1781. *February* 27.

JAMES GORDON, Tenant in Corrinachie, *againſt* JAMES GORDON, Tenant in Inchbroom.

No 14.
Objected, that the ſtatutes 1584 and 1594, (*ſupra*,) had gone into deſuetude. The Lords found the contrary.

A PETITION and COMPLAINT was preſented to the Court, by the former of theſe parties, ſetting forth, that the latter, prompted by reſentment, on account of an action then depending between them before this Court, had been guilty of an aſſault and battery againſt him; and craving judgment, in purſuance of the ſtatutes 1584, cap. 138. and 1594, cap. 219. relative to battery *pendente lite*; to which it was *answered*, That theſe ſtatutes, in conſequence of the change of our national manners, have properly gone into deſuetude.

THE LORDS 'found the ſtatutes to be ſtill in force, and allowed a proof.'

Act. *Elphinston.* Alt. *Alex. Abercromby.*

Stewart. *Fol. Dic. v.* 3. *p.* 70. *Fac. Col. No* 40. *p.* 72.

No 15.
Found in conformity with the above.

1789. *February* 20. BALFOUR FOWLER *againſt* JOHN GILLESPIE.

DURING the dependence of a proceſs of declarator of property, at the inſtance of Fowler againſt Gilleſpie, the latter, in an accidental rencounter with the former, gave him a ſtroke with a potatoe-hoe, by which he was ſlightly hurt.

On this circumſtance Gilleſpie inſtituted an action for having it found, in terms of the ſtatute 1594, cap. 219. 'that without farther probation, decree in his 'favour ſhould be pronounced in the depending proceſs of declarator.' It was

Pleaded for the defender: At the æra of the enactment in queſtion, the ſtate of this country was extremely different from what it is at preſent; inſomuch that the legiſlature, from neceſſity, appears to have had recourſe to ſo extraordinary a remedy. The violence of it was thought to be juſtified by the magnitude of the evil; for 'the manifold oppreſſion done within the realm between parties con-'tending in juſtice, by proud and undaunted oppreſſors,' as the preamble of the act bears, forced the legiſlature to adopt a method of cure, that, without any exertion of the executive power, which was weak, might operate forcibly, though not very equitably or juſtly. But, in modern times, when the evil has ceaſed, and manners are totally altered, to preſerve in force ſuch an undiſtinguiſhing penal law, would be much the ſame as to continue the ſevere regulations, made in the time of a plague, after the diſtemper had ſubſided, and the country was reſtored to its uſual health.

Accordingly this penal ſtatute has been ſo little heard of in later times, that it is not without reaſon it has been made a queſtion, whether it had not entirely gone into deſuetude. The occaſions have been few where it could have been inſiſted on in the preſent mild ſtate of manners; and, if any did occur, men of ſpirit

would deſpiſe, and men of integrity would ſcruple, to take ſuch an advantage of their neighbour. No 15.

The ſtatute is exceptionable in another view; ſince, comprehenſive and unlimited as its terms are, it cannot, without abſurdity, be extended indiſcriminately to cauſes of every kind. For example; in the caſe of a declarator of marriage, it is impoſſible that a battery, committed by the defender on the purſuer, ſhould at once make them married perſons, however clear it might be that no marriage had exiſted.

Anſwered, Of the import of the ſtatute of 1594, or of thoſe preceding ſimilar enactments which it ratified, there can be no doubt. Nor is it leſs certain that thoſe laws are ſtill in obſervance, as was determined in the caſe of Gordon *contra* Gordon, (No 14. *ſupra*,) and in ſome other late inſtances; ſo that all inquiry, with reſpect to the original cauſes of their inſtitution, is precluded.

THE LORD ORDINARY reported the cauſe; and

'THE LORDS found the battery *pendente lite* by the defender John Gilleſpie 'ſufficiently inſtructed; and therefore, agreeably to the declarator at the inſtance 'of the purſuer Balfour Fowler, found he had good and undoubted right to the 'property of ſeven eleventh-parts of the lands of Todſgreen,' &c.

A reclaiming petition againſt this judgment, though appointed to be anſwered, was afterwards refuſed.

Reporter, *Lord Eſkgrove*. Act. *G. Fergusson*. Alt. *M. Ross, M'Cormick*. Clerk, *Home*.

Stewart. *Fol. Dic. v.* 3. *p.* 70. *Fac. Col. No* 63. *p.* 114.

1790. *March* 4. JOHN ANNAND *againſt* JOHN ROSS.

No 16.
The defender, in a proceſs of battery, *pendente lite*, having become bankrupt, his creditors inſiſted that their intereſt in the original action ought not thereby to be prejudiced. The Court would not liſten to this plea.

ANNAND having ſued Roſs in an action of oppreſſion and damages, the defender, while it was in dependence, meeting the purſuer, ſtruck him ſeveral blows on the face. Upon this, Annand raiſed a proceſs of battery *pendente lite*, concluding againſt Roſs on the ſtatute of 1594, that decree ſhould be given according to the terms of the original libel.

The topics inſiſted on were in ſubſtance the ſame as were urged in the caſe of Fowler *contra* Gilleſpie, *ſupra*.

But Roſs having become bankrupt, appearance was alſo made for his creditors, who ſtated, that they had a material intereſt in the queſtion, as this penal ſtatute, if found to be ſtill in force, would operate againſt them, and deprive them of all fund of payment of their debts. If the ſtatute is ſtill in force, it ought at leaſt to be limited to its own purpoſe, which was the puniſhment of the offending party; but it would be injuſtice to allow it to affect the rights of third parties, who have committed no offence.