

No. 185. ploughed part of that very muir, which was the subject in controversy, and so would be a gainer or loser by the cause, and which the Commissioner for taking of the proof had sustained, was so far repelled as to allow the witness to be received, reserving the consideration of the objection till advising; the like occurring every day in questions about marches, where the tenant himself is always received.

*Kilkerran, No. 15. p. 602.*

No. 186.

1751. July 16. The KING'S ADVOCATE *against* HERDS.

The King's advocate insisting in a complaint against John and David Herds, for forging a bill, adduced as witnesses the alleged acceptors thereof.

Objected, They are inhabile witnesses, as interested in the cause: The complaint directly concludes that the bill should be declared forged; whereby they, by their own deposition, will be freed of their obligation.

Answered, They are no parties to this action; and can directly take nothing by the decret: When crimes are pursued by the King's advocate, and especially in crimes excepted with regard to the strict rules of evidence, the person lesed is admitted a witness.

The Lords sustained the objection.

*Act. Advocatus.*

*Alt. A. Macdowal.*

*D. Falconer, v. 2. p. 266.*

1751. November 22.

ALEXANDER IRVINE *against* ALEXANDER RAMSAY-IRVINE.

No. 187.

A witness having expressed resentment, and being purged, and no cause of ill-will shown, reprobator was not sustained.

Alexander Irvine of Saphock, by contract of marriage betwixt Alexander Ramsay, afterwards called Irvine, and Mary his daughter, dispoined his estate to the said Alexander and his heirs-male; which failing, his heirs and assigns whatsoever.

Saphock died, and afterwards his daughter without children, whereupon Alexander Irvine, son of John Irvine writer in the Chancery office, to whom the estate had been destined by a former deed, raised a reduction of the disposition; insisting on Saphock's incapacity at the time of executing it; and adduced his relict as a witness: To whom it was objected, That she had on many occasions declared her malice and ill-will to the defender, wishing and praying that he might lose his cause; and uttered the most horrid imprecations against him, without any cause whatever: And this is offered to be instantly proved, by many witnesses who are presently in this place. These are the words in which the objection was made by the defender's agent, though not marked in the minute; as neither was the inter-

locutor repelling it; and so the witness was admitted; the defender protesting for reprobators. No. 187.

The Lady purged herself of malice against the defender, adding this expression, " God forgive him."

The defender prayed to be allowed to prove capital enmity, in order to reprobate; and condescended that the Lady had expressed the most inveterate malice against him; that once she laid her hand on his head, and prayed the curse of God might fall upon him, and that he or his might never thrive: That hearing Mr. Ramsay and his Lady were going to live at an house belonging to them, she went there, having declared she intended to burn it; and, on her return, said she had prayed her curses round the house: That she refused to see her daughter, on Mr. Ramsay's account; and, on her death, often affirmed that he had killed her; and prayed that the curse of God might come upon all his name: That she still persisted in saying he had killed her daughter; and that she has instigated the process, signified her wishes that he might lose the cause, and her intention to promote the pursuer's interest.

The Lords 5th July 1751, before answer, allowed the petitioner to prove the facts set forth in the petition and condescence.

Pleaded in a reclaiming bill: The nature of reprobators is to set aside a witness wholly, by reason of his being perjured: It is not making such an exception to the credibility of his evidence, as admits it to be taken into consideration, and the objection weighed against it: Such lesser objections are not allowed to be proved by parole evidence; because that would be an endless affair. The objection made that the witness having purged herself of malice, added a wish that God would forgive the defender, is not of a nature to reprobate her testimony, as it does not imply she had malice; though it may be made use of in weighing the credibility of it, as no doubt it imported she had been dissatisfied with him; as neither do the alleged imprecations: Malice is a disposition of the mind, and can only be known by the person who harbours it, but cannot be certainly gathered from passionate expressions, or rash curses, as hasty people will utter these, and in a little time entertain less ill-will than often lurks under a calmer appearance: That she instigated the process is not a reprobator; since she has not deponed the contrary in the initials of her testimony, against which reprobators lie, but only that she has not been instructed: It might have been objected to receiving her, That she had given partial counsel; but that not having been done, the objection cannot be now made: And indeed the whole condescence is incompetent, being no more than was objected before examination and repelled.

Answered, Reprobators are competent after a witness has been examined; for as no term is allowed to prove objections to a witness, the objector, if his witnesses are not ready, has no remedy but to protest for reprobators; and on account of this defect, the witness behaved to be examined in this case: There is no minute made on the objection, nor interlocutor repelling it; and the condescence is more particular than it was then made: They lie not only against the initials, but against the matter of the testimony, if the witness is single: The reprobator offer.

No 187. ed is against the initials, shewing the witness had malice; and though that is a disposition of the mind, it is to be collected from the outward behaviour; and the condescence clearly imports it: There is offered to be proved a continued course of horrid imprecations, a perseverance in affirming the defender had killed her daughter; and the addition made to the initials of her testimony, was giving a vent to that rancour she entertained; not a charitable prayer.

The Lords repelled the reprobator.

Act. Lockhart

Alt. W. Grant.

Clerk, Murray.

D. Falconer, v. 2. p. 284.

1752. June 18.

GOVAN against YOUNG.

No. 188.

The objection to a witness sustained, that he had been employed as lawyer in the cause.

This day the Lords, on the verbal report of an Ordinary, agreeable to their former practice, sustained the objection made by Govan to Mr. James Burnet advocate, adduced as a witness for Young, That he was his lawyer in this cause, and had actually drawn the condescence on which the witnesses were to be examined; and that although the fact, with respect to which he was to be examined, had happened long before his being employed as a lawyer, a circumstance on account whereof some of the Lords were for repelling the objection.

But the Court were of opinion, that if this distinction should be admitted, we might throw the objection of giving partial counsel out of our law books. And as for the judgment of the House of Peers in the case between the Earl of March and Anthony Sawyer, which *vide supra* Nov. 21, 1749, No. 180. p. 16757. it was a special case, and did not affect the general point.

Kilkerran, No. 6. 304.

1752. ——— —

GRAY against ———, and BARONY of TILLIBOLE against ———.

No. 189:

Where more persons are pursued, *super eodem medio*, every objection to a witness, which renders him inhabile for any one of the defenders, renders him also inhabile for all the rest.

Where more persons pursue or are pursued *super eodem medio concludendi*, an objection made to a witness for any one of the defenders is likewise sustained to cast him from being a witness for any of the rest.

And so it was found in the case of William Gray against certain inhabitants of the Town of Rutherglen, whom he pursued for the expense of a process in which they had employed him as agent, and became jointly and severally liable for his payment; and they having alleged certain facts, and among other witnesses for proving thereof, offered to adduce the brother of one of the defenders, who was pleaded to be a habile witness, at least for the other defenders, the Lords refused to admit him.

The same thing was done this Session in another case. In a declarator of ascription of the barony of Tillibole to the Creek-mill, the custom of the barony was libelled as being to pay two lippies for the boll of sheilling, one to the miller,