No 18. The like happens every day, where one suspends because he is charged for more than is due; if, when the suspension comes to be discust, he only plead that reason, he is safe; but if he pleads other reasons and fails, he may be subjected to expense, notwithstanding his having been charged for more than was due.

*Fol. Dic. v.* 3. *p.* 199. *Kilkerran*, (Reparation.) *No* 3. *p.* 484.

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1762. *November* 18.

Agent for Mrs M'Alister of Loup, *against* Her Husband.

No 19.
A husband is liable for expense of successful declarator of marriage against himself. Special costs given in such case do not bar the wife's agent from recovering the whole money laid out by him.

Angus M'Alister of Loup having denied his marriage with Jean M'Donald she brought a declarator thereof. The Commissaries decerned in her favour, with L. 80 of costs; and the House of Lords affirmed the decree with L. 100 costs.

Colquhoun Grant, her agent, having expended L. 104 over and above these two sums, in the necessary conduct of the cause, brought an action for repayment against Mr M'Alister, as liable for his wife's necessary and just debts.

*Objected* for Mr M'Alister, 1*mo*, He cannot be liable for a debt contracted against his consent, and in prosecuting himself; 2*do*, The costs given by the Commissaries and House of Lords are taxative, and exclude higher costs.

*Answered* to the last for Mr Grant; He does not ask repayment on the footing of costs, but on the footing of money necessarily expended for a wife, and for which, as such, the husband is liable.

'The Lords found Mr M'Alister liable.'

Act. *Lockhart, J. Dalrymple.* Alt. *Jo. Campbell, Ferguson.*

*J. M.* *Fol. Dic. v.* 3. *p.* 199. *Fac. Col. No* 97. *p.* 219.

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1763. *June* 21.

Christian Severine Balle, and John Matthias Brink, *against* Robert Benton Merchant in Newcastle, and Andrew Fowler and Alexander Cushnie, Merchants in Aberdeen.

No 20.
The original owner having arrested a ship that had been taken by the enemy, and sold to the subject of a neutral state, and having been cast in

The ship the John and Robert of Newcastle, having been taken by a French privateer, was carried into Christiansands in Norway, where, after a dispute with regard to the legality of the seizure, the captor was allowed to dispose of her, and sold her at a public roup to Christian Severine Balle merchant in Christiansands, who gave her a new name, and sent her upon a voyage to Aberdeen, under the command of John Matthias Brink.

No 20.
a process brought for recovering the property of her in this country, was found liable in damages and expenses. A factor for a stranger is personally liable in damages and expenses awarded against his employer.

This vessel was arrested at Aberdeen, by virtue of a precept from the Magistrates, as Admirals depute, upon the application of Andrew Fowler merchant there, as agent for Robert Benton the former owner; and the Danish commander having immediately reclaimed her, Fowler was ordered to find caution for payment to him of all damages and expenses he might be found entitled to in the event of the process; and, in these terms, a bond of caution was granted by Alexander Cushnie merchant in Aberdeen.

The Magistrates of Aberdeen having declined to take cognizance of the question with regard to the property of the ship, the cause was removed to the High Court of Admiralty, and from thence to the Court of Session, where, after a long debate, it was found, by interlocutor of the 23d July 1761, *voce* PRIZE, that the property was regularly transferred to, and vested in the person of the Danish purchaser.

Upon this, a process was brought in the names of the said Christian Severine Balle, and Matthias Brink, against the said Robert Benton, and Fowler his agent, and also against Cushnie their cautioner, in which the pursuers insisted to be indemnified of the whole damage they had sustained, and expense they had been put to by the arrestment of the ship, and the judicial procedure which followed upon it.

*Pleaded* for the defenders jointly;

1*mo*, In no case has there been less foundation for demanding expenses of suit. The vessel had come so near a neutral port before she was taken, that she had got a pilot to conduct her to the harbour; and, when the master applied to the ordinary court at Christiansands, the seizure was found to have been made within the limits of the port, and she was ordered to be restored. It is true indeed, that, upon a remit from the King of Denmark to another court, with instructions to resolve this question, 'An navis, in distantia unius milliarii 'Germanici a littore Norvegico, esset capta necne?' the owners were cast by a majority of the judges; but then this decree could determine no other question but that of the infraction of the privileges of the neutral port. The great question still remained, Whether the capture was fully completed, as the ship had never been brought *intra præsidia* of the enemy? And as this question had been determined by a number of authorities, both ancient and modern, in favour of the original owners, the defenders were not to blame in demanding the judgment of a court of justice upon a point of such importance. They accordingly received the judgment of the Admiral court in their favour; and, if they were not to blame in applying for this judgment, they can still less be blamed for endeavouring to support it before the Court of Session when it was brought under review. Unless, therefore, it can be said that it is culpable to challenge a capture made by the enemy, upon grounds of law maintained by many approved authors, or that it is faulty to defend against the reversal of a decree given in pursuance of such challenge, the defenders conduct has been unexceptionable, and, of course, the demand of expenses made by the pursuers ought to be rejected.

No 20.

2*do*, The same reasons will obviate the claim of damages, as an obligation to pay damages can only arise from some delinquency in the party from whom they are claimed. Besides, the chief part of this claim arises from the pursuers being turned out of the possession by the arrestment of the ship; but to this the answers are obvious: For, 1*mo*, As both Mr Brink and his constituent were foreigners, an arrestment was necessary, in order to found a jurisdiction over them; and, if the defenders were not blameable in bringing the question to a trial, it could be no fault in them to use the arrestment; 2*do*, It was entirely owing to Brink himself that any inconvenience arose from this arrestment, as it would have been loosed immediately, if he had inclined to find caution *judicio sisti et judicatum solvi*.

*Answered* for the pursuers; Few cases have occurred where the plea of a *probabilis causa litigandi* could with less justice be resorted to, the vessel having undergone the usual condemnation in the Courts of Admiralty in France, and the legality of the seizure being justified by the decree of the Superior Court of Denmark. It was most inexcusable in Benton, after the ship had been legally condemned, sold by public roup, purchased, and refitted at a great expense, to endeavour to overhaul these proceedings. He ought to have known, that the courts of this country had no power to reverse the judgments of foreign courts, after they had received full execution in the countries where they were pronounced; and the plea founded upon the vessel's not being carried *intra præsidia* of the French King, was an after thought altogether inconsistent with the laws and practice of modern nations; but, though it had been good for any thing, it ought to have been pleaded in the process before the Danish courts, to prevent her from being sold as a lawful prize by the authority of the King of Denmark.

Neither can there be any doubt of the justice of the pursuers claim of damages. It is no sufficient answer, to say, that the arrestment would have been loosed upon caution; for, 1*mo*, As it was used *in rei vindicatione*, and as Benton insisted that the property of the ship remained with him, there were no *termini habiles* for caution. It would have been absurd in the Magistrates of Aberdeen, while the question depended, to which of the parties the property belonged, to have ordered the ship to be delivered to the now pursuers, upon their finding caution for the value; and it is highly probable, that such caution would not have been accepted by Benton; 2*do*, The case of merchants would be extremely hard, if, upon every frivolous claim that may be reared against them, their ships might be arrested and detained for years together with impunity, unless the shipmasters, who are often persons of no fortune or credit, can find caution to make good whatever shall be decreed against the owners; 3*tio*, Though the master had been able to find caution, which he truly was not, yet he was not bound to do so. It was the duty of the then pursuers, before they proceeded to so distressing a measure, to have been well advised that their action was

founded in law; and they must have laid their account with being answerable for all consequences of an unfavourable judgment. No 20.

*Pleaded separatim* for Robert Benton; That, he being a native of England, and having no *forum* in this country, no decree could pass against him, without establishing a jurisdiction by securing his person or effects.

*Answered*, By the established rules of judicial proceedings in the laws and practice of all nations, the *jus reconventionis* is acknowledged and allowed, without distinction whether or no there is any connection between the *causa conventionis* and the *causa reconventionis*; and, in this particular case, it must obtain with double force, seeing the claim of damages arises from the proceedings in the original process, in which the now defender was pursuer.

*Replied*, It is true, that an action of reconvention was allowed by the Roman law, and is also allowed in the practice of several modern nations; for this reason, that a defender, who is called to answer in his own *forum*, ought not to be obliged to part with that security which he has in his hands, and to go in quest of the pursuer into a foreign country; and therefore, if a pursuer refuse to answer to the claim of reconvention, he may be repelled from the action brought at his own instance. But this will not apply to the present case; for, 1*mo* The English owners have obtained no decree for any claim against the present pursuers, nor are they insisting for any; so that the subject has failed upon which only the *jus reconventionis* could be founded; 2*do*, Although they had prevailed in their action, it would not have been competent to Mr Brink, or his constituent, to have moved any claim of reconvention after judgment was pronounced. A claim of this kind must be brought early in the process, that both actions may be carried on together; and it is not even competent to a native to propone a claim of reconvention in order to stop execution, as is observed by Sande in his *Decisiones Frisicæ*, *lib.* 1. *tit.* 6. *dein.* 2.; and by *Voet*, § 80. *de judiciis*.

*Pleaded* also *separatim* for Andrew Fowler and Alexander Cushnie his cautioner; There is neither law, reason, nor precedent for subjecting the manager of a process to damages, who cannot be said to be liable either *ex contractu*, *quasi contractu*, or *delicto*; and, if such a rule were to obtain, no stranger would find an agent to serve him in any action brought in this country.

*Answered*, As Fowler was the person who arrested the ship, and brought the action, which occasioned the damages, in his own name and in the name of Benton, he must answer for the consequences; and, if agents of this kind, who carry on suits for behalf of strangers, were not to make good the damages and expenses awarded to their party, it would be an intolerable grievance upon the subjects of this country, who might be harrassed by groundless suits at the instance of foreigners, without having the smallest security for their indemnification, as is justly observed by Lord Bankton, v. 2. p. 602, § 15. where, after quoting two cases collected in the Dictionary under the word FOREIGNER, and another mentioned by Spottiswood, (No 2. p. 2069.) in all of which the agent was

No 20. found liable in the costs of suit awarded against his employer, he concludes in these words, 'Such factor is likewise bound, for the same reason, to answer 'the defender's claim in a reconvention or counter action.'

'The Lords repelled the defences, and found the defenders liable, conjunctly and severally, in damages and expenses.'

Act. *Lockhart.* Alt. *Rae.*

*A. W.* *Fol. Dic. v. 3. p. 198. Fac. Col. No 113. p. 263.*

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No 21. 1778. *March 6.* M'Kay *against* Barclay and Others.

M'Kay was decerned to pay the expenses of process by a judgment of the Inner-house, and the account was modified. A reclaiming petition was presented for M'Kay, praying to alter the interlocutor, in so far as to modify the account to a smaller sum. The Court refused the petition, as falling within the intendment of the act of sederunt 1st February 1715, § 4. discharging reclaiming petitions against judgments of the Inner-house awarding expenses.

*G. Buchan-Hepburn.*

*Fac. Col. No 20. p. 35.*

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## SECT. IV.

### Personal Charges.—Decrees of Constitution.—Discharge and Conveyance.—Costs in the House Lords.

No 22. 1748. *July 23.* Mackail and Mitchell *against* Blackwood.

Though where only expenses are found due, the Lords are not in use to sustain the parties personal charges as expense, yet where *damage* and expense is found due, the parties personal charges are admitted as damage no less than any other loss.

*Fol. Dic. v. 3. p. 199. Kilkerran,* (Expenses.) *No 4. p. 181.*

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No 23. Expenses of a decree of constitution never given. 1749. *July 20.* Fergusson *against* The Officers of State.

James Fergusson writer in Ayr, as assignee of William Cunninghame of Auchinskeith, having pursued and obtained a decree of constitution *declara-*