

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. 49A.*