

1741. *June 26.* JAMES STENHOUSE *against* JEAN YOUNG.

A timber house in Libberton's Wynd, belonging to the deceased Alexander Young, being burnt down, James Stenhouse, by a warrant from the Dean of Guild, rebuilt it in stone, and added two storeys and garrets more than there was before. His title for building, was, *1mo*, an obligation from Alexander Young, in his contract of marriage with Christian Young, the said Alexander's daughter, to grant a wadset upon that timber tenement, for the security of 2000 merks, the tocher;—*2do*, His daughter's right, who, as heir to her mother, was entitled to one half of the area of the burnt tenement, Alexander Young having only left behind him two daughters. For these reasons, the Lords found, that the rule of law does not here take place, *quicquid solo inædificatur solo cedit*, and that the other heir portioner could not claim the half of the house rebuilt, though the half of the area was hers, without refunding one half of the expenses, which in this case were so high that she did not think it proper to make the offer of them.

Therefore, the Lords found that James Stenhouse might retain the house for his expenses, but that he behoved to allow to the heirs portioners a consideration for the value of the area; and likewise, if they could show that they could have made more of the area, by building in another shape, to make up that loss to them.

1741. *June 26.* BAVIELAW *against* CREDITORS OF KERSLAND.

[Elch., No. 6, *Ranking and Sale.*]

KERSLAND, though he had no right to his teinds, feued out some of his lands for a joint duty, payable for stock and teind. Afterwards the teinds came to be evicted by the titular. The question was, What part of the feu-duty the feuars could retain from a singular successor, into whose hands the superiority had come? whether a proportionable part, *e. g.* if a fifth part of the rent of the feu was evicted for the teind, then the feuar might deduce the fifth part of the feu-duty? or whether he could retain the whole value of the eviction, to the utmost extent of the feu-duty, for beyond that he could not have relief from a singular successor?

The Lords found,—That the feuar could retain the whole value of the eviction as far as the feu-duty would go; because, by the feudal contract, the obligation of the *reddendo* was only conditional, if the vassal enjoyed the land; and, therefore, the payment of the feu-duty was necessarily burthened with the eviction of the subject.

N.B. It was supposed here, that, if the feuars had completed the forty years' prescription, they would have been safe against the titular, who only could have had recourse against the superior and affected the feu-duty.