

owning her for such at bed and board were sufficient to infer a presumption of the marriage, as Stair shews, Lib. 1. Tit. 4.

*Fol. Dic. v. 2. p. 193. Fountainhall, v. 2. p. 580.*

No 208.

1804. February 16. MAGISTRATES OF INVERBERVIE, Petitioners.

A PETITION was presented to the Court by the Magistrates of Inverbervie, stating, that they had brought an action against Robert Barclay Allardyce of Urie, for reduction of a tack granted by their predecessors, and for ascertaining certain marches; that it was necessary, in this action, to take the depositions of several old and infirm persons, whose evidence might be lost, unless it were immediately taken; and praying that their depositions might be taken, to be sealed up, and lie *in retentis*.

No 209.  
In what circumstances a proof may be taken to lie *in retentis*.

It was *objected*, That the summons had not been called in Court; and the LORDS (January 21. 1804) upon that account refused the petition. The petitioners afterwards, when the ordinary *induciæ*, according to which the summons had been executed, were expired, renewed their application, which was granted, (January 21.) and the depositions ordered to be taken.

Against this judgment a reclaiming petition was presented by the factor of Barclay Allardyce, stating, that there was properly no action in Court, as the defender had left Scotland *animo remanendi* before the summons had been executed; that it had been executed at the mansion-house of Urie, and had been called upon the short *induciæ*; that the citation therefore was irregular, and, of course, there being no action in Court, the present application was incompetent, June 9. 1791, Sharp against Robson, No 55. p. 3721.

THE LORDS, by a narrow majority, refused the petition without answers. But great doubts were expressed from the Bench, with respect to the regularity of the citation, and the competency of the examination of these witnesses.

For Petitioners, *Baird.* Agent, *John Græme, W. S.*  
Alt. *Wolfe Murray, Jardine.* Agent, *John Innes, jun. W. S.* Clerk, *Home.*

J.

*Fac. Col. No 145. p. 326.*

## SECT. XI.

## Reprobator.

1580. June. BISHOP OF MURRAY against The LAIRD OF WESTER WEMYSS.

IN the action betwixt George Douglas, Bishop of Murray, John Douglas, and the Laird of Wester Wemyss, anent the teinds of Abernethy, there were cer-

No 210.  
Found that a reprobator of witnesses can-

## No 210.

not be received, though ever so clear, before pronouncing decree; but only if protestation has been admitted, which may afterwards be insisted on.

tain witnesses examined, in an incident diligence, for proving the tenor of an obligation. Before the pronunciation of the decret, the Bishop gave in a supplication, and desired to be heard, to improve and falsify a witness, called Ogilvy, and his deposition, which witness was very suspect to sundry of the Lords, and *alleged*, on his supplication, certain practicks past of before, betwixt the Earl of Errol and the Laird of C. which were recent in the Lords' memories. The matter being reasoned among the Lords, some were of that opinion, to grant the desire of the bill, conform to the practicks past of before, and also conform to the common law, *nam si opponens contra testes offerat promptam suæ oppositionis causam ut in presenti causa offerebat Episcopus*, to improve the witness, by his own hand-writ, *tunc incontinenter recipiendam eam probationem*. It was reasoned upon the other part, that if it was brought in practice of receiving of improbation of witnesses, before the giving of the sentence and decret, there would rise, and follow, many great inconveniences, *et nunquam esset litium finis*, for they would ay take to improve witnesses, and stay process, and of the practice of this country there is not *apertura et publicatio testimoniorum*, but *judici tantum*, and the party is not herein hurt, because, if he protest, and take instruments and protest of the witnesses' depositions, after sentence, he will be heard to improve the same, *et sic beneficio protestationis ei semper servetur integrum jus reprobandi personas testium*. THE LORDS would not grant the desire of the bill, and refused the reprobation of witnesses, before the decret be given, *tanquam contrarium praxi*.

*Fol. Dic. v. 2. p. 193. Colvil, MS. p. 284.*

1583. March.

STEWART against STEWART.

## No 211.

A party having duly purged himself of partial counsel, the Lords refused to allow any other probation of partial counsel.

IN an action of reduction of certain tailzies, intented at the instance of Margaret Stewart, *alleging* to be nearest of true heir to the umquhile Laird of Rosyth, and the young Laird of Durie, her spouse, for his interest, against Harry Stewart, nearest heir of tailzie of the same lands, Harry Stewart, the Laird of Barnbougall, *alleged*, and offered to prove, and to remain in ward, in the mean time, That Robert Commendator of Dunfermline, one of the number of the Session, had given partial counsel in the said action. It was *answered* by my Lord Commendator, That he had of before purged himself of partial counsel, and given his oath. The matter being reasoned among the Lords, if the probation of the pursuer should be received to prove the giving of the partial counsel, the LORDS found, by interlocutor, that they would not receive any probation after the declaration and purgation of my Lord's own conscience, et