

1781. February 27.

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

No 14.

Objected, that
the statutes
1584 and
1594, (*su-
pra*.) had
gone into de-
fuetude. 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 defuetude.

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

Adv. Elphinston.

Adv. Alex. Abercromby.

Stewart.

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

No 15.

Found in con-
formity 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 contending 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 defuetude. The occasions have been few where it could have been inflicted on in the present mild state of manners; and, if any did occur, men of spirit