

1687. November 16. SIR WILLIAM BINNING *against* HOPE of CARSE.

Sir William Binning, late Provost of Edinburgh, pursues Hope of Carse on the testament of Colonel Gordon, who died in Germany, and was the third who, with Lesly and Butler, killed Valston Duke of Fritland. ALLEGED,—This cause was *res hactenus judicata* in Holland, and the Lady Carse was assoiyled there. ANSWERED,—The process there was upon its privilege, as being *testamentum militare*; and here it is not insisted on *super eo medio*, but as holograph; and it is certain that *res judicata* takes no place, except the two libels be both *super eodem medio*. And they cited Boeckleman, *de Action*. where he tells of one that had been *ter victus*, coming to him; and he caused him intent the right and genuine action, wherein he prevailed, though he had so often succumbed before.

The Lords having advised this on the 23d of November, they found the Lady Carse had shunned to exhibit these papers upon oath, and, to evade it, had retired out of the kingdom to Holland; and had assigned and conveyed her jointure, and all her effects, and particularly this right, to some confidant for her son's behoof; so that a sentence against her would be elusory, and frustraneous,—she being *extra regnum*, and having nothing to affect. Therefore, before answer, they ordained Carse, her son, betwixt and eight days, either to state himself as party, and *legitimus contradictor, et litem in se suscipere*, and to find caution *judicatum solvi*, or else they would instantly decern against her.

And, he having stated himself as party, they directed two commissions,—one to Holland, for her to depone anent the having, and to try if this defence was proponed there, to take off the *res judicata*; and the other directed to Lubeck, where the testament was made, to inquire if holograph testaments by their law be probative. The event of this process was of great importance, being upwards of 40,000 rixdollars; and Sir William, in journeys to Holland and in processes, had wared more than £1000 sterling in it.

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1686 and 1687. SCOTT of HARWOOD'S REAL CREDITORS *against* his PERSONAL CREDITORS.

1686. February 19.—SCOT of Harwood's Real Creditors, *viz.* Sir William Ker of Greenhead, &c. competing with Goldilands and his other Personal Creditors, or adjudgers, who craved the real Creditors' rights to be reduced, because granted to near relations by one *in meditatione fugæ*, though not under any diligence at the other creditors' instance; in so far as that, finding himself broken, he convened his friends, who were bound for him as cautioners, and discovered to them his condition, and gave them thir infestments of relief amongst them, which eventually, and all conjoined together, prove to be a *dispositio omnium bonorum*, though granted at sundry times; which was an un-

warrantable gratification, prohibited by the Act of Parliament 1621. ANSWERED,—That act only takes place where creditors have done diligence ; and here there is none ; and the receivers are creditors for most onerous causes, *et sibi vigilarunt*.

The Lords, before answer, granted a mutual probation anent his condition the time of his granting thir dispositions, *viz.* if he was bankrupt, or holden and reputed solvent at that time ; and if he convocated and gathered his friends together, and privily disclosed his case to them ; for that made it a machination and contrivance, and them *participes fraudis*. *Vide* 18th Nov. 1687.

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1687. *November 18.*—The Lords advised the probation led between Scott of Goldilands, and the other Creditors of Scott of Harwood, and Sir William Ker of Greenhead, and the other real Creditors infesters, on the other hand, mentioned 19th February 1686 ; and assoilyed the real Creditors from the reduction on the Act of Parliament 1621, because, though they were the bankrupt's near relations, and amongst them had got dispositions *omnium bonorum*, and had prevented other diligences, yet the dispositions were but partial, and not granted all at one time ; and he was not under horning and inhibition at the pursuer's instance ; and no contrivance, machination, or concealment was proven ; and it appeared he was then esteemed solvent, and got credit in the country, and was Sheriff-depute of Roxburgh at the time.

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1686 and 1687. PATRICK ARCHIBALD *against* ROBERT TURNBULL and BURN'S and NEILSON'S RELICTS.

1686. *March 30.*—PATRICK Archibald, factor in Bordeaux, against Robert Turnbull, merchant in Edinburgh, and Burn's and Neilson's Relicts. The Lords, on Forret's report, having advised the fitted account, and the merchants' report, they approved of George Galbraith's and Harry Joussie's report, except as to the goods sold to Oswald, which did come home after the merchant's death : as to which they only allow the price paid for the said goods by James Oswald ; and ordain Jameson, who, as trustee, delivered the said goods to Oswald and Margaret Wallace, to order the payment of them to the pursuer ; and discern the representatives of the said Alexander Burn and John Neilson to make payment to the pursuer of the respective sums, as the price of the wines he sent home to their husbands, as the same is stated in the above written report ; and allow the pursuer to insist either before the Lords, or any inferior court, for proving the passive titles against them, as he thinks fit. *Vide* 22d June 1687.

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1687. *June 22.*—Patrick Archibald, factor at Bourdeaux, as donatar to the escheat of Burn and Neilson, to whom he had furnished wines, as mentioned 30th March 1686, pursues an improbation against Robert Turnbull, merchant in Edinburgh, of a disposition made to him by the said Burn and Neilson, on this ground, That though the disposition bears to be of a day's date prior to Burn's and Neilson's denunciation to the horn, at Rutherford's instance, on