

1712. *July 30.* SIR ANDREW KENNEDY, Conservator, &c. *against* SIR ALEXANDER CUMING of Culter.

The Lords, 26th of June last, having found Sir Alexander Cuming obliged to answer to Sir Andrew Kennedy's claim of expenses summarily ; it was contended for Sir Alexander, 1. Seeing in this case expenses are ordered to be taxed, according to the course of the session, none can be modified ; because by the practice of the session, no expenses are due, where there is *probabilis causa litigandi*. Now, Sir Alexander had *causam litigandi maxime probabilem* : in so far as he had not only the opinion of the doctors of the civil law, but also the authority of a decret of the session itself on his side ; and it was never heard, that a party prevailing, should in the same court where his action was sustained as just, be condemned in expenses as *temere litigans*. 2. There is no precedent for charging, in this account before the Lords of Session, the expenses of the appeal before the House of Peers. 3. If the Lords were to proceed to modify expenses, they could not enter into the detail, or particular consideration of the account given in by Sir Andrew, nor modify a greater sum in the whole, than used to be modified in other processes before the session, where there had not been eminent calumny or contumacy.

The Lords found, 1. That the remit from the House of Peers to tax expenses, implies that expenses are to be modified, but that their Lordships are to determine the quantity. 2. That the expenses of discussing the appeal are not to come in *computo*, or be considered in this modification. 3. The Lords, without entering into the detail, or particular consideration of Sir Andrew Kennedy's account of expenses, modified L100 Sterling of expenses, to be paid to him by Sir Alexander Cuming.

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1712. *November 19.* JOHN HAMILTON of Pumpherstoun *against* the LADY CARDROSS.

The House of Peers having reversed a decret of the Lords of Session, reducing a tack of the lands of Broxburn, &c. set by Sir William Stuart of Strathbrock, the Lady Cardross's predecessor, to Alexander Hamilton of Broxburn, his heirs, &c. for the space of three nineteen years after the respective terms of commencement ; and removing John Hamilton of Pumpherstoun, his son and heir, from the possession ; and having ordered John Hamiltoun to be restored to the possession of the lands, and to have satisfaction for what he hath lost, in respect of the profits thereof, by reason of the decret reversed : he, in pursuance of this sentence, applied to the Lords of Session, for liquidating what he had lost by his being turned out.

The Lords found the Lady Cardross liable to Pumpherstoun, for the years he was out of possession, for the excrescent duty contained in the tack set by her to the new tenant, more than what was contained in the tack set to Pumpherstoun's

father ; and for a proportion of the grassum, paid by the present tenant to the Lady, effeiring to the said years ; in full satisfaction of Pumpherstoun's damages, through being dispossessed :

Albeit it was ALLEGED for Pumpherstoun, that the decree of the House of Peers, entitled him not only to the profits the Lady had made by the decret of the Session, but also to the advantage he might have made, had he been allowed to continue his possession ; and therefore she should be liable to him for what profit the land yielded to the tenant put in by her, since that would have fallen to him if he had not been removed :

In respect it was ANSWERED for the Lady, that seeing the decree of the House of Peers orders satisfaction to be given to Pumpherstoun for his loss in general terms, the Lords are left to proceed and determine the same in their judicative capacity, regarding those differences that law makes betwixt possessors *bona fide*, and vitious possessors or intruders : and the Lady having set the lands to the present incumbent to the best advantage she could, *bona fide*, from a belief of her having right so to do, and by all the authority our law could give her ; she can be obliged to restore no more than what she made thereby.

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1713. *January 28.* BEATRIX LINKLATTER, Relict of Captain JOHN BOSWAL, Skipper in Kirkaldy, *against* JOHN and ISOBEL BOSWALS, his children and Representatives.

BEATRIX LINKLATTER having, in her contract of marriage with Captain Boswal, disponed her whole means and estate to him and her in conjunct-fee and life-rent, and the bairns of the marriage in fee ; and in case of her surviving him without children of the marriage, she being empowered to dispose upon the equal half thereof : she pursued John and Isobel Boswals, as heir and executor to the Captain, to implement the contract, the marriage having dissolved without children. The defenders gave in a list of deductions and grounds of compensation. viz. 1. The expense of leading an adjudication in the pursuer's name, on a bond due by Weems of Fingask to her, and infetment thereon ; as being a necessary disbursement for securing a subject, wherein she has a joint interest by the clause of return. 2. The expense of rousing the pursuer's furniture and plenishing, which deduceth naturally, as the expenses of shearing corn, or confirming, and the like.

ALLEGED for the pursuer,—The defunct having right, by the assignation in the contract, to the bond and the plenishing, his representatives cannot charge the relict with the expenses of rousing the one, or leading an adjudication for security of the other ; because *negotium suum gessit*. 2. Though the relict had been debtor in a share of these expenses, yet since by law a husband is bound to pay his wife's moveable debts, his representatives could crave no deduction from her, upon the account of paying a debt which law transferred on him by the marriage.