No 202.

THE LORDS found, that the being of tenants or servants to Sir John Whiteford, instructed by their oaths, or otherwise, was a sufficient cause to examine them, to remain *in retentis*, lest they might be put out of the way; unless Sir John would find caution to produce them; and would not examine them upon the account of penury of witnesses, unless Castlemilk would declare he would make use of no other witnesses; in which case, they superseded the examination for 20 days, that objections and interrogatories might be proponed by the other party; and reserved all objections against them at any time before conclusion of the cause; but found it not necessary to cite the other party, that not being accustomed in the examination of witnesses to remain *in retentis*.

Fol. Dic. v. 2. *p.* 192. *Stair, v.* 2. *p.* 398.

*** Gosford reports this case:

THERE being a deliverance of the Lords, granted upon a bill given in by Castlemilk, for examining of three witnesses, in a reduction and improbation of a disposition of certain lands, *ex capite vis et metus*, the disponer being kept as prisoner in a house the time that he subscribed the disposition, that the depositions might be taken, and lie *in retentis*, and that one of the witnesses had been kept by Milton, and carried about with him as a prisoner, and threatened if he should depone, and that the rest were Milton's domestics, and so might be put out of the way when the witnesses were brought in to depone, and were ready to be examined. It was represented for Milton, and the Duke of Hamilton, who stood publicly infeft in these lands upon a right from Milton, That the special reason for granting the deliverance being most false representations, and if any of them could be instantly proved, they were content they should be examined otherwise; by the order of process, and the act of regulation, the process ought to be first enrolled, and parties heard to debate, before any witness could be examined, unless it were made appear, by sufficient testificates, that through sickness, infirmity, or old age, they were not able to travel, or likely to die; whereas, all these witnesses were young, strong, healthful persons, and not in that condition. It was *answered*, That they had no certain residence, and were but mean persons, and might be practised to absent themselves.—THE LORDS did ordain them to be examined, and their depositions to lie *in retentis*, notwithstanding, which seemed hard, the like being only granted in the cases of infirmity, sickness, or old age, where it were made appear that witnesses were going off the country, none of which were here made out.

Gosford, MS. No 834. *p.* 527.

1678. *June* 12. A. *against* B.

No 203.

IN an improbation of a sasine, the witnesses being brought in to depone, the Ordinary proposed this query to the Lords, If they could be examined before

No 203. the other party subscribed his abiding at the sasine?—THE LORDS ordained the witnesses to be examined, reserving to themselves, at the advising, to consider what they shall operate.

Fol. Dic. v. 2. p. 192. Fountainhall, MS.

1685. *December 9.*

Mr JOHN HAMILTON *against* The MASTER of BALMERINO.

No 204.

MR JOHN HAMILTON, Minister of Edinburgh, having raised a proving of the tenor of a discharge against the Master of Balmerino, he gave in a bill, craving some of the witnesses may be examined *ad futuram rei memoriam*, to lie *in retentis*; because they were old and valetudinary, and some of them were members of the Session. THE LORDS refused it, because of the state of the process that it was only executed for the first diet, and the summons was yet blank, and the adminicles not libelled nor filled up.

Fol. Dic. v. 2. p. 192. Fountainhall, v. 1. p. 383.

1696. *February 21.*

The EARL of SOUTHESK *against* The LORDS STORMONT, DRUMCAIRN, &c.

No 205.
The Lords consider they have a discretionary power, where the circumstances require it, to examine witnesses before answer.

THE Earl of Southesk presents a bill against the Lords Stormont, Drumcairn, &c. shewing, that when his father was *in agonia mortis*, the petitioner was induced *per metum reverentialem*, and threats of exheredation, and cursing, to sign a bond of L. 5000 Sterling, without any onerous cause, to his aunt, the Lady Errol, upon trust, and as a check on him not to be too much led by his mother's counsels, (as was then feared he would,) and therefore craved witnesses might be examined as to the cause of the bond, and the manner of exacting it, seeing he had raised improbation, reduction, and declarator, against it, and his witnesses might die ere it came to be debated by the course of the roll. *Answered*, This desire of examining witnesses to lie *in retentis*, uses never to be granted, except where they are old, valetudinary, or going out of the kingdom, which was not pretended in this case. Yet examples were adduced on both sides, as in Niddry's case, (see No 184.) where witnesses, though in health, were examined; and at other times it was denied, except they were *testes instrumentarii* in a writ which was offered to be improved as false; but, in other cases, extraneous witnesses were not allowed. THE LORDS thought it more regular to examine *ex officio* after the cause should be debated; and therefore called Stormont's procurators to see if they would instantly answer the reasons of reduction and qualifications of trust; but thought, if they declined, the Lords had latitude enough, in this circumstantiate case, to examine witnesses before an-