

# APPENDIX.

## PART I.

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### EXPENSES.

1799. March 6.

JOHN PRINGLE *against* The LEGATEES OF ELIZABETH TOD.

JOHN PRINGLE brought a reduction of a will executed by Margaret Pringle, in favour of Elizabeth Tod, founded on alleged incapacity of the testatrix, and imposition practised by Elizabeth Tod.

A proof was led.

The Court of Session assoilzied the defender; but an appeal was entered, in which, on the death of Elizabeth Tod, her legatees appeared as respondents.

The House of Lords, (14th December 1796), pronounced the following judgment: Ordered, "That the interlocutors complained of, in the said appeal be, and the same are hereby reversed; and, it is further ordered, That the reasons of reduction be sustained; and that the cause be remitted back to the Court of Session to proceed accordingly."

In the application of this judgment, the pursuer claimed the expenses of the whole previous litigation, including that of the appeal.

The Lord Ordinary, on considering "the proceedings in this cause, and the judgment, and remit of the House of Lords, whereby the reasons of reduction are sustained, and the Court is directed to proceed accordingly, and being of opinion, that under the circumstances of this case, the late Miss Tod cannot, consistently with said judgment, have been *in bona fide* to defend said reduction, found the pursuer entitled to his expenses down till the cause was appealed; but found the claim for expenses incurred in discussing the appeal with Miss Tod's legatees, incompetent."

The defenders, in a reclaiming petition,

Pleaded: When the House of Lords think the appellant entitled to the expenses of the litigation in the Court of Session, a remit with a special instruc-

#### No. 1.

When a judgment of the Court of Session is reversed on appeal, and the cause is remitted to apply the judgment, without an instruction to give the appellant the expenses of the previous litigation, they cannot afterward be awarded.

No. 1. tion to that effect is inserted in the judgment ; House of Lords, 29th December 1797, Douglas against Trustees of Dalrymple, (not reported) ; 5th January 1798, Ross against Macdowall, (not reported). When it is silent on the subject, they are meant to be refused ; and it would be productive of much confusion, if any supposed grounds of the judgment were taken into view which are not expressed in it.

Answered : If the judgment of this Court had been in favour of the pursuer, expenses of process would have been awarded as a necessary consequence ; and the House of Lords having sustained the reasons of reduction, which, in the circumstances of the case, is equivalent to finding fraud and imposition on the part of the original defender proved, and there being a remit to apply the judgment, matters are in the same situation as if this Court had just decided the merits of the cause, and a motion was now made for expenses. The respondent in an appeal in the ordinary case, is entitled to the credit of having litigated *bona fide* ; but here, the difficulty of detecting the improper conduct of the original defender, rather enchances its criminality.

Upon advising the petition with answers, the Court were clearly of opinion, that the pursuer's claim was incompetent, and therefore repelled it.

Lord Ordinary, *Meadowbank*. Act. D. Douglas. Alt. Jo. Dickson. Clerk, *Menzies*.

D. D. *Fac. Coll., No. 117. p. 265.*

1800. June 3.

JOHN SMITH against The TRUSTEES for the Creditors of DONALD MACLEAN.

No. 2.

The creditors of a bankrupt having brought a reduction of an heritable bond on the act 1696, C. 5. from which the defender was assoilzied, with expense of extract, he was afterward found not entitled to rank on the penalty in the bond for the expenses of process.

DONALD MACLEAN, when insolvent, and in prison at the instance of the Paisley Banking Company, borrowed a sum of money from John Smith, for which Maclean granted an heritable bond over some houses belonging to him. The money received from Smith was immediately paid to the Paisley Banking Company, and Smith took infeftment.

Maclean was then liberated from prison, but was afterward incarcerated, and obtained a *cessio bonorum*. The trustees for his creditors instituted a reduction of the heritable bond, on the act 1696, C. 5. on the ground that Smith had advanced the money in order to give an undue preference to the Paisley Banking Company. Several interlocutors having been pronounced, sustaining the reasons of reduction, Smith brought an action of relief against the Paisley Banking Company. The processes were conjoined. A proof was led as to the whole circumstances attending the loan, and Smith was ultimately assoilzied, and found entitled to the expense of extract.

His bond contained a power to sell, if the debt was not repaid by the first Martinmas after its date, and Smith accordingly sold part of the houses, and recovered the greater part of the debt due to him.