1750. *January* 3. SETON *against* GLASS.

THE lands of Sauchie were purchased from John Glass by Captain Cheap, prior to which, George Seton had inhibited the seller, and also executed a summons of adjudication, in which thereafter the Ordinary decerned; but having omitted to registrate the abbreviate within sixty days, he enrolled his cause of new, and the Ordinary again decerned.

Whereupon Captain Cheap presented a petition, complaining, 1*st*, In general of the adjudication as invidious, in respect the pursuer had no more to do but appear in a multiplepoinding, which the purchaser had raised, in which the pursuer and the other creditors were called, and therein, as his debt was preferable, he might for the asking obtain preference, and thereon payment. 2*do*, That the inhibition was only a ground of reduction of the purchaser's right, to which, were it pursued, the answer would be good, No prejudice, because the price is *in medio* for the taking. 3*tio*, That the same answer would serve, were there a reduction pursued, on account of the subject's having been made litigious by the preceding summons of adjudication.

And more particularly, 2*do*, That the decree of adjudication, now pronounced, was not valid, the Ordinary having been *functus* by the first decree now deserted.

The Lords "refused to stay the adjudication, unless the petitioner would pay the pursuer his debt;" for there was nothing in the objection, that the Ordinary was *functus*, which never is the case till decree be extracted; and this very thing is what is done every day. *Kilkerran*, p. 18.

1750. *July* 21.

THE Ordinary on the bills reported a bill of suspension, presented by certain burghers, inhabitants of the town of Kirkaldy, shopkeepers, sailors, weavers, masons, wrights, coopers, smiths, &c. of the sentence of the Justices of the Peace, ordering them out to work at the highways, or to pay 1s. 6d. for each day's absence; and the Lords directed him to pass the bill as to sailors, who go upon foreign voyages or coast-ways, but not as to fishers, or those who ply in passage-boats; and to refuse the bill as to these and the whole other suspenders.

Kilkerran, p. 253.

1751. *June* 28, *and November* 22. IRVING RAMSAY *against* BARBARA DUNDAS Lady SAPHOCK.

A REDUCTION was brought by Alexander Irving, the heir of line of the deceased Mr. Alexander Irving of Saphock, advocate, of a settlement made by Saphock in a contract of marriage between his daughter, while not above eleven years of age, and Alexander Ramsay, of his estate upon the heir-male of the marriage, whom failing, upon him the husband, and who, by the decease of the wife without heirs-

male, now possesses the estate; upon this ground, that it was made when Saphock was utterly incapable.

A proof being allowed to either party on the state of Saphock's health and soundness of mind when he made the settlement, the pursuer, among other witnesses, adduced the said widow Lady Saphock, the defender's mother-in-law, to whom, nevertheless, the defender objected malice and ill-will; and in support of the objection, offered instantly to prove by witnesses, that she had on many occasions declared in the strongest terms her malice and ill-will to the defender, wishing and praying he might lose his cause; and uttered the most horrid imprecations against him, such as the curse of God upon him, and that he might never thrive, &c. And the objection being reported, the Lords overruled it, as not sufficiently qualifying *inimicitia capitalis*, and the defender protested for reprobators.

The improbator was now insisted on, and the expressions formerly mentioned offered to be proved with some others; particularly, that after the death of her daughter, the defender's wife, she had said openly, and upon many occasions, that Mr. Ramsay had killed her daughter. And upon account of this last expression it was, that the Lords upon the 28th June, before answer, "allowed a proof of the several expressions." They had before, as has been said, found the *inimicitia capitalis* not sufficiently qualified, and allowed the witness to be examined, having considered that expressions were not sufficient for that, without assigning a cause for them; but it being now observed, that she was averred to have said that he had killed her daughter, this was considered as a cause for the expressions, and, therefore, the proof was allowed.

The witness reclaimed; and after some general observations upon the true scope of a reprobator, which the law admits *contra initialia*, that it is in effect an allegation that the witness was perjured, that it is of the like nature with falsifying or improving a writing, after which, as in the one case, the writing, so in the other, the testimony of the witness is laid aside as false and improbative, it was argued that nothing was the subject of a reprobator, but some palpable fact that is capable of being disproved with certainty. For example, if a witness tell a lie grossly about his age, being essential, about his being married or single, of his being eye-witness, when afterwards he should be proved to have been at a distant place; if he swear to his having got no good deed, and it shall be proved he got a bribe, or that he took instructions in writing what he should depone, these, and the like are palpable facts capable of proof; but where the objection is enmity or ill-will, and that the person has disclaimed ill-will upon oath, there are no habil terms for disproving it by any expressions, as it is an affection of the witness's mind, which the most angry or vehement expressions are no proof of, which men, as well as women, ladies, as well as women of low rank, often utter, where there is not the smallest malice in the heart, and, which, therefore, is always thought to be sufficiently removed by purging the witness upon oath.

The Lords, 22d *Nov.* 1751, "Refused to allow a proof."

N. B. It has been observed, that what the Lords went on, when by their former interlocutor, they allowed the proof, was, that the Lady had assigned for the cause of her expressions, that Mr. Ramsay had killed her daughter; but it was now observed from the bench, that it is not the meaning of assigning a cause that the expressions bore a cause, but it must be a cause distinct from the expressions, *e. g.* that the person against whom the expressions were used should be proved to have done some heinous injury to the witness or the like.

Kilkerran, p. 492.