

called by an incident no more than the other members of session, and that till they were summoned on the principal summons the session was not called; and therefore remitted to the Ordinary to the end that he might sustain the objection.

**No. 20.** 1751, Nov. 22. **ALEXANDER IRVINE** *against* **ALEXANDER RAMSAY IRVINE.**

IN the reduction against Ramsay Irvine of Sapphock, of a very irrational settlement made by the deceased Sapphock, in his infant daughter's contract of marriage with Ramsay, upon the head of imposition and incapacity, the widow Lady Sapphock being adduced a witness by the pursuer, was objected to on the head of malice and ill-will; but as the objection was in two general terms, it was repelled, and the witness admitted and purged, but reprobators protested for, and thereafter the defender applied by a petition for diligence to cite witnesses to prove reprobators, and condescended on very strong qualifications of malice and ill-will, and many witnesses of credit to prove them, and further offered to prove that she had instigated the process, and given partial counsel; and 28th June last he was allowed a proof before answer. The pursuer reclaimed, and insisted that the objection of malice being repelled before examining the witness, it could not be received. 2dly, That nothing is sufficient to reprobate a witness but what will prove a witness perjured; that malice is *animi*, and not capable of such a proof, and that nothing is competent by way of reprobator but what falls under the senses. And for these reasons (as I am told, for I was in the Outer-House) the Lords altered, and refused the reprobators;—whether rightly or not I confess I doubt. Our law admits no objections against witnesses but what are instantly proven, and therefore it is that reprobators, if duly protested for, are admitted even after deponing, and therefore I apprehend, that whatever would be admitted, if instantly proven before deponing, ought to be admitted by way of reprobator. Malice, it is true is *actus animi*; but if that reason be good, it would exclude all proof by witnesses of malice, however strongly qualified, even before deponing; but our law books prove the contrary, Stair, p. 695, (717) Dict. Verb. WITNESS; for where injuries are atrocious, law so far presumes malice, as not to credit them as witnesses; and instigating the process and giving partial counsel are faults capable of proof; and these are matters on which witnesses are not of course interrogated, though they are said to be purged of partial counsel, yet that means no more than having received partial counsel;—I doubt if there be good reason for refusing a proof, to weaken or discredit a witness's testimony, though it could not entirely reprobate it, since such objections and proofs are admitted before his deponing.

**No. 21.** 1751, Nov. 30. **BURNETT'S TRUSTEE** *against* **ELIZABETH BARROW, (BROWN) &c.**

See Note of No. 40, *voce* ADJUDICATION.

**No. 22.** 1752, Feb. 26. **DUKE OF NORFOLK, &c.** *Supplicants.*

THEY represented that they had pursued process of ranking and sale of the Company's estates, and executed it in terms of the act 23d November 1711, but found there were

two parish kirks called Kinnaird, that the summons should have been executed at both of them, but was only executed at one of them, and it was uncertain which, and therefore prayed for our warrant for letters of incident diligence for citing the Company and the creditors at these two parish kirks on 21 and 6 days; which the Lords granted, and ordered the executions to be recorded in terms of that act; *me solummodo, sed maxime, renitente*, because that was a method of citing edictally all persons having or pretending to have interest, established by proper authority, and that had been observed above 40 years; and though we might alter it and make a new and different regulation, yet till that was done it was binding even upon us, and we had no dispensing power to dispense with it *via facti*, especially since the persons concerned neither were nor could be in the field, the question being only in what manner they should be summoned. *Vide contra*, 26th June 1752, (No. 24 *infra*.)

No. 23. 1752, June 3. ANDERSON, *Supplicant*.

A PETITION of Anderson's complaining of the Magistrates of Canongate's interlocutor in modifying his aliment on the act of grace, was found incompetent without an advocacy.

No. 24. 1752, June 26. HAMILTON *against* DALGLEISH.

THE heir of the common debtor was minor, and the pursuers had neglected to call his tutors and curators at the market cross, and Justice-Clerk, Ordinary, gave them a diligence to call them. The defenders reclaimed. The President was clear, that no person necessary to be called originally in a process could be called by a diligence. And on advising bill and answers, we found without a vote that the tutors and curators could not be called on a diligence. *Vide contra*, 26th February 1752, Duke of Norfolk and Creditors of York Buildings Company, No. 22, *supra*.

No. 25. 1752, Dec. 12. MR JOHN GOULDIE *against* THE HEIR AND TRUSTEES OF MURRAY OF CHERRIETREES.

MR GOULDIE, as having a gift of *ultimus hæres* to the last heir of Maison-dieu, pursued declarator with reduction of a disposition to Murray of Cherrietrees, which came before me, and was fully litigated, and after some no-processes, determined both by me and the whole Court. I took the principal cause to report; and informations on both sides were drawn; but before report Cherrietrees died, and the process was transferred against his son. And when I came to make my report, a lawyer for the son appeared, and declared he did not represent, and was ready to renounce; upon which the Lords gave decret for the pursuer, which bore in common form to be on my report,—it also mentioned the said compearance. On this decret he pursued mails and duties against the tenants; and Cherrietrees having executed a trust deed, the cause was by them advocated, and the question was, Whether they could be heard after that decret *in foro*, or whether it was a decret *in foro*? I thought it was not, nor could not be so against the defunct, because there never was any decret in his life, and not against the son, who was willing to re-