

No 24.
 compared
 in the pro-
 cess, compet-
 ed upon their
 interest, and
 opposed refer-
 ring to the
 defender's
 oath.

their interest, opposed the referring to the defender's oath what he owed to their cedent, and craved a term to search for the instruction of the debt.

Fol. Dic. v. 2. p. 347. Forbes, p. 138.

1722. February 2.

FERGUSSON of Auchinblain against Mr WILLIAM MAITLAND.

No 25.
 The oath of
 the debtor in
 a forthcoming,
 found good
 against the
 creditor, pur-
 suing for the
 debt as assign-
 nec.

FERGUSSON of Auchinblain being creditor to John Colvin, did arrest in the hands of Mr William Maitland, Colvin's debtor; and, in the forthcoming, having referred to Mr Maitland's oath, if he was debtor to Colvin the time of the arrestment; he deponed negative, specifying, that he had been owing by a bond and back-bond, but that these debts were satisfied and paid, though not retired. Some time after, Auchinblain procures from Colvin assignation to the said bond and back-bond, in security and payment of his debt;—upon which having charged Maitland; in the suspension of the charge, Maitland having objected his oath, the question arose, if he could now be liable to the arrester upon these writs, as instructions of debt, having already deponed negative, *deferente adversario*.

It was *urged* for the pursuer; That as an oath emitted by a debtor in a forthcoming, cannot hurt the common debtor, neither the common debtor's assignees; and as it had been competent for any other assignee to insist against Maitland upon the bond and back bond, it is equally competent to Auchinblain, who insists not here as arrester, but as assignee; for whatever might be alleged against him as arrester, it seems evident, that the oath can militate nothing against him as assignee. Nor can it make any difference, that the same person is both assignee and arrester, because the assignation was a superadded title in the arrester's person, after the oath was emitted; and all effects thence arising, equally competent to the arrester, as to the cedent, or any other assignee.

It was *answered*; That the superadded title is of no effect, nor does it any way alter the case; for it is really nothing else but the same person choosing a different way of proof, which the law does not allow, especially when there is a transaction upon an oath. That Auchinblain is here to be looked upon as *eadem persona* in law, though vested with a different right, appears from this, that had Mr Maitland been absolved from the pursuer's claim, as arrester, by a decret in his favour, the exception of *res judicata* would protect him, from the pursuer claiming as assignee, L. 5. D. De exceptione rei judicatæ. “De eadem re agere videtur, et qui non eadem actione agat, qua ab initio agebat; sed etiam si alia experiatur de eadem tamen re: Ut puta si quis mandati acturus, cum ei adversarius judicio sistendi causa promisisset, propter eandem rem agat negotiorum gestorum, vel condicat; de eadem re agit. Recteque ita definietur, eum demum

de re non agere, qui prorsus rem ipsam non persequitur. Cæterum cum quis actionem mutat et expeditur, dummodo de eadem re experiatur, etsi diverso genere actionis quam instituit, videtur de ea re agere. Had the assignation indeed been purchased any other way, than in security or payment of the debt, which was the foundation of the arrestment, perhaps the case might receive a different determination; for it would be hard to say, that an oath emitted *deferente adversario*, can conclude that adversary further than his interest reaches; for thus far it might be reasonably urged, could the transaction be understood only to extend, by deferring the oath, since that was only in dispute: But then so far as the pursuer's present interest goes, an oath deferred is certainly conclusive; which, in this case, was the arrester's claim against the common debtor. Now here the assignation was in security and payment, which made it *eadem res*, the same interest with that in the process of forthcoming; the conclusion was the same, the *medium concludendi* only different: And therefore the oath must meet Auchinblain pursuing as assignee, equally as he were still insisting in his forthcoming.

“THE LORDS found the oath met Auchinblain pursuing as assignee.”

Fol. Dic. v. 2. p. 349. Rem. Dec. v. 1. No 31. p. 63.

1731. *January* BONTEIN, or CREDITORS OF MACHAR, against BONTEIN.

IN a civil action for reparation and damages, founded upon theft and robbery, for which crimes a sentence of banishment had formerly passed against the defender, the LORDS allowed the extracts of the depositions taken before the Lords of Justiciary to be received *per modum probationis* in this process, but allowed the defender to give in objections against the proof.

No 26.
Effect in a
civil action of
a proof taken
in the Court
of Justiciary.

1737. *December 9.*—AND accordingly it being *objected*, That one of the witnesses was rendered infamous, since the date of his deposition, the same was sustained to invalidate the deposition; because such depositions being allowed *ex nobile officio*, only to save the trouble of examining the witnesses anew, every objection must be sustained against the depositions that would be relevant against the witnesses were they appearing personally to depone *de novo*.

1739. *November.*—IN the same process it was afterwards *pleaded*, That the verdict of the inquest was a *probatio probata*, which could not be overturned by the Court of Session; that, by the sentence of the Court of Justiciary, the pannel was convicted of theft, and that damages were a necessary consequence. *Answered*, That the sentence of the Court of Justiciary is ultimate so far as it goes; but a sentence inflicting a penalty can be no rule with regard to damages. upon which no judgment was given; and as for the verdict of the jury, it was authoratative in the criminal process, but in no other process, nor upon