1682. *November.* HOME *against* The Earl of HOME.

No 308.
The Lords found no necessity of a wakening, where the action had been several times called within the year, tho' nothing had been marked on it.

THE Earl of Home having granted bond to the Lady Home, his mother, for the sum of 40,000 merks, which being assigned to Mr Charles her son, and he having pursued an adjudication against the Earl his brother; *alleged* for the defender, That he offered to prove, by the pursuer's oath, that this action was to the Lady his mother's behoof; and by the Lady's oath, that this bond was granted to the defender's own behoof; which action having lain over year and day, and thereafter the pursuer having craved a commission to take the Lady's oath; the defender did rectify his allegeance and offer to prove that by a late agreement betwixt the Lady and him, she had discharged the said sum, and renounced all her right for the payment of 2500 presently, and 5000 merks yearly in time coming; upon which there being a commission extracted for taking the Lady's oath, the defender did reclaim against the commission, as being unwarrantably extracted, and the process first behoved to have been wakened. *Answered*, That there was no necessity of a wakening, the action being several times called within year and day, albeit nothing marked; and, albeit it had been sleeping, yet the Lady being sickly and valetudinary, her deposition ought to be taken upon the commission to lie *in retentis* before the conclusion of the cause. THE LORDS repelled the dilator, and found no necessity of a wakening.

Fol. Dic. v. 2. p. 202. Sir Pat. Home, MS. v. 1. No 267.

1707. *July* 22.

Mr ALEXANDER MAITLAND *against* ALEXANDER BRAND of Reidhall.

No 309.
A cause found not to be sleeping tho' nothing was done therein from 14th February 1706 to 30th June 1707, in respect the session was under adjournment from the 1st of November 1706 to the 4th of February 1707, and in order to the sleeping of a cause the time of adjournment was to be con-

IN the declarator of non-entry at the instance of Mr Alexander Maitland against Alexander Brand of Reidhall, it was *alleged* for the defender, That the cause is sleeping; in so far as nothing was done from the 14th of February 1706 to the 30th of June 1707; whereby it lay over more than year and day, even after deduction of the whole space of the adjournment of the winter-session, viz. from the 1st of November 1706 to the 4th of February last bypast; and therefore no process could be sustained till the cause were wakened.

Replied for the pursuer; The time of the adjournment of the session by the Parliament, is to be considered as *tempus utile*, and so before the process could sleep, he should be allowed three months of session, without reckoning the intervening vacation.

Duplied for the defender; The year within which a process must be called to hinder sleeping, was never imagined to be a year of session-months, but *tempus continuum*, including session and vacation. This is farther cleared from the tenor of the acts adjourning the session, whereby it is declared, That the