

* * * Spottiswood reports this case.

No 7.

IN an action of contravention pursued by the Laird of Balcaskie and Florence Strang against Mr Andrew Sandilands, *excepted*, No process on the summons of contravention, because there was action of molestation depending betwixt the pursuers and the Laird of Abercromby about the same matter, (which was about the right of a gate and passage) which being prejudicial, cognition should be first taken in the molestation, *quia utraq. actio versabatur circa eandem rem, et idem subjectum*. *Replied*, That the action of contravention was *facti* only, that no party should trouble another by way of deed, and the molestation was *tam facti quam juris*, and so the one could not be prejudicial to the other. THE LORDS found the molestation prejudicial to the contravention, and so that cognition should be taken in it first. Next *alleged*, That the libel was not relevant to infer any pain of contravention, because there was no damage or hurt, nor any thing qualified wherein the pursuer was interested, (the deed of the contravention being only in stopping of a passage, so that the pursuers might not lead their corns to Pittenweem) *nemo enim punitur nisi delictum vel noxam commiserit; et ubi nullum damnum ibi nullum delictum*. *Replied*, That the pursuer's libel was founded upon the act of lawburrows inserted in the books of Secret Council, and in so far as the pain was inserted in the act, it was *pæna judicialis et legalis, et a iudice decreta; et ubi ejusmodi decernitur pæna, non inspicitur damnum sive interesse, sed an iudici obtemperatum sit vel non*; and so the pursuer was not obliged to qualify any interest or damage, but only if he was molested by way of deed, and otherwise than by order of law. THE LORDS repelled the allegiance. Next *alleged*, That albeit the libel were sustained, not qualifying any *damnum et interesse*, yet the deed of molestation was so small, that neither of law nor equity it could infer so great a pain (*viz. 2000 merks*) for the stopping of a cartful of corns; *quia pænæ inferendæ sunt, habita ratione rerum et personarum; et in pænis proportio geometrica, et non arithmetica consideratur, vide Arist. l. 5. Ethic. c. 3. & 4*. THE LORDS would not modify the pain before probation, because the one half thereof belonged to the King and his Treasurer.

Spottiswood, (CONTRAVENTION & LAWBURROWS.) p. 74.

No 8.

1549. *June.* AULD TOWN of ABERDEEN *against* NEW TOWN.

THE Auld Town of Aberdeen got charges against the Provost, Bailies, Council, merchants and craftsmen of the New Town of Aberdeen, for finding of lawburrows to them under several pains respectively: And in like manner the Laird of Ferne got charges against the Provost, Bailies, and Council of Ruther-

glen, for finding lawburrows to them, in June 1595, and the year preceding, one Crichton against Sanquhar.

No 8.

Fol. Dic. v. 1. p. 533. Haddington, MS. No 409.

1501. July 24. EARL of CASSILLIS *against* KNOCKDOLOAN.

No 9.

IN an action betwixt the Earl of Cassillis and the Laird of Knockdoloan, an horning for not finding of lawburrows was found null, because the raiser of the charge had not made faith before the charge was given.

Fol. Dic. v. 1. p. 532. Haddington, MS. No 656.

* * * A similar decision was given 1583, — against Bishopton, No 1. p. 5731.
voce HORNING.

1604. February. WALLACE *against* LAIRD of HAYNING.

No 10.

IN a contravention pursued by one Wallace against the Laird of Hayning, the LORDS found, That the contravention was not relevantly libelled, being only founded upon boasting and chacing, without any harm or skaith; therefore the pursuer eiking to his libel that his servants were chaced down and stricken by the defender, the summons was found relevant.

Fol. Dic. v. 1. p. 533. Haddington, MS. No 705.

1604. February. SHAW *against* WILKIESON.

No 11.

THE Laird of Shaw pursued James Wilkieson for contravention of lawburrows, through casting of feal and divots upon his proper lands, and pasturing his guidis thereupon:—THE LORDS found not the summons relevant for pasturing nakedly, while the pursuer eiked his summons with the words herded and kept the same upon his proper lands, which was found relevant.—It was further *alleged*, That he did no wrong in casting divots, because he being infest in the miln and miln-land, land of —, and thereby having pasturage and commonty through the hail lands of the said town, he did no wrong to cast feal and divot upon the ground thereof.—It was *answered*, That no such privilege nor use of pasturage and commonty could give him liberty to cast divots upon the pursuer's proper said lands; albeit, because he offered him to prove that he did cast them upon his proper arable land, which he tilled and sowed diverse years before the said fact, and which was presently tilled, ready to sow. In respect of the which reply, the LORDS rejected the allegiance.

Fol. Dic. v. 1. p. 533. Haddington, MS. No 707.

Pasturing of cattle does not infer contravention, unless herding be also libelled.