

No 224. his judge, *ut pro se ferat sententiam, pro quo vide, L. 2. § 2. D. De conditione obturpem causam.*—See PROCESS. PROOF.

Act. Nicolson & Morvat.

Alt. Stuart & Craig.

Clerk, Gibson.

Fol. Dic. v. I. p. 458. Durie, p. 641.

1674. January 7.

JANET M'MATH, LADY GRANGE, *against* LAURENCE OLIPHANT.

No 225.

Found that absolvitor pronounced as to the direct manner of improbation, hinders not to improve by the indirect.

IN an improbation pursued at the Lady's instance, as having right by progress to a bond granted to Sir Patrick Douglas of Kilspindie, whereupon she had used arrestment in the hands of Thomas Tyrie of Drumkilbo, who was debtor to Kilspindie, in the sum of seven thousand merks, against Sir Lawrence Oliphant of Gask, who had right by translation to the foresaid bond, flowing from Douglas of Lumsden, who was assignee, constituted by Kilspindie, for improving the said assignation, as false and feigned, it was *alleged* for the defender, That there could be no improbation of that assignation, because the only pretext being that it was false of the date, it was *res hactenus judicata in foro contentiosissimo*, in so far as by decret of the Lords, in *anno* 1656, it was found, That the assignation bearing date in April 1638, albeit it did relate to a decret of registration of the bond in July thereafter, whereupon there were letters of horning raised against the heir of Tyrie of Drumkilbo, yet that was not sufficient to make the assignation false *in toto*, but only *quoad datam*, which might have been done by an error; and the defender's condescending that it was truly dated in August thereafter, that same year of God, and that they did abide at the verity of the bond as a true deed by the foresaid decret, the LORDS did assoilzie from the improbation, upon that ground that it was false in the date, and did prefer the assignee to the arrester, in respect that the assignation was intimated by raising and executing letters of horning therein narrated; so that it being evident that the falsehood of the date was only *per errorem*, and not to prejudge them who had done no diligence until ten years thereafter; and by our law, a false date doth not make the writ questioned null and void, as being false *in toto*, unless it be alleged that it was *error notorius*, and done of design to prejudge a party having interest. It was *replied*, That the improbation ought to be sustained notwithstanding, because there being nothing formerly produced before the LORDS, when they gave their decret and assoilzied from the improbation, but an extract of the assignation, bearing date the 17th of April 1636, which certainly must be false, seeing it relates to a decret of registration obtained in July thereafter; likeas William Dalzell, writer of the assignation, being examined upon oath, did depone, That if ever he did write any assignation, it was in *anno* 1648 or 1649; and the same being then blank, it hath been filled up in the date, and made to have been written in April 1638, of purpose to

make it prior to the pursuer's arrestment, which was executed before any of these years; that Dalzell deponed he did write the same; and farther, there being a submission betwixt Kilspindie and Tyrie, the decret following thereupon being long after the assignation, it was evidently clear, by the depositions of the arbiters, that the assignation made to Lumsden was never a delivered evident, but still retained by Kilspindie, who did only make use of Lumsden's name on trust; and the assignation was found in the custody of one Douglas, who was servant to Kilspindie, after his death. It was *duplied* for the defender, That the principal assignation now produced by the pursuer is vitiated in the date, being written of late by another hand and new write, and differs altogether from Dalzell's deposition, which is false in itself, bearing that he never did write any assignation but in the year 1648 or 1649, whereas the extract out of the register is in the year 1647; and for the depositions of the arbiters, they bear only that Kilspindie did affirm to them that the assignation was in trust, which cannot take away the defender's right flowing from Lumsden, for most just and onerous cause; so that now after the space of 24 years, and a decret absolvitor obtained, when the direct manner of improbation was competent, the writer and witnesses being then alive, and now dead; upon weak presumptions and indirect articles, to find the said assignation false and feigned against the defenders, who were singular successors and could know nothing of the contrivance thereof, were against law and practice; specially seeing that the principal assignation was a true deed, the defenders, as having right thereto by translation, will undoubtedly prevail against the pursuer, whose arrestment is not until ten years thereafter. THE LORDS, after much debate amongst themselves if they should first ordain the parties to debate as to their preference, supposing the principal assignation now produced to be a true deed, or should first proceed to decide in the improbation, by plurality of votes they ordained the improbation to be first decided; and thereafter having advised the whole debate, *pro et con*, with the depositions of the notary and arbiters and the decret arbitral itself, they did improve the assignation as false and feigned *in toto*, but declared the defenders free thereof, being singular successors, and who might be ignorant; which seems hard upon two respects; *first*, That the registrate assignation did differ in substance from the principal produced, the one bearing for debts and sums of money, and the other for relief of cautioners, so that they were different of their own nature; as likewise finding by the decret, that the defenders were altogether innocent, it ought first to have been decided, supposing the assignation produced to be a true deed, and thereby the defenders would have been preferred; but it was decided otherwise, reserving to the parties to be heard upon the preference.

*Fol. Dic. v. 1. p. 458. Gosford, No 661. p. 389.*