awarded by the Court; and if they awarded no expense of process, either because none were sought or none were given, a decree for the penalty could only carry the expense of putting it into execution. So found, 23d December 1757, *Allan* against *Young*. This decision held to be law, and approved of in the case, 16th July 1779, *Montgomerie Beaumont* against *Thomson and Alexander*.

Again, 27th November 1761, *Gordon* against *Maitland;* also, 4th January 1740, *Cowper* against *Stewart;* observed by Kilk., p. 375.

The case is different in adjudications: there the expense of process is recovered out of the penalty, even in cases where the penalty is restricted to necessary expenses.

The Lords were of this opinion, August 1774, *Henry Davidson* against *Sir Hector M'Kenzie*.

1764. *June* 23. GEORGE M'KAY *against* MUNRO of NEWMORE.

IN the process of proving the tenor, George M'Kay, Esq. against Munro of Newmore; the Lords finding it proven that Newmore had wilfully abstracted a sheet of a tailyie, of which the tenor was sought to be proven; they fined him in L. 20 to the poor, and found him liable in the expenses of process.

See B. Sederunt, 16th December 1761, *Harrison* v. *Wilson*.

1774. *July* 14. HARRISON *against* WILSON.

HARRISON, in an action before the Sheriff of Dumfries, obtained decreet against Wilson. Of this decreet, Wilson presented a bill of suspension, which at last was refused; but, in obtaining this refusal, Harrison was put to an expense of L. 7 : 17 : 6.

For this sum, he brought a process against Wilson before the Sheriff of Dumfries, in which the Sheriff pronounced this interlocutor, (4th March 1773):— "Finds the libel relevant, and that the pursuer has a just title to insist for repetition of the expenses libelled; as, otherways, a rich litigious debtor might expose a poor creditor to expenses exceeding the amount of his just debt."

The defence pleaded for Wilson was, that, as the Court of Session had decreed no expenses to Harrison, it was not competent for him to ask them in a subsidiary action before the Sheriff. But this plea was absurd. The Court of Session, in passing or refusing a bill of suspension, by their forms, are precluded from giving expenses; and, therefore, their not giving them could afford no defence in the present action before the Sheriff. For although it is a general rule that one cannot ask expenses by a subsidiary action, yet this only holds in cases where the Judge has it in his power to give expenses, but gives them not, either because they are not sought, or that he thinks them not to be due. But where he is precluded from giving them, merely by form, it is competent to ask them by a subsidiary action.