EXPENSES.

SECT. I.

Expenses laid out *in re commune.*

1674. *June* 4.

BOGIE, BOOG, or LAW, *against* The EXECUTORS of the LADY OXENFORD.

No 1.
An executor having followed out a process begun by the defunct, and at last succumbed, it was found that the expenses thereof must be defrayed out of the executry, and come off the whole head. This case is reported otherwise by Gosford and Stair; *See* next page.

THE Executors of the Lady Oxenford being pursued at the instance of a legatar, did, in the count before the auditor, give in an article of discharge, viz. that the expenses of a process at the executors instance should be allowed. It was *answered*, That if the executor had not pursued that process, there was as much free gear as would have satisfied the legacy, and the executor had not prevailed; and if they had prevailed, the benefit would only have accresced to the executor, and not to the legatars; and therefore *penes quem emolumentum, &c.* and seeing they would have had no benefit, they should have no loss by the event of that process.

THE LORDS found, That the executors having prosecuted a process intented by the defunct, did their duty, and *officium* should not be *damnosum;* and therefore, the charges of that process should not be upon their own account, but should be defrayed out of the executry; but so that where executors have no benefit by the confirmation, but are either simple executors or universal legatars, as to the superplus, particular legacies being paid, if there be as much executry as will satisfy such expenses, and the legacies, the legacies ought to be paid entirely, before the executors have any benefit; but, if the executry will not amount to satisfy the charges and particular legacies, the charges are to be satisfied, and the legacies to be abated proportionally, and the executor is to have no benefit; but, if he be a particular legatar, he is to be considered with the rest of the legatars, and to share with them proportionally. Concluded cause.

Clerk, *Mr Thomas Hay.*

Fol. Dic. v. 1. *p.* 285. *Dirleton, No* 181. *p.* 73.

*** Gosford reports the same case:

No 1.

HUGH BOOG being one of the legatars of the Viscountess of Oxenford, did pursue her daughters, who were left universal legatars, and their tutors, for payment of his legacy. It was *alleged*, That the whole inventory of the testament was exhausted by debts and other legacies, so that the pursuer could not be satisfied of his whole legacy, but proportionally with the other legatars he ought to suffer an abatement; and accordingly, there being a condescendence given in of the debts wherein there was an article of a great sum of money bestowed upon law expenses debursed by the tutor of the children, who were universal legatars for recovering, by a decreet, an additional jointure made to the Viscountess, against this article it was *objected*, That it could not be allowed, because that pursuit in law as to the event did not at all concern the legatars; seeing, albeit decreet had been recovered, the benefit thereof would not have fallen to the particular legatars, but to the universal legatars only; and, without that pursuit, there were sufficient moveables and free gear to pay the whole legacies. It was *answered*, That the universal legatars being obliged in law to pursue and recover whatever debt belonged to the defunct, or any action that was competent to them or their tutors to do diligence, they ought to have retention and allowance of all debursements upon law pursuits, whether the same did take effect or not, and were not obliged to pay the whole legacies, but with deduction thereof. THE LORDS did refuse that article, and ordained the legacy to be fully paid, seeing the event of that pursuit did not concern the particular legacy, but did belong to the universal legatars, but reserved to the tutor whensoever he should make count and reckoning of his intromissions to crave allowance of his debursements.

Gosford, MS. No 689. *p.* 410.

*** This case is also reported by Stair:

WILLIAM LAW having right to a legacy left by the Lady Oxenford, pursues her children as executors, and their tutors for payment, who having *alleged*, that the executry was exhausted, and amongst other points did condescend upon the expenses of a process which was begun by the Lady, and prosecuted by them for an additional jointure, and the third of moveables, wherein they did succumb, but had expended a considerable sum upon a probable ground, which they were obliged to do by their office as tutors, it was *answered*, That this legacy could neither be taken away nor abated by the expenses of that pursuit, because it is clear by the testament, that there were more free goods than would pay all the legacies, without expecting any thing by the foresaid pursuit; by which, if any benefit had arisen, it would only have belonged to the children, and the legatars would have had no part of it, and therefore should not be bur-

deined by it; and nothing can abate legacies but the defunct's debts. It was *replied* for the defenders, That the executors could not know what would be free of the executry, till they had fully executed their office, the execution whereof is a debt burdening the executors, as a part of their office, and so must as well abate the legacies as the defunct's debts. No 1.

THE LORDS found, That when executors have but an office to the behoof of others, they are obliged to do diligence upon all probable interest of the executry, which cannot be loss to them, but must abate the legacies; but where the executors have the superplus of the executry above the legacies, whereby it is in their power to pursue any thing exceeding the legacies, or not, such pursuits are upon their own peril, and do not abate the legacies, and so found that these executors being the defunct's children, the tutors could not abate the legacies by expenses of process, for the superplus of the executry.

Stair, *v.* 2, *p.* 270.

1674. *November* 20. SOMMERVELL *against* Sir WILLIAM SHARP.

No 2.
A donatar to a gift of bastardy being pursued by the bastard's creditors will get allowance of all expenses laid out for the gift, and in pursuing debtors.

SIR WILLIAM being donatar to a gift of bastardy, was pursued at the instance of Sommervell, as a creditor to the bastard, for payment of his debt, in so far as he had intromitted with the bastard's means. It was *alleged* for the donatar, That he ought to have allowance of what he had laid out for the gift by composition and passing the seals, and his true expense laid out in pursuing the debtors, and recovering sentence. It was *replied*, That in law, a bastard having no means, but *deductis debitis*, the donatar could take no gift to the prejudice of creditors; and, what he had bestowed upon the gift and other pursuits, it being *suo periculo*, it ought not to be allowed. THE LORDS did sustain the defence, and granted the allowance for these reasons, that the creditor could not pursue the debtors without a gift of the King, which he having neglected to crave, the donatar was in *bona fide* to seek the same, and what charges he had laid out in recovering of the debts being just and necessary, whereupon he was ordained to make faith, so that the creditor could have bestowed no less, he ought in law to be looked upon as *negotiorum gestor*, and what was profitably employed ought to be refunded.

Fol. Dic. v. 1. *p.* 286. *Gosford, MS. No* 710. *p.* 429.

1702. *January* 16. CREDITORS of PITTENCRIEFF, Competing.

No 3.
The expenses of ranking and sale found to come off the whole head.

IN the roup of the lands of Yeaman of Pittencrieff, bought by Major Forbes, it fell to be debated among the Creditors, and particularly by Sir Thomas Moncrieff, one of the preferable ones, how the common expenses, such as the extract-