

1674. *Januaey 7.*M'MATH *against* OLIPHANT.

JANET M'MATH in the year 1647, did arrest in the hands of Tyrie of Drumkilbo, the sum of 7000 merks addebted by him to Douglas of Kilspindie, her debtor, and *in anno* 1656, she *insisted* in a process for making forthcoming, wherein compearance was made for Sir Lawrence Oliphant of Gask, who craved preference to the arrester, because Kilspindie her debtor was denuded of this sum by an assignation made by him to Douglass of Lumsden *in anno* 1638, nine years before the arrestment; to which assignation Sir Lawrence hath right by progress, and upon which the estate of Drumkilbo hath been apprised, and which assignation was intimated by two hornings produced at the instance of Lumsden the assignee against Drumkilbo's cautioners and his heir. It was *answered* for the said Janet M'Math arrester, That the foresaid assignation was evidently false in the date, in so far as it bears date the 17th day of April 1638; and yet it doth not only assign Drumkilbo's bond, but doth assign a decret of registration thereof, by way of action against Drumkilbo's heir; which decret is of the date the 12th of July 1638, so that it is most evident that the assignation was subscribed, not upon the 17th day of April 1638, but after the 12th day of July 1638, before which the decret of registration assigned was not in being; so that the assignation being false in the date, is false in all, the date being amongst the substantials of the writ, especially in cases of competition of rights upon their priority or posteriority; and it having been answered, that the inserting of April hath been a mistake and error, which cannot be otherwise imagined, that any forger could be so foolish as to insert a contradiction as to the date in the body of the writ itself, if it had not been by mistake that the writer hath inserted April for August, and therefore the month was holden as delete; and, seeing the year remained to be 1638, it was long before the arrestment *in anno* 1647, especially seeing the verity of the assignation was adminiculated by two hornings raised at the assignee's instance thereupon. Upon which debate *anno* 1656, Sir Lawrence Oliphant the assignee was preferred to the arrester, "reserving to her action of improbation of the assignation as accords;" whereupon she insisted in an improbation, and *in anno* 1658, did cite William Dalzell notary, writer of the assignation, and Alexander Douglass a witness therein; Dalzell compeared and made faith, but being the end of the session, did not depone, but falling sick in the time of the vacance, he did declare upon his oath before ministers, that he was never writer to an assignation by Kilspindie to Lumsden, but only that he drew the draught of an assignation *in anno* 1648 or 1649, and left the date blank, and that the assignation bearing date at Aberlady *in anno* 1638, he was not for many years after come to Lothian, or had ever drawn a writ there. This improbation being insisted on before the Lords, the assignee did always found upon the decret of preference, and the adminiculation of the date by the two hornings, and now lately Janet

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A false assignation inconsistent with its date improbated; but the singular successor, the user, not found accessory to the forgery.

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Mr Math having found an assignation by Kilspindie to Lumsden, dated the 17th day of April 1638, amongst the writs of Alexander Douglass writer, who was ordinary for Kilspindie, it was *alleged* for her, That the pretence of error in the date and adminiculation thereof by the two hornings was clearly taken off, and the forgery and contrivance were manifest upon these grounds; *1mo*, There was truly an assignation by Kilspindie to Lumsden in April 1638, which is now produced, but the same was never delivered to Lumsden the assignee, as appears by a decree-arbitral betwixt the cedent Kispindie and Drumkilbo, bearing expressly, That Kilspindie had subscribed an assignation to Lumsden in trust to his own behoof, and had retained the same in his own hand; and Mr Robert Trotter, arbiter for Kilspindie, who was Lumsden's ordinary, pronounceth a decree-arbitral, finding Drumkilbo only debtor to Kilspindie in L. 3000, so that the true assignation never having been delivered to Lumsden after Janet Mr Math had arrested *in anno* 1647, the hornings being found at the register at the instance of Lumsden, upon an assignation of the date the 17th of April 1638, to exclude the arrestment there is made up this false assignation, and that the falsehood might not appear by the subscriptions, it was put in the register in October 1647, without any necessity for registration of the assignation, and it behoved to be made of the date the 17th day of April 1638, otherwise it could neither be adminiculated or intimated by the said two hornings, and so could not be preferred to the posterior arrestment; and now by comparing it with the true assignation now produced, it appears palpably forged, for the true assignation is given to Lumsden for relief of cautioneries particularly expressed, but the forged one, albeit of the same date, is simply for sums of money; and albeit both bear one place and one day, yet the writers, witnesses, and tenors are divers, so that one of the two must be false, and that which is now produced is a principal assignation unquestionable, whereas that quarrelled is but an extract, whereof the principal cannot be found; and albeit certification was not granted against it for not production, because the registers were taken away by the English, yet there is no ground to compare or prefer it to the principal assignation now produced; likeas, Mr Robert Trotter hath deponed, that he heard Lumsden say that he was troubled by Kilspindie in making use of his name in assignations; *2do*, It is clear by the hornings that they are founded upon the principal assignation for relief, and do proceed upon an assignation to the principal bond, not bearing an assignation to the decret of registration, albeit the assignation to the bond carried that decret followin upon the bond in consequence, and therefore the assignee got horning against the cautioners upon the bond registered summarily, and upon the posterior decree of registration of the bond against the principal's heir; likeas the writer to the signet hath marked his name upon the back of the true assignation produced, and the horning bears, the assignation to be produced by Kilspindie the cedent, and not by Lumsden the assignee; and therefore the date being unquestionably untrue, and no true date being instructed or adminiculated be-

fore the arrestment, and so pregnant evidences of the contrivance, the said registered assignation ought to be simply improved. It was *answered*, That it was of dangerous consequence to improve a writ by indirect articles after so long a time, and passing through so many singular successors' hands by infestments acquired *bona fide* for sums of money, especially seeing that the direct manner hath of purpose been forborne till the writer and witnesses were dead; and neither Dalzell the writer, nor Douglas the witness were put to depone judicially, but Dalzell being a necessitous person, and weak through his sickness, was practised to declare which in this was palpably false, that he declares the draught drawn by him was in 1648 or 1649, and yet it is registered in October 1637; and it might well consist that Kilspindie gave an assignation to Lumsden in April 1638 for relief, and thereafter another simple assignation in August 1638. It was *replied* for the arrester, That her interest was not till the year 1647, that she had still insisted thereafter, that Douglas the witness did not appear, that Dalzell the writer appeared in the close of the session, and died before the next session; that though he had forgot the year he drew the draught, as to the immediate next year, yet he is positive that he came not to Lothian till 1641; and albeit the assignation be registered in October 1647, yet it is known to be easy to get a writ registered with an antedate, the books not being filled up, so that what was presented in January or February 1648, might have been gotten registered as in October 1647 years.

Much was here debated as to the error and falsehood of dates, whether they can be made up by the witnesses inserted, or other adminicles, or if a wrong date vitiates the writ when it is not error *nociuus*; but the LORDS determined the case in question as it stands, and found that this assignation quarrelled, bearing, "an untrue and inconsistent date with its own tenor," and not being adminiculated by the hornings produced, or otherwise to have been subscribed of a true date prior to the arrestment, but many adminicles and evidences to the contrary, that it was made up *ex post facto*, therefore the LORDS did improve the same, but found not the singular successors users thereof accessory to the forgery.

Fol. Dic. v. 2. p. 267. Stair, v. 2. p. 247.

*** Gosford's report of this case is No 225. p. 6788. *voce* IMPROBATION.

1675. June 23.

JANET TENNANT and LINDSAY her Husband *against* JOHN TENNANT.

IN an improbation of a discharge granted by James Lindsay, as husband to Janet Tennant, of the said Janet's fifth part of the executry of Christian Tennant, to whom John Tennant was tutor; which discharge was offered to be improved by the witnesses inserted, and by ocular inspection, the witnesses names and

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One of two witnesses of a discharge was uncertain whether he had subscrib-