

1686. *March.* DAVID CRICHTON *against* MURRAY of Skirling.

No 375.

Where the defender has been *in dolo* to take out the decree, competent and omitted cannot be obtruded.

A DECREE at an assignee's instance, being quarrelled as *ultra* the pursuer's title, in so far as, though two of four cautioners were discharged, and excepted from the assignation, and the defender, then pursuer, represented another of these cautioners, decree was taken against the pursuer, (then defender, who represents but one of the four cautioners) for three parts of the debt.

*Answered*; The reason was competent and omitted, in respect the assignation was given out in process, and decree pronounced thereon in foro contentiosissimo; *2do*, Res est homologata et transacta, the defender having gotten an abatement of the sum decerned, and discharged the decree.

*Replied*; The defender being *in dolo* to take out a decree in such terms, competent and omitted cannot be obtruded, though the pursuer's advocates had not observed the error; *2do*, What the pursuer did in obedience to the decree, cannot be constructed homologation, which is *actus voluntarius*, seeing he was under the lash of a charge of horning upon the decree at the time; *3tio*, The defender's dole ought to open the transaction; and the pursuer now insists, as representing a co-cautioner, for relief of the third share of the other co-cautioner now insolvent; and it were hard to make the pursuer pay four shares, when two were discharged, and a third cautioner insolvent.

THE LORDS repelled the answer of competent and omitted, and homologation, in respect of the reply thereto; but sustained the transaction relevant.

In this process the LORDS found, That the assignation, bearing, that the two cautioners were discharged, though for love and favour, did operate a discharge of the half of the debt, and was more than a *pactum de non petendo*.

*Fol. Dic. v. 2. p. 207. Harcarse, (DECREETS.) No 409. p. 109.*

1688. *Februury.* Sir WILLIAM BINNING *against* Laird and Lady CARSE.

No 376.

In a competition against Lady Carse, she having proponed the peremptory defence of *res judicata*, upon a decree of absolviture by the court of Holland, relating to the same subject;

It was *answered* for the pursuer; That the absolviture in Holland proceeded on this ground, That the *causa petendi* there was but a copy of a military testament, which the Dutch judges looked on as a *charta blanca*, as the decree bears; whereas now the testament itself, or, which is equivalent, letters acknowledging it, and venditions of a part of the defunct's estate by virtue of the testament, and other homologations thereof, are produced, which new grounds afford *novam causam petendi*, that by the civil law excludes the exception of *res judicata*.

THE LORDS repelled the defence of *res judicata*, in respect of the answer. Thereafter this affair ended in a submission.

No 376.

*Fol. Dic. v. 2. p. 207. Harcarse, (DECREETS.) No 411. p. 110.*

1692. December 27. KINLOCHS against CHARLES OLIPHANT, the Clerk.

No 377.

THE LORDS found Charles's decret-absolvitor of the nature of those exceptions that are called *impeditivæ litis ingressus*, and that the said decret should be first reduced, ere they can quarrel the disposition; but found, if there was any new ground of law insisted on against the disposition, that was not *deductum in judicium* in that decret-absolvitor, that they might be yet heard on it; seeing competent and omitted did not hold in reductions, nor could be obruded against pursuers, but only against defenders; for a man may first quarrel a right *ex capite exhibitionis*, and if he succumb, he may raise a reduction of it on the act of Parl. 1621; and he may pursue first as donatar, and then as adjudger; and competent and omitted will not exclude him in either cases, whether the reasons be *in facto* or *in jure*: So they allowed the reporter to hear Kinlochs, the pursuers, on any new grounds not alleged in the former absolvitor.

*Fol. Dic. v. 2. p. 207. Fountainhall, v. 1. p. 539.*

1700. January 2. PETER ARCHIBALD against JAMES WILSON.

No 378.

ANSTRUTHER reported Peter Archibald against James Wilson, merchant in Edinburgh. Patrick charges the said James for L. 200 contained in his bond. He suspends on this reason, that he must have compensation for the aliment of the said Patrick's daughter, who staid three years in his house. *Answered*, The case was *res judicata*, seeing he had an absolvitor from the aliment before the Sheriff. *Replied*, I have raised reduction of that decret, which proceeded on a wrong ground; whereby his wife, in his absence, offered to prove there was express paction for an aliment, in the probation whereof she succumbed, whereas there was no need of putting it upon that foot; for whether paction or not, you are liable, for *debitor non præsumitur donare*, and I liquidate it instantly by referring the alimenter and time of it to your oath, and the modification of it to the Lords. *Duplied*, If the process was mismanaged by burdening themselves to prove an unnecessary allegiance of paction; and, upon their succumbing, I being assoilzied, *sibi imputent*, but the decret must stand.

Found in conformity to Strachan against Drysdale, No 369. p. 12225.

THE LORDS thought competent and omitted did not militate against a pursuer, but he might still insist *super alio medio* than that which was formerly deduced *in judicium*; and being a decret of an inferior court, they reponed