

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.

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Reprobator before sentence, for rejecting the testimony of a witness as infamous, not admitted, without citing the witness.

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,

upon the ordinary grounds, whereupon the witnesses themselves are interrogated, viz. That they are not worth the King's unlaw, and such like; that repro- bator ought not to be sustained, especially the party being heard to object a- gainst the witnesses: And yet the LORDS sustained reprobatior by way of excep- tion, and without limitation, in respect the oath of the witnesses concerning their own hability is only an oath of calumny, and notwithstanding thereof a reprobatior may be pursued by way of action; and the objections against the witnesses may come to the party's knowledge, after they have declared; and as there may be two litiscontestations, if an exception of falsehood, or any other, should arise upon the production of the writs, there is *eadem ratio* as to the wit- nesses, seeing the objections against them could not be proponed before liti- contestation; and, if they be relevat, they ought to be proved; and it is the interest of both parties that the reprobatior should be received by way of excep- tion, *ne lites protelentur*. But the LORDS ordained a condescendence to be given in writ of the grounds of the reprobatior, and to be given to the other party, that he might be heard to debate upon the relevancy of the same.

Clerk, Gibson.

Dirleton, No 383. p. 187.

1678. \* January 18.

IRVING against IRVING and Others.

FRANCIS IRVING pursues reduction of a decret of the Lords, upon reprobatior of the testimonies of the witnesses, whereupon the decret proceeded. The de- fender *alleged*, That reprobators were not competent, because not protested for at the examination of the witnesses, at least before sentence; *2do*, The reason of reprobatior is mainly *contra dicta testium*, because the witnesses had sworn false, contrary to their own oath, in the same cause, taken before the Council and Sheriff of Aberdeen; but reprobators were never sustained upon canvelling of the verity of the testimonies, as to the cause in which the witnesses concurred, though their oath may be cancelled as to the preliminary questions of their age, residence, being free of partial counsel, or as to their reason of knowledge, in all which they are single witnesses, and not *contestes*. It was *answered*, That though reprobators used to be protested for, yet that cannot exclude any inabi- lity emerging by their testimony, which, by the law of this kingdom, not be- ing published, the pursuer could not know the same; but finding by the sen- tence, that they had proved contrary to what they had formerly proved, the concurrence of these testimonies, as inconsistent, did necessarily infer the witness- es to be perjured, and so inhabile.

THE LORDS inclined to sustain the reprobatior, upon the contrariety of these testimonies, as emergent, though reprobators were not protested for; and, therefore, before answer, gave warrant for production of the testimonies taken

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Found in con-  
formity with  
the above.