

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 absolvied 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