No. 16. 1744, Dec. 11. HERDMAN *against* YOUNG.

HERDMAN having commission from some feuars and inhabitants of Stonehive, dated 1741, raised in 1742 reduction, improbation, and declarator against York-Buildings Company, and others having commissions from them as Bailies, Treasurers, Clerks, and other officers in Stonehive, to have it found that the feuars had the nomination of these officers, —and in the same summons engrossed in the form of a criminal libel a charge against John Young, town-clerk, of a number of grievous oppressions committed by him, not on the pursuer but on many persons, a few named, but some hundreds not named, in the shire of Kincardine, in Young's several offices of Clerk of Stonehive, Sheriff-clerk and Sheriff-substitute of Kincardine, and Clerk to the Peace, concluding a declarator of infamy, incapacity, fraud, &c. This I reported on memorials. Found that part of the libel incompetent, injurious, and defamatory, fined the pursuer in L.10 sterling to the poor, and in the full expenses to Young, and ordered that part of the libel to be delete.—N. B. The pursuer had printed this libel and sent sundry copies north, and after raising it had obtained a commission from eight persons not in the first commission to prosecute it. The Lords seemed to think, though the parties injured had been complainers, that yet such a *cumulatio actionum* as joining this with the reduction and declarator was incompetent. 2dly, They also doubted of their own power to judge such an accusation, where the pursuit was principally or solely *ad vindictam publicam* and not for reparation.

No. 17. 1746, July 11. A. *against* B.

REPORTED by Drummore without naming parties, a summons wrong filled up in the days of compearance. The summons being dated May 1745 was executed in June, and the blanks were filled up to 3d and 13th June next, which was before the execution. The pursuers craved to amend the summons; and the question was whether they could be allowed or not? and it carried, not, by the President's casting vote, *renit. inter alios* Tinwald *et me.*

No. 18. 1749, Jan. 6. CREDITORS of BAIN of Tulloch, viz. SIR HENRY MONRO *against* BAIN AND HIS CREDITORS.

FIND that the sale cannot proceed on a summons not containing the whole lands belonging to the common debtor, though the lands omitted were lands to which he succeeded but was not entered.

No. 19. 1751, July 18. HERITORS OF ST NINIANS *against* KIRK-SESSION.

IN a process at the instance of the heritors of St Ninians against the Minister and kirk-session to account for the poors' money, and to exhibit all books and papers touching the poor, two of the elders having been omitted to be summoned, whereof one had not attended the session for some years, Lord Minto, Ordinary, gave an incident diligence for summoning them; but on a reclaiming petition to us, we all thought that they could not be

called by an incident no more than the other members of session, and that till they were summoned on the principal summons the session was not called; and therefore remitted to the Ordinary to the end that he might sustain the objection.

No. 20. 1751, Nov. 22. ALEXANDER IRVINE *against* ALEXANDER RAMSAY IRVINE.

IN the reduction against Ramsay Irvine of Sapphock, of a very irrational settlement made by the deceased Sapphock, in his infant daughter's contract of marriage with Ramsay, upon the head of imposition and incapacity, the widow Lady Sapphock being adduced a witness by the pursuer, was objected to on the head of malice and ill-will; but as the objection was in two general terms, it was repelled, and the witness admitted and purged, but reprobators protested for, and thereafter the defender applied by a petition for diligence to cite witnesses to prove reprobators, and condescended on very strong qualifications of malice and ill-will, and many witnesses of credit to prove them, and further offered to prove that she had instigated the process, and given partial counsel; and 28th June last he was allowed a proof before answer. The pursuer reclaimed, and insisted that the objection of malice being repelled before examining the witness, it could not be received. 2dly, That nothing is sufficient to reprobate a witness but what will prove a witness perjured; that malice is *animi*, and not capable of such a proof, and that nothing is competent by way of reprobator but what falls under the senses. And for these reasons (as I am told, for I was in the Outer-House) the Lords altered, and refused the reprobators;—whether rightly or not I confess I doubt. Our law admits no objections against witnesses but what are instantly proven, and therefore it is that reprobators, if duly protested for, are admitted even after deponing, and therefore I apprehend, that whatever would be admitted, if instantly proven before deponing, ought to be admitted by way of reprobator. Malice, it is true is *actus animi*; but if that reason be good, it would exclude all proof by witnesses of malice, however strongly qualified, even before deponing; but our law books prove the contrary, Stair, p. 695, (717) Dict. Verb. WITNESS; for where injuries are attrocious, law so far presumes malice, as not to credit them as witnesses; and instigating the process and giving partial counsel are faults capable of proof; and these are matters on which witnesses are not of course interrogated, though they are said to be purged of partial counsel, yet that means no more than having received partial counsel;—I doubt if there be good reason for refusing a proof, to weaken or discredit a witness's testimony, though it could not entirely reprobate it, since such objections and proofs are admitted before his deponing.

No. 21. 1751, Nov. 30. BURNETT'S TRUSTEE *against* ELIZABETH BARROW, (BROWN) &c.

See Note of No. 40, *voce* ADJUDICATION.

No. 22. 1752, Feb. 26. DUKE OF NORFOLK, &c. *Supplicants.*

THEY represented that they had pursued process of ranking and sale of the Company's estates, and executed it in terms of the act 23d November 1711, but found there were