

No 3. they sall not be heard efterwart to seik ony farder lawborrowis personallie, for thame awin selfis, fra him at whase instance thay ware summoundit.

*Balfour, (LAWBORROWIS.) No 3. p. 518.*

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No 4. 1545. *July 9.* The KING *against* DAVID BALFOUR.

GIF ane find sovertie and lawborrowis under ane certane pane, to ane uther, that he sall be harmless and skaithless of him, and it happin efterwart out of ane *chaud-melle*, or suddentie, that ilk ane of thame slay uther, the King and his Thesaurer has just action aganis the sovertie for payment of the pane, notwithstanding that the principal partie quha fund the said lawborrows is slane; and the sovertie in this cais aught and sould be releivit be his air, for quhom he became lawborrowis and sovertie.

*Balfour, (LAWBORROWIS.) No 5. p. 519.*

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No 5. 1561. *July 31.* The TREASURER *against* JOHN SINCLAIR of Dryden.

GIF ony man findis caution and sovertie of lawborrowis to ane uther, under ane certane pane, and thairefter brekis the samin, the King has just actioun and cause to persew him, or his cautioner and sovertie, for the haill sowme and pane under the quhilk the lawborrowis wer fund.

*Balfour, (LAWBORROWIS.) No 5. p. 519.*

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No 6. 1567. *August 10.* THOMAS PATERSON *against* ANDREW URQUHART.

GIF ony craftsman within this realme purches our soverane Lord's letteris, chargeand our soverane Lord's lieges to find lawborrowis to him, his kin, friendis and servandis, the persounis chargit sould not be compellit to find lawborrowis to all and sindrie brether of the craft; because in this cais thay ar not all friendis to him that seikis the lawborrowis, quhidder he be Deacon of the craft or not.

*Balfour, (LAWBORROWIS.) No 2. p. 518.*

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No 7. 1591. *November.* STRANGS *against* SANDILANDS.

No 7.  
Contraven-  
tion of law-  
burrows was  
sustained, al-  
though no  
damage was

THE Laird of Balcaskie and Florence Strang, pursued Mr Andrew Sandilands father's brother to the Laird of St Monance, to hear and see that he had contravened an act of lawborrows acted in the books of Secret Council, into the which the said Mr Andrew was obliged not to trouble or molest the pur-

suers in body or goods, otherwise than by order of law. It was *answered* by the defender, That he ought not to answer to the summons of contravention, because the contravention was alleged to be done into the stopping of a gate through the lands of Abercromby; and, true it was, that there was action of molestation depending betwixt the Laird of Balcaskie and the said Florence Strang and the indwellers in Pittenweems against the Laird of Abercromby, anent the right of the said gate and passage, and that being prejudicial, therefore cognition ought first to be taken in the molestation, quia utraque actio versabatur circa eandem rem et idem subjectum. *Answered*, That this action of contravention was *facti* only, that no person 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, that the action of molestation was prejudicial, and cognition ought first to be taken thereintill before the defender answer to the contravention.

No 7.  
done but only  
the party had  
stopped a  
high way  
where carts  
with corn  
used to pass.

1591. *December.*--In the aforesaid action of contravention, pursued by Florence and David Strangs, against Mr Andrew Sandilands, the deed of contravention was libelled to be done in the stopping of a high passage, so that the pursuers might not lead their corns from the lands of Abercromby. It was *alleged* that the libel was not relevant to infer any pain of contravention, because there was no damage or any interest libelled or qualified, nam pæna dicitur a puniundo, et nullus punitur nisi delictum aut noxam commiserit, et ubi nullum est damnum ibi nullum est delictum; and so there could be no pain sought of contravention, except it had been expressly libelled, that the pursuer had been damnified or interested in so meikle. To this was *answered*, That the pursuer had founded his libel upon the act of lawborrows that was insert in the books of Secret Council, and in so far as the said pain was insert in the act it was pæna judicialis et legalis et a iudice decreta, et ubi ejusmodi decernitur pæna, non inspicitur damnum sive interesse, sed si iudici obtemperatum sit aut non; and so the pursuer was not obliged to qualify any interest or damage, but if he was molested by way of deed or any otherwise without order of law. THE LORDS repelled the allegiance, and found that the pursuer needèd not to qualify damage or interest.

In the same action and cause, it was *alleged*, That albeit the libel might be found relèvant, not libelling *damnum sive interesse*, yet the deed of the molestation was so small, that it neither in law nor equity could infer so great a pain viz. for stopping a cartful of corn, quia pænæ inferendæ sunt habita consideratione rerum et personarum; et omnibus pænis proportio geometrica et non arithmetica consideratur, de qua vide Aristot. L. 5. THE LORDS found, that before the probation, they could not modify the pain, because the one half pertained to the King's Majesty and his Treasurer.

*Fol. Dic. v. 1. p. 533. Colvil, MS. p. 462. & 463.*

\* \* \* 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 judice decreta; et ubi ejusmodi decernitur pæna, non inspicitur damnum sive interesse, sed an judici 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-