

**No 207.** Outer-house, the very end of the Session, some urged, that behoved to be conditional till November, (as all certifications in improbations the last week of the Session use to be,) yet the LORDS ordained it to be extracted, if it were not produced betwixt and the 10th of August next, to the effect the witness might compear and depone before the three Ordinaries on the bills in time of vacance, or any two of them, anent the verity of his subscription.

*Fol. Dic. v. 2. p. 192. Fountainhall, v. 2. p. 107.*

**No 208.**

A summary application may be made, in cases of necessity, to have witnesses examined, to lie *in retentis*.

1710. June 24. The EARL of WINTON *against* — KINGSTON.

THE Earl of Winton gave in a bill to the Lords, the occasion whereof was, that the Earl was born several years before his father married my Lady, his mother; and the family of Kingston, the next branch of the tailzie, doubting of his legitimation by subsequent marriage, he took a brief out of the chancery to serve himself heir to his father before the macers; but the marriage having been private, there were no witnesses on life who were present, but only Sir John Ramsay, and James Smith, clerk of Tranent, whom he designed to adduce as witnesses to the inquest; but James Smith being suddenly ill, and in hazard of death, and in no hopes of life till the day of the service, the Earl gives in a bill, desiring the Lords to name some of their number, or any other to take his oath presently, to lie *in retentis*, lest by his death the mean of probation perish, and to put this single interrogatory to him, if he was not a witness present when the last Earl married the present Earl's mother. The difficulty was, that it ought to be intimated to the next heir, and abide the minute-book; and if it had been any other day of the week but Saturday, it is likely it would have been delayed till the next day for an answer, but to have superseded till Tuesday might endanger the cause, if he should die before that, so there was *periculum in mora*. THE LORDS granted the desire of the bill, and named two of their macers (as Judges before whom the cognition of his legitimacy by the service was to come) to go to Tranent that same afternoon, and take his oath, if he was present at the last Earl's marriage, and to take one of the clerks with them. The heirs of tailzie produced a signature under King James VII.'s hand, taking the lands to himself *et hæribus masculis legitime ex corpore suo procreandis*, which being long after the present Earl's birth, evinces he did not esteem him to be his heir. The Earl, on the other hand, produced a bond settling a jointure on her, and designing her Countess of Winton. THE LORDS left these documents to be produced to the assize; but thought the case favourable, and required dispatch, though the next heirs of tailzie did expect they should have been heard before granting any such extraordinary desire. Some thought that cohabitation, and the being reputed man and wife by all about them, and his

owning her for such at bed and board were sufficient to infer a presumption of the marriage, as Stair shews, Lib. 1. Tit. 4.

*Fol. Dic. v. 2. p. 193. Fountainhall, v. 2. p. 580.*

No 208.

1804. February 16. MAGISTRATES OF INVERBERVIE, Petitioners.

A PETITION was presented to the Court by the Magistrates of Inverbervie, stating, that they had brought an action against Robert Barclay Allardyce of Urie, for reduction of a tack granted by their predecessors, and for ascertaining certain marches; that it was necessary, in this action, to take the depositions of several old and infirm persons, whose evidence might be lost, unless it were immediately taken; and praying that their depositions might be taken, to be sealed up, and lie *in retentis*.

No 209.  
In what circumstances a proof may be taken to lie *in retentis*.

It was *objected*, That the summons had not been called in Court; and the LORDS (January 21. 1804) upon that account refused the petition. The petitioners afterwards, when the ordinary *induciæ*, according to which the summons had been executed, were expired, renewed their application, which was granted, (January 21.) and the depositions ordered to be taken.

Against this judgment a reclaiming petition was presented by the factor of Barclay Allardyce, stating, that there was properly no action in Court, as the defender had left Scotland *animo remanendi* before the summons had been executed; that it had been executed at the mansion-house of Urie, and had been called upon the short *induciæ*; that the citation therefore was irregular, and, of course, there being no action in Court, the present application was incompetent, June 9. 1791, Sharp against Robson, No 55. p. 3721.

THE LORDS, by a narrow majority, refused the petition without answers. But great doubts were expressed from the Bench, with respect to the regularity of the citation, and the competency of the examination of these witnesses.

For Petitioners, *Baird.* Agent, *John Græme, W. S.*  
Alt. *Wolfe Murray, Jardine.* Agent, *John Innes, jun. W. S.* Clerk, *Home.*

J.

*Fac. Col. No 145. p. 326.*

## SECT. XI.

## Reprobator.

1580. June. BISHOP OF MURRAY against The LAIRD OF WESTER WEMYSS.

IN the action betwixt George Douglas, Bishop of Murray, John Douglas, and the Laird of Wester Wemyss, anent the teinds of Abernethy, there were cer-

No 210.  
Found that a reprobator of witnesses can-