

No 205. ject; the rather, that each of these opinions seemed to have decisions in its favour; that, further, the said decision observed by Fountainhall in 1697, Forrester against Rowat, did not seem well to agree with another, observed by Stair, June 19th, 1677, Binning against Gibson, *voce* PROCESS, though appearing to proceed upon the same principle: And that, last of all, occasion might be given to mention, that in so much did the Lords consider this as an unsettled point, that, to the effect the lieges might be at a certainty when it might be safe to propone improbation, they remitted to three of their number to bring in an act of sederunt, settling when a party, by proponing falsehood, is barred from proponing or recurring to other defences, and when a party may propone other defences, after abiding by.

Kilkerran, (IMPROBATION.) No. 4. p. 281.

No 206.

Abiding by *qualificate* is in desuetude. Abiding by must be simply; but a protest may be taken, containing facts, indicating innocence of accession, which, when proved, will divert the consequences.

1743. December 7.

ROBERTSON *against* ALISONS.

ROBERTSON having charged on a bill accepted by John, Robert, and James Alisons, it was suspended on the following grounds, as to James Alison, that the acceptance was not duly signed by him. Robertson refused to abide by the bill simply, but only *qualificate*, as to that acceptance, that the bill accepted by James Alison had been brought to him by Robert, who had got the money. It was agreed, that abiding by *qualificate* was entirely gone into desuetude, for this reason, that, when such practice was allowed, a forger might be secured from punishment, because the fact, or qualification condescended on, might be proved to be true, which destroyed the effect of the abiding by, and yet, in fact, the person not be less guilty. The Court was of opinion, that the person ought to abide by the deed simply, *et non qualificate*; but under protest, that, notwithstanding of his abiding by the deed as a true one, he might be at liberty to prove the various facts and circumstances, which might shew how the deed, which he believed to be a true one, came into his hands; and, in that case, although the deed should be forged, yet, if the facts and circumstances contained in the protest appeared to be true, the abider by would not be liable to punishment, either as a forger or user of a false deed.

THE LORDS allowed Robertson to abide by the deed, not *qualificate*, but under protest.

Fol. Dic. v. 3. p. 313. MS.

No 207. 1747. June 16.

A. *against* B.

Two persons being joint creditors in a bill, and charging thereon, a bill for the precise same debt was produced by the debtor, retired, and given up by one of the partners, which occasioned mutual processes of improbation.

The bills, upon production, appeared the one signed by both drawers, and with the acceptance; the other signed by one of the drawers, and the place of acceptance torn off. No 207.

The charger *alleged*, The bill accepted was brought to him by the other drawer, to which he adhibited his subscription, and deposited it in the hands of a third person; but he did not know whether the acceptance might not have been forged by his partner, who had since absconded, and had perhaps received the money, on giving up the other draft by himself, which might have been the one truly accepted; and he offered to abide by, with this quality, to wit, the truth of his own subscription, and that it was so delivered to him.

THE LORDS allowed him to abide by *qualificate*.

D. Falconer, v. I. No 187. p. 252.

1747. November 19.

YOUNG *against* WATT.

No 208.

ELIZABETH YOUNG having proponed improbation by way of exception before the Ordinary, against a receipt produced by James Watt, defender, in a process at her instance against him; after the said Watt had abidden by, and that several witnesses had been examined before the Ordinary, the pursuer, Elizabeth Young, applied by petition, craving that Watt, the defender, might be brought before the Lords, to answer such interrogatories as should be put to him; which was refused, as in all views out of form; for besides, that, after witnesses are examined, it is irregular to ask an examination of the party, so where an improbation is proponed, only by way of exception before the Ordinary, which resolves into no more than a voidance of the debt, it is the Ordinary only who examines the party; and the party is never examined in presence, but where the forgery is brought before the Court by complaint.

Kilkerran, (IMPROBATION.) No 6. p. 283.

SECT. X.

Consignment by the Pursuer.—Summary incarceration upon suspicion of forgery.—Improbation against titles of honour.

1581. December.

A. *against* B.

No 209.

It was found by interlocutor, That the King's Advocate in actions of improbation should consign as well as other parties.

Fol. Dic. v. I. p. 458. Colville, MS. p. 312.