

* * * Gilmour reports the same case :

No 174.

ONE Kennedy, in an action of improbation, being pursued by the now Earl of Leven, as assignee constituted by his father, he did exhibit certain bonds, alleged granted by the deceased Countess of Leven, pertaining to her umquihle husband *jure mariti*; and the same bonds being undertaken to be improven by Lamberton's son and relict, they *urged*, That the Earl of Leven might declare whether he would bide by the same or not? who *answered*, That he would bide by the same *qualificate*, in respect he was only assignee; and that the bonds were never in his own hands, nor in his father's, but were produced by Kennedy for satisfying the production; and that therefore Kennedy having abidden by the bonds as true, and he knowing nothing of the falsehood therein, he might bide by them till they were found false.

THE LORDS ordained the Earl to produce his declaration, with such qualifications as he should think fitting, which the LORDS would take to consideration, how far it would be allowed or not.

1662. July 22.—The bonds were found false, and Kennedy remitted to the Justice Court. *In presentia*.

Gilmour, No 5. p. 4.

No 175.

An assignee called on to abide by a bond, offered to abide by it as delivered to him as true, and to produce his cedent. This was all that was found to be incumbent on the assignee. But the cedent being bankrupt, it was found that he must enact himself judicially to appear when necessary, and if he did not, the bond should be improven, even as to the assignee, who would not however be liable to the penal consequences, if not accessory.

1666. January 3.

GEORGE GRAHAME and JACK *against* MR ANDREW BRIAN.

GEORGE GRAHAME, as assignee by Jack, having charged Mr Andrew Brian, he suspends and raises improbation, wherein he insists and craves that the assignee may abide by the bond. The assignee declared that he would abide by it, as being delivered to him as a real true done deed, without any knowledge of his in the contrary; and offered to produce the cedent to abide by it; who compearing, it was *alleged*, That he was a bankrupt, and had a *bonorum*; and therefore behoyed to find caution to appear at all the diets of process, or to enter in prison till the cause were discust; or at least that the assignee would be obliged to produce him.

THE LORDS having considered the case, found that the assignee was obliged no further than what was offered, and they found the cedent not obliged to find caution, or enter in prison; but that he should enact himself to compear judicially, whensoever any point of the improbation were referred to his oath, which might infer the falsehood of the writs, if confest; and that, if in that case he compeared not, the bond should be improven, not only to him, but as to the assignee, inferring no hazard to the assignee, as to the criminal part, if he were not found accessory.

Fol. Dic. v. 1. p. 456. Stair, v. 1. p. 332.

* * Dirleton reports the same case :

IN the case betwixt Mr Andrew Brian and George Grahame, the said George being constituted assignee to a bond granted by the said Brian to Thomas Jack, and having charged thereupon, the suspender offered to improve the bond, and urged the charger to abide by the same, which he was content to do in these terms, viz. That he did abide by the said bond as truly assigned and delivered to him by the cedent ; and that the cedent would compear and abide by the same as a true bond.—The suspender *answered*, That the cedent was *lapsus*, and had come out of prison upon a *bonorum* ; and therefore he ought to find caution to compear all the diets of the process.—THE LORDS found, That the cedent should abide by the said bond, with certification, that if he should not appear when the Lords should think fit, for clearing the question anent the falsehood of the bond by his oath or examination, the bond should be declared to be void, and to make no faith both as to cedent and assignee.

Dirleton, No 11. p. 6.

No 175.

1668. *January 21.*

HOME *against* TELFER.

AN exception of improbation being proponed against a writ, and thereafter Telfer of Harycleugh being desired to abide at it, he declared that he had gotten it as a true evident, and condescended upon the way he had gotten it, and it being alleged that he ought to be positive, whether he would abide at it or not,

THE LORDS declared that after probation they would consider how far his using and abiding at the said writ should import against him, and if he be in *bona fide* to use the same.

Fol. Dic. v. 1. p. 456. Dirleton, No 142. p. 58.

No 176.

1672. *June 20.*

HENDERSON *against* HENDERSON.

IN an improbation betwixt Henderson and Henderson, the production being satisfied, and the writs produced, there was a term assigned to the defender to compear and abide by the same ; and the defender not compearing, and the term circumduced, it was proposed to the Lords what should be done thereupon, whether the writs should be improven *simpliciter* upon that evidence, that the user thereof would not bide by the same, so as to infer a forgery, or if further evidence behoved to be made use of.

THE LORDS found, That decret ought to follow thereupon, as upon the certification implied in the act for biding by, that they should make no faith in the same manner as in a certification for not production.

Fol. Dic. v. 1. p. 457. Stair, v. 2. p. 85.

No 177.

In an improbation, where a term was circumduced for not abiding by the writ, it was declared to make no faith, as if it had not been produced.