

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

No 567.

No 568.

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

No 568.
ed or not.
The other
witness posi-
tively denied.
There being
another man
of the same
and designa-
tion, the writ
was not found
false, because
it was not
shewn the
subscription
was not that
of this other
man.

their subscriptions being all of one hand-writing ; after examination of the witnesses, the LORDS having ordained James Lindsay to depone anent the verity of the said discharge ; and he having declared, that he did truly subscribe a discharge, but that it was of a particular sum, and not of the whole executry belonged to his wife, and that any general discharge was only granted by him in trust, and received and cancelled before the death of the tutor whom this defender represents ; and the witnesses' depositions being considered, whereof one was John Ormiston, who was son-in-law to the pursuer, who declared that he could not say whether the hand-writing was his own or not, but was positive that he did never see James Lindsay subscribe the same ; as likewise, another witness named John Smith, who was designed servitor to Stephen Rob, who did depone that he was servant to the said Stephen, but that he did not subscribe nor was it his hand-writing ; and for instructing the verity of the discharge, it being *alleged*, That Ormiston had produced the same in a process at his instance judicially as a ground of pursuit, which was proved by the Bailie's deposition and the clerk ; as likewise, it being *alleged* and proved, That there was another John Smith, who was servant to the said Stephen Rob at that time ; the LORDS having considered the allegiances and probation *hinc inde*, did assoilzie from the improbation, being moved with these reasons ; that the defender was a minor, and it could not be imagined that he, or any other for him, could forge a discharge for so inconsiderable a sum as the fifth part of an executry which was never liquidate ; and that the said John Smith, who was the only denying witness, might not have been the person who subscribed, there having been another proved to be of that name and designation, and no other hand-writing produced to shew that the subscription could not be his, which was found necessary in a former practick, Sir William Stewart of Kirkhill against Kettleston, No 564. p. 12654. ; as likewise, that it was proved *per membra curiæ*, that this was the discharge produced in process after the death of the tutor ; and thereupon assoilzied from the pursuit.

Fol. Dic. v. 2. p. 265. Gosford, MS. No 761. p. 761.

1678. February 20. JO. STORACH *against* Mr THOMAS CHEYNE.

No 569.

THE LORDS sustained this reason of reduction of a bond to be proved by the witnesses inserted, that they did not hear the pursuer give mandate to the notary to subscribe for the party.

Fol. Dic. v. 2. p. 264. Fountainhall, MS.