

No. 1. tion to that effect is inserted in the judgment ; House of Lords, 29th December 1797, Douglas against Trustees of Dalrymple, (not reported) ; 5th January 1798, Ross against Macdowall, (not reported). When it is silent on the subject, they are meant to be refused ; and it would be productive of much confusion, if any supposed grounds of the judgment were taken into view which are not expressed in it.

Answered : If the judgment of this Court had been in favour of the pursuer, expenses of process would have been awarded as a necessary consequence ; and the House of Lords having sustained the reasons of reduction, which, in the circumstances of the case, is equivalent to finding fraud and imposition on the part of the original defender proved, and there being a remit to apply the judgment, matters are in the same situation as if this Court had just decided the merits of the cause, and a motion was now made for expenses. The respondent in an appeal in the ordinary case, is entitled to the credit of having litigated *bona fide* ; but here, the difficulty of detecting the improper conduct of the original defender, rather enchances its criminality.

Upon advising the petition with answers, the Court were clearly of opinion, that the pursuer's claim was incompetent, and therefore repelled it.

Lord Ordinary, *Meadowbank*. Act. *D. Douglas*. Alt. *Jo. Dickson*. Clerk, *Menzies*.

*D. D.* *Fac. Coll., No. 117. p. 265.*

1800. June 3.

JOHN SMITH against The TRUSTEES for the Creditors of DONALD MACLEAN.

No. 2.

The creditors of a bankrupt having brought a reduction of an heritable bond on the act 1696, C. 5. from which the defender was assoilzied, with expense of extract, he was afterward found not entitled to rank on the penalty in the bond for the expenses of process.

DONALD MACLEAN, when insolvent, and in prison at the instance of the Paisley Banking Company, borrowed a sum of money from John Smith, for which Maclean granted an heritable bond over some houses belonging to him. The money received from Smith was immediately paid to the Paisley Banking Company, and Smith took infeftment.

Maclean was then liberated from prison, but was afterward incarcerated, and obtained a *cessio bonorum*. The trustees for his creditors instituted a reduction of the heritable bond, on the act 1696, C. 5. on the ground that Smith had advanced the money in order to give an undue preference to the Paisley Banking Company. Several interlocutors having been pronounced, sustaining the reasons of reduction, Smith brought an action of relief against the Paisley Banking Company. The processes were conjoined. A proof was led as to the whole circumstances attending the loan, and Smith was ultimately assoilzied, and found entitled to the expense of extract.

His bond contained a power to sell, if the debt was not repaid by the first Martinmas after its date, and Smith accordingly sold part of the houses, and recovered the greater part of the debt due to him.

The trustees sold the rest of the property; but, before the price was divided, Smith raised a process of mails and duties against the tenants and purchasers, who brought a process of relief against the trustees.

Besides the balance of the debt due to him, Smith claimed the penalty in his bond, in order to cover the expenses of the process of reduction, which exceeded its amount.

Pleading: The validity of the bond against the creditors being now established, the case comes to be the same as if Maclean himself were insisting that the security should be renounced. The pursuer's infetment includes the penalty, and he is not obliged to relinquish it till he be indemnified for the expense necessarily incurred in supporting the security, and which expense has been occasioned solely by Maclean's failure to pay the debt, in due time; 19th June 1788, Allardyce against Morrison, No. 22. p. 10052.

In sales, warrandice is not incurred by an unsuccessful challenge of the right brought by a third party, because the obligation of the disponer is, that the subject shall be effectually transferred; but even in sales, warrandice is incurred in such case, if the challenge has been occasioned by the fault of the disponer; for example, if he has granted double conveyances, he will be found liable to indemnify both disponees. Upon the same principle, in the present case, Maclean is bound to relieve the pursuer of the expenses of the reduction occasioned by his culpable conduct in giving a preference to the Paisley Banking Company, and not informing the trustees of the whole circumstances of the case, which would have prevented the action of reduction.

Besides, in heritable bonds, the debtor warrants that the debt shall be paid *cum omni causa*, and is on that account liable for expenses incurred in supporting the security.

Answered: A disponer is not liable to warrant against unsuccessful attempts by a third party, to evict the subject; Voet, L. 21. Tit. 2. § 25. Stair, B. 2. Tit. 3. § 46. Bankt. B. 2. Tit. 3. § 124.; Ersk. B. 2. Tit. 3. § 25. 30.; Dict. *voce* WARRANDICE. It is likewise established, that expenses of process cannot be claimed out of a conventional penalty, unless they have been expressly awarded, 28d. December 1757, Allan against Young and Miller, No. 19. p. 10047; 27th November 1761, Gordon against Maitland, No. 20. p. 10050; 21st May 1796, Young against Sinclair, No. 23. p. 10053. Here they were refused in the original litigation; and Maclean being insolvent, this is, in truth, a second attempt indirectly to obtain them from the same party.

The Lord Ordinary gave judgment in favour of the pursuer.

Upon advising a reclaiming petition, with answers, the Court ordered memorials; and on considering them, the Judges were divided in opinion.

On the one hand, it was thought that an heritable creditor is entitled to the expense of asserting his preference.

On the other, it was observed: In the original litigation, the objection was collusion, which the Court did not think sufficiently made out to warrant a de-

No. 2. cree of reduction, but at the same time they saw no reason to award expenses of process, which this is an indirect attempt to obtain from the creditors.

The debtor is not liable to warrant against unsuccessful attempts to evict. The propriety of the decision in the case of Allardyce may be doubted, if the Court meant to go further than to allow the creditor to adjudge for the penalty, reserving the effect of the adjudication for after consideration.

The Court, by a considerable majority, repelled the pursuer's claim for the penalty, and found the creditors entitled to the expense of extract. See PENALTY.

Lord Ordinary, *Craig*.  
Clerk, *Home*.

Act. *T. W. Baird*.

Alt. *Craigie, Williamson*.

*D.*

*Fac. Coll. No. 182. p. 418.*

1803. *May 21.* CAMPBELL and COMPANY *against* MACKENZIE.

No. 3.

It is not competent, after a case has been decided by the Inner-House upon a petition and answers, and no expenses given, to claim expenses from the Lord Ordinary.

This case was decided upon its merits, by advising a reclaiming petition, with answers, upon the 18th May 1803, at which time no motion for expenses was made. The cause was afterward enrolled before the Lord Ordinary, for the purpose of obtaining them; and his Lordship stated to the Court the general point of the competency of this demand, which was made to him after the cause had been finally decided in the Inner House.

The Court were of opinion, that when a petition is refused without answers, the cause may be enrolled before the Lord Ordinary, for the purpose of obtaining the expenses; but that when a cause is advised upon a petition and answers, such demand for expenses should be made when the cause is before the Court. They therefore instructed the Lord Ordinary to refuse expenses in this case, and signified that this rule should be adopted in similar cases.

Lord Ordinary, *Hermand*.  
Alt. *Connell*.

Act. *Ross*.  
Agent, *M. Montgomerie*.

Agent, *J. Campbell, tertius, W. S.*  
Clerk, *Menzies*.

*J.*

*Fac. Coll. No. 104 p. 231.*

1808. *February 6.*

MESSRS. JOHN PRINGLE, &c. Principal Clerks of Session, *against* DAVID BLACK and Others, Heritors, and the Rev. MR. SPENCE and the KIRK SESSION of the Parish of Orwell.

No. 4.

In a process the pursuer and defender are conjunctly

In the parish of Orwell there was no kirk-session; and the fund for the maintenance of the poor had always been under the exclusive administration of the clergyman.