[23*d March*, 1843.]

JAMES WALKER, late Tenant in Bellfield, now residing in Dundee, *Appellant*.

WILLIAM WEDDERSPOON, Writer in Perth, and others, *Respondents*.

Assignation. — *Title to sue* — *Costs.* — If the cedent of a debt assigned in security sue the debtor in his own name, the Court may order him to find security for costs.

Appeal. — *Costs.* — Costs at dismissing an appeal not given, because the appeal had been brought with leave of the Court below.

WALKER having alleged claims against Wedderspoon, for his actings as trustee on the sequestrated estate of Kelty, presented a petition and complaint against Wedderspoon, on the ground of misconduct. The Court held, that this proceeding was incompetent, by reason that the creditors on Kelty's estate had, by formal resolution, approved of Wedderspoon's whole conduct and management, but they reserved right to Walker to bring a reduction of the resolution. Walker accordingly brought a reduction of the resolution. After the action had been somewhat proceeded in, Walker applied for and obtained the benefit of the poor's roll for its farther prosecution.

Previous to the adoption of these proceedings, Walker had assigned to Rutherfurd his claims against Wedderspoon, in security of a debt of L.343, afterwards increased to L.533, by advances for the purpose of enabling Walker to carry on the action of reduction. By the terms of the deed, Rutherfurd was taken

bound to account with Walker for whatever he might recover under the assignation exceeding the debt in respect of which the assignation was made.

Wedderspoon met the action of reduction by a preliminary defence, that Walker had no interest to sue, by reason of the assignation to Rutherfurd, who, as was shewn by his advances to Walker, was in truth the pursuer of the action.

Walker answered, that his claims against Wedderspoon amounted to L.2390, while the debt for which the assignation had been made amounted only to L.533, which had lately been greatly reduced; that he therefore had the substantial interest in the claims, as Rutherfurd was bound to account to him for what he might receive exceeding his debt, and therefore he, Walker, was entitled by himself to sue the reduction.

The Lord Ordinary, on the 11th January, 1838, pronounced this interlocutor. "In respect it appears that the pursuer has "transferred his whole interest in the action to a third party, and "that the assignee declines to appear and sist himself so as to "render himself liable for costs, while the letter produced by him "in no respect affords any guarantee to the defender for his costs, "if the suit against him is unsuccessful, finds that the pursuer must "find caution for costs before this action proceeds."

Walker then produced a deed of retrocession by Rutherfurd, and insisted on his right now to proceed with the action.

The Court, on 11th June, 1839, found "that the cause cannot "proceed farther, until payment of the expenses incurred by the "defender in the preliminary discussion, occasioned by the con-"cealment of Rutherfurd's interest, as truly the party for whose "behoof this action was insisted in, and that the defender is not "now entitled to insist that caution shall be found for any "future expense."

The appeal was brought against this interlocutor, with the leave of the Court below, after leave had once been refused.

WALKER *v.* WEDDERSPOON. — 23d March, 1843.

Mr Shebbeare for the appellant, cited Fraser *v.* Dunbar, 6th June, 1839, 11 *Jurist*, p. 500.

Mr Anderson for the respondent, was not called on.

LORD CAMPBELL. — My Lords, I am quite clear that this interlocutor ought to be affirmed. The interlocutor chiefly complained of is that of 11th January, 1838.

Now the only objection the appellant makes is, that the assignment is not absolute, that it is only in security. Therefore, the doctrine laid down and contended for is, that wherever there is an assignment in security — not out and out — the Court has no discretion at all to interfere and order security for costs, although substantially the action is brought in the name of a pauper, for the benefit of another person. The Court of Session seems to me clearly to have this jurisdiction, and I think no Court can effectually discharge its duty, and do justice to the suitors, without having such a power. The case cited by Mr Shebbeare goes no farther than to shew that it is matter of discretion. It would be extremely inconvenient if, when the Court acts in the exercise of a discretionary power, there were to be an appeal to this House. I think Lord Cunninghame was fully justified in making the order, and I entirely approve of it. The same attention will certainly be paid to this appellant as if he had been a person of the highest rank in the land; but it appears to me that this is an appeal which ought never to have been brought, and I very much regret that it has been brought here.

Lord Brougham. — My Lords, I quite agree with my noble and learned friend. There is, no doubt, a distinction for some purposes, between an assignment out and out, and an assignment in security for a debt. But observe this, — suppose the debt amounts to the value of the property assigned in security, it does not signify one farthing whether it is assigned in security, or whether it is assigned out and out, for the equity of redemption

is not worth a farthing in that case. However, it is not necessary to say any thing about that.

Lord Campbell. — Can you inform us, Mr Anderson, how it happened that the Court gave leave to appeal in this case?

Mr Anderson. — I believe it was in this way, — that at first the Inner House refused the petition for leave to appeal. After this the appellant moved the Lord Ordinary to assoilzie the respondents. The Lord Ordinary reported this motion to the Inner House, who were equally divided, and left the Lord Ordinary to dispose of the motion himself, which he did by refusing the motion. After this the appellant presented a new petition for leave to appeal.

Lord Campbell. — I should like to know what was the question of law which the Judges wished to have reviewed.

Mr Shebbeare. — I apprehend it was, whether, under these circumstances, the inference of law was to be drawn which I have submitted to your Lordships.

Lord Cottenham. — After the first interlocutor had been the subject of a reclaiming note, and had been abandoned by the party, and a different course adopted with respect to the rest of the litigation, the party gets leave to appeal against the original interlocutor.

Lord Brougham. — I wish the Court had not given leave. I do not understand why they gave it.

Lord Campbell. — The only difficulty I feel in this case is respecting the costs. If it had not been that leave was given under the extraordinary circumstances to appeal to this House, I should have had no difficulty in affirming the interlocutor with costs. I regret exceedingly that the learned Judges were not more firm, and did not adhere to their original order, whereby they refused leave. I know that Courts have always a great inclination to allow their decisions to be reviewed, but that ought to be where there is a point of law of importance which is doubt-

ful, and which ought to be settled by a superior tribunal. I am here at a great loss to conceive what point of law their Lordships conceived ought to be brought before the consideration of the House of Lords, and in respect of which they rather seem to have encouraged the appeal, by causing it to be supposed that there was some question fit to be considered by this House. I think the interlocutor should be affirmed without costs.

Lord Cottenham. — I am of the same opinion. If the party had appealed without leave, I should have thought the appeal ought to be dismissed with costs.

Lord Brougham. — If there had been no such leave obtained, but it had been an ordinary proceeding by the party, without leave of the Court, the interlocutor ought to have been affirmed with costs. It is very hard upon the respondent, and I cannot help feeling that it is no benefit to the appellant. On the contrary, it is very injurious to him. Any little remnant of property that he might have had has probably been exhausted by this injudicious course that has been taken. If we do not give costs it is simply in consequence of the Court having given leave.

Mr Anderson. — In all cases of appeals from interlocutory judgments leave must be had, and I do not think your Lordships have ever drawn the distinction when you have dismissed the appeal, of not giving the respondent costs because leave had been given to appeal.

Lord Brougham. — Each case stands on its own grounds. There may be a case where leave may be properly granted, and yet that would be no reason for not giving costs.

Mr Anderson. — That is making the respondent pay for the error of the Court.

Lord Brougham. — That parties constantly do. When you move for a new trial on the ground of the misdirection of the Judge, the costs are not given.

WALKER *v.* WEDDERSPOON. — 23d March, 1843.

Lord Campbell. — I hope it will be understood below, that costs were refused entirely because this House is of opinion that the Court ought not to have given leave to appeal.

Lord Cottenham. — When a case is brought here in pursuance of leave given by the Court, it encouraĝes the party to go on, when probably he would not otherwise have done so.

Mr Anderson. — We resisted the application for leave.

Ordered and Adjudged, that the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed.

DUNN and DOBIE — DEANS, DUNLOP, and HOPE, Agents.