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-

swer; and accordingly, on their refusing to debate, the LORDS ordained the witnesses to be examined. No 205.

Fol. Dic. v. 2. p. 192. Fountainhall, v. 1. p. 713.

1696. *February* 28.

EARL of LAUDERDALE *against* the DUCHESS of LAUDERDALE.

No 206.

JOHN, now EARL of LAUDERDALE, and the other Creditors of the Duke of Lauderdale, give in a petition against the Duchess, craving the Lord Harcarse and Sir Andrew Foster, the only two instrumentary witnesses alive, who signed witnesses to the Duke of Lauderdale's disposition of the barony of Leidington, and others, to the Duchess, may be examined, to lie *in retentis*, if it was read to the Duke, and if he knew what was signing, and if he did not ask them after he had done, what-for a paper it was he had subscribed; and if he was not made believe, that it was only a conveyance of his estate in trust, for the behoof of his heirs. *Answered* for the Duchess, That the present Earl's father and brother had both ratified it; and though there was a reduction now raised, yet it was neither seen nor returned, and so it was great precipitation to examine witnesses. Yet the Lords, on the suspicion that practices had been used by the Duchess, for impetrating that disposition, granted the desire of the bill.

Fol. Dic. v. 2 p. 193. Fountainhall, v. 1. p. 716.

1700. *July* 30. The EARL of ANNANDALE *against* SIR JOHN DALZIEL.

No 207.
The Lords found that a witness in an improbation could be received to lie *in retentis* before the reasons came in to be debated in course.

THE Earl of Annandale pursues a reduction and improbation of a bond of 6000 merks, granted by his father to the deceased Sir John Dalziel of Glennae, in 1662, against which there were sundry presumptions urged, that it was never heard of by the space of 30 years, whereas, there was another bond for a lesser sum, the annualrents whereof had been punctually paid and exacted; and one of the witnesses in the bond, called Patrick Johnston, having lived these many years bygone in Ireland, and being now accidentally here, the Earl craved to have him examined on the verity of his subscription. Glennae, astructing and adminiculating the bond, produced a letter of the same date with the bond, and relative thereto, wrote by the Earl's father, and *alleged* there was no necessity for examining the instrumentary witnesses, seeing the letter, acknowledged by the Earl to be his father's hand-writ, sufficiently documented and supported the bond. THE LORDS were divided, whether a witness in an improbation could be received to lie *in retentis*, before the reasons came in to be debated of course; and, by a plurality of eight against seven, it carried in the affirmative, that he might. The next difficulty was, he could not depone, in respect the bond was not yet in the field. But there being a certification obtained against it in the