

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 stipulated 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.

In appealing to the Court, the tenant

Pleaded; The conventional penalty should be restricted to the actual damage incurred; Stair, B. 1. T. 10. p. 104. Now, this farm has been all along managed in a most beneficial way for the landlord, so that what was formerly heath, is now producing very valuable crops; yet the tenant is subjected in payment of penalties and expenses, without any damage having been incurred.

Answered; A tenant is liable in damages for every infringement of any stipulation in his lease; and to prevent the tedious and expensive investigation necessary for proving the real damage in such a case, a conventional penalty is here substituted, which ought to be exacted for the reasons which induced its insertion. A penal sum in a bond, over and above performance, it is true, is always restricted to the actual damage incurred, otherwise it would be liable to the objection of usury. But the case is different, where the penalty is inserted as a liquidated satisfaction in lieu of damages, or a fair equivalent agreed to be accepted by the one party, and paid by the other, for departing from the terms of the contract, Principles of Equity, b. 3. c. 2. *Inst. De Verb. Oblig.* § 7. Marshall against Cunningham, 13th December 1780, No 39. p. 9183.

The Court adhered to the judgment of the Lord Ordinary*.

Lord Ordinary, *Cullen.*

Alt. *Inglis.*

Act. *Maconochie.*

Agent, *Tb. Robertson.*

Agent, *J. Hanton.*

Clerk, *Home.*

F.

Fac. Col. No 25. p. 49.

* Upon the same principles, the case of Little Gilmour against William Mutter, June 1797, was decided, *see APPENDIX.*

See APPENDIX.