de re non agere, qui prorsus rem ipsam non persequitur. Cæterum cum quis actionem mutat et experitur, 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.

No 25.

"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.

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

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.

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

No 26.

no other judge. The Lords found, That the verdict of the jury is not *probatio probata*, and that it is still competent to the creditors to object to the proof.

Fol. Dic. v. 2. p. 248.

*** Kilkerran reports this case:

Where one had, by a sentence of the Circuit or Justice Court, upon a verdict finding the facts proved, been convicted of theft and banished, but no judgment had been given upon that part of the libel which included damage, an action being brought before the Court of Session for damages, founded upon the conviction by the Criminal Court, the Lords "Sustained the action, and found the sentence of the Criminal Court not to be a *res judicata*, to bar civil action for damages upon the same fact."

At the same time the Lords allowed the proof led before the Criminal Court to be repeated in this process, but found that the said proof was not *probatio probata*, but that it was still competent to the creditors of the defender convicted (he himself was, as said is, banished, and no appearance for him) to object to the proof; for that however the sentence of the Criminal Court must have its effect so far as it goes, yet neither the *comitas* among the courts of different countries, nor the necessity which ties different courts within the same jurisdiction to regard the judgments of one another, can oblige one court to proceed farther than the other court has done, without being satisfied of the justice of the claim.

Kilkerran, (Res Judicata.) *No* 2. *p.* 495.

1733. *December* 15. Captain Chalmers *against* Sir James Cuningham.

No 27.

A process of count and reckoning, which had gone some length before arbiters, probation taken and interlocutors pronounced, having been brought before the Court of Session, after running out of the submission, without a decreet-arbitral; the Lords found, That the probation, taken before the arbiters, ought to be admitted as evidence, so far as the same is habile, and concluding upon the subject matter of it, reserving all objections upon the import or insufficiency thereof; and reserving to either party to re-examine such of the witnesses as are alive, the party being always at the charge of the re-examination, and the former depositions being previously cancelled; lastly, reserving to either party to adduce what other proof they think necessary. *See* Appendix.

Fol. Dic. v. 2. p. 349.