1662. *July* 11.

RENTOUN of Lamertoun *against* EARL of LEVEN and ALEXANDER KENNEDY.

No 563.
A case of the direct manner of improbation, in which there were many articles for and against the deeds.

JOHN RENTOUN of Lamertoun, as heir to his father, having charged the deceased Earl of Leven for the sum of ———, due by him to umquhile Lamertoun; the Earl suspended upon compensation, by six bonds granted by umquhile Lamertoun to the umquhile Countess of Leven, four of them to herself, and, after her decease, to her daughters, and two of them blank in the creditor's name; which being done *stante matrimonio*, by this Lady, did belong to her husband *jure mariti*, and not to her or his daughters. These bonds were produced out of the hands of Alexander Kennedy, some time Master Porter of the Castle of Edinburgh, who declared, that he had the foresaid six bonds in trust from the umquhile Countess, and the Laird of Lamertoun, *in anno* 1649; Leven being then Captain of the Castle of Edinburgh, Lamertoun Constable, and the said Alexander, Porter; and produced a paper of trust, subscribed by Lamertoun and my Lady, bearing, that the bonds were put in Alexander's hands, as a faithful person, whom both trusted, to be kept till after the Lady's death, and then delivered, according to her direction: Against which writs Lamertoun raised improbation, and Alexander Kennedy abode by the same; and the Earl of Leven declared, he made use of them upon the ground foresaid in his improbation; the six bonds being written by Alexander Kennedy, and James Rule, who is dead, and the witnesses being George Watson, Spittal, and Young, and, in some of them, Alexander himself, all being dead but Alexander the producer, the direct manner of improbation thereof ceased; and, therefore, they proceed to the indirect manner, and give in many articles of improbation, and the Earl's articles of probation. The relevancy of which being disputed, to quadruplies in writing, and all persons that either parties desired being examined *hinc inde*, and their testimonies published to either party; and they having thereupon disputed, both as to the relevancy and probation, in writing, and being heard at last *viva voce*;

THE LORDS proceeded to advise the cause.

The weight of the whole matter lay in these particulars mainly; 1*st*, For astruction of the writs, the said paper of trust holding in it two living witnesses and one dead, being true, the bonds related therein could not be false. This paper could not be improved directly; because, the direct manner was competent by two living witnesses, whereof the one deponed, that the subscription was like his subscription, as he subscribed at that time, being young, and the third witness being dead, proves. It was *answered*, That the witnesses inserted proved not; because, *comparatione literarum*, Crawford the defunct's subscription was altogether unlike his true subscription produced; Learmonth says his subscription was only like his; and though Kill says it was his subscription, yet none of them depones to have seen it subscribed by any body, or by any

witness, nor to know any thing of the time, place, or truth of the matter, contained in the writs, being but an evidence to keep the witnesses in remembrance, either of the matter or of the subscription of the principal or themselves; albeit they need not be proved here as in England, by the witnesses inserted: Yet, in the case of improbation, if the witnesses prove nothing of the fact or subscription, as remembering that they or the party subscribed, but only deponing that it is their subscription, which can import no more of certain knowledge, than that it is like their subscription, seeing none can swear that it may not be feigned so like that they cannot know it; and albeit that would be sufficient, where nothing is in the contrary, yet where there is strong presumption in the contrary, as the writ not being in the party's hands, but in the hand of a third party, *malæ famæ*, and who hath at least betrayed his trust, never having made these bonds known, till six or seven years after the Countess of Leven's death, and then offering to sell some of them to others; and with all the paper of trust, the body thereof being written with one hand, and the filling up of the witnesses with another, which nobody hath, or can condescend upon, nor are designed therein, so the same being null by act of Parliament, cannot sufficiently astruct the truth of the other bonds, being in themselves suspected. No 563.

THE LORDS found the paper of trust not sufficiently to astruct, nor the testimonies not to prove it sufficient, in respect of the grounds foresaid being instructed, and the many presumptions against these writs; therefore, they improved the said pretended paper of trust.

There were further produced for astructing the bonds, two holographs, alleged written and subscribed by Lamertoun's own hand, relative to the bonds and trust; and for proving these were holograph, they produced a holograph account-book of Lamertoun's, and six witnesses, of whom three or four were without exception; and the whole deponed that they truly believed that the holographs were Lamertoun's hand, and Lamertoun and the Lady Leven's subscriptions. The question then was, Whether these papers were so proved to be holograph, that they did sufficiently astruct the bonds, notwithstanding all the grounds instructed against them?

THE LORDS found *negative*, upon this consideration, that when the probation of holograph is by witnesses, who saw the holograph writ written and subscribed, albeit they be not inserted, it is a full probation, admitting no contrary probation; but when it is only *comparatione literarum*, or by witnesses deponing that they believe, or that positively it is the hand-writing of the party, that can import no more, but that it is so like, that it is undecernible, for no man who saw it not written can positively swear with knowledge, that it is impossible to feign the hand so like, that it is undecernible; and, therefore, holograph so proved admits a stronger contrary probation; and, therefore, the LORDS found that the evidents against the bonds were stronger than this probation of holograph.

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