

1731.

CUTLAR

v.

MAXWELL.

ARCHIBALD CUTLAR of OROLANDS, *Appellant*;
ALEX. MAXWELL of NEULAW *et alii*, *Respondents*.

30th March, 1731.

PROOF—PRESUMPTION—Circumstances from which it was held, that the payment of a debt had been made by a cautioner, and not by the principal debtor.

No. 14. THIS was a question between the representatives of a principal debtor and those of a cautioner. Bonds had been granted by the cautioner for the amount of the debt; and on the other hand, the principal debtor executed an obligation, bearing that the debt for which these bonds had been granted, was a debt due by him, and obliging himself to pay it with interest.

1660.
1665.

1669.

The interest was uniformly paid by the principal debtor, (unless during six months) down to the year 1677, at which date the principal sum was paid to the creditor, who granted a receipt and discharge for the same in favour of the cautioner.

In 1710, Cutlar, the heir of the cautioner, raised an action against Maxwell and others, (the representatives of the principal debtor,) for payment of the debt, and the question came to be, by whom was the debt to be presumed to have been paid?

Cutlar's case rested simply on the discharge by the creditor, as evidence that his father had paid the debt; on the other hand, the defenders founded on a variety of circumstances, from which they

argued the presumption that the debt had been paid by their father, the principal debtor.

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Among other things, they founded upon the fact, that the principal bond for the debt had been found cancelled in the repositories of their father. They likewise founded upon the length of time which had elapsed without any claim of relief being made, both from the date of the alleged payment until the death of the cautioner, (ten years,) and also from that event until the raising of the present action; further, on the fact of the principal debtor having paid the interest.

The Lords found “the presumptions pleaded for the children of Samuel Maxwell of Newlaw, not sufficient to instruct that the contents of the bond were paid by the effects of Newlaw, except in as far as the receipts of annual rent bear expressly to be received from him.” July 8, 1727.

This interlocutor was adhered to. Upon advising a petition and answers, however, their Lordships found the presumptions pleaded for Newlaw’s children, especially the fact of the retired bond having been found in his repositories, sufficient to instruct that the contents of the bond had been paid by the effects of Newlaw. A petition against this interlocutor was refused. Feb. 9, 1728.
Feb. 4, 1729.

The appeal was brought from the interlocutors of the 9th Feb. 1728, and the 4th Feb. 1729. Entered
Jan. 28, 1730.

After hearing counsel, “it is ordered and adjudged, &c. that the interlocutor complained of be reversed; and that the interlocutory sentence of the Lords of Session, pronounced the 8th July 1727; and the interlocutors of the same Judgment
March 30,
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“ 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 } *Respondent*.
 Elgin, - - - - - }

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.