Respondents' Authorities.—Cheap, 6th July 1626 (M. 17,014); Nisbet, 10th Dec. 1630 (5,682); Bready, 1st July 1662 (M. 5683); Sinclair, June 1582 (——;) Home, 4th Feb. 1629 (——); Lauder, 15th Feb. 1637 (——); Wemyss, 35th July 1661 (——); Bonnack, 22d June 1748 (M. 1,695); Home, 4th Feb. 1629 (M. 15,280); Lauder, 15th Feb. 1637 (——); 3 Ersk. 8, 48; Kinloch, 4th Jan. 1678; Lord Glenlee in Duncan v. Robertson, 9th July 1813 (——); Waddle, 19th June 1828 (——); Wemyss, 10th Nov. 1768 (9174); Rowan, 21st June 1638 (13,450); Davie, 2d June 1814 (——); Keith, 17th Dec. 1703 (——); Creditors of Earnslow, 29th Nov. 1705 (——); 2 Stair, 2, 11; Kames's Elucid. Art. 35; 1 Bell, 696; Kibble, 16th June 1814 (F. C.); Baxter, 15th May 1818, 1 Bell p. 692—6; Stat. 1,617. c. 16, 1695 c. 18. Stair, 2, 11, 11; Logan, 1628 (13,342); 1 Bell, p. 692—6.

Sept. 23, 1831.

ALEXANDER DOBIE—M'DOUGALLS and BAINBRIGGE,—
Solicitors.

GEORGE BRODIE, Appellant.

No. 43.

WILLIAM SINCLAIR, Respondent.

Expenses.—A party raised an action for 219*l.* 10*s.* 3¼*d.*, and the defender offered payment of 11*l.* and 10*l.*, with interest, but subject to such qualifications as did not amount to a tender; decree was pronounced against the defender for those sums, with interest amounting to 42*l.*, and the pursuer was found liable in expenses:—Held (reversing the judgment of the Court of Session), that the pursuer was not liable in expenses.

Sept. 23, 1831.

2D DIVISION.

IN 1827 George Brodie raised an action against William Sinclair for 219*l.* 10*s.* 3¼*d.*, being the amount of an alleged account. The defender denied the debt, with the exception of 11*l.* and 10*l.*, which he offered to pay, under deduction of a counter-claim of 17*l.* The Lord Ordinary (24th June 1828) sustained "the defences as to all the articles in the account "libelled, except the cash payments on 8th and 9th February "1810, for the sums of 11*l.* and 10*l.*, and decerns for these sums, "with the interest due from said dates, till paid; but in respect "that the expense of litigation in this case had been mainly, "if not altogether, occasioned by the pursuer insisting for the "other items in the account which have not been sustained, "finds the pursuer liable in expenses to the defender, and "authorizes the defender to retain, out of the sum decerned

Sept. 23, 1831.

" for, the amount of the said expenses." These were afterwards taxed at 58*l.** The Court adhered, and Brodie appealed, pleading, that certain items of the account should be sustained, and that the appellant, having succeeded in his cause to the extent of 42*l.* 5*s.* 1*d.*, ought not to have been subjected in expenses to his opponent; but, on the contrary, should have been found entitled to his own expenses, more especially as the respondent resisted payment of the sum found due to the appellant, alleging that it had been paid, or was more than compensated.

The respondent made no appearance.

Lord Chancellor.—My Lords, in this case I took a little time to consider whether there was any thing in the law of Scotland so anomalous as that when a person sues another for 200*l.* and recovers 42*l.*, and therefore has got a judgment to a considerable amount, the Court may order him, the winning party, to pay all the costs to the other party, amounting to 58*l.*; and instead of giving him the sum recovered, leave a charge against him of 12*l.* No doubt, Lord Medwyn says, that " the expense of litigation in this case has been " mainly, if not altogether, occasioned by the pursuer insisting for " the other items in the account, which have not been sustained;" and therefore, because the items he mentioned had given rise to the expenses of the litigation, he ordered him, the winning party, to pay all the costs of the losing party, which gives the losing party the benefit of 12*l.* and the winning party a loss to that amount. It seemed to me very extraordinary that there should be any such rule. It is quite true that the costs are in the discretion of the Court in all cases, but I find there is no such rule as that assumed for the interlocutor. Therefore I am disposed to advise your Lordships to reverse that part of the decree of the Court of Session. But then I am referred by the respondent to his offer in the nature of a tender. No doubt if the defendant, who has lost to the amount of 42*l.*, had tendered at the early part of the suit, and offered to pay that into Court, I should, without looking very narrowly, and applying our very strict rules in England to the Scotch doctrine of tender, have been disposed to think that that bore out the opinion of the learned judge, that the costs might be paid by a party, though he should win, to the other party, though he had lost; because the effect of a

* 9 Shaw and Dunlop, p. 36.

party paying the amount into Court, or there being a tender and refusal, is, that the other party must pay the costs if he gets no more by the judgment than he had offered to pay. But I find the tender is this: "The only articles in this account which the defen- "dant ever knew any thing about are the two sums of 11*l.* and 10*l.*, "which are there mentioned to have been given to the defender on "the 8th and 9th days of February 1810, and even these the de- "fender is satisfied were paid immediately afterwards, either by the "defender himself, or his factor or trustees. But as he does not "seem to have preserved any vouchers for it, he would have been "perfectly ready at any time, in order to prevent disputes about "such a trifle, if application had been made to him, and is still "ready, to pay these sums over again, with interest." Suppose he had lost, there would have been to be paid all the costs incurred up to the period of the action, but that was only a tender after an action brought, which will not do. Then there comes, "But there "will require to be deducted a balance of about 17*l.* still due by "the pursuer for his last intromissions." That is any thing but a tender of 21*l.*; it is a tender after action brought of 21*l.* minus 17*l.* But there is another remarkable circumstance — it is a ten- der the other way — it is not a tender of money to be paid to the pursuer, but a demand upon the pursuer to pay money to the defender. "But as he does not seem to have preserved any "vouchers, he is still ready to pay or give credit for these sums "over again, according as the balance might otherwise stand "betwixt them at the time; but at present there will require to be "deducted, in addition to what balance may appear on the accounts "above alluded to, a sum of 14*l.* 16*s.* 7*d.* still due by the pursuer "to the defender and his trustee for the rents of a small farm on "the estate of Lochend, and as the price of a certain quantity of "grain in the years 1818 and 1819, per state in process, together "with the interest from the respective periods there mentioned; "and also another sum of 33*l.* 10*s.* 6*d.* as the price of a certain "number of bolls of meal of barley, of crop 1816, delivered to the "pursuer, and not accounted for, together with the interest from "1816." I have taken the trouble to calculate these sums, and I find, instead of being a tender of 21*l.* or a tender of 42*l.*, it is a claim that the other party should pay him 60*l.*; and therefore nothing can be more wild than the supposition of this being a ground for the decision in the Court below. For these reasons I am obliged to move your Lordships that this judgment be affirmed, except so far as regards the costs so singularly ordered to be paid by the winning party to the losing party, and with that alteration that the judgment be affirmed.

Sept. 23, 1831.

Sept. 23, 1831. The House of Lords ordered and adjudged, That the judgment appealed from be altered as regards the costs, and quoad ultra affirmed.

EVANS, STEVENS, and FLOWER,—Solicitors.

No. 44. THE OFFICERS OF STATE, Appellants. — *Attorney General* — *Solicitor General* (*Cockburn*).

EARL OF HADDINGTON, Respondent. — *Dr. Lushington* — *Mr. Anderson.*

King.—Found (reversing the judgment of the Court of Session), that the keeper of the King's park of Holyrood House is not entitled to work quarries in the park to any extent.

Sept. 24, 1831.

2D DIVISION.
Ld. Pitmilly.

WHEN this case was formerly before the House of Lords on appeal* their Lordships (May 25, 1826,) ordered and adjudged, "That so much of the interlocutor of the 24th of June 1823, "complained of in the said appeal, as finds that the defender "has no feudal right of property in the park of Holyrood House, "be, and the same is hereby affirmed: And it is further "ordered, that as to the remainder of the said interlocutor, and "as to the other interlocutors complained of in the said appeal, "the cause be remitted back to the Court of Session in "Scotland to review the same: And it is further ordered, "that the Court to which this remit is made do require the "opinion of the other judges of the said Court of Session in "writing upon the questions of law which may arise in the "same, which opinion the said other judges are required to "give; and after such review the said Court do and decern in "the said cause as may be just."

The Court, in applying the judgment of the House of Lords,

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* 2 Wilson and Shaw, 468. In the Report of the Speech of Lord Gifford, p. 480, line 12, "Lord Haddington" has, by mistake, been printed instead of "Officers of State."