

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.