

## 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 jumble 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.

THE LORDS found, that the being of tenants or servants to Sir John Whiteford, instructed by their oaths, or otherwise, was a sufficient cause to examine them, to remain *in retentis*, lest they might be put out of the way; unless Sir John would find caution to produce them; and would not examine them upon the account of penury of witnesses, unless Castlemilk would declare he would make use of no other witnesses; in which case, they superseded the examination for 20 days, that objections and interrogatories might be proponed by the other party; and reserved all objections against them at any time before conclusion of the cause; but found it not necessary to cite the other party, that not being accustomed in the examination of witnesses to remain *in retentis*.

*Fol. Dic. v. 2. p. 192. Stair, v. 2. p. 398.*

\*\* Gosford reports this case:

THERE being a deliverance of the Lords, granted upon a bill given in by Castlemilk, for examining of three witnesses, in a reduction and improbation of a disposition of certain lands, *ex capite vis et metus*, the disponent being kept as prisoner in a house the time that he subscribed the disposition, that the depositions might be taken, and lie *in retentis*, and that one of the witnesses had been kept by Milton, and carried about with him as a prisoner, and threatened if he should depone, and that the rest were Milton's domestics, and so might be put out of the way when the witnesses were brought in to depone, and were ready to be examined. It was represented for Milton, and the Duke of Hamilton, who stood publicly infest in these lands upon a right from Milton, That the special reason for granting the deliverance being most false representations, and if any of them could be instantly proved, they were content they should be examined otherwise; by the order of process, and the act of regulation, the process ought to be first enrolled, and parties heard to debate, before any witness could be examined, unless it were made appear, by sufficient testificates, that through sickness, infirmity, or old age, they were not able to travel, or likely to die; whereas, all these witnesses were young, strong, healthful persons, and not in that condition. It was answered, That they had no certain residence, and were but mean persons, and might be practised to absent themselves.—THE LORDS did ordain them to be examined, and their depositions to lie *in retentis*, notwithstanding, which seemed hard, the like being only granted in the cases of infirmity, sickness, or old age, where it were made appear that witnesses were going off the country, none of which were here made out.

*Gosford, MS. No 834. p. 527.*

1678. June 12.

A. against B.

IN an improbation of a sasine, the witnesses being brought in to depone, the Ordinary proposed this query to the Lords, If they could be examined before

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