To the *third*, That infeftment is given for the penalty, which is held to be an existing debt, though the LORDS, from their *nobile officium*, generally restrict it to the expenses really debursed. No 18.

"THE LORDS found, That William Duff was entitled to be preferred for his penalty, to the extent of the expenses in recovering his debt."

Act. *Hamilton Gordon.* Alt. *Burnet.* Clerk, *Kirkpatrick.*

Fac. Col. No 142. *p.* 213.

1757. *December* 23.

JOSEPH ALLAN, Portioner of Littlegovan, *against* JAMES YOUNG of Netherfield, and JOHN MILLER, Portioner of Hazzledean.

No 19.
The penalty of a mutual contract upon which adjudication has not followed, cannot be exacted, for indemnification of expenses incurred in discussing a suspension of the contract, where the other party has not been specially found liable in such expenses.

IN January 1750, Young and Miller entered into a contract with Allan, whereby Allan became bound to dispone to them certain heritable subjects which had belonged to George Arkle, dyer in Strathaven, and were conveyed to Allan in security of a debt. On the other hand, Young and Miller obliged themselves to pay to Allan the principal sum of his debt, extending to 2950 merks, with the bygone interest, and expenses incurred in securing the same, all to be accumulated at Whitsunday 1750, "with a fifth part of the said sum so accumulated, of penalty and liquidated expenses, in case of failzie." The contract contained other conditions; and concluded with an obligation on both parties to perform the premises *hinc inde*, "under the penalty of L. 10 Sterling."

The purpose of this contract was, that Young and Miller, as trustees for Arkle and his personal creditors, should, with Young's concurrence, bring the subjects to a roup; and in case of their yielding more than Allan's debt, apply the surplus for payment of the other creditors. By the contract itself, John Marshall, Allan's agent, was appointed clerk to the intended roup; and by a separate missive addressed by Allan to Young and Miller, he declared, that in case the subjects should not sell above the extent of his debt, he would, upon their application, free them from the engagements they had undertaken by the contract; but thus qualified, "I always being put *in statu quo* as I was preceding this date, you making intimation to me of your not chusing to hold bargain with me, on or betwixt and the 25th of March next.

The subjects were, in the beginning of March 1750, exposed to roup. John Scot offered for them 3820 merks; and James Stevenson having offered 3900, was preferred to the purchase. Both these offers considerably exceeded the extent of Allan's debt; but no caution was found by Stevenson, in terms of the articles of roup; nor did Marshal, the clerk, insist against Scot, the next bidder, agreeable to those articles. Young and Miller thereupon resolved to throw up their concern, and get free of the contract. They made an intima-

No 19. thereof to Allan three days before the time limited for that purpose by Allan's missive.

Allan however refused to pass from the contract, and charged Young and Miller with horning to implement the same, particularly to pay him the sum thereby stipulated, as the price of the subjects, with a fifth part more of penalty, as incurred through failzie, and also to pay the mutual penalty of L. 10 Sterling likewise therein contained.

Young and Miller obtained a suspension of the charge; in discussing which, they *insisted*, That as the roup had proved ineffectual for answering the intended purposes, and they had intimated their resiling from the contract in due time, they were not liable in the obligations thereof. Allan *answered*, That they were debarred from resiling by the roup, which left matters no longer entire; so that he could not be put *in statu quo*, as the purchaser might still insist for implement of the articles.——The LORD ORDINARY, by two consecutive interlocutors, "sustained the reasons of suspension;" to which the LORDS adhered. But upon a second reclaiming petition for Allan, they were pleased to "find the letters orderly proceeded, and decern." And Young and Miller having then reclaimed, the LORDS, on the 19th December 1755, "adhered to their last interlocutor, and refused the petition."

When these interlocutors were pronounced, neither party applied to the Court for recovering expenses from the other side; but during the vacation, which followed soon after the last interlocutor, Allan extracted the decreet, in the precise terms of the charge upon which it proceeded, namely, decerning Young and Miller to pay him, not only the accumulated sum stipulated by the contract, but also the fifth part more, and the other mutual penalty of L. 10 Sterling, as incurred through failzie.

Young and Miller offered payment of the principal sum, interest, and expenses of security; but Allan likewise insisting for the whole penalties, as an indemnification of his expenses of plea incurred in supporting the validity of the contract, Young and Miller obtained a new suspension as to these penalties; and thereupon Allan took payment of the principal sum and interest.

Pleaded for Allan, the charger,

1*mo*, Penalties were introduced into our law, to furnish a security to the creditor, which he might hold for indemnifying him of all expense and damage sustained through delay or stop of payment in any way whatever. In strict law, the whole penalty is due *ex forma verborum*, whenever the debtor allows the term to pass without payment or performance; and hence an adjudication is legally and validly led for the whole penalty the day after the term of payment. The LORDS indeed do sometimes modify exorbitant penalties; but in so doing, they act *ex nobili officio*, and take every equitable circumstance under consideration, so that all loss arising to the creditor by the debtor's not explicitly performing his obligation may be repaired. Thus, where a bond bore a penalty, but no stipulation that annualrent should be paid, the penalty was

allowed to be exacted to the extent of the interest, 29th November 1622, Sempill, No 2. p. 10033. Upon the same ground, in this case, the expenses incurred by the charger, in maintaining the validity of the contract, having exceeded the penalties, he is in equity entitled to exact these penalties for indemnifying him so far, and otherwise he would be a considerable loser. No 19.

2*do*, The charger pleads a *res hactenus judicata*, by the extracted decree of the Court, decerning for payment of the penalties, as well as the principal and interest. If the suspenders thought themselves aggrieved by the last interlocutors, whereon that extract proceeded, with regard to the penalties, they ought to have applied in due time, which they did not, whereby the decree became final. And,

3*tio*, Supposing the case open to review, yet decreet would still fall to be pronounced for the penalties, not only as due *ex pacto*, as well as the principal and interest, but in respect of the circumstances of the case, which show, that the charger was unnecessarily put to expenses exceeding the penalties, in litigating the objections made by the suspenders to their being bound by the contract, which now stand finally over-ruled.

Answered for the suspenders, 1*mo*, Conventional penalties have been always considered as highly unfavourable, so that both law and equity have concurred in restricting them. Though due *ex obligatione*, yet they have been confined to the reparation of that damage which the creditor appears to have truly sustained by non-performance. In the case of adjudications, the law specially allows either a fifth part of the principal sum more, or the conventional penalty to be adjudged for, according as a special or general adjudication is suffered to pass, in order to indemnify the creditor for the loss he is supposed to sustain by being obliged to take land for his money. But that is a peculiar privilege given by statute to adjudgers; and in no other case is a creditor allowed arbitrarily to exact penalties, without having incurred to the extent of those penalties the damage or expense thereby properly intended to be repaired. Interest is always understood to be due on a bond debt; and thence, in Sempill's case, the penalty was rightly taken, to supply the want of a stipulation of interest in the bond. Expenses of plea stand on a quite different footing. These are in no case due or exigible, unless the Court finds that a party has been litigious, and specially subjects him to the costs of his opponent, *in pœnam* of his offence. It is only the charges of expeding securities, or doing diligence for recovery of a debt, that are meant to be reimbursed by conventional penalties in bonds or contracts, (whereon no adjndication is led,) as such only are held to be strictly necessary, and in the view of parties at contracting, and not expenses of plea incurred in trying the question, whether the ground of debt is effectual or not?

2*do*, There is not here a *res judicata*, as to the exacting the penalties for indemnification of those expenses. The Court never had before the question as to such expenses under consideration. The words of the interlocutor were in

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.