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

No 23. was in terms of a libel concluding for a penalty; 23d December 1757, Young against Allan, No 19. p. 10047.; 27th November 1761, Gordon against Maitland, No 20. p. 10050.

Answered; Whatever may be the case when an action is brought for payment of a debt not secured by a penalty, and the summons contains a random conclusion for expenses, where the document of debt contains a penalty which is concluded for in the summons, a decree, in terms of the libel, must include expenses of process. In other cases they are given because there has been some fault on the part of the defender; but when a conventional penalty is sustained to the extent now claimed, the ground of judgment is, that a party cannot, from considerations of equity, be deprived of the full penalty, which, at strict law, is due to him, without at least being indemnified for the expense incurred by him in making his debt effectual; 4th January 1740, Couper, No 16. p. 10044.; 19th June 1788, Allardes against Morison, No 22. p. 10052.

The Lord Ordinary on the bills reported the cause on memorials.

Observed on the Bench; When a decree is pronounced in terms of the libel, in absence of the defenders, the actual expenses of process are included; but they are not included where the decree is *in foro*, unless they are expressly given.

The Lords unanimously remitted to the Lord Ordinary to pass the bill, *quoad* the charge for expenses of the former process.

Lord Ordinary, *Polkemmet*. For the charger, *Montgomery*. Alt. *Tod*.

D. D. *Fac. Col. No 218. p. 513.*

No 24.
A conventional penalty in a lease, for mismanagement, exacted to the full extent.

1802, *February* 24. Henderson *against* Maxwell.

John Maxwell entered to the farm of Eastertown of Rochelhill, at Martinmas 1781, on a lease for 19 years, from John Henderson, the proprietor, which, among other clauses, contained one prescribing 'the course of labouring during the currency of the tack, and that under a penalty of L. 3 Sterling for 'each acre laboured otherwise than as above, to which the damages are hereby 'estimated, without power to any Judge to modify them on any pretence 'whatever.'

Not having adhered to the mode of management pointed out by the lease, an action was brought by Henderson before the Sheriff of Forfarshire, concluding for the stipulated damages. A proof was allowed, and the defender was 'decerned to make payment of L. 6: 18s. Sterling, being the penalty sti-'pulated by said tack, and incurred by the defender through his not manuring 'and improperly cropping,' &c. He was also found liable for the expense of plea, and the dues of extract.

A suspension of this decree was pleaded (4th February 1800) before the Lord Ordinary, who affirmed the judgment.