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,

No 20.

should so conclude the whole parties, that they could not resile or agree with their party, but behoved to proceed to the end of the plea, and bear equal expenses, for which there is neither law nor reason for communion, much less parity of interest can be a ground to oblige any party, even though benefit arise to them by the parity of the case; 3*tio*, If these letters import a mandate, all mandates are revocable, *etiam re non integra*; and the mandant is only liable, *ex ante gesto*, according to the opinion of Bachovius, in his Commentary upon the institutes *De Mandato et Societate*, and other most recent and accurate lawyers; and there can be no pretence of society from these letters, because there is no stock, or any thing communicated, but only a warrant to raise sums for a common interest; and it were of evil consequence to allow societies in pleas; 4*to*, Suppose it were a society, all societies may be renounced, *ex natura contractus*, unless there be a particular agreement to the contrary, prefixing a time of endurance. It was *answered* for the charger, That his decreet against the defenders, for their share of the expenses, did proceed upon just and warrantable grounds; and, first, as to the process concerning the Mutie, and the benefit of the Miln, all the parties have a joint and individual right; for a Miln cannot be divided as land; and therefore all of them having begun a process jointly, for maintaining their right against the town of Inverness; though the suspenders did disclaim the pursuit, after litiscontestation, yet seeing they enjoy the benefit, by preserving their right, they must be liable for their share of the expenses, till the end of the plea; for it is not here a consequential benefit, *a paritate causæ*, which will not infer an obligation to pay any part of the expenses; but these expenses are impended *in rem communem*, viz. the Miln; and though the expenses exceed the worth of the differences of the measure then in question, yet the benefit is far greater to exclude the encroachments of the Town, which make up the thirle, who, as they were found wrongously to have made this invasion upon the right of the heritors of the Miln, so they might have proceeded, if that injury had not been pursued; and as to the expenses of the process, for liberating the Milns and Forests of Drakies, from the Town's stents, what concerns the Miln is common and necessary for preserving all these parties' rights; and as to what concerns their feus in the Forest of Drakies, albeit they be distinct, and that a conjunct process could not import a society, from which they could not resile; yet the letters produced do necessarily import a concourse to the end of the plea, and a particular proportion of the expenses in five equal parts, which imports a society; for though there be not a common stock, yet there is a communication of profit and loss; and there is also a mandate to the charger, to borrow money upon all their credits, and to let no expenses be wanting for their common interest, which mandate cannot be recalled, *nisi re integra*. And what Bachovius says of recalling a mandate, *etiam re non integra*, is only in the case of mandates, whichare only *mandantis gratia*, wherein the mandatar having no interest, cannot proceed against the will of the mandant, and hath only his expenses and damages, *ex ante gesto*.

No 20. But where the mandate is *mandantis & mandatarii gratia*, as in this case, it can only be recalled *re integra*; but here there is not only a mandate, but a society. And it is commonly agreed amongst all lawyers, that Societies may be renounced, yet with these limitations, unless a term be prefixed, or that the nature of the affair in communion, import the finishing of it, as *in negotiis indivisibilibus*: For instance, if partners shall engage to build a house for their common profit, if the house be begun to be built, it being one indivisible body must be perfected; or if the renunciation be fraudulent, upon the foresight of an advantage, which is imminent to the whole society, as in universal societies, where heritages are communicated, if a partner should offer to renounce when a person were *in extremis*, to whom he would succeed, his renunciation, as being fraudulent, would be rejected till the event of that succession appeared. So here the suspenders never having disclaimed till the dispute was ended, and litiscontestation made, the disclamation was most fraudulent, for after litiscontestation the charger could not desist, without losing his expenses, and being liable to be condemned in expenses to the Town, who were defenders, so that it was a gross fraud for the suspenders then to desert, when they knew they would reap equal benefit with the charger, without expenses; so that without disputing the nature of the contract, whether society, mandate, or both, or whether nominate or *præscriptis verbis*, yet in all cases there is ever *actio ex dolo*. It was *replied*, That the charger had homologated the disclamation, by raising a declarator in his own name only, and making use of the suspenders as witnesses therein, and taking out the decreet only in his own name. It was *duplied*, That the joint suspension being undiscussed, the raising of a declarator, on the reasons of suspension, that thereby the suspender might insist on his declarator, and might not be postponed by the charger, did not alter the cause, and it was the suspender's fault that they would not take out the decreet in their own name; but they do enjoy the benefit of it, and may take it out when they please to insist.

The Lords found the suspenders liable for the expenses necessarily expended to the end of the plea, as to the process relating to the mill, as being their common interest; but as to what concerned their distinct feus in the Forest of Drakies, they found the letters did not mention the liberation of these feus, but only the inequalities of the stents, and would not sustain the expenses thereanent, unless it were proved by writ, or oath of party, that warrant was given to insist in that point; and found that the letters did not instruct a mandate to the charger, to attend the processes, which continued seven sessions; but allowed only such expenses for his attendance as should be modified by the Lords, for such time as he had warrant to attend.

Stair, v. 2. p. 391.