

No. 22.
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.