

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.

The heritors, conceiving they had a power to interfere in the disposal, and dictate the application of these funds, met in the winter of 1799 and 1800, for the purpose of relieving the necessities of the poor. They appointed a committee of their number, empowered them to use the credit of the rest, and directed them to purchase grain to the amount of £100 Sterling, and to apply for reimbursement to the Rev. Patrick Spence, the clergyman of the parish and treasurer of the poor's funds.

Mr. Spence refused to reimburse the heritors, or to permit them to interfere in the administration of the poor's funds.

The committee, in name of the heritors at large, raised a process before the Sheriff of Kinross, concluding against Mr. Spence, as treasurer aforesaid, for the sum of £100. which they had applied for the benefit of the poor.

In this action the heritors were unsuccessful, (3d March 1801,) for the Sheriff Depute found, "That by law the poor's funds of every parish are under the management of the kirk-session and heritors of the parish for support of the ordinary poor; and that, when the state of the parish requires any extraordinary assistance, the sum must be supplied by voluntary subscription, or an assessment on the heritors according to the valued rent; therefore dismisses the action; but, in respect of the improper manner the cause has been argued by both parties, finds no expenses due."

The heritors then raised a declaratory action before the Supreme Court, concluding to have it found and declared, 1st, That the heritors of the parish have a joint right and power with the minister and kirk-session, (where there is a kirk-session,) in the administration and distribution of the poor's funds, of whatever description; 2d, That when any acts of extraordinary administration are to be done, such as letting the lands belonging to the poor's funds, or exercising any right of property thereon, uplifting or re-investing money, the minister ought to intimate from the pulpit a meeting for taking such matter into consideration, at least ten days before holding the meeting, that the heritors may have an opportunity to be present and assist if they think fit; 3d, That the heritors, or any of their number, have a right to call meetings of the whole heritors, minister, and kirk-session, (where there is a kirk-session,) for the administration of the poor's funds, as often as they shall see cause; that if the minister should fail to attend such meetings duly called, the heritors assembled may proceed without him; that the majority of such meeting, whether the minister attends or not, may, if they see cause, take the vouchers of the poor's money, and the title deeds of the lands out of his hands, and commit them to any one or more of their number; and the majority of the heritors should have power to appoint persons to the office of treasurer or cashier to these funds, or remove them according to their discretion; and, 4thly, That Mr. Spence should exhibit an account of his intrusions.

The process before the Sheriff was advocated and conjoined with the declarator. After these actions came into Court, a kirk-session was constituted by the members of the presbytery.

No. 4.
and severally
liable to the
Clerks of
Session for
the dues of
extract, al-
though the
proceedings
have not been
extended to
a decree.

No. 4. After proceeding some time before Lord Meadowbank, Ordinary, the case was reported to the Court on informations; and the following interlocutor was pronounced, (15th November 1803.) “ Upon report of Lord Meadowbank, and having advised the informations for the parties in this case, the Lords, in respect that the rights of the heritors of landward parishes on the one hand, and of the minister and kirk-session of such parishes on the other, were fixed by the decision in the case of Humbie*, by which it was found, That the heritors had a joint right and power with the kirk-session, in the administration, management, and distribution of the funds belonging to the poor, and a right to be present and join with the session in their administration, distribution, and employment of such sums, without prejudice to the kirk-session to proceed in their ordinary and incidental charities, though the heritors be not present or attend; and that, when any acts of extraordinary administration, such as uplifting money that had been lent out, or lending or re-employing the same, occurred, the minister ought to intimate from the pulpit for taking such matter under consideration, at least ten days before holding the meeting, that the heritors might have an opportunity to be present and assist if they thought fit; and that no sufficient reason has been assigned for departing from these rules on either side in the present case; and also, in respect that no act of mismanagement or malversation on the part of the minister and session has been condescended on, find it unnecessary to proceed further in these conjoined actions; dismiss the same, and decern.” To this interlocutor the Lords adhered on advising a reclaiming petition without answers.

Both parties refused to extract decree, or to pay a composition of the clerk's dues.

Whereupon the Principal Clerks presented a petition to the Court, praying to be found entitled to the dues of extract. This petition was answered.

Argument for the petitioners.

By act of Parliament the petitioners are entitled to certain fees on all processes brought into Court; and certain regulations were at an early period made for computing these fees in cases where an extract of the proceedings was not desired by any of the parties, (1672, ch. 16. § 29.)

At a subsequent period it was enacted, that the clerks, in further security, should be entitled to retain the pieces produced in process till their fees were paid, (1694, ch. 5. 2d Nov. 1695, Act of Sed.)

Whether the pursuer or defender should ultimately be liable in expense of extract, is a question which in many cases is determined by the Court. Where this point has been undetermined by the Court, it must be a matter of private arrangement between the parties. But in either case, both the parties are liable to the clerks; and in security of their fees, their right of retention of

* No. 5. p. 10555. *voce* Poor.

the productions in process applies equally to those made by the pursuer and defender.

Accordingly the Court has uniformly so determined in a long series of adjudged cases.

The first instance in which the point was judicially discussed, occurred in a process between Mr. Montgomery of Magbiehill, and Mr. Murray of Blackbarony; a petition was presented to the Court by the clerks, the parties paid the dues, and no decision became necessary. Principal Clerks of Session against Montgomery and Murray, 11th November 1751. (Not reported.)

The pursuers had soon afterwards occasion to complain of another attempt to evade their claim; but the Court found them entitled to their fees as if the decree was extracted. Principal Clerks of Session against Stewart and Ayton, 20th July 1753, Acts of Sed.

From this period to the present, the same point has frequently occurred, and received the same decision; 1754, Napier;—20th July 1760, Russell;—20th January 1795, M'Dowal;—3d March 1798, Keir and Robb;—11th July 1800, Gentle's Trustees; all unreported cases.

Argument for the defenders.

The respondents gave in separate answers, in which they united in maintaining a general plea, that there was here no claim for the fees of extract. To entitle the clerks of Session to these dues, it is pre-supposed that an extract is necessary for one or other of the parties; and to compel them to pay for what was neither necessary nor useful to their interest was unjust. In the present case there was no decerniture in the process which could render it a matter either of propriety or interest, that the respondent should possess an extract. It did not contain any *jus exigendi* at the instance of the one against the other. It did not even contain a declarator of their rights.

The parties were not fraudulently transacting the process for the purpose of obtaining the advantage, without paying the expence of extract, for in truth an extract was utterly useless.

Besides, the Court having found it unnecessary to proceed further in these actions, and having dismissed the same, an extract could not be competently given out. An extract might be considered as a further proceeding, which the Court had considered to be unnecessary.

The Court, however, were of opinion, that in a question with the Clerks of Session, no discussion could be entertained between the parties respondents, regarding the point of their respective and ultimate liability. In every process, whether an extract be required by the parties or not, the clerks are entitled to their regulated fees as certified by their collector. In the course of the process, both parties avail themselves of the labour of the clerks of Court, of which the dues of extract form part of the recompence, and both therefore must be conjunctly and severally liable for these fees.

No. 4. The following interlocutor was unanimously pronounced (6th February 1808.)
 “ Find the petitioners entitled to their fees of the within mentioned process, as
 “ if the proceeding were extended into a decret ; and therefore decern against
 “ the whole respondents, conjunctly and severally, for payment to the peti-
 “ tioners of their dues accordingly as the same shall be certified by their col-
 “ lector ; reserving to the respondents, the said David Black and others, and
 “ the said Mr. Patrick Spence and others, their recourse against each other as
 “ accords.”

Lord Ordinary, *Meadowbank.* Act. *Matthew Ross.* Alt. *Thos. W. Baird.*
J. & C. Bremner and Geo. Wilson, Agents. *Buchanan, Clerk.*

J. W. *Fac. Coll. No. 29. p. 104.*

1808. February 6.

JOHN PRINGLE, &C. PRINCIPAL CLERKS OF SESSION, *against* MRS. ROSE
 INNES, &C. and JOHN GORDON.

No. 5.

In a process, the pursuer and defender are conjunctly and severally liable to the clerks of Session for the fees of extract, although the process may have been removed out of Court by extrajudicial transaction.

The claim of the Clerks of Session arose in these circumstances.

In the year 1798, Mrs. Rose Innes of Netherdate, with concurrence of her husband, raised an action against John Gordon, Esq. of Avochie, writer to the signet, concluding for payment of certain sums of money.

After considerable litigation before the Lord Justice Clerk, Ordinary, an interlocutor was pronounced, in part sustaining, and in part repelling the pursuer's claim.

Both parties reclaimed to the Court ; and the interlocutor of the Lord Ordinary was adhered to ; but no expenses were found due to either party. Mutual reclaiming petitions were again presented. Both petitions were appointed to be answered ; but in consequence of an extra judicial settlement, no farther proceedings took place in the action.

The clerks gave in a petition to the Court, and therein referred to the argument and authorities stated in the case of Black, *supra*.

The Court were clearly of opinion, that the clerks of Court could not be deprived of their dues by extrajudicial transactions ; and that in all processes, whether pursued to decree or not, they were entitled to their regulated fees as certified by their collector. But as, in consequence of the preceding decision, the case was given up by the respondents, no interlocutor stands upon the records of Court.

Act. *Matthew Ross & William Erskine.* Alt. *J. Hagart & T. W. Baird.*
Agents, J. & C. Bremners, & Geo. Wilson. *Buchanan, Clerk.*

J. W. *Fac. Coll. No. 30. p. 108.*

* * The same thing happened in the following cases at the same time : Stirling Banking Co.—C. Crighton and D. Mill.—Arch. Johnston.—A. Robertson.