by his relations, who insisted that they had the property of the said burying-ground; and that although Mr Cunningham had laid his wife there, yet they would not suffer him to cover her grave with a stone, which was in effect withdrawing so much of the ground from being employed to the purpose of burying. In a process before the Sheriff; without determining the property, the Sheriff found this proceeding rather peevish, and, as the contest was not so much about the right to bury, as to erect a grave-stone, that there was no good reason why Mr Cunningham should be denied that pious satisfaction. But, in passing a bill of advocation, Lord Covington remitted the cause to the Sheriff with this instruction, (21st July 1778,) "That he find, That the property of the church-yard, as of the church itself, belongs to the heritors, having property lands in the parish, as part and pertinent of their property lands, for the interment of those in their respective families, and other inhabitants upon their several properties; and those who neither are heritors nor reside within the parish, have no right to be buried, or to bury those of their families who did not reside in the parish, in the church or church-yard, without consent of the heritors; and, as it stands confessed that Mr Cunningham was no heritor, nor had his family residence within the parish at the time of his wife's death, several months ago,—the interment of his wife within the controverted part of the church-yard of Currie, without permission of the heritors, does not entitle him to erect a tomb-stone over his wife's grave, whereby so much of the common area of the church-yard would be withdrawn from the public or common use, and appropriated to the defender; and therefore, to find that he has no right to erect a tomb-stone without consent of the complainer and the other heritors; and, as no such consent is alleged, to prohibit him to do so."

And to this interlocutor the Lords, upon advising bill and answers, adhered; (5th December 1788.)

CLERKS OF SESSION.

1771. *August* . FEUARS of MEARNS MUIR, Petitioners, *against* SIR ROBERT POLLOCK, &c.

THE clerks of Session are entitled to certain dues in all processes which have depended in Court. But as these were frequently evaded by settlements and transactions between the parties, this was considered to be an act of injustice, and a remedy was provided against it, first by the regulations 1672, and afterwards by the regulations 1695, Art. 5; the last giving the Clerks a hypothec, or right of retention, to the pieces produced in process.

Several years ago the Clerks were laid under the necessity of applying to the Court to recover their fees in certain causes, of which the parties or their agents meant to disappoint them. See Acts of Sederunt 20th July 1753, and other instances, against *Gabriel Napier*, *William Russell*, &c. And the com-

plaints being served, the Lords found the Clerks entitled to their fees, as if decreet had been extracted, and also entitled to the expenses of the application. But, in fact, the chief compulsitor which the Clerks have for payment of their fees is retention of the pieces, *i. e.* the papers produced in process.

It is established, that papers produced in process by third parties, as havers, are not subject to this hypothec: it is confined to papers produced either by pursuer or defender; but these are subject equally. A defender, though he be assoilyied, and though he produced his papers by force of the pursuer's application and process, is no more entitled to receive them back again than if he had been condemned, or had himself been pursuer. This, at first sight, seems hard; but the regulations 1695 make no distinction between pursuer and defender. See *23d June* 1762, *Petition Bennet and Others, Feuars of Muthill.*

The feuars of Mearns Muir brought a process of declarator against Sir Robert Pollock, Oswald of Fingleton, and Others, for having it found that the pursuers had the sole right and property of said Muir, exclusive of the defenders; but the defenders prevailed and were assoilyied, but were refused expenses.

The Feuars, vassals of Sir Michael Stewart, wanted up their papers from the Clerks, being threatened with a process of non-entry. The Clerks refused to deliver them; and, on advising petition and answers, the Lords refused the petition, (August 1771.) The Feuars allowed the force of the hypothec, but they insisted that the defenders, who were assoilyied, were bound to extract, and so to loose the hypothec. The Lords did not think so,—they did not see reason to force a defender to extract a decreet of absolvitor unless he chose it. They therefore left parties to settle with the clerks as they best could.

In this case the Clerks offered not only to accept a composition, but they offered to accept a composition from each feuar separately, as his papers were delivered up.

One extract from either side is in every case sufficient.

1765. *July* . POOR JOHN M'KAY *against* M'LEODS.

WHERE a pursuer, or defender, on the poor's roll recovers expenses from the other party, the practice is, that in his account he charges the fees which he ought to have paid to the Clerks in the course of the process, and which he would have paid, had he not been on the poor's roll, and these expenses he recovers from the other party, and pays to the Clerks. If it was otherways, the benefit of the Clerks giving down their fees would redound not to the poor man but to the rich. And the Court has repeatedly found, That, where advocates serve a poor man gratis, as being on the poor's roll, in case he prevail, and gets expenses, the advocates are entitled to their fees; and no reason occurs why the same thing ought not to hold with regard to the Clerks; and so the Court found July 1765.