

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 reprobatore 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 reprobatore 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 reprobatore 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 reprobatore, 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 reprobatore of the testimonies of the witnesses, whereupon the decret proceeded. The de- fender *alleged*, That reprobatore were not competent, because not protested for at the examination of the witnesses, at least before sentence; *2do*, The reason of reprobatore 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 reprobatore were never sustained upon canyelling 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 reprobatore 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 reprobatore, upon the contrariety of these testimonies, as emergent, though reprobatore were not protested for; and, therefore, before answer, gave warrant for production of the testimonies taken

No 219.

No 220.

Found in con- formity with the above.

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  
not competent  
but when  
protested for  
*re integra*,  
when other  
witnesses may  
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