No 142. the defunct had a brother, who was produced, and at the Bar: Whereto it was *answered*, That, *in hoc statu*, the defence was not receivable; and it could not be said to be *noviter veniens*, seeing the father could not be ignorant that he had another son.

The Lords, in respect of the state of the process, would not receive the defence, though verified *instanter*, unless the son would *suscipere judicium*, and be content that the process should proceed as against him; which appears to be hard; seeing that which was to be proved was not only that the defender intromitted, but that he was apparent heir; and *in casu notorio*, no probation was to be respected to the contrary; and though the father could not but know that he had a son, yet he might be ignorant that his son would be preferred to himself, as to the succession of his own son; and *in damno vitando*, *ignorantia juris* is excusable.

Clerk, *Jo. Hay*.

Dirleton, *No* 246. *p.* 117.

1676. *February* 22. The Laird of Innes *against* Gordon.

No 143.
Exceptio falsi omnium ultima hinders not action of improbation and reduction, both on falsehood and nullity.

Gordon of Buckie having granted a bond of L. 1000 to Walter Ogilvie, his half-brother, *in anno* 1626, and he having assigned the sum to the Laird of Innes, he pursues this Buckie, as representing his goodsire, granter of the bond, who proponed a defence upon two discharges, one of 300 merks, and the other of 1200 merks. Innes raised reduction and improbation of the last discharge; 1*mo*, As being null by the act of Parliament, as wanting the writer's name; 2*do*, As being false; and before litiscontestation Innes having petitioned that Buckie might abide by the bond, and that some old witnesses might be examined, to remain *in retentis*, for proving that Walter Ogilvie neither was, nor could be at Banff (where this discharge bears to be subscribed) upon the 22d day of January 1629 years, because he was at Edinburgh upon the 26th day of January 1629 years, as appears by a letter of Slains, subscribed by him of that date, wherein Philorth and one Gardner are witnesses; who being examined, did depone, that Walter Ogilvie was several weeks before the letter of Slains in Edinburgh, agreeing about the slaughter of his brother. Innes now insisting upon the nullity in the foresaid article in the indirect improbation, the witnesses inserted being dead; it was *alleged* for the defender, That the pursuer could not insist upon the nullity, having once insisted upon the improbation, which is *omnium exceptionum ultima*, and having put the defender to abide by, and examined witnesses upon the indirect articles.—The pursuer *answered*, That though improbation be the last exception, it is not here proponed by way of exception, but by way of action; and when the same libel contains both improbation and reduction, the pursuer may insist jointly upon both;

Which the LORDS sustained. No 143.

The defender further *alleged*, That, as to the reason of reduction upon the nullity, he would condescend upon the writer, which hath always been sustained to elide that nullity.—The pursuer *answered*, That the act of Parliament doth declare such writs simply null, wherein writer and witnesses were not designed: And though the Lords have admitted of designations to be condescended on, yet that was only *in casu recenti*, where the writer and witnesses were alive, that they might be adduced to improve. But here, in a matter so ancient near 50 years since, the defender cannot be admitted to supply this nullity, by designing a writer at random, who cannot be known, especially seeing there are so many evidences of falsehood in the writ.

THE LORDS found the discharge null, for want of the designation of the writer; but if the defender will presently design a writer that is alive, or though he be dead, will produce several of his manuscripts, that may be compared with the hand-writing of this discharge, they will consider the same with the indirect articles of the improbation.—*See* WRIT.

Fol. Dic. v. 2. *p.* 188. *Stair, v.* 2. *p.* 420.

1677. *June* 15. BINNIE *against* GIBSON.

No 144.
Improbation by action being succumbed in, hinders not to propone compensation.

CAPTAIN JOHN BINNIE, as assignee to a bond of Gibson's of Clayships, pursues him for payment, who *alleged*, That the pursuer having raised improbation of this bond, and succumbed, he could propone no other defence; because, *exceptio falsi est omnium ultima*.—It was *answered*, That here there was no exception, but an action.—The pursuer *replied*, That there is *par ratio*, that parties be not encouraged to propone falsehood, which is a common exception, and would breed long delay, and would be ordinary, if, after they succumb therein, they might propone other allegeances, by way of defence.—It was *duplied*, That, albeit the allegeance of falsehood might exclude allegeances of payment, as inconsistent, yet it cannot exclude compensation, especially where the bond in question was old.

THE LORDS found, that an action of improbation against an old bond did not exclude compensation against the same, after absolvitor in the improbation.

Fol. Dic. v. 2. *p.* 188. *Stair, v.* 2. *p.* 526.

*** Gosford reports this case:

IN the action depending at the instance of Binnie against Gibson, for payment of a sum of money contained in a bond, there being a defence of compensation proponed, it was *replied*, That no defence was now competent to elide the said bond; because, the defender had intented an improbation, wherein he had led full probation, and finding that he was like to succumb, hath not