

No 220. formerly before the Council and Sheriff of Aberdeen, that, by comparing thereof with the testimonies taken by the Lords, both testimonies being shortly after each other, it might appear whether the witnesses became infamous by swearing contrary to one another.

Fol. Dic. v. 2. p. 194. Stair, v. 2. p. 595.

No 221. 1678. November 14. LORD BARCLAY against TOWIE.

FOUND, That *testis omni exceptione major* imported not only to be free of crimes, but that they were not *fama gravati*, though assoilzied; but permitted the witness to be received, and allowed the pursuer to raise a reprobator, for proving his objection of inability, though the witness purged himself thereof in his oath.

Fol. Dic. v. 2. p. 194. Fountainball, MS.

No 222. 1679. February 6. IRVING against IRVING.

No 222.
Reprobators
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but when
protested for
re integra,
when other
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be adduced.

IRVING of Lenturk pursues a reduction of a decret of spuilzie, obtained at the instance of John Ross against Francis Irving, his assignee, upon two grounds; *1mo*, By way of reprobator, against the hability of the witnesses, who, by the act of litiscontestation, being limited to witnesses in the neighbourhood, who might know the ordinary sowing and increase of the room that was alleged spuilzied; yet others living at a great distance were admitted, and insisted upon other grounds of inability; *2do*, Because Francis Irving having pursued the same process before the Sheriffs, and the same witnesses being adduced there before him, and having pursued a riot upon the same head before the Council, and being there adduced again, and now the third time being adduced before the Lords, it is evident, by comparing their testimonies taken before the Sheriff and the Council, that no spuilzie was proved, and yet no spuilzie is proved before the Session; and, therefore, the witnesses must have contradicted their former testimonies, which necessarily canvels the last testimonies upon which this decret is founded, the contradiction making the witnesses infamous and perjured; and this decret is so exorbitant, that though, by a tack of the room, whereof the crop was alleged spuilzied, now produced, it be evident, that the room was set for 20 bolls of victual, yet the crop is made to extend to 18 score threaves of bear, and 27 score threaves of oats, and the price of the boll is L. 8 over-head; whereas, the fiars of the Lothian boll that year was L. 5 the boll; and, by all the testimonies, it is evident to be but one plough, which could not render such a crop. It was *answered*, *1mo*, As to the reprobators, they are only competent when protested for by our constant custom, founded upon most solid and important grounds; for, when witnesses are received, the other party

is allowed to be present, and to object against their hability; and when they are examined, they are allowed to be present when they depone *de initialibus* of their age, residence, being married or not, and of their being purged of corruption and partial counsel, wherein, if they doubt of the truth of their deposition, they may instantly redargue the same, by writ or other witnesses; and, if they cannot, they may protest for reprobators, by way of action, for adducing witnesses above exception, and other probation, to cancel the testimonies *circa initialia*, which are of purpose required, though they make nothing to the cause; and their being married or not can in no case do prejudice, and seldom their age or residence; and as to these, they are not contested, nor do depone as to the cause; and, therefore, the testimonies may be cancelled, and, in consequence, their cause falls, as being false and perjured witnesses: But if the other party protest not for reprobators, he will never be heard thereupon thereafter; for if he did protest, the adducer of the witnesses, if he found a ground of suspicion, might adduce others; but if there be no protestation, he rests upon these witnesses, and others adduceable die, and yet, 39 years after, all may be called in question, and reduced, upon questioning the hability of the witnesses. Neither was ever reprobator sustained upon pretence of new coming to knowledge, without protestation. And as to the witnesses contradicting themselves, it is not receivable, because that is not *circa initialia*, but *substantialia testimoniorum*, wherein there is a concurrence of witnesses, which no other probation can redargue, without which there could be no termination of pleas, and there behoved to be a multiplication of contrary oaths; much less can conjectures for a tack-duty, which may be great or small, as the parties agree, or the being a plough infer what may be sown, or the increase, that being most variable, and so can never cancel a positive probation of concurring witnesses.

THE LORDS found, that reprobators were not competent, but when protested for *re integra*, when the adducer might adduce others; nor that no posterior testimonies of the same or other witnesses were receivable, or could cancel the decreet; but found, that the contradiction of the witnesses' testimonies in the same cause, formerly given, might cancel their testimonies, on which this decreet was founded; and, therefore, did compare the testimonies, and found two of the witnesses to have given contradictory testimonies before the Sheriff and Council, to those given thereafter before the Session; and, therefore, rejected their testimonies, and ordained one of them, whose contradiction was nine years of difference as to his age, and as to his residence, to be brought before them, that he might be stigmatized as a false witness; but found, that the testimonies of the remanent witnesses did fully prove the whole decreet; and, therefore, assoilzied from the reduction.

Fol. Dic. v. 2. p. 193. Stair, v. 2. p. 687.

No 222.

* * * Fountainhall reports this case :

A REPROBATOR, that the witnesses had contradicted themselves, and deponed falsely, both *in initialibus et in dictis*, and *in causa scientiæ*; yet every light vacillation is not a ground to cancel testimonies that may proceed either from rusticity, inadvertency, or different stiles of Clerks: Yea, a reprobator is competent, though not protested for: Durandus, *De Reprobatione testium*, NO. II. says, *Audiendi sunt etiam sine protestatione*, if emergent; and *in codice* we have a title, that *sententiæ ex falsis instrumentis, vel testibus latae*, are *nullæ*—See Clarus, § *De Testibus*, where the first deposition is believed, in case of clashing. Reprobators are not for the *dicta testium*; because, there were no more reason to believe these last witnesses adduced in the reprobator, than to believe the first.—THE LORDS refused the reprobator, because not protested for; as also, rejected the summons, as it was a reduction, founded on the contradiction of the testimonies taken before themselves, for that dipped on their own decret; but sustained it as to the contrarieties betwixt their testimonies before the Lords, and these before the Sheriff and Privy Council; and found two of them interfered palpably; and, therefore, rejected their testimonies; and ordained them to be apprehended, to be stigmatized; and though the quantities were exorbitant, yet they would not touch that part.

Fountainhall, MS.

No 223.

1700. July 13.

GOODEN against MURRAY.

IN a question upon the edict *Nautæ, Caupones*; two witnesses were led for the pursuer, and proved, that a cloakbag was brought into the defender's house. At advising the probation, the defender *objected* to one of the witnesses, That he was ultroneous, and had come to the messenger, and desired himself to be cited.—*Answered*, Reprobators were not protested for before deponing.—*Replied*, Reprobators are still competent before sentence; and the defender was absent at deponing, being hindered by a great storm.—THE LORDS found the reprobator receivable, though not protested for at the time.

IN this matter of fact, where there was penury of witnesses, it being *objected* against one of them, after he had deponed, That he was ultroneous in coming to the messenger, and desiring himself to be cited, and so *produerat testimonium*, the LORDS considered that this was *nuda emissio verborum*, the import