

1709. June 9. AGNES BIRNY *against* JOHN HERRIOT in Dirleton.

JOHN HERRIOT in Dirleton being tenant to Hamilton of Reidhouse, and Agnes Birny, the Lady, being infest in a liferent annuity of 1000 merks *per annum* out of these lands, she and Mr Andrew Rule, her second husband, poinded Herriot's corns in October last, for her annuity due for the crop 1708, and upon his making payment disposed the same to him. Captain Hamilton of Reidhouse, the fiar, pretending that Herriot's rents did much more than pay his mother's annuity, seizes upon the tenant's corns, and carries them to his girnels, and sells and disposes on a part of them; whereon Herriot, the tenant, pursues him for a spuilzie before the Justices of peace, who ordained Reidhouse to enact himself not to intromit with, nor dispose upon the victual, till they met again on the 1st of June; at which day, there being no diet, the tenant advocates the cause to the Lords, and Reidhouse at his own hands seizes on the victual, and sells 50 bolls of it for ready money; whereupon Herriot applies to the Lords by bill, complaining of this unwarrantable intromission; and if he, as an officer of the army, should go off to Flanders, he would be deprived of all remedy and redress; and therefore craved the victual might be secured, both what remains, and what he had masterfully carried away, and be roup'd to the best avail, and the price consigned in some responsal person's hand, to be made furthcoming in the event to the person who shall be found to have best right thereto. *Answered* for Reidhouse, That the tenant's rent was much more than paid his mother's annuity of 1000 merks, and to which surplus he had the only undoubted right; and by his hypothec, as master of the ground, he might not only hinder the tenant to remove the corns off the ground, but intromit therewith, especially seeing there was a standing submission, yet unexpired betwixt them; and that the Justices of the peace did not meet on the 1st of June, was none of his fault; and his mother's collusion with the tenant can never prejudice him, seeing her poinding was precipitant before the term; and the appreciation of the corns was far below the prices then giving, and all contrived to defraud him, the heritor. THE LORDS found, that the master, in right of his hypothecation, had a power of detention of the corns growing on his ground, that they could not be transported elsewhere till he were satisfied or secured; but that he had no power to intromit or dispose thereon, till he had a sentence liquidating his debt; and that he was *in mala fide* to carry them away after he was cited in the spuilzie, and ordained to enact himself to forbear meddling with the corns in the mean time; and directed a commission to Mr Alexander Hay, and John Hay of Hope, Sheriff-deputes of Haddington, to roup the corns yet remaining, and keep the price for the use and behoof of any that should be found to have interest at discussing of the cause; and for what Reidhouse has summarily intromitted with at his own hand, ordained him

No 5.

In a case of spuilzie, found, that a party was not entitled both to insist for his oath *in litem*, to ascertain damages and violent profits; and to claim the penalty in law-burrows.

No 5. to find caution to make the same furthcoming, if the same shall not be found to belong to him, but the tenant shall instruct he has paid his full rent.

1712. *January 28.*—JOHN HERRIOT late tenant to Hamilton of Reidhouse, now in Dirleton, having applied first to the Sheriff, and then to the Justices of the Peace, and lastly to the Lords of Session, for sequestration of his rents, in regard Reidhouse had, under pretence of his hypothec, broke up his barns and girdels, and seized on his corns, he obtained a warrant discharging Reidhouse to intromit, *vide supra* June 9th 1709. Notwithstanding whereof he carried away near 200 bolls of corn, and sold it up and down the country to baxters, brewers, and mealmongers, and uplifted the money, and then departed to Flanders. Whereupon the poor man had no remedy left but to raise a spuilzie against him, and the persons who bought the corn from him, and Robert Sandilands, his cautioner in lawburrows, wherein he was allowed to prove the taking away of his victual, with the quantities and prices: And the probation coming this day to be advised, no compearance was made for Reidhouse, he being abroad, and little to be said for him. But it was *alleged* for Grant and others that had bought the corn, *absolvitor*; for they had bargained with Reidhouse, and made *bona fide* payment before your citation in the spuilzie, and produced discharges. *Answered*, Though there be just-ground to suspect the discharges are antedated, yet you were still *in mala fide*, for your payments were after the warrants he had obtained against Reidhouse. *Replied*, These were not intimate to them. THE LORDS found it relevant to put them *in mala fide*, that they knew, before they made payment, of the applications Herriot had made to the Sheriff, &c. to have the corns sequestrate. Then Herriot insisted to have his oath *in litem*, not only on the quantity spuilzied more than he had proven, but likewise on the prices, which is always allowed *in odium spoliantis*, as Spottiswood observes, tit. Spuilzies and Ejections; and Brown *contra* Murray, *voce* OATH, *in litem*; Earl Roxburgh *contra* Langton, No. 2. p. 379. It is true, the witnesses he has adduced have deponed on the prices, but through their ignorance how the markets then ruled, they have condescended on a price far below what victual then gave, so this can never debar him from his oath in so atrocious and black a spuilzie. But the LORDS found he having adduced witnesses on the price, as well as the quantity, and examined them by a particular interrogatory upon the price then giving, he cannot reclaim now, but must stand to the price they have deponed upon, and can seek no more. Then Herriot insisted against Sandilands, the cautioner in the lawburrows, who *alleged*, his case to be most favourable, seeing Reidhouse had turned his back on this business, and so he could expect no relief. *Answered* for Herriot, This gave him a very dismal and melancholy prospect of his recovering payment of such vast quantities of victual robbed from him, and so had the more need to hold Sandilands the cautioner fast; who *alleged 2do*, You can never claim the benefit ether of the spuilzie or lawburrows, for the corns were not yours, but the Lady Reid-

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;

VOL. VII.

16 Y

No 5.

No 6.

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