

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