

1736. *January 2.*PROCURATOR-FISCAL of Edinburgh *against* ARCHIBALD CAMPBELL.

No 18.
Expressions that imply a challenge to fight are probable by oath of the defender, if the libel be restricted to a pecuniary mulct.

IN the process at the Fiscal's instance against the said Archibald Campbell, before the Bailies, for a riot alleged to have been committed by him against James Stewart; the libel set forth, ' That the defender did, at the cross of Edinburgh, assault the said James Stewart, calling him by opprobrious names, did spit in his face, and desired him to resent it if he durst, publicly in presence of several persons there convened; which expressions, the libel adds, have no other meaning, than a challenge to Mr Stewart to fight him the defender.'

For Campbell it was *pleaded*, That, if he used Mr Stewart in any disrespectful manner, it was upon great provocation received; he having, on many occasions, propagated the grossest and falsest calumnies against the defender, tending not only to destroy his credit as a merchant, but likewise to defame his private character; particular instances whereof were condescended on.

When this cause came to be advised, the Bailies found the libel relevant, and admitted the same to proof; but, at the same time, sustained it relevant, for alleviation of the offence libelled, that Mr Stewart had defamed the defender in the way and manner set forth in the defence; whereupon a diligence was granted to both parties for proving.

When this proof came to be advised, the Fiscal restricted the conclusion of the libel to a pecuniary mulct, and referred the same to the defender's oath of verity, which the Bailies found relevant; and, upon his declining to depone, he was held as confessed.

However, after protesting that he did not acquiesce in the interlocutor, he craved a second diligence to compel some witnesses to appear for further proof of his defence; producing, at the same time, an execution on the first diligence against those who had not appeared; which being refused, he thereupon offered a bill of advocacy, upon the following grounds:

Imo, That the Bailies had committed iniquity, in not allowing him a second diligence for proving his defence, agreeable to the practice of the Court, which was offered to be proven, and which they ought to have granted, seeing this process could not be compared to a trial by a jury, where all the proof must be brought in their presence at one diet, and where a pannel has compulsitors given him of the nature of first and second diligences at once; by which, if he apprehends any of the witnesses to be refractory, he may compel them to attend at the diet appointed for the trial. But here there was no means to compel the witnesses to compare at the first citation; wherefore he ought still to be allowed to bring further evidence of his defence, and, if necessary, even to cite Mr Stewart himself as a witness to prove it. *2do*, They did wrong in finding that his oath was a relevant mean of proof; as the giving of a challenge to fight,

albeit no fighting ensue, is punished with banishment and escheat of moveables by the act 1696. And the libel here sets forth, That he affronted Mr Stewart, and then he desired him to resent it if he durst; which expressions, it avers, have no other meaning than a challenge to Mr Stewart to fight him. Therefore his oath could never be competent, if the fact libelled was relevant to infer such a punishment. *3tio*, The fiscal was not entitled to prosecute and refer to oath an injury which could not be proved by witnesses, when the party said to be injured was not complaining; seeing his silence is an evidence that either the fact is not true, or that he has seen cause to pass it over, and be reconciled to the aggressor; especially considering that it may be attended with several bad consequences, if fiscals were encouraged in such prosecutions, as it would tend to publish injuries, which perhaps all parties inclined to conceal.

To the *first* reason of advocacy, it was *answered*, That the procedure of the Magistrates in this process was agreeable to their regular course in matters of riot; and, if there are instances to the contrary, they ought not to be drawn into example or followed in this case; where, from the proof already adduced by Campbell, there is no reason to expect any further light can be got in this affair. And although it is not a trial by jury, yet the usual rules of evidence must be observed; one necessary circumstance whereof is, to prevent witnesses from knowing what each other depones; which cannot be done, if examinations in a public court were to be permitted at different diets. And with respect to the demand of being allowed to cite Mr Stewart, it ought not to be yielded to; seeing it is informed, that Campbell has brought a process against him before the Commissary court, founded upon the very same allegation on which he grounded his defence before the Magistratès. The fact so standing, he cannot demand Mr Stewart's oath as a witnesses in one court, and, upon the same fact bring a proof by witnesses in another jurisdiction, when both processes are depending at the same time.

As to the *second*, Whether it is competent to prove the libel by Campbell's oath, it was *answered*, That, by the 7th article of the instructions to the Justices of the Peace, as contained in the 38th act of the Parliament 1661, such riots may be proved by the defender's oath, especially as the libel is now restricted; of consent to a pecuniary mulct. And it is only direct, not implied challenges to fight, that are punished by the statute with banishment and escheat of moveables; if it were otherwise, that punishment might be extended very far. With respect to the *third*, The concurrence of the injured party is unnecessary, as appears from the 7th article of the said instructions; besides, it is pretty extraordinary to suppose the law would leave the preservation of mankind from injuries and violence to the dispositions they may or may not have to prosecute wrongs done them.

THE LORDS found, it was competent to prove the libel by Campbell's oath; and also that Mr Stewart might be adduced as a witness.

Fol. Dic. v. 2. p. 14. C. Home, No 5. p. 17.