Alexander Robertſon Eſq. of Strowan, *Appellant*; Caſe 16.
Margaret Robertſon, his Siſter, - - *Reſpondent.*

Fountainhall, 12 Feb. 1712, Forbes, 22. Feb. 1712.

4th *June* 1712.

Proviſions to Children.—A mother being put in poſſeſſion of part of her eldeſt Son's forfeited eſtate for aliment to younger children, in a queſtion with the Son after the eſtate reſtored, it is found that her intromiſſions, above the current intereſt of their portions, went in diſcharge of former intereſt due thereon and of current intereſt, but not in payment of principal, or of intereſt after the intromiſſions ceaſed.

Battery pendente lite.—Circumſtances inferring this crime: though decree taken in the civil action, recourſe might alſo be had to the penal: the pain of battery not remitted by an act of general indemnity.

Coſts.—4cl given againſt the appellant.

BY contract of marriage in Auguſt 1663, between the father and mother of the appellant and reſpondent, the father bound himſelf, his heirs, executors, and ſucceſſors to pay to the younger children of the marriage 10,000 merks ſcots among them for their portions at Whitſunday or Martinmas next after they ſhould attain their ages of 15 years. The iſſue of this marriage were the appellant, the reſpondent, and three younger children.

The reſpondent attained her age of 15 years, on the 18th of May 1681, but before the had received any part of the intereſt or principal, her father died in November 1688, and her brother the appellant ſoon after went beyond ſeas, and became *forefaulted*, and all his paternal eſtate was ſeized by their then majeſties. The younger children being thus left deſtitute, application was made to the Privy Council to have ſome part of the eſtate of Strowan allotted to the mother for their maintenance; and on the 5th of February 1691, the Privy Council, by an act allotted the ſaw miln of Strowan, with as much of the wood growing on the eſtate of Strowan as was accuſtomed to be ſawed and wrought, and the whole profits and caſualties thereof, and ſervices thereto belonging, for the maintenance of the younger children during their pleaſure, appointing the ſaid profits, caſualties, and ſervices with the pertinents thereof to be paid and performed to their ſaid mother, for her ſaid children's aliment, during the Council's pleaſure, upon her receipts and diſcharges which ſhould be ſufficient to exonerate the payers thereof.

The mother and children continued in poſſeſſion till 1704, when the appellant having returned to Scotland, his eſtates were reſtored to him. In 1708, the reſpondent brought an action againſt the appellant before the Court of Seſſion, for payment of her portion being one fourth part of the ſaid 10,000 merks ſcots, with intereſt ſince 1681, when ſhe attained her age of 15 years.

In this action the appellant pleaded, at firſt that he had no part of his father's eſtate either as heir, or by other paſſive title, but that his intromiſſions were by other ſingular titles, and that

he was not liable to pay the ſaid portions; but after examining ſundry witneſſes on this point, the Court on the 15th of June 1711, found the paſſive titles proved, and the defender to be liable. The appellant then took another defence, that the portions of the younger children were more than fully paid principal and intereſt by their receipt of the profits, &c. of the ſaid ſaw-miln; and the reſpondent contended that ſuch receipt was merely in conſequence of a gift to the mother for maintaining the younger children from government, and was not to be imputed in payment of the principal or intereſt of their portions: after ſundry proceedings in this action and a proof of the intromiſſions allowed, the Court on the 20th of July 1711, "found that during ſuch time as the "purſuer was maintained by virtue of the act of Council out of "the defender's ſaw-miln, there could be no intereſt due to her "for her ſaid portion; but ſuſpended the determining how far "the purſuer's ſuper-intromiſſions ſhould extinguiſh her ſaid "portion, or the intereſt thereof after the defender's entry, till "the proofs of her intromiſſions came to be conſidered."

Sundry witneſſes were examined with regard to the profits of the ſaw-miln, and the purſuer's intromiſſions therewith, and the cauſe being afterwards heard, the Court on the 29th of December 1711, pronounced the following interlocutor, "The Lords having "conſidered the debate with the ſtate of the proceſs and proba-"tion, find that the ſuper-intromiſſion above the intereſt of 10000 "merks, being the younger children's portions during the "mother's poſſeſſion, was not only imputable to the payment of "intereſt during that intromiſſion, but to the payment of the "former intereſt thereof, from the father's deceaſe to the "mother's poſſeſſion by the act of Council, but found that the "ſuper-intromiſſion was not to be imputed in payment of any "part of the principal ſum or intereſt ſince ſhe ceaſed to poſſeſs, "and found that the intromiſſion continued till Whitſunday "1704, and therefore decerned to the purſuer her ſaid portion "with intereſt from that time." Againſt this interlocutor the appellant reclaimed, but on the 9th of January 1711-12, the Court adhered to their former interlocutor.

While this action was in dependance the reſpondent preſented a petition to the Court ſetting forth, that ſince the commencement thereof, in April 1709, the appellant with a deſign to force the reſpondent to relinquiſh her juſt right to her portion, and to give him a diſcharge, did cauſe her to be ſeized on a ſunday by eight men armed with ſwords, piſtols, and guns, and carried as a criminal five miles to the appellant's houſe at Cary, from whence ſhe was by his command dragged away to his miller's houſe, and there kept priſoner with centinels till ſhe made her eſcape; and therefore ſhe prayed that, purſuant to the act of
1594. c. 219. parliament 1594. c. 219., the appellant ſhould be decerned to pay the reſpondent her ſaid debt, damages, and expences. The appellant made anſwers, and the Court allowed a proof of the matters of facts. A proof was taken accordingly in this matter, and reported to the Court, but before procuring judgment thereon, the

the interlocutor of the 29th of December 1711, was pronounced. The reſpondent after this, petitioned the Court to take the proof of the ſaid invaſion into conſideration; to this the appellant made objections, that it was now incompetent as ſhe had taken decree in the civil action, and that the penal action was remitted by the late act of indemnity. Theſe objections were repelled, and the Court on the 22d of February 1711-12, found the complaint "proved in terms of the act of parliament, and therefore de-"cerned the defender to pay to the purſuer the whole debt "libelled with expences."

The appeal was brought from "an interlocutor or decree of the "29th of December 1711, and ſeveral ſubſequent interlocutors." Entered, 4 March 1711-12.

Heads of the Appellant's Argument.

This proviſion to the reſpondent being conſtituted by the mother's contract of marriage, whereby the mother had an intereſt to ſee to the payment thereof, the reſpondent's petition to have her mother put in poſſeſſion of a part of the appellant's eſtate for that end can receive no other reaſonable conſtruction, but that the ſame was done for the full ſatisfaction both of principal and intereſt of theſe proviſions contained in the contract of marriage expreſsly referred to in the application to the Privy Council.

By act of parliament in Scotland, no part of any forfeited eſtate is to be gifted away, and ſo long as there remains any debts upon the ſame, the profits of the eſtate muſt be applied in the firſt place in diſcharging theſe debts; and had not this part of the eſtate been ſo applied for the uſe of the reſpondent, and the other younger children, it would have been applied in payment of other debts, and would have extinguiſhed them.

Beſides it plainly appears, that the Privy Council were deceived in the value of this grant; for the reſpondent applied to the Privy Council, that her mother might be put in poſſeſſion of that part of the eſtate for an aliment to the reſpondent, and the other children in the firſt place, with an order to the factor upon the ſaid eſtate, to pay them the ſurplus, in caſe the ſaid part ſhould not prove ſufficient. The Privy Council then probably intended no more than a ſimple aliment anſwerable to the intereſt of the children's proviſions, and were made to believe that the part of the eſtate they were to poſſeſs would ſcarce amount to ſo much. But now it appears plainly to be of a much greater value.

It is impoſſible to find any manner of reaſon for the diſtinction the Lords of Seſſion have made by their judgment, viz. That the ſuper-intromiſſions ſhould extinguiſh the intereſt of the debts due before their poſſeſſion but not after; for if it was purely to anſwer the intereſt during their poſſeſſion, then it could not ſatisfy any thing due before that time; but if it was applicable towards ſatisfaction of what was before due, then there is all imaginable reaſon that their receipts ſhould extinguiſh their debts, ſo far as they had received.

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As to the ſentence or judgment upon the complaint made againſt the appellant on the act 1594. c. 219., there is nothing proved againſt the appellant to bring him under that penalty; beſides, it was prior to the act of indemnity, and the reſpondent having taken judgment in the civil action, could not afterwards inſiſt in the penal.

Heads of the Reſpondent's Argument.

The profits of the ſaw-miln were only a gift of the government to the mother for the aliment of the reſpondent and the other younger children, who by the appellant's forfeiture were totally deprived of maintenance: and the reſpondent never intromitted therewith, otherwiſe than as a ſervant to her ſaid mother, who diſcharged her of all ſuch intromiſſions.

By the ſaid act 1594. c. 219., It is provided "that if ony per-
"ſon either perſewer or defender ſuld happen to ſlay or
"wound to the effuſion of blood, or utherwiſe to invade ane of
"them ane uther in ony ſorte quhairupon they micht be
"criminally accuſed, after the raiſing of the ſummondes and
"precepts and lauchful execution thereof, or in ony time before
"the compleit execution to be recovered thereupon, the com-
"mitter of the ſlaughter, blood or invaſion in maner foreſaid,
"gif he be the defender, he ſall be condemned at the inſtance
"of the perſewer, without ony probation of the libel except
"ſummar cognition to be tane of the ſlaughter, bloodſhed, or in-
"vaſion before the juſtice, or ony other judge competent there-
"to."

The acts of invaſion which the reſpondent ſet forth againſt the appellant in her complaint to the Court, were within the proviſions of this act of parliament; and of this invaſion the reſpondent made full proof not only by witneſſes, but alſo by letters under the appellant's own hand. She alſo complained to the Court of Seſſion of another act of invaſion, which occurred during the examination of the witneſſes.

In July 1711, the Court ordered a ſtate of the proof of the invaſion which had been taken, to be prepared for their conſideration, and afterwards declared they would conſider the ſame with their firſt conveniency, but the reſpondent chooſing rather to ſhew the juſtice of her debt, than the barbarity of her brother, did firſt proceed to the obtaining the ſaid decree of the 29th of December 1711.

The act of indemnity, upon which the appellant founded part of his defence relates only to offences againſt the government, but not to any perſons private right or damages.

Judgment, 4 June, 1712.

After hearing counſel, *It is ordered and adjudged that the appeal be diſmiſſed; and that the interlocutors or decrees therein complained of be affirmed: and it is further ordered that the ſaid Alexander Robertſon ſhall forthwith pay or cauſe to be paid to the ſaid Margaret Robertſon the ſum of* 40l. *ſterling for her coſts ſuſtained in defending the ſaid appeal.*

For Appellant, *J. Pratt. P. King.*
For Reſpondent, *Tho. Lutwyche.*