

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.

No. 10. case ——— Scot, son to Longshaw, who deforced a messenger executing a caption. To the *second*, it was *answered*, If the pursuer had insisted criminally for his civil interest of the escheat or payment, he could not have insisted civilly ; but having only insisted *ad vindictam publicam* for punishment, as any of the people might do in *actione publica et populari*, it cannot hinder him now to proceed civilly.

THE LORDS repelled both the defences, and found the defenders liable for payment of the sum.

Fol. Dic. v. 1. p. 186. Stair, v. 2. p. 133.

* * * Gosford reports the same case :

ROBERT FRENCH being pursued for payment of the whole debt contained in a bond, granted to Murray, as having deforced the messenger in the execution of his caption against the debtor; it was *alleged*, By acts of Parl. 1587, c. 85. and 1592, c. 152. it was statute, That deforcers of messengers shall escheat their whole moveables, the one half to the King, and the other to the party wronged ; so that this being a penal action, and the punishment expressly determined by law, there is no power left to the Judges to extend the same. *2do*, The acts of Parliament, allowing that deforcers may be either civilly or criminally pursued *una electa non recurritur ad aliam* ; but so it is, that the defender was pursued criminally before the Justices for that same fault. It was *replied* to the *first*, That the acts of Parliament (render parties) liable to the whole debt, for deterring of deforcers, the escheat of their moveables was statute to belong to the King, and the creditor who suffered thereby, and hath been so determined by the LORDS, Mitchel against Barclay, No 9. p. 2916. It was *replied* to the *second*. That albeit the deforcer was pursued criminally before the Justice for his violence and breach of the peace, yet that hindereth not the pursuer to intent a civil process for his damage and loss, both these actions being consistent, and for diverse causes ; and, the law doth not allow to recur, where two actions are competent ; only where they are for one and the same cause, and where *pinguior actio electa alia extinguitur*.

THE LORDS did repel the defences, notwithstanding that the acts of Parliament bear, that the creditor *quoad* the debt, whereof he is frustrate, should be first satisfied, before the fisk can have any right, but statutes nothing for payment of the debt by the deforcer ; as to which, the debtor himself is still liable. But, in respect of the foresaid practise, and that if the libel had been expressly founded upon damage and interest, undoubtedly it would have been sustained upon that ground, and therefore, they found the defender liable for the debt, seeing otherwise the creditor might be altogether frustrate, the debtor being from the caption, and in a capacity to go away, and the deforcer might be a man of no fortune and his moveables inconsiderable.

Gosford, MS. p. 287.