

1673. February 20. The COMMISSARY of GLASGOW against NIMMO.

THERE was a bond of L. 120 granted by Mr William Nimmo to the Commissary's father *in anno* 1656, which being confirmed in the Commissary's testament, and assigned to Mr William Weir, he pursued Nimmo for payment, who *alleged*, That the pursuit was to this Commissary's behoof, and offered to prove by his oath that the sum was paid to himself; he compeared and deponed negative, whereupon Nimmo was decerned to pay. Shortly thereafter Nimmo gave out that he had found a discharge of 200 merks of that sum, and insinuated that the Commissary had wronged himself by his oath; whereupon the Commissary pursued him before the Council for defamation; and Nimmo pursued the Commissary before the Justices for perjury; and the Commissary Nimmo for improbation of the discharge before the Lords, and *insisted, first*, in the direct manner by the witnesses inserted in the discharge, being only two, John Alexander, servant to Mr William, and John Smith servant to the Commissary, who were not witnesses inserted; but Nimmo affirmed, that when the discharge came to him with Smith the Commissary's man, that he caused him and his own servant subscribe witnesses thereto, albeit the body was holograph, written by the Commissary's own hand: John Alexander approved the bond, and John Smith denied that the subscription was his, or that he was witness to the delivery of the money, or signing of the discharge. The indirect articles of improbation were, *1mo*, That by ocular inspection, neither the body nor subscription was like the Commissary's hand writ or subscription; *2do*, That Nimmo had a standing suspension undiscussed, and yet he paid in the vacant time, albeit he was not opulent, but had great enmity against the Commissary; and that by his missive letter produced, he affirmed that this sum was to the Commissary's father for a consultation not worth a sixpence, which clearly imports that this discharge must have been forged; and there is no person pretends to have seen the money delivered, or the parties to have been together at that time; *3tio*, Nimmo by his missive to the Commissary after the discharge expostulates that the said bond was not justly due, and that if he were put to it he would find out a compensation against it, and that there was no other bond he rested to the Commissary; and yet if he would deliver up all bonds, and free him of Mr William Weir, he would make payment of the sum, which necessarily imports he had no discharge then, and yet the letter is after the date of this discharge, at which discharge Mr William did only abide, as having received it from the Commissary's man, and so could not run the hazard of the falsehood of it; all which, with the Commissary's oath, who is a man of entire fame; and great fortune, denying any payment, so soon after the discharge, did sufficiently cancel the truth of it. Nimmo gave in his articles of approbation, consisting in this, the discharge was holograph, and that he being of entire fame, it could not be imagined that he

No 566.

In a reduction and improbation of a discharge where both the direct and indirect manner were made use of, the Lords found the deed null, but that the probation was not sufficient to infer forgery against the user of it.

No 566. would forge a writ for 200 merks, which could have no effect after the oath given; and that he should have forged it holograph, which is so difficult, and insert witnesses, the one being the Commissary's own man; and in answer to the direct manner *alleged*, That albeit one of the witnesses inserted denied, being the Commissary's own man, yet the discharge stood valid, being not only holograph, but having one witness affirming; and as a bond having three witnesses, albeit one did deny, yet if two approve, the bond would be good, much more when one witness inserted approves, and many others prove holograph, which alone is sufficient without witnesses; and though the Commissary's man denies, yet the subscription being compared with many other subscriptions produced, it is undeniably like his; neither doth the payment during the suspension import, because it was only 200 merks in part of payment of greater sums; but the Commissary having received the money, would only attribute it by this discharge to the said bond, wherewith Nimmo was displeased when the discharge came to him, and that it wanted witnesses, and therefore he caused the two witnesses subscribe as witnesses who saw the Commissary subscribe; and as for the missive alleging the sum not to be justly due without mention of a discharge, and promising to pay the bond, the reason thereof was, that there being twelve years annual rent due before the discharge, it with the principal sum did much exceed the 200 merks paid, and therefore the exposition and promise of payment were to be understood of what remained due of the bond; and the receipt not being in Nimmo's hand, but in another friend's hand at the time, he did not remember that it was particularly relative to this bond. It was *answered* by the Commissary, That the pretence that there could be no motive for Nimmo to forge this discharge, which could have no effect, it was very subtly invented to fix perjury upon the Commissary, and to divest him of his place, which Nimmo hath all alongst designed, as evidently appears by his moving Bishop Burnet to pursue the Commissary, to be deposed for insufficiency; neither is there any considerable difficulty to forge some few lines so like a party's hand-writ, that it might appear holograph; and though holograph being proved might be sufficient without witnesses, yet where witnesses are adhibited, and subscribing, and so accepted by the user of the writ, that he can pretend no objection against it, if one of two witnesses deny, it cancels the faith of the writ, and improves it; after which approbation of holograph is neither receivable, nor of any effect; for it were absurd to affirm, that though both the witnesses inserted did deny, that the writ being proved holograph, would be sustained. There being many witnesses examined *hinc inde*, upon the articles of approbation and improbation, and many writs being produced to compare, it did appear that the Commissary's subscription was not always alike, but did alter in form of the letters; and many of Nimmo's witnesses proved that the discharge in question was the Commissary's hand-writ and subscription, and that themselves would have accepted without question;

and many of the Commissary's witnesses having deponed that the writ and subscription of this discharge were not the Commissary's, upon several differences that they remarked therein; and two having deponed that Nimmo shewed them another discharge of the same sum, which was a smaller tighter hand-writ, and that they remembered several palpable differences betwixt the two;

THE LORDS upon the whole matter found that the discharge was a null and not probative writ, and could make no faith, so could not redargue the Commissary's oath, but found that the probation was not sufficient to prove that there was a forgery committed by Nimmo.

Fol. Dic. v. 2. p. 266. Stair, v. 2. p. 175.

. Gosford reports the same case :

1673. February 19.—IN an improbation pursued at Sir William Fleming's instance against Mr William Nimmo, as having forged and counterfeited a discharge of the sum of 200 merks alleged paid by the said Mr William, in part of payment of a bond granted by him to Sir William's father, Commissary Fleming, there being allowance given to both parties to give in and verify indirect articles of improbation, and of approbation of the writ quarrelled, in respect the discharge had two subscribing witnesses, whereof the one being the pursuer's servant, did altogether deny upon oath the subscription, or that he knew any thing thereof, and the other being the defender's servant, did on the contrary declare the verity thereof, and that it was truly his hand writ; The indirect articles of improbation, and whereupon witnesses were examined, and writs adduced, were as follows; That the defender being charged upon the said bond did suspend upon a reason of payment referred to the pursuer's oath, and whereupon he suffered him to depone, without ever making mention of such a discharge, and as formerly he had been ingrate, and had taken all indirect ways to have gotten Sir William deposed from his office of being Commissary, that he himself being his depute might enjoy the same, so he did contrive and forge the discharge of purpose to make him guilty of perjury, and accordingly had pursued him criminally before the Justices, that he might not only lose his place, but be punished with the loss of moveables, and be declared infamous; *2do*, By a missive letter after Sir William had deponed in the said process, the defender did confess that the bond was truly resting, but it being granted to Commissary Fleming for a consultation only, if he were forced to pay he would be as far in Sir William's way, but never mentioned any thing of this discharge; *3tio*, It was offered to be proved, and two witnesses did prove the same, that when Mr William did first reveal that he had a discharge, he did take them into a private room and shew them one, and made them read it, which was different from that now produced, in the bigness of the characters, and some words which they had both observed were not placed

No. 566. in that discharge shewn them as they were in this now questioned ; as likewise several witnesses did depone relative to the subscription as to the framing of the letter G. and bigness of the W. and some other circumstances.

The articles of approbation were that the subject of the discharge being only 200 merks Scots, it could not be imagined that the defender would have ventured to forge, and forge the same, which would destroy both his life and reputation. *2do*, The discharge itself was holograph, consisting of ten or twelve lines, and was not possible to be counterfeited, seeing the witnesses who had deponed upon their knowledge of the pursuer's ordinary hand-writ, did declare that they themselves would have accepted it as his true hand-writ, it was so like, and for the two witnesses that declared they saw another discharge, they must be presumed to have been instructed to depone for the pursuer, on whom they had a dependence, the difference observed by them being so inconsiderable, and no more or less observed by them both, who did only once read over that discharge ; *3tio*, It is not imaginable the defender would have forged the subscription of the pursuer's own servant, but rather would have made any other person witness, or forge the name of one that was dead ; *4to*, The reason of keeping up the discharge when the payment was referred to the pursuer's oath was, that it being laid aside amongst many papers, the defender could not recover the same after much search, but had delivered so much that he had told it to his advocates and agents. THE LORDS considering, that in a case of great importance, the probation ought to be very clear whereupon a sentence of improbation was to be given, and that the articles in the indirect manner being compared with the articles of approbation did make the case ambiguous and doubtful, as likewise considering that by comparison of the discharge with many holograph writs, they were so like that no material difference could be observed ; therefore they assoilzied the defender in the improbation from falsehood and forgery ; but in regard that the defender had most maliciously referred the verity of the payment of that sum to the pursuer's oath, without making use of this discharge for proving thereof, or so much as intimating that ever he had such a discharge, and that after the pursuer's oath was taken he had in effect acknowledged that he was debtor for the sum contained in his bond, therefore they decerned the said discharge to be void and null, *quoad omnes effectus civiles*, and in regard that it was the foundation of a criminal pursuit before the Justices for perjury, and that for the reasons foresaid Sir William might have been *in probabili ignerantia* to deny the verity of the payment, albeit he had subscribed such a discharge, the LORDS did recommend to those of their number who were Judges in criminal caues, not to proceed in the action of perjury founded on that discharge, as not being a sufficient evident whereupon to found an action of perjury.

Gosford, MS. No 577. p. 319.