

No 20.

be of that force and consequence to make the whole assignation to fall, seeing the date was not essential, neither was the defender prejudged by the date, the same being of any date before it was intimated; likeas, he was content to abide at the same, as truly done and perfected before the said intimation, which ought to be enough, if he use the same of any date preceding the intimation, seeing the defender had no prejudice, if it be of a date anterior to the intimation, as said is; the LORDS found this allegiance of improbation in the date to be relevant, notwithstanding of the answer, and notwithstanding that the pursuer *alleged*, That he might fill up any date therein as he pleased, before the intimation; which the LORDS found could not be changed, being once used and produced of a filled up date by the pursuer in judgment, and being intimated; and so found, that if the defender improved the same in the date, albeit the defender had no prejudice by the said date, yet that it was sufficient to make the whole assignation to fall, seeing of the law, what is found not to be truly done of that date, as it bears and as it is used, must be presumed not to be done at all.

Act. Burnet major.

Alt. Burnet minor.

Clerk, Gibson.

Nam quando non est orta quæstio inter partes, notarius emendare potest ea quæ sunt sui officii per se, ut dies, nomina testium; sed si orta sit quæstio, non potest, nisi parte adversa ad hoc citata; ubi autem redarguitur instrumentum falsum post intensionem litis, nec per se, nec per judicem, nec in iis quæ sunt sui officii, nec in aliis corrigere potest. Lanfr. de Fid. Instr.

*Fol. Dic. v. 2. p. 214. Durie, p. 199.*

\* \* \* Kerse reports this case:

IN improbations *in data*, the Lords will give the party user place to abide by the writ of the other date *in die, sed non in mense*.

*Kerse, MS. fol. 207.*

1626. July 27.

M'CULLOCH against M'CULLOCH.

No 21.

A BRIEF whereupon a service was deduced found null, because it was blotted and vitiated in the date of execution, and the pursuer was not allowed to mend the same and abide by it, as is usual in other executions, in respect of the act 113th, Parl. 1429; which act was found to extend to the date of the execution, as well as to the date of the brief.

*Fol. Dic. v. 2. p. 214. Durie.*

\* \* \* This case is No 11. p. 6856. *voce* INDUGIÆ LEGALIS.