No 20. found liable in the costs of suit awarded against his employer, he concludes in these words, 'Such factor is likewise bound, for the same reason, to answer 'the defender's claim in a reconvention or counter action.'

'The Lords repelled the defences, and found the defenders liable, conjunctly and severally, in damages and expenses.'

Act. *Lockhart.* Alt. *Rae.*

A. W. *Fol. Dic. v. 3. p. 198. Fac. Col. No 113. p. 263.*

No 21. 1778. *March 6.* M'Kay *against* Barclay and Others.

M'Kay was decerned to pay the expenses of process by a judgment of the Inner-house, and the account was modified. A reclaiming petition was presented for M'Kay, praying to alter the interlocutor, in so far as to modify the account to a smaller sum. The Court refused the petition, as falling within the intendment of the act of sederunt 1st February 1715, § 4. discharging reclaiming petitions against judgments of the Inner-house awarding expenses.

G. Buchan-Hepburn.

Fac. Col. No 20. p. 35.

SECT. IV.

Personal Charges.—Decrees of Constitution.—Discharge and Conveyance.—Costs in the House Lords.

No 22. 1748. *July 23.* Mackail and Mitchell *against* Blackwood.

Though where only expenses are found due, the Lords are not in use to sustain the parties personal charges as expense, yet where *damage* and expense is found due, the parties personal charges are admitted as damage no less than any other loss.

Fol. Dic. v. 3. p. 199. Kilkerran, (Expenses.) *No 4. p. 181.*

No 23. Expenses of a decree of constitution never given. 1749. *July 20.* Fergusson *against* The Officers of State.

James Fergusson writer in Ayr, as assignee of William Cunninghame of Auchinskeith, having pursued and obtained a decree of constitution *declara-*

torie against the Officers of State, of a debt due to the said William Cunninghame by the deceased John M'Ilvain a bastard, the LORDS 'refused to give the pursuer expenses,' as in no case is the expense of a decree of constitution given. No 23.

And though it was represented that others of the creditors had got their expenses decerned by the Ordinaries, where their claim either needed no proof, or where the proof had been led on a diligence; the LORDS 'refused, nevertheless, to give expense, leaving it to the pursuer to quarrel such decrees of the Ordinaries, if, in the event, the fund should not be sufficient for the debts.'

Fol. Dic. v. 3. *p.* 199. *Kilkerran*, (EXPENSES.) *No* 5. *p.* 181.

1781. *July* 3. JAMES OGILVIE *against* JOHN FYFE.

No 24.
In practice the creditor pays the expense of a discharge on conveyance, but where a creditor had given up his penalties, he was found not liable for such expense.

OGILVIE granted an heritable bond to Fyfe for L. 150 Sterling, on which an adjudication followed. The Incorporation of hammermen of Canongate, who were also adjudging creditors, agreed to pay up this debt, on getting a conveyance of the security. Fyfe restricted his penalty to the expenses he had really laid out, with interest from the date of each disbursement: and received payment accordingly. The conveyance was made out by the assignee's agent; and a demand having been made upon Fyfe, for so much of the expense thereof, as was reckoned equivalent to that of a simple discharge, he brought the matter before the Court by suspension, and

Pleaded; The supender, in virtue of his adjudication, was entitled to have drawn his whole accumulated sum with interest; and, it was only on condition of getting his principal and interest paid down to him, without any deduction, that he agreed to give up his penalties. It would, therefore, be contrary both to good faith and equity, should the charger, at the same time, be allowed to keep his discharge, and to get back any part of the consideration which he gave for obtaining it.

It is perhaps the common, but by no means the universal practice, that the creditor pays for the discharge. But this practice is evidently owing to there being no other proper fund for the payment of such expense? and, therefore, it can have no influence here, where there was a fund, namely, the penalties, more than sufficient for that purpose. Had the suspender paid the expense now demanded, there is not a doubt but he might have charged it against his debtor, and have insisted for payment of it out of the penalties, before denuding. And, had the charger refused to allow these expenses at that time, the consequence must have been, that the suspender would have held by his adjudication, and would have drawn in the name of penalties about L. 25 Sterling more than he received by the transaction in question.