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ROBERT BEATSON, Esq., of Kilry, . . *Appellant;*
MR. WM. JAMESON, . . . . . *Respondent.*

BEATSON *v.* JAMESON.

House of Lords, 5th March 1798.

EXPENSES OF PROCESS—AGENT AND CLIENT—APPEAL—COMPETENCY.—A summons having been raised before the Court of Session against several debtors; and *inter alia* against the appellant for £3. 5s. 10½d., for the price of bricks, he called on the pursuer at his place, and paid the amount, offering at the same time to settle the expenses. Mr. Jameson not being at home, and his clerk not knowing any thing about the expenses, he declined receiving them. Thereafter, Mr. Jameson's son, who was the writer that brought the action, took decree in absence, and sent the appellant a note of the expenses, amount £3. 11s. 3d., and raised horning, and charged thereon. In a suspension, the appellant was held liable for the amount, with the whole costs of suit, amounting to £35. In an appeal to the House of Lords, these interlocutors were reversed. There being here no contrivance on the part of the appellant to settle with the client, without the knowledge of the agent, he having tendered the expenses at the time he got a discharge for the account, and therefore was only liable for the amount of expense *then due*. Objection was stated to the competency of the appeal, as merely for expenses, but objection not regarded.

The appellant having occasion for some bricks of a particular kind, to be employed on his estate of Kilry, Fifeshire, ordered some bricks from a brickfield, near Leith, belonging to the respondent, a mason.

The bricks were sent accordingly, but as they happened not to be of the kind to suit the appellant's purpose, and as his near neighbour, Mr. Ferguson of Raith, was in want of some bricks at the time, for the use of his garden, they were, by the appellant's order, delivered to Mr. Nicol, principal gardener to Mr. Ferguson. In these circumstances, the appellant stated, that it being a matter of perfect indifference to him whether he should pay the respondent the trifling sum of money to which the price of the bricks amounted, (£3. 5s. 10½d.) and receive it again from Mr. Nicol, or that Mr. Nicol should pay it directly to the respondent; so he naturally conceived it to be a matter of equal indifference to the respondent whether he should receive it of the appellant, by whom the bricks had been ordered, or of the person to whom the bricks were delivered.

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At the distance of two years, the appellant stated that nothing more occurred about the bricks, until one morning early, before he was out of bed, the respondent sent his servant for payment of the account. The appellant being then in bed, and apprehending that it would not be any inconvenience for the servant to call at Raith, which he passed in going back to Kirkaldy, desired his own servant to tell the man to go to Mr. Nicol, Mr. Ferguson's gardener, and he would pay him the money.

In a few days thereafter, he received a letter from a lawyer, making a demand for payment of this account. In answer, the appellant referred him to Mr. Nicol for payment, and application being accordingly made, Mr. Nicol's answer was, that he would speak to the factor, and send the money as soon as he received it.

Nothing further occurred until January 1794, when a summons before the Court of Session, against four other debtors, with his name included, was served on the appellant, no intimation having in the interval been made to him that Mr. Nicol had failed to pay the account for the bricks, or that Mr. Anderson had failed to see the factor about it. In these circumstances, the appellant wrote the respondent's country
Jan. 31, 1794. agent, (Mr. Anderson), stating, that had he known Mr. Nicol had not paid for the bricks, he would have settled long ago, and consequently that he was "not liable for any expenses incurred," and expressing his readiness "to pay for all "bricks when demanded."

On the 26th January the appellant went to Edinburgh, and called on old Mr. Jameson to pay the account, but finding him from home, he paid the amount of the account, getting a receipt therefor from Mr. Guthrie, his clerk. At same time he offered payment of the expenses, which Mr. Guthrie declined to take. In the meantime, however, a demand was, about fourteen months thereafter, made by the respondent's son, Mr. Jameson, a writer in Edinburgh, for the expenses, amounting to £3. 11s. 3½d. This Mr. Jameson, the appellant alleged, was the real respondent in this case, and though he well knew the debt was paid, and an offer made at same time of the expense then due, yet he chose, unknown to the appellant, to proceed with the action, and took decree thereon, upon which horning was raised, and a charge given. The appellant, in these circumstances, brought a suspension of the charge.

June 2, 1795. In this suspension decree in absence was pronounced

against the appellant. And, on representation, the Lord Ordinary adhered. On another representation, the Lord Ordinary pronounced this interlocutor: "In respect there "appears to be sufficient evidence in this case, arising from "the admission of parties, and letters and correspondence "in process, refuses the desire of the representation, and "adheres to the interlocutor complained of." July 3, 1795. Dec. 11, ——

On reclaiming petition for the appellant to the whole Lords, the Court adhered. On further reclaiming petition, the Court adhered. And the account of expenses being given in, the Court decerned therefor against the appellant, amounting to £35. 4s. 7d. Feb. 16, 1797. Mar. 11, —— June 3, ——

The appellant presented a bill of suspension against the judgment of 10th March 1797, which was refused by the Lord Ordinary. July 13, ——

Against these interlocutors the present appeal was brought to the House of Lords.

*Pleaded for the Appellant.*—1. That the respondent was bound, in the particular circumstances, to give the appellant notice before he commenced his action; and not having done so, he is not entitled to charge him with the expenses incurred by it. 2. That if this were not so, yet after the original debt was satisfied, and the expenses tendered and abandoned, and the cause of action at an end, he was bound to give notice before he proceeded further; and not having done so, he is not entitled to charge the appellant with the expenses of such proceedings. 3d. That of several averments, material to the points in issue between the parties, a proof was neither required of the respondent, nor allowed to the appellant.

*Pleaded for the Respondent.*—1. The question in this dispute is, Whether the respondent shall recover the expenses incurred in making the demand against the appellant effectual? And, in considering this question, the *first* objection which occurs is, that it is incompetent to appeal against expenses merely. 2. But, even supposing the appeal were competent, the appellant admits, that if the facts stated by the respondent were true, the interlocutors complained of are well founded. He rests upon the facts set forth by himself, of which he craves a proof. But such a proof is unnecessary. 1. Because, with the exception of the fact that the respondent's servant went at the desire of the appellant to Mr. Nicol, and returned a second time to Kilry, every averment made by the respondent is either admitted or proved. 2. Because every allegation

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made by the appellant is either disproved by the letters produced and founded on by himself, or is contradicted by other averments made by him. Besides, the settlement of the claim on the part of the appellant with the respondent was a mere contrivance, to defeat the agent's claim for expenses, who was entitled to go on with the suit, to the effect of recovering these costs.

After hearing counsel,

THE LORD CHANCELLOR (LOUGHBOROUGH) said,

"MY LORDS,

"I am sorry that it has been necessary to bring the present appeal before your Lordships; the point which gives rise to it is of the smallest nature which I recollect to have come before this House. An appeal, where the matter at issue was very small, made some noise a good many years ago; the circumstances there were singular, and the appeal frivolous.* But, in the present case, there appears matter of serious consideration, and the judgment of the Court, if it remained, might be urged as a bad precedent. We must therefore consider what the justice of the case requires to be done.

"I must own that I feel a considerable degree of favour towards the respondent, who has obtained several judgments of the Court of Session; I mean, towards the person who, loosely speaking, is termed the respondent; but the true respondent here is young Jameson the attorney in the cause, who, I conceive, has acted in a manner unworthy of the character of a Writer to the Signet, and the son of a respectable tradesman. As such, he ought *not* to have followed the course of proceeding which he has done in the present case.

"The cause of action here was of a very trifling nature, £3. 5s. 10d., as the price of some bricks furnished by old Jameson to the appellant. The appellant not needing the bricks, they were given to a neighbour, a gentleman well known, Mr. Ferguson of Raith. The account for the bricks not having been paid, a servant of Jameson calls upon the appellant for the money, and is informed that the bricks had been given to Mr. Ferguson, and that if the servant called upon his gardener the bill would be paid. This was not done however, and a writer on the spot, one Anderson, is applied to, to recover the money from Beatson. This Anderson wrote to the appellant, and, it appears, that he also applied for payment to Mr. Ferguson's gardener, who referred him to the factor, and this factor, Anderson says, he should soon see upon the subject. It does not appear, however, that he did see him, and from the accidental negligence

* His Lordship alludes here to the appeal, Napier *v.* Macfarlane, which was for the price of an ox.—*Vide*, App. vol. iii. p. 649.

of Anderson, the account remains unpaid until it is taken up by young Jameson.

"He claps the appellant's name in a summons before the Court of Session, along with four other persons. On notice of this, Beatson writes to Anderson, and Anderson says in answer, he is surprised that Jameson should have done this without having given advice to *him*; and, he adds, that he was Jameson's creditor for a few shillings. But Mr. Beatson being alarmed, writes to old Jameson that he would be in Edinburgh soon and pay the account. He accordingly soon after went there, and called at the house of old Jameson, who was not at home, and paid the account to a person stated to be Mr. Jameson's head clerk, taking his receipt for the money. He took no release for the debt; it was therefore injuriously alleged that he had decoyed the clerk to discharge him. He talked to the clerk about expenses, but the latter declined to take anything, not recollecting perhaps that young Jameson could not make bricks without straw any more than the father. But after old Jameson had thus received the money, the son goes on with the proceedings at law against the appellant, and, while the appellant was suspecting nothing, takes a decree against him for the money which had been already paid, and for a bill of costs, amounting to £3. 11s. 3½d.

"Drawing the strictest line between the parties, the utmost that could be demanded of Beatson, was the expenses due at the time he paid the money, either incurred by Jameson, or what he was engaged to pay to Anderson. It became the Writer to the Signet to have acted with more caution. It is an established rule with the courts in this country, that if a defendant *contrive* to pay to the plaintiff, and take a release from him, without satisfying the attorney, the attorney having a lien upon the action for his bill, the Court will allow him to go on to a judgment to recover his costs; but always under this express qualification, that he gave notice of his demand to the defendant, who refuses or declines to pay: in no other circumstances would he be listened to for a moment. The courts here would not allow an attorney to carry on an action for the mere purpose of running up his bill of costs. If such a matter had come before the courts here, they would only have allowed Jameson the son, the bill incurred at the time of paying the money, and no other expenses.

"I had some difficulty here to state the judgment in this case, but I think it will be of good example to reverse all the interlocutors complained of, and allow the respondent the sum of £1. 11s. 1d. as the expenses due at the time of paying the money by the appellant."

It was accordingly

Ordered and adjudged that the interlocutors complained of in the appeal be reversed, except as to the sum of £1. 11s. 1d., to be paid by the appellant to the respondent, in full of the costs of his proceedings up to the

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M'CALLUM,&c. *v.* CAMPBELL,&c.

26th of February 1794, when the debt of £3. 5s. 10½d. was paid.

For the Appellant, *Sir J. Scott, Wm. Adam.*
For the Respondent, *W. Grant, M. Nolan.*

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NEIL M'CALLUM, Wright in Inverary, and HUGH MUNRO, Esq. of Stuckghoy, his Trustee, . . } *Appellants;*

JAMES CAMPBELL, eldest son of NEIL CAMPBELL, Esq. of Duntroon, and NEIL MALCOLM, Esq. of Poltalloch, . . } *Respondents.*

House of Lords, 12th March 1798.

PRESCRIPTIVE POSSESSION—PROPINQUITY—BASTARDY—HEARSAY.—A deed conveyed lands to a party, and the heirs male of his body, whom failing, to his nearest lawful heirs whatsoever. The property passed into the hands of a purchaser, but it was alleged that it had been acquired from one who was a bastard heir male. In a question raised by the heir general, nearly half a century afterwards, Held that the length of time, and failure in the proof of bastardy, made the title unquestionable.

The titles of the lands of Kilchoan, belonging to the appellant's ancestors, the M'Indeors, situated in the parish of Kilmartin, and county of Argyle, appeared by the old title deeds to have been conceived and demised in favour of heirs male.

At that period, the respondent Campbell's ancestors were the superiors of the lands, and had granted several charters and precepts of clare constat, conceived in those terms.

Aug. 12, 1725. Of this date, Patrick Campbell of Duntroon, the respondent, Campbell's ancestor, granted a charter of resignation, with consent of Neil Campbell his son, in these terms:—

" dicto Nigello M'Indeor de Kilchoan in vitali reditu duran.
" omnibus suæ vitæ diebus, et post ejus decessum, *hæredi-*
" *bus masculis* legitime procreandis inter eum et Annam
" M'Callum ejus sponsam; quibus deficientibus hæredibus
" masculis legitime procreandis de ejus corpore, ullo subse-
" quenti matrimonio; quibus deficien. Duncano M'Indeor in
" Kilchoan, filio Patrui dicti Nigelli M'Indeor, et hæredi-
" bus masculis legitime procreatis, sive procreandis de corpo-