APPENDIX.

PART I.

BATTERY.

1776. *November* 30. JOHN DORWARD *against* JANET DORWARD.

No. 1.

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

JOHN DORWARD complained to the Sheriff of Forfar, that a battery had been committed upon him *pendenti lite*, by the defender Janet Dorward; there being two causes depending between the parties before the Court of Session, of which the complainer was suspender in one, and pursuer in another. A proof having been allowed and reported, the Sheriff in terms of the act 1594 gave judgment against Janet Dorward, to the full amount of the articles of charge against her in the pursuers libel. This judgment was brought into the Court of Session by advocation.

This process having been conjoined by Lord Auchinleck Ordinary, with the other processes depending betwixt the parties, his Lordship, December 20th 1775, pronounced the following interlocutor: "Finds, *first*, That the proof "by witnesses is not habile; and, *2dly*, Finds that the statute refers to bat- "teries committed by *men* not *feminine scuffles*, as it bears that *he* shall be subject- "ed to the penalties, but does not say *or she*, and therefore sustains the de- "fences against the conclusion for the battery, and assoilzies." But upon advising a representation against this judgment with answers, the Lord Ordinary, February 9th 1776, pronounced the following interlocutor: "Makes avizan- "dum to the Lords, and appoints parties procurators to give in printed me- "morials mutually to the boxes."

Pleaded for the pursuer: That the facts alleged in this case to be proved, fully amount to the description of a battery in terms of the statute, and of the decisions of this Court, cannot be doubted. The pursuer, in presence of a notary and witnesses, went to the house of the defender in order to intimate to her the bill of suspension in obedience to the order of the Court. This opportunity

No. 1. she embraced of not only bestowing upon him a great deal of scurrilous language during the reading of the bill of suspension, but thought proper also, upon his making no reply to this abuse, to give him a shove when near the top of the stair in leaving her house, which drove his head against the wall, while she at the same time lent him a box behind the ear, and twisted his nose so severely that blood sprung out, and the skin was stripped off.

Injuries much less atrocious have frequently been found sufficient to incur the statutory penalties. Thus in the case of Cruikshanks, February 15th, 1679, No. 2. p. 1368. a thrust or push on the breast was found sufficient. In the case of Williamson, June 6th, 1669, No. 8. p. 1371. the same was found from a lighted candle being thrown at the pursuer, though he received no harm; and in the case of Kennedy against Herbertson, July 7th 1724, No. 12. p. 1376. the simple drawing of a sword, and demanding gentlemanlike satisfaction, was held sufficient to subject the aggressor to the penalties of the statute.

As to the extent of the effects of the battery, this does not seem to admit of much dispute. The Sheriff's decree is clearly just in decerning for the whole amount of the pursuer's libel. This in the case of Tolquhoun, No. 4. p. 1369. it was found that in a question of battery *pendente lite*, decree is to be pronounced conform to the libel or summons, and not to the act of litiscontestation, if it be narrower than the libel. And in the case of Stewart against Maxwell of Shambelly, No. 3. p. 1369. the battery was found, even after the pleas of the aggressor were sustained, to have the effect of setting aside the interlocutors in his favour.

With regard to the argument that the defender is a woman, and that the alternative *she* is not in the statute, this distinction has no place in our law. The term *man* in English, as *homo* in Latin, includes both sexes, and in our statutes the *sexus nobilior* includes the other. If women are to be exempted from the punishment of the satute, they must equally be excluded from its benefit; but as the Court will not be disposed to deprive them of this protection, so neither can it screen them from punishment. The statute perhaps is even more necessary for women than for men. A man may be restrained from violating its enactments, through fear of chastisement for his ill manners; while a woman is so far unrestrained as her sex protects her.

It has been mentioned as an alleviation in the present case, that the defender is an old woman, lame, and peevish. If lame, her weakness serves only to prove an uncommon degree of ill will, to neglect her own situation, as well as disregard to the laws; and as to her peevishness, it seems to be worse than no excuse; for laws are made to check the turbulence of bad tempers.

The objections to the witnesses, resolve into these, that one of them wrote an account of the battery to the pursuer's agent at Forfar, and that another of them wrote some interrogatories for the pursuer to be put to the witnesses for

proving certain articles of his account of compensation, in his process with the defender. No 1.

But it is impossible that an objection can be stated against a witness because he chanced, in a *private* letter to a friend, to mention an affair, concerning which he was afterward called as an evidence. Neither is it easily perceived, how the writing interrogatories in *another* cause, should give such a bias as to render suspicious the testimony of an honest man. At any rate, every witness called agrees, that there was an assault of some kind made upon the pursuer, equal at least to similar assaults, which have been found sufficient to incur the statutory penalties.

Argued for the defender, That there does not appear in the proof, any thing sufficient for subjecting her to the penalties in the act of Parliament. One of the witnesses who was present the whole time, depones, that he did not see the defender twist the pursuer's nose, and the same thing is established by two other witnesses; and the witness who is most explicit can be proved to have acted all along as the pursuer's agent.

The statute 1584, cap. 138, was made at first to endure only for 7 years, but was made perpetual by the statute 1594, cap. 219. by reason, as the act itself bears, "of the manifold oppressions done within this realm, and for the most "part occurring betwixt parties contending in justice." These statutes were passed at a period when this country was in a state of great barbarism, and when law was but ill able to exert its authority. It is a law peculiar to this country, and though it may not be now actually in disuetude, yet must be acknowledged not to be so necessary now, as at the time it was enacted. The subjects of this country are now in a very different state from what they were in at that period.

They have now a proper sense of the duty they owe to the legislature, and a just dependence upon the laws of their country for protection.

In this view of the case the distinction that the statute refers to batteries committed by men, not to *feminine scuffles*, is well founded. It is clear that the legislature had not in view such altercations as the present. The act on the contrary expressly bears, that the offences committed ought to be such as would be sufficient foundation for a criminal prosecution. In conformity to this doctrine is the decision Fea against Trail, 18th January 1709, No. 9. p. 1372.

It is the genius of the legislature of this country to interpret penal laws in the strictest manner. Thus when it was enacted by a statute in the first year of Edward the VI. cap. 12. § 10. that those who were convicted of "stealing horses, gelding, or mares," should not have the benefit of clergy, it was found necessary the very next year to enact another statute for the special purpose of extending the former act to those who should steal *a horse*, &c.—2d and 3d Edward the VI. cap. 33. In like manner, when the by statute 14 Geo. II. cap. 6. the stealing of sheep "or other cattle" was made felony without benefit of clergy, the legislature thought it necessary to make an express act of Parliament,

No. 1. 15 Geo. II. cap. 34. extending the penalty to *bulls*, *cows*, *oxen*, *lambs*, &c. specifically. The statute upon which the defender is prosecuted is highly penal. It is clear that she does not fall under the words of it, nor can she with any propriety be said to come under the spirit and meaning of the law. In the decision Town of Peebles against Murray of Cringlety, No. 11. p. 1374. the beating of a burgess during a process against the town was found not sufficient to infer the penalties of the statute. Upon the same principles, it has been held in numberless questions as to contravention of lawburrows, and alleged deforcements, that a wilful wrong must be committed by the party transgressor, unprovoked by the party complainer, in order to subject a person in penalties. From many circumstances in this case, it appears that the pursuer industriously gave provocation for the purpose of founding an action: And *nemo ex suo delicto meliorem conditionem facere potest.*

The Court were of opinion that the distinction was too nice, which exempted women from the penalties of this statute, and that the rule of the Roman law, by which, *si quis* comprehended *si quæ*, was to be held as the rule in the present and similar instances: But they were of opinion hat the proof in the present case was defective, and pronounced accordingly, 14th Nov. 1776, the following interlocutor, "Find the complaint for an alleged battery not sufficiently "proven, assoilzie from said complaint, and find the complainer John Dorward "liable in expenses hitherto incurred, which modify to £10. Sterling, and also "for the expense of extracting the decree now pronounced, conform to the col- "lector's certificate, and decern, and remit to the Ordinary to proceed ac- "cordingly, and further to do in the cause as he shall see just." A reclaiming petition against this interlocutor was, 30th Nov. 1776, refused without answers.

Lord Reporter, *Affleck.* Act. *M'Connochie, Elphinston.*

J. W.

See APPENDIX, PART II.