

defenders, being singular successors, did *bona fide* transact and pay real money for the right of translation; and it is hard, after thirty-eight years, all parties being dead, to annul such a right upon a wrong date, it being only *lucrum cessans* to this pursuer, who is opulent. As to the trust was in Lumsdean's person, it is incompatible here. Let them raise a declarator. *Et exceptio falsi* being *omnium ultima*, even there it could not be received. As to the writer's declaration, no regard; *1mo*, Because extrajudicial. *2do*, False; he affirming he wrote it in 1648, and yet it is registrate in 1647. *3tio*, The eliciting that declaration was a practice unwarrantable and indirect.—See the reply in the informations.

On this debate, the Lords, before answer, allowed the parties to adduce such evidences, adminicles, and testimonies, as they could, either by writ or witnesses, to instruct what was the cause of the assignation quarrelled, granted to Douglas of Lumsdean; whether it was for onerous causes and relief of cautionary, wherein Lumsdean was either creditor to, or cautioner for, Kilspindy, the cedent; and if the debt and cautionary was satisfied, and how, and by whom. This was to find out if it was only a trust in Lumsdean's person, for then the arrester was clearly preferable. In obedience, both parties produced sundry writs and documents; which, being advised, the Lords, upon the probability of the trust and behoof, and the antedating, improved the assignation.

Advocates' MS. No. 431, folio 229.

1677, 18th January.—IN the Lady Grange Dick and Sir James Douglas's case against Oliphant of Gask, mentioned *supra*, in November, 1673, No. 431, about Gask's false assignation; they found him liable *in quantum lucratus et locupletior factus erat* by it; though he had a true assignation *super eodem subjecto*; *quia nemo debet ex proprio dolo lucrari*: for his true assignation having fallen by, another was forged, and thereafter the true one found; *et non est magna falsitas quæ habet primordium veritatis*.

Advocates' MS. No. 534, folio 273.

1673. December. ANENT ATTESTERS OF CAUTIONERS.

IN a certain action, between _____ and _____, the Lords found both the principal suspender and the cautioner behoved to be discussed before the attester. And that the attester of a cautioner in a suspension attests only his solvency, sufficiency, and responsality; but not his age, in case he be minor, and revoke his attestation; unless the creditor will offer him to prove, that the attester knew the cautioner was minor, for then he will be liable: and the creditor needs not qualify he *dolose* knew it, since *animus colligitur ex silentio*. *Vide supra*, No. 181. 22d June, 1671.

Advocates' MS. No. 432, folio 230.