

## CONCURSUS ACTIONUM.

### S E C T. I.

Where different Actions arise upon the same fact, tending to the same end, the Pursuer cannot insist upon both.

1610. December 13. JOHNSTON against CHARTERIS.

**I**N an action of contravention, pursued by Mr John Johnston against Sir John Charteris of Hempfield, the LORDS found that they would grant no contravention against Hempfield, for uplifting of the mails and duties of the lands, whereupon decret of removing was given against Hempfield; and that because Mr John had obtained a decret of violent profits thereupon, which he might put to execution; and that notwithstanding Mr John was content to renounce his decret of violent profits.

*Fol. Dic. v. 1. p. 185. Kerse, MS. fol. 232.*

\* \* Haddington reports the same case :

He who obtained a decret of violent profits, against that man who found him caution of lawburrows, pursued contravention for the defender's wrongous meddling with the profits of his land, albeit he offered to renounce the execution of his decret, so far as may concern the bygone profits; yet the LORDS will not permit him to do it, and to pursue contravention upon that fact, for the which he had a rigorous action of violent profits, whereof he had made election by his former pursuit and decret.

*Haddington, MS. No. 2049.*

1611. November 29. SIR JOHN HEPBURN against CARCATTLE.

**I**N a contravention pursued by Sir Robert Hepburn against Patrick Carcattle, for contravening an act of caution found by him, by the occupation of the lands

No 1.

Where the party had made his election, and taken a decret of violent profits upon ejection, the LORDS refused to sustain contravention; and that although the pursuer was content to renounce his decret of violent profits.

No 2.

Found as above.

No 2.

pertaining in property to his umquhile mother, who was wife to the said Sir Robert;—THE LORDS would not sustain the action of contravention, because Sir Robert, upon warning made to him in his wife's time, having obtained decret of removing, had his action of violent profits; and therefore, having an action of that nature, which of the law was [a punishment of violence, the LORDS would not grant contravention.

*Fol. Dic. v. 1. p. 185. Haddington, MS. No 2322.*

No 3.

The Lords sustained a contravention, although the Magistrates of the place, (both parties being burgesses,) had immediately committed the party to prison for the fact; and this because no satisfaction was decerned by the Magistrates to be given to the complainer.

1623. March 20.

FITHIE against CARMICHAEL.

IN a contravention, Fithie *contra* Carmichael, being both burgesses of Dundee, the fact of contravention being for casting down the pursuer to the ground, and bruising him with his knees and elbows, without any blood or other violence;—THE LORDS sustained the contravention, notwithstanding it was *alleged* by the defender, That he being convened at the pursuer's instance, for the same fact, before the Bailies of Dundee, they being town burgesses of that burgh, the Bailies had, for that fact, committed him to prison, after trial taken by them, of the matter of the fact; and so he being once punished therefor, he ought not to be pursued *de novo* at the pursuer's instance; therefore this allegiance was repelled, because no satisfaction was decerned by the Bailies to be given to the party complainer.

Act. Mowat.

Alt. Russel.

Clerk, Gibson.

*Fol. Dic. v. 1. p. 185. Durie, p. 59.*

No 4

The deed of contravention being ejection, the party has his election whether to insist in an action of ejection or contravention; for the Lords found, where a party has two actions upon the same fact, he may chuse either; but if both tend to the same end, whether *ad pœnam* or reparation, chusing the one sopites the other.

1630. February 19.

L. HIDLESTON against MAXWELL.

HIDLESTON pursuing contravention upon this deed, viz. because he was ejected out of his room; and the defender *alleging*, That seeing the pursuer had an ordinary action of ejection competent to him in law for that deed, for which he pursued contravention; therefore that contravention should not be sustained. This allegiance was repelled; for the LORDS found, That where the party had two actions in law, by which, or either of them, he might seek redress for any one deed, that he might pursue in his option either of them, at his pleasure; but where there are two actions upon one fact, *si utraque tendat ad vindictam, electa una non recurrit ad alteram, quia pœnam petit, et ut injurians puniatur, nisi et cum injuria damnum datum sit, tum enim post pœnam petitam potest agi ad reparationem damni.*

*Fol. Dic. v. 1. p. 185. Durie, p. 494.*