

be hurt by the depositions of witnesses, whereby they may help themselves, and not by such actions of reduction, as is now intended, the preparative whereof he alleged to be of so dangerous consequences, that never shall any party be in security, if such reductions be permitted by alleging the witnesses to be suborned, and so to crave them to be re-examined, who after any space may either forget the particulars, whereupon they have deponed, or otherwise may be suborned by the party to alter their depositions: THE LORDS found, that this, and the like reductions, were receivable, notwithstanding of the sentence given *parte comparente*; and therefore that they would try this reason, if the witnesses were suborned, and had deponed falsely *in prima instantia*, and to that effect that they would examine the said witnesses thereupon; and found this action was of the nature of a reprobator; and because there might be peril in the form, to give way to such pursuits, where there were sentences given upon probation against parties compearing, if after trial there should be found no just cause to infringe the sentence, and to cohibit the preparative, if any should move the like action without good grounds; therefore the LORDS ordained the reducer to consign L. 100 to be given to the party defender in this process, in case after trial it shall be found that there is no reason for this action; which sum was modified, because the sum contained in the sentence was not far above the penalty, and also the parties were but mean persons; whereas if the sentence had been a matter of more consequence, the LORDS would have modified a greater sum for penalty.

Clerk, *Scot.*

Fol. Dic. v. 2. p. 196. Durie, p. 781.

1667. February 25. Lady MILTON against Laird of MILTON.

THE Lady Milton having obtained divorce against John Maxwell, younger of Calderwood her husband, before the Commissaries of Edinburgh, Sir John Whiteford of Milton, who had gotten a disposition of her liferent-right from her husband, pursues reduction of the decret of divorce, on these reasons, that the decret was in absence, and that he compeared before the Commissaries, and craved to be admitted for his interest, and was refused, and if he had been admitted he would have objected against Paterson and Clerk, the only two proving witnesses, that they were not habile witnesses, being neither men of fame nor estate, and Paterson by common reputation of very evil fame, and that they were not purged of partial counsel, but suborned by the Lady, and had both received money to bear testimony, and promise of more, and were prompted by the pursuer how to depone. *2do*, As they were not habile, so neither did they prove the commission of adultery. THE LORDS caused produce the process, and testimonies before the Commissaries; and finding that the

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should be found that there is no reason for the action.

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Found that subornation or corruption of witnesses could not be instructed by their own posterior testimonies.

No 215. witnesses were not purged of partial counsel, they ordained them to be re-examined upon such interrogatories as were not contrary to their former depositions, whereupon they were twice re-examined. Paterson, in his first examination before the Commissaries, depones, That he knew John Maxwell and his Lady, and that he saw John Maxwell in naked bed with Margaret Davidson, lying above her, and that he upbraided John Maxwell for it, who answered, he carried not always his wife about with him. Clerk deponed, That in another month, at Edinburgh, he saw John Maxwell in naked bed with Margaret Davidson, and that the said John was very displeas'd at his coming into the room. The Goodman of that house being another witness, deponed that John Maxwell and another man, and two women, lay altogether at one time in one bed in his house, and that he saw John Maxwell very familiar with one of the women, embracing and kissing her, and keeping her upon his knee, whereupon he put them out of his house. Another witness deponed, That seeing Margaret Davidson with child, she acknowledged to him that it was to John Maxwell, and that it was commonly reported that she called the child Maxwell, after John Maxwell. Paterson and Clerk being re-examined by the LORDS, did purge themselves of partial counsel, but at the close of their deposition, Paterson acknowledged that the Lady threw down a dollar and a half upon the table, which he took up before his first testimony; and, in his second re-examination, acknowledgeth that she offered him five hundred merks, and to be a bairn of the house. And both acknowledged that she gave them tokens, to make appear they knew Margaret Davidson by her countenance and cloaths, but both adhere to the truth of the former deposition; and being asked, how they knew that woman was Margaret Davidson, deponed that they knew her not, nor saw her ever before nor after, but that John Maxwell's servant, called Dougal Campbell, being in the outer room, told them several times that that woman's name was Margaret Davidson.

THE LORDS, having considered the depositions first and last, ordained the parties to debate, whether corruption or subornation of the witnesses, being acknowledged by themselves in their re-examination, did invalidate their testimony, and whether their testimonies not agreeing as in the same individual act, but as to divers facts, and divers times, and places, were sufficient to prove.

It was *alleged* for the Lady, That whoever adduced witnesses was obliged to entertain them, and also denied that ever she gave money, or promise; and that it could not be instructed by the re-examination of the witnesses, whose posterior testimony could never invalidate the first, or else there were an open door for prevarication and bribing of witnesses to alter their testimonies; but the opinion of all lawyers is, that a witness may correct himself before his testimony be perfected, and subscribed, not after. But the only way was to protest for reprobators, and by other witnesses to prove the corruption of the witnesses, in which case it behoved to be proved, that there was an undertaking,

or at least endeavour, that they should bear witness to that which they knew not to be true. As to the second point, it was *alleged*, That albeit the common rule be that in matters criminal, the witnesses must be *contestes*, both being witnesses at once to the same individual act, yet it had these limitations; *imo*, That though this hold in criminals *specifico*, yet not in *crimine generico* which may be perpetrated by reiterable acts when the pursuit is not capital, but either for torture, canonical purgations, or to any civil effect, as in adultery, it is *crimen genericum*, by reiterable acts, and therefore being pursued *civiliter* to separate the marriage, or to restore the jointure, it might be proved by two witnesses, though not concurring in the same individual time and place, and therefore singular, albeit not single witnesses. And the lawyers do generally give the instance in adultery, which is a secret and transient fact. And if such proof were not sufficient it would be impossible to prove it; but if adultery were pursued criminally in those cases where it is capital, probation were required more exact, and agreeing in time and place. Or if the case were in murder, which is not reiterable, witnesses not agreeing in time and place could not prove, but in adultery, *heresie simonie*, and such reiterable crimes, witnesses to divers facts, being in the same crime, are sufficient; for which Clarus, Farnatius, and Covaravias, were cited. It was *answered*, to the first point, That subornation or corruption of witnesses is inferred by attempts, or endeavours to prompt witnesses to depone that they know not, albeit they did it not, nor yet undertook it; and that taking of any money, not only inhabilitates the witnesses, but makes the takers and givers falsers, is the opinion of all lawyers; neither may the witnesses take the expences of their travel and attendance, till it be decerned by a judge; and as to the matter of corruption, the witness's own oath is sufficient, even by re-examination, because the adducer can never quarrel the oath of the witnesses adduced by himself, by which he carries the cause, but much more where the witnesses acknowledge, that at the first examination they were not interrogated if they were free of partial counsel, and if that be omitted, or not understood by them, they may be interrogated specially thereupon again, as was done in this case. To the second point, albeit more witnesses being singular, but not agreeing to the same fact, or sometimes one witness may be receivable to infer torture, or that the several witnesses agree not as to all the same points and circumstances, as if the witnesses look through a rift or hole, albeit they cannot see all at the same instant, yet all of them see the same individual fact; or if one witness depone in the case of murder, that he saw the party accused with a bended pistol, or drawn sword, go into a room, but going out saw no further, and another hear the shot and the strokes, and saw the accused coming out alone, or with a bloody sword, and a third saw the slain lying dead in a room, and no more than these, although they agree not as to the same points and minutes of time, yet all agree in one fact, but the witnesses not agreeing to one fact, are all single witnesses, and are not *contestes*, and so cannot be confronted, confirmed, or redargued each by other, which is the great ground of faithfulness, and trust of testimo-

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nies; but if one person alone can bear witness, where he knows none can gainsay him, it would prompt him to perjury, or mischief; and here the two witnesses are only *ex auditu*, seeing neither of them knew Margaret Davidson, but only by the report of Dougal, so that both did not positively know that the person with whom they found John Maxwell was not his Lady, seeing Clerk neither knew the Lady nor Margaret Davidson. It was *answered* for the Lady, That whatever may infer subornation or corruption, it cannot be proved by the testimonies to derogate their former depositions, unless it were proved by others upon reprobators; and as to the other point, *in facto reiterabili*, to a civil effect, witnesses, though not agreeing in the same fact, yet agreeing in divers facts of the same crime, were sufficient.

THE LORDS found that subornation or corruption of the witnesses could be instructed by their own posterior testimony, and found the adultery sufficiently proved by the testimony of the witnesses, and assoilzied from the reduction, and found the letters orderly proceed, used against Milton for removing. But Milton gave in a new bill, offering him to prove by other witnesses the subornation and corruption of the witnesses in the divorce, being in effect a reason of reprobator, which is very competent in his reduction; and yet the LORDS refused the same *in hoc statu processus*, not being libelled or insisted in before, but superseded execution in the removing, &c. as to the house and mains possessed by Milton, till Martinmas, that in the mean time he might insist in his reprobators, as he would be served,

Fol. Dic. v. 2. p. 195. Stair, v. 1. p. 453.

1668. July 30. Laird of MILTON *against* Lady MILTON.

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Reprobators are not competent, but when protested for *re integra*, when other witnesses may be adduced.

THE Laird of Milton insisted in his action of reprobator, wherein this point of the dispute was only discussed, whether reprobators were competent, unless they were protested for at the taking of the witnesses' testimonies, or whether it were sufficient to protest at any time before sentence, or if there were no necessity at all, and especially as to this case. It was *alleged* there was no necessity of a protestation, and if it were, there was a protestation at the re-examination of the witnesses, and also before sentence. It was *answered*, That a protestation was most necessary, because the want of it was an acquiescence in the hability and honesty of the witnesses; and if it should not be necessary, all processes these five years might come in question upon reprobation, which were of dangerous consequence; and therefore, as incidents are not competent, but when protested for, no more reprobations; as to the alleged protestation, at the examining of the witnesses, it is but subjoined to the interrogatories, only subscribed by one of the four examiners, who subscribed the testimonies, and who does not remember of his subscription, so that it has been surreptitiously