

No 8.
Found as a-
bove.

1592. December 20.

GUTHRIE against GUTHRIE.

IN an action pursued by James Guthrie of ———, against Guthrie of Colestoun, for probation of the tenor of a tack, alleged to be made by the Cardinal Abbot of Arbroath to the said James's father, his mother, his eldest brother and himself, as part and portion of the said lands of Colestoun, &c.; it was *alleged* by the said Guideman of Colestoun, That no process should be granted to the said James, for probation of the said tenor, in respect that he had two other actions depending for the said tack; the one for transuming of the said tack furth of the register of Arbroath, the other for delivery of the same against the said Guthrie of Colestoun and others, alleged having thereof, and so *quandu subest spes recuperandi*, the pursuer can never have place to prove the tenor; because this inconvenience might follow, that in-proving the tenor, the principal might thereafter be found of a tenor contrary to that which would be proven in this instance. THE LORDS, by their interlocutor, found that the said pursuer would not be heard to pursue this action of the tenor, unless he would renounce the other actions for recovery of the tack itself.

Fol. Dic. v. I. p. 186. Haddington, MS. No 60.

S E C T. III.

Where the Conclusions of two Actions are only Different, not Contradictory, both may be Insisted in.

1633. July 25.

MITCHEL against LAW and STUARTS.

No 9.
Though a party de-
forced has pur-
sued crimi-
nally, *ad vin-
dictam publi-
cam*, for pu-
nishment, he
may thereaf-
ter pursue ci-
villy for his
private inte-
rest.

DAVID MITCHEL having raised caption against Alexander Barclay, younger of Maters, who was rebel at his instance, for sums of money; whereupon a messenger, at his instance, having past to apprehend him, and having met with him, Mr George Law, George and Robert Stuarts being in the rebel's company, impeded the said officer, and debarred him from taking of the rebel, and put him away with violence, with drawn swords and pistols; whereupon the said David Mitchel intents action against them for payment of these sums, for which the rebel was to have been apprehended, and for which he was rebel at the pursuer's instance. The defenders *alleging*, That this was an action of the nature of deforcement, which ought to

be pursued after the manner of a cause, at the King's advocate's instance, and should conclude, as is ordained by act of Parliament, c. 118. 1581, that the deforcement being tried, the deforcer's escheat should be adjudged to the King, and the creditors to be paid in the first end thereof; but whereas, it is pursued for payment of the debt, for staying of an officer, and to be so proven by two witnesses, it were of dangerous consequence, the like whereof was never pursued before, nor can be now sustained. The exception was repelled, and the action sustained upon the deed libelled, to infer the conclusion libelled, which the LORDS found ought to be proven by sufficient unsuspected witnesses; and found it not necessary, to urge the pursuer to intent an action of deforcement, as the act of Parliament prescribes; seeing the act prohibits not the party hurt, to seek any other lawful redress, as in law he best might; for, if that action was competent to him, which was more, far more this action, whereby less punishment is craved against the defenders, and the pursuer having his option of two causes, he might chuse any of them as he pleased. And this pursuit was found very allowable, and if the King's advocate, or any party having interest, pleased to intent a deforcement against these defenders, that action was also free to them to pursue, unprejudged by this pursuit.

Act. ———.

Alt. *Advocatus.*Clerk, *Scot.**Fol. Dic. v. 1. p. 186. Durie, p. 69r.*

1672. December 13.

MURRAY against FRENCH of French-land.

MURRAY pursues French of French-land for payment of a sum, as he who deforced the messenger in the execution of a caption. The defender *alleged*, That the libel is not relevant, because the acts of Parliament anent deforcement declare the penalty thereof to be the escheat of moveables, and that the party deforced shall have ready access for payment out of the first and readiest of the moveables, but does not bear, that the deforcer shall pay otherwise. *2do*, The act of Parliament puts it in the party deforced his option to pursue civilly or criminally, which must import, that if he have made his election to pursue criminally, as he hath done before the Justices, he cannot pursue civilly before the Lords. It was *answered* to the *first*, That the act of Parliament bears expressly payment of the debt by the deforcer, but doth not say in the same sentence, out of the escheat goods, but by a distinct sentence, that the deforced shall be preferred to the King or donatar, and have ready execution against the moveables; which is a several privilege, and neither ought to be restrained in a case so favourable, for maintaining authority, and the execution of public sentences; for it may readily fall out, that the deforcer have little or no moveables, and so should run no hazard; and it was so decided 25th of July 1633; *Mitchel contra Barelay*, No 9. *supra*; and was lately so decided in the

No 9.

No 10.

Found as above.