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possession, the same should be cancelled upon probation by witnesses, that the witnesses upon whose testimony the decreets proceeded were corrupted.

4to, 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*.

5to, 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*.

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

7mo, 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.

8vo, 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. Cuninghame 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 decret 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, 2do, 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 decret 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 decret

founded upon a false writ may be questioned, so when the same is founded upon false testimonies, and the falsehood is evident, and may be qualified *sine altiore indagine*, the same may be likewise questioned; and the remedy of a reduction of decreets *in foro* being denied, only upon that pretence of competent and omitted, ought not to be denied in such cases, seeing the ground foresaid, that the testimonies were false, doth arise upon the depositions of the witnesses, and was neither known nor competent to the defender, who is not allowed to see nor to question *dicta testium*; and a remedy, which in law and reason ought to be allowed, is not taken away, because it is not protested for by a party, who for the time did not know that there were any ground for the same.

Reporter, *Newbyth.*

Clerk, *Gibson.*

Fol. Dic. v. 2. p. 193. Dirleton, No 361. p. 175.

* * * Stair reports this case :

JOHN ROSS having obtained decreet against Irving of Lentürk and others for his whole corns in his barn-yard, which they promiscuously intromitted with and disposed of, there was a bill of suspension presented against the decreet, upon these reasons, *1mo*, That by the act of litiscontestation, the libel was to be proved by witnesses that lived thereabout, who might know the quantity of the crop; and the witnesses received lived 20 miles off; *2do*, The quantities and prices were most exorbitant; *3tio*, Francis Irving, who had the right, and pursued in his cedent's name, is known to have led horses that he used for witnesses; *4to*, That these witnesses were inhabile, neither being famous, nor worth the king's unlaw; *5to*, It was offered to be proved, that they being sworn in the council, did depone contrary to their deposition before the Lords, and so their testimonies are false, and themselves infamous; *6to*, It is offered to be proved by the charger's oath, that both the quantities and prices are exorbitant. It was answered for the charger, That to all these specious and false pretences, he opposes his decreet *in foro contentioso*, wherein the defenders compeared at all the diets of process, and were present at the examination of the witnesses and advising of the cause; and it would make processes endless, and unsecure all the lieges, if such solemn decreets were to be drawn in question upon any of these grounds alleged, for such may be pretended against each decreet, and what concerns witnesses, no party can know the same, they being close, and advised without publication, by the constant custom of this kingdom; and as to the hability of the witnesses, the law hath afforded this remedy, and no other, that if their inhability can be instantly verified when they are received, by the oath of the adducer or the witness's own oath, or by any other witness or writ, they are rejected; and if the party cannot instantly verify, he may protest for reprobatours to prove their inability by way of action, which if he omit, he is understood to acquiesce, and never to be heard thereafter; and therefore, repro-

No 218. bators are never admitted but when protested for, when the party compares at their examination; and though reprobators were protested for, and depending, law admits not the quarrelling of the *dicta testium* as false: And as to the offer to refer the quantities and prices to the charger's own oath, that was competent before probation by witnesses, but is not competent after, as inferring perjury and defamation of witnesses, and it would be an universal protest against all decreets upon probation by witnesses.

THE LORDS repelled all the reasons in respect of the answers.

Stair, v. 2. p. 429.

*** A similar decision was pronounced, Paip against Newton, No 143. p. 9012, *voce* MINOR.

1676. November 9.

PATERSON *against* JOHNSTONS.

No 219.
Reprobator
before sen-
tence, for re-
jecting the
testimony of
a witness as
infamous, not
admitted,
without cit-
ing the wit-
ness.

CAPTAIN PATERSON having charged Johnstons, sons to Lockerbie, upon their bond, they suspend, and raise reduction upon minority and lesion. The charger offered to prove that they were majors. THE LORDS preferred neither party to the probation, but before answer allowed either party to adduce witnesses, to prove what was the true age of the suspenders when the bond was subscribed: And they having adduced some witnesses, and the charger being to adduce others, he offered to prove that the suspender's witnesses were infamous vagabonds. It was *answered*, They were received, the charger being present, and neither objecting nor protesting for reprobators, which are not receivable but when protested for. It was *replied*, That though after a definitive sentence it will not be called in question upon reprobator, unless protested for, yet this process not being ended, nor the testimonies advised, but the testimonies lately come to knowledge, it is very competent.

THE LORDS refused to admit witnesses upon the inability of the witnesses already examined, unless the witnesses whose fame was chiefly concerned were cited; and granted warrant to cite them for that effect.

Eol. Dic. v. 2. p. 194. Stair, v. 2. p. 461.

*** Dirleton reports this case :

It was desired by a bill, that a party against whom witnesses had been used, and who had declared, might be allowed to qualify the inability of the witnesses, and that a term should be assigned to that purpose; whereupon it was agitated among the Lords, if a reprobator should be sustained by way of exception, whereupon there would be a new litiscontestation; and it was urged by some of the Lords, that if the inability of the witnesses should be qualified,