

as is usual, and craved that the pursuers might abide by *sub periculo falsi*; and the pursuers having brought the messenger to the bar, who abode by the execution; the LORDS found, That in respect the messenger a public servant, had abidden by his own execution *sub periculo falsi*, the pursuers were not obliged to abide by the same.

Thereafter, 2d December 1712, the LORDS found that the defenders, albeit they had consigned the L. 40, could not be allowed a term to improve the execution, unless they propone the exception of falsehood *peremptorie*.

Fol: Dic. v. 1. p. 456. Forbes, p. 634.

1713. July 30.

JOHN BLAIR of Dunsky against ROBERT M'DOWALL of Logan.

IN a reduction *ex capite inhibitionis*, at the instance of John Blair against Logan, the defender having offered to improve the execution, the LORDS ordained the pursuer to abide by the same simply, *sub periculo falsi*, and would not suffer him to abide by with this quality, that he found the inhibition and execution among his father's writs, in a process of ranking of the Creditors of Sir Godfrey M'Culloch, but allowed him to protest, at his abiding by, upon any quality he thought fit.

Albeit it was *alleged* for the pursuer, That the inhibition was executed and registered in the year 1685, when he was an infant an year old, and never objected against in his father's lifetime, by the defender compearing in the process aforesaid, where it was produced. And, in the opinion of the Lord Stair, Instit. lib. 4. tit. 20. sect. 19. abiding by *qualificate* is allowed; which is confirmed by decisions, February 5th 1635, Ker against Forsyth, No 173. p. 6750; July 24th 1661, the Laird of Lamerton against the Earl of Leven and Kennedy, No 174. p. 6753. Nor was it ever otherwise decided, except where the producer of a writ lay under some jealousy of accession to the falsehood. This is also agreeable to law and equity; because, no man can, by his own consent, subject himself to the pain of any crime he is not guilty of, or accessory to. Law never makes the using of a false writ unwittingly, *et sine dolo*, to be a crime; yea, the Lords are so far from finding it criminal to use a false writ, without being conscious of the falsehood, that a forged assignation was sustained a sufficient title of *bona fide* possession, against repetition of what was *consumptum*, Jan. 18th 1677, Dick against Oliphant, No 11. p. 6548. Now, though this execution were false, the pursuer could not possibly have been accessory thereto, seeing it was registered as soon as he was born.

In respect it was *answered* for the defender, 1st, A qualified abiding by was never allowed to an heir or assignee, unless the cedent, or some other party concerned, offered to abide by simply, July 14th, 1680, Gray against Ro-

No 202.
poned improbation against the execution of the summons, the pursuers were not found obliged to abide by the executions *sub periculo falsi*, in respect the messenger at the bar abode by his own execution; and the defenders were not allowed a term to improve, unless they would propone the exception of falsehood *peremptorie*.

No 203.
Found in conformity with No 197. p. 6768. that a party must abide by a messenger's execution, *sub periculo falsi*, although he may protest as to the way he received it.

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.