1807. *Nov.* 28.

ADAM GRIEVE *against* Lieutenant-Colonel CUNNINGHAM.

No. 9.

Part of a decree giving expences to a pursuer may be carried into execution by him, while the rest of the decree is under appeal at his instance.

VARIOUS actions depended both in the Court of Session and House of Lords, relative to the farm of Barlaugh, in which Colonel Cunningham, and William and Adam Grieve were parties. The procedure in these actions terminated in several interlocutors. By these the assignation of a tack was sustained in favour of William Grieve, Colonel Cunningham was assoilzied from an action of declarator at the instance of Adam Grieve, and at the same time the Colonel and William Grieve, the successful parties, (a thing rather unusual), were found liable jointly and severally to Adam Grieve, the unsuccessful party, in the sum of L. 216 : 16 : $5\frac{1}{4}$, as expences of process and dues of extract. For this sum Adam Grieve charged Colonel Cunningham, who presented a bill of suspension on this ground, that he was not bound to pay this sum in implement of one part of the decree, unless the party receiving it would promise to submit to the other part of it, and not carry it to appeal. This bill was refused.

Colonel Cunningham reclaimed.

Argument for the petitioner.

There is no principle more universally admitted in all systems of law, than this, "*Approbans non reprobat;*" see vol. ii. Bacon, p. 445. "No "man," says Lord Stair, "can approve and disapprove the same individual "thing." But this applies with full and even peculiar force to a decree, which, as it is drawn up with more pains than a private deed, must have its different parts more nicely adjusted to, and more fully dependant upon each other. It is impossible, therefore, that he who has enforced one part of a decree which was in his favour, can be allowed to challenge it *quoad ultra*, because the part he is attempting to overturn, may have been the inseparable condition of that which he has carried into execution. If this were allowed (not to mention less general instances) in every case of decree on a mutual contract, one party might obtain implement of it, in so far as he was creditor, and then appeal it in so far as he was debtor, though this last was the necessary counterpart of the other. The suspensive effect of an appeal is of itself an evil of sufficient magnitude, but this would be increased tenfold, if it were left entirely to the appellant's discretion what part was to be suspended, and what executed. A cross appeal is no sufficient cure for this evil. It is too late to enter a cross appeal when the appeal comes to be made, for the part that was liable to cross appeal is executed before the appeal is made. It would be necessary, therefore, in all cases where part of a

NO. 9. decree is in favour of an individual, and part against him, that he should enter a cross appeal merely as a precautionary measure, however well satisfied he was with the decree on the whole. But our law never can require a party to appeal against a judgment with which he is well satisfied, merely because his adversary chooses to appeal. This absurdity is prevented by the maxim of *approbans non reprobat.*

This maxim is just another expression of the rule of our law, that taking implement of one part of a decree is homologation of the rest, which is established by a train of decisions; 31st July 1560, Laird of Ruthven, which holds even taking instruments to be homologation, No. 1. p. 5619.; 23d February 1566, Montgomery against Ninian Semple, No. 2. p. 5619.; Duke and Dutchess of Monmouth against Earl of Tweeddale, No. 9. p. 5625., from which the same rule may be inferred. The decrees to which these cases relate are decrees-arbitral, but that can make no difference; and the following cases are exactly in point even in this particular, Brisbane against Harvey, 26th February 1724, No. 36. p. 5656.; Hepburn against Hepburn, 1st December 1736, No. 41. p. 5658.; and Wauchope against Hamilton, 1st December 1711, No. 92. p. 5712.; where the rule was recognised though the decision went on a specialty. Primrose against Duie, 21st February 1662, is to the same effect, No. 92. p. 5702.

But if the receiving implement of a part of a decree, binds the party to acquiesce in the rest, there is no reason why he should not do it in proper form by a regular written deed at the time when he receives implement? And this is necessary, for he cannot otherwise be with certainty prevented from entering the appeal; and if he should enter it, the other party could have no advantage from that part of the judgment which was favourable to him, till the appeal was decided, even supposing the objection of homologation to be sustained in the House of Lords. The ordinary form of the discharge of a decree is to be found in the Juridical Styles. The pursuer granting that form of a discharge, it is evident, acquiesces in the decree in so far as it is against himself. He discharges the action *in toto*, not merely grants a receipt to account, and never could afterwards ask more in that action by appeal. Why then should not the charger here grant a similar discharge in this action?

Some of the Judges were moved by the arguments of the petitioner, and observed that if the respondent was successful in the House of Lords, the award of expences would not stand, so that it would be unjust to allow it to be executed now, unless that appeal was to be relinquished. That this was not a usual case of expences, being almost the only one where expences had been given to the unsuccessful party, and that the award of expences formed an inseparable part of the decree.

On the other side it was observed, that this award of expences was just in the situation of an interim decree, which is given every day. That, particularly, it is quite common to give a party his expences, and at the same time to find that he is not entitled to go on with his process. That this award of expences was no condition or inseparable part of the decree, but might justly be enforced, though the rest should be appealed or even reversed. No. 9.

The Court "Refused the petition."

Lord Ordinary, *Glenlee.* Act. *Geo. Cranstoun.* Agent, *J. Smith* jun. W. S.
Clerk, *Mackenzie.*

M. *Fac. Coll. No.* 12. *p.* 37.

*** See case between these parties, under the title TACK, and the Appendix to that title.