

No 24.

*Answered*; Although the penalty in a bond appears *ex figura verborum* to be forfeited, upon the debtor's failing to make payment, yet, equity has interposed to moderate the rigour of the obligation, and has in practice restricted the claim of the creditor to the expenses he has actually incurred in recovering his debt. In this view, the stipulation has nothing really penal in its nature. It is only intended to put it in the creditor's power, without the trouble of a separate action, to recover what expenses he may have incurred in operating his payment; and, therefore, the creditor can exact no more of it than the amount of those expenses, which he could have recovered by an action at common law.

But, where no penalty is stipulated, it is clear that the expense of the discharge could not be recovered by a separate action, like the expense of diligence; and, upon the same principle, where the obligation contains a penalty, the expense of the discharge cannot be taken out of it. In short, the creditor is in no case entitled to receive more than his principal, interest, and expenses of diligence. If he receives payment of his debt when due, he must himself, by the common practice, be at the expense of the discharge; and he is bound to be at the same expense, upon recovering his debt, and the expense of his diligence, which is all that the debtor's delay of payment has occasioned.

THE COURT had no doubt, that, in practice, it is usual for the creditor to pay the expense of the discharge. But as the creditor here had given up his penalties, they thought he should not be liable. They, therefore, 'suspended the letters *simpliciter*; and found the charger liable in expenses.'

A reclaiming petition was refused without answers.

Lord Ordinary, *Alva*.Act. *H. Erskine*.Alt. *C. Hay*.Clerk, *Tait*.*Fac. Col. No 67. p. 110.*

No 25.

A party was permitted to withdraw an appeal, upon payment of a sum in name of costs. Found, that the cause continued in dependence in the House of Lords, till they should be paid.

1784. July 20.

ANDREW BROWN Petitioner.

By a judgment of the House of Peers, John Shortreid was permitted to withdraw an appeal entered by him, against certain interlocutors of the Court of Session, upon payment of L. 30 Sterling, in name of costs.

Upon this, Andrew Brown, who was the respondent, applied by petition to the Court of Session, for a decret authorising him to levy the above mentioned sum.

*Observed* on the Bench; Where costs are awarded by the House of Lords, upon a final discussion of the matters brought before them, the authority of the Court of Session must of necessity be interposed, to render the judgment effectual, because the court of review has no longer any jurisdiction. But in

cases like the present, no such interference is necessary. Till the L. 30 is paid, the cause is still in dependence in the House of Lords, and upon the appellant's refusing to pay, the respondent may insist for a determination of the appeal, and obtain full costs.

No 25.

THE LORDS refused the petition without answers.

For the Petitioner, *George Currie.*

*Fol. Dic. v. 3. p. 199. Fac. Col. No 169. p. 264.*

Expenses by way of *Solatium.* See REPARATION.

Expenses against Foreigners. See FOREIGNER.

Claim for expenses cannot be made by a new process. See PROCESS.

See Hodge against Brown, No 118. p. 2651.

See Malloch against Boyd, No 11. p. 300.

See APPENDIX.