No 47.

tion, and so it could not militate against him; for if he had been called, he would have produced his author's right; likeas now he is content to produce the same. THE LORDS did find that the sub-vassal, being in possession as heritor, ought to have been called; and that the improbation could not militate against him, albeit his right was not confirmed; and if it were otherwise, it were easy to superiors, upon collusion or default of their immediate vassals, to take away the sub-vassals' right, albeit they had the principal rights, and were ready to produce the same, and so they reponed him against the improbation.

Gosford, MS. No 844. *p.* 534.

No 48. 1685. *March* 12. Captain ANDREW DICK *against* CRAIGIE of Gairsey.

CAPTAIN Andrew Dick against Craige of Gairsey, being reported by Pitmedden, the LORDS found, seeing Gairsey was but cautioner for Oversandy his uncle, in the suspension, it was competent for him to propone any defences, though omitted by the principal party; and they did not stint him to prove them *instanter*, but allowed him terms for that effect.——This has been formerly so decided, as appears from Stair.

Fol. Dic. v. 2. *p.* 351. *Fountainhall, v.* 1. *p.* 352.

No 49. 1709. *December* 20. HAMILTON *against* CALDER.

A decree having been taken out by the tacksman of the customs against his cashier, for a balance in his hands, without calling the cashier's cautioner, the LORDS, in a suspension, allowed the cautioner to be heard against the accounts, as if he were yet *in libello*, and found the decree not to be *res judicata*, either as to relevancy or probation.

Fol. Dic. v. 2. *p.* 351. *Forbes.*

*** This case is No 24. p. 2092, *voco* CAUTIONER.

No 50. 1738. *July* 28. ELIZABETH WALKER *against* CHATTO.

Where a Bailie had fined for a riot, the Commissary's sentence fining of new for opprobrious expressions sustained.

WHERE a person had been guilty of a riot, and of giving opprobrious language, at one and the same time, in one continued act, which commonly happens, and had been convened before the Bailies of Kelso for the riot, which the libel bore to be aggravated by the opprobrious language, and fined for the offence; it was notwithstanding found, that he might thereafter be pursued before the Commissary for the opprobrious language, as a distinct crime from the

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.