

*torie* against the Officers of State, of a debt due to the said William Gunninghame by the deceased John Millvain a bastard, the LORDS 'refused to give the pursuer expenses,' as in no case is the expense of a decree of constitution given.

No 23.

And though it was represented that others of the creditors had got their expenses decreed by the Ordinaries, where their claim either needed no proof, or where the proof had been led on a diligence; the LORDS 'refused, nevertheless, to give expense, leaving it to the pursuer to quarrel such decrees of the Ordinaries, if, in the event, the fund should not be sufficient for the debts.'

*Fol. Dic. v. 3. p. 199. Kilkerran, (EXPENSES.) No 5. p. 181.*

1781. July 3. JAMES OGILVIE *against* JOHN FYFE.

OGILVIE granted an heritable bond to Fyfe for L. 150 Sterling, on which an adjudication followed; The Incorporation of hammermen of Canongate, who were also adjudging creditors, agreed to pay up this debt, on getting a conveyance of the security. Fyfe restricted his penalty to the expenses he had really laid out, with interest from the date of each disbursement: and received payment accordingly. The conveyance was made out by the assignee's agent; and a demand having been made upon Fyfe, for so much of the expense thereof, as was reckoned equivalent to that of a simple discharge, he brought the matter before the Court by suspension, and

*Pleaded*; The suspender, in virtue of his adjudication, was entitled to have drawn his whole accumulated sum with interest; and, it was only on condition of getting his principal and interest paid down to him, without any deduction, that he agreed to give up his penalties. It would, therefore, be contrary both to good faith and equity, should the charger, at the same time, be allowed to keep his discharge, and to get back any part of the consideration which he gave for obtaining it.

It is perhaps the common, but by no means the universal practice, that the creditor pays for the discharge. But this practice is evidently owing to there being no other proper fund for the payment of such expense? and, therefore, it can have no influence here, where there was a fund, namely, the penalties, more than sufficient for that purpose. Had the suspender paid the expense now demanded, there is not a doubt but he might have charged it against his debtor, and have insisted for payment of it out of the penalties, before denuding. And, had the charger refused to allow these expenses at that time, the consequence must have been, that the suspender would have held by his adjudication, and would have drawn in the name of penalties about L. 25 Sterling more than he received by the transaction in question.

No 24.

In practice the creditor pays the expense of a discharge on conveyance, but where a creditor had given up his penalties, he was found not liable for such expense.

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