

1766. *August 2.* PETER RAMSAY and OTHERS, Councillors and Burgesses of Pittenweem, *against* ANDREW MARTIN and OTHERS.

WITNESS.

A Witness for the Pursuer having sworn, upon her examination *in initialibus*, that she had no malice against the defender, found not competent for the Defender to adduce other witnesses to prove that she had used expressions importing malice against him.

PETER Ramsay and Others exhibited a complaint to the Court against Andrew Martin and others, setting forth that the election of magistrates and councillors for the burgh of Pittenweem, at Michaelmas 1765, was brought about by bribery and corruption; and therefore praying that the Court would set aside that election.

The Court allowed a conjunct probation in common form, and granted commission. Among other witnesses, the complainers produced Ann Thomson, the daughter of one of the respondents. The agent for the respondent protested for reprobaters against her, and, in the initials of her oath, interrogated her specially as to many things, and, in particular, whether she bore or ever threatened malice against the respondents?—to all which she deponed *negative*. Ann Thomson deponed as to a conversation which had taken place between her father and Andrew Martin, relative to a supposed plan or agreement for bribing the burgh. Some days after, the respondent examined one Margaret Oumston, for proving certain expressions importing malice, and alleged to have been uttered by Ann Thomson, with respect to Andrew Martin, or some other of the respondents.

The complainers suffered this examination to go on; but, upon perceiving the tendency of such interrogatories, they forthwith protested that her deposition might not be admitted into the proof, and that no other witnesses might be examined for the purpose of reprobating the testimony of other witnesses, unless by the regular form of action of reprobator. Christian Thomson, however, was examined for the like end with Margaret Oumston.

Upon this the complainers applied by petition to the Court, praying the Lords “to find that the proof of reprobator, attempted on the part of the respondents, cannot be admitted incidentally as part of the proof in the principal cause; but that the same must proceed in the regular and established form; and, therefore, to ordain the depositions of the said Margaret Oumston and Christian Thomson to be expunged from the proofs; and also to ordain such other depositions, or part of them, as are liable to, and as have had the same objections made to them, to be expunged from the proof.”

To this petition answers were put in for Andrew Martin and others, respondents in the original complaint.

ARGUMENT FOR THE COMPLAINERS:—

When a witness is suspected of swearing falsely upon any of the matters which have gone to proof, the opposite party has a title to render the character of such witness suspicious, by redarguing what he has said upon the subject-mat-

ter of the proof itself; but it is not competent to bring evidence incidentally, for proving that a former witness has sworn falsely in what relates not to the subject-matter of the proof. This must either be done by an action of reprobator, if the falsehood is *in initialibus*, or by a common action on the head of perjury, if the falsehood is *in substantialibus* of the oath. When this distinction is attended to, it will be found, that the respondents, by being precluded from the proof in the manner sought, are not precluded from an exculpatory proof. Thus, if a witness should say that a bribe was given by one person to another at a particular place and time, each of those circumstances is the proper subject of an exculpatory proof. It is competent to prove, that he who is said to have given or to have received the bribe, was not present at the time or place mentioned by the witness; and, if this were proved, then perjury on the part of the witness would be proved;—a perjury tending to hurt the defenders in the very matters upon which the parties had joined issue. But the question presently agitated is quite different. The respondent's averment is, that Ann Thomson, before she was brought upon oath, used expressions of malice against Martin, and, when brought upon oath, denied these expressions. The respondents do not desire to prove actual malice, but to prove that Ann Thomson did say she had malice. Now, supposing this to be true, it will not disprove any act of bribery sworn to by Ann Thomson, or any other witness; and, consequently, will not affect the subject-matter of that charge which is brought by the complainers. That the proof sought to be taken and reported incidentally, may tend to discredit the witness, is not of itself sufficient. Were every thing which might tend to create suspicions of a witness's veracity to be received, although not relating to the subject-matter in issue, upon what principle could the Court refuse a proof of the character of a witness? And yet such proof of character is constantly rejected.

ARGUMENT FOR THE RESPONDENTS:—

Although it is competent for the respondents to insist against Ann Thomson in a proper action of reprobator, with concurrence of his Majesty's advocate, in order to have her deposition cancelled, and herself declared infamous, yet there seems no doubt but that they may incidentally bring witnesses for the purpose of discrediting the evidence given by her, and for that purpose solely; and, as this is the sole purpose of the proof which they have, and propose still to lead, there is no occasion to make her a party. Actions of reprobator are in disuse: none have been brought into Court for these ten years past, as this incidental method of discrediting testimonies has been found sufficient. The practice at present seems reasonable and expedient. The rule of law is, *cui damus actionem, ei multo magis damus exceptionem*. Were parties always obliged to insist in formal actions of reprobator, it would increase expense to them without necessity. The present practice has been established ever since proofs before answer were allowed; for, by the form of interlocutors in such cases, parties are allowed to prove all facts and circumstances which they may judge material. Neither is there any danger of perjury remaining unpunished by the disuse of actions of reprobator; for the Court can, and, *ex officio*, does, punish perjury whenever it occurs in the testimony of witnesses. And, as there are many examples of such punishments where there occurred no action of reprobator, it is plain that the testimony of witnesses has been discredited incidentally; for the false witness

could not in such cases have been punished had he not been convicted by contrary evidence.

On the 19th July 1766, "the Lords ordained the depositions of Margaret Oumston and Christian Thomson to be expunged."

On the 2d August they adhered, upon advising a reclaiming petition and answers.

Act. G. Cockburn, H. Dundas. *Alt.* T. M'Claurin, R. M'Queen.

OPINIONS.

AUCHINLECK. The point does not concern the *initialia* of the oath : it is not sought to prove malice, but to prove that the witness has perjured herself, by denying that she had said she harboured ill-will against Martin.

COALSTON. There are three questions put in the *initialia* : Have you been instructed ;—have you received a reward to swear ;—do you bear malice against the parties ? The meaning of a protest for reprobators is, that the party may be allowed to disprove the *initialia*. Here the proof may detract from the credibility of the witness.

PRESIDENT quoted the case of *Fulton's Children* against *Malloch*, where the Justiciary Court would not allow witnesses to be examined, in order to prove that a witness had said one thing before he was examined in Court, and another when examined in Court.

Diss. Pitfour, Gardenston. *Non liquet*, Coalston.

1766. *August 5.* JEAN HUNTER, Relict of David Gray, Mariner in Dundee, and ELIZABETH HUNTER, Spouse to John Jaffray, Writer in Forfar, *against* JANET BROWN, Relict of Andrew Hunter, Residenter in Forfar.

HUSBAND AND WIFE.

What Deeds are extinguished by Dissolution of the Marriage within Year and Day.

[*Faculty Collection, IV. 270 ; Dictionary, 6164.*]

ANDREW Hunter had three sisters, Margaret, Jean, and Elizabeth. Margaret died : Andrew intromitted with her effects, but made up no title to them. On the 7th January 1764, Andrew Hunter gave up his name for having the bans proclaimed between him and Janet Brown : It appears that the bridegroom had few effects ; the bride, none. On the same day Andrew Hunter executed a deed in favour of Janet Brown : Its narrative bears "for the pure love, favour, and esteem I have for Janet Brown, lawful daughter of the deceased James Brown, sometime messenger in Forfar, my betrothed wife, and for her better living in the world after my decease." By this deed he made a general disposition of moveables in her favour, reserving his own liferent right : he