1778. *July* 18. ALEXANDER MAIR *against* JAMES SHAND.

JURISDICTION.

Competency of the Court of Session to an action on a battery, *ad civilem effectum*, in the first instance.

[*Faculty Collection, VIII.* 53; *Dict.* 7421.]

HAILES. The defender says that this is of the nature of a criminal libel, because it is in the form of a syllogism: but all libels, whether civil or criminal, are, or ought to be in the form of a syllogism. The libel before us is altogether civil; for there is neither instance nor concourse of a public prosecutor. A conclusion for damages is civil, and independent of a conclusion for punishment. The fact, in different lights, may be tried in a Court having criminal jurisdiction, in the first instance, and in a civil court, which has not such jurisdiction.

BRAXFIELD. There may be a claim for damages in this Court, although a civil court; for an action arising *ex delicto*, may, in its nature, be only *rei persecutoria*. A man who burns my house may be hanged, and yet I may bring a civil action against him for reparation.

ELLIOCK. I thought that here there was a drunken idle squabble, not fit for the cognisance of this Court.

JUSTICE-CLERK. If the pursuer is unreasonable, and brings an action before this Court without sufficient cause, he may be censured for his litigiousness; but still the action seems to be competent. It matters not that there is a conclusion for *solatium*: that will, in the end, be found to be only another name for damages. I am informed, that, in 1763, the Lords sustained their jurisdiction in a similar cause from Irvine.

On the 18th July 1778, "The Lords sustained action;" altering Lord Elliock's interlocutor.

Act. Henry Erskine. *Alt.* Charles Hay.

1778. *July* 3, and 22. JAMES SELLARS *against* NINIAN ANDERSON.

LAWBURROWS.

After application for letters of lawburrows, and oath that he dreads bodily harm, the person who applies is not bound to specify the facts on which his application proceeded.

[*Fac. Coll. VIII.* 44; *Dict.* 8042.]

HAILES. The defender has argued at great length from the analogy between the law of England and Scotland. He argues well as to a presumed analogy between the ancient laws of the two countries; for anciently there was such a

resemblance as to make us apt to mistake the one for the other. But, when the defender comes to more recent times, his argument is defective: he quotes a *positive* statute, in the reign of James I, which improved the law of England; and he supposes, that, by analogy, the positive enactments of an English statute should be held to be the law of Scotland also. But, if our practice needs correction, it must be corrected by statute, as in England. The Act 1429 seems to imply that the oath of party is sufficient proof. I do not doubt that parties sometimes swear rashly; and that they might be punished for perjury, could evidence be obtained for that end.

MONBODDO. The number of lawburrows on record is very great; but there is no example of an action like this. If a person swears that he apprehends danger, it is all that the law of Scotland requires.

BRAXFIELD. The great use of lawburrows is to quiet the minds of the lieges. Some people are frightened for little: but even such timorous people must be made easy. It often happens that a proof of the danger apprehended is impossible; as when one man whispers threatenings into the ear of another. If a person applies for lawburrows, he may be interrogated as to his cause of fear; and, if he has no reasonable cause of fear, the judge may refuse the lawburrows, and this will satisfy the man that he was afraid without cause. If a person set forth particular facts, and such facts are afterwards disproved, he will be punishable: he may even be prosecuted for perjury.

COVINGTON. The oath made is sufficient to justify the judge in granting the lawburrows; but still the person applying must justify his charge. This precisely corresponds to another part of our law, a warrant to apprehend on *meditatio fugæ*. Lord Bankton, treating of lawburrows, says that the defender may insist on the pursuer's particularising. If a pursuer specifies facts which cannot, from the nature of the thing, be proved otherwise than by oath of the party, his oath will be sufficient: but that applies not to the present case, where the pursuer says he can prove; therefore there are witnesses.

KENNET. This case differs from that of an oath with respect to a *meditatio fugæ;* for *there* there is something tangible, whereas *here* the question is as to what a man inwardly dreads. If the application for lawburrows is malicious, the defender may bring evidence of that; but still the *onus probandi* is incumbent on him, not on the pursuer.

WESTHALL observed that the law of Scotland and the law of England are still the same as to this subject, with the single exception of applications made in Westminster Hall, in virtue of the statute of King James VI.

KAIMES. I could wish that the law of Scotland stood in this case, as in all other complaints, that the party charged should be called, to say what he has to offer in defence. Things of a private nature are not capable of proof: all that remains is, that, when a weak person dreads harm without cause, and he swears, without objection made, there the matter must rest. After an oath made, it is too late to enter into any discussion of his causes of dread. There may be no *danger* and yet a great deal of *fear*. The defender may still prove malice; and, if he does, the lawburrows will be recalled, and the person applying for the letters of lawburrows will be punished. The act of James VI. in England went beyond the bounds of reformation, in so much that I do not know of any action having been brought on that act.

On the 3d July 1778, " The Lords found that it was not incumbent on the defender to justify the grounds of his application for lawburrows;" altering Lord Covington's interlocutor.

Act. R. Cullen. *Alt.* W. Craig.

Diss. Covington, Ankerville.

1778. *July* 22. JUSTICE-CLERK. I was not present when the former judgment was pronounced. I think it agreeable to law. This writ of lawburrows is one of the oldest writs known among us. I am not for departing from what I always understood to be the rule of our law. It is true that, in different inferior jurisdictions, different regulations prevail; and we are told that the sheriff of Edinburgh does not grant warrant for lawburrows till after forty-eight hours. This may be right; but it is not the general practice. If you require a condescendence and a proof, the consequences would be fatal; for lawburrows is particularly aimed at private malice, which cannot be proved, and which is often exerted in conveying alarms when there is no serious intention of doing hurt.

GARDENSTON. When there are witnesses present there is no occasion for lawburrows, for then there is a manifest breach of the peace, which of itself is sufficient to warrant a prosecution.

COVINGTON. This applies not to the present case; for the party offered to prove by witnesses.

GARDENSTON. His offer was rash; his retracting prudent.

JUSTICE-CLERK. We will not cut a man out of his just right because he hastily offered to prove before an Ordinary what he was not obliged to prove.

On the 22d July 1778, " The Lords refused the petition, and adhered to their interlocutor of the 3d instant."

For the petitioner,—R. Cullen.

1778. *July* 28. ALEXANDER SPEIRS, &c. *against* THOMAS DUNLOP, &c.

PROVISION TO HEIRS AND CHILDREN.

Powers of the Father over a Subject provided to the Heirs of the Marriage.

[*Fac. Coll. VIII.* 62; *Dict.* 13,026.]

GARDENSTON. The question is on an important branch of our law, the effect of settlements on heirs of a marriage. I think that a father has power to make a settlement like the present one, when the son is bankrupt. The right of the son is a contingent right, and it may be disappointed by the father contracting debt or by the predecease of the son. The intent of the marriage-