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 infeft as proprietor, equally with two other persons, James Morison and Andrew Murison; and on the bond infeftment 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.

the name of penalty, seems to be even absurd; it having been expressly found, that 'expenses were not due.' No 22.

Answered; The pursuer was entitled to have his heritable bond guaranteed to him; and for this end the expenses in question were laid out. He has therefore the same claim to an adjudication for these as for the expense of executorial diligence, both the one and the other being necessary for rendering his security effectual, and recovering the debt. It is true, Morison and Murison have been found not liable to reimburse the pursuer; but that does not affect the obligation which lies upon Bogie.

The Lord Ordinary reported the cause; when

THE COURT found, that the pursuer was entitled to an adjudication in security of the penalty in the bond.

Reporter, *Lord Hailes.* Act, *G. Ferguson* Alt. *C. Hay.* Clerk, *Gordon.*

S. *Fol. Dic. v. 4. p. 55. Fac. Col. No 23. p. 39.*

1796. *May* 21.

Mrs JANET YOUNG, and her Husband, *against* Mrs JANET SINCLAIR, and Others.

No 23.
A decree *in foro*, 'in 'terms of the 'libel,' upon a bond containing a penalty, does not include expenses of process.

CAPTAIN ALLAN granted Mrs Janet Young an heritable bond of annuity for a certain sum, 'with a fifth part more of liquidate expenses in case of failie.' After his death, a doubt having arisen among his representatives which of them should be ultimately liable in payment of it; Mrs Young brought an action against one class of them, concluding for the arrears due to her, and for punctual payment of the annuity in time to come, 'and one-fifth part more, being 'the liquidate penalty and expenses, or stated damages arising from the failure 'in the regular payment of the said annuity, and costs and charges incurred 'in enforcing payment thereof.'

THE LORD ORDINARY, after hearing parties, "decerned against the defenders in terms of the libel; but, upon payment of the annuities, ordained the pursuers, upon the defenders' expenses, to grant an assignation in the defenders' favour." A decree, in these terms, was afterwards extracted.

Mrs Young having claimed expenses of process under this decree, Mrs Sinclair and the other defenders raised a suspension, in which they contended, that where a Judge, after hearing parties, pronounces a judgment which is silent with regard to expenses of process, none are understood to be given; *l. 3. God. De fruct. et lit. imp.*: That where a party extracts a decree, without craving an express judgment on that point, the incontrovertible presumption is, that he was convinced, if he had asked expenses when the Judge was master of the case, they would have been refused; and that this held although the decree