

1712. *July 30.* SIR ANDREW KENNEDY, Conservator, &c. *against* SIR ALEXANDER CUMING of Culter.

The Lords, 26th of June last, having found Sir Alexander Cuming obliged to answer to Sir Andrew Kennedy's claim of expenses summarily ; it was contended for Sir Alexander, 1. Seeing in this case expenses are ordered to be taxed, according to the course of the session, none can be modified ; because by the practice of the session, no expenses are due, where there is *probabilis causa litigandi*. Now, Sir Alexander had *causam litigandi maxime probabilem* : in so far as he had not only the opinion of the doctors of the civil law, but also the authority of a decret of the session itself on his side ; and it was never heard, that a party prevailing, should in the same court where his action was sustained as just, be condemned in expenses as *temere litigans*. 2. There is no precedent for charging, in this account before the Lords of Session, the expenses of the appeal before the House of Peers. 3. If the Lords were to proceed to modify expenses, they could not enter into the detail, or particular consideration of the account given in by Sir Andrew, nor modify a greater sum in the whole, than used to be modified in other processes before the session, where there had not been eminent calumny or contumacy.

The Lords found, 1. That the remit from the House of Peers to tax expenses, implies that expenses are to be modified, but that their Lordships are to determine the quantity. 2. That the expenses of discussing the appeal are not to come in *computo*, or be considered in this modification. 3. The Lords, without entering into the detail, or particular consideration of Sir Andrew Kennedy's account of expenses, modified L100 Sterling of expenses, to be paid to him by Sir Alexander Cuming.

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1712. *November 19.* JOHN HAMILTON of Pumpherstoun *against* the LADY CARDROSS.

The House of Peers having reversed a decret of the Lords of Session, reducing a tack of the lands of Broxburn, &c. set by Sir William Stuart of Strathbrock, the Lady Cardross's predecessor, to Alexander Hamilton of Broxburn, his heirs, &c. for the space of three nineteen years after the respective terms of commencement ; and removing John Hamilton of Pumpherstoun, his son and heir, from the possession ; and having ordered John Hamiltoun to be restored to the possession of the lands, and to have satisfaction for what he hath lost, in respect of the profits thereof, by reason of the decret reversed : he, in pursuance of this sentence, applied to the Lords of Session, for liquidating what he had lost by his being turned out.

The Lords found the Lady Cardross liable to Pumpherstoun, for the years he was out of possession, for the excrescent duty contained in the tack set by her to the new tenant, more than what was contained in the tack set to Pumpherstoun's