

1724. July 7. ALEXANDER KENNEDY *against* JOHN HERBERTSON.

No 12.

A quarrel at play, and a scuffle having happened, between the parties in a *causé*; the pursuer seemed to have been rather the aggressor, and the defender had been hurt in a very slight degree.

They were reconciled next day. But the Lords found that this did not take off the effect of the battery; and they affoizied the defender.

KENNEDY having charged Herbertson to make payment of the contents of a bill due to him, Herbertson suspended; and whilst the process was depending, there happened a difference betwixt the charger and suspender; upon which a complaint was made to the Lords by Herbertson, setting forth, That, during the dependence of the plea, he had been invaded and wounded by the charger; and therefore craved, that, upon a proof's being adduced, he might be affoizied from the process, in terms of the 21st act, Parl. 14. Ja. VI. A conjunct proof being allowed; at advising thereof, it was *pleaded* for the charger, *1st*; That in this case there was no such actual invasion as the law requires; it was indeed proved by two witnesses, who were in company at the time, that Kennedy, upon ill usage from Herbertson, drew his sword, and demanded gentlemanly satisfaction; but then they both depone, that they did not see Mr Kennedy either push or strike at Mr Herbertson with it; and though their depositions likewise bear, that after the scuffle was over, they observed a scratch and a little blood upon Herbertson's finger, which they suspected might be by the sword, yet they were not positive of that; and indeed such a thing might have happened by many other accidents. There being then nothing else proved against Mr Kennedy, it can amount to no more than mere threats, which never have been sustained to infer battery.

2^{dly}, Although there were a proof of an actual attack upon Mr Herbertson, yet the provocation given by him was sufficient, if not to justify, at least to excuse what was done, in so far as to free Mr Kennedy from the heavy penalty of the statute founded upon. It was proved, that a small difference arising at play, the complainer gave the charger very abusive language, calling him no less than scoundrel; upon which, it is said, Mr Kennedy drew his sword, which indeed he could hardly forbear, according to the way of the world upon such occasions.

3^{dly}, Though Mr Kennedy's conduct should be found to fall under the compass of the statute, yet any injury done must be looked upon as taken away by a subsequent reconciliation, which was the case here, the parties having met the next day after the difference happened, and shaken hands together in token of friendship, upon Mr Kennedy's begging the complainer pardon; and they frequently afterwards conversed and drunk together as comrades, without the least appearance of any resentment.

It was *answered* for the complainer, *1st*, That he had brought as full a proof as the nature of the thing could bear, of his being attacked and wounded by the charger to the effusion of his blood; and it does not import any thing, that the persons present in company did not see a thrust or stroke given him, since he had distinctly proved, that the charger had drawn his sword, and that immediately blood followed, without any other visible cause to which it could be imputed; for it is not to be expected, that, amidst confusion and surprise, every circumstance that happens can be observed by by-standers: And, besides what the two witnes-

ses who were present at the scuffle depone, there was another who came in upon the noise, who says, that he saw blood upon the complainer's finger, and heard the charger say, when in a passion, that he would serve him as he had served Mr Herbertson, which implied that he had wounded him. Another witness, who was mediator in the difference next day, depones, that the complainer shewed him, in presence of Mr Kennedy, the hurt in his finger, as a wound he had received from him, which at that time Mr Kennedy did not disown to have been given by him.

2dly, It was *answered*, That no verbal provocation can excuse such an outrageous attack upon a man's person, so as to screen the invader from the penalty of the statute; neither was it distinctly proved, that the name of scoundrel was given by Mr Herbertson, before the attack was made upon him, that being only sworn to by one witness. The other witness does indeed speak of ill language given by Mr Herbertson to Mr Kennedy, but that, he says, happened when the scuffle was over.

3dly, As to the reconciliation, it was *answered*, That whatever was pretended of that kind, could not have the effect to take away the private interest of the party injured. It was acknowledged, that they were so far reconciled, as that they gave over thoughts of following out their resentment in a private way, and such a reconciliation might perhaps have some influence in criminal trials, though it is doubted if, even in these, it could have any weight where the injury was so atrocious; but it can never have the consequence to debar the party from an exception in law upon which he has right to crave, that the plea in dependence against him may be dismissed.

THE LORDS found the battery proven; and that the reconciliation, as proven, takes not off the effect thereof; and therefore affoizied from the principal process.

Decisions cited for Herbertson: Maxwell *contra* Stewart, 20th January 1684, No 3. p. 1369.; Cruikshanks *contra* Gordon, 13th February 1679, No 2. p. 1368.

For Mr Kennedy: Forbes of Knapperny against Forbes of Tolquhon; where the Lords dismissed a complaint of this kind, the complainer's ill usage appearing to have been extorted by his bad language. This decision is not recorded.

Reporter, Lord Cullen.

For Herbertson, Hay.

Alt. Ja. Fergusson & Jo. Kennedy.

Clerk, Murray.

Fol. Dic. v. 3. p. 70. Edgar, p. 70.

1730. November 12.

SINCLAIR OF BRADSTERDORAIN *against* SINCLAIR OF SOUTH DUN.

No 13.

IN this case the LORDS affoizied from a battery *pendente lite*, some qualifications being condescended on of a premeditated intention in the complainer to provoke the other to make the alleged assault upon his person. See The particulars of this case, *voce* BILL of EXCHANGE.

Fol. Dic. v. 1. p. 94.