No 334.

3*tio*, Matters were artfully managed by the other party, so that there was not sufficient time for full pleadings or deliberation upon so important and delicate a question; and in other cases of a similar nature, the Court has received petitions for review after extract. Thus, in the case of Mortimers, co-heiresses of Auchinbady, against Hay of Montblairy, a petition, complaining of a decreet of ranking, pronounced after a dependence of many years, was received, and, upon full deliberation, the decreet was reduced. And in the case of Lord Crawfurd, the Court likewise received a petition against an extracted decreet of ranking and sale; and the decreet was finally reduced in the House of Peers. See APPENDIX.

Replied, 1*mo*, The judgment of the Court leaves none of the points of the cause undetermined, so far as respects the merits of the election; and the supposal, that it was not intended to stop all further litigation, is somewhat strange, and, in effect, expressly contradictory to the words of the decree.

2*do*, The want of the word decern is of no consequence. That word was necessary as to the election of Admiral Holburn and his party, because the judgment was reductive, and a voidance of what they were in possession of; but, with regard to the election of the petitioners, it was altogether unnecessary; they were not in possession; they had indeed the figure of an election; but it required the authority of the Court to make it effectual; and as that authority was refused, it fell to the ground of course, and required no decretory words to void it.

3*tio*, The cases of Mortimers and the Earl of Crawfurd do not apply. Those decreets were most irregularly extracted, and were attended with many particular circumstances, none of which occur in the present case.

"The Lords refused the petition as incompetent."

For the petitioners, *Garden*. For the respondents, *Montgomery*, *David Dalrymple*. Clerk, *Gibson*.

A. W. *Fol. Dic. v.* 4. *p.* 152. *Fac. Col. No.* 59. *p.* 142. & 349.

This case was appealed:

1761. *February* 11.—The House of Lords ORDERED and ADJUDGED, that the petition and appeal be, and the same is dismissed this House; and that the appellant do pay to the respondent the sum of thirty pounds costs, in respect of the said appeal.

No 335.
A decree having been extracted, before expenses,

1789. *November* 17. TOWN-COUNCIL of ROTHSAY *against* NIEL MACNIEL.

A COMPLAINT at the instance of Macniel, a councillor of the burgh of Rothsay, against the election of its magistrates and council, was dismissed, and costs of suit, according to the terms of the statute of 16th Geo. cap. 11. awarded. Be-

fore these were modified, however, the Town-Council caused the decree to be extracted; and some time after this, they craved a decerniture for the expences.

No 335. warded, were modified, and without any reservation of them being made, not competent afterward to demand decerniture for them.—Nor any distinction in the case of statutory costs by 16th Geo. II. cap. 11.

Macniel having then *objected*, That by the extracting of the decree the cause had been finally removed out of Court, so that it was too late to make any claim in it, whether for expenses or any thing else; the Magistrates and Council

Pleaded, When any interlocutor of a court has been regularly reduced into the form of an extracted decree, the jurisdiction of the court, so far as that judgment extends, is no doubt closed, and the cause thence removed. But with respect to subsequent proceedings, the powers of the Court remaining entire, judgment may be pronounced in the same manner as if no extract had been given out. Thus, by extracted acts and commissions, the point respecting the allowing of a proof is irreversibly fixed, and so may be said to be out of Court; and yet the cause, in respect of all future questions that arise in it, continues as open as ever to its decision. Nor are any parts of a cause more separate, than the question of expenses is from any one that regards the merits.

Were this not the case, it is plain, as either party may obtain an extract, that thus, wherever expenses had been awarded without being modified, the party found liable might easily elude the payment.

In the present instance, the rule ought to hold *a fortiori*: For the awarding of costs being enacted by a special statute, this circumstance seems in a peculiar manner to strengthen the distinction between the respective determinations concerning the merits and the expenses.

Answered, An extracted decree on the merits of a cause puts a period to the proceedings, and then, instead of a depending action, a *res judicata* takes place. It is true, indeed, that by special authority of Court, a decree, which is denominated for that reason an *interim* one, may be extracted under the reservation of a farther procedure; but this specialty concerns not the present case, where no such authority was given. Acts and commissions form no exception, being in their nature nothing more than a preparatory step to the determination of a cause.

Neither surely can it create any distinction, whether a judicatory shall have decreed expenses in obedience to a particular statute, or in conformity to the rules of common law.—Haldane and Others *contra* Holburn, No 333. p. 12185. 4th August 1761; 10th March 1768, Douglas and Milne *contra* Elphinston, No 53. p. 8649.

THE LORDS sustained the objection, and adhered to this judgment on advising a reclaiming petition and answers.

For Macniel, *Solicitor-General Blair, Jo. Clerk.* Alt. *Dean of Faculty.* Clerk, *Sinclair.*

S. *Fol. Dic. v. 4. p. 152. Fac. Col. No 90. p. 164.*