No 1.
firſt aggreſſor; and the penalty ſtill holds, altho' the party aſſaulted defend himſelf.

THE LORDS found, That invaſion by any ſtroke, though without blood, fell within the act of Parliament; and that it was to be underſtood of the firſt agreſſor; and that the other party being invaded, although he did defend himſelf, and in his defence wounded and blooded the other, yet that did not take off the firſt invaſion, and therefore ordained witneſſes to be examined *hinc inde*, to know who was the firſt invader; and found the defence competent without a cognition of the crime before any other judge.

Fol. Dic. v. 1. *p.* 93. *Stair, v.* 2. *p.* 163.

*** The ſame caſe is reported by Gosford:

In a purſuit at Bailie Sleich's inſtance, before the bailies of Haddington, againſt Swinton, for payment of a ſum of money, which thereafter was advocated of conſent; wherein the purſuer *inſiſting*; it was *alleged* for the defender abſolvitor, becauſe, by an act of Parliament 1555, which is ratified by 14th Parliament of K. Ja. VI. in the caſe of invaſion by any of the parties in proceſs, cognition ſhould be firſt taken criminally before the Juſtice: 2*do*, The foreſaid act of Parliament relates only to proceſſes depending before the Seſſion, and not before inferior judges: 3*tio*, Albeit the purſuer did ſtrike, yet he was firſt invaded; and ſo falls not within the act of Parliament, having done it for his own defence.—— THE LORDS did find that they themſelves might take trial of the injury *ad civilem effectum*, that the parties who does the wrong ſhould *cadere causa*; which did not prejudge a criminal purſuit for the breach of the peace; and did likewiſe find, that the act of Parliament did extend to all Judicatories where proceſſes are intented: And whereas it was alleged, that each party did ſtrike the other, the LORDS did find that the firſt agreſſor was only liable to the pain contained in the act of Parliament; and for trial thereof, ordained both parties to lead witneſſes.

Gosford, MS. p. 306.

1679. *February* 13. CRUIKSHANK *againſt* GORDON.

No 2.
A party who had only *thruſt* his opponent on the breaſt, in conſequence of a quarrel diſtinct from the law-ſuit, found to fall under the penalty in the act of Parliament.

GEORGE CRUIKSHANK having charged Gordon of Seaton to grant to him a charter of the lands of Longcraig, conform to his obligement in his diſpoſition; he ſuſpended on this reaſon, that he had fulfilled the obligement by a charter given by him, and accepted by the charger.—The charger *anſwered*, 1*mo*, That the foreſaid charter was diſconform to the diſpoſition, both in the tenor and *reddendo*. 2*do*, The ſuſpender, during the dependence of this proceſs, had invaded the charger, and thereby had loſt all his defences or reaſons of ſuſpenſion, by the act of Parliament anent parties invading one another during the dependence of proceſs between them; and for inſtructing thereof, produced a decreet of the Privy Council, bearing, that the ſuſpender had invaded the charger, for which he was fined; which invaſion was poſterior to this charge.—It was *anſwered*, That the act of Parliament takes place only where the invaſion is upon account

of the proceſs. 2*do*, That the invaſion muſt be by beating, wounding, or other like invaſion, amounting to a crime cognoſceable by an inqueſt; but here the caſe of the decreet of Council was a ſudden outfall upon injurious words, wherein the ſuſpender was only found to have thruſted the charger on the breaſt; whereas the charger did purſue him with a durk; and being fined as being the aggreſſor in ſuch a caſe, it could not amount to a crime; and ſo is expiated by a ſuitable puniſhment inflicted by the Council. No 2.

THE LORDS found the invaſion relevant to exclude the ſuſpender's reaſons of ſuſpenſion, and approven of by the Council; and that there was no neceſſity to prove, that the invaſion was upon account of the proceſs, but that the ſtatute was made to ſecure parties in law-ſuits againſt invaſion, by beating, &c. which did comprehend thruſting, without reſpect to what followed from the perſon invaded, upon occaſion of the invaſion, and at the time when he was invaded.

Fol. Dic. v. 1. *p.* 93. *Stair, v.* 2. *p.* 693.

1684. *January* 20. MAXWEL of Wethergate *againſt* STUART of Chambelly.

MAXWELL of Wethergate having charged Stuart of Chambelly for payment of a ſum of money, conform to his bond: And Chambelly having ſuſpended, upon ſeveral reaſons of compenſation, whereof ſome were found relevant and proven; but before diſcuſſing of the other reaſons, and before extracting of the decreet, Chambelly having ſtrucken over the head, with a reed, Maxwell of Nethergate, Maxwell gave in a bill to the Lords, craving, That Chambelly, upon the act of Parliament, might loſe the plea; and that the letters might be found orderly proceeded, and the hail reaſons of compenſation repelled: Witneſſes being adduced, and the fact proven, it was *alleged* for Chambelly, That none of the reaſons formerly diſcuſt, found relevant and proven, could be repelled; but only ſuch reaſons as were pendent, and not diſcuſt at the time of the fact. And, 2*dly*, Even as to theſe reaſons, they could only be repelled *hoc loco*, to be received by way of compenſation; but he could not be precluded by way of action to purſue for them.——THE LORDS found, that he ought to loſe the hail plea, the ſame not having come to a period by ſentence; and refuſed to reſerve action for theſe grounds of compenſation againſt Nethergate. No 3. In an action, where battery intervened, the Lords decerned the aggreſſor to loſe the whole plea, though he had various interlocutors in his favour; as the whole cauſe had not been finally decided.

Fol. Dic. v. 1. *p.* 94. *Pres. Falconer, No* 45. *p.* 24.

1687. *January.* DR STRACHAN *againſt* TOLQUHOUN.

FOUND, that when one party invaded another during the dependence, decreet is to be pronounced conform to the libel or ſummons, and not conform to the act of litiſconteſtation, if it be narrower than the libel. No 4.

Fol. Dic. v. 1. *p.* 94. *Harcarſe, No* 934. *p.* 262.