

No 86.

extended also to the decreets obtained by the executor, before the assignation, albeit the same bore not 'to be made to the decreets,' seeing it bore 'in and 'to the debts, and all that had followed thereon;' but in this case, the assignation was received and kept a long space by the assignee before he pursued the executor, the debtors being then deceased, who were living the time of the receiving and making of the assignation; likeas the assignee had caused charge the debtors upon his own charges, whereby he had accepted the assignation; and so it was found, that a naked executor, where there was an universal legatar, was not obliged *ad diligentiam*.

Act. Aiton &amp; Miller.

Alt. Mowat.

Clerk, Gibson.

Fol. Dic. v. 1. p. 439. Durie, p. 444.

1683. January 5.

GRAHAM against ROCHEAD.

No 87.

A factor, after having settled accounts, found not entitled to demand salary.

JOHN GRAHAM, chamberlain to the deceased Alexander Murray of Melgum, pursues Janet Rothead, as relict and executrix, for payment of 6000 merks, due to him as chamberlain for several years; and albeit that he was discharged of his chamberlain accounts, yet the same bore a reservation of all sums by bond, ticket, or otherwise due by the pursuer to the defunct.—It was *alleged* for the defender, That the pursuer was only *negotiorum gestor*; and unless paction were proved the time of the entry to his service, he could not pursue the representatives of the defunct for a salary, after the chamberlain accounts were fitted by the defunct, and a discharge granted to the pursuer.—THE LORDS sustained the defence, and assoilzied the defender.

Fol. Dic. v. 1. p. 439. P. Falconer, No 39. p. 21.

\*.\* Sir P. Home reports the same case :

JOHN GRAHAM having pursued Janet Ruthven, relict of the deceased Alexander Murray of Melgum, for payment of 6000 merks, as his factor and chamberlain fee, for managing of her husband's estate before his decease; *alleged* for the defender, There was no salary due, because there was none conditioned; and the defunct, her husband, in his own lifetime, did entertain the said John Graham and his children in his house, which must be allowed in place of the fees, seeing her husband never promised him any more but to maintain him in his house; as also, he having counted with her husband, he did grant a discharge of his intromissions, which necessarily implies either there was no salary due, otherwise he would have craved allowance thereof in his accounts; or if there was any due, it was allowed at counting.—*Answered*, That albeit there was no express condition for a salary, yet *ex natura rei*, the pursuer having managed Melgum's affairs for the space of five years, he ought to have a salary, seeing by the law, whoever manages another man's affairs, the party

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