

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*.