

riot, and the Commissary's decret 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.

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 infest 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. Decret 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 decret 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.

During the dependence of a declarator of the right to an estate, the cause being ready for judgment, the defender died, having disposed 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.