

No 203. bertson, No 188. p. 6763; Jan. 3. 1666, Jack against Bryan, No 175. p. 6754, which is the meaning of the citation out of my Lord Stair's Institutions. For, *qui falsum recitaverit tenetur in crimen falsi subscribere, Tit. D. ad L. Cornel. De Fals.* And where the user of a false writ abides by the same after it is quarrelled, *dolus malus* is presumed *ex re ipsa*. This is confirmed from the practise aforesaid, betwixt Ker and Forsyth, February 5th 1635, No 173. p. 6750, and that betwixt Lamerton and the Earl of Leven, July 24th, 1661, as observed by President Gilmour, No 174. p. 6753.

*Fol. Dic. v. 1. p. 455. Forbes, p. 715.*

1739. January 31.

RUSSELL against ADIE.

No 204.

THOUGH the form of abiding by is, that it be simply, yet it is never refused to allow the party, by way of protest, to add any quality he pleases, which should be given in in writing; but where there are two defenders, if one abide by simply, the other may abide by *qualificate*; e. g. that he got the deed from the person who has abidden by. Thus, where a messenger's execution was challenged on falsehood, the messenger abiding by simply, the user was allowed to abide by *qualificate*, that he got it from the messenger; but *one* must always abide by simply.

*Fol. Dic. v. 3. p. 313. Kilkerran, (IMPROBATION.) No 1. p. 280.*

1743. July 5. & November 23.

HAMILTON & BAIRD against HUNTER.

No 205.

*Exceptio falsi omnium ultima*, how to be understood.

HAMILTON and Baird, executors confirmed to Hamilton of Newton, charged William Hunter, writer in Edinburgh, upon a bond of 8000 merks, due by him to the defunct, which he suspended: And, at discussing, the cautioner in the suspension *objected*, That he could not be liable, in respect his bond of cautionry did not refer to the bond charged on, which the Ordinary repelled; and the LORDS, after proof taken, "Adhered," as is to be seen, *Tit. Falsa Demonstratio*, July 5th, 1743, *inter eosdem*, No 4. p. 4155.

A petition against this interlocutor of the Ordinary being appointed to be seen; before the answers were given in, the cautioner proponed improbation of the execution of the edict, which was so far proceeded in, that consignation was made of the L. 40, the officer had abidden by, and articles of improbation were exhibited; and when, after all this, the answers came in to the cautioner's petition, a preliminary point was therein pleaded to the competency of the objection to the bond of cautionry, after improbation of the edict had been proponed before the Ordinary.

And, at first, the LORDS found the objection to the bond of cautionry not competent, after proponing improbation, consignation made, and that the officer had abidden by ; but, upon advising petition and answers, the Lords were of different sentiments.

Some were of opinion, that how soon the party abode by, whereby he was *positus in vitæ periculo*, the brocard took place, that, *exceptio falsi est omnium ultima*, and that it was to be taken in the most extensive sense ; that the proposer could not be allowed to recur to any other defence whatsoever ; and so it was said to have been found in the case between Corbet and Gray, *anno 1734*.\*

Others were of opinion, that, notwithstanding the party's abiding by, yet, till *litiscontestatio*, (that is by act extracted for probation,) the proposer of the improbation might recede from it, and propone other defences ; and for this the ancient practice was referred to, as was said to appear from a decision observed in 1635, Ker against Forsyth, No 173. p. 6750, and for which also a late decision was referred to, July 16th, 1713, Dunbar against the Earl of Cromarty, *voce* PROCESS.

Others, again, were for understanding the brocard in a more limited sense, that, whether it should take place how soon the party had abidden by, or no sooner than after an act for probation was extracted, the meaning of it was no other than that by failing in the improbation, the deed against which it was proponed became unexceptionable ; but, by no means that all other defences were cut off, except in the case of improbation proponed against the execution of a summons ; which practice, the best interpreter of all such general brocards, had from expediency refused to admit, unless proponed *peremptorie causæ*, lest otherways it might be made a handle for delaying processes on all occasions ; but, when parties are entered upon litigation, as the rule of expediency is answered, when, by the party's failing in the improbation, the writing against which the exception is offered is rendered unexceptionable ; so the practice has carried it no further. And, accordingly, after one had proponed improbation of an assignation, which was the pursuer's title, and failed, it was still found competent to him to propone payment, or every other defence that did not concern the title, July 8th, 1697, Forrester against Rowat, *voce* PROOF.

But, after all this was said, there was no judgment given on the general point, in respect of the specialty which had not been before adverted to, that the objection to the bond of cautionry lay by petition before the Lords, before the improbation had been proponed before the Ordinary ; and upon which ground they found it competent for the cautioner in this case to have the judgment of the Court on it, notwithstanding the proceedings in the improbation.

Although this debate among the Lords received no judgment, it has been thought not improper to take notice of their different opinions upon this sub-

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.