

On the 8th August 1776, "The Lords adhered to their former interlocutor, modified the damages to Robert Scotland to L.5, with L.25 jointly to the other two; decerned for fifty guineas of expenses."

*Act.* H. Dundas, &c. *Alt.* Ilay Campbell.

*Diss.* Gardenston, Alva, Stonefield, Hailes, President.

1776. November 13. JOHN DORWARD *against* JANET DORWARD.

BATTERY.

What to be understood to be battery *pendente lite*? and whether the statute applies to women?

[*Faculty Collection*, VII. 308; *Dict.*, *App.* 1, *Battery*, No. 2.]

HAILES. I am not much moved by the objections to the witnesses; because, in criminal matters, especially when transacted *intra privatos parietes*, the best evidence must be received that the nature of the thing admits; and, in the circumstances of this case, it behoved the witnesses to the intimation of the suspension naturally to be persons connected with the suspender; besides, what they say is corroborated by the other witnesses, so far as they heard or saw.

[This seems to be better ground than *that* taken up by the pursuer,—That in this age of knowledge there can be no fear of perjury. If the knowledge of the age is to be judged by the candour and impartiality of witnesses, *this* is not an age of knowledge. The nature of the thing must always give place to the matter of fact.]

I do not think that any stress can be laid on the omission of *she* in the statute. Our statutes are not like the English, which abound in *he*, *she*, or *they*. It would be dangerous to suppose that *he* in the statute did not comprehend *she*, for the instigator and outhounder is as much within the statute as the actual invader.

But I have two doubts,—*1st*, Whether this case comes within the statute? Here is a stroke by a woman with her hand: the blood shed seems to have been in consequence of a push which she gave. The man did not expect it, and was off his guard, and lost his balance: Is this such an *invasion* or *assault* as the statute meant?

It was about the period of this statute that one Lord of Session was excused from his attendance in Court, because his road lay through the country of people with whom his chief was at variance. And that another Lord of Session was assaulted and slain, in broad day-light, between Edinburgh and Leith, on account of a quarrel about the management of a tutory? These were fierce times, and in them the violent remedies of the statute were held necessary.

*2dly*, How can Dorward, the pursuer, be allowed, in consequence of the bat-

tery *pendente lite*, to draw his whole charge for intromissions without evidence? Some of the articles in his charge are absurd. If the woman is within the statute, she cannot plead that Dorward had no title to pursue; nor can she herself plead that she had a title to intromit without accounting: but still there must be evidence of intromissions. Suppose that there were action on a bond for L.1000, with a fifth part more of penalty, and also for L.100 of expenses, would the defender, in consequence of a battery *pendente lite*, be obliged to pay, not only the principal sum, but the L.200 of penalty and the L.100 of expenses, although the one implies necessary expenses only, and the other is libelled altogether at random. [There are two decisions in Harcarse in the affirmative; but I do not think that, in a just interpretation of the statute, they can be followed.]

COVINGTON. The pursuer here seeks to operate a violent forfeiture, by the interpretation which he puts on the statute. I think that *women* come under the statute. If a woman cannot offend by the statute, neither can she be offended, for the law makes no distinction; and this would be severe on women, and expose them to be insulted and abused by the opposite party. A battery by a man must, in the course of things, occur oftener than a battery by a woman: the proof *here* is very dubious, and comes not up to the offence charged. I doubt whether the statute ought to be extended to such trifling squabbles. When it was enacted we were in a state of barbarity. In those days a law feud was a deadly feud; but times are much changed. The object of the law was matters of bloodshed; and, accordingly, we see that the king could not grant a remission in the cases which fell within the statute: that applies not to the *species facti* here. Formerly, the Court might have gone even beyond the words of the statute, to the spirit of the law; but there is no occasion for that in our age.

MONBODDO. The case of *women* falls under the statute. I am for the rule of the Roman law in the Prætor's edict, that *si quis* implies *si quæ*. In our neighbouring country there is more scruple, which, by studying to make laws plain, embarrasses their interpretation. But I am not for distinguishing this case from other batteries. If the proof had been sufficient, I would not have regarded the consequences. What I rest my opinion on, is the uncertainty of the proof.

PRESIDENT. I never could think that the word *he* was to be judaically interpreted. It is impossible to say that a woman, using a sword, or any other weapon of offence, would not fall under the statute. But I think that here the battery was trifling, and in a great measure provoked. It is dangerous to define what is a battery under the statute. I would not, however, stretch the statute to every petty squabble or scuffle; but I would apply it when I see any intention to raise disorder.

On the 18th November 1776, "The Lords found the libel not sufficiently proved, and assoilyied; found expenses due, and modified them to ten pounds."

*Act.* A. M'Conochie. *Alt.* A. Elphinstone.

*Reporter*, President for Auchinleck.

*N.B.*—The only material point determined here was, that women are comprehended under the statute. The opinions of the judges were not brought to one or to any other particular, and the interlocutor was worded accordingly.