No 56. That the Court had formerly pronounced a judgment exhausting the whole cause, and decree thereon had been extracted; so that there was no depending process; the cause was out of Court; and it was incompetent to resume the consideration of any of the other objections. THE LORDS refused the desire of the petition.

Fol. Dic. v. 2. p. 236. Fac Col.

*** This case is No 53. p. 8649, *voce* MEMBER of PARLIAMENT.

1789. *July* 30.

TRUSTEES of ROBERT KER *against* CREDITORS of MAINSNEIL.

No 57.

An informal adjudication had been sustained as a security. In a future ranking, the creditors repeated the objections formerly judged of. Found that the adjudication was to be sustained, only the competition with creditors whose debts had been contracted after the original agreement.

IN an action brought by the proprietor of the lands of Mainsneil, for setting aside an adjudication which had been led by the predecessor of Robert Ker, it was determined that the adjudication was informal and inept. But as it was not disputed that the sums for which the adjudication had been led were truly due, the Lord Ordinary, on 17th January 1784, and afterwards the whole Lords, found, that, in the circumstances of the case, the adjudication was to subsist as a security for the principal sums and interest, without accumulations or penalties.

Afterwards the proprietor having contracted debts to a great amount, the lands were sold judicially. In the ranking which ensued, the Creditors objected to Robert Ker's adjudication on the same grounds which had been formerly urged.——In answer to these objections, the Trustees of Robert Ker, he himself being at the time abroad,

Pleaded; By the judgment of the Court, pronounced *in foro contentioso*, it has been found, that the decreet of adjudication was to a certain extent a good and effectual step of diligence. This is a *res judicata*, which neither the common debtor, nor those coming in his right, can afterwards call in question. It would indeed be extremely unreasonable if a contrary decision were to be given; as in this manner, by a very natural reliance on the judgment of a Supreme Court, a party might be entirely precluded from the most just claim. Had it been found that the adjudication was ineffectual, the creditor might of new have used the proper methods of attaching the lands. This reasoning at least must be quite decisive in a question with those who became creditors after the adjudication had been sustained by the Court.

Answered; The rule, *quod res judicata pro veritate habetur*, only takes place where the parties are the same. The judgment, therefore, pronounced in the question between the common debtor and the adjudger cannot here have any influence. It is also evident, that the *ratio decidendi* in the former litigation, resting on the circumstances of the case, is quite inapplicable to the present

argument. In a question with the common debtor, there was no harm in sustaining the adjudication as a security for those sums which were confessedly due. This was of advantage to both parties, by avoiding those expenses which would have been incurred in leading a new adjudication. These considerations, however, are of no weight in a competition of creditors, who are entitled to plead every objection, however minute, that can enlarge their fund of payment. In a question, particularly, respecting the transmission of landed property, it would be dangerous to give effect to a decreet of any Court, which enters into no proper record for publication, so as to affect the rights of creditors and *bona fide* purchasers. No 57.

THE LORDS, after advising informations, pronounced this judgment:

" Find, that the judgment of the Court, sustaining the adjudication at the instance of Robert Ker's predecessor, as a security for the principal sum and interest, is to be held as a *res judicata;* and therefore repel the objection to the adjudication."

But upon advising a reclaiming petition, which was followed with answers,

THE LORDS " found, that the adjudication at the instance of Robert Ker's predecessor was only to be sustained as a proper step of diligence, in a question with those creditors whose debts were contracted after the judgment of the Lord Ordinary, of date 17th January 1774."

Reporter, *Lord Rockville.* Act. *Blair, Cha. Hay.* Alt. *Rolland, Hope.* Clerk, *Home.*

C. *Fol. Dic. v.* 4. *p.* 237. *Fac. Col. No* 85. *p.* 153.

1789. *November* 17. TOWN COUNCIL of ROTHESAY *against* MACNEIL.

No 58.

A DECREE having been extracted, before expenses, though awarded, had been modified, and without any reservation of them having been made; the LORDS found it was not competent afterwards to demand decerniture for those expenses, though they were costs awarded by statute.

Fol. Dic. v. 4. *p.* 236. *Fac. Col.*

*** This is No 335. p. 12188., *voce* PROCESS.

1789. *November* 24. GEORGE HARKIES *against* WELSH and CUMING.

No 59.
The property of a third party being poinded, may be reclaimed without the necessity of a reduction.

WELSH and CUMING caused a poinding to be executed, of a number of horses in the possession of John Hogg their debtor. Among these, there was one which proved to be the property of Harkies, as had previously been intimated by Hogg.