

in refusing to allow it to be opened and made a part of the proof, grounding their opinion upon the objection of partial counsel given in the cause. No. 200.

Lord Ordinary, *Gardenstone.* For Maclatchie, *Lockhart, Maclaurin, A. Ferguson.*  
Clerk, *Campbell.* For Brand, *Sol. H. Dundas, Macqueen, Abercrombie.*

*Fac. Coll. No. 112. p. 334.*

1773. *March 22.*

\* \* This judgment was reversed upon appeal, and the evidence of Malcolm allowed to be received.

1778. *August 4.*

BOGLE *against* YULE.

A party about to sue an action of reduction, took a precognition before an inferior Magistrate relative to it, in which he examined the defender and several other persons. Having in his after process of reduction, insisted for a re-examination of the defender, who demanded inspection, not only of his former declaration before the Magistrate, but also of those of the other witnesses; the Lords, after expressing their dissatisfaction with the pursuer's conduct, allowed the defender to see his former declaration, but not the other declarations called for.

*Fac. Coll.*

\* \* This case is No. 26. p. 4899. *vide* FRAUD.

1785. *August 10.* ROBERT FALL *against* ALEXANDER SAWERS.

Mr. Fall, with a view of commencing a criminal prosecution against Alexander Sawers, applied to a justice of the peace, by whom several witnesses were examined. Afterwards, having dropped his original purpose, he brought, in the Court of Session, a civil action for damages, in which a proof was allowed.

Mr. Fall intended to adduce as witnesses the persons who had been precognosed; and before their examination took place, his agent transmitted to each of them a copy of their own declarations, together with the declaration of a particular witness who was considered as the leading one, that they might recollect, as he said, what had passed when the facts were more recent.

The defender insisted, that this procedure disqualified those witnesses from giving evidence for the pursuer, and

Pleaded: Precognitions are allowed in criminal matters, to enable the public prosecutor to judge of the expediency of a trial, and to form his indictment with propriety. In questions of a civil nature they are altogether improper, as tending to give to one party an undue advantage over his antagonist, and affording a dangerous opportunity of tampering with the witnesses; Erskine, Book 4. Tit. 4. § 84, 86.; 4th August, 1778, Bogle against Yule, No. 26. p. 4899.

But even in criminal prosecutions, the declarations of those who have been examined in a precognition, are not to be used as evidence in the trial itself. They

No. 201:

Witness previously examined.

No. 202:

Objection to a witness sustained, that having been previously examined in a precognition, his declaration had been shown to him before he was re-examined.