1675. *December* 14. ROBERTSON *against* ROBERTSON.

No 299.
Effect of a bond under improbation, where the sum in the adminicle is not precisely the same.

MATTHEW ROBERTSON having obtained decreet against Colin Robertson before the Sheriff of Ross for payment of a bond of 5600 merks granted by Gilbert Robertson his father, whom he represents; he suspends, and raises improbation of the bond. The charger having *answered*, That the defunct by his testament had given up a bond of 5000 merks due to the charger, the same did instantly exclude the improbation, unless the testament were improved.

THE LORDS finding that the improbation might be instantly discussed, ordained the charger to answer to the acknowledgment of the testament:

Who *alleged*, That the testament could not exclude the improbation, because the bond related in the testament did not quadrate with the bond charged on, which is a bond of 5600 merks, and that in the testament is a bond only of 5000 merks; 2*do*, The testament bore, that that bond was all paid to 1600 merks, and therefore, if use was made of the testament, it could not be divided. It was *answered*, That the mistake of the quantity could import nothing, it being incident to men in health to forget the odds of sums, much more to those on death-bed, and the acknowledgment of the testament was only made use of to astruct the verity of the bond.

THE LORDS found, that the acknowledgment of the testament not meeting in the sum, though it was a strong adminicle of the probation in the indirect manner, yet could not exclude the direct manner of improbation by the witnesses inserted who were alive, and therefore, seeing the improbation could not be instantly discussed, they would not admit it by suspension, but reserved the action of reduction to be insisted in, as accords.

Stair, *v.* 2. 381.

*** Gosford reports this case:

IN a suspension at the instance of Colonel Robertson of a decreet obtained at the instance of Matthew Robertson, for payment of 5000 merks contained in a bond granted by the suspender's father; after discussing of the reasons, it was offered by the defender to improve the principal bond, and that accordingly he had raised an improbation, wherein he had craved the principal bond to be produced. It was *answered* for the charger, That the improbation could not now be admitted, being only intented *animo protrahendi litem*, in so far as the suspender's father, in his testament, had acknowledged that he was debtor to the charger in the sum of 5000 merks, and therefore, unless that they could instruct that there was any such bond for that sum, they can never raise an improbation for that sum of 5600 merks, seeing the suspender's father being a dying man, might have mistaken the true sum contained in the said bond, but did acknowledge, that he was debtor by bond, which could not prejudge the creditor of

No 299. the true sum contained in his bond subscribed before witnesses. It was *replied*, That the testament being only an adminicle, did only instruct the sum contained in the testament, and could not hinder the suspender to pursue an improbation of the bond charged upon, because it contained a greater sum, to which if he would restrict the charge, he was content to pass from the improbation. It was *duplied*, That the offer to restrict being a clear acknowledgment that there was a bond granted by the defunct, he could never offer to improve the bond charged upon, unless such a bond were produced, bearing only 5000 merks. The Lords having seriously considered the case, did find, that any allegeance founded upon an adminicle which differed in the sum from the bond craved to be improved, could not hinder the improbation of the principal bond, whereupon decree was given, especially seeing the testament testamentary confirmed was sufficient to make the suspender liable, without any bond for the sum confirmed, but doth not hinder the suspender, who had confirmed, to pursue an improbation of a bond containing a greater sum.

Gosford, MS. No 819. *p.* 516.

1684. *January.* Robert Fotheringhame *against* Captain Agnew.

No 300.

In an action for payment of debt, at the instance of an assignee, the defender proponed compensation upon a debt due to him by the cedent, which he offered to prove by the cedent's oath.

Answered; The cedent's oath is not competent against the pursuer, whose assignation is for an onerous cause.

Replied for the defender; The onerous cause is not adequate, and, in so far as it is not adequate, the assignation is without an onerous cause, and the cedent's oath competent *pro tanto*.

The Lords were of opinion, that the pursuer should allege the cause of his assignation to be both onerous and adequate; but, before answer, they ordained him to condescend upon the onerous cause, that they might see if it was fully, or near adequate to the sums contained in the assignation.

Fol. Dic. v. 2. *p.* 236. *Harcarse,* (Compensation.) *No* 253. *p.* 61.

1702. *November* 14. Anderson *against* Dempster.

No 301.

A trustee in lands having sold the same for a just price, his oath acknowledging the trust found not probative against the purchaser.

Fol. Dic. v. 2. *p.* 235. *Fountainhall.*

*** This case is No 45. p. 10213, *voce* Personal and Real.