1694. *February* 28.

MR ALEXANDER JOHNSTON, Writer, *against* FORBES of Watterton.

No 5.
Taking the benefit of a battery *pendente lite*, is a privilege merely perſonal, therefore cannot be founded upon by the cautioner in a ſuſpenſion, unleſs he ſubſume that the principal is *lapsus*, and that he would otherwiſe totally loſe his relief.

THIS point fell to be argued amongſt the Lords: Where a party beats the other during the dependence of the ſuſpenſion, if he who is cautioner in the ſuſpenſion can propone that abſolvitor, though the principal party injured diſclaim it under his hand.——THE LORDS once inclined to think it competent, ſeeing the cautioner can propone any defence or objection that the principal omits; yet many of the LORDS, after re-conſideration, thought it a perſonal privilege; and that if the principal party injured paſſed from it, the cautioner alone could not found upon it: And there are ſeveral exceptions in law merely perſonal, *inhærentes ossibus*, which cautioners cannot claim; ſuch as the privilege of minors and married wives; whoſe cautioners cannot plead them, but will be found liable, though the principal be aſſoilzied and freed from all obligation of relief to them whatſoever.——*Nota*, This point being re-conſidered on the 25th of January 1696, the LORDS found it not competent to the cautioner, unleſs he would ſubſume, that the principal was *lapsus* and bankrupt, and ſo he would totally loſe his relief. *See* CAUTIONER.

Fol. Dic. v. 1. *p.* 94. *Fountainhall, v.* 1. *p.* 674.

1695. *November* 13. FALCONER *against* CARNEGIE of Pittarrow.

No 6.
Running with a drawn ſword at the opponent, found ſufficient cauſe for incurring the penalty in the act of Parliament.

IN the incidental complaint given in by Sir Alexander Falconer of Glenfarquhar againſt Sir David Carnegie of Pittarrow, for aſſualting him with a drawn ſword during the dependence of their plea: Sir Alexander having neglected to take out a diligence to prove the fact, in regard it was brought by Sir David before the Parliament by an appeal, which made him forbear the executing: THE LORDS, by a narrow plurality of 5 to 4. prorogated the term, and renewed his diligence; though it was argued, that, *in materia odiosa*, it had been better on this occaſion to have refuſed Glenfarquhar's bill, ſeeing the reponing parties againſt their negligence in ſuffering diets to elapſe is a point of favour *in arbitrio judicis*, to grant or not as he ſees reaſonable.

Fountainhall, v. 1. *p.* 677.

1696. *December* 1. MR ALEXANDER JOHNSTON *against* ANNA MURRAY.

No 7.
A woman, in paſſion, beat her opponent's hand from her

IN the action purſued by Mr Alexander Johnſton againſt Anna Murray, his wife's mother, and Robert Cuthbert, her huſband, for his wife's portion; when ſhe had deponed anent ſome points referred to her oath, and was going away, Mr Johnſton took hold of her, and jeering, bid here ſtay till ſhe heard her Sweetheart

(meaning her husband) depone; whereupon she lifted up her hand, and, in passion, beat his hand off her shoulder. This he *alleged* was an invasion and battery, for which, by the act of Parliament, she ought to lose the depending plea.—The Lords having examined the witnesses, and advised the depositions, found, he having given the provocation, this was not such an invasion as was meant by the act of Parliament, and therefore assoilzied her from this incident process; and, because of some defamatory expressions in his information against his mother-in-law, they fined him in ten dollars, six to the party, and four to the poor.

Fol. Dic. v. 3. *p.* 69. *Fountainhall, v.* 1. *p.* 738.

No 7.
shoulder, who had *jeeringly* taken hold of her. She did not incur tinsel of her cause.

1699. *June* 6. WILLIAMSON *against* GOVAN.

No 8.
Throwing a lighted candle, which occasioned no hurt, found sufficient cause for incurring the penalty.

WILLIAMSON of Cardrona pursued John Govan, Provost of Peebles, for L. 48 Scots he had given him in of clipped money to pass; and, during the dependence, Cardrona, in company, on a quarrel betwixt him and Provost Govan, had thrown a lighted candle at him. The Provost complains, in terms of the 219th act 1594, that he may be assoilzied; and the Lords allowing a probation, which came this day to be advised; it was *objected*, 1*mo*, That the throwing of a lighted candle was not such an invasion as fell under the act of Parliament; which requires it should be such a deed as would be the foundation of a criminal pursuit, which this was not, but only a petty riot or scuffle. 2*do*, It had no contingency with the depending process, but arose from another debate betwixt them about a seat in the church. 3*tio*, The probation did not bear that he received the least hurt or prejudice thereby.—The Lords considered, if they once found such practices not to be included in the meaning of the act of Parliament, but only downright beating, wounding, or invading, then many insults of this kind might be encouraged, and they might throw stoups and other things at their antagonist; and it was easy to abstract from the depending plea, and forge another quarrel, if that were sufficient to elude the act: And they remembered that Pittarow's running with his drawn sword at Glenfarquhar was lately found an invasion in the terms of the law, though he was not touched, nor any prejudice followed, (*See* No 6. p. 1370.); and that the act was necessary to curb *præfervidum Scotorum ingenium*; and therefore they found this case, though but a slender attempt, fell within the meaning of the act of Parliament; and therefore assoilzied the defender; and though penal statutes are strictly to be interpreted, yet this was thought no extension.

Fol. Dic. v. 1. *p.* 93. *Fountainhall, v.* 2. *p.* 50.