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CUTLAR
v.
MAXWELL.

"Lords, of the 28th November and 29th of December following, adhering to the said former interlocutory sentence, be revived and affirmed."

For Appellants, *Dun. Forbes* and *C. Talbot.*
For Respondents, *P. Yorke* and *A. Hume Campbell.*

SIR WILLIAM GORDON, BART. *Appellant;*
LUDOVICK GORDON, Merchant in Elgin, - - - - - *Respondent.*

5th April, 1731.

PROCESS—RES JUDICATA—A party having been prosecuted before the Court of Justiciary, on a criminal charge, concluding likewise for damages and expenses, and acquitted,—found to be still subject to a civil action.

OATH OF PARTY—Found to be discretionary with the Court whether or not to grant commission for taking the oath of a party who was out of Scotland at the time.

No. 15. SIR WILLIAM GORDON was prosecuted before the Court of Justiciary at the instance of Ludovick Gordon, (with concurrence of the Lord Advocate) on a charge of having assaulted and violently taken from him, two bills for the several sums of L.68 and L.25, due to him by Sir William, and certain other small articles. The libel also contained a conclusion for the private interest of damages and expenses, to which, upon going to trial, the indictment was restricted. Sir William was acquitted.

Thereafter Ludovick raised an action against him in the Court of Session, for restitution of the above property, and likewise for payment of L.100 in name of damages and expenses. Sir William having appeared by counsel and denied the charge, the pursuer offered to prove the same by reference to his oath. Sir William, being in London at the time, prayed that a commission might be granted for taking his oath there, on the ground of extreme inconvenience and detriment to his private affairs, without which he could not then come to Scotland. This being twice refused, he again prayed that a commission might be granted, and further stated in defence, that a criminal action having been brought against him at the pursuer's instance, not only for punishing his alleged violence, but likewise for compelling him to pay the pursuer's damages, from which he had been fully acquitted, no new suit either civil or criminal, could competently be raised against him on the same point.

The pursuer having insisted on his being examined in presence of the Court, their Lordships "refused to grant commission, and held the de- Feb. 26, 1729.
"fender as confessed," &c. Several petitions against this judgment were refused, and of this date the Lords "ordained the pursuer to give his Feb. 11, 1730.
"oath in supplement." The pursuer's oath being accordingly taken, the Court found "it proven, "that the defender seized upon and took from "Ludovick Gordon, the pursuer, in November "1713, two bills drawn by him upon and accepted "by the defender, for L.93 sterling, and find the

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" defender liable for the same, with interest from " that time; and find it also proven by the said " oath, that the defender is justly owing L.6 ster- " ling, as value of herring barrels, and ordain the " said Ludovick Gordon to give in a condescen- " dence of the value of his jockey coat, sword, and " switch, and of the expense of suit, and of the " expense of the said Ludovick's journeys to " Edinburgh." These articles were afterwards taxed to L.800 Scots.

Entered March 6, 1730.

The appeal was brought from the interlocutors of the 26th February, 13th June, 2d July, 21st November, 1729, and the 11th, 12th, 17th, and days of February, 1730.

Pleaded for the Appellant:—1. The facts charged as the foundation of the suit, are utterly untrue, and neither are nor can be proved by any legal evidence.

2. The appellant having been tried for the same facts before a supreme and competent court, and acquitted even from the demand of damages and expenses, no new action can be brought against him. For if judgment had been given against him in the former action, which was competent for recovery of the articles now claimed, and of damages, no civil action would thereafter have remained; whence it is plain, that not only the *vindicta criminalis*, but the *interesse civilis* of the respondent, was then brought into judgment. Judgment having been given, it became *res judicata*, and the same thing could not again be brought forward under any form of action whatsoever; for it would be most unreasonable that a party should be concluded by

a judgment against him, and yet that a sentence acquitting him should profit him nothing, but leave him still subject to a new action.

3. The appellant, having been necessarily detained in London by important private affairs, ought, according to the common rules of justice and the practice in like cases, to have been allowed a commission for taking his oath, which he was, and still is ready to emit, although he apprehends that he cannot now be compelled to do it, for the respondent having in his former action made choice of his manner of proof, viz. by witnesses, and suffered the case to go to judgment upon their evidence, no other proof should be allowed him. There is no instance where a commission, in the case of a person who was necessarily out of the jurisdiction of the court, was refused.

4. The allowing the respondent to prove his claim by his own oath, after he had relied on the appellant's oath, in place of all further proof, has no foundation in law, and is quite without precedent.

Pleaded for the Respondent:—1. The oath of the party is legal evidence, and if he declines to give his oath, the fact is justly considered as admitted.

2. Although there had been no foundation for the charge of violence, and breach of the peace, on which the criminal action was raised, yet the bills accepted by the appellant, might still have been due; and if, from his oath, which, by the law of Scotland, is the most decisive mean of proof in civil causes, for restitution or reparation, it could

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be established, that the appellant truly owed that money, or that the articles were in his possession, the acquittal from the criminal complaint could be no reason for his not being compelled to pay the civil debt.

The appellant having once consented to be examined, could not afterwards plead the former suit as a bar to this action.

3. It is discretionary in the court, by way of indulgence, and upon cause shown, to grant a commission for taking the oaths of a party; and as in the usual case he is examined by one or all of the judges in the presence of the counsel and agents, who have a liberty of cross-examining, it was a much more effectual way to find out the truth, to have him examined in that way, than upon a commission, where the interrogatories must be previously settled, and the examination confined to them. It may be necessary, also, to confront the party with other persons who know any thing of the subject matter.

4. The appellant having been indulged from time to time, for above two years, with an opportunity to give his oath, and neglected it, the charge was taken *pro confesso*, but the court properly tendered the oath to the respondent for their further satisfaction.

Judgment April 5, 1731.

After hearing counsel, "it is ordered and adjudged, &c. that the appeal be dismissed, and "that the several interlocutors therein complained "of be, and the same are hereby affirmed."

For Appellant, *C. Talbot*, *Will. Hamilton*, and *A. Hume Campbell.*

For Respondent, *P. Yorke*, and *Dun. Forbes.*