

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 *concursum cumulativum* as well as *electivum*; 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 2d, 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 decret 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. Fountainball, 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.