

No. 35. siring to have another in his place, whose name he designed; the said John Hamilton offered rather to admit the witness repelled. The Lords would not give him place to resile, but gave the choice of the witness to Caprington.

Kerse MS. f. 259.



No. 36.

1615. June 6. EARL OF KINGHORN *against* ROSS.

In an action betwixt the Earl of Kinghorn and Mr. John Ross concerning the parsonage of ———, the Lords would not grant diligence against witnesses out of the country, because it was known that they were absent *animo remanendi*; and therefore they forced the party who had the probation to lead, to take a commission to examine them before the Judges of Rome and Lyons.

Kerse MS. f. 254.



No. 37.

1615. July 27. COUNTESS OF BUCHAN *against* EARL OF MURRAY.

In an action pursued by Dame Mary Douglas, Countess of Buchan, against the Earl of Murray, de testibus examinandis ad futuram rei memoriam, the Lords found, that the witnesses might be examined upon the article of minority contained in the summons, without production of the libel of restitution to which the same was relative.

Kerse MS. f. 259.

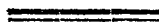


No. 38.

1616. November 13. MUIRHEAD *against* CLELAND.

In an action betwixt Arthur Muirhead and James Cleland, the Lords repelled a witness, because there was blood betwixt him and one Muirhead, cousin-german to the said Arthur; albeit it was not alleged, that the said Arthur Muirhead was art and part of the blood.

Kerse MS. f. 259.



No. 39.

1622. November 22. GRANT *against* BALLINDALLOCH.

In the mutual contraventions betwixt Grant of Carron and Grant of Ballindalloch, a witness called Grant being produced, who granted that he was within degrees descendant to the producer, was notwithstanding thereof admitted, because

he was a bastard. But the Lords declared, that if he had been of kin by the mother's side, he would have been repelled *quia partus sequitur ventrem*, and so breeds kindred, *et certitudinem sanguinis, licet ex illicito coitu*; but upon the father's side, a bastard is reputed *sine patre et terra filius*. In that same cause, John Stewart, Baron of Kilmachlie, being of kin to the producer, was repelled, albeit he was nearest of kin to the other party who objected.

No. 39.

Haddington MS. v. 2. No. 2674.

1623. March 25.

STUART against SCOT.

In an action Francis Stuart against Scot for reduction and improbation, the Lords found, that a witness ought to be examined *ad futuram rei memoriam*, concerning the verity of the writs taken to be improved, in respect of the age and sickness of the witness, who was desired to be examined; and this was found by the Lords, albeit it was alleged by the defender, that such examinations and depositions are never appointed to be received by the Lords in actions of improbation, as this action betwixt these parties is, but the same is done sometimes by the Lords in actions of other natures, but not in improbations, especially it ought not to be granted, where this action being both reduction and improbation, the party cannot crave the same, except he would pass from the reduction, and that litis-contestation were made in the improbation; neither of which being done, the desire thereof ought not to be granted; the which allegiance was repelled, and the witnesses ordained to be examined.

No 40.
Evidence to
lie in retentis..

Act. Stuart & Craig.

Alt. Nicolson, Lawtie, & Scot.

Clerk, Gibson.

Durie, p. 62.

1623. June 5.

MASTER of JEDBURGH against ELLIOT.

A man under caution to underly the law for theft, may be witness so long as he is not tried nor convicted guilty. He cannot be witness against me, whose brother I have wounded, albeit the witness declare that he bears no feud against me.

No. 41.

Haddington MS. v. 2. No. 2856.

* * Nicolson reports this case :

Alexander Elliot, the witness produced, cannot be received, because the defender against whom he is produced for proving the pursuer's replies, wounded the witness's brother, and left him for dead in presence of this witness himself,