

“ thereabouts, the reasons of which taxation are particularly
 “ expressed in their interlocutor for that purpose ;’ which sums
 “ so taxed and allowed, the committee were likewise informed,
 “ the said Hog did immediately, by a notary, offer payment of
 “ to the petitioner, but he refused to accept thereof :

“ The committee, before they conclude, think proper only fur-
 “ ther to observe, that your lordships having formerly been of
 “ opinion, the Lords of Session had rightly proceeded to tax only
 “ the costs of suit before them, and not the costs of the peti-
 “ tioner’s appeal ; and your said order of the 8th March 1717,
 “ directing the Lords of Session to tax and allow the petitioner
 “ the costs he had or should be put to in the taxation of his
 “ costs, having been complied with in the allowance of the said
 “ 8*l.* 6*s.* 8*d.* for that purpose as afore-mentioned ; that therefore
 “ the said Lords of Session have proceeded agreeably to the or-
 “ ders of this House, and have not disregarded the authority of
 “ your lordships’ last order, as particularly complained of in the
 “ petition.

“ Which report being read by the clerk, was agreed to by the
 “ House : And the order and judgment of this House of the 19th
 “ of August 1715, on hearing the petitioner’s appeal, being read :
 “ ‘ It is ordered by the Lords Spiritual and Temporal in parlia-
 “ liament assembled, that the said petition be and is hereby dis-
 “ missed this House.’ ”

Case 37. Katherine Lyon, Widow of John Lyon of
 Muireisk Esq. - - - - - *Appellant ;*
 The Right Hon. John Earl of Aboyne, an
 Infant, and others, - - - - - *Respondents.*

22d August 1715.

Costs and Expences — A person, having right to the balance of the price of an estate, which price was stipulated for in an agreement with penalty, obtains decrees in several different actions for principal and interest ; and in the last of these actions, insists for expences of all the former actions : the Court having found that in that action the expences of the others could not be allowed because there was *probabilis causa litigandi*, and since she did not insist for expences in her other actions ; upon appeal the judgment is reversed, and the Court ordered to cause the costs and expences of all the actions to be taxed and paid to the appellant.

Subsequent proceedings of the House of Lords on two complaints by the appellant, that the Court had not taxed her costs : the House by a committee afterwards taxes the costs and expences of the Court of Session, and the expences of the said two complaints, and ordains the respondent (a minor), his tutors and curators, to pay 6*l.* 4*s.* 4½*d.* to the appellant for her costs and expences.

ON the 3d of January 1667, Charles Earl of Aboyne, grandfather to the respondent Earl John, entered into articles of agreement with John Lyon of Muireisk, the appellant’s late husband ;

husband; whereby the said John Lyon, on the one part, bound himself to make up a complete right and title in his person to certain lands in the shire of Banff, and thereupon to convey the same to the said Earl Charles on or before the 15th of May then next ensuing, in consideration whereof, the said Charles Earl of Aboyne on the other part, agreed to pay the sum of 9000 merks, on or before the then next term of Whitsunday; and both parties bound themselves mutually to the performance of that agreement under the penalty of 3000 merks.

In pursuance thereof, Earl Charles paid to the said John Lyon the sum of 5500 merks, part of the price, so that there then only remained a balance of 3500 merks, and entered to possession of the lands, in which he, and those claiming right from him, continued ever after. John Lyon not having made up titles in his person according to the said agreement, the said Earl had recourse to the legal diligences of horning, caption, and inhibition to oblige him to perform his part of the articles; and his Lordship afterwards in 1670 apprised the said lands.

On the 24th of May 1678, the said John Lyon executed an assignation of the said balance of 3500 merks to one John Riddoch. John Lyon died in December 1700, leaving the appellant in low circumstances.

In 1706, 39 years after the date of the agreement Riddoch the assignee commenced an action before the Court of Session against the respondent Earl John, a minor, for payment of the said balance of 3500 merks with interest due thereon. In April 1707, the said Riddoch assigned his right to the appellant after which the action was carried on in her name. The respondents contended that the appellant's late husband had not performed his part of the agreement, but the appellant insisting that the respondent and his predecessors had been in possession of the lands for 40 years, and that therefore she was entitled to the interest of the money, as she would have been to the profits, she craved decree for interest only. On the 7th of November 1707, the Court decreed the respondent to pay the interest due on the said 3500 merks, and this decree was extracted on the 28th of February 1708.

The appellant by virtue of this decree arrested the rents in the hands of the respondent's tenants; and brought an action of forth-coming against them to pay these rents to her till she should be satisfied for the interest decreed to her. Opposition was made by the tenants and by Lord and Lady Kinnaird, who had a jointure upon these lands, but in June 1709, the Court decreed the tenants to pay their rents to the appellant till she should be satisfied the said interest in arrear; and this decree was adhered to on the 23d of February 1710. Lord and Lady Kinnaird afterwards brought an appeal against the same, but their appeal was dismissed with 40% costs to the present appellant. Case, No. 5.

She also brought an action of adjudication against the respondent's estate, in which she obtained decree in her favour on the 10th of June 1709; and afterwards brought an action of mails and duties against the respondent's tenants to pay their rents to her.

And

And further she brought an action against the respondent for recovery of the balance of 3500 merks, due on the original principal sum, and of a part of the penalty in the agreement corresponding thereto. On the 10th of February 1710, she also obtained decree in this action in her favour for 1637*l.* 14*s.* Scots of principal sum due to her after all deductions, together with a proportion of the penalty, to bear interest till paid.

The respondent brought a bill of suspension of these several decrees. But on the 12th of February 1712, the Court adhered to their former decrees, with this quality, that if principal and interest should be paid on or before the 15th of May then next, the respondent should be free from the penalty. The respondent reclaimed against this interlocutor but after various proceedings, the same was adhered to, on the 27th of February 1714.

In the mean time, the appellant had presented a petition to the Court, stating that she had been put to great expences in recovering the small sum due to her, that she had prevailed in all the actions brought by her or against her, and therefore praying that the Court would allow her the expences of these actions. The Court on the 26th of February 1714, found "that in this process, the expences of the appellant's other processes could not be allowed her, since there was *probabilis causa litigandi*, and since she did not insist for expences in her other processes." The appellant reclaimed and the Court on the 10th of June 1714, "adhered to their former interlocutor, and modified her expences to 250*l.* Scots." She again reclaimed, and contended that by the interlocutor of the 12th of February 1712, it was declared that if principal and interest was paid on the 15th of May then next, the respondent should be free from the penalty; but that as the respondent had not made payment in terms of that interlocutor she was entitled to the penalty. The Court on the 24th of June 1714, "adhered to their former interlocutors."

Entered,
23 May
1715.

The appeal was brought from "several interlocutors of the Lords of Council and Session of the 26th February, the 10th of June 1712, the 26th of February 1714, and the 24th of June 1714 (a).

Heads of the Appellant's Argument.

Costs are in cases similar to the present to be allowed by the law of Scotland: and the appellant made it appear in the Court below, that her expences amounted to more than 400*l.* sterling, besides the expences of the last action.

The appellant has been forced to leave her native country, and spend nine years in obtaining seven decrees, before she could come at her money, due upon so clear a demand, against the most vexatious and obstinate defence.

(a) In this case, the interlocutors appealed from cannot be correctly stated by their dates; but in the appellant's case, she mentions, that she "appeals from these interlocutors by which she was related part of the penalty and her expences or costs."

Though

Though there have been different actions, yet they were such as were necessary by the law of Scotland, and all founded upon the same most clear demand, and occasioned by the respondent's groundlessly contesting her indisputable right. And the appellant had much better have sat down under the loss of her debt, if she shall not be re-imbursed the expences she was forced to be at, in prosecuting her right.

Heads of the Respondent's Argument.

The appellant founded her argument in the Court below upon the acts of the Scots Parliament, 1587 c. 43. & 1592 c. 144. with regard to damages and expences. But from these and other acts it appears that the Judges have the sole power of modifying expences; and the intent of the acts being to suppress vexatious law suits, therefore the Judges have ever construed them by observing that intent, viz. in allowing expences where an action appears vexatious, and in acquitting therefrom, when there is *probabilis causa litigandi*, as they found in the present case. It is not obvious therefore, after what manner these acts, or any of them can be construed for the benefit of the appellant, who all along has appeared so litigious and vexatious to a minor, and notwithstanding she has recovered and received principal interest and costs, for which she has given a discharge, yet still insisting for penalty and additional expences, she has appealed from several interlocutory sentences refusing the same.

After hearing counsel, *It is ordered and adjudged that the several interlocutors complained of in the said appeal whereby the appellant was refused her expences or costs be reversed; and it is further ordered, that the Lords of Session do cause the costs and expences of all the suits and processes between the appellant and respondent mentioned or referred to in the said appeal, to be taxed and ascertained, and that the same when so ascertained be forthwith paid to the said appellant.*

Judgment,
22 August,
1715.

For Appellant, J. Jekyll. Rob. Raymond.
For Respondent, N. Lechmere. John Cumyng.

On the 21st of December 1717, a petition was presented to the House, in the name of Katherine Lyon, reciting the judgment on her appeal, and praying that "their lordships would please to enforce the same by effectually obliging the Lords of Session in Scotland to cause the petitioner's bill of costs to be taxed and ascertained, according to the acts of regulation of fees; and that the same should be then forthwith paid her without further suit." This petition was referred to a committee.

Proceedings
relative to
the taxing
of expences
in this case,
1717, Dec.
21.

The Earl of Clarendon reported from the Lords committees, "That the committee have accordingly considered the matter of the said petition; and in respect of the facts therein alleged, acquaint your lordships, that on hearing the petitioner's appeal, the said 22d of August, this House did reverse the several interlocutors

1717-18.
Feb. 11.

“terlocutors of the Lords of Session therein complained of, where-
 “by she was refused her expences or costs; and ordered the Lords
 “of Session to cause all the costs and expences of all the suits and
 “processes between the appellant and respondent, mentioned or
 “referred to in the said appeal, to be taxed and ascertained; and
 “that the same, when so ascertained, should be forthwith paid to
 “the appellant: the committee further inform the House, that an
 “authentic copy of the proceedings of the Lords of Session, since
 “the making the said order and judgment, had been, on the pe-
 “titioner’s part, produced before the committee; by which it
 “appears that the Lords of Session had, on consideration of the
 “petitioner’s account of costs and expences exhibited to them,
 “and produced before the committee, amounting to 538*l.* 4*s.*
 “sterling, modified the sum of 100*l.* sterling in name of costs
 “and expences, to be paid to the said Mrs. Lyon *Attour*, that
 “is above the several sums already modified and paid to her for
 “expences in the process above-mentioned: And it appeared to
 “the committee, that the sums mentioned to have been before
 “paid to her amounted only to the sum of 250*l.* Scots, being
 “about 20*l.* sterling, which in the said account, out of one article
 “is mentioned to be deducted: There was also on the part of
 “the petitioner produced to the committee the articles of regu-
 “lation concerning the Session, approved by his late Majesty
 “King William, in pursuance of an act passed in Scotland in the
 “4th session of King William and Queen Mary’s first parliament,
 “intituled, ‘Commission for regulation of judicatories;’ which
 “articles regulate the several fees and charges to be paid in rela-
 “tion to prosecutions in the said court; and by the said articles
 “it is expressly directed, ‘That in all causes where the Lords
 “at the conclusion thereof, shall find the succumber,’ that is,
 “the party who loses the cause ‘to have been calumnious or
 “litigious they shall take in an account from the party prevailing
 “upon his oath, of the expences and damages that he hath been
 “put to in that process; and that then they discern, or, in case
 “of extravagance tax and modify the said expences and damages
 “to be paid by the succumber to the party prevailing as said is.’

“That the committee having been directed by the House to
 “search for precedents, think it proper to inform your lordships,
 “that they find none of the like nature; the only one insisted
 “on, on the part of the respondents (being the case of Sir
 “Andrew Kennedy) widely differing from the case of the peti-
 “tioner:

“And upon the whole matter the committee are of opinion,
 “that the Lords of Session have not taxed and ascertained the
 “petitioner’s costs and expences agreeably to the forementioned
 “order and judgment of this House, on hearing her appeal; and
 “are likewise of opinion, that the said Lords of Session be di-
 “rected to tax the petitioner’s costs, expences, and damages,
 “according to the articles of regulation; and to note what extra-
 “vagancies they shall disallow;”

“ Which

“ Which report was read by the clerk entire. And the first
 “ resolution being again read, the same was agreed to by the
 “ House. Then the other resolution being likewise read a second
 “ time, was, with some amendments, agreed to by the House,
 “ and ordered as follows :

“ ‘ Ordered, that the said Lords of Session be and are hereby
 “ directed to tax and ascertain the petitioner’s costs and expences,
 “ by considering the particulars of such costs and expences, article
 “ by article.’ ”

Mrs. Lyon presented a second petition to the House, complaining,
 “ That the Lords of Session in Scotland have not taxed the peti-
 “ tioner’s costs and expences agreeably to the order and judgment
 “ of this House, of the 22d August 1715, and the order of the
 “ 11th February 1717, and praying relief ;” —which was referred
 to a committee.

1719.
Dec. 19.

The Earl of Clarendon reported from the Lords committees :
 “ That the committee have accordingly considered the said peti-
 “ tion, and heard counsel thereupon, as well on behalf of the
 “ Earl of Aboyne as for the petitioner, and think proper to ac-
 “ quaint your lordships with the matter, as it appeared before
 “ them :”

1719-20.
Feb. 9.

(Here are recited the judgment, 20th August 1715, and pro-
 ceedings thereupon, before the Court of Session; Mrs. Lyon’s
 petition of 21st December 1717, and the resolution and order of
 the House, 11th February 1717-18.) “ Which (last-mentioned)
 “ order being likewise by the petitioner soon after exhibited to
 “ the said Lords, and therewith a bill, amounting to 785*l.* the
 “ said lords did not only reject the whole charges she had been at
 “ before them, on their ordering her the said 100*l.* in the name
 “ of costs, which amounted to about 23*l.* 15*s.* sterling; but also
 “ the charges she had been at in her complaint to the House
 “ thereupon, which amounted to 50*l.*; and gave for reason,
 “ ‘ That such costs fell more properly to be taxed by your Lord-
 “ ship’s?’ And in taxing the petitioner’s said bill, the said lords
 “ disallowed all the articles therein charged for counsel’s fees, in
 “ drawing answers to the said Earl’s reclaiming bills or petitions,
 “ amounting to upwards of 100*l.* sterling: though she was obliged
 “ by the interlocutors of the said Lords of Session to give in all
 “ the said answers to such reclaiming bills or petitions, and to
 “ have the same drawn and signed by counsel; or in default
 “ thereof, she must have lost the whole effect of her suit: And
 “ the committee upon this occasion think proper to take notice,
 “ that the said lords did, notwithstanding, allow the petitioner
 “ her charges for printing the said answers, and the fees paid to
 “ the clerk in putting in the same: The committee further ac-
 “ quaint your lordships, that the Lords of Session likewise refused
 “ to allow the petitioner what she was from time to time obliged
 “ to pay for inrolling her cause before the Lord Ordinary, money
 “ to clerks’ servants, extractor’s servants, and to her agent or soli-
 “ citor, and several other expences: But the counsel for the said
 “ Earl insisting that such particulars of costs are not usually
 “ allowed

“ allowed by the Lords of Session, the committee think proper
 “ further to acquaint your lordships, that there was produced
 “ before them, on the part of the petitioner, a declaration or
 “ certificate under the hands of several advocates, ancient prac-
 “ tisers before the Lords of Session, testifying, ‘ That the dues
 “ claimed in the account of expences given in by her in the
 “ taxing of her costs, as paid to the Lords of Session’s principal
 “ servants, to advocate’s second servants, to clerks and ex-
 “ tractors servants, and to agents, for their agenting processes
 “ and pleas of law, were, many years before the petitioner’s
 “ process, in use to be paid by all persons whatsoever, whether
 “ pursuers or defenders before the said Lords; insomuch
 “ that no person now can, nor could for many years past,
 “ prosecute or defend any suit at law, without paying the said
 “ dues to the above-mentioned persons: And that the lawyers
 “ in that part of Great Britain do receive their consultation
 “ money for drawing answers to petitions, ordained to be an-
 “ swered by the said Lords; which are the same with the above-
 “ mentioned reclaiming bills, as well as for drawing the said
 “ petitions; and generally for all papers signed by lawyers pre-
 “ sented to the said lords:’

“ The committee think fit also to acquaint your lordships,
 “ that they observed a distinction made by the Lords of Session,
 “ that the former order of this House directed only their taxing
 “ such costs and expences as preceded the petitioner’s said appeal;
 “ though your committee, upon their enquiry, observed the said
 “ lords have allowed her several *Items* of costs since the determi-
 “ nation of this House on hearing the same, particularly upon
 “ the petitioner’s application to the said lords, pursuant to your
 “ lordships’ last order, directing them to tax her costs, article by
 “ article:

“ The committee, before they conclude, likewise think it
 “ proper to inform your lordships, that though the petitioner’s
 “ bill of costs before-mentioned, given in to the Lords of Session,
 “ amounted to 785*l.*; yet the said lords, by disallowing or reducing
 “ divers articles therein contained, have taxed the same at a
 “ sum under 300*l.* which is in no sort a compensation to the peti-
 “ tioner for her costs; in regard it was alleged, that though she
 “ was allowed her whole bill, yet the sum would fall much
 “ short of the real costs, which the aforementioned suits and
 “ processes have necessarily occasioned her.

“ And the committee conceiving this to be a matter wherein
 “ the honour and judicature of this House is very nearly con-
 “ cerned, they declined coming to any opinion; but humbly
 “ leave the same to your lordship’s consideration.”

“ Which being read by the clerk intire, ‘ It is ordered, that
 “ the said report be taken into further consideration on this day
 “ se’nnight; and the lords to be summoned.’ ”

1719-20.
Feb. 16.

The said report being again read by the clerk, and debate there-
 upon, “ It is ordered, that the said report be referred back to the
 “ same committee, to consider what further sums should be allowed
 “ the

“ the petitioner for her costs; and to report the same to the
“ House.”

The Earl of Clarendon reported back from the Lords commit- Feb. 26^e
tees, “ That an attested copy of the petitioner’s bill of costs,
“ which was by her exhibited to the Lords of Session in Scotland,
“ was laid before the committee, who in the first place proceeded
“ to consider the nature of such costs therein as were by the said
“ Lords of Session disallowed; and in such consideration were
“ attended by an ancient practiser in causes before the Lords of
“ Session; and having heard him, upon oath, as to the ordinary
“ allowances made for the several articles in the petitioner’s said
“ bill so disallowed as aforesaid, and particularly considered the
“ same are of opinion, that most of them ought to have been
“ allowed; and therefore, having caused such of the said articles
“ to be cast up, they find the sum total thereof amounts to
“ 186*l.* 4*s.* 4½*d.* :

“ The committee also, upon their enquiry into the other dis-
“ allowances of the said Lords of Session of the petitioner’s
“ costs and expences, were informed that the said lords wholly
“ disallowed all the costs, charges, and expences she had been at
“ upon her last application to this House, when she was obliged
“ to complain that the House of Lords had not taxed her her
“ costs, pursuant to your lordships order, on hearing her appeal;
“ which costs upon that application, as she alleged and offered
“ to make oath, amount to 50*l.* and upwards, exclusive of the
“ whole incident charges and damages she had been put to in
“ prosecuting her several suits for thirteen years past; but the
“ said Lords of Session, on their refusal, gave for reason, that the
“ charges of the said application fell more properly to be taxed by
“ this House :

“ The committee were likewise informed, that the costs and
“ charges which the petitioner has necessarily been already put
“ to upon her present application to your lordships, and the
“ further charges which will unavoidably be incurred before she
“ can reap any advantage thereby, will not be less, than the
“ expences which her said former application occasioned,
“ amounting as is above mentioned to upwards of 50*l.*

“ The committee, upon this whole matter, think it further ne-
“ cessary to acquaint your lordships, that the costs taxed upon
“ the petitioner’s bill, by the said Lords of Session, amount to
“ 295*l.* besides her charges of extracting their decree, which
“ they have also allowed, though not ascertained; and which
“ the committee were informed by the same ancient practiser
“ will amount to upwards of 30*l.*; that the costs disallowed by
“ them, which the committee conceive should have been allowed,
“ amount to 186*l.* 4*s.* 4½*d.* which, with the costs of the said two
“ applications to this House, amounting to 100*l.* make together
“ in the whole the sum of 611*l.* 4*s.* 4½*d.*

“ Which being read by the clerk intire, ‘ It is ordered, that the
“ said report be taken into further consideration on Monday next,
“ and the lords to be summoned.’ ”

1719-20.
March 1.

“ The said report being again read by the clerk and agreed to,
“ the following order was made :
“ It is ordered by the lords spiritual and temporal in parliament
“ assembled, that the said Earl of Aboyne, his tutors and cura-
“ tors do forthwith make payment to the said Katherine Lyon of
“ the sum of 611*l.* 4*s.* 4½*d.* for her costs and expences in the seve-
“ ral suits and processses mentioned or referred to in her said ap-
“ peal, and in respect of further costs since incurred, upon her
“ several applications for obtaining relief upon the matters com-
“ plained of in her said petition.”

In the Dictionary of Decisions, vol. 1. p. 439. *Implied Discharge and Renunciation*, many decisions are stated for the doctrine, that after extracting a decret expences are not to be allowed : but that doctrine in the present appeal was reversed.

Cafe 38. John Goddard, Gentleman, - - - *Appellant* ;
Fountain- Sir John Swinton, Baronet, - - - *Respondent.*
hall,
13 July
1709.

30th August 1715.

Foreign Decree — The effect of a judgment of the Court of King's Bench, when founded upon by a pursuer against a defender in the Court of Session.

Homologation. — The defender had in England been surrendered by his bail, who were discharged ; and the defender executed an instrument, importing that the judgment should not be released by such discharge ; this instrument found not to homologate the judgment.

THE appellant's mother Ursula, as administratrix of his late father Robert Goddard, deceased, in October 1700 commenced an action against the respondent before the Court of Session for payment to her of the sum of 404*l.*, with interest since the year 1680 ; stating the circumstances of the case to be :

That in 1675, the respondent being at London and dealing as a merchant, he and the said Robert Goddard and nine other persons executed articles of agreement under their hands and seals to become partners in a ship called *The John and Thomas of London*, and her cargo, to the value of 3800*l.* on a voyage to Guinea ; and all the parties, under a penalty of 6000*l.*, covenanted to account with and pay each other for such proceeds of the cargo as should come to each partner's hands :

That by the said articles Mr. Goddard was declared to have four parts of 32 in the said ship and cargo ; and the ship, proving successful in her voyage, returned to the port of London in 1677, and the disposal of the cargo was committed to the respondent, as cashier and agent for the partnership : he received thereon to the value of 5403*l.* 9*s.* 4*d.*, whereof 675*l.* 8*s.* 8*d.* was Mr. Goddard's share ; and the respondent having paid him 285*l.* 8*s.* 8*d.*, there remained due to him 390*l.* :

That