

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 &amp; Craig.

Alt. Nicolson, Lawtie, &amp; 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,

No. 41. and so must be presumed to bear him at great ill-will. Answered, That the witness will make faith he bears not ill-will to the proponer; repels him *a testimonio ferendo*.

*Item*, The other witness within this 15 days, begged almes frae the defender, and got both meat and silver. Answered, The witness has free gear worth the King's unlaw. Repells him *a testimonio ferendo*.

*Item*, Another witness is accused before the justice of theft, and admitted on caution to answer at the next ayre, or on 15 days warning, and so is infamous. Answered, He is not convict. Admits him witness. Protested if he be convict *ante conclusum in causa*, his deposition work not.

The witness is tenant to the producer, in so far as he has a house of him for payment of a mail in the town of Leith. Answered, Leith is a burgh of regality or royalty, and tenants of houses within burghs of regality or royalty may be witnesses in their landlord's causes, because they have no commodity of the house by the worth of the habitation which they pay their landlord; and if they were removed, they might have another as commodious easily *in tanta frequentia*, so that they are not so suspect of partiality in favours of their landlord, seeing they must not fear his removing. Admits the witness.

*Nicolson MS. No. 544, 545, and 546, pp. 374. and 375.*

1623. June 11.

WATSON against GRINLAW.

No. 42.

In an action betwixt Watson and Grinlaw, a witness produced for a party who dwelled in a house within Leith, pertaining to the producer, and being tenant therein to him removeable, for payment of mail and duty; the Lords found, that notwithstanding he was tenant removeable, yet he might be witness, and that this was no cause to repel him, seeing he was only his tenant within burgh of a house, and that such tenants of houses within burghs-royal might be witnesses for them, to whom they were tenants, and found in this cause Leith to be respected as a burgh-royal.

Act. Stuart.

Alt. Lawrie.

Clerk, Hay.

*Durie, p. 64.*

\* \* This case is reported by Haddington :

He who is tenant of a tenement within burgh, will not be repelled from being witness in his landlord's cause, albeit a tenant of field-land may not be witness for his master; and the custom of receiving tenants within burgh witnesses for their