

No 199. ther his honour, life, or estate, upon a messenger's deed, at which he was not present. THE LORDS, on Rankeilor's report, found Sir George not liable to abide by the execution any farther than he had made use of it, which was only against Graham; without prejudice of their forcing him to abide by its verity, *simpliciter*, when he insisted against the rest contained in that execution.

Fol. Dic. v. 1. p. 454. Fountainball, v. 2. p. 198.

1706. February 1.

No 200.

SIR WILLIAM MAXWELL of Monreith *against* GEORGE IRVINE of Stank.

IN an action at the instance of Sir William Maxwell against Irvine of Stank, the pursuer having offered to improve a discharge produced by the defender; the LORDS ordained the defender to abide by the same *simpliciter*, and would not allow him to adject to his abiding by, this quality, that he abides by the discharge as a true writ and deed except as to the designation of the writer.

Fol. Dic. v. 1. p. 454. Forbes, p. 89.

1708. June 25.

No 201.

In a competition, between adjudgers for mails and duties, the one suffered the term for improving a discharge to be circumduced against the other. The common debtor, notwithstanding, found entitled to appear and abide by it.

WILLIAM COUPLAND of Collistoun *against* WILLIAM CARRUTHERS Chirurgion.

IN a competition for the mails and duties of Brakenwhat, betwixt William Coupland and William Carruthers adjudgers thereof, the latter craved preference upon this ground, That the debt for which Coupland had adjudged was satisfied in whole or in part, before the leading of his adjudication. Carruthers, for proving thereof, recovered by a diligence a discharge of the debt, which Coupland offered to improve, and Carruthers was ordained to abide by *sub periculo falsi*; after Carruthers had suffered the term to be circumduced against him, for not abiding by, the LORDS admitted James Carlyle of Brakenwhat compearing for his interest, and proponing payment upon the discharge, to abide by the verity thereof, and ordained Coupland to consign his L. 40, in respect no collusion betwixt Carruthers and Coupland could prejudice or debar James Carlyle from extinguishing his creditor's debt, and abiding by the verity of the instruction thereof; albeit it was *alleged* for Coupland, That in all improbations the user of the writ must abide by it, June 16. 1675, Lady Logie *contra* Meldrum, No 179. p. 6756., since otherwise the effect of an improbation might easily be elided by shifting suspected writs from hand to hand; besides, James Carlyle is an insolvent person.

Fol. Dic. v. 1. p. 455. Forbes, p. 255.

1712. November 21.

No 202.

Defenders in an action having pro-

COLIN MACKENZIE of Rosend *against* The INHABITANTS of BURNTISLAND.

IN the action of abstracted multures at the instance of Colin Mackenzie and his authors, against the Inhabitants of Burntisland, the defenders having proponed improbation, against the execution of the summons, and consigned L. 40,

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-

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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.