1683. *November.* Mr JOHN PAIP *against* The LAIRD of NEWTON.

No 143.
A *reprobator* not protested for at the examining of a witness, was refused to a minor.

ONE of more witnesses adduced against a minor, having designed himself indweller in Edinburgh,, when he was a soldier in Berwick, and another having deponed he had a tack from the pursuer; the minor, sometime after the examination of these witnesses, craved a diligence for proving reasons of *reprobator*, in respect they had deponed falsely as to some of the *initialia*, viz. the dwelling place, and the having of a tack.

Alleged for the pursuer, That *reprobator* could not be allowed, it not having been protested for the time of the examination.

Answered, The defender being minor, cannot be prejudged by such an omission; and the *reprobator* is now craved before advising of the depositions.

THE LORDS would not grant a diligence, but allowed the defender to raise a summons of *reprobator*, which they declared they would take in *incidenter*; and they delayed advising of the depositions of the principal cause till January.

1684. *February.*—A *reprobator* not protested for at the examining of the witnesses, being craved after the clause was concluded, upon this speciality, that the defender was a minor, and so ought to be reponed against the omission,

Answered; The time of protesting being among the solemnities and methods of process, the minor ought to have no benefit of restitution, especially seeing the party has this prejudice, that he cannot now adduce new witnesses before conclusion of the cause, which he might have done, had the faith of his witnesses been called in question by a protestation for *reprobator debito tempore*. And the minor has recourse against his tutors and curators that were present at the examination of the witnesses, and did not protest when they heard the *initialia*.

THE LORDS refused to sustain *reprobator*.

Fol. Dic. v. 1. *p.* 583. *Harcarse*, (REPROBATORS.) *No* 846. & 847. *p.* 241.

*** Sir P. Home reports this case:

1683. *November.*—IN the action Newton of that ilk against John Paip, the LORDS having allowed Mr John Paip to prove the value of the goods intromitted with by Newton's father, which belonged to Cicilia Vandershill, his mother; and Mr John Paip having adduced witnesses for proving thereof, and Newton having given in a petition, reclaiming against the witnesses, and being allowed to raise a *reprobator*, he did insist upon these grounds, that leg. 3. Digest. De testibus,' it is declared, that momenta probationum sunt, in arbitrio judicis quantum fidei testibus adhibendum est; so that by the common law, judges ought to consider the quality of the witnesses, the verisimilitude of their testimonies, and the cause of

their knowledge, and accordingly, to give more or less credit to their testimonies; and in this case no respect ought to be had to the testimonies of the witnesses adduced by Mr John Paip. For, as to William Meick, one of the witnesses, it was offered to be proven he was guilty of several thefts, and particularly did steal and run away with money belonging to several persons that he had formerly served, and for which he was forced to flee the country, and did lurk in the borders of England ever since that time, and was in a clandestine and private manner brought to Edinburgh to depone in this cause; and immediately after he had deponed, he did withdraw himself out of the country, least he should have been apprehended and punished for these crimes. And Newton, with his advocate, were not present, nor did they know that the said William Meick was to be examined; whereas if they had been acquainted, they would have made use of that exception against him; and he has deponed falsely, *circa initialia et in se habilitando* to be a witness, which is a clear ground of *reprobator* and instantly instructed in so far as he designs himself in his deposition to be an indweller in Edinburgh, which is false, seeing he has his ordinary residence in England. And Robert Richardson, the other witness, has deponed falsely *circa initialia*, in so far as it being objected against him, that he was a moveable tenant, and so could not be a witness; he declared he had a tack, which is false, seeing, upon production of the tack, it will appear that it is of a date after his deposition; and if it bear a date prior, it is offered to be improved by the writer and witnesses inserted; and as to the matter of their depositions, the same appears likewise to be false, in so far as they depone in relation to a praticular inventory of household furniture in Cicilia Vandershill their mother's possesion, and that the same was intromitted with by the defender's father; whereas it will be obvious, upon reading of the inventory, that it was impossible that any person could depone positively upon such an inventory, especially upon such species and quantities of furniture, as used to be kept in chests and other lockfast places; which is a clear evidence that these witnesses have been prompted and suborned to depone; seeing they declare exactly conform to that inventory upon which they were examined, and which was not the person that had the charge of any of that household furniture, his employment being to wait upon the horses, as he declares. And Richardson gives the reason of his knowledge, not that he was a servant in the family, but that he was coming and going, and so he could not be supposed to know the particular household furniture. And as a farther evidence of the falsehood of their testimonies, there is more furniture contained in that inventory than there is in any nobleman's house in Scotland, and more than the house of Newton, where they alleged it was, could contain, if there had been nothing in it but the furniture; as also they declare, that the hail goods and plenishing in the inventory were in the possession of the said Cicilia Vandershill the time of her decease, which is evidently redargued, in so far as Mr John Paip being confirmed executor *qua* creditor to the said Cicilia Vandershill, the confirmed testament

No 143.

No 143. bears, that a great part of the silver plate and jewels, to the value of 950 merks, of those contained in the inventory, were impigniorated, and in the possession of Thomas Noble, and therefore the superplus value was only confirmed, which evinces that the goods were not in Cicilia Vandershill's possession; and Mr John Paip being confirmed executor creditor, as said is, it must be presumed that he has confirmed all the goods belonging to Cicilia Vandershill, his mother-in-law, especially having confirmed things to the nearest value. And the inventory of the testament will not amount to the 20th part of the inventory upon which the witness has deponed; and it cannot be supposed but that Mr John Paip, who was her son-in-law, and always in the house, would know all the goods that belonged to his mother-in-law, and has confirmed the hail goods, and not a part of them; especially seeing the inventory of the goods confirmed did come far short of his debt; and albeit these objections were not made against the witnesses, or a *reprobator* protested for the time that they were admitted, yet the same ought not to be received, being before sentence, as was decided the 30th July 1668, Laird of Milnetoun against Lady Milnetoun, *voce* PROCESS, where a reprobator was sustained, being protested for before sentence, albeit not before the witness was received; much more ought the *reprobator* be received in this case, Newton the pursuer being a minor, and being lesed by the omission, he ought to be restored *in integrum*; it being a certain principle of law, that minors, when lesed, ought to be restored to the benefit of all defences, whether consisting *in jure* or *in facto*; as also, the LORDS by an express deliverance, upon a bill, have already allowed the pursuer to raise the reprobator. *Answered*, That there was nothing produced to instruct that William Meick was guilty of theft, and there was nothing of that nature objected against him when he was received a witness, and the most honest man in the world may be calumniated; and therefore, unless he had been convicted of theft before a lawful judge, he could not be repelled from being a witness, if that had been objected when he was received, much less now after he has deponed; and he did not prevaricate in his testimony, in so far as he declares he was residenter in Edinburgh, in so far as his wife and family did reside at Edinburgh; and where a party is said to have his dwelling, 'ubi habet forum et larem;' and albeit he did sometimes reside in England, as a servant to an English gentleman, yet he having left his service, and come to Edinburgh before he deponed, he may justly say he was indweller in Edinburgh. And as to Robert Richardson, he had a tack not only before he deponed, but before he was cited, as will appear by the tack, and which is of a true date; and albeit he had no tack, yet he might be admitted witness, seeing he was only tenant of a house and yard in the Pleasance, which is within burgh, as was lately decided in January last, in the case of Pearson against Wright, *voce* WITNESS; and as to the matter of their depositions, they are clear and positive, conform to a particular inventory of the househole furniture which they did see in the house, which they might very well know, being either servants, or ordinarily conversing in the house; and

these pretences that are objected cannot take away a positive and clear reprobator. And that part of the plate and jewels which was in Thomas Noble's possession, being only impignorated to him a little before the mother's decease, and being shortly thereafter redeemed by her son, and so seeing them both in the mother's and the son's possession, they might justly presume that they were in the mother's possession the time of her decease; and Mr Paip's confirming of certain goods as executor creditor cannot redargue a positive probation, nor can it be looked upon as a presumption that there were no more goods; it being ordinary for executor creditors to confirm only a part, and to save a confirmation, to take a licence and pursue for the rest. And all that the said Mr John Paip designed by the said confirmation was only to be a motive to cause Newton to take a course with his debt, which is evinced from this, that albeit Newton continued in possession for several years after the confirmation, yet Mr John Paip did not pursue him for these goods that he had confirmed, expecting always to get payment otherwise as Newton had promised. And albeit these answers are sufficient to take off the objections against the witnesses, and their testimonies, yet Mr John Paip needs not say any more in law, but that the reprobator cannot be sustained, not being protested for, the time of the taking the depositions of the witnesses; and albeit the Laird of Newton was minor, yet minors cannot be restored against those things that are *solemnia juris*. THE LORDS found the reprobator not being protested for the time of the admitting of the witnesses could not now be sustained; and that Newton, albeit minor, could not be restored against that omission. But, in the advising of the of the testimonies, which did only prove the species of the goods, but not the prices, the LORDS being convinced of the exorbitancy of the probation, did modify the prices to a smaller value. No 143.

Sir P. Home, MS. v. 1. *No* 485.

*** This case is also reported by P. Falconer:

1684. *February.*—IN the action of reprobator, pursued by Newton of that ilk, against Mr John Paip, for reprobating of some witnesses, that had deponed in a process pursued at Mr John Paip's instance against him, it was *alleged* for Mr John Paip, That there could be no reprobator sustained, because the time when the witnesses were received, the same was not protested for, albeit there was compearance, both the time when the witnesses were received, and interrogatories given in for Newton. It was *replied*, That Newton was minor, and so ought to be reponed against his tutor's omission. It being *duplied*, That although minors may be reponed, in relation to the omission of any relevant defence, yet, as to judicial proceedings, they were in the same case as majors. THE LORDS found, that the reprobator, not being protested for, could not be sustained, and that Newton, albeit minor, could not be reponed against the omission thereof. *See* PROCESS.

P. Falconer, No 85. *p.* 59.