bands granted a real ſecurity for the ſum awarded upon the ſaid lands belonging to the wives, and of which they were then in poſſeſſion. And the huſbands, ſubſequent to the decree arbitral, did acknowledge, in ſeveral writings under their hands exhibited to the Lords of Seſſion, and mentioned in the decree, that the property was in the perſons of their wives; and in particular the ſaid Alexander Maxwell took a conveyance for his wife before George Maxwell would convey to him, which, if there were any room for doubt, is ſufficient to explain and prevent any queſtion as to the property of the ſaid lands. Though the ſaid real ſecurity, granted by the wives with their huſbands conſent, was not accepted of by the creditor, yet it was undeniable evidence of the ſenſe and meaning of the parties. And no part of the money was ever paid by the appellant's father, but on the contrary by the reſpondent, in name of his mother, as her truſtee, and it cannot be pretended that ever the reſpondent had any of the appellant's money.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the ſeveral interlocutory ſentences and affirmances thereof in the ſaid appeal complained of be affirmed.* Judgment, 28 July, 1715.

For Appellants, *J. Jekyll.* *W. Lechmere.*
For Reſpondents, *Tho. Lutwyche.* *David Dalrymple.*

William Habkin, Belt-maker in Edinburgh, *Appellant;* Caſe 36.
Roger Hog, Merchant in Edinburgh, - *Reſpondent.*

19th *Auguſt* 1715.

Annual Rent, Coſts, and Expences.—Two tradeſmen having contracted to clothe a regiment, and to divide equally under a penalty the ſums to be received by virtue of an aſſignment of off-reckonings delivered to each of them: one of them afterwards receives a new aſſignment of off-reckonings, and a ſum of money from the Treaſury, and refuſing to pay a balance due to the other, the Court ordained the perſon receiving the money, which, they found, fell under the firſt aſſignment, and their mutual contract, to pay the balance due to the other, which however was reſtricted to a ſmaller ſum than was claimed: but the Court having refuſed him damage and intereſt; upon appeal the judgment is reverſed, and the reſpondent is ordered to pay to the appellant the principal ſum found due to him, with the intereſt thereof, from the time the reſpondent received the remainder of the money; and the Court is ordered to cauſe the coſts and expences of the appellant in the action to be taxed and aſcertained and forthwith paid to him by the reſpondent.

No ſpecific ſum being here awarded, proceedings afterwards upon the complaint of the appellant, relative to the taxing of his expences by the Court of Seſſion, and reſolutions and orders of committees and of the Houſe thereon; a ſum allowed to the complainant for his ſubſequent expences, in taxing coſts.

IN January 1705, an agreement for cloathing a regiment of guards in Scotland was entered into between Lieutenant-General Ramſay, the Colonel of the regiment, of the one part,

and the appellant and reſpondent of the other part: the appellant and reſpondent bound and obliged themſelves, jointly and ſeverally, their heirs, &c. before the time therein ſpecified, to deliver over to the ſaid General or his order, cloathing for his ſaid regiment: In conſideration whereof, on the other part General Ramſay bound and obliged himſelf to execute an aſſignment of the off-reckonings of the ſaid regiment unto the appellant and reſpondent until ſuch time as out of the ſaid fund they ſhould be fully paid and ſatisfied the ſum of 3151*l.* 10*s.* ſterling as the conſideration money for their cloathing the ſaid regiment.

In February thereafter the appellant and reſpondent entered into another contract between themſelves, reciting, That whereas they were bound jointly and ſeverally to cloath the ſaid regiment, and that it was juſt and reaſonable to relieve each other therein, therefore the appellant on the one part, obliged himſelf to cloath the firſt battalion of the regiment, and the reſpondent obliged himſelf to cloath the ſecond battalion, without any regard to the coſts and charges either might be at in furniſhing his reſpective battalion; and they expreſsly declared, that the money ariſing out of the fund to be aſſigned to them ſhould be equally divided between them: And each of them was reſpectively to perform the contract to the other under the penalty of 500*l.* to be paid by the party failing to the party performing the ſame.

The appellant and reſpondent furniſhed their reſpective ſhares of ſaid cloathing, but there being ſtill ſome things wanting which were not contracted for, the reſpondent furniſhed ſome of theſe upon his own ſeparate account, to the value of 106*l.* 1*s.* and the appellant furniſhed the remainder to the value of 27*l.* 8*s.* 4*d.* ſterling.

On the 29th of October 1705, the Earl of Dalhouſie, who then had the command of the ſaid regiment, granted two aſſignments of the ſaid off-reckonings or cloathing fund, one whereof was to the appellant for the ſum of 1603*l.* 13*s.* 4*d.* being his juſt ſhare of the total ſum of 3285*l.* 9*s.* 4*d.*; the other to the reſpondent for 1681*l.* 16*s.* for his ſhare and proportion. By each of theſe aſſignments the appellant and reſpondent were expreſsly *ſimul et ſemel* intitled to the payment of the cloathing money, from and after Whitſunday 1705, until ſuch time as their reſpective ſums ſhould be fully and completely ſatisfied. Purſuant to theſe aſſignments ſeveral orders or precepts were iſſued from the then Commiſſioners of the Treaſury to the Receivers General, in conſequence of which the appellant and reſpondent received to the amount of 2956*l.* 5*s.* 6d. ſterling, which was equally divided.

The reſpondent afterwards entered into a ſeparate agreement for cloathing one half of the ſaid regiment from 1ſt of October 1706 to 1ſt of February 1707, and was to have 631*l.* allowed him for the ſame, for which the Earl of Dalhouſie gave him a further aſſignment of the off-reckonings. There being alſo a balance ſtill due to him upon the former account, he, on the 30th of April 1708, procured an order from the Commiſſioners of the

Treaſury

Treaſury upon the paymaſters of the army for 72*l.* of which alſo he received payment.

A balance on the original account being ſtill due to the appellant, when the reſpondent received the laſt-mentioned ſum of 72*l.* the appellant made application to him for payment of that balance, contending that the off-reckonings or cloathing-money of the regiment were appropriated for the payment of their reſpective aſſignments, and not otherwiſe applicable till they were paid; and that this order for payment to the reſpondent commenced before the appellant's aſſignment was ſatisfied, and the reſpondent's accepting of ſuch order was a breach of the articles of agreement. Upon the reſpondent's refuſal, the appellant gave him a charge of horning upon the articles of agreement, for the ſaid penalty of 500*l.* The reſpondent raiſed a bill of ſuſpenſion before the Court of Seſſion; and after ſundry preliminary proceedings, the foreſaid charge and contract were turned into a libel, and the appellant inſiſted for payment of the balance due to him with intereſt, ſince the money had been received by the reſpondent on his laſt order.

After ſundry further proceedings in this action, the court, on the 25th of June 1713, "found that the ſums paid to the re-
"ſpondent by virtue of the order for 72*l.* ſterling, being the
"cloathing-money from the 1ſt of October 1706 to the 1ſt of
"February 1707, fell under the aſſignment formerly made to the
"appellant and reſpondent, and under their mutual contract,
"whereby the money was to be equally divided between them
"under the penalty of 500*l.* and ordained the reſpondent to pay
"to the appellant a proportional part of the ſums received by
"the reſpondent in ſo far as the former aſſignment to the appel-
"lant remained unſatisfied." It was afterwards remitted to the Lord Ordinary to ſettle the accounts between the parties, and the appellant claimed a ſum of 216*l.* as due from the reſpondent; the reſpondent gave in an account alſo, and the Lord Ordinary at firſt found a balance of 192*l.* 7*s.* 2*d.* due to the appellant; but this ſum was afterwards reſtricted (by the reſpondent's making oath to ſundry articles of deduction, as the appellant ſtates) to the ſum of 166*l.* 19*s.* 1*d.* For this latter ſum decree was given by the court, in favour of the appellant, upon the 27th of February 1713; and this decree was acquieſced in by all the parties.

The appellant afterwards preſented a petition to the court, praying to have the intereſt of the ſum decreed for allowed to him from the time the reſpondent received it from the government, together with the expences of the action; or otherwiſe that they would order the reſpondent to pay the aforeſaid penalty incurred through his breach of the ſaid agreement, in lieu and ſatisfaction of the ſaid principal ſum, intereſt and expences. The court, by ſeveral interlocutors, the laſt of them upon the 24th of February 1714, "refuſed the deſire of the ſaid petition."

The appeal is brought from "ſeveral interlocutors of the Lords "of Seſſion, and in particular a decree made by the ſaid Lords "the 24th of February 1714." Entered, 3 June 1715.

Heads of the Appellant's Argument.

The reſpondent committed a manifeſt breach of the ſaid contracts and of the faith and truſt of copartnerſhip; for without any power or authority from the appellant, or giving any notice to him, he in a clandeſtine manner made application to the treaſury, and obtained from them an order or precept for the whole remainder of the money due upon both the ſaid aſſignments. When the reſpondent, too, appeared to the action in the court below, he poſitively denied that he had received any of the appellant's money, which put the appellant to great expence in producing the books of the treaſury, the order of the Lords Commiſſioners to pay the ſaid 72*l.* and the reſpondent's receipt for the money. The appellant has been put to great trouble and charges for four years ſucceſſively in this buſineſs; and he claims to have awarded to him his ſaid reduced principal ſum and the intereſt thereof, together with his expences in the court below, to be aſcertained by the appellant's own oath, in conſideration that the ſaid principal ſum was reduced in a great meaſure by the oath of the reſpondent; or otherwiſe the penalty contained in the contract in lieu and ſatisfaction thereof.

Heads of the Reſpondent's Argument.

Though the court did decree the reſpondent to allow the benefit of this payment to the appellant, as to the balance due to him of the former aſſignment, yet that was becauſe theſe prior aſſignments were preferable upon the whole fund of cloathing-money, nor did the court find any *mala fides* in the reſpondent. There can be no manner of reaſon for expences againſt the reſpondent, eſpecially ſince the reſpondent never declined accounting with the appellant; on the contrary, he, by form of inſtrument, required him to ſettle accounts, but the appellant declined it. Nor was any part of the expences in this action occaſioned by the reſpondent, but by the appellant's irregular proceedings in ſuing out execution upon the agreement, without condeſcending upon any particular breach of it, or liquidating any ſum due to him. That occaſioned the bill of ſuſpenſion, and the greateſt part of the expences; and in all the points relative to this proceeding of the appellant's, wherein the reſpondent and he were adverſaries, the court gave it againſt the appellant by ſuſpending his charge, and firſt turning it and afterwards the contract into a libel, whereby the court ſuſtained that contract as a foundation for an account, which was never oppoſed by the reſpondent. Had the appellant given in a fair and juſt account the ſubſequent expences would have been but ſmall, but the appellant inſiſting for 216*l.* as the balance due to him, and denying ſeveral articles the reſpondent charged him with, this obliged the reſpondent to be at great expence in recovering ſeveral vouchers of the account from the Commiſſioners and others, and by theſe deductions the account was balanced 166*l.* 19*s.* 1*d.* which the reſpondent ſubmitted to. The coſts then were occaſioned by the appellant's irregular proceeding,

ceeding, and ſince the reſpondent ſubmitted to account and pay the balance; and ſince the appellant's demand was reſtricted from 216*l.* to 166*l.* 19*s.* 1*d.* there is no reaſon to load the reſpondent with expences. On the contrary, the appellant ought to pay expences; for it is an undoubted principle in the law of Scotland, that a purſuer claiming more than is really due to him, and occaſioning trouble and expence to the defender in defending that claim, and reſtricting it to a juſt balance, can never pretend to expences; but on the contrary, ought to pay them. The Court of Seſſion, therefore, refuſed the appellant's demand at firſt reading his petition, and without obliging the reſpondent to give in an anſwer. Nor can the appellant pretend to any part of the penalty, ſince the court has not found the reſpondent guilty of any breach of the articles: And as to intereſt there is no reaſon for that, ſince in this caſe it is neither due *ex pacto* nor *ex lege*, which are the only caſes where intereſt is allowed.

After hearing counſel, *It is ordered and adjudged that the ſeveral interlocutors and decree complained of in the ſaid appeal whereby the Lords of Seſſion did refuſe the appellant's demands by his bill exhibited to them as to intereſt and coſts be reverſed: And it is further ordered that the reſpondent do forthwith pay, or cauſe to be paid to the appellant, the principal ſum found due to him, with the intereſt thereof, from the time the reſpondent Hog received the remainder of the money due on the two firſt aſſignments made of the off-reckonings in queſtion. And further, that the ſaid Lords of Seſſion do cauſe the coſts and expences of the ſaid appellant in the ſaid ſuit to be taxed and aſcertained, and that the ſame when ſo taxed be forthwith paid to the appellant by the ſaid reſpondent.* Judgment, 19 Aug. 1715.

For Appellant, - *Rob. Raymond.* *John Cumyng.*
For Reſpondent, *J. Jekyll.* *Will. Hamilton.*

A petition of William Habkin was preſented to the Houſe and read, reciting the judgment on hearing his appeal, whereby it was remitted to the Lords of Seſſion, to tax the petitioner his coſts of ſuit; and complaining, "that the ſaid order is eluded," and praying, "that the ſame may be made effectual for the petitioner's relief, touching the coſts both here and in Scotland, by explaining the ſaid order in ſuch manner as to the Houſe ſhall ſeem juſt." This petition was referred to a committee to report thereon. Proceedings relative to theſe coſts, Journal, 1717-18. Feb. 27.

The Earl of Clarendon reported from the ſaid committee, "That their lordſhips have accordingly conſidered the ſaid petition, and have examined into the facts therein alleged, and find that on hearing the petitioner's appeal, the 19th day of Auguſt 1715, the Houſe did reverſe the interlocutors," &c. (here the judgment is recited): "the committee likewiſe inform the Houſe, that the petitioner produced before them his bill of coſts, both here and in Scotland, amounting to 408*l.* ſterling, which he exhibited before the ſaid Lords of Seſſion on the 3d of February 1716; but they found that by the judgment of this Houſe the expences craved in the proceſs depending March 8.

" before the Lords of Seſſion were only remitted to be deter-
" mined by them, which were refuſed; and againſt which the
" petitioner appealed; and therefore remitted to the Lord Grange
" to modify the ſaid account, or report as he ſhould find juſt;
" whoſe lordſhip, on the 29th of November 1717, having con-
" ſidered the account of expences given in by the ſaid William
" Habkin of the ſuit before the Lords of Seſſion, amounting to
" the ſum of 951*l.* 8*s.* 6*d.* Scots, modified the ſame to the ſum
" of 760*l.* Scots; and decerned that is decreed therefore: but
" upon a repreſentation made by Roger Hog, merchant in Edin-
" burgh, the reſpondent to the petitioner's ſaid appeal, the 1ſt
" of December following, the petitioner was, on the 5th of the
" ſame month, directed to ſee and anſwer; and in the mean time
" the extracting the ſaid decree was ſtopped: and ſome ſhort
" time after the ſaid account, with the inſtructions thereof, and
" the judgment of this Houſe, were ordered to be put into the
" clerk's hands; and it did not appear to the committee, that
" any further proceedings have been had thereupon. And their
" lordſhips, upon conſideration of the whole matter, are of opi-
" nion, that the ſaid Lords of Seſſion have rightly proceeded to
" tax only the coſts of ſuit before them, and not the coſts of the
" petitioner's appeal to this Houſe; and that no final order
" ſhould be made by this Houſe upon the petitioner's complaint,
" touching the ſaid coſts until it be ſeen what coſts the Lords
" of Seſſion will allow: but in reſpect of the great delay which
" it appears to the committee has been in the taxing the peti-
" tioner's coſts ordered by this Houſe, the committee are likewiſe
" of opinion, the Lords of Seſſion ſhould tax and allow the pe-
" titioner the coſts he has or ſhall be put to in the taxation of
" his ſaid coſts."

Which report being read by the clerk, was agreed to by the Houſe.

1719-20. March 10. A petition of Mr. Habkin was preſented to the Houſe and read, complaining " that the Lords of Seſſion in Scotland have
" not taxed his coſts, purſuant to former orders of this Houſe;
" and praying ſuch final order may be made, touching his coſts,
" both here and in Scotland as ſhall be thought proper for the pe-
" titioner's relief." Which was referred to a committee to report.

1720. May 17. The Earl of Clarendon reported from the ſaid committee,
" That their lordſhips having cauſed notice to be given of this
" complaint to one Roger Hog, merchant in Edinburgh, who
" was the reſpondent to the petitioner's appeal, and being at-
" tended as well by an agent on behalf of the ſaid Hog, as by
" the petitioner himſelf and his agent; their lordſhips took the
" ſaid petition into conſideration; and find, that this Houſe, on
" the 19th of Auguſt 1715, upon hearing the petitioner's appeal,
" did in part reverſe a decree of the Lords of Seſſion therein
" complained of; and directed them to cauſe the coſts and ex-
" pences of the petitioner in the ſuit between him and the ſaid
" Hog, to be taxed and aſcertained, and that the ſame, when
" ſo taxed, ſhould be forthwith paid to the petitioner.

" That

" That the petitioner having exhibited the ſaid order, as alſo " his account of expences, to the ſaid Lords of Seſſion, the ſame " was by them referred to the Lord Grange, to be taxed accord- " ingly; and the ſaid account was by him modified to the ſum " of 63*l.* ſterling or thereabouts.

" That the committee were informed, the ſaid account or bill " of coſts was by the Lord Grange ſo taxed or modified *ex parte*, " and a decree made thereon; but upon the ſaid Hog's repre- " ſentation, in four or five days after, the petitioner was directed " to ſee and anſwer; and in the mean time the extracting the " ſaid decree was ſtopped; and ſome ſhort time afterwards, the " ſaid account with the inſtructions thereof, and the order of " this Houſe of the ſaid 19th of Auguſt were ordered to be put " into the clerk's hands: notwithſtanding this proceeding, the " petitioner, without complaining to the Court of Seſſion of the " taxation of the ſaid Lord Grange, thought fit to take up his " account, or bill of coſts, and vouchers from the clerk, and to ap- " ply to this Houſe by petition, complaining of the ſaid taxation, " and deſiring that the above-mentioned order of your lordſhips " on hearing his appeal might be made effectual for his relief, " touching his coſts both here and in Scotland: and a com- " mittee being appointed to conſider of the ſaid petition; their " lordſhips, on the 8th of March 1717, reported it as their opi- " nion, 'That 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 to this Houſe; and that no final order ſhould " be made upon the petitioner's complaint, until it ſhould be " ſeen what coſts the Lords of Seſſion would allow:' but in re- " ſpect of the delay in taxing the petitioner's coſts, it was like- " wiſe their opinion, 'The Lords of Seſſion ſhould tax and allow " him the coſts he had or ſhould be put to in the taxation of " the ſaid coſts:' And your lordſhips agreeing with the com- " mittee in their ſaid report, the petitioner applied again to the " ſaid Lords of Seſſion, purſuant to the directions therein con- " tained: And here the committee think proper to obſerve, that " on the 11th of February 1717, but a few weeks before the " above-mentioned report was made, your lordſhips, upon a " petition from one Mrs. Lyon, touching the taxation of her " coſts in Scotland, did direct the Lords of Seſſion to tax and " aſcertain her coſts and expences article by article. And the " committee were informed, 'That the ſaid Lords of Seſſion " conceived it was expected by your lordſhips that they ſhould " obſerve the like method in the re-taxation of the petitioner's " account or bill of coſts, as was done in Mrs. Lyon's, and there- " fore proceeded accordingly. And having fully heard the parties " on both ſides in relation thereunto, and duly conſidered the " acts of regulation which are authorized by acts of parliament " in Scotland, regulating the fees about the Court of Seſſion " there, the whole Lords went through the ſaid account or bill, " article by article, and taxed the ſame at 25*l.* ſterling or there- " abouts, and allowed for coſts of ſuch taxation 8*l.* 6*s.* 8*d.* or

" there-

" 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 Muireſk 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 611*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 Muireſk, the appellant's late