in refusing to allow it to be opened and made a part of the proof, grounding their opinion upon the objection of partial counsel given in the cause. No. 200.

Lord Ordinary, *Gardenstone.* For Maclatchie, *Lockhart, Maclaurin, A. Ferguson.*
Clerk, *Campbell.* For Brand, *Sol. H. Dundas, Macqueen, Abercrombie.*

Fac. Coll. No. 112. *p.* 334.

1773. *March* 22.

*** This judgment was reversed upon appeal, and the evidence of Malcolm allowed to be received.

1778. *August* 4. BOGLE *against* YULE.

No. 201. Witness previously examined.

A party about to sue an action of reduction, took a precognition before an inferior Magistrate relative to it, in which he examined the defender and several other persons. Having in his after process of reduction, insisted for a re-examination of the defender, who demanded inspection, not only of his former declaration before the Magistrate, but also of those of the other witnesses; the Lords, after expressing their dissatisfaction with the pursuer's conduct, allowed the defender to see his former declaration, but not the other declarations called for.

Fac. Coll.

*** This case is No. 26. p. 4899. *voce* FRAUD.

1785. *August* 10. ROBERT FALL *against* ALEXANDER SAWERS.

No. 202. Objection to a witness sustained, that having been previously examined in a precognition, his declaration had been shown to him before he was re-examined.

Mr. Fall, with a view of commencing a criminal prosecution against Alexander Sawers, applied to a justice of the peace, by whom several witnesses were examined. Afterwards, having dropped his original purpose, he brought, in the Court of Session, a civil action for damages, in which a proof was allowed.

Mr. Fall intended to adduce as witnesses the persons who had been precognosced; and before their examination took place, his agent transmitted to each of them a copy of their own declarations, together with the declaration of a particular witness who was considered as the leading one, that they might recollect, as he said, what had passed when the facts were more recent.

The defender insisted, that this procedure disqualified those witnesses from giving evidence for the pursuer, and

Pleaded: Precognitions are allowed in criminal matters, to enable the public prosecutor to judge of the expediency of a trial, and to form his indictment with propriety. In questions of a civil nature they are altogether improper, as tending to give to one party an undue advantage over his antagonist, and affording a dangerous opportunity of tampering with the witnesses; Erskine, Book 4. Tit. 4. § 84, 86.; 4th August, 1778, Bogle against Yule, No. 26. p. 4899.

But even in criminal prosecutions, the declarations of those who have been examined in a precognition, are not to be used as evidence in the trial itself. They

No. 202. ought to be produced before the Judge, and cancelled by his authority. This the witnesses are entitled to demand, that they may not, from the want of a distinct recollection, be exposed to a suspicion of perjury. And it is still more the undoubted right of the defender, who ought to be tried only by that proof to the adducing of which he is a party.

The opportunity here given to the witnesses, of comparing what they had said with the other testimonies, was in the highest degree reprehensible and illegal. To restrain the freedom of evidence, is the least evil which could ensue from it. Were such a practice permitted, nothing would be more easy, than, under the colour of a precognition, to form a combination for depriving any one of his fortune, or his life, and, by afterwards giving to the persons employed a perusal of what they themselves and their confederates were to swear, to preclude almost every avenue to detection.

It appeared, that the precognition had been *bona fide* taken for the purpose of bringing a criminal action, and that one of the witnesses, hearing of his intended re-examination, had insisted upon seeing the declaration he had formerly emitted. The pursuer's character, too, as well as his agent's, removed every idea of an unfair intention on their part. The Court, however, unanimously sustained the objection. The cancelling of his previous declaration, it was observed, every witness has a right to demand, though not inspection of it before he be examined in the trial; but to send, as was here done, the whole proof to each witness, was highly unwarrantable, and of the most pernicious tendency.

The Lords sustained the objection to the witnesses to whom their declarations had been sent previous to their examinations, and found, that their evidence could not be admitted in this cause; and likewise found the agent for the pursuer liable in a fine of £5 for the use of the poor.

Lord Reporter, *Rockville.* Act. *Wight, Buchan Hepburn.*
Alt. *Mackintosh, Maclaurin.* Clerk, *Home.*

C. *Fac. Coll. No. 230. p. 356.*

1786. *November* 20. BROWN of Johnston-Burn.

No. 203.
A nephew-in-law may be examined as a witness.

The Ordinary on the oaths and witnesses reported to the Court a question as to the admissibility of a witness, who was nephew-in-law to the party in whose behalf he was cited.

The Lords were unanimously of opinion, That the witness should be examined.

Lord Reporter, *Eskgrove.*

Fac. Coll. No. 295. p. 455.