No 59.

Harkies having brought an action of spuilzie for having the horse restored, &c. the Sheriff of the county before whom the cause came, pronounced this judgment: "In respect it appears, that at the time of the poinding, the horse libelled was in the possession of John Hogg the debtor, and that there is a regular execution of poinding produced, finds, that it is beyond the jurisdiction of the Court to set aside that poinding, and therefore dismisses this action as incompetent."

The pursuer presented a bill of advocation, on which the following deliverance was given by the Lord Ordinary on the bills: "Finds, that as the poinding was *res inter alios acta* as to the complainer, who was no party to it, it cannot affect him in any respect, and consequently that he is not obliged to bring a reduction of it, or precluded from bringing an action for recovering possession of his horse in any way competent to him before it was executed; therefore refuses the bill, and remits to the Sheriff, with instruction to vary his interlocutor, sustain process at the complainer's instance, and do therein as to him shall seem just."

In a reclaiming petition it was argued, in the words of Lord Kames, That 'a poinding is of the nature of a decree; it is a sentence of a compent Judge, 'adjudging and decerning the goods to belong to the creditor; and 'this decree cannot be taken out of the way otherwise than by a proper reduction,' Currie, No 12. p. 6206. And this doctrine it was endeavoured to support by the authority of Lord Stair, who denominates the messenger 'Judge in the execution of poinding,' B. 4. Tit. 30. § 6.; and of Mr Erskine, who states 'the adjudication and delivery by the messenger, as vesting the creditor with the full right of the goods,' B. 3. Tit. 6. § 24.

The COURT were unanimous in the opinion, that in such cases it is competent for the owner to reclaim his property in a petitory action, and an illustration was given from the adjudication of lands that did not belong to the debtor, where the proprietor, without resorting to an action of reduction, would be entitled to be assoilzied from a process of mails and duties at the instance of the adjudger.

The petition was therefore refused without answers.

Lord Ordinary, *Dreghorn*. For the Petitioner, *Elphinston*.

S. *Fol. Dic. v. 4. p. 237. Fac. Col. No 92. p. 167.*

1793. *December* 17.

No 60.
A verdict of acquittal in the Court of Justiciary

JOHN KER, and the TRUSTEE for His Creditors, *against* The AGENT for the SUN FIRE-OFFICE.

JOHN KER having been suspected of wilfully setting fire to his own house, in order to defraud the Insurers, a precognition was taken before a Magistrate

No 60.
does not preclude a proof of the same facts, and by the same witnesses, in a civil action.

by their Agent. Ker was afterwards tried before the Court of Justiciary. The prosecution, though in the name of his Majesty's Advocate, was conducted and the expense of it defrayed by the Insurers.

The jury unanimously found the libel not proven.

Ker then made a claim against the Insurers for the loss he had sustained by the fire. A submission was entered into, and the arbiters allowed the Insurers to prove, that the pursuer had wilfully set fire to his house. The witnesses examined in the Court of Justiciary were again examined; but the death of one of the arbiters prevented a decree-arbitral from being pronounced.

Ker then brought his claim before the Court of Session. The Insurers craved a proof of his guilt; and in support of the competency of the demand, they quoted the case, 27th November 1739, Buntein against Buntein, No 26. p. 14044.

The Lord Ordinary found, that "the proof and verdict in the Justiciary trial are no bar to the defenders in this civil Court, from supporting their defence, by a proof of the pursuer's having actually been concerned in the burning of his own house; and therefore allowed a proof at large."

In a reclaiming petition, Ker and the Trustee for his Creditors

Pleaded; Although the prosecution was in the name of the Lord Advocate, the defenders were the real prosecutors in the criminal court. Having thus joined issue upon the pursuer's guilt, they are barred *exceptione rei judicatæ* from demanding farther proof. The sentence of a competent court must be held as *probatio probata* of the facts which it establishes. In the consistorial questions of marriage or legitimacy, the Court would not allow the facts established by a final decree of the Commissaries to be contradicted in any consequent civil action. When a person is remitted by the Court of Session to the Court of Justiciary, as guilty of forgery, the latter proceeds entirely upon the sentence of the former. Had the verdict of the jury been against the pursuer, he could have brought no claim against the Insurers, and for the same reason the proof granted by the Lord Ordinary is incompetent. It is particularly hard on the pursuer, that those witnesses who have not only been precognosced at the instance of the defenders, a step of itself irregular, (10th August 1785, Fall against Sawers, *voce* WITNESS; 4th August 1788, Bogle against Yule,) * but who have afterwards beent wice examined, and have consequently had it in their power to frame a connected story, should again be brought forward.

Observed on the Bench; If the pursuer had brought his claim in the Court of Session, and been successful, a criminal prosecution would still have been competent against him. On the other hand, a verdict of acquittal in the Court of Justiciary, even if the words employed by the jury had been "not guilty" instead of "not proven," does not preclude the competency of the proof allowed; 4th December 1789, Stein against Bonnar*. If the pursuer

* Not reported, see APPENDIX.

No 60. had been accused of forgery, and had been acquitted, improbation might still have been proponed in the Court of Session.

The taking a precognition with a view to a criminal prosecution, does not preclude the examination of the persons precognosced in a civil action; 26th February 1793, Wemyss, *voce* WITNESS.

THE LORDS, 28th November, refused this and a second reclaiming petition, without answers.

Lord Ordinary, *Swinton.* For the Petitioner, *Geo. Fergusson, Honyman, Rae.*
Clerk, *Home.*

D. D. *Fol. Dic. v. 4. p. 236. Fac. Col. No. 85. p. 188.*

Exceptio rei judicatæ, whether good against the same pursuer in a new process. See PROCESS. Sect. 20.

Actio et exceptio rei judicatæ upon foreign decrees. See FOREIGN.

Where an apparent heir has been decerned against *passive* upon proponing peremptory defences, can such a decree be founded upon by other creditors? See PASSIVE TITLE. Division 1st.

See APPENDIX.