

conditioned by paction. As for the suspender's desire to have the suspension, or ground of it, remitted to the bailies of Edinburgh, since the cause coincident and of equivalent nature, is depending before them, it is impertinent; since the *connexitas et continentia causæ* ought rather to attract that of the bailies hither, as the nobler Court, than the action before the bailies should draw this to them.—See Stair's Form of Process, p. —. and the laws there cited on the margin.* Dury, 25th November, 1624, Hamilton *against* Mathison.

There was also another reason of suspension insisted on, viz. that, by the contract-matrimonial, Halbert, the charger, was mutually obliged to ware and employ L.1000 Scots, on sufficient security and annualrent to the wife and children; which reciprocal obligation not being performed, he was not tied till that were done.

ANSWERED,—That can never stop execution for payment of the tocher; no execution being ordained to pass at the suspender's instance, and the wife and children concerned not craving it; and it being more their interest that it be employed in merchandizing, by which it will afford double the annualrent. And, therefore, I think that destination should be dispensed with where the party uses trade.

See the information of the cause *apud me*. *Vide supra*, No. 180, in June, 1671; and 321. [Laird of Balnamoon *against* M^rIntosh,] in 9th February, 1672.

Advocates' MS. No. 430, folio 228.

1673 and 1677. LADY GRANGE and WILLIAM DICK, her son, *against* SIR LAURENCE OLIPHANT of Gask.

1673, *November*.—IN 1618, Sir William Tyrie of Drumkilbo, and his cautioners, granted bond to Sir Patrick Douglas of Kilspindy for 7000 merks. Kilspindy assigns this bond to Douglas of Lumsdean in 1638; who thereupon obtains a decret of registration *against* Sir William Tyrie's heir, and charges him, and such of the cautioners as were living, with horning. This assignation having been apparently to Kilspindy's own behoof, was afterwards given up to him, and cancelled. Kilspindy, in 1642, becomes bound, as cautioner for John Rind, to William Dick of Grange and Janet Macmath, his spouse, the longest liver, in 10,000 merks. Janet, in 1647, arrests the 7000 merks, due by Tyrie to Kilspindy. For evicting and eluding of which arrestment, this conveyance was thought on,—to make a new assignation, by Kilspindy to Douglas of Lumsdean, of the bond, in place of the former cancelled one, and of the same individual date it bore, viz. the 17th of April, 1638; that so, the hornings on the former assignation answering to this, it might pass for the first intimated by the charges of horning, and be preferable to the arrestment; and, for making it more obscure, Lumsdean, the assignee, transfers it to Gask.

The Lady Grange insisting *against* Tyrie for making forthcoming, he suspended, on double pointing between the assignee and arrester, in which she proponed an exception of falsehood *against* the assignation. But the Lords then, in 1658, preferred Gask; reserving to her, action of improbation.

* *Videlicet* that *judiciorum contiguïtas, connexitas, et continentia, non est dividenda*; l. 10. C. de *Judiciis*; l. 13. C. de *Rei Vindictione*. *Hippolitus de Marsiliis singulari*, 654.

Accordingly, in 1667, she raises improbation on thir grounds, (the direct way being extinct, by the notary and witnesses their decease,) *Imo*, That the assignation was false evidently in the date, because it narrates, deduces, and relates to a decret of registration near four months after its own date, which is the 17th of April, 1638, and the decret it mentions is not till the 24th of July, 1638. Now, of the law, *falsum in data corrumpit in totum*, and can make no faith, the date being *de substantialibus instrumenti*; and was so decided, in Dury, 29th March, 1626, Keith and Robertson, and the citations there: see Craig, Feud. p. 156; Dury, 10th February, 1636, Edmiston; and lately found, in the case of Shaw and Calderwood, on the 11th February, 1669: see also *supra*, No. 375. in November, 1672, George Hoome and Brown. It is the opinion of all lawyers, that *falsum*, even in *capitulo disparatis*, vitiates and derogates from the faith of the whole writ; just as falsehood in one point of a witness's depositions, convells, redargues, and enervates the whole; and much more in a false date, which indivisibly affects and respects *totum instrumentum*; and, for this end, law ordains the date to be inserted, for a mean of improbation: and if it were not, it were an inlet, foundation, and encouragement of all forgeries, if men were allowed to condescend on other dates than it bears, especially in cases of competition, though, *quoad substantiam actus*, the other date were fully astructed: See more of this in the informations. *2do*, William Dalzeell, the notary, upon his death-bed, before Mr Robert Laury, minister, and Bailie M'Morran, declared, he wrote that assignation about 1648, which is after the arrestment, and it was then blank in the date and name; which proves, it was patched up to defraud and evacuate the arrestment: which most serious declaration proceeded from a mere sense and conviction of truth, *et nemo moriens præsumitur salutis æternæ immemor*.

ANSWERED to the first of thir,—That the date is not always a material part, *ubi constat de substantia actus, et negotii gesti veritas est in vado*. That a date may be wrongously inserted, without any fraud or design, or eventual prejudging any. The error of a wrong date was never, *per se et solitarie*, sustained as relevant to convell the faith of a writ, without dole or prejudice redounding to some party thereby; *falsum* being *crimen quod sine dolo, animo, et proposito, non committitur*. And every error *in data* does not infer falsehood, since *inter falsum et verum datur medium, sc. error*; which errors in dates are very frequent.* And, here, 17th April is put for the 17th of August; and the Lord Balcomy, in 1657, being then President, allowed them to hold the month as delete, they abiding at the assignation as truly granted in that year; so that it is *res hactenus judicata*: and the pursuer having suffered the direct manner to perish, and never having raised review of that decret *debite tempore*, she cannot be heard now; so that neither *dolus* nor *nocumentum partis* can here be qualified. And whereas it is alleged, that this late assignation is antedated to make it quadrate with the old horning raised on the first, it is answered *negando*. *A posse ad esse* is an evil consequence; and the honour and uprightness of the gentlemen concerned, is a greater adminicle of the truth of what they assert than the pitiful conjectures and slender pretences in the contrary. And they will abide at it as a true deed in August, 1638, which is all the Lords required and considered in the case between Doctor Pittillo and the Lady Feddinche. Besides, the

* See Dury, 4th December, 1629, Winrahame. Hope's Collections, *titulo* Of Improbation, *folii mihi* 183 et 185.

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.