obtained from him. As to the other protestation, the same was not when the the witnesses were taken, but at the conclusion of the cause. It was *answered*, That it was in competent time, even at the conclusion, and that the reprobators were not only not rejected, but expressly allowed by the pursuer, by way of action. No 216.

THE LORDS found this reprobator competent in this case, but did not resolve the point generally, whether they were competent, when not at all protested for; as to which the LORDS were of different jndgments, but most seemed to require a protestation, *ante rem judicatam*, yet so that if it were omitted, the LORDS might repone the party to reprobators, if any emergent made the testimonies suspected through inhability or corruption, in the same manner as the LORDS will repone parties against certifications, circumductions of the term, and being holden as confessed.

Fol. Dic. v. 2. p. 193. Stair, v. 1. p. 560.

1671. *January* 31. Laird of MILTON *against* Lady MILTON.

No 217.
Found that reprobators were competent, though the witnesses upon oath deponed upon their hability.

Reprobators, even though pursued after sentence in the principal cause, may be proved *pro et de jure*.

JOHN MAXWELL, younger of Calderwood, having married the Lady Milton, Sir John Whiteford of Milton, her stepson, acquired from him his right to her jointure of Milton as her husband *jure mariti*. Thereafter John Maxwell having gone out of the country, the Lady pursues a divorce against him upon adultery committed with Margaret Davidson; in which process, Milton, as having interest in the jointure, which would return to the Lady from him upon the divorce, craves to be admitted in the process, but was not admitted, so the process proceeded, and the decreet of divorce pronounced. Whereupon Milton raises reduction of the Commissary's decreet on iniquity, because he was unjustly excluded from defending, and if he had been admitted, he would have proponed pertinent interrogatories to the witnesses which were omitted, and would have proponed objections against their hability, which would have excluded them from being witnesses.

In this process, the LORDS ordained the witnesses to be re-examined upon all such pertinent interrogatories as Milton should propose; and they being re-examined, did acknowledge that the Lady prompted them how to depone as to their knowledge of Margaret Davidson, and gave them tokens of her by her cloaths and stature, and that she promised them a good deed to depone.

In which process the LORDS found that the witnesses upon re-examination, after sentence, could not, by their posterior deposition, derogate from the first deposition, and therefore assoilzied from the reduction; reserving and allowing to Milton his action of reprobator, wherein he now *insists* on these grounds; *first*, That the witnesses, Paterson and Clerk, who only proved, were *viles personæ*, having no means worth the King's unlaw; *2dly*, That they were persons infamous and of very evil repute, and in their examination before, they had

No 217. prevaricated and contradicted themselves; 3*dly*, That the Lady had suborned and corrupted the witnesses, by prompting and instructing them how to depone; 4*thly*, That she had corrupted the witnesses before their testimonies before the Commissaries, by giving some of them twenty dollars to bear witness, which is far above their ordinary allowance of witnesses for their charges. It was *answered* for the defender; *first*, No objection was now competent against the hability or sufficiency of the witnesses, because objections were given in against them by the pursuer, and they have deponed thereanent; so that albeit reprobators be competent, where the pursuer cannot instantly verify his objections against the witnesses, and protests for reprobator; yet, if either he forbear to protest, or refer his objections to the witnesses' oaths, he can never be heard by way of reprobator against them; and here this pursuer neither protested for reprobators at the first, nor at the re-examination, but upon his own desire they were purged, and did depone anent these objections; 2*dly*, Having made use of the witnesses upon the said interrogatories, he has approved them, and cannot quarrel their testimonies. And as to the particular objection of their poverty, they have already deponed that they are worth the King's unlaw, and it being a negative which is not presumed that persons are so poor, it cannot be proved by witnesses; and though it could, and were a sufficient objection ordinarily, yet in a crime of this nature, which is so clandestine, objections of poverty would not be sufficient, and as to that member of the reprobator, that they are persons of evil fame, it is not relevant unless they were infamous, *infamia juris*, either by such deeds as the law declares to infer infamy, or by a sentence of a Judge declaring them infamous. As to that member of the reprobator upon subornation, it is not relevant, unless it were libelled, that the witnesses undertook so to depone, or that they had deponed accordingly, for the witnesses might be far above exception, as no offer of subornation could canvel the faith of their testimony, and so infer a blemish upon them. And it was *answered* to all the members of the reprobator that they are not proved by witnesses, but by oath of party, otherwise such processes could never end; for, if witnesses were receiveable to prove the inhability or corruption of the first witnesses in the principal cause, then the testimonies of the witnesses in the reprobator might be canvelled by witnesses in a second reprobator against the witnesses in the first reprobator, and so reprobator upon reprobator without end. It was *answered* for the pursuer to the *first*, That he cannot be excluded from reprobators against the Commissary's decreet, though he protested not therefor, in respect it is evident by the decreet that he was not admitted to compear, but he did protest in the reduction before the Lords, who have expressly allowed him his reprobators, neither doth the taking of the oaths of the witnesses *de initialibus testimoniorum* exclude reprobators, albeit the party desire them to be re-examined upon oath thereupon, for that oath is not an oath upon the party's reference, as stating the sole probation thereupon, but it is a judicial oath *et partis judicis*, for the Judge may, and ought to examine

the witnesses whether the party require or not, so that the party refers not these points to the witnesses, but requires it of the Judges as a part of his office. And as to these points, every witness is *testis singularis*, for he depones only his own hability, and so there is no probation thereby, except in so far as may militate against the witness himself, so that contrary probation may well be admitted against such an oath as well as against executors upon super-intromission, tutors or curators upon negligence or malversation; and if it were otherwise, reprobators could be sustained in no case against decreets of the Lords, because of course they take the party's oath to purge themselves of partial counsel and of corruption by promise, or receiving of good deed, &c. Neither doth the pursuers making use of the testimonies of these witnesses in their re-examination import his approbation of their hability and integrity, for parties may give interrogatories to witnesses not adduced by themselves. To the *second*, This process being of so great importance, all lawful objections against the witnesses are competent, and there is none more ordinary than that they are *pauperes* not worth the King's unlaw, and so liable to great temptation of corruption; and as to the attempt of suborning or bribing the witnesses, it is most relevant and express in law, l. 33. D. De re judicata, bearing, testibus pecunia corruptis conspiratione adversariorum, &c. which being pessimi exempli in odium corrumpentis, not only are the witnesses punishable, but the sentence annullable, which is confirmed toto titulo Codicis, Si ex falsis instrumentis, and that without regard whether they undertake or depone falsely or not, as is observed by Bartol. l. in prine. D. De falsis et addict. l. divans 33. De re-judicata. Num. 7.; and Covaruvias in repet. C. Quamvis, Fol. 57. Col. 3. which he attests to be the common opinion; and which is likewise attested by Boss. in Tit. De falsis Num. 1608.; and by Will. 66. com. opin. fol. 2991.; and especially by Hartman, Tit. 15. De testibus, Observ. 16. where he doth expressly maintain, that it is not so much as lawful to instruct a witness, excitandæ memoriæ causa non si subito deprehendatur hæsitet et titubet, in respect any such instruction is subornationis velamentum; and which opinion hath been likewise confirmed by the decisions of the most eminent and famous courts of justice, as may appear per Capell. tholos. deces. 2804. and others. And which is likewise the opition of Clarus, viz. that the foresaid acts of corruption are disjunctive and separatim relevant, as may appear by Fassum. Num. 12. & 13. and Quest. 53. De exceptionibus quæ contra testes opponi possunt. And to the last allegeance against the probation by witnesses, that it would infer an endless course of reprobators; it was *answered*, That by the same reason reductions might be taken away; because the decreet-reductive might be reduced, and that decreet by another reduction without end; but reprobators have every where been sustained, and no such inconvenience ever found; neither can it be imagined that every pursuer of a reprobator will prevail, which this infinite progress must suppose, only it may infer that witnesses in reprobators ought to be more unquestionable than the witnesses called in question thereby.

No 217.

No 217. THE LORDS found that reprobators were competent, albeit the witnesses upon oath deponed upon their own hability at the desire of the party; and albeit the party protested not for reprobators, seeing he was not admitted to compear, and found that member of the reprobators upon the poverty not relevant in this clandestine crime; neither that member upon their alleged infamy, unless it were alleged that they were infamous, *infamia juris*, by any deed which the law expressly declares to infer infamy, or were declared infamous *sententia judicis*; and found that member of the reprobators upon instructing or prompting the witnesses relevant, without necessity to allege the witnesses undertaking or deponing conform, and that *in odium corrumpentis*, without inferring any blemish upon the witnesses so prompted, who consented not, or swore falsely; and found that member relevant of corrupting the witnesses, by giving or promising of good deed, more than might be suitable to the witnesses for their charges; but as to the manner of probation by oath or witnesses, the LORDS superceded to give answer till a practique alleged upon were produced.

1671. *July* 14.—THE Laird of Milton having insisted in an improbator against the Lady Milton, for annulling a decreet of divorce obtained at her instance against John Maxwell her husband, the relevancy whereof was discussed upon the 31st day of January 1671, and only the manner of probation of the corruption of witnesses, by prompting them how to depone, or by promising or giving them bribes, or any good deed to depone, more than their ordinary charges, remained undiscussed. It was *alleged*, That such reprobators were only probable by writ or oath of the party adducer of the witnesses, *post sententiam latam*; for reprobators upon corruption, albeit they might be proved before sentence by witnesses above exception as to giving of bribes, which was a palpable fact, yet not then by prompting or promising, or any words emitted, which are only probable by the witnesses adduced, or by the oath of the adducer; neither in that case, if the witnesses adduced be above all exception, can witnesses be adduced against them, but only their own oath or oath of the party; so that any party that quarrels witnesses by reprobators, ought to do the same after they are adduced, and before sentence; but if sentence be once pronounced and extracted, it is res judicata quæ pro veritate habetur; and, if reprobators upon corruption be used after the sentence upon corruption, the same can only be probable by the oath of the adducer, and neither by the oath of the witnesses adduced, who cannot annul their own testimony, post jus quæsitum parti, nor by other witnesses; and if it were otherwise, the greatest inconveniences would follow; for then the sentence, and securities of the people founded thereon, might, for forty years space, be quarrelled upon pretence of corruption, and singular successors acquiring *bona fide*, might be outed of their rights; as also, there shall be no termination of processes; for, as the sentence may be canvelled by reprobators against the testimonies whereupon it proceeded, so may the second be canvelled in the same manner by a second reproba-

tor, and so without end; and, seeing the law of this kingdom hath been so jealous of probation by witnesses, that it hath not allowed sums above L. 100 to be proved thereby; so witnesses should not be admitted in reprobators, especially after sentence. It was *answered*, That reprobators being a necessary remedy against the partiality and corruption of witnesses; and the question being only the manner of probation by the law of God and all nations, witnesses are the general mean of probation, and so ought to take place in all cases where law or custom hath not restricted the same; and it cannot be pretended that ever there was one decision of the Lords finding reprobators only probable scripto vel juramento; and it being acknowledged that witnesses are competent ante sententiam, there is neither law nor reason to refuse the same post sententiam, especially with us, where the names of the witnesses are never known till they be produced, neither is their testimonies published or ever known before sentence; so that the other party can have no interest to quarrel their testimonies, or know them before sentence, and so reprobators shall never be effectual, unless proved by the oath of the party that hath corrupted them, which is as good as absolutely to refuse reprobators; for it cannot be imagined that a party will corrupt witnesses, and not resolve to deny it upon oath. And as to the inconvenience to singular successors, the oath of the author may be as hazardous to them as witnesses; and if the acquirer of the sentence be denuded, if in that case, even their oath be not receiveable, it is easy to evacuate all reprobators. And as for the inconvenience of perpetuating processes, that holds, whether witnesses be receiveable in reprobators before sentence or after; and if admitting of witnesses be so qualified, that it be only when the witnesses in the first sentence are not above exception, and the witnesses in the reprobators above all exception, and that it be in a palpable fact of receiving bribes, and recently only after sentence, and with a liberty to the obtainer of the sentence to astruct the same by other witnesses or evidence, as in improbations, (for reprobator is a kind of improbation,) there can be no hazard of multiplying reproprobators; but this inconvenience, if it were relevant, would not only take away all reprobators, but all reductions, for the decreet-reductive may be quarrelled by a second reduction, and that by a third, and so without end. But the inconvenience on the other hand is far greater, that all parties will be sure to corrupt witnesses if they do but resolve not to confess it, and witnesses will be easy to be corrupted, being secured against all redargution; and whereas it is pretended, that witnesses with us prove not above L. 100, that is only where writ may, and uses to be adhibited, in pœnam negligentium; but otherwise witnesses are adhibited in the greatest matters, as improbation of writs, probation of tenors, extortion, circumvention, spuilzies, ejections, and intromissions of whatsoever kind or quantity. No 217.

THE LORDS found reprobators upon corruption, and prompting of witnesses, only probable *scripto vel juramento* after sentence. This was contrary to the opinion of many of the Lords, and was stopped till a further hearing at the bar.

No 217.

1672. *February* 20.—The summons of reprobator at the instance of the Laird of Milton against his step-mother, the Lady Milton, for reducing the decreet of divorce, obtained against John Maxwell her husband, which is at large disputed and decided the 14th of July 1671; at which time the Lords found reprobators upon corruption or prompting of witnesses, if they were used before sentence, probable by witnesses; but if they were only protested for before sentence, and insisted in after sentence, that the same should only be probable by writ or oath of party, which being immediately after that interlocutor stopped, and now heard *in præsentia* at length, the Lords did recall the former interlocutor, and found reprobators either before or after sentence probable by witnesses being above all exception, and ordained the pursuer to condescend upon them.

It was proposed, That reprobators might not lie over to run the course of the long prescription, but that it should be intented at least within three years after sentence, at least not thereafter, unless the evidences of the corruption or inhability of the witnesses were newly come to knowledge, and that this requiring a statute might be offered to the Parliament.

Fol. Dic. v. 2. *p.* 194. *Stair, v.* 1. *p.* 710. 756. & *v.* 2. *p.* 73.

*** Gosford reports this case:

1671. *July* 14.

IN an action of reprobation, pursued at the Laird of Milton's instance against the Lady, upon this ground and condescendence, that the Lady, in an action of divorce before the Commissaries, had bribed the witnesses, by real delivery of gold and money, before they deponed, which was offered to be proved by witnesses above all exception; it was *alleged* for the defender, that there being a decreet given and pronounced, whereby there was *jus acquisitum* to the Lady, and no reprobator protested; for when the witnesses were received, by our law, that right could not be taken away but *scripto vel juramento*; and if it should be sustained probable by witnesses, then there should never be an end of processes; for as the witnesses' depositions might be canvelled by the testimony of other witnesses, so any sentence following thereupon might be reduced and found null, upon the depositions of new witnesses, who might be adduced for proving that they were corrupted, *et sic daretur progressus in infinitum*. It was *replied* for the pursuer, 1*mo*, That he could not protest for a reprobator when the witnesses were received, because the Commissaries did refuse to admit him for his interest; upon which reason the Lords of Session did sustain the reprobator; and as to the manner of probation of corruption of witnesses, by our law, and lawyers who write upon that subject, it is probable by witnesses; and if it were otherwise, that it could not be proved but by the oath of the party, then the inconvenience would be far greater than that alleged; for witnesses

might be easily bribed, as being secure that it could not be revealed, there being no other way to prove the same, but by the oath of the party who adduced them, who being concerned, as liable to the punishment of corrupting of witnesses, it was not to be expected that they would prove themselves guilty, and destroy their own right acquired by the decreet; and so corruption of witnesses should grow common, and a vice of so great importance remain unpunished. THE LORDS, after much reasoning amongst themselves upon this question, and the inconveniencies on both hands, did find, that after sentence, the corruption libelled was not probable but by the oath of the defender, there being no reprobator protested for; which seems to be very hard, the inconveniency and occasion of frequent corruption of witnesses being thereby rendered remediless; whereas, by the law of all nations, it is probable by witnesses above all exception, the reprobator being intented *debito tempore*, and the evidence of the corruption made so pregnant, that there could be no hazard or suspicion that ever their testimonies should be redargued. Thereafter, the foresaid debate being re-advised before the extracting of the sentence, the contrary was found, and the reprobator sustained to be probable by witnesses above all exception. No 217.

Gosford, MS. No 380. *p.* 188.

*** Dirleton also reports this case:

1672. *February* 20.—IN the process at the instance of the Lady Milton, against Sir John Whiteford, the said Sir John, after the process had depended long, and all endeavours to delay and prevent a decision, having insisted upon a reprobator, upon that head, that the Lady's witnesses were corrupted; it was *alleged*, and urged by many arguments, That a reprobator upon the ground foresaid, after sentence *in foro contradictorio*, which is the great security of the people, could not be proved but *scripto vel juramento*: And accordingly, the LORDS found, that it was only probable that way; and yet this day the LORDS having again ordained the cause to be debated, as to the point foresaid, anent the probation of corruption after sentence obtained, they retracted their former interlocutor, and found, that reprobators upon the head foresaid are receivable, and probable *prout de jure* after sentence.

These arguments were urged both at the bar, and in the debate among the Lords, viz. That sentences *in foro* are the great security of the people; and if these should be canvelled, upon pretence of such personal exceptions against witnesses, there should not be a period of pleas and processes.

2*do*, Upon the consideration foresaid, many exceptions, which are admitted before sentence even after litiscontestation, are not received after sentence, v. g. exceptiones noviter venientes ad notitiam, and ex instrumentis noviter repertis.

3*tio*, Prescription being the great security of the people, *ne dominia sint incerta*, should be weakened, if, after decreets *in foro*, founded upon 40 years,

No 217. possession, the same should be canvelled upon probation by witnesses, that the witnesses upon whose testimony the decreets proceeded were corrupted.

4*to*, There should be *progressus in infinitum* if the testimonies of witnesses should after sentence be reprobated by other witnesses, and after sentence in the reprobator, the testimony of the reprobatory witnesses should be reprobated by others, *et sic in infinitum*.

5*to*, Reprobators were only in use when the designation of witnesses, before they declare, from their dwelling and vocation, and other circumstances, was questioned as false, which being obvious and easy to be known, it is not to be presumed that the reprobatory witnesses will declare falsely anent such points which may be easily tried; but the corruption of witnesses being an occult and unwarrantable practice, it is not to be presumed that witnesses were present and conscious; and the reprobatory witnesses may be suborned, and declare falsely *impune*.

6*to*, Our law is jealous of probation by witnesses, they being for the most part *viles personæ* and yet *habiles*, and writs cannot be taken away by such probation, and sentences *in foro* are *scriptura publica et solennis*.

7*mo*, By our practice, *dicta testium* cannot be questioned *post sententiam*, tho' by the common law and the law of other nations they may; and there is less reason to admit personal exceptions *contra testes* to be proved by witnesses.

8*vo*, As to the *incommodum*, that a door should be opened to corruption, if the testimonies of witnesses after sentence should not be questionable upon that head, it is easily answered, seeing witnesses may be pursued criminally, and severely punished, if they may be discovered to have been corrupted or false.

Act. *Cunninghame and Lermonth.* Alt. *Mackenzie and Harper.*

Dirleton, No 161. *p.* 65.

1676. *June* 22. IRVING *against* IRVING.

No 218.
Reprobators are not competent but when protested for *re integra*, when other witnesses may be adduced.

ALEXANDER IRVING of Lenturk raised suspension and reduction against John Ross in Strathmore, and Francis Irving, brother to Drum, of a decreet of spuilzie and wrongous intromission, upon these grounds, That the witnesses had declared falsely, in so far as, being adduced by the pursuer before the council, they had declared they knew nothing, and in the process before the Lords, they declared fully and positively as to all that was libelled; and, 2*do*, They declared upon quantities so exorbitant, that the same do amount to the twentieth corn, whereas, in the country where the corns grew, they have scarce the third corn.

THE LORDS found, that the decreet being *in foro*, could not be questioned upon any ground, and in special upon the testimonies of the witnesses as false, seeing there should be no end nor period of pleas, and there being no protestation for reprobators. Some of the Lords were of opinion, that as a decreet