

swer; and accordingly, on their refusing to debate, the LORDS ordained the witnesses to be examined.

No 205.

Fol. Dic. v. 2. p. 192. Fountainball, 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 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 Glenrae, 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. Glenrae, 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

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.

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