

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,