1684. *March.* Nicol *against* Newlands.

No 193.

In an action of improbation at the instance of Nicol *against* Newlands, of a bond of cautionry in a suspension, the Lords allowed the defender to abide at the verity of the bond of cautionry, that he received it from the clerk of the bills, whose duty it was to receive such bonds of cautionry.

Fol. Dic. v. 1. *p.* 456. *Sir P. Home, MS. v.* 1. *No* 596.

1687. *February.* Laird of Waterton *against* Robert Innes.

No 194.

The Lords refused to allow a qualified abiding by; but found, That the defender might protest for the quality, and prove the same.

Harcarse, (Improbation and Reduction.) *No* 570. *p.* 158.

1692. *November* 12. Young *against* Hays.

No 195.
Found competent to abide by, with the quality that the party had received the deed blank in the creditor's name for onerous causes.

When one refuses to abide by, nothing can be done except to declare the deed false, on account of the presumptive evidence; but where one has abidden by, he cannot resile, or qualify.

The Lords, upon Alexander Young, merchant in Edinburgh, his petition against Colonel Hay's daughters, found he might object that quality to his abiding by the truth of the bond, which they offered to improve as false, that he received it blank in the name, for onerous causes, but saw it it not subscribed; and the Lords, at advising the articles of falsehood, would consider if the quality was pertinent to assoilzie him *a pœna falsi in toto*, or *pro tanto*; and that *hoc loco* they would declare nothing; for however an assignee may be permitted to abide *qualificate*, it was not so reasonable, that the party to whom the bond is granted should have the same allowance.—But this case of a blank-bond differs, being originally granted to a third party.

1695. *November* 15.—In a charge at Alexander Young merchant in Edinburgh, his instance, against Mrs Christian and Elizabeth Hays, on a bond for L. 1200 Scots, granted in 1667, whereof they proponed improbation, the instrumentary witnesses, in their oaths, wavering much anent the verity of their subscriptions, and the Lords considering how far Alexander, the producer and user, had abidden by the verity thereof, they found he had first abidden by it simply, as a true and real deed *sub pœna falsi*, but afterwards he had adjected a quality and protestation that he had received it from one Robert Fraser, for most onerous causes, blank in the creditor's name, and thought himself *in bona fide* to fill up his own name in the same, and craved he might be allowed to abide at its verity only in these terms; and the Lords had permitted him to adject any pertinent quality, he always proving the same; so the question arose, whether he ought to get a term to prove the manner how he came by the said bond, or if he could be forced to abide simply at it, so as if it should be improved, he behoved to be remitted to the Criminal Court, either as a forger or user. For the Lords

thought it of dangerous consequence to admit such qualified abidings at writs quarrelled for falsehood; for they would never fail either to name a dead man, or one out of the kingdom, if that were sufficient to liberate them from the hazard of punishment; and, on the other hand, some thought his case equivalent to an assignee's, whom it were hard to tie simply to abide at the verity of the paper, if he could not produce his cedent. THE LORDS gave him some time to deliberate, but put him under caution of 5000 merks to present himself at the said diet, otherwise to go to prison till it were tried.

No 195.

Where one refuses to abide at a writ quarrelled, all that can be done is to declare it false by presumptive falsehood for not abiding by it; but when the user has once abidden by it judicially, he ought not to be allowed to resile, or adject qualities thereto; and, in that case, if the articles inferring the falsehood be found proved, then not only the writ is declared false, but the user remitted to be criminally punished according to the quality of his guilt. See Durie, 5th February 1635, Ker, No 173. p. 6750.

1695. *November* 19.—The cause mentioned *supra*, 15th current, of Young against Hays being called, and the pursuer, after deliberating, refusing to abide simply by the writ quarrelled, the LORDS found it improbative, and did improve it, without descending to advise the testimonies, in regard of his not abiding by the same; but, least he should afterwards be pursued as user of such a writ, the LORDS adjected, by a special vote, this quality, that they found no ground to pursue him for his using before the Criminal Court, and therefore refused to remit him to the same. THE LORDS did not resolve to make this a constant rule; but, in regard of his apparent innocence, they adjected this *salvo* to secure him. See an instance of a qualified remit to the Justice Court, in Durie, 14th July 1638, Dunbar, *voce* JURISDICTION. See also Stair, 24th July 1661, Lamberton, No 174. p. 6753.

Fol. Dic. v. 1. p. 457. *Fountainhall, v. 1. p.* 518. & 678.

1694. *November* 30.

WALLACE *against* The VISCOUNT of KINGSTON, and His TENANTS.

No 196.

IT came to be debated, how far he was bound to abide at the verity of the intimation made to the tenants, which was offered to be improved as false, and which he was content to abide at as truly delivered to him by Mr Robert Swinton the notary, who was content to enact himself to abide by it *simpliciter*; in regard the Lords had varied in this, sometimes allowing a qualified abiding to heirs who found it in their predecessor's charter chest, and to assignees, that it was really so delivered to them by the cedent; at other times obliging them to abide at it without any quality, in regard of the danger of the preparative, that one, to shun the hazard, will assign it to a person of no fame nor substance; therefore they took here a middle course, seeing the notary abode at it *simpliciter*, (as messengers do at executions) and superseded to declare how far he