No 12.
A debtor, suspending on double distress, is entitled to retain his expenses; but, where he had shewn an anxiety to delay payment, his expenses were refused to be allowed.

1707. *June* 20. Keir *against* Creditors of the Earl of Winton.

Adam Keir, baxter in Edinburgh, having bought a quantity of wheat from Mr Christopher Seton, who acted as *negotiorum gestor* for the Earl of Winton, his brother, and being distressed by sundry of the Earl's creditors competing on their arrestments, and other diligences, he suspends on double poinding; and, after debate, Hugh Brown, chirurgeon, is preferred; and now Keir craves, that he may detain, out of the first end of the sums owing by him, L. 57 Scots of expenses they had put him to in defending, that he might be only liable in once and single payment; for, when debtors are put to processes without their own default, it is both just and reasonable that their expenses be allowed them, seeing *nemo debet militare suis impensis* in such cases.—The Lords thought this a general case, and required mature deliberation. If a party was always ready to pay, and sought nothing, but that he might do it securely, it seemed equitable he should be indemnified and reimbursed; but having considered his account, with the steps of the process, found he had by bills retarded the advising of the cause, and seemed too willing to detain the money in his own hands from the creditor; therefore, because of his shifting and delay, found he had forfeited his claim; and the Lords refused to give him any expenses.

In this case, it was likewise found, that though Christopher sold the victual, and entered into the contract with Deacon Keir, and the price was made payable to him, yet, in a competition betwixt his creditors and his brother, the Earl's creditors, to whom the victual belonged, were preferred, in regard it was proven, that the victual grew on the Earl's lands of Longniddry; and though Mr Christopher was creditor to his brother in a considerable sum by a bond of provision, yet not having affected this particular subject, the victual was found to be the Earl's.

Fol. Dic. v. 1. *p.* 287. *Fountainhall, v.* 2. *p.* 373.

SECT. III.

Expenses of Plea.

No 13.
Expenses and a fine awarded for a vexatious and improper prosecution.

1675. *June* 28. Livingston *against* Garner.

A bond being granted for payment of a sum, and thereupon the granter having suspended in his own time, and a decreet of suspension being recovered in

his favour, after his death, his son being of the same name, was charged, denounced, and taken with caption for the same debt. No 13.

THE LORDS upon a bill did find, That the son ought to be free of the said debt; and in regard of the charger's trincating and fraudful practice, they modified L. 40 to be paid by him, the one half to the party, the other half to the poor's box.

Clerk, *Gibson.*

Dirleton, No 281. *p.* 137.

1694. *July* 38. FALCONER *against* WISHART.

No 14.

DAVID FALCONER gave in a petition *contra* William Cleland, mentioned 26th July 1694, No 70. p. 3731. founded on the acts of James III. and V., Queen Mary, and James VI. that malicious pleyers who tyne the cause, should pay the other party damage and expenses; and subsumed, that on an uncontroverted principle anent the nullity of the inhibition, he has put him to upwards of L. 1200 Scots of expenses, &c.——THE LORDS found, seeing there were different interlocutors, and so *probabilis causa litigandi*, there could be no expenses modified; for the lawyers say, that *opinio unius doctoris* is sufficient to liberate from expenses.

Fountainhall, v. 1. *p.* 640.

1701. *February* 23. ROBERT SMITH *against* JOHN HAMILTON.

No 15.
A person assoilzied, in consequence of his oath, was, notwithstanding, found liable in expenses, on account of improper conduct.

ROBERT SMITH chirurgeon having pursued John Hamilton in Elgin, for payment of L. 200 he had entrusted him to uplift from one of his debtors; he first denied the trust, and that being made out against him by witnesses and other pregnant adminicles, then he founded on a discharge; and it being referred to his oath, that this debt was neither *actum* nor *tractatum* to be comprehended, he, after much shifting and tergiversing, at last compeared, and deponed that it was communed and included, whereupon he is assoilzied and gains the cause. But Smith gave in a bill, representing how calumnious he had been in all the steps of this process, and had most disingenuously denied the trust, till it was clearly proven against him; and that he had declined all along to depone, by which he had put Robert Smith to vast expenses in adducing witnesses to evince the trust; and therefore craved that he might be condemned in his expenses. THE LORDS thought the case new, for one who had lost the cause to crave expenses of him who had gained it; seeing the rule of law lay just in the contrary, that *victus victori in expensis condemnatur:* Yet the Lords, considering that such cases might fall out, where the party who wins the cause may be most