

1673. January 31.

SWINTON against SLICE.

No 11.

THE LORDS found, that they themselves might take trial of a battery *ad civilem effectum*, that the party who does the wrong should *cadere causa*; but that this did not prejudice a criminal pursuit for the breach of the peace.

Fal. Dic. v. 1. p. 186. Gosford, MS.

* * See The particulars of this case, *voce* BATTERY, Vol. IV. p. 1368.

1711. June 15.

WILLIAM SCOT against MARK CARSE.

No 12.

WILLIAM SCOT, chirurgian in Dalkeith, pursues Mark Carse of Cockpen for L. 71 Scots of an accompt of drugs and medicaments furnished to his family, and for curing a fracture to himself. During the dependence, he beats Scot with a cane over the head, whereupon he is pursued before the Sheriff by the procurator-fiscal, with concurrence of Scot, the party injured; and after probation of the riot he is fined in L. 30 Scots, to be paid in for the use of whom it concerned to the procurator-fiscal. Thereafter, Scot insisted against Cockpen, that seeing the battery *pendente lite* was now proven, he might be decerned to have lost the plea, conform to the certification of the 219th act 1594, and to pay the debt pursued for. *Alleged*, He being already fined in L. 30 Scots for the riot, he cannot be punished again in the same cause, by making him pay the debt, for that were to sustain two penal actions on the same head, whereas law has clearly determined, where a party has two actions arising from one delict, viz. both a fine and tinsel of the cause, if he elect one of them, his option is absorbed, and he can never recur to the other; for then *obstat exceptio rei judicatae*; and the law says, *jus agendi super eadem re per priorem actionem consumitur. Vid. etiam l. 53. D. de obligat. et act. 2do. Esto* the penal action for the loss of the plea were competent notwithstanding of the fine, yet the battery is not proven; for, there being only two witnesses adduced, and one of them does not condescend on the time when the stroke was given, but only that he saw him beat Scot, the pursuer; now, the essence and quality of the crime, in so far as concerns that conclusion of losing the cause absolutely, consisting in the precise time of its being committed during the dependence of the plea, the witnesses must concur as to the time; which not being here, though it be sufficiently proven to infer a riot and fine, yet *quoad* the effect of the act of Parliament to lose the cause, it is only proven by a single witness. *Answered*, The pursuit for the riot was only *ad vindictam publicam*; and the fine was not to Scot the pursuer, but to the procurator-fiscal; and these words, 'for the use of those concerned,' is not the party injured; but, in their stile, is to the use of the members of court, which is explained by the next clause, reserving action

A party was fined for a riot, and on account of the same act lost a cause, it being a battery *pendente lite*.