

*** Dirleton reports the same case :

No 177.

A BOND being produced to satisfy the production in an improbation, the LORDS, without further probation, did improve and decern *quoad* the defender, in respect he refused to abide by the truth of the same.

Clerk, *Gibson.*

Dirleton, No 168. p. 68.

No 178.

Decree of certification was pronounced for not abiding by, and it was left in the pursuer's option, either to take out this certification, to insist in the improbation, or to insist in a declarator of its nullity for wanting witnesses. The witnesses here were under age, and could not have sworn positively as to the fact.

1675. June 10.

GRANT *against* GRANT.

IN the improbation of a bond, the bond being produced, and the defender refusing to abide by the same, certification was craved against the said bond, because the defender did not abide by the same; and the LORDS were clear, that the certification should be granted for not abiding by the said bond, though it was produced; but because the witnesses in the bond had been examined, and there being only two witnesses to the same, they both declared that they were *impuberes*, the one of eight and the other of nine years of age, the time of the subscribing of the bond, and the subscription was not like the subscription now used by them, and to their remembrance they were not witnesses to the same, but were not positive that they were not witnesses.

THE LORDS, in respect of their declarations, and that the defender himself, did in effect, at least presumptively, acknowledge the falsehood of the bond, in so far as he did not abide by the same, had an impression that the bond was false, and therefore they granted certification for not abiding by the same; and did leave to the pursuer, either to take out the certification, or to insist in improving of the bond, or for declaring the same null, as wanting witnesses, as he should think fit; seeing, without question, though the witnesses did not fully improve it, yet in respect of their age the time of their pretended subscribing the same, and by their declaration they did not astruct the truth of the same, in which respect the bond ought to be constructed, and looked upon as wanting witnesses, and so null.

Clerk, *Mr Thomas Hay.*

Dirleton, No 262. p. 126.

1675. June 16.

LADY LOGIE *against* MELDRUM.

No 179.

In an improbation, a woman using a writ, was not allowed to a-

KATHARINE M'MILLAN Lady Logie, having obtained disposition from Mr John Hay her husband, pursues Meldrum as nearest of kin, for delivery thereof, who proponed improbation; and the pursuer being ordained to bide by, offered to do the same in these terms, that ' she truly received this disposition, as it now

‘ stands, from her husband;’ and the Lords are in use to admit of such qualities. It was *answered*, That albeit the Lords admit qualities to singular successors or heirs, yet never to persons who immediately receive the writ in question, which would encourage all forgeries; for in all cases that may be pretended; but if the writ shall be found forged, and the pursuer be pursued criminally as a forger or accessory, by using of the writ, she may then allege and prove that she was innocent, having received the writ as it is from her husband; but it is not competent to lead a probation upon it here, neither is it presumed or probable in any case, that a husband would truly deliver a writ assigned by himself, when it was forged.

THE LORDS refused to admit the quality.

Fol. Dic. v. 1. p. 455. Stair, v. 2. p. 330.

* * * Dirleton reports this case :

A disposition being granted by a husband to his wife of moveables, and she, in an improbation of the same, being urged to abide thereat; and offering to abide at the same as a writ truly delivered to her by her husband, the LORDS found, That she ought to abide at the same *simpliciter*; and though such a qualification may be allowed to strangers and singular successors, who may be *in bona fide* to take assignations to writs; yet wives, and conjunct persons and relations, are in a different condition; seeing they are presumed not to be ignorant of the deeds and transactions of their husbands and relations.

Reporter, *Newbith.*

Clerk, *Monro.*

Dirleton, No 265. p. 128.

* * * The same case is also reported by Gosford :

IN an action of exhibition and delivery of several moveable bonds at the instance of Mary and Isobel Meldrum, as nearest of kin to Mr John Hay of Logie their uncle, against Katharine M'Millan his relict, it was *alleged*, That she could not exhibit, because she had a disposition from her husband of all these bonds and others called for in the exhibition; which disposition being produced, the pursuers offered to improve the same and consign, and craved that the defender might be decerned judicially to abide at the verity of the said disposition under the pain of falsehood. It was *alleged* for the defender, That she was content to abide by the verity of the said writ, as being truly delivered to her by her husband, but no otherwise. It was *answered* for the pursuer, That she ought to abide by the verity of the said writ, since she made use thereof as a true writ, so that if it were improven, she ought to incur the pain of falsehood. THE LORDS did find, That the defender, being wife to the granter of the disposition, in making use thereof, she could not but know of the verity of the said

No 179.

abide by it *qualificate*, that it was received in the same state from her husband.

No 179. deed, and therefore ought to abide at the truth of the deed itself, and that the quality that it was truly delivered, ought to be rejected as being only competent to a singular successor.

Gosford, MS. No 757. p. 470.

1675. June 30.

STEWART *against* RIDDŌCH.

No 180.

It was the opinion of the Court, that it was incompetent to abide by only as a factor, who had received the deed as true, but that there ought to be a party to abide by simply. See Caldwell *against* Blair, No 190. p. 6765.

JAMES STEWART of Aberlednoch, having obtained a decret *cognitionis causa* against John Riddoch, for implement of a disposition granted by David Riddoch his grandfather; and thereupon having also obtained a decret of adjudication, the same was stopped upon a bill given in by John Campbell of Tar-ririck, pretending that he had a right to a contract of marriage betwixt Alexander Riddoch and his wife, as assignee constituted by the said Mr Alexander, in whose favours the granter of the disposition to Stewart was obliged by the said contract to dispoise to him the same lands; and the assignation granted by the said Alexander Riddoch to the said Campbell being questioned as false,

THE LORDS thought fit to hear both parties on their several adjudications, reserving improbation of the said assignation; and with this declaration, that if the said assignation should be improven, the decret and adjudication upon the same should fall.

Because there was a competition in diligence, the LORDS did wave the debates in the improbation, being most as to that point, who should abide by the said assignation as true; seeing the assignee Campbell declared, that his name was filled up in the same without his knowledge, and was not concerned to abide by the same; and Mr John Drummond of Megginsh compearing, as having a complete warrant and commission from the said Mr Alexander Riddoch, who was in Barbadoes, to prosecute the said action, which had been intended in Campbell's name, offered to abide by the said assignation only as a factor.

Some of the Lords thought, that a writ being questioned as false, there should be some person to abide by the same upon their hazard simply, and not with such qualities; seeing the consequence and hazard of persons that abide by writs questioned upon falsehood, if the same should be improven, is the great bulwark and security of the people against falsehood, which doth increase daily. But this point was not decided.

Fol. Dic. v. 1. p. 457. Dirleton, No 286. p. 138.

* * * Gosford reports the same case :

IN an adjudication at the instance of James Stewart against John Riddoch his goodsir, upon a decret *cognitionis causa* given against him for adjudging the lands of Aberlednoch, which were dispoised to the pursuer by the second son.