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nies; but if one person alone can bear witness, where he knows none can gainsay him, it would prompt him to perjury, or mischief; and here the two witnesses are only *ex auditu*, seeing neither of them knew Margaret Davidson, but only by the report of Dougal, so that both did not positively know that the person with whom they found John Maxwell was not his Lady, seeing Clerk neither knew the Lady nor Margaret Davidson. It was *answered* for the Lady, That whatever may infer subornation or corruption, it cannot be proved by the testimonies to derogate their former depositions, unless it were proved by others upon reprobators; and as to the other point, *in facto reiterabili*, to a civil effect, witnesses, though not agreeing in the same fact, yet agreeing in divers facts of the same crime, were sufficient.

THE LORDS found that subornation or corruption of the witnesses could be instructed by their own posterior testimony, and found the adultery sufficiently proved by the testimony of the witnesses, and assoilzied from the reduction, and found the letters orderly proceed, used against Milton for removing. But Milton gave in a new bill, offering him to prove by other witnesses the subornation and corruption of the witnesses in the divorce, being in effect a reason of reprobator, which is very competent in his reduction; and yet the LORDS refused the same *in hoc statu processus*, not being libelled or insisted in before, but superseded execution in the removing, &c. as to the house and mains possessed by Milton, till Martinmas, that in the mean time he might insist in his reprobators, as he would be served,

*Fol. Dic. v. 2. p. 195. Stair, v. 1. p. 453.*

1668. July 30. Laird of MILTON *against* Lady MILTON.

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Reprobators are not competent, but when protested for *re integra*, when other witnesses may be adduced.

THE Laird of Milton insisted in his action of reprobator, wherein this point of the dispute was only discussed, whether reprobators were competent, unless they were protested for at the taking of the witnesses' testimonies, or whether it were sufficient to protest at any time before sentence, or if there were no necessity at all, and especially as to this case. It was *alleged* there was no necessity of a protestation, and if it were, there was a protestation at the re-examination of the witnesses, and also before sentence. It was *answered*, That a protestation was most necessary, because the want of it was an acquiescence in the hability and honesty of the witnesses; and if it should not be necessary, all processes these five years might come in question upon reprobation, which were of dangerous consequence; and therefore, as incidents are not competent, but when protested for, no more reprobations; as to the alleged protestation, at the examining of the witnesses, it is but subjoined to the interrogatories, only subscribed by one of the four examiners, who subscribed the testimonies, and who does not remember of his subscription, so that it has been surreptitiously

obtained from him. As to the other protestation, the same was not when the the witnesses were taken, but at the conclusion of the cause. It was *answered*, That it was in competent time, even at the conclusion, and that the reprobators were not only not rejected, but expressly allowed by the pursuer, by way of action.

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THE LORDS found this reprobator competent in this case, but did not resolve the point generally, whether they were competent, when not at all protested for; as to which the LORDS were of different judgments, but most seemed to require a protestation, *ante rem judicatam*, yet so that if it were omitted, the LORDS might reponne the party to reprobators, if any emergent made the testimonies suspected through inhability or corruption, in the same manner as the LORDS will reponne parties against certifications, circumductions of the term, and being holden as confessed.

*Fol. Dic. v. 2. p. 193. Stair, v. 1. p. 560.*

1671. January 31.

Laird of MILTON *against* Lady MILTON.

JOHN MAXWELL, younger of Calderwood, having married the Lady Milton, Sir John Whiteford of Milton, her stepson, acquired from him his right to her jointure of Milton as her husband *jure mariti*. Thereafter John Maxwell having gone out of the country, the Lady pursues a divorce against him upon adultery committed with Margaret Davidson; in which process, Milton, as having interest in the jointure, which would return to the Lady from him upon the divorce, craves to be admitted in the process, but was not admitted, so the process proceeded, and the decret of divorce pronounced. Whereupon Milton raises reduction of the Commissary's decret on iniquity, because he was unjustly excluded from defending, and if he had been admitted, he would have proponed pertinent interrogatories to the witnesses which were omitted, and would have proponed objections against their hability, which would have excluded them from being witnesses.

In this process, the LORDS ordained the witnesses to be re-examined upon all such pertinent interrogatories as Milton should propose; and they being re-examined, did acknowledge that the Lady prompted them how to depone as to their knowledge of Margaret Davidson, and gave them tokens of her by her cloaths and stature, and that she promised them a good deed to depone.

In which process the LORDS found that the witnesses upon re-examination, after sentence, could not, by their posterior deposition, derogate from the first deposition, and therefore assoilzied from the reduction; reserving and allowing to Milton his action of reprobator, wherein he now *insists* on these grounds; *first*, That the witnesses, Paterson and Clerk, who only proved, were *viles personae*, having no means worth the King's unlaw; *2dly*, That they were persons infamous and of very evil repute, and in their examination before, they had

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Found that reprobators were competent, though the witnesses upon oath depone upon their hability.

Reprobators, even though pursued after sentence in the principal cause, may be proved *pro at de jure*.