

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*

*empt.* and *l. 75. § 9. D. De verb. obligat. Tot sunt stipulationes quot sunt res*; there is both a *stipulatio sortis et stipulatio usurarum*; and the law distinguishes betwixt interest arising *ex mora debitoris*, and where due *ex stipulatione et pacto*. In the first case, *sorte soluta usuræ peti non posunt*; but in the second, though the principal sum be paid, yet the annualrents may be afterwards acclaimed. And so Joannes a Sande observes it was decided in the Court of Frizeland, *lib. 3. tit. 14. def. 10.* though the principal sum was paid, *etiam absque protestatione et reservatione*, yet the *usuræ rei judicatæ* were still due.—THE LORDS were divided on this point of law, but the plurality found no expense, and assoilzied the Earl.

*Fol. Dic. v. 1. p. 439. Fountainhall, v. 2. p. 555.*

Implied Renunciation of Legitim.—*See* LEGITIM.

*See* APPENDIX.