No 563.

There were also produced three contracts betwixt umquhile Lamertoun and Kennedy, at Stirling, upon the 9th of August 1651. By the last of them, Kennedy was obliged to deliver Lamertoun the bonds for such several sums, he obtaining the Lady Leven's consent, of all these the writer and witnesses were dead, and the date proved to be false.

In this process, the Lords having considered all the indirect articles of the improbation, in respect that these writs in question were never in the alleged creditors' hands; and that there was not one witness that did depone, that either they remembered to have subscribed any of these writs themselves, or that they saw either the parties, or any other of the witnesses, subscribe, or any thing communed, done, or acknowledged, by either party, contained in the writs; and that the subscription of Watson, one of the witnesses in all the bonds, was, by comparison with other contraverse writs, about the same time, altogether unlike his subscription, and that the word witnesses, adjoined to the subscription of all the witnesses, did appear to be so like, as written with one hand;

They found sufficient ground to improve the foresaid writs, besides many pregnant presumptions from Kennedy's inclination and carriage; which being extrinsic, were accounted of less value; and yet the astructions aforesaid, and presumptions on that part, were so strong, that several of the Lords were unclear simply to find the bonds false, but not authentic probative writs.

Fol. Dic. v. 2. p. 265. Stair, v. 1. p. 125.

*** See a case betwixt the same parties, No 174. p. 6753. *voce* Improbation.

1672. *February* 7. Mr John Stewart of Kettlestoun *against* Kirkhill.

No 564.
Case of improbation, where one of the witnesses was dead, another admitted his hand-writing, but deponed he did not see the granter of the deed subscribe, and of the third the designation was uncertain.

Mr John Stewart of Kettlestoun having obtained a bond from Sir Lewis Stewart his father for 10,000 merks principal, and for an annuity of 3000 merks yearly during Mr John's lifetime, pursues Sir William Stewart as representing his goodsire for payment, who proponed improbation by way of exception, and insisted first in the direct manner. There were four witnesses in the bond, the Earl of Southesk was one, one Sands, then servitor to Mr John, was the second, Robert Nisbet, Sir Lewis's own servant, was the third, inserted and not subscribing, and the fourth was designed John Carnegy, servitor to the Earl of Southesk, who was both writer and a subscribing witness. Nisbet being examined, denies he knew any thing of it; Sands depones that it was his writ, but he remembers not he saw Sir Lewis Stewart subscribe, or that he got any direction from him to subscribe; John Carnagy cannot be found; but there having been several that passed under that designation at that time, the pursuer cited two of them, who denied that the subscription was theirs, or that

they were servants to the Earl at that time, but deponed, that, however, at that time there were two that served the Earl of that name; and the defender having given in a number of indirect articles, and being heard upon the whole matter, he did *allege*, That Nisbet did improve, that Sands did not approve or prove that he saw Sir Lewis subscribe, and that it might be true that the hand-writ was his, and that it might have been put to a blank, and he not witness; for so the witnesses in Captain Barclay's false disposition deponed that their subscriptions were true, but that the Captain rolled up the writ, and did not let them see the subscription of the principal party, whereupon the writ was improved, and they found falsers: And as for John Carnagy, it was alleged, that the defender having used so much diligence to find him out, the pursuer ought now to condescend and instruct that there was such a man; and there being more of that denomination, he ought to give a more discriminating designation; for albeit writs prove in Scotland till they be improved, yet when the verity comes to be questioned by improbation, if it doth not appear that ever there was such a person as the witness designed, the user of the writ must condescend, and instruct that there was such a person; or if the witness have a common designation, such as indweller in Edinburgh, the improver cannot be obliged to call the whole members of a city to instruct that there is none there of that designation, but the user of the writ must more specially design till the person be known, or otherwise there were no remeid against forgery; for any party, designing and subscribing for two persons that never had a being, there were no possibility to improve that writ. It was *answered*, That the bond is sufficiently astructed, for the Earl of Southesk being dead, he is a proving witness; and Sands acknowledges his subscription, neither doth it import that he remembers not that he saw Sir Lewis subscribe, for that being a transient act, it can hardly be remembered, and it is ordinary for masters to cause their servants to subscribe witnesses to their master's hand-writ, which they perfectly know though they see them not subscribe; and as for Carnagy, he is designed conform to the act of Parliament, and the pursuer is obliged to do no more; neither hath the defender caused examine the other persons that were of that name, which were condescended on by the witnesses examined. No 564.

THE LORDS found that the pursuer was obliged to design no further, but that this being a circumstantiate negative, that at the time of the date of this bond there were no persons who were servitors to the Earl of Southesk who could be writer or witness in this bond, that the same was such a negative as might be proved, the designation not being more general, and therefore assigned a term to the defender to prove the same by those who were servants to the Earl of Southesk at that time, and by other habile witnesses, and declared that they would then conclude the manner of probation.

1672. *December* 19.—SIR GEORGE MACKENZIE, as assignee to Mr John Stewart of Kettlestoun, to a bond granted by Sir Lewis to Mr John of 10,000

No 564. merks, and 3000 merks yearly, during Mr John's life, pursues Sir William Stewart, as heir to Sir Lewis Stewart, for payment; and he having proponed improbation by exception, the same was sustained, whereupon the defender *insisted*, first upon the direct manner, and there being four witnesses in the bond, the Earl of Southesk who is dead, Edward Nisbet, who was inserted, but not subscribing, and deponed that he knew nothing of the matter; James Sands who deponed that he was certain that the subscription of him as witness was his hand-writ, but that he remembered not to see Sir Lewis subscribe it, or that Sir Lewis desired him to subscribe it, or that Mr John desired him to subscribe; the fourth witness was John Carnagy, servitor to the Earl of Southesk; and it having been represented to the Lords, that there were several persons of that designation, and that therefore the pursuer should more specially design him, *ut constet de persona*,

The Lords found that this was not a designation altogether general, as if it had been indweller in Edinburgh, and that it was a circumstantiate negative, that at the time of this bond there was none servant to the Earl of Southesk who was writer or witness therein.

Thereupon the defender adduced many witnesses, who proved that there were five or six called John Carnagy, who passed under that name, as servitor to the Earl of Southesk, from the year 1648 till his death, whereof some were examined, and denied, and some were dead before the bond, and one who was a messenger was living the time of the bond, but died since; and several papers under his hand was produced, that by comparison thereof it might appear that it could not be his writ. The defender did likewise give in indirect articles of improbation on these grounds, that the bond not being clearly approved by the witnesses inserted, but the only testimony for it being James Sands, who, though he affirm his subscription, yet as to all the rest depones *non memini*, the said deposition, by the opinion of all lawyers, is no probation; for the point to be proved is, whether Sir Lewis Stewart subscribed this bond; as to which this witness says he remembers not, and so proves not; and the question is not whether Sands himself subscribed the bond, for that he might have done without warrant, especially considering that he was then a young boy of sixteen years old, and was Mr John's domestic servant; and there is nothing more ordinary than to desire servants to subscribe as witnesses, which they are ready to do upon the trust of their masters, though they did not see the parties subscribe, as they may warrantably do upon the desire of the parties, whose desiring witnesses to subscribe imports an acknowledgment that the subscription is theirs, though they saw it not done: And as to Carnagy, who is mentioned writer and witness, the testimonies adduced do sufficiently cancel the faith of that subscription, at least they put the burden of probation upon the pursuer, to condescend specially upon the writer, to produce him, or if he be dead his hand-writ to be compared. Nisbet also denies, so that there remains nothing but the Earl of Southesk's subscription. 2*do*, This bond was never

heard of, produced, nor made use of for the space of twenty years; and it appears to have been written upon fresh paper, and to have been sudled of design; albeit it be known that Kettlestoun's condition required to make use of it; and albeit there were references between his brother Sir James and him, and claims given in by them both of things controverted and clear; and though both were desired to give in what more claims they had, they declared they had none: Likeas, though this bond designs the granter Sir Lodovick Stewart of Strathbrock, as he never designed himself, who being a man most provident and careful for the standing of his family, gave never a portion to his children without reservation of his own liferent; yet here he burdens himself during his own life, and his heirs after him, for that which now extends to 100,000 merks to Mr John, who was married and provided before. It was *answered* for the pursuer, That all which is adduced by the direct and indirect manner of probation, doth no way prove the falsity or forgery of this bond; for forgery being of so great importance, as inferring death and infamy, it must have a clear probation; and here Sands is a clear astructing witness, who deponeth *positive* that he is certain this is his hand-writ, and not that he believes it, or thinks it like it; neither doth his saying that he remembers not that he saw the party subscribe, or had warrant from him, import any thing, seeing his being positive that he subscribed witness to this writ, doth necessarily infer that he was witness to all that was in it: And if bonds and all evidents should depend upon the memory of the witnesses, the whole securities of the kingdom should become uncertain; but the subscription is of purpose introduced to supply the memory, which when the witness sees and acknowledges, and does not depone that it was without warrant, it necessarily infers that it was with warrant; for albeit *non memini* proves not where a witness subscribes not, as Edward Nisbet, who is inserted and not subscribing, which certainly hath been by the ordinary inadvertance of writers, by filling in of many witnesses, upon expectation of their being present and subscribing; but if any one be absent, two or three subscribing are always esteemed sufficient, so that if there had not been two witnesses beside Nisbet, his *non memini* would have improved; but a subscribing witness, owning his subscription, must necessarily prove; and as to John Carnagy, the pursuer is obliged to design him no further, and it is enough for him to say, that there might have been another John Carnagy, servitor to the Earl; neither is it sufficient to prove that John Carnagy the messenger was not writer, by comparison of letters; and though some of the witnesses mention John Carnagy the butler, to be the same with John Carnagy in Forfar, who is examined, and hath denied, yet another mentions them as two different persons, so that the butler may yet be the man; and if the designation of witnesses, for finding out of their persons, were necessary to be so special, all securities might be cancelled; for no man takes notice how the witnesses design themselves, and whether the designation be true or special; and as to the indirect articles, they are of no moment, for the true reason of keeping up this bond, was, lest

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No 564. Sir Lewis's heir might have changed the tailzie, whereby the land was provided to heirs-male; and albeit he did actually change the tailzie, there was still hope of alteration, and the bond was kept up after his death, that it might not be a mar to the marriage of Sir William, and was not brought into the reference, being a clear bond without question. It was *replied* for the defender, That though these grounds severally would not be sufficient to improve, *ad vindictam publicam*, yet it is sufficient here if the writ in question be not an authentic document and probative writ, which may be in many cases where forgery is not proved; especially where for twenty years time there was nothing heard of, nor any use made of the writ, by a party having great need of it, and no evident impediment by minority, or absence, or the like, but a gsoundless pretence of the tailzie, which could have had no weight if the bond had been shown in the father's life, and as little when the tailzie was broken, and the lands provided to Sir James's daughter, and the parties out of speaking terms upon that account; which was so far from an excuse that it was a just provocation, so that a witness subscribing, owning his subscription, but deponing *non memini*, doth neither improve nor approve the bond, for all he depones may be true, whether Sir Lewis subscribed or nor, especially where he was a servant to Mr John, and where the bond is astructed by nothing *positive*; nor can it be alleged, that ever any famous person saw it, or that Mr John made notice of it to his greatest confidant in his straits; so that all the consequence will be only, that writs latent for twenty years, without any probable cause, if there be no positive witness that so much as depones that he certainly knows that he never subscribed a writ as a witness, but upon the sight of the principal party, or his desire, and that so he subscribed this, though he remembered not the time and place, as to which he is neither examined, nor depones; for though he says Mr John desired him not to subscribe, yet he might have been desired and moved by some of Mr John's relations.

The Lords found the exception of improbation not proved, and sustained the bond.

Fol. Dic. v. 2. p. 266. Stair, v. 2. p. 65 & 137.

*** Gosford reports this case:

1672. *December* 19.

In an improbation pursued at Kirkhill's instance against Kettlestoun, and Sir George Mackenzie his assignee, of a bond granted by Sir Lewis Stewart, his grandfather, to his son Kettlestoun, *in anno* 1652, for payment of the sum of 10,000 merks, and of an annuity of 3000 merks out of the lands of Strathbrock, wherein he did insist in the direct manner upon these grounds; that there were four witnesses inserted, whereof one, who does not subscribe, does depone, that he never knew any thing of the granting of that bond, nor was witness thereto; and another deponed, that it was his true subscription, but remembers nothing of Sir Lewis Stewart's granting or subscribing thereof, or that he was re-

quired to be witness, or any thing of the contents thereof; and for the third, viz. John Carnagy, who is designed writer of the bond, and servitor to the Earl of Southesk, that designation being general, there being many of that name who had been servants to the said Earl, if they would make a particular designation, to make it known which of the said John Carnagies it was, they would either improve the bond by his deposition, if he be living, or *comparatione literarum* if he be dead. It was *answered* for the defender, That Edward Nisbet, who is the witness inserted, and he out of the way the time of the subscribing of the bond, there being three other subscribing witnesses, which is more than the law requires, whereof the late Earl of Southesk being one of them, he must be reputed a proving witness; and as to James Sands, who is the living witness, and depones that it is his true subscription, it is sufficient to astruct the verity of the bond, notwithstanding that he depones *non nomini* as to all the substantials thereof, there being nothing more ordinary than that servants will be called to subscribe witness where they know nothing of the contents of the bond or deed itself, and after many years, that they are out of the service, it cannot be imagined that they should remember either the date, or that they were required to be witnesses, or that they did see their master subscribe, and yet, adhering to their own subscription as true, they must be proving witnesses, otherwise the greatest part of writs or bonds might be improved; and as to John Carnagy, designed writer and servitor the Earl of Southesk, such a designation was all that was required by the act of Parliament; and the defender was not obliged to be special, having declared upon oath that the bond was truly delivered to him by his father, as it is now produced, but knows not more of that writer and witness in the indirect manner. It was *alleged*, That the bond being granted *in anno* 1652, and never made known till twenty years thereafter, that the parties writer and witnesses were all dead, except one, it ought to be presumed, that it hath been forgot, seeing Kettlestoun was known to be in great straits and difficulties; and there being several references and submissions betwixt him and the pursuer's father, his elder brother, he did never make mention of this bond as a debt in any claim given in to him: Likeas the bond being for an annualrent of 3000 merks out of Kirkhill's lands, it is not imaginable that Sir Lewis, who had a great estate in moneys and bonds, and who did leave to Sir James his oldest son and heir 100,000 merks of money, should not rather have assigned Kettlestoun to bonds than to have burdened his heritage with such an annualrent. To which it was *answered*, That Kirkhill's father having but one son, and his estate tailzied to the heirs-male, Kettlestoun being to succeed by the tailzie, in case the pursuer, who was his only son, should happen to die, he did forbear to make use of this bond, and crave payment, least it should have occasioned the breach of the tailzie; and the bond being a clear bond, without any conditions, he would never submit the same as being that which could be controverted. The Lords, before answer, having allowed both parties to adduce witnesses, and to produce writs, both as to the

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No 564. direct and indirect manner, and for improbation or approbation of the bonds in question, and having taken Kettlestoun's oath, when he did abide by the verity of the bond indirectly, that he could not condescend any otherwise upon the writer of the bond than as he was designed, and did not know the particular person who did write the same; and having found by the depositions, that there were at least six John Carnagies who had served the Earl of Southesk, whereof some were dead, and no hand writs of theirs were produced, that, *comparatione literarum*, John Carnagy, the writer of the bond, his hand writing and subscription might be improved, and that Kettlestoun himself, judicially upon oath, had abidden by the bond as a true bond, delivered by his father; as likewise, upon deathbed, a little before the advising of the cause, that, in presence of the minister and his friends, he had attested God that that bond was a true bond, and that he was never guilty of wronging any person in his lifetime; and that he had been always a person of entire reputation, albeit an ill manager of his estate and fortune;

They did assoilzie from the improbation.

Gosford, MS. No 546. *p.* 291.

1672. *June* 5. ANDERSON *against* JOHNSTON.

No 565.
Improbation of a bond sustained by inspection of the writing, and no witnesses answering the designation of those inserted in it being found, the bond having been kept up for twenty years.

WILLIAM ANDERSON having pursued an improbation of a bond alleged granted by him to George Johnston, and failing of him by decease to Agnes Johnston his daughter, the pursuer *insisted* in the indirect manner; whereupon the LORDS, having advised the improbation, found that the bond bearing date *in anno* 1649, and nothing done thereupon, till of late after Mr George Johnston the pretended creditor's death, and that by ocular inspection, the body of the bond, the pursuer's pretended subscription, and one of the witnesses, were the same hand-writ; and that by several testimonies and testificates, it did appear, that there could be no such persons, as the writer and witnesses in the bond, found to have been existent, or to have been servants then to the persons to whom they are designed to be servants;

THE LORDS thereupon declared the bond to make no faith; but if the defender would astruct the bond, by proving the cause thereof, which was expressed to be a debt due after count and reckoning or would instruct that there were such witnesses as are here designed, who could write, the LORDS would receive the same, albeit the same was not proponed, or admitted the time of litescontestation: But the LORDS did not refer the matter to the Justices, not having found who was the forger, and the bond being pretended to be granted to the pursuer's father, who had a probable ground of ignorance for making use of the same.

Fol. Dic. v. 2. *p.* 266. *Stair, v.* 2. *p.* 83.