

1666. *January 4.* LAIRD of MILTON *against* LADY MILTON.

THE LAIRD of Milton pursuing a reduction of a decret of divorce pronounced by the Commissaries of Edinburgh, at the instance of the Lady Milton, his step-mother, against Calderwood, her last husband, upon adultery, desired that the testimonies of the witnesses might be made private to him, being a matter of so great importance, as tending to take away the right of the Lady's jointure, dispoised by her husband to this Milton.

THE LORDS refused the desire; but ordained the Clerks to give a note, expressing the names, designations, and the preambulatory questions in the depositions, as their age, married or not, purged of partial counsel, &c.

Stair, v. 1. p. 333.

No 198.

Witnesses' testimonies taken in an action of divorce before the Commissaries, and of which a reduction was raised, not allowed to be published.

1667. *June 12.* MITCHELL *against* MITCHELL.

THE LORDS, upon a bill, ordained witnesses to be received before litiscontestation, and their depositions to lie *in retentis*; because they were in town for the present, and were to go to Zetland, and *senes valetudinarii* and *peregre profecturi*; and, upon such like considerations, others may be received witnesses *in hoc statu*.

Clerk, *Scot.*

Fol. Dic. v. 2. p. 192. Dirleton, No. 74. p. 30.

No 199.

1669. *February 16.*

CREDITORS of BALMERINO *against* LA. COUPAR.

IN a reduction upon the head of death-bed, the LORDS allowed the depositions of witnesses to be taken, to lie *in retentis*, though it was before the day of compearance, and no allegation made, that the witnesses were old or valetudinary, or that there was a penury; for the LORDS thought, though many witnesses were called, there might be few who truly knew the defunct's condition, and these might be removed out of the way, by death or by collusion.

Fol. Dic. v. 2. p. 192. Stair.

No 200.

* * This case is No 98. p. 10421. *voce* PERSONAL AND TRANSMISSIBLE.

1675. *February 4.* CRANSTON *against* MR MARK KER.

UPON a bill, it was desired that witnesses should be examined in relation to a process, that their depositions should lie *in retentis*; but the LORDS found, that

No 201.

Proof to lie *in retentis* was not allowed.

No 201.

where the summonses were not executed, and so no dependence.

though summons were raised, that the same not being executed, there was not a dependence; and that it was a stretch great enough, to receive witnesses before litiscontestation in a depending process, which the Lords are sometimes in use to do; but that witnesses should be received upon a bill, without the foundation of a process, is inconsistent with form.

It is to be regretted, that of late, the time of the English, that abuse having crept in, that there are so many bills given in, and sometimes passed through inadvertency in a hurry; the said custom should be yet retained; so that bills do justle out processes and the hearing of causes; especially it being considered, that they are oft-times offered in the very time, when, after pleading in other causes, parties and advocates are removing; which is the occasion that oft-times most of the Lords are not advertent when the same are offered: And it is a practice not suitable to the gravity of the Court, and not without a dangerous consequence; seeing bills may be anent matters of great importance, which ought to be offered to the Lords in a decent way, and should be considered by them deliberately.

Fol. Dic. v. 2. p. 192. Dirleton, No 236. p. 113.

1676. January 13.

LAIRD OF CASTLEMILK *against* WHITEFORD.

No 202.

Found, that depositions might be taken, to lie *in retentis*, in the case of reduction of a disposition obtained by extortion, the witnesses being tenants and servants of the defender.

CASTLEMILK having pursued a reduction of a disposition granted by Stuart of Minto to Sir John Whiteford, of lands of a great value, as being obtained by extortion, having carried the disponent from place to place as prisoner, and kept him secret till he was forced to subscribe this disposition; there was a bill given in for Castlemilk, for examining of witnesses, to remain *in retentis*, upon account of their being valetudinary; but being called by the Lords, and found young healthful men, the Lords refused to examine them. By a second bill it being *alleged*, That they were necessary witnesses, the deed of extortion being by keeping Minto close in private rooms, there could be but few witnesses who knew the same, and they might be put out of the country before the cause could come in by the course of the roll; there was an answer given in for the Duke of Hamilton, as having interest by a disposition, but not produced, and for Sir John Whiteford, that there was no specialty here for examining the witnesses before discussing of the cause, because the ground of Castlemilk's pretence was, that the witnesses were tenants or servants to Sir John Whiteford, or dependents upon him, as being officers of the Sheriff of Lanark; and it was condescended to, that they should be examined, whether they were tenants or servants, but being officers was no sufficient ground; and as for the penury of witnesses, it could not be pretended, because the witnesses inserted were not examined. It was *replied*, That the witnesses inserted were chosen by Sir John Whiteford, and were suspected of concourse.