

No 222.

* * * Fountainhall reports this case :

A REPROBATOR, that the witnesses had contradicted themselves, and deponed falsely, both *in initialibus et in dictis*, and *in causa scientiæ*; yet every light vacillation is not a ground to canvel testimonies that may proceed either from rusticity, inadvertency, or different stiles of Clerks: Yea, a reprobator is competent, though not protested for: Durandus, *De Reprobatione testium*, NO. II. says, *Audiendi sunt etiam sine protestatione*, if emergent; and *in codice* we have a title, that *sententiæ ex falsis instrumentis, vel testibus latae*, are *nullæ*—See Clarus, § *De Testibus*, where the first deposition is believed, in case of clashing. Reprobators are not for the *dicta testium*; because, there were no more reason to believe these last witnesses adduced in the reprobator, than to believe the first.—THE LORDS refused the reprobator, because not protested for; as also, rejected the summons, as it was a reduction, founded on the contradiction of the testimonies taken before themselves, for that dipped on their own decret; but sustained it as to the contrarities betwixt their testimonies before the Lords, and these before the Sheriff and Privy Council; and found two of them interfered palpably; and, therefore, rejected their testimonies; and ordained them to be apprehended, to be stigmatized; and though the quantities were exorbitant, yet they would not touch that part.

Fountainhall, MS.

No 223.

1700. July 13.

GOODEN against MURRAY.

IN a question upon the edict *Nautæ, Caupones*; two witnesses were led for the pursuer, and proved, that a cloakbag was brought into the defender's house. At advising the probation, the defender *objected* to one of the witnesses, That he was ultroneous, and had come to the messenger, and desired himself to be cited.—*Answered*, Reprobators were not protested for before deponing.—*Replied*, Reprobators are still competent before sentence; and the defender was absent at deponing, being hindered by a great storm.—THE LORDS found the reprobator receivable, though not protested for at the time.

IN this matter of fact, where there was penury of witnesses, it being *objected* against one of them, after he had deponed, That he was ultroneous in coming to the messenger, and desiring himself to be cited, and so *produerat testimonium*, the LORDS considered that this was *nuda emissio verborum*, the import

whereof might be easily mistaken, therefore, they found it only probable by the witness's own oath, and granted diligence to re-examine him. No 223.

Fol. Dic. v. 2. p. 194. & 195. Fountainhall.

This case is No 5. p. 9237. *voce* NAUTÆ, CAUPONES, &c.

* * * The like was found, where it was objected against a witness, That he had declared he would swear best to them who paid him best.—Fountainhall; Forbes; 17th June 1707, Livingston *contra* Menzies, No 69. p. 3265.

1737. January 5. JAMES WRIGHT *against* JOHN DIN.

IN this process, a proof having been allowed to both parties, the pursuer, in the beginning of the examination, protested for reprobators against the defender's witnesses; after which, Elizabeth Neilson, spouse to James Elder, was examined as a witness for the defender; against whom Wright *objected*, That, in May 1727, she had been put in the Town-guard for keeping a bawdy-house; from whence she was liberated, upon enacting herself to depart the city, never to return, under the pain of the Correction-house; notwithstanding whereof she had returned, and continued the infamous practice of bawdy procuring.

Answered for Din; The objection was neither competent nor relevant. As to the *first*, it was *pleaded* to be a rule in law, That whatever falls under reprobator is not competent, where there are *contestes*; it being only given where the witness is likely to stand single, as in the initials of the oath, or the *causa scientia*: Thus Lord Stair says expressly, B. 4. T. 43. p. 717. and in several other places, That the testimonies of the reprobators may not be *contra dicta testium*, where there are *contestes*. Now, in the present question, another witness has concurred with Elizabeth Neilson; neither can every objection, which was not proponed before the witness was sworn, be hooked in under the head of reprobators, only because they were protested for in the beginning; *2dly*, It is not relevant; because, although infamy is a good objection by our law, yet none are reckoned such but those who are convicted *criminis infammantis*. Now, the enactment referred to is no conviction, but a transaction which would not infammate, since it was done with the intervention of the Magistrate. But, granting the objection were true, which is denied, still it is not relevant, seeing it is not of the same kind with false swearing; for a woman may be supposed lewd, or a promoter thereof in others, and yet scruple at swearing a false oath.

THE LORDS repelled the objection, in respect no particular reprobator was protested for, but only reprobator against the witnesses in general.

Fol. Dic. v. 2. p. 194. C. Home, No 46. p. 82.

No 224.

The Lords repelled reprobator, because not particularly protested for at the examination of the witness.