1673. *January* 31. SWINTON *against* SLICH.

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 prejudge a criminal pursuit for the breach of the peace.

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

WILLIAM SCOT, chirurgeon 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 concourse 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 judicatæ*; and the law says, *jus agendi super eadem re per priorem actionem consumitur*. *Vid. etiam l.* 53. *D. de obligat. et act.* 2*do*, *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

No 12.

to Scot the pursuer for his assythment. So the two actions are not *ad idem*; but, even in the Roman law, *nunquam actiones, præsertim penales, de eadem re concurrentes, una aliam consumit, l.* 130. *D. de reg. jur.* and the Doctors tell us, there is a *concursus cumulativus* as well as *electivus*; where a party insisting for a penalty due by one law, may thereafter crave what is more of penalty, by another law. Yea, if a jurisdiction be limited to a sum, as Justices of Peace in some cases are, the party to get his full satisfaction, may insist before a judicatory of ampler power, to make up and supply what he wants; but here, the charger got not a farthing of the fine, but all went to the use of the court; so nothing debars him from seeking the benefit of the act of Parliament, that Cockpen should lose the plea. To the 2*d*, anent the witnesses, *answered*, The fact of beating him is clearly proven; and, though the clerk has inadvertently omitted to adject to one of their depositions, that it was done at the time libelled, yet that is necessarily presumed, unless Cockpen will prove he beat him at another time, that was not during the dependence. Some thought, where the party beat, libels an arbitrary punishment and damages, and takes a decreet in these terms, he cannot raise a new process to seek a different punishment and penalty for the same fact; but seeing the fine came not to his use, the LORDS, by plurality, found Scot might insist to have the penalty of the act of Parliament of losing the cause applied to Cockpen, the defender; and accordingly decerned him in respect of the probation of the battery (which they sustained) to pay the debt pursued for, and so rejected the defences.

Fol. Dic. v. 1. *p.* 186. *Fountainhall, v.* 2. *p.* 645.

SECT. IV.

Contingent causes ought to proceed together.—After a Fine for Contumacy, the Judge cannot fine a Second time for the Delict.

No 13.
A cause was advocated, chiefly because there was an improbation depending in the Court of Session, of the same deed which was the subject of the action in the inferior court.

1675. *July* 2. BONAR'S RELICT *against* His REPRESENTATIVES.

A BILL of advocation being reported of a pursuit at the instance of John Bonar's Relict, against his Representatives, before the town of Edinburgh, for payment of 10,000 merks, conform to a bond granted by him, the LORDS did advocate, not so much in respect of the importance of the cause, the Town being competent judges; but because there was an improbation depending before the LORDS, upon the same pursuit of the said bond: And *contingentia causa non debet dividi*; and doth found the LORDS' jurisdiction to advocate to themselves all questions concerning the said debt.

Dirleton, No 288. *p.* 141.