

1676. December 14.

A. against B.

No 183.

THOUGH in improbations the user of writs, questioned as false, ought to compare to abide by the same; yet a commission was granted to take the defender's declaration that he did abide by, in respect he was a person of great age.

Fol. Dic. v. 1. p. 454. Dirlston, No 403. p. 198.

1678. November 14. ALEXANDER ARBUTHNOT against LADY KNOX.

No 184.

IN Alexander Arbuthnot's cause against Knox, improving of the bond produced by her, and granted to her by her husband, betwixt her contract and marriage, when she came to abide at the truth thereof, (for Laurieston her brother resiled,) she offered to abide at it, qualified thus, that she had received it from her brother Laurieston, among whose papers it was laid up, she being only a girl 15 years old when it was done and granted. "THE LORDS ordained her to abide simply and absolutely at the truth thereof." This was no more than what they had done formerly in the case of Lady Logie, No 179. p. 6756. But where the user of a writ is an assignee or heir, the Lords sometimes permit them to abide at the verity thereof only *qualificate*.

Fol. Dic. v. 3. p. 313. Fountainball, v. 1. p. 20.

1679. January 3.

GRANT against GRANT.

No 185.

ONE offers to bide at a writ with this quality, that he found it among his father's papers, the LORDS *pro hac vice* allowed this by proving the said quality; in which, if he had failed, they would punish him as a forger, at least accessory. But in regard of the difficulty of the probation, they declared they would consider that at the advising. THE LORDS repelled these two reasons, that there were four witnesses inserted, and only three subscribing; *2do*, That the two notaries' subscriptions were with different inks, since each of them might use their own ink. THE LORDS ordained Mr Hay of Logie's relict to bide simply by a discharge, No 179. p. 6756.

Fol. Dic. v. 1. p. 455. Fountainball, MS.

1679. December 24.

COMBLINE against CORBIE.

No 186.
A party offered to abide by a writ.

MARION COMBLINE pursues reduction of an apprising led against her, and insists on this reason, that the executions of the denunciation and instrument of requisition are false, and offers to improve the same, and craves the defender

No 186.
qualificate, as
 so received
 from a mes-
 senger and
 notary.
 Found that
 he must abide
 by the writ
 as true, but
 might add
 protestation,
 which he
 might in-
 struct by pro-
 ducing the
 messenger
 and notary,
 or other evi-
 dence.

may bide thereby, with certification if he do not, that they shall be holden and reputed false and feigned. The defender offered to bide by the same, as having so received them from the notary and messenger. It was *answered*, That he ought to abide by them as true, and if he please to protest that he knew nothing else, but that he received them as believing them to be true, he might do it so at his hazard, as the Lords had determined the 12th instant, in the case, Gray of Skilbo *contra* Robertson of Kindees, but not recorded here till July 14th 1680, No 188. p. 6763. It was *replied*, That the Lords being accustomed to admit qualified abiding by the writs, as that they were found amongst a defunct's writs, which were delivered to a cedent; much more ought they to sustain qualified bidding by, on the instruments of notaries, or executions of messengers, which are ordinarily done in the absence of the employers; so that if they be abiden by simply as true, and yet be improved, the criminal Judges who do summarily proceed upon the Lords's sentence without further proof, may condemn the user abiding by, as art and part, and the protestation will avail nothing, unless it were not only permitted, but admitted by the Lords, seeing the other party will protest in the contrary; and the criminal court being peremptory, there will be no time to admit such protestations; and frequently it cannot be instructed, for none take witnesses at receiving or finding of writs; and there is a great difference of principal writs made to parties, who are presumed to be present at the making thereof, and the executions of messengers, or instruments of notaries, which are ordinarily in their absence; and the former decision was in the case of a bond granted to a creditor himself. It was *answered*, That the ancient custom of the Lords was always to improve writs quarrelled, if they were not abidden by simply as true. It is true, of late the Lords have allowed qualifications to be adjected, on the peril of the adjecter; but never do approve the same; and now have resolved to suffer only protestation for freeing the user of accession; and have allowed them to instruct the same during the process before them; wherein if they give such evidences as the matter require, the Lords will never remit the forgery to the Justices, as either done by the user, or whereunto he is accessory; but seeing forgeries are so frequent, and that it is as easy to forge a writ, as done by another, and assigned by him to the forger himself, as done by a debtor immediately to the forger, it would be very hurtful, so to encourage forgers, by suffering the user to bide by *qualificate*, and that upon his own assertion only; neither is there any difference as to this and the former case of Skilbo, where the bond in question was of a date in the infancy of the creditor.

THE LORDS ordained the defender to bide by the writ as true, and suffered him to add protestation, as to his being free of any forgery, and that he received the writs from the notary and messenger as true, and that he might astruct his protestation, by producing the notary or messenger to own the writs as true, and signed by them, or by such other evidences as he thought fit.

Fol. Dic. v. 1. p. 456. Stair, v. 2. p. 728.