No 184.

1692. *December* 23. WAUCHOPE of Niddry *against* KERS.

THE LORDS found, after Niddry had led witnesses, and seen what they had deponed, he could not now crave others he condescended on to be examined, not being in his former diligence; though he offered to depone, that they were *noviter venientes ad notitiam*, and that it should not stop the advising of the cause; for this might open a great door for bribery, and subornation of new witnesses, where he saw the former had not proved as he expected.

Fol. Dic. v. 2. *p.* 190. *Fountainhall, v.* 2. *p.* 538.

No 185.

1706. *July* 16. A. *against* B.

SOME parties to whose probation certain points were admitted to be proved *prout de jure*, petitioned the Lords, that the witnesses by whom they expected to have proved were either dead or gone out of the country, after they were, by their extracted diligence, cited, or were cast, upon legal objections, and therefore craved liberty to cite others in their room, who were come to their knowledge since. Some thought, if there were none yet adduced, or that those led deponed *nihil noverunt*, they might be allowed to cite others, though not in the first diligence, they deponing they were emergent, and *noviter venientes ad notitiam.* But the plurality thought this against form, and a bad preparative, which might open a door to suborning and picking out of witnesses, and therefore refused the bill, seeing he may blame himself that did not put in all the witnesses he intended to make use of into his first diligence.

Fol. Dic. v. 2. *p.* 191. *Fountainhall, v.* 2. *p.* 343.

No 186.
A party cannot be compelled to examine a witness he has cited.

1711. *February* 7. CAMPBELL of Glasnock *against* FARQUHAR of Gilmillscroft.

THE deceast Farquhar of Gilmillscroft having got a disposition from Campbell of Glasnock, the same was quarrelled, in a reduction, as granted the day before he died, when he was utterly insensible of what he was doing; and the other contending he was then rational, and acted several things as pertinently as ever he did at any time before; a conjunct probation was allowed anent his condition at that time. And Gilmillscroft adducing two witnesses, Davidson of Holehouse, and the other called Weir, it was *objected* against the first, That he could not be a habile witness, because he might tyne or win in the cause; in so far as he having trusted Glasnock with the right of a bond, he took a retrocession from him that very day Gilmillscroft's disposition was subscribed, and so *consimilem*

fovet causam; for if it shall be proved the granter was then insensible, by the palsy and lethargy affecting him, his retrocession falls to the ground, and so is concerned to depone that he was rational then, to support his own right. *Answered*, That right is long ago sopite and extinct, the debt being transacted and paid many years since, and all the writs given up and cancelled, so he is under no hazard that way. *Replied*, Glasnock's heir may reduce the retrocession, if he was then incapable to grant, and so cause him repeat the money. THE LORDS thought there was some weight in the objection; but reserved the consideration of it till advising. It was *objected* against Weir, That he had given bond to Gilmillscroft for a sum of money, and he had him under diligence for it, which impression might bias him to be partial. *Answered*, The bond was granted for the price of some sheep he had bought of Glasnock's executry, and, seeing the right was yet *sub judice*, he was willing to pay it, but knew not to whom, till the competition was discussed. 2*do*, It is no relevant objection against a witness that he is debtor to the adducer, seeing it is *vis legalis* to cause one pay their just debt. THE LORDS repelled this objection. Then Glasnock's heir *complained*, That Gilmillscroft had cited Mr Samuel Nimmo, late minister of that parish, and who being with the defunct in his sickness, could not but know his condition, and yet now shunned to adduce him, by which he was lesed, seeing he might have the benefit of putting cross interrogatories; and therefore craved that either he might examine him, or give him the use of his act to cite him. THE LORDS found a party could not be compelled to use any witnesses but whom he pleased; and therefore refused the desire, as informal and irregular. But the heir might have cited him, if he had done it *debito tempore*; but then he must extract the act himself, and take out his diligence, as he and the Clerks shall agree. (*See* WITNESS.) No 186.

Fol. Dic. v. 2. *p.* 191. *Fountainhall, v.* 2. *p.* 633.

1747. *February* 18.

Lord FORBES and Others *against* The Earl of KINTORE and Others.

No 187.
How one of more defenders dying, his heir is to be called into Court.

ONE of more defenders dying during the dependence, all of whom were necessary to be made parties, as being in society, and his heir being called by an incident, the question was, whether this was sufficient, or if it was not necessary to call him by an orginal summons or transference, in common form. *Ratio dubitandi*; where there are more defenders, the death of one does not throw the process out of Court; which is the case where a single defender dies during the dependence.

But the LORDS had no regard to this distinction, and "found no process."

It has been a form established since the foundation of the College of Jusice, that where a defender dies, the action must be transferred against his heir