

his favour, after his death, his son being of the same name, was charged, denounced, and taken with caption for the same debt.

No 13.

THE LORDS upon a bill did find, That the son ought to be free of the said debt; and in regard of the charger's trincating and fraudulent practice, they modified L. 40 to be paid by him, the one half to the party, the other half to the poor's box.

Clerk, Gibson.

Dirleton, No 281. p. 137.

1694. July 38.

FALCONER against WISHART.

No 14.

DAVID FALCONER gave in a petition *contra* William Cleland, mentioned 26th July 1694, No 70. p. 3731. founded on the acts of James III. and V., Queen Mary, and James VI. that malicious pleyers who tyne the cause, should pay the other party damage and expenses; and subsumed, that on an uncontroverted principle anent the nullity of the inhibition, he has put him to upwards of L. 1200 Scots of expenses, &c.—THE LORDS found, seeing there were different interlocutors, and so *probabilis causa litigandi*, there could be no expenses modified; for the lawyers say, that *opinio unius doctoris* is sufficient to liberate from expenses.

Fountainball, v. I. p. 640.

1701. February 23.

ROBERT SMITH against JOHN HAMILTON.

No 15.

ROBERT SMITH chirurgion having pursued John Hamilton in Elgin, for payment of L. 200 he had entrusted him to uplift from one of his debtors; he first denied the trust, and that being made out against him by witnesses and other pregnant adminicles, then he founded on a discharge; and it being referred to his oath, that this debt was neither *actum* nor *tractatum* to be comprehended, he, after much shifting and tergiversing, at last compeared, and deponed that it was communed and included, whereupon he is assoilzied and gains the cause. But Smith gave in a bill, representing how calumnious he had been in all the steps of this process, and had most disingenuously denied the trust, till it was clearly proven against him; and that he had declined all along to depone, by which he had put Robert Smith to vast expenses in adducing witnesses to evince the trust; and therefore craved that he might be condemned in his expenses. THE LORDS thought the case new, for one who had lost the cause to crave expenses of him who had gained it; seeing the rule of law lay just in the contrary, that *victus victori in expensis condemnatur*: Yet the Lords, considering that such cases might fall out, where the party who wins the cause may be most

A person assoilzied, in consequence of his oath, was, notwithstanding, found liable in expenses, on account of improper conduct.

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,