

fore the LORDS decerned the same to make no faith, and caused cancel the same, and found no necessity that the pursuer should be urged to proceed any further to the trial of the falsehood thereof, nor that it was necessary to summon the defender to compear and declare, and give his oath if he had just cause to use the said bond, and that he would abide at the same as a true evident; but found, that his absence, and his not compearing after his citation by the principal summons of improbation, and in the continuation by the second summons, was sufficient to infer the foresaid sentence.

No 170.

Act. *Stuart.*Alt. *Absent.*Clerk, *Hay.*• *Fol. Dic. v. I. p. 457. Durie, p. 164.*1628. *June 27.*LESLEY *against* LESLEY.

No 171.

FOUND betwixt George Lesly and Janet Lesly, that we behoved to pass frae improbation of the rest of the writs produced, and that it should be lawful to the said Janet to take the same up, because we had taken a day to improve two contracts produced; and the LORDS would not let the writs passed frae be in process, albeit we took instruments upon the production thereof, and declared that we would use the same in the indirect manner of improbation.

*Kerse, MS. fol. 208.*1629. *December 4.*WINRAM *against* ANDERSON.

No 172.

JOHN WINRAM, cautioner in the contract of marriage betwixt umquhile Mr Robert Winram and Grizel Anderson, relict of umquhile Mr William Coupar, Bishop of Galloway, pursues the said Grizel for improbation of the said contract. The defender declares that she will abide to the verity of the subscription of the said contract before no witnesses, and that she and the cautioner subscribed the same before the witnesses inserted in the contract. It was contended by the pursuer, that her declaration in this kind would not be reserved, because it prejudged the pursuer of his direct form of improbation.—THE LORDS found that she might declare how she would abide the verity of the contract.

Auchinleck, MS. p. 96.

Found competent to abide by a deed under this qualification, that although not signed of the date, and before the witnesses, it was truly subscribed.

* * Durie reports the same case :

ONE Winram pursues the relict of Mr Robert Winram for improving of their contract of marriage.—THE LORDS found, That albeit the contract was subscribed by the husband, and a cautioner for him, and bore only one date, and before the same witnesses; yet that the relict, who was pursued for improbation

No 172.

by her husband's heir, and the cautioners might declare, that she would not abide by the contract as subscribed by the principal and the cautioner, at the day therein inserted, and subscribed before these witnesses; but declared she abode thereat as truly subscribed by her husband, and written all in the body with his own hand, there being no witnesses present at his subscription, and that the cautioner subscribed thereafter before these witnesses insert; whereby she *alleged*, That except the pursuer would improve the contract otherwise than because it was not subscribed at the date therein, and before these witnesses, as witnesses to both parties subscriptions, they could not improve the same.—THE LORDS found, That the party might make the foresaid declaration; and found, that except the pursuers would improve the same contract otherwise than in the date, because it was not subscribed on that day, and before these witnesses, (which they found to be no argument against the contract of marriage, whereon marriage had followed, and bairns procreated,) that it ought not to improve the same.

Act. *Stuart & Craig.*Alt. *Nicolson & Lawrie.*Clerk, *Hoy.**Durie, p. 473.*

No 173.

A third party producing a deed, being required to abide by it, *periculo*; he contended he could only be bound to abide by it as fairly acquired by him. The Court superceded determining the effect, to the assignee, of producing the deed, till the truth of it came to be tried.

1635. February 5.

KER against FORSYTH.

MR WILLIAM KER pursues one Forsyth and Forsyth of Dykes, for improving of a disposition of his wife's liferent, alleged made by him to the said Forsyth; and which being produced by Dykes, to whom Forsyth had assigned the same, for relief of some money, wherein Dykes was bound as cautioner to Forsyth's creditors for him; and the pursuer offering to improve the same, and therefore desiring that Dykes, who produced the same, should abide by the same, upon peril of the pain of falsehood; seeing the principal party, to whom it was made, has left the country, and was not present to abide thereat;—and Dykes *answering*, That he could not abide thereat, but as given to him by the principal party as a true writ, wherein he could know nothing whether it were true or false, he not being a direct party therein, and noways accessory thereto, but is a third person, who is heavily prejudged by the party, and with no reason ought to be drawn under this danger;—and the King's Advocate *contending*, That the writ being thus produced, the producer ought to advise if he will abide by it or not, so as that he will stand to the peril of it, seeing there is no other person to abide at it; and if the producer were not urged to this by the Lords, it would open a door to all falseties, the forger flying himself, and putting over the writ to a third person, whereby all punishment might be evited;—THE LORDS would give no answer at this time, whether a third person should be holden absolutely to abide at this writ or not, seeing he produced the same in judgment, where he might yet deliberate with himself if he would abide at it,