

No 15.

calumnious in the managing of it, and that here he had maliciously put Mr Smith to vast charges in proving a trust which afterwards he acknowledged; therefore they found him liable in Mr Smith's expenses, which they modified to L. 200 Scots, especially seeing his absolvitor proceeded upon his own oath. This is the first case in which I have observed the victor to pay the expenses of him who has succumbed in the cause; but in effect it was imposed *in modum pœnæ*, for his calumnious management of the process. In the English law, there is a parallel case betwixt Mrs Jones and Sir Robert Ker, marked by Mr Turner in his folio history of Remarkable Providences, cap. 134.

*Fol. Dic. v. 1. p. 287. Fountainball, v. 2. p. 110.*

1742. July 12.

CUMMING against ABERCROMBY.

No 16.

Expenses given in a tentative process of reduction and improbation, where the defender produced a clear right to the estate.

A TENTATIVE process of reduction and improbation being brought against a gentleman in possession of an estate, who, in the course of the process, produced a clear progress from the 1663 downward, which, by the positive prescription, secured him against all challenge, the Court was of opinion, That such tentative processes, which give much vexation, ought not to be rashly commenced; and therefore, abstracting from all particular circumstances, they found expenses due to the defender.

*Fol. Dic. v. 3. p. 198. Rem. Dec. v. 2. No 29 p. 46.*

1747. February 24.

WEIR against WHITE.

No 17.

A REDUCTION repeated *incidenter*, and not executed, can go no farther than the suspension (which was the present case) or libel of the other process into which it is repeated.

Expense of a refused bill of advocation, is an instance of expense whereof the party aggrieved has no access to get reparation. See PROCESS.

*Fol. Dic. v. 3. p. 199. Kilkerran, (PROCESS.) No 7. p. 435.*

No 18.

A defender was found liable in expenses, tho' he prevailed in part, the point which he gained not being that which occasioned the expense.

1747. June 16.

CRUICKSHANKS against FORSYTH.

IN the year 1744, James Cruickshanks, master of the grammar-school at Elgin, was employed to bleach some linen cloth for Alexander Forsyth, Bailie of that burgh; and having carried the same to his shop, the Bailie carped at the cloth as ill whitened; and, without any provocation from the answer made by Cruickshanks, after giving him hard names, gave him a stroke over the head with his ellwand. The Bailie was sensible of the crime he had committed, but,

in place of endeavouring to make it up with Cruickshanks, he applied to his brother Magistrate, and got himself fined in L. 30 Scots to the procurator-fiscal of the Bailie-court; and Cruickshanks having brought his complaint before the next Circuit at Inverness, the LORDS remitted the matter to be tried before the Sheriff of Elgin, with this instruction, That the Sheriff should have no regard to the decree of the Magistrates of Elgin, the same appearing to have been collusive.

In virtue of this remit, the process being brought before the Sheriff, and proof taken, on advising thereof, the Sheriff decerned the Bailie in L. 100 Scots to the procurator-fiscal, and in L. 350 Scots to the private party, in name of damage and expense.

Of this decree, the Bailie obtained suspension; and at discussing, having not only insisted on the exorbitancy of the fine, as sufficient to open the decree, but, in order to a total absolvitor, alleged provocation, the Lord Ordinary turned the decree into a libel, and before answer, ordained the defendet to give in a condescendence of the provocation, and the pursuer to give in a special condescendence of his damage. And the defender not being able to make any tolerable condescendence of provocation, nor the pursuer to condescend upon any special articles of damage, the LORD ORDINARY 'modified the sum of L. 350 of damage to L. 24 Scots, and the fine to the procurator-fiscal to L. 3 Scots, and found the defender liable for these sums, and for the expense of the process before the Sheriff; and ordained the pursuer to give in an account of the said expense.'

But the pursuer having reclaimed, the LORDS, upon hearing parties upon the proof, 'Adhered to the Lord Ordinary's interlocutor, finding the expense before the Sheriff-court due, and remitted to the Ordinary to tax the same; and adhered also to the Ordinary's interlocutor, restricting the L. 100 decerned to the procurator-fiscal to L. 3 Scots; but found the defender liable to the pursuer in L. 10 Sterling in name of his damage and expense in discussing the suspension.'

The riot was considered as atrocious, as having been committed by a Magistrate, at the time in office, within his own house, and without provocation; and though, strictly speaking, there was no damage other than the expense, yet when a man is affronted and beat, something was thought to be due *in solatium*, and for encouraging persons to seek redress in this way, rather than to take it at their own hand. And whereas it was said that the Sheriff's decree was extravagant, and therefore the defender was under a necessity to suspend, the answer was, That true the Sheriff's decree was extravagant, and, when the suspension came to be discussed, had the suspender only objected to the extravagance, and subjected the modification to the judge, he would have had much to say against being liable in the expense of the suspension; but, instead of that, he pleaded a total absolvitor, on pretence of provocation, in which he failed, and thereby made his right a wrong.

No 18. The like happens every day, where one suspends because he is charged for more than is due; if, when the suspension comes to be discust, he only plead that reason, he is safe; but if he pleads other reasons and fails, he may be subjected to expense, notwithstanding his having been charged for more than was due.

*Fel. Dic. v. 3. p. 199. Kilkerran, (REPARATION.) No 3. p. 484.*

1762. November 18.

AGENT for MRS M'ALISTER of Loup, *against* Her HUSBAND.

No 19.

A husband is liable for expense of successful declarator of marriage against himself. Special costs given in such case do not bar the wife's agent from recovering the whole money laid out by him.

ANGUS M'ALISTER of Loup having denied his marriage with Jean M'Donald she brought a declarator thereof. The Commissaries decerned in her favour, with L. 80 of costs; and the House of Lords affirmed the decree with L. 100 costs.

Colquhoun Grant, her agent, having expended L. 104 over and above these two sums, in the necessary conduct of the cause, brought an action for repayment against Mr M'Alister, as liable for his wife's necessary and just debts.

*Objected* for Mr M'Alister, *1mo*, He cannot be liable for a debt contracted against his consent, and in prosecuting himself; *2do*, The costs given by the Commissaries and House of Lords are taxative, and exclude higher costs.

*Answered* to the last for Mr Grant; He does not ask repayment on the footing of costs, but on the footing of money necessarily expended for a wife, and for which, as such, the husband is liable.

'THE LORDS found Mr M'Alister liable.'

Act. *Lockhart, J. Dalrymple.*

Alt. *Jo. Campbell, Ferguson.*

J. M.

*Fel. Dic. v. 3. p. 199. Fac. Col. No 97. p. 219.*

1763. June 21.

CHRISTIAN SEVERINE BALLE, and JOHN MATTHIAS BRINK, *against* ROBERT BENTON Merchant in Newcastle, and ANDREW FOWLER and ALEXANDER CUSHNIE, Merchants in Aberdeen.

No 20.

The original owner having arrested a ship that had been taken by the enemy, and sold to the subject of a neutral state, and having been cast in

THE ship the John and Robert of Newcastle, having been taken by a French privateer, was carried into Christiansands in Norway, where, after a dispute with regard to the legality of the seizure, the captor was allowed to dispose of her, and sold her at a public roup to Christian Severine Balle merchant in Christiansands, who gave her a new name, and sent her upon a voyage to Aberdeen, under the command of John Matthias Brink.