

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-