1726. *June* 21.

Sir William Johnston of Westerhall *against* Marquis of Annandale.

No 16.

A party having uplifted the defunct's rents, and applied the same for defraying the expenses of the funerals, it was found, That he, having done the same by the relict's order, was to be considered as her hand; and therefore that he was liable to account to the heir for his intromissions; seeing, if the relict were pursuing for an exoneration upon this head, it would be competent to object to her, that she had in her hands the defunct's moveables, which ought to be applied, in the first place, towards defraying the funeral expenses.

Fol. Dic. v. 2. *p.* 318.

*** Lord Kaimes's report of this case is No 4. p. 9281. *voce* Negotiorum Gester; and Edgar, No 3. p. 8486. *voce* Mandate.

SECT. IV.

Expenses laid out *in re communi*.

1665. *February* 23. Jack *against* Pollock.

No 17.

A relict being infeft in a ruinous tenement, repaired the same, and built it much better than ever it was. The heir was decerned to refund her expenses, not only in so far as necessary, but in so far as he should be a profiter by greater mail after the relict's death, she leaving the tenement in as good case as at the time of the pursuit.

Fol. Dic. v. 2. *p.* 319. *Stair.*

*** This case is No 36. p. 3213. *voce* Deathbed.

1672. *January* 24. Hacket *against* Watt.

No 18.

An appriser of a burnt tenement, upon which there was a liferent constituted after it was burnt, repaired it after expiry of the legal. Found,

Hacket being infeft in life-rent in a tenement, which is mentioned in the infeftment to be burnt, having pursued Hugh Watt, who apprised the tenement from her husband, and after expiring of the legal, had built and repaired the burnt tenement, she obtained decreet for mails and duties. Hugh Watt suspends, and raised reduction on this reason, that the Bailies of Leith had committed iniquity, in sustaining this irrelevant reply, that it being alleged that *inædificatum solo cedit*, so that the building did accresce to her during her life, especially seeing the building was *mala fide*, the said Hugh Watt knowing, or

No 18.
that the life-renter might either have what the tenement was worth before the repairs, or possess it, paying for the necessary outlay.

being obliged to know her life-rent infeftment, being in a public register; and it is the express sentence of the civil law, that *qui scienter ædificat in solo alieno donare præsumitur*, which ought not to have been sustained; 1*mo*, Because Watt being a creditor-appriser, was not obliged to know the rights granted by his author, or to search the registers for them; 2*do*, He being proprietor, by an expired apprising, might have compelled her to suffer him to repair the building, and she would have demanded no more than what she could have made of it before the reparation; or if she will have the possession, she ought to pay the annualrent of the sums necessarily and profitably wared out for the reparation *in quantum lucrata est*, which is a principle of the law of nations; and the civil law in this case is of no such force with us; for the presumption of donation is easily taken off with the proprietor's own interest; and even by that law, the necessary and profitable expenses of the builder and repairer are due.

THE LORDS found, That the liferenter might either have what the burnt tenement was worth, or in use to be set at, before the reparation, from Watt, or otherwise the possession, she paying, or allowing out of the duties, the annualrent of what was necessarily and profitably wared upon the reparation, at her option.

Fol. Dic. v. 2. p. 319. Stair, v. 2. p. 54.

*** Gosford reports this case:

IN a reduction of a decreet, obtained at Elizabeth Halket's instance, against Hugh Watt, for payment of the mails and duties of a tenement lying in Leith, upon this reason, that the Bailies had committed iniquity in repelling a just defence, viz. that the said Hugh had comprised the said tenement, from the pursuer's husband, when it was waste and destroyed by burning, and after expiring of the legal, did build and repair the same, so that the pursuer, albeit she had a prior life-rent, could not crave the mails and duties, unless she would first refund the whole expenses and charges wared out thereupon, as is clear in law, qui bona fide ædificat in alterius solo potest se tueri contra dominum vindicantem, nisi expensæ refundantur, ne locupletetur cum alterius damno. It was *answered* for the pursuer, That it was as clear in law, that quicquid ædificatur in alterius solo, solo cedit, and therefore the life-rentrix being infeft upon her contract of marriage, before the building, the benefit did accresce to her during her lifetime; neither was the pursuer *in bona fide* to build, seeing the defender's sasine was registrated, and might have been known to him, which puts the pursuer *in mala fide*; in which case the law refunds no expense, quia qui sciens ædificat in alterius solo, præsumitur donasse.

THE LORDS did find that the life-renter could have only right to so much as the waste land would have yielded, if it had not been repaired, or otherwise, that she paying yearly the annualrent of the whole sums expended upon the

No 18. building during her lifetime, might possess the same; and put it in her option to do either.

Gosford, MS. p. 233.

1672. *February* 2. GUTHRIE *against* LORD M'KERSTON.

No 19. A WIDOW having rebuilt her jointure-house, burnt *casu fortuito*, was found to have no action against the heir, unless the house had been accustomed to be let for mail, and, in that case, found the heir liable *in quantum lucratus*.

Fol. Dic. v. 2. *p.* 319. *Stair.*

*** This case is No 74. p. 10137. *voce* PERICULUM.

1676. *January* 6. FORBES *against* ROSS & PATERSON.

No 20. Parties having a common interest in a law-suit, found proportionally liable for the expenses.

JOHN FORBES of Culloden, Robert Ross, and Alexander Paterson, having a joint right to the Miln of Inverness, and having certain lands and tenements holden of the town of Inverness, feu, and in burgage, the town of Inverness, by a decreet of the Dean of Guild, ordained a vessel, by which they received the dues of the Miln, to be broken, as being larger than the due and accustomed duty. This vessel they called the Mutie. They did likewise stent these three, and other two persons, not only for their burgage tenements, but for the Miln, and their feu-lands in the forest of Drakies; and they conceiving that they were unequally stented, and burdens put upon them unwarrantably, raised a suspension in all their names jointly, of both the decreets, and, by a missive letter to Culloden, desired him to borrow money upon all their credits, for carrying on their common interest, and to spare no expenses, and obliging them to bear their equal fifth parts. Whereupon the process was carried on by Culloden, who attended at Edinburgh, and obtained a decreet, first anent the Mutie, finding that the Town had done wrong to break it, and that it was the just due of the thirle. There was also a decreet, declaring the Milns, and the Forest of Drakies, to be free of the Town's stents. Whereupon Culloden obtains a decreet against Ross and Paterson, for their share of the expense, both for his attendance, and for the expenses of plea, extending the whole expenses to 10,000 merks. They suspended this decree, and *alleged*, That it was most unjust and exorbitant, obtained before his own nephew, upon his own oath, upon general articles, not otherwise instructed; 2*do*, That they could be liable for no expenses after they disclaimed the plea, and intimated the same to him; for whether their letters will import a mandate or society, or communion only, they had always place to disclaim the process, or agree with their party; and it were of very evil consequence, if the joining in one process, for a common interest,