

*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

Nimmo, sometime Commissary Clerk there; wherein the case was; the Commissary Clerk being addebted in a small sum of money to Sir William, Sir William pursues him for the same: wherein Nimmo alleged it was paid and discharged, but the discharge had miscarried, and therefore referred the truth of his allegiance to the Commissary's oath; who swore *positive*, it was yet owing. Nimmo in all companies did not stick to assert the Commissary had perjured himself; whereupon the Commissary cites him before the secret council for a defamer and slanderer; there he offers to verify it, and so could not be punished, and produces a discharge of that debt under the Commissary's own hand before his oath. The Commissary storms and offers to improve it as false. The Council sends them to the Judge-Ordinary. There are two witnesses at it; the one of them Sir William's man, who being examined by the Lords, denies his subscription; the other, Mr. Nimmo's man, upon oath, astructed the truth of the subscription.

The Lords, by a kind of trysting interlocutor, assoilyied both parties *hinc inde*, the one from falsehood, and the other from calumny; only found the discharge null, and therefore ordained Mr. Nimmo to pay the sum sworn by the Commissary to be owing: which seems very contradictory. It was thought by many the discharge was a true deed, and though the Commissary was a person of integrity and honour, (which was the great cause of the Lords their decision,) yet it was wondered how he forgot it so soon, seeing *probabilis oblivio in facto proprio recenti non cadit*. This interlocutor may seem strange, *quia inter verum et falsum non datur medium*. See 15th December 1680, *Arbuthnot of Knox*.

*Advocates' MS. No. 383, folio 162.*

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1672. *December*. SIR JO. HENDERSONE of Fordell *against* MR. ROBERT WEYMES of Cuthlehill.

IN the same month of December, 1672, was debated the declarator raised by Sir Jo. Hendersone of Fordell against Mr. Robert Weymes of Cuthlehill, to hear and see it found and declared that he and his predecessors had for the space of forty years and upwards, been in possession of the harbour of Aberdour, and of a high way leading through the said Mr. Robert's lands of Cuthlehill, for driving their coals to the said harbour from their coalheughs; as also, had right to the said highway and passage, and had accordingly carried their corns and other goods to the said harbour, and exported and imported thereat as the usual harbour and port of that place, till they were wrongously debarred from the use thereof by the said Mr. Robert; and with the which declarator, the Earl of Murray, towns of Innerkeythin and Aberdour, and neighbouring heritors, did concur.

ALLEGED,—That the defender being heritor of the lands of Cuthlehill, within which both the said burn-mouth, called by the pursuers a harbour, and the said way leading thereto, were locally situated, he was founded *in jure communi* to impede and interrupt all others from passing through or using his property, unless the pursuers had a sufficient right in their persons to the said way or harbour, either by the formal constitution of a servitude, by a contract clad with possession, or