riot, and the Commissary's decreet imposing a second fine, sustained by a narrow majority of seven to six. No 50.

Fol. Dic. v. 4. *p.* 235. *Kilkerran,* (RES JUDICATA.) *No* 1. *p.* 495.

1739. *November* 27. CREDITORS of BUCHANNAN *against* BONTEYN. No 51.

WHERE a person, on a sentence of the circuit Justiciary-court, had been convicted of theft by a verdict, and banished, but no judgment had been given on the part of the libel which included damages, an action was brought before the Court of Session for damages, founded on the conviction in the Criminal-court. THE LORDS sustained the action, and found the sentence of the Criminal-court not to be a *res judicata* to bar the civil action on the same fact.

Fol. Dic. v. 4. *p.* 235. *Kilkerran.*

*** This case is No 26. p. 14044.

1752. *November* 28.

Mr JOHN GOLDIE *against* the TENANTS of MAISON-DIEU.

No 52.
During the dependence of a declarator of the right to an estate, the cause being ready for judgment, the defender died, having disponed the estate in question to trustees. The action was transferred against his son, who refused to enter heir, or to defend; and judgment having been given for the pursuer, this was found not to be *res judicata* as to the trustees.

THE King was pleased to grant unto Mr John Goldie, professor of divinity in the University of Edinburgh, the lands of Maison-Dieu, which were supposed to have fallen to his Majesty as *ultimus hæres.*

IN consequences of this gift, Mr Goldie raised a declarator of his right; wherein he called Murray of Cherrytrees, who stood infeft in the lands of Maison-Dieu under a disposition from the last proprietor. Cherrytrees appeared, and offered objections to Mr Goldie's right and defences in support of his own, but died while the cause was yet in dependence. The action having been transferred against his eldest son, he refused to enter heir or to defend. Decreet was then given in favour of Mr Goldie; after which he insisted against the tenants of Maison-Dieu in an action of mails and duties.

The tenants *objected,* That the decreet was not *in foro contradictorio*; not against the father, because he died before it was pronounced; not against his son, because he refused to enter heir, or to debate; and the case is, that Murray of Cherrytrees had made over his whole estate, therein including the lands of Maison-Dieu, to certain trustees for uses; now, as these trustees were not called in the action of declarator, they are still intitled to be heard on their objections to the right in the pursuer, to plead their defences, and their preferable right to the lands of Maison-Dieu.

No 52.

Answered for Mr Goldie, The cause was ripe for judgment before the death of the original defender, and its merits fully known to the Court. After his death, that there might be a person to sustain the character of the defender, the forms required that the heir should be called by a transference. He was called, but refused to enter. Now the decreet must be deemed valid and *in foro*, for that the case was fully debated by the father, the original defender, and afterwards his eldest son was regularly called, in order that he might receive judgment on the debate. The pursuer could not oblige him to represent or defend; and therefore justice will not permit him, by his refusal, to undo the whole proceedings against his father. As to the right in the trustees, it is founded on a latent, personal, revocable, and testamentary deed, granted by Cherrytrees in their favour; of which deed the pursuer had no knowledge; and as the trustees have no interest in it distinct from the interest of Cherrytrees' own family, it will follow, that the decreet obtained by Mr Goldie, after debate with Cherrytrees himself, and after transference of the action against his eldest son, must be held as conclusive against the trustees.

"The Lords found that it was still competent to the trustees to be heard notwithstanding of the decreet."

Act. *A. Pringle, J. Ferguson*, et *Advocatus*. Alt. *T. Hay*, et *A. Lockhart*. Reporter, *Tinwald*, *D.* *Fol. Dic. v.* 4. *p.* 236. *Fac. Col. No* 38. *p.* 60.

1760. *July.*

Hugh Crawford, Trustee for David Smith of Methven, *against* Mrs Anne Randal of Breck.

No 53.

In a challenge of a creditor's right affecting an estate, for behoof of the apparent heir to the original debtor, a decree pronounced in a former challenge and competition, to which the pursuer's father, who then held the right of apparency, had been made a party, was held as a

Crawford, upon a trust-bond granted by Methven, apparent heir of Andrew Smith of Rothesholm, his granduncle, obtained an adjudication against him, as charged to enter heir in special in the lands of Rothesholm and Hurtesso; and then pursued an action of mails and duties against the tenants, and also against Mrs Anne Randal, as intromitter with the whole rents.

Randal produced her titles; *1mo*, A bond granted to Michael Randal of Breck, 26th June 1667, by Mr Patrick Smith, Advocate, and Andrew Smith of Rothesholm, conjunctly and severally, for L. 1057 Scots; *2do*, Decreet of adjudication obtained by Breck, 12th July 1688, of the lands of Rothesholm and Hurtesso, for payment of the accumulated sum of L. 2139, 14s. Scots; *3tio*, A decreet of reduction and improbation obtained by Thomas Randal, her brother, in 1740, against the present Methven's father, and Trail of Sabay, Hugh Smith and others.——On this last-mentioned decreet she pleaded *res judicata*, and set forth,