

The Court approved of the table.
The question of expenses was then argued.
J. MARSHALL for pursuers.
GIFFORD for defenders.
At advising—

LORD DEAS—No doubt the question of expenses is of great importance to the parties, but, having had to do with the case throughout, I have no doubt how that question should be decided. The magistrates made a table of rates in 1854, which has now been found not to be a lawful table. It had many items which have not been supported. What they are is of little moment, except as showing that substantially the action went in favour of the public. This action was not raised until 1862, and, so far as one can see, if this action had not been brought, this table would have been acted on in all time coming until some one challenged it. The magistrates were not entitled to wait until some one brought an action of reduction or declarator to have this set right. When objections were made to particular items it was the duty of the magistrates to consider them; and if they seemed illegal or doubtful, it was their duty to make a table so as to satisfy the rate-payers, or to come here to have it found and declared that the table was right. In such a case, if no public spirited individual is found to bring up the matter, it might go on for ever. I don't care whether the action was brought by the whole gentlemen of the county, or by one or two of them. It was most proper to bring it; and the natural and proper result is, that the parties opposing it and causing all this expense in getting a thing done which they ought to have done themselves, should bear the expenses. There was no disposition throughout this action to get this matter adjusted. On the contrary, when there was a remit to an accountant, and a table was framed on a certain construction of the judgment of this Court which we held was unsound, it was maintained by the defenders that that table must stand. The case is just this, that the magistrates have been very zealous to increase the revenues under their charge, and they have failed, and the ordinary consequence is that the funds for the benefit of which that was done must bear the expense of the litigation. I think the pursuers should have all their expenses in the Outer House, and the expenses in the Inner House since the date of the last interlocutor reclaimed against. The pursuers may have been unsuccessful in some points, and, of course, under the Act of Sederunt, the expenses applicable to these points will be struck off.

LORD ARDMILLAN thought that, as the preponderance of success had been in favour of the pursuers they were entitled to their expenses, with some small modification.

LORD KINLOCH—If I had been deciding this question myself, I should have found the pursuers entitled to expenses, subject to modification, reserving to myself the power to modify to such extent as I thought right. It is clear that the magistrates were wrong in holding fast by the table of 1854 as an alleged adaptation of the old table of 1772, and the pursuers were compelled to come to this Court in order to get that table rectified. On the other hand, it is undoubted that among the numerous details of the case there are several as to which the defenders have been successful; and therefore, while the pursuers are generally entitled to their expenses, I think these should be subject to some modification.

LORD PRESIDENT—My acquaintance with this case is less than that of your Lordships, but I think the pursuers are entitled to their expenses without any modification, and my reason for that is that, as Lord Ardmillan says, the great preponderance of success is on their side. In such cases I don't see how any one could expect more, for there is a great deal of detail, and much investigation necessary, and no pursuer, however prudently he conducts his case, can expect to be wholly successful. The fact that they have been so successful is the greatest compliment that could be paid them as litigants in such an action.

This interlocutor was pronounced:—

“*Edinburgh, 18th June 1869.*—The Lords having resumed consideration of this cause, with the report of Mr Charles Ogilvy, dated 28th May 1869, No. 154 of process, and heard counsel for the parties, Find that the defenders are not entitled to levy any dues which have not been in use to be levied for 40 years or time immemorial prior to the raising of this action; approve of the said report and of the table of dues appended thereto; and, in conformity therewith, find that the said table is to be the only table to regulate the levying the Dumfries Bridge Custom in all time coming: To this extent and effect repel the defences, and declare and decern in terms of the declaratory conclusions of the libel: Find it unnecessary to dispose further of any of the conclusions: Find the pursuers entitled to expenses incurred by them in the Outer House and also in the Inner House since the said interlocutor of 17th December 1868: Allow an account to be given in, and remit to the auditor to tax the account when lodged and to report.”

Agents for Pursuers—Scott, Bruce & Glover, W.S.

Agent for Defenders—W. Kennedy, W. S.

Thursday, June 19.

UDNY v. ESSON.

Landlord and Tenant—Removing—Duration of Lease.

A farm was let for nineteen years from Whitsunday 1850, the crop of 1850 being declared to be the first grain crop. Held that the tenant's possession continued to Whitsunday 1869.

Question as to the tenant's right to an away-going crop.

By minute of agreement dated 18th June 1852, Skinner, commissioner for Udney, of Udney and Dudwick, let to Alexander Esson and his heirs, “with reference to and under and in terms of the burdens, conditions, and others contained in the regulations established on the estate of Udney, recorded in the Sheriff-court Books of Aberdeen 25th May 1850, all and whole that croft or possession, as at present possessed by him, on the hill of South Fardine, on the estate of Udney, in the parish of Foveran, and that for nineteen years from and after the term of Whitsunday 1850, which, notwithstanding the date hereof, is hereby declared to have been the term of entry to the premises, the crop of the year 1850 being the first grain crop under this tack.”

The regulations contained this clause:—“At whatever term the tenant may have entered, he shall remove as at Whitsunday of the last year of the lease, being bound to give the landlord or incoming tenant access to the garden or yard at

Candlemas preceding said term, in order that the same may be laboured and sown."

On 2d April 1868 Udny raised an action of removing against Esson in the Sheriff-court of Aberdeenshire, pleading that "the tack under which the defender possesses being for nineteen years or crops, commencing with that of 1850, his tenure under it expires with the crop or year of 1868, and he is, in terms thereof, bound to remove at Whitsunday of that year."

The Sheriff-substitute (THOMSON) found "that, in terms of the minute of agreement, No. 12 of process, the possession in question was let to the defender on the terms following—viz., for nineteen years from and after the term of Whitsunday 1850—the crop of the year 1850 being the first grain crop under the tack, and the first half-yearly payment of rent being due at Martinmas 1850: That, under and in terms of the regulations and conditions of the estate, article 9, section 1, referred to in the said minute of agreement, the defender was bound to remove as at Whitsunday of the last year of the lease: Finds that the possession in question at the time it was let consisted simply of a portion of land without houses or garden: Finds, as matter of law, that the defender was entitled under the said tack to reap nineteen crops only: That his first crop was that in the ground at Whitsunday 1850, and his last crop that in the ground at Whitsunday 1868: Finds that Whitsunday 1868 is the 'Whitsunday of the last year of the lease,' and that, except to the effect of reaping the crop of 1868, the defender was bound to remove from the farm at Whitsunday 1868: Therefore repels the defences: Decerns removing against the defender, in terms of the conclusions of the libel."

On appeal, the Sheriff (JAMESON) pronounced this interlocutor:—"Recals the interlocutor appealed from: Finds that, in terms of the minute of agreement, No. 8 of process, the commissioner for the late John Augustus Udny let to the defender's predecessors the croft or possession in question for the period of nineteen years from and after the term of Whitsunday 1850: Finds that the pursuer is not entitled to remove the defender from the said possession until that period expires—viz., at the term of Whitsunday 1869, therefore dismisses the action, and decerns: Finds the defender entitled to expenses of process."

"*Note.*—The minute of agreement contains this declaration—'The crop of the year 1850 being the first grain crop under this tack'—and it is this clause which has given rise to any uncertainty about the rights of parties. But although this provision may make it questionable whether the defender shall be entitled to an away-going crop, there is no ambiguity regarding the sense of the leading provision in the contract, which fixes the endurance at nineteen years. The defender cannot be removed from the subjects let until that period expire. The action was therefore premature."

The pursuer appealed.

FRASER and CRICHTON for appellant.

CLARK and KEIR for respondent.

The Court adhered to the judgment of the Sheriff, and dismissed the appeal.

Agent for Appellant—W. Skinner, W.S.

Agents for Respondent—Macdonald & Roger, S.S.C.

Thursday, June 17.

GRAHAM v. MACFARLAN & CO.

Executor—Confirmation—Vitious Intromission—Summons. Observations by the Court as to the proper style of concluding against an executor confirmed, for claims on the executry funds.

Macfarlan & Co. raised an action in the Sheriff-court of Argyllshire "against Duncan Graham, residing at Daltot, in the parish of North Knapdale, and county of Argyll, as executor-dative, *qua* next of kin of the late Mrs Janet Graham or M'Arthur, innkeeper, Tayvallich, in the said parish of North Knapdale, for having vitiously intromitted with the goods, gear, and effects of the said deceased Mrs Janet Graham or M'Arthur, or at least as representing her on one or other of the passive titles known in law," concluding for £100, 9s. 3d., for goods supplied to the deceased Mrs M'Arthur.

The defender put in the following minute of defence:—" (1) The defender is executor-dative of the late Mrs Janet Graham or M'Arthur, conform to testament-dative in his favour by the commissary of the county of Argyll, of date 5th August 1868, and is liable only for payment of the deceased's debts, *secundum vires inventarii*. He is not liable for her debts as a vitious intromitter, nor as representing her on a passive title. (2) The defender does not know what sum is due to the pursuers, but he does not dispute the amount of the account pursued for. The defender is willing to rank and pay the pursuers' claim ratably with those of the other creditors of the deceased, and the pursuers having adopted proceedings needlessly, are bound to constitute their claim at their own expense. (3) The defender is not liable for expenses. (4) The present summons being defective, the defender is entitled to the expense of this defence and subsequent procedure, if any."

A debate having taken place on the closed record, the Sheriff-substitute (HOME) pronounced the following interlocutor:—

"*Inverary, 30th January 1869.*—The Sheriff-substitute having heard parties' procurators, and made avizandum, in respect that it was not disputed that the late Mrs Janet Graham or M'Arthur was indebted to the pursuers in the sum of £100, 9s. 3d. sued for, and that the defender is her executor; assoilzies the said defender from the passive title or titles libelled on, but grants decree against him as executor, for the said sum of £100, 9s. 3d.; but, in respect this action was not raised against the defender only in his character of executor, but also as a vitious intromitter, although he had obtained confirmation as executor before this action was raised, and also in respect that the pursuer was bound to constitute his claim at his own expense, finds the defender entitled to his expenses; appoints an account thereof to be given in, and remits to the auditor to tax and report, and decerns."

"*Note.*—This case was argued before the Sheriff-substitute, not on the merits, but on the question of expenses. After the defender had been confirmed executor, this action was raised against him, alternatively as executor, or vitious intromitter. It seems to the Sheriff-substitute that the defender was entitled to object to decree going out against him as a vitious intromitter, and that therefore, on this ground, he would be entitled to his expenses. But besides this, it seems to the Sheriff-substitute that the pursuer was bound to constitute his debt