

No. 206. Answered : Mr. Reid is merely a nominal pursuer. His interest in the issue of the cause, which was at first but contingent and remote, the principal pursuer being undoubtedly solvent, is now entirely done away.

Besides necessary witnesses, like the present, have in many cases been admitted, even where they had a real interest ; 12th July 1743, Lindsays against Ramsay, No. 168. p. 16746 ; 19th December 1786, Scott against Caverhill, No. 204. p. 16779. and other cases *supra h. t.*

The Lord Ordinary allowed Mr. Reid to be examined, reserving all objections to his credibility.

Upon advising a reclaiming petition and answers, the Court " adhered."

Lord Ordinary *Justice-Clerk.*
Clerk, *Gordon.*

Act. M. Ross.

Act. Honyman.

Fac. Coll. No. 26. p. 53.

1793. February 26.

JAMES WEMYSS and Others, *against* WILLIAM WEMYSS.

No. 207.

Objection that witnesses were precognised before a Justice of the Peace at the instance of the pursuer in a civil action, repelled.

David Wemyss named William Wemyss his sole executor, to the exclusion of the nearest of kin, who resided in a different part of the country.

Upon David's death, James Wemyss, one of the nearest of kin, came to the place of the deceased's residence, where, entertaining suspicions that the will had been obtained by improper means, he presented a petition to two Justices of the Peace, praying that the surgeons and others who had been most with the deceased during his illness might be examined ; and the declarations of several persons were accordingly taken in their presence.

None of the persons examined were allowed to be present during the examination of the rest, till their own was finished ; but those first examined were permitted to hear the declarations of those who came after them.

Some time after the nearest of kin caused the declarations to be cancelled, each in the presence of the person by whom it was emitted. And in a process of reduction afterwards raised against the executor, they proposed to adduce as witnesses the persons who had been thus examined.

The defender

Objected : The peremptory diets of Court, and the accuracy required in laying the indictment, render precognitions necessary in criminal cases ; and as they are taken at the instance of a public officer, who cannot have any private interest in the matter, no bad consequence can result from them.

But such a practice would be both unnecessary and dangerous in civil actions, where the pursuer is allowed considerable latitude both in framing his libel, and in leading his proof. In such cases, too, precognitions are taken by a party interested in the issue of the cause, in absence of his opponent, in a loose and inaccurate manner ; and, in these circumstances, the persons examined will hazard

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.