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 attrocious, 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