

1671 and 1672. MR. JOHN STEWART of Kettleston, *against* The LAIRD of KIRKHILL.

1671, *July*.—IN the action pursued by Mr. John Stewart of Kettleston, against his nephew, the Laird of Kirkhill, upon a bond of provision for 3000 merks *per annum*, granted to him, during all the days and years of his lifetime, by Sir Lewis, his father, to which Sir Lues the defender is heir by progress; they had no other defence but to offer to improve the bond as false; at least to seek the same reduced, as subscribed by circumvention, or impetrate at some time when Sir Lues has been overtaken in drink. The adminicles against it were, that Sir Lues was too rational a man to do a deed so destructive to his heir and representative as this is; that Mr. John, the pursuer, was more than competently provided *aliunde* without this; (he got 10,000 merks and upwards from his father;) that the same is 22 years old, and never made known till now; that in the many dealings, counts and reckonings, and pursuits, that intervened betwixt this pursuer and the defender's father, his brother, there was never so much as one mum heard of this bond all that while, and yet there were many proper occasions offered for founding allegiances or defences thereon; (at all other times he is designed Sir Lues in this 'Sir Lodovick;') it was never made a ground of compensation, which, in law, tacitly and presumptively infers a discharge *inter propinquos, per legem 26. D. de probationibus*. But that which is most concluding is, they find the late Earl of Southesk a witness in the bond, and one John Carnegie, designed servitor to the Earl of Southesk, is writer thereof. They have got of the handwritings of all the Carnegies that were servants to the said Earl either six years before, or six years after the date of the bond; (so that there can be none condescended upon of whom they have not letters, bonds, counts, or other writs, all written with their hand;) and yet none of them agree with the handwrit of this bond, but differ therefrom *toto cælo*. In the submissions and claims of all that could be asked *hinc inde*, this was never an article. When first shown it was most white and tight, the next time it was all sullied, rankled, and torn. All the Carnegies living are examined, and deny it to be their handwriting.—*Queritur*, if this narrow point will be a sufficient warrant in law for authorizing the Lords to find the said bond null, for one man may have two or three most different ways of writing.

*Advocates' MS. No. 229, folio 106.*

1672. *February 7th*.—IN the pursuit mentioned *supra*, at No. 229, betwixt Kettleston and his nephew, the Lords, after a long debate, found Kettleston was not obliged to condescend farther upon the writer of the bond whereon he pursues, than the bond does, designing him servitor to the Earl of Southesk; and find the 80th [175th] Act of Parliament, *in anno 1579 [1593]*, sufficiently satisfied by the designation made in the bond; and therefore that the improver must now condescend: and they closed the direct manner of improbation; and assigned Strabrock the 26th of this month to prove that there was none of the name of John Carnegie, in the year 1652, servitors to Southesk, who could write a bond, or whole context of a writ as this is. Which though it seems a negative, and so may not be proven, yet it is that which the doctors call *negatio pregnans*, being circumstantiated both *quoad locum et tempus*. See the information of it. *Vide Tractatus*

*duos de probanda negativa, apud me, Herculani et Martini a Fano. Vide infra, Nov. 1676, No. 508, § 5. Advocates' MS. No. 319, folio 128.*

*December.*—IN the same month of December 1672, did the Lords advise the indirect articles of improbation, mentioned *supra*, Nis 319 and 229, pursued by Sir William Stuart of (Kirkhill) Strabrock, against the Heirs of Mr. John Stuart of Kestleston, his uncle, of the bond there mentioned; and did find the said articles either not relevant or not proven, and therefore assoilyied from the improbation, and decerned Kirkhill, the defender, to pay the sums contained in the said bond.

Which decret would have done much to have broken him, had not two things happily concurred for his liberation. The first was, that, finding his uncle was year and day at the horn, he (by the moyen of my Lord Kincairne, who procured a letter from the king for passing it in Exchequer,) took the gift of Kestleston's liferent escheat, without any backbond exacted for being countable to Kestleston's creditors or Exchequer, whereby he got absolute right to the said bond pursued on, and decret, as falling under his liferent escheat; yea, with a high hand, his whole estate was carried away, to the disappointment of his creditors of their payment, and the frustrating of his relict and children of their subsistence and livelihood; a very hard preparative, seeing new methods of confiscation ought to be restricted and not invented: and it was hoped the Lords would not declare it without a backbond. (*Vide supra, No. 307, My Lord Halton's case, [July 1671.]*) The second was this: Sir J. Cunyghame having occasion to see the style-book of a writer young man called Patrick Falconer, he, as one of Kirkhill's procurators, remembering the handwrite of that bond which they had offered to improve, fell immediately in a strong fancy that the handwrites were all one, and he who had written that style-book behoved likewise to be the writer of that bond: which setting him upon a more narrow scrutiny and comparison, he found them all one. Which having been represented to the Lords, they called for the said Patrick, and showed him the bond. He immediately, in all their presences, owned that the whole body of that bond was written with his hand; and that he remembered about three years ago, the Lady Kestleston, who is his near relation, sent for him, and caused him secretly copy the said bond off a principal, which she gave him, as he thought, and which he did all to the subscriptions, and then returned it to her: that he never saw it since, and that this bond, now used by them, and produced to him, is the very same he copied at her desire. Which is a most grievous stain upon the said lady, and loads the memory of her husband; though she utterly denies this to be that which he copied, and that she gave that copy to the defender and his curators, who were desiring a sight of it, not judging it fitting to intrust them with the principal. I heard oft that Kestleston ever offered up this bond to his nephew, if so be he would marry one of his daughters.

*Advocates' MS. No. 382, folio 162.*

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1672. *December.* SIR WM. FLEMING, Commissary of Glasgow, *against* MR. WM. NIMMO, Commissary Clerk.

ABOUT this same time, there was managed with great heat, an improbation pursued by Sir William Fleming, Commissary of Glasgow, against Mr. William