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, *Hay.*
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 The Court superceded determining the effect, to the assignee, of producing the deed, till the truth of it came to be tried.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,

and use it or not, seeing it was yet entire to him, either to use it or pass from it; but superceded to give answer thereto while the trial of the truth of the writ were deduced; according whereto, as they found by the consideration of the course of the process, and trial taken therein; and as any thing should reflect upon this party, they would give answer either to tie him thereto *simpliciter* or not.—And it being further *alleged* by the defender, That the pursuer could never be heard to improve the disposition called for, and now produced; but absolvitor *simpliciter* ought to be granted from this improbation, because the pursuer has sincesyne ratified the said disposition; which, being of consent admitted to probation, the defender produced the said ratification, for improving thereof; and the pursuer offering to improve the same as false, and so alleging the exception could not be found proved; wherein it being contested betwixt the parties, if the pursuer should be holden also to improve the principal disposition called for, or if it should suffice in law, and that he had no necessity to improve any more but the ratification produced, to verify the exception, as the pursuer alleged; who *replied*, That seeing the exception elided the whole cause *in toto*, and that the probation thereof, as it would produce absolvitor *simpliciter et in toto* from the pursuit, so the succumbing therein should produce condemnator, without any further probation of the libel; for *exceptio affirmat libellum*, at least *præsumptive*; and it is absurd that there can be any probation of a libel totally elided by the exception; for the exception and the libel cannot admit probation to go upon both;——THE LORDS nevertheless found, That it was incumbent to the pursuer to improve both the disposition and the ratification; and that albeit he should improve the ratification, yet he would not be freed from improving the disposition called for; so that albeit the exception elided the whole pursuit, yet being in an improbation, where the exception was proponed against the party not materially *in causa*, but while he could not improve the writ; it was found, that the proponing thereof did not exeem the pursuer from the burden, to improve the writ libelled; therefore they assigned a term to improve both; but declared that they would consider by the trial deduced, if the improving of the ratification should suffice to take away the writ ratified or not; and because the pursuer desired a short day to be assigned to him to improve, against which day Forsyth, who was the party principally called, and to whom the disposition libelled was alleged to be made, was alleged to be out of the country, and so could not be conveniently summoned to that day; therefore he desired that the LORDS should find no necessity to cite him to that diet, as use is in other diets, where defenders are absent, and which, in this process, he alleged he needed not to do, seeing he being twice cited before, and not compearing to abide at the writ, nor to sustain the trial, *quoad eum*, the writ ought to be deemed to make no faith; which ought to liberate the pursuer of any further warning of him to any subsequent diet of the process; for these diets are not deduced, nor the trial taken against him, but against this third party compearing, and who uses and produces the writ; notwithstanding whereof the

No 173.

No 173. LORDS found, that tney would not find the writ to make no faith against the principal party absent, seeing it was produced by another, and that trial was to be taken upon the verity of the writ; therefore they ordained him to be warned to all the diets, but upon citation of 15 days only, and not as against one out of the country upon 60 days.

Act. *Advocatus.* Alt. *Nicolson & Gilmor.* Clerk, *Scot.*

Fol. Dic. v. 1. *p.* 456. *Durie, p.* 751.

*** Spottiswood reports the same case:

An assignee bound only to abide by a deed, as truly delivered to him by the cedent, without his accession to any fraud.

The exception of nullities in a deed, and improbation, are inconsistent. The party must chuse the one or the other.

MR WILLIAM KER intented an action of improbation against William Forsyth of Dykes, of an alleged disposition of the pursuer's wife's liferent made by him to James Forsyth, whereunto the defender was made assignee by James; wherein it was *alleged* that the pursuer could never be heard to improve the said disposition, because, by a posterior ratification he had approved it. This ratification being produced, the pursuer offered to improve it likewise; but first he desired that the defender, William Forsyth, might be holden to abide by it upon his peril.——THE LORDS, in regard he was but assignee, would not astrict him further, but only to abide by it as an evident truly delivered to him by his cedent; although the advocate urged mainly for the ratification produced by himself, that he should abide by it upon all peril.—Next *alleged*, That if he should improve the ratification, the disposition should likewise be decerned to make no faith; because he having taken the disposition to improve, the defender had taken him away by his exception, which being a peremptor, freed him of the probation.——THE LORDS found that he should improve both; but declared that if he should improve the ratification, and fail in improving of the disposition, they would take it into their consideration what it should work.

It was further *alleged* in that cause, That the pursuer having a nullity to propone against the writs offered to be improven, it should be reserved to him *per expressum* if he should fail in the improbation.—*Answered*, It could not, because once having taken in hand to improve them, by our practick he could never oppone either nullity or any other exception against them, improbation being *ultima exceptionum*.——THE LORDS would not reserve it to him; but declared they would suffer him yet to pass from his improbation if he pleased, and take him to his nullity; in regard that although he had taken the writs to improve, yet there was no term assigned to him, before which it was thought there was no litiscontestation made in the improbation.

Next *alleged* by the pursuer, Because James Forsyth the cedent was out of the country, whom he had as well summoned as the assignee, and that he compeared not to abide by the disposition, that it might be declared to make no faith *quoad eum*, and that he might go on in his process against the assignee defender, without any necessity to summon the cedent to the rest of the diets of the pro-

cess, since he was summoned already by the first and second summons.——THE LORDS thought that in formality of process the cedent behoved to be cited to all the diets, but not upon 60 days, having been once cited upon so many already, but only upon 15 days at every diet. No 173.

Spottiswood, (IMPROBATION.) *p.* 170.

1661. *July* 24.

LAIRD of LAMERTON *against* EARL of LEVEN and ALEXANDER KENNEDY.

No 174.
In an improbation of a writ, the user was allowed to abide by it, *qualificate*, viz. That he used it as produced by another, which was in his favour, and he knew nothing of the forgery of it.

THE Laird of Lamerton having wakened an improbation against Alexander Kennedy and the Earl of Leven, for improving of several bonds exhibited by the said Alexander Kennedy, and made use of by the Earl of Leven, Lamerton craved that the Earl of Leven might bide by the bonds, seeing he made use thereof. The Earl offered to abide by them *qualificate*, viz. that he made use of them as believing they were true bonds, and that he was not accessory to any falsehood or forgery thereof.—It was *alleged*, He ought to abide by them simply; for such qualities were contrary to the act of Parliament, declaring users of false writs, and abiders by them, to be accounted as accessory to them. Many of the LORDS were of opinion that he should abide by them simply; but that he might protest under the foresaid quality, in respect it was not proper to the Lords to consider the consequence of his biding by the bonds, which was criminal, yet *alterius fori*; yet it was carried that he might bide by them *qualificate*; and therefore he was ordained to give it in writing, that the Lords may consider how far they will allow it.

1661. *July* 26.—THE Laird of Lamerton, upon the improbation mentioned 24th July, did then desire that Alexander Kennedy, producer of the six bonds quarrelled, might be examined *in præsentia*, and his person sequestrated and secured, and warrant granted to examine new witnesses.

THE LORDS superceded to give answer till they considered the process; and now having considered the same, and finding that the direct manner of improbation was not competent, because the witnesses were dead, and that the pursuer had insisted in the indirect manner, and had obtained warrant for inspection of the depositions taken in the cause, both of Alexander Kennedy himself, and of the witnesses then adduced, and had given in articles of improbation, and the defenders articles of approbation, replies, and duplies; both which being considered by the LORDS, they found grounds of suspicion, and therefore granted all the desires of the supplication; and ordained Alexander Kennedy to be kept close prisoner in the tolbooth till he were re-examined, and witnesses *hinc inde*, to be examined by some of the Lords in the vacancy, upon what either parties should desire, which seemed pertinent to the said Lords examinators.

Fol. Dic. v. 1. *p.* 456. *Stair, v.* 1. *p.* 54. & 58.