

whose affair is managed is liable for a salary to the pursuer that manages the same *actione negotiorum gestorum*; and it is denied that he got any salary allowed at the fitting of his accounts; and it cannot be otherwise proved but *scripto vel juramento*; and the accepting a discharge of his intromission cannot militate against him, because it bears a reservation of all that was due to him by bond, ticket, or otherwise.—THE LORDS, in respect the pursuer had fitted his accounts with the defunct, her husband, and had taken a discharge of his intromission, without seeking allowance of any salary, and that there was no paction for a fee or salary when he entered to the service; therefore found there was none due.

No 87.

Sir P. Home, MS. v. I. No 349.

1709. January 26.

CHARLES MENZIES, Writer to the Signet, *against* ALEXANDER GORDON of Pitlurg.

No 88.

IN the action at the instance of Charles Menzies against Pitlurg, for damage and expenses sustained by him in a former process of reduction and declarator against the same defender, the LORDS refused to allow any such expenses to the pursuer, in regard there was a decret in that former process extracted, and no expenses therein decerned, which did terminate the plea; albeit it was *alleged* for the pursuer, That his first summons contained a conclusion for damage and expenses against Pitlurg; and he might legally insist in that conclusion, whereon nothing was done, notwithstanding of the decret extracted upon other points, as is daily observed in general and special declarators, actions against principals and cautioners, passing from *pro loco et tempore*, &c.; because, albeit different conclusions for different effects may be insisted in after extracting decret in other points, the article of damage and expenses is but a consequence of the process, which is understood to be past from when not demanded and modified in the decret.

Fol. Dic. v. I. p. 439. Forbes, p. 311.

* * * Fountainhall reports the same case:

1709, February 1.—HAMILTON, tutor to Menzies of Kinmundie, having obtained a decret of sale of his pupil's lands, for payment of the debts he had proved affecting it, he affixes placards for a roup; and though Charles Menzies writer to the signet was the highest offerer, yet he exposed them to a second roup, and therein preferred Alexander Gordon of Pitlurg, whereof Charles raised a reduction, and was preferred; but Pitlurg having possessed for some years, there was a count and reckoning raised, wherein Charles was ordained to find caution to pay him what in the event should be found due, on Pitlurg's ceding the possession; and this process being closed by an extracted decret, Mr

No 88.

Menzies now insists for his expenses and damages, incurred through Pitlurg's intermeddling clandestinely in his bargain; which being reported by my Lord Grange, the LORDS seemed to agree to these positions, *1mo*, That the expenses laid out in process cannot be acclaimed after a decret is extracted thereon, for then *lis est finita*, and there is no more process depending; and *esto* the defender had been both calumnious and litigious, yet no new process is competent for these expenses, because, after extracting, law presumes such an acquiescence that no more is to be claimed by either party than what is contained in the decret terminating the plea; *2do*, That this rule will not extend to damages, but a process might be raised for these; or, if there was a conclusion in the first summons to that purpose, not insisted on before, he may now give out his process of new, and insist upon that conclusion whereon there was no debate nor interlocutor before; *3tio*, That in this particular case, though Pitlurg was *in mala fide* to interpose in the roup, yet Charles did not give in his bond of caution when instrumented, and so being *in mora*, retarded the process; thus the one fault must compensate the other; and refused to modify either expenses or damages to Charles, and assoilzied Pitlurg from the same.

Fountainball, v. 2. p. 486.

1710. *January 17.* HUTTON *against* The EARL of FORFAR.

No 89.

A creditor, in possession of a decret containing expenses, accepted of the principal sum. Found, that he was precluded from afterwards claim- in g expenses.

THE Earl of Forfar being debtor to Robert Hutton, merchant in Edinburgh, by a subscribed account in L. 13: 19s. Sterling, he pursues him for payment, and obtains a decret in absence, bearing L. 25 Scots for expenses of plea. After this, the Earl pays the sum contained in the account, and takes a receipt on the foot of it. Then Hutton charges the Earl for the L. 25 of expenses contained in the decret. He suspends upon this reason, That by the receipt produced, the principal sum is paid and discharged, and so the principal debt being extinguished, the expenses must fall in consequence; *nam sublato principali corrui accessorium, quod sequitur naturam sui principalis*; and if you had any further sum to claim of me, you should have mentioned and excepted it in your discharge, and not have concealed and kept it up, as you did; for if you had spoke of it, I would not have paid the account till I had been freed of all. —*Answered*, The expenses modified to me by the Judge did *ipso momento* of his sentence become a separate obligation, subsisting *per se*, and could never be extinguished by paying the principal debt, the discharge whereof can go no further than what is expressed; and though an accessory falls with the principal, yet here the expense becomes a distinct independent debt, even as if one pursues on two tickets, and takes a decret for both, the paying of one of them will not exclude nor exoner *quoad* the other. Put the case, one discharged a sum bearing annualrent, that will not comprehend the annualrent, unless it be *per expressum* mentioned; and so does the Roman law decide, *l. 49. § 1. D. De act*