the said Alexander, called Richardson, that dwelled in Ballencrieff. It was objected against himself by Sinclair, defender, that there was one to whom the defender was third of kin, and so according to the daily use and custom of Scotland, the deadly feud that is once contracted follows the kin and surname, and the witnesses that were produced could no more depone against the said Sinclair, defender, nor he could depone against the principal slayer of his nephew. The witness being interrogated, and sworn, deponed, That he bore no deadly feud against the defender. Answered to the objection, that in so far as the defender was not at the committing of the slaughter, and participate of the same, and also that the witness' self had deponed that he bore no feud against the defender, that the witness ought to be admitted. The Lords found, that the witness should not be received, and that notwithstanding of the witness' own deposition and declaration that he bore no feud; sicut bona pars Dominorum in contraria fuerunt opinione.

No. 21:

*Colvil MS. p. 440.*1606. *February 14.* L. CULMALINDIE *against* EARL of ORKNEY.

The Laird of Culmalindie pursued the Earl of Orkney for contravention; because after the charge and caution found, Captain Allan \_\_\_\_\_ domestic servant to the Earl, and captain of the ship called the Dunkirk, came to the pursuer

No. 22.

Sufferers of violence at sea may be witnesses, if

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they be not  
pursuers.

being sailing upon his voyage towards Scotland, and boarded the pursuer's ship, took his household men and servants prisoners, struck and dragged them, and detained them prisoners, took them to land, and kepted them in prison five or six days. It was alleged that the summons was not relevant, unless the pursuer had libelled the Earl's express command or ratification, and he set down the manner thereof; because a man's servant committing a crime, and being fugitive, and never being reset nor maintained by his master after the fact, his deed cannot draw his master to any inconveniency. It was answered, that the defender having found caution for himself, his men, tenants, and servants, he should provide and take order that they should do no violence, and failzleing thereof should pay the penalty; for commands being privately given cannot be proved. And if a master were free of the contravention by his not resetting of the defender, he might cause a debauched friend or servant, by his secret command, do mischief; and thereafter abstaining from public reset of him, eschew the peril of the contravention, all acts of lawburrows should be elided, and the finder of caution should be bound for nothing but for his own actual deed, or express command proved. And in this case it was offered to be proved, that this person remained still Captain of the Earl's ship long after the fact; which the Lords found relevant. It was thereafter alleged, that the summons was not relevant in that part bearing that the Earl's servants took two of the pursuer's servants, with other mariners, unless he had condescended upon the names of the said mariners, because the pursuer craftily suppressed their names, to the effect they might be witnesses, albeit in effect they had that same cause to be parties which the pursuer had. It was answered, that the pursuer needed not to condescend; and albeit they were named, they might be witnesses; because in seafaring matters, the witnesses, present behoved to be witnesses, seeing there were no others that could be witnesses, but such as were present. Therefore, the Lords found that the pursuer needed not to condescend more particularly.

*Haddington MS. v. 1. No. 1031.*

1609. *February.*

KINROSS *against* GRAHAM.

No. 23.

Mr. Henry Kinross pursued Graham in Stirling, Mr. John Archibald, and certain others, for exhibition and delivery of a bond made by them and umquhile Robert Harries; in which cause litescontestation being made, Mr. Henry produced one Duningston, writer in Stirling, to be witness. It was objected that his nephew was servitor of the pursuer Mr. Henry; which being confessed, thereafter Mr. Henry replied, that notwithstanding of this allegiance he should be received, because he was nearer of kin to the defender; notwithstanding whereof the Lords found the objection relevant, and rejected the witness.

*Haddington MS. No. 1568.*