

Answered for the charger; *imo*, 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. *2do*, 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.

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 decree 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. 55. Fac. Col. No 66. p. 150.*

1787. July 25.

JOHN MACADAM *against* CREDITORS of CAMPBELL and COMPANY.

IN the ranking of the creditors of Campbell and Company, Mr Macadam, a preferable creditor in virtue of an heritable bond, followed with infestment, 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 infestment 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

No 21. more than compensate the loss arising to this creditor from the long delayed payments of interest.

Answered; In the particular case of adjudication, the law allows creditors to rank for the full accumulate sums, including penalties. But heritable bonds are in no other situation than personal, in which the penalty is restricted to the expense actually laid out by the creditor in recovering his money. For the penalties in his adjudication, Mr Macadam may be ranked *pari passu* with the other creditors.

THE LORD ORDINARY found, That Mr Macadam could only be ranked for his principal sum and annualrent, and for the penalty to the extent of the expenses incurred; reserving his claim upon his adjudication. And

THE LORDS adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Alva.* For Mr Macadam, *C. Brown.* Alt. *Blair.*
Clerk, *Robertson.*

Fol. Dic v. 4. p. 56. Fac. Col. No 344. p. 532.

1788. June 19.

WILLIAM ALLARDES *against* JAMES MORISON and ANDREW MURISON.

No 22.

A creditor having prevailed in a challenge of his ground of debt, at the instance of a third party, who was, however, found not liable in expenses, entitled to recur against the debtor upon the stipulated penalty for payment of such expenses.

MR ALLARDES lent to William Bogie a sum of money, for which, with annualrent and a liquidated penalty, the latter granted an heritable bond over a subject, in which he stood infest as proprietor, equally with two other persons, James Morison and Andrew Murison; and on the bond infestment followed.

This right was challenged by Morison and Murison, in an action of reduction*; but sustained after considerable litigation; though it was found, that no expenses were due by the pursuers.

Allardes afterwards brought a process of adjudication upon the bond, in which Morison and Murison appeared; and making offer to pay the principal sum and annualrents, while they denied that any part of the penalty could be exacted, objected to the passing of the adjudication; and

Pleaded; An adjudication is unnecessary when payment of a debt is offered to the full legal amount. Conventional penalties are only exigible as a recompence for the loss of annualrent, or in order to re-imburse the charges of diligence for recovery of the debt; but by no means on account of the expenses of any action which may take place with respect to it; *Fac. Col. 23d December 1757, Allan contra Young and Millar, No 19. p. 10047.* Wherever such expenses are due, it is so found; and thus they are repaid without the aid of the stipulated penalty. In the present case, any demand of expenses, under

* See 8th March 1787, No 11. p. 8335, *voce* LITIGIOUS.