

assertions which they would not have made upon oath, but which they may be afterwards ashamed to retract. The practice of taking such precognitions accordingly has always been condemned by the Court; 14th July 1621, Livingston against Galloway, No. 210. p. 6776. Fountainhall, Vol. 1. p. 286, Campbell*; 4th August 1778, Bogle against Yule, No. 201. p. 16777; August 1785, Fall against Sawers, No. 202. p. 16777.

No. 207.

The objection is the stronger that the witnesses were examined in presence of each other, and were afterwards shewn their declarations, so that even with the best intentions, their after evidence will be biassed, and, if so inclined, they may frame a connected story, the falsehood of which it may be impossible to detect.

In the case of the Lochmaben rioters, the Court of Justiciary refused to allow certain witnesses to be examined, merely because they had been present during the precognition of the rest.

The Lord Ordinary allowed the witnesses "to be examined, reserving all objections to their credibility."

At advising a reclaiming petition, the Court expressed their strong disapprobation of taking precognitions in civil causes, but were nevertheless unanimously of opinion, that the objection did not in this case amount to a total exclusion of the evidence of the persons formerly examined.

The petition was refused without answers.

Lord Ordinary, *Swinton*.

For the Petitioner, *Tait*.

Sinclair, Clerk.

D. D.

Fac. Coll. No. 33. p. 66.

* This is the report of a trial in criminal Court. (See APPENDIX.)

1793. June 7.

THOMAS ANDERSON against JOHN SPROAT.

John Sproat having been suspected of writing a forged letter to certain correspondents of Thomas Anderson, injurious to his credit, the Procurator-fiscal of the Town of Kirkcudbright took a precognition, with the view of raising a criminal prosecution against him. In the course of the precognition, John, Thomas, and David Maclellands were examined.

Mr. Anderson having afterwards learned, that no further steps were to be taken by the public prosecutor, brought an action of damages against Sproat, in which he offered to prove certain facts, by the evidence of the above persons, who had formerly been precognoscéd. This was objected to by the defender, on the following grounds:

1st, That as it was admitted by the pursuer, that the precognition had not been transmitted to the Crown agent, in order to be laid before the Lord Advocate, to enable him to judge whether there were grounds for bringing the defender to trial, it was clear, that the sole view in taking it was to give the present pursuer an opportunity of preparing and combining the evidence he was to bring forward

No. 208.

It is not a relevant objection to a witness in a civil action of damages, that he has been formerly examined in a precognition taken by the public prosecutor, even although his declaration should have been lodged in the process at the instance of the private party.

No. 208.

—The presence of a witness in an official capacity, while others are precognosced, is no bar to his admissibility.

in the present action. Indeed, in his summons he founds on this precognition, and adds, “ that it will be recovered and used as evidence in this process ;” where it has accordingly been lodged for the last eighteen months, during all which time it has been exposed to public inspection. In these circumstances, the witnesses, for the sake of character and consistency, will feel themselves tied up to give their evidence agreeably to what they have already said, and therefore they cannot be admitted ; 10th August 1785, Fall against Sawyers, No. 202. p. 16777.

2d, David Maclelland was present when the other two Maclellands emitted their declarations, which is itself a sufficient objection to his being now received as a witness.

Answered : *1st*, The pursuer had no connection whatever with the precognition, further than in giving information to the Procurator-fiscal of the injury he had suffered. And it would be strange if a public prosecutor, by taking certain preliminary steps, from which he afterwards thought proper to depart, should have it in his power to preclude the private party from the benefit of those witnesses whom he may have occasion to call in an action of damages at his own instance.

It was, no doubt, irregular to found on and produce the precognition in this process ; but it would be extremely hard, on that account, to deprive the pursuer of the evidence of material witnesses, particularly as the Court may order their declarations to be cancelled, and as the witnesses will be purged of partial counsel, before they are examined.

2do, The presence of David Maclelland was not voluntary, but owing to his official situation of assistant to the Town-clerk, and is therefore no objection to his admissibility ; 26th February 1793, Wemyss against Wemyss, No. 207. p. 16782.

The Lord Ordinary at first sustained the objections ; but having afterwards taken the cause to report on informations, it was

Observed on the Bench : As the precognition was taken at the instance of the public prosecutor, it is clearly no objection to the admissibility of the witnesses ; and as David Maclelland was only present in the course of his duty, neither ought this circumstance to be a bar to his evidence. In the Justiciary Court, a similar objection has been repelled, in several late instances.

The Court unanimously repelled the objections.

Lord Ordinary Stonefield.
For Anderson, Corbet.

For Sproat, Solicitor-General, Rae.
Clerk, Sir James Colquhoun.

R. D.

Fac. Coll. No. 58. p. 127.