

No 12.

1605. June 21. CONSTABLE of DUNDEE against FLESCHOUR.

THE Constable of Dundee younger having found caution of lawburrows to David Flescheour in Dundee, the said David pursued him for contravention, in so far as after the act and charge of lawburrows, he came to the said David, standing upon the side of High Street with Mr Andrew Lamb, and the said young Constable being accompanied with ten or twelve of his accomplices, took the hat off his head, crushed it under his feet, and tramped upon it; and menacing the said David, said, that if he, or the others of this town, took not off their hats to him, he should nail it with a whinger to his head.—It was *alleged*, That the summons was not relevant, because the defender was only acted and obliged, that the pursuer should be harmless and skaitless in his body and goods; and true it was, that he had neither harmed his body, or done skait to his goods.—It was *replied*, That the defender was bound that the pursuer should be untroubled or molested, directly or indirectly, otherwise than by order of law; and the defender had troubled, wronged, and dishonoured him, both in his person and goods.—Notwithstanding whereof the LORDS found the summons irrelevant, and assoilzied from the same.

*Fol. Dic. v. 1. p. 533. Haddington, MS. No 838.*

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1607. February 6. SOMERVILLE against —.

No 13.  
Reconciliation found not to take away action of contravention, but that the party may pursue for an injury done, even before the reconciliation.

JOHN SOMERVILLE of Torbreks pursued — for contravention of lawburrows, for violently putting of hand, and striking of the pursuer's wife and servants.—It was *excepted*, That John Somerville could have no action for contravention upon the said fact; because, since the committing thereof, the pursuer and defender were reconciled, whereby the said injury being remitted, the pursuer could never thereafter crave any reparation or amends for the same, or pursue action thereupon, *quia injuriæ temporis lapsu, et dissimulatione tolluntur, multo magis expresso reconciliatione et remissione*.—To this was *answered*, If a reconciliation was, the same proceeded upon the express command and desire of the minister of the parish, where both the parties dwelt at the very instant time when they were going to the communion, whereby, albeit the feud and quarrel was removed, yet the civil action was not taken away, unless he had renounced *per expressum*, which was neither done nor alleged; and it is of truth, that actions of contravention are competent upon many facts that are not grounds of quarrel, and among persons that are not at feud; and seeing the action was intended before the said alleged reconciliation, the same cannot take away the pursuer's action, and far less the King's interest, to whom right is acquired by the fact of the contravention, which, after the action is once intended, can never be taken away from the King's Majesty by any transaction, agreement, or

other deed of the party; and the reconciliation may only be thought to take away of future grudge and quarrel, and not of the preceding action, and civil pecuniary pain.—To this was *duplied*, That their reconciliation was an express remitting and forgiving of the deed of contravention, which being remitted, the pain cannot be craved by the party; neither could the King have any action, when the interest of his informer was decided, because of our practise the party informer *ante litem contestatam est dominus litis*. Notwithstanding of which exception and duply the LORDS found, That not only the King, but likewise his informer had good action. A case in some respects conform to this was decided before, betwixt the Laird of Craigiehall and Kinninmound.

*Fol. Dic. v. 1. p. 534. Haddington, MS. No 1289.*

No 13.

1607. February 27.

M'KIE against M'KIE.

IN an action pursued by M'Kie against M'Kie for the contravention of an act of the burrow court of Wigton, wherein the said M'Kie obliged himself and his cautioner, that the other should be harmless, &c. under the pain of L. 500, because, after the said act, he had drawn a sword, and pursued and invaded the other M'Kie; it was *excepted*, That this fact could infer no contravention nor penalty, because it was *modo conatus sine damno aut effectu*.—It was *answered*, That the invasion was relevant without any farther qualification. In respect of the which summons and reply, the LORDS repelled the exception. The Advocate compeared thereafter, and according to his desire was admitted for his Highness, and *alleged*, That the half of the penalty could not appertain to the Provost and Bailies of Wigton, but to the King; because that all acts of caution found for keeping the King's peace, under pecuniary pains, in cases of contravention, make the half of the pain to fall to the King's Majesty, unless the act bear the express contrary, which is not in this case.—It was *answered*, That albeit the King had right to the half of the penalties resulting from the contravention of lawburrows, found in the register of Session or Privy Council, yet penalties of troubleance within burgh pertain to the Magistrates of the same. Notwithstanding whereof the LORDS found, That the King's Majesty and his Treasurer had right to half of the penalties foresaid.

*Fol. Dic. v. 1. p. 534. Haddington, MS. No 1338.*

No 14.  
Drawing a sword to invade a man, though no harm followed, was found sufficient to infer contravention.

1609. December 2.

KILSPINDIE against LEARMONTH.

THE Laird of Kilspindie being charged to find lawburrows to Patrick Learmonth in Aberlady, under the pain of 5000 merks, for eschewing the danger of horning, found caution; and being thereafter pursued for contravention, the

No 15.  
A person was charged for an exorbitant penalty