No 19.

the common style, finding the letters orderly proceeded, and decerning. The more particular decerniture in the extract, for the penalties, was the operation of the extractor, in respect of the terms of the charge given for them, as well as for the principal sum and interest. As no expenses of plea were specially awarded by the Court, the suspenders had no occasion to apply for relief of such expenses, or to apprehend that the same would be demanded under the denomination of penalties.

And, 3*tio*, It is indeed true, that upon reasons for suspending the contract being repelled, decreet must have passed, if demanded, for payment of the penalties, as well as of the principal sum and interest, in the precise terms of the contract; because it could not be foreseen what expenses might afterwards be incurred, in doing diligence for recovery of the debt thereby properly due, or whether the charger might not be obliged to adjudge. But such decerniture could not be understood to make the suspenders liable in the actual payment of the penalties, whether diligence of that kind came to be done or not, or to make them liable in the expenses of plea already incurred in discussing the previous question as to the validity of the contract; and as the contract is now implemented, by payment of the principal sum and interest, the penalties must fall of course, as no expense of diligence can be hereafter incurred. Neither is there room for still awarding costs of suit against the suspenders, in respect of the circumstances of the case itself, independent of the conventional penalties, as the suspenders were not litigious, but had at least a *probabilis causa litigandi*; which is proved by their obtaining two interlocutors of the LORD ORDINARY, and one of the whole LORDS, in favour of their plea.

"THE LORDS sustained the reasons of suspension, as to the penalties."

Act. *Macqueen, Advocatus.* Alt. *Rae.*

D. R. *Fol. Dic. v.* 4. *p.* 55. *Fac. Col. No* 77. *p.* 132.

1761. *November* 27.

WILLIAM GORDON, Trustee for KATHARINE and ANNE MAITLAND, *against* Major ARTHUR MAITLAND of Pittrichie.

No 20.
Penalty in a bond allowed only to the extent of the expense of diligence used in putting the decree obtained by the creditor in execution.

MAJOR MAITLAND having, by decree of the Court of Sesion, affirmed in the House of Peers, been found liable to Katharine and Anne Maitland in the sum of 19,000 merks, and annualrent due thereon, contained in a bond granted to them by their brother Mr Charles Maitland, with a fifth part more of penalty in terms of the said bond; he was charged with horning at the instance of William Gordon their trustee, to make payment of the whole.

The Major paid the principal sum and annualrents; but suspended the charge *quoad* the penalty; and *insisted*, That the charger could recover no more of it than would defray the expense of diligence used upon the decree.

Answered for the charger; 1*mo*, His constituents laid out a more considerable sum than the whole penalty charged for in obtaining a decree of the Court for payment of their provisions; and as in strict law, the penalty in a bond is as much due as either principal or interest, so equity can never interpose further than to restrict it to the neat expenses disbursed, and the damage sustained by the creditor through want of his money at the stipulated term of payment. 2*do*, As the words of the decree are express, finding the suspender liable in the sums contained in the bond of provision, with a fifth part more than the said respective sums of penalty, in terms of the said bond; and as this decree was simply affirmed, the suspender must be liable for the whole penalty, unless he can show, that the Court of Session has a power to review the judgment of the House of Peers; and the only remedy now left to him is to apply to that most honourable Court, and pray for an explanation of their judgment in this particular, or for a special reference to the Court of Session to reconsider that part of their interlocutor by which they decerned against him for the penalty. No 20.

Replied; The judgment of the House of Peers could not make the decree of the Court of Session broader than it was originally; and though it is common for the Court of Session, in cases of this nature, to decern for the penalties as well as the other sums contained in the deeds to which they are adjected; yet it has always been understood, that the creditor could recover no more out of these penalties than would answer the expenses laid out by him in carrying the decreet into execution; and so it was expressly found in the case of Young *contra* Allan, *anno* 1757, No 9. p. 10047.

"THE LORDS found the letters orderly proceeded *quoad* the expense of diligence incurred since the decree of the Court of Session; but suspended the letters *quoad* the remainder of the penalty."

For the Charger, *Wight, Ferguson.* Alt. *Burnet.* Clerk, *Justice.*

A. W. *Fol. Dic. v. 4. p. 56. Fac. Col. No 66. p. 150.*

1787. *July* 25.

JOHN MACADAM *against* CREDITORS of CAMPBELL and COMPANY.

No 21.
A creditor by heritable bond, though infeft, can claim the penalty to no greater extent than a personal creditor.

IN the ranking of the creditors of Campbell and Company, Mr Macadam, a preferable creditor in virtue of an heritable bond, followed with infeftment, claimed to be ranked for the whole of the penalty therein contained. He had likewise deduced an adjudication on the bond.

Pleaded for Mr Macadam; By the infeftment on the bond, the same security is given for the penalty as for the principal sum and annualrents; and therefore it is to be fully exacted; which is an equitable claim, seeing it will do no