

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 assoilyied 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-