

house's, whose jointure-lands you possessed. *Answered*, It is very true, her annuity was payable out of these lands, and she pointed my corns for the very same: But I redeemed them, and got an assignation from her, so the son had the less pretence to seize his mother's victual. *3tio, Alleged*, That, the pursuer cannot claim both the violent profits in the spuilzie, and likewise the penalty in the contravention of the lawburrows; for two penal actions concurring *una consumit alteram*. The party indeed has the election, but he cannot seek both. And Stair, lib. 4. tit. 48. § 9. tells us the Lords are not in use to sustain both penalties. *Answered*, This poor man is in a special case; for *1mo*, He gets not the full price of his corns; *2do*, He loses the annualrent he could have made; *3tio*, The law gives him but the half of the penalty, the other going to the fisk; so he falls but 500 merks, which does not compensate his damage; *4to, Alleged* by the cautioner, The sum he is taken bound in of 1000 merks is illegal and exorbitant; for that is the penalty of a freeholder, which Reidhouse is not, never yet infest. *Answered*, The apparent heir, in construction of law, is subject to the same penalty as if he stood infest. *5to, Alleged*, Reidhouse must have compensation for what rent the tenant owed him. *Answered*, The Lady liferented these lands, at least the greatest part, and he has satisfied her, and got her right; which demonstrates the great bangistry and oppression he has met with: And Stair, *ubi supra* § 2. thinks where the fact is clothed with atrocious circumstances, by men of violent tempers, the penalty may be increased. That spuilzie *inurit labem realem* and affects the goods; see *Hay contra Leonard, voce PERSONAL and REAL*: Yet *bona fides* will excuse onerous purchasers who knew nothing of the vitiosity. That penal actions may sometimes concur, L. 130 *D. de reg. juris* seems to import. But it wants not its own limitations. THE LORDS found he could not have both his oath *in litem* on the damages, highest prices and violent profits, and likewise the penalty in the lawburrows; but allowed him the election of any of the two he judged most to his advantage: And repelled the cautioner's defences, and refused to restrict the penalty to 200 merks, (as he craved) which is imposed on an unlanded gentleman: For, though Reidhouse was not infest, yet he was apparent heir to a freeholder who stood infest, and so was liable to the same penalty.

*Fol. Dic. v. 1. p. 185. Fountainball, v. 2. p. 501. & 699.*

1712. February 15.

JOHN BUCHANAN, Writer in Edinburgh, against JOHN MENZIES.

IN a process at the instance of John Buchanan against John Menzies, for restitution of some bank notes belonging to the pursuer, which he alleged Mr Menzies had unwarrantably intromitted with;

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No 6.

A party prosecuted another, as for the crime of fraudulently intromitting with bank notes. He

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afterwards  
brought an  
action for  
them, only *ad*  
*civilem effec-*  
*tum*. This  
last was sus-  
tained, not-  
withstanding  
of the former.

*Alleged* for the defender; The pursuer had irregularly, without any process or intimation to the defender, caused sist one John Strachan before a Bailie of Aberdeen, who elicited from him a signed declaration upon oath, of what he knew concerning the defender's having of the notes, and how he came by them; which extrinsic examining and precognosing in a civil cause, is a ground to assilzie the party against whom that method was taken, and punishable as a practice of pernicious consequence, 14th July 1621, Livingston *contra* Galloway, *voce* IMPROBATION.

THE LORDS repelled the defence; for they thought the practise, 14th July 1621, betwixt Livingston and Galloway ought not to be followed or made a precedent. *Forbes, p. 589.*

\* \* Fountainhall reports the same case:

JOHN BUCHANAN, servant to Robert Campbell, writer to the signet, having received from his master L. 95 Sterling in bank notes, to deliver to another person; and he meeting with John Menzies, son to Sir William Menzies of Gladstones, and accidentally telling him his errand, being acquainted, they went in to drink, and either they were taken out of his pocket by the said John, or being dropt were found by him. Buchanan, after their parting, missed his notes, and went straight to John Menzies, and enquired if he had seen them, who denied it strongly; whereon they were put in the Gazette in 1708, and a premium offered to the finder. This matter continued dark for a year or two, till Providence ordered it, that one John Strachan, Sir William Menzies's servant, whispered it in some companies, that John Menzies had found the bank-notes thought to have been lost; whereon he is convened before a bailie; and, being examined, declares he heard Mr Menzies say he had found about that time bank-notes to that value. On this discovery, Mr Campbell, Buchanan's master, applied to John Menzies, and his father, who at last confessed his intromission with these notes; but added, that he had sent them back by a gentleman he had employed. This not being instructed, promises were made to repair the damage; but that not being performed, Buchanan applied to the Queen's advocate for a warrant to arrest him; which was done, till he found his brother Thomas caution to produce him; and, after many communings, reparation being shifted, Buchanan raised a process before the Lords, for restitution of his money, and L. 20 Sterling, as his damages. *Alleged*, The matter of this libel is criminal in a high degree; and though it might be likewise the ground of a civil action, yet you have elected to insist criminally, by exhibiting a complaint to her Majesty's advocate; so no process can now be sustained, till the criminal accusation be first discussed, as clearly prejudicial, and not to be anticipate by this civil process. And which quadrates exactly with the common law, *l. 54. D. de judiciis*, and *l. ult. C. de ordine judiciorum*, where *prius de crimine judicandum quam de civili causa cognoscatur*. 2do, Your libel is most irrelevantly founded on extrajudicial confessions, and other unconcluding circumstances;

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.*

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## 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.*

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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*.