

cess, since he was summoned already by the first and second summons.—THE LORDS thought that in formality of process the cedent behoved to be cited to all the diets, but not upon 60 days, having been once cited upon so many already, but only upon 15 days at every diet.

Spottiswood, (IMPROBATION.) p. 170.

No 173.

1661. July 24.

LAIRD OF LAMERTON *against* EARL OF LEVEN and ALEXANDER KENNEDY.

THE Laird of Lamerton having wakened an improbation against Alexander Kennedy and the Earl of Leven, for improving of several bonds exhibited by the said Alexander Kennedy, and made use of by the Earl of Leven, Lamerton craved that the Earl of Leven might abide by the bonds, seeing he made use thereof. The Earl offered to abide by them *qualificate*, viz. that he made use of them as believing they were true bonds, and that he was not accessory to any falsehood or forgery thereof.—It was *alleged*, He ought to abide by them simply; for such qualities were contrary to the act of Parliament, declaring users of false writs, and abiders by them, to be accounted as accessory to them. Many of the LORDS were of opinion that he should abide by them simply; but that he might protest under the foresaid quality, in respect it was not proper to the Lords to consider the consequence of his bidding by the bonds, which was criminal, yet *alterius fori*; yet it was carried that he might abide by them *qualificate*; and therefore he was ordained to give it in writing, that the Lords may consider how far they will allow it.

No 174.

In an improbation of a writ, the user was allowed to abide by it, *qualificate*, viz. That he used it as produced by another, which was in his favour, and he knew nothing of the forgery of it.

1661. July 26.—THE Laird of Lamerton, upon the improbation mentioned 24th July, did then desire that Alexander Kennedy, producer of the six bonds quarrelled, might be examined *in presentia*, and his person sequestrated and secured, and warrant granted to examine new witnesses.

THE LORDS superceded to give answer till they considered the process; and now having considered the same, and finding that the direct manner of improbation was not competent, because the witnesses were dead, and that the pursuer had insisted in the indirect manner, and had obtained warrant for inspection of the depositions taken in the cause, both of Alexander Kennedy himself, and of the witnesses then adduced, and had given in articles of improbation, and the defenders articles of approbation, replies, and duplies; both which being considered by the LORDS, they found grounds of suspicion, and therefore granted all the desires of the supplication; and ordained Alexander Kennedy to be kept close prisoner in the tolbooth till he were re-examined, and witnesses *hinc inde*, to be examined by some of the Lords in the vacancy, upon what either parties should desire, which seemed pertinent to the said Lords examiners.

* * * 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.