NOT TO BE QUOTED PLEASE: STILL SUBJECT TO REVISION

1.31. **Incidental benefits.** Many cases hold that an enrichment claim does not lie where the defender’s enrichment is merely an “incidental”, “occasional” or “consequential” benefit arising from the pursuer’s actings. Indeed reliance on this control device is a rather distinctive feature which Scots enrichment law emphasises more than many other systems do[[1]](#footnote-1). The following sources exemplify the point. In a leading early case *Burns v McLellan's Creditors*;[[2]](#footnote-2) the Court of Session held: “No law subjects a man to recompense or remuneration who reaps an occasional or consequential benefit from the deed of another done with no view to his interest”. Hume in his *Lectures*:[[3]](#footnote-3) gave two graphic examples of irrecoverable incidental benefits, namely that though the erection of the North and South Bridges of Edinburgh benefited owners of property in the neighbourhood, no claim for recompense lay at the instance of the magistrates as the benefit was consequential. Again the expenses of a lawsuit settling a point of law were not recoverable from third parties merely because they benefited from it. [[4]](#footnote-4) Tenants, liferenters and other persons possessing on a limited title are generally presumed to effect improvements for their own benefit so that any benefit enuring to the landlord or owner is incidental and irrecoverable by recompense. [[5]](#footnote-5) In *Orr v Graham*[[6]](#footnote-6) a lower riparian owner benefiting from the construction of a dam or reservoir built by an upper riparian owner was not liable to him in recompense; the mere circumstance of benefiting did not create an obligation of recompense. In *Fernie v Robertson* [[7]](#footnote-7) tradesmen, the agents of a *negotiorum gestrix* for an incapax mother, executing repairs on the home of the incapax, were held entitled to payment of accounts from heir-at-law of incapax after her death. Lord Neaves observed[[8]](#footnote-8) “A man who at his own hand executes operations on a property, partly for himself and partly for another, has no claim against that other”. In *Buchanan v Stewart*[[9]](#footnote-9) the trustee on a sequestrated estate who completed unfinished buildings was not entitled to recompense from a secured creditor of the bankrupt: it could not be shown that the trustee had not been acting *in suo* (for his own benefit) by making improvements for the purpose of increasing the reversion for the benefit of the general body of creditors and thus indirectly benefiting himself.[[10]](#footnote-10) In *Stewart v Steuart*[[11]](#footnote-11) the supply of water to an entailed estate through a neighbouring estate incidentally benefited the owner and tenants of the neighbouring estate without loss to the entailed estate and it was held that the neighbours were under; no obligation of recompense in respect of the past supply. In *Rankin v* Wither[[12]](#footnote-12) a husband rebuilding a wife’s property was treated as a temporary possessor making improvements for his own benefit and had no claim for recompense against his wife’s heir-at-law.In *Shilliday v Smith*[[13]](#footnote-13)Lord President Rodger “explained” several of the above cases[[14]](#footnote-14) on the basis that the *in suo* prohibition on recovery only applies where the benefit conferred by the service is incidental: “a defender is not regarded as being unjustly enriched just because he enjoys an incidental benefit from expenditure or work which a pursuer has made or carried out for his own purposes”.But in such a case the in suo prohibition of recovery is otiose since the defender can rely on the rule against recompense for an incidental benefit .

It may well be that the reason why incidental benefits are not redressed by recompense is that looking at the matter from the pursuer’s standpoint, the pursuer suffers by his actings no extra loss over and above the expenditure which he incurred to benefit himself or for his own purposes. Hume linked the two elements of no loss and the incidental character of the benefit when remarking:

“the … claimant of restitution must have sustained a loss; must be substantially out of pocket. It is not sufficient that the defender has reaped some occasional benefit from the claimant’s money, if this expenditure has sufficiently answered its purpose, withal, to the claimant himself.”[[15]](#footnote-15)

The same connection was made by Lord President Dunedin in *Edinburgh & District Tramways Co v Courtenay*[[16]](#footnote-16) the famous “decency boards” case when giving the example of a man heating his own house and incidentally heating his neighbour’s[[17]](#footnote-17). The linkage was again made by Lord Guest in *Exchange Telegraph Co Ltd v Giulianotti*[[18]](#footnote-18)as follows:

“the expense had been incurred by the pursuers in providing the racing news service to their subscribers. The fact that the defender by obtaining the news service from other subscribers benefited incidentally did not involve the pursuers in any extra expenditure”.

1. In fact the “rising heat” example of incidental benefit given by Lord President Dunedin in *Edinburgh & District Tramways Co v Courtenay* 1909 SC 99 at 105; 16 SLT 548 was popularized by Birks and is one of the few Scots sources on unjustified enrichment cited throughout the Common Law world. [↑](#footnote-ref-1)
2. (1735) Mor 13402; 6240. [↑](#footnote-ref-2)
3. Hume, *Lectures* vol III, p 166, footnote 8. [↑](#footnote-ref-3)
4. Citing unreported case of *Ferguson v Smyth* 18th November 1802, Signet Library, Old Session Papers vol 437, No 30 (cit. *Swinton or Ferguson v Smyth)];*see *More’s Notes to Stair’s Institutions* p liv. [↑](#footnote-ref-4)
5. Rankine, *Landownership* (4th edn) p 87; Rankine, *Leases* (3d edn) p 260. [↑](#footnote-ref-5)
6. *Orr v Graham* (1831) 10 S 135. [↑](#footnote-ref-6)
7. *Fernie v Robertson* (1871) 9 M 437. [↑](#footnote-ref-7)
8. Ibid at p 442 [↑](#footnote-ref-8)
9. *Buchanan v Stewart* (1874) 2 R 78. [↑](#footnote-ref-9)
10. See at p 87 per Lord Neaves. [↑](#footnote-ref-10)
11. *Stewart v Steuart* (1878) 6 R 145. [↑](#footnote-ref-11)
12. (1886) 13 R 903. [↑](#footnote-ref-12)
13. 1998 SC 725; 1998 SLT 976 at p 980. [↑](#footnote-ref-13)
14. *Fernie v Robertson*; *Buchanan v Stewart*; *Rankin v Wither* and *Newton v Newton* 1925 SC 715; 1925 SLT 476. [↑](#footnote-ref-14)
15. Hume, *Lectures* vol III, p 166. [↑](#footnote-ref-15)
16. *Edinburgh & District Tramways Co v Courtenay* 1909 SC 99; [↑](#footnote-ref-16)
17. At 105. [↑](#footnote-ref-17)
18. *Exchange Telegraph Co Ltd v Giulianotti* 1959 SC 19 (OH) at p 26; 1959 SLT 293(OH) at p 296. [↑](#footnote-ref-18)