

and Strachan's examination was contrary to law, the LORDS having condemned such precognitions, either in civil or criminal cases, as dangerous and pernicious to ensnare unthinking people, no ways on their guard for such catches; and was so found, Livingston *contra* Galloway, *voce* IMPROBATION; and prohibit by the claim of right, act 18th of the convention of the estates 1689. *Answered*. These defences have more the air of a dilatory trifling, than might have been expected in such a case, where he was deeply concerned, rather to vindicate and exculpate himself from a charge dipping on his reputation, than to procrastinate the plea, and disappoint the pursuer's just demand of his money; a bad requital for his lenity and forbearance. And to the *first*, It is a strange novelty, where a fact complained of produces both a civil and criminal pursuit, the party may not have his choice of the softest method to recover his money: And the very laws cited give this liberty that *utraque actione licet experiri*; and as to the extrajudicial declarations, we are not in that case; for Strachan's was taken *auctore pratore*, before a magistrate; and that case out of Durie is old and single, has no second; neither meets the affair in hand, which was to discover a concealment, *ad rimandam veritatem*, and in favours of one who was *in damno vitando*. THE LORDS repelled the dilators, and sustained the process *ad civilem effectum*, to make up the pursuer's loss.

Fol. Dic. v. 1. p. 185. Fountainhall, v. 2. p. 725.

SECT. II.

Where the Conclusions of two Actions are contradictory, the Pursuer cannot Insist in both.

1590. June.

HOME *against* CAIRNCROSS.

WILLIAM HOME, younger brother to the Laird of Coldenknows, pursues the Laird of Mellerstons, to hear and see the tenor of an tack proven, the whilk was sett by the said Laird to the said William, of certain husband lands of sounes; and also, the said William pursewit Nicoll Cairncross, for exhibiting and delivering of the said tack, *alleging* the same to be in his hands. It was *alleged*, That the pursuer could not pursue both the ways, and the two actions were *incompatibilia*. *Answered*, That it was *inter diversas personas, et non eodem modo agendi*. THE LORDS fand be interlocutor, That the pursuer might not pursue both the ways, but behoved to choose *et quod electione unius tollebat altera*. As the pursuer thereafter pursued for the proving of the tenor.

Fol. Dic. v. 1. p. 185. Colvill, MS. p. 453.

16 Y 2

No 6.

No 7.

A party intending an action of proving the tenor, and also another action of exhibition and delivery of the same writ against a third person, the Lords found, that altho' it was *cum diversis personis*, yet *electione unius, tollitur altera*.