

disappoint that useful and necessary law of selling by roup; for, where many annualrenters affected such an estate, the buyer could not disburden the lands of these infestments, without giving them likewise their penalties, which would exhaust more than the price he was to pay; for he could not compel them to take their principal sum and annuals, unless he likewise offered the penalties. But it was *answered*, That the 6th act 1695, provided a clear remedy for this, where the buyer is allowed to consign the price in the Town of Edinburgh's hands, where the creditors are unwilling; and in that case he is declared free, and the lands disburdened; and the infesters, rather than have their money consigned, only to pay them 3 *per cent.* will think it better to accept of their principal and bygone annuals; which method makes room for posterior creditors to get something; whereas, if the annualrenters got their expenses, it might exhaust the whole price. I find, by the Roman law, retention was allowed, but action refused to one who has bestowed melibrations in building on another man's ground, where the *dominus soli* vindicates the whole; § 30. *Instit. De Rer. Divis.*

*Fol. Dic. v. 2. p. 54. Fountainhall, v. 1. p. 770. & v. 2. p. 101.*

1702. January 9.

SIR JOHN COCHRAN of Ochiltree *against* The LORD MONTGOMERY.

THE Lord Ross, Lord Montgomery, and seven others, gave a written commission to Sir John Cochran to bid at the roup of the poll, imposed by the act of Parliament 1693, and not to exceed L. 40,000 Sterling, unless he were allowed by Colonel Erskine and Sir Thomas Kennedy to bid further. Sir John was preferred as the greatest offerer, but he exceeded their commission in L. 4100 Sterling. Thereafter the tacksman and partners entered into a contract, whereunto there were about 22 assumed; and the Lord Montgomery, by a missive letter, declared his willingness to be one of that number; and sent a commission and warrant to William Cunningham of Brownhill to vote for him at the meetings as his proxy, and accordingly he is marked in two sederunts as acting for my Lord Montgomery. The tack eventually falling to be detrimental, and my Lord Montgomery conceiving himself not bound by the foresaid letter and proxy, neither of them being formally recorded in the society's books, Sir John Cochran pursues him to relieve him of a proportional part of the loss and damage resulting from the tack.—*Alleged* for my Lord, *absolutor*, because you exceeded our commission in bidding beyond the L. 40,000 to which you was limited.—*Answered*, I had the concurrence and allowance of the two assessors adjoined to me, and they being present and not contradicting, are presumed to have given their consent.—THE LORDS found taciturnity was not a sufficient concurrence nor acquiescence here, but *ex officio* ordained them to be examined

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The Lords acquitted one of many contractors, who had resiled, he paying the penalty, the words 'by and attour performance' not having been in the deed.

The tacksmen of a branch of the revenue assumed partners, under the *proviso*, that these partners should find caution by a certain day, or pay a penalty. One of them was found free on paying the penalty.

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upon oath if they consented.—*2do*, *Alleged* for my Lord, I cannot be liable as one of the 22, because my letter was not only an offer, and never accepted, but repudiated ay till they found they would be losers; and if it had been profitable, he could never have compelled them to communicate any share of the gain, and so it was plainly *societas leonina* as to him; and the first nine undertakers were to have been liable *in solidum*, because *electa erat industria personæ*, and they knew one another's solvency and sufficiency: But in 22 assumed they can only be liable *pro rata* for their 22d share, seeing they had not that knowledge and confidence in one another; and Sir John might as well have assumed 200 as 22, for whom it were absurd to think the Lord Montgomery should stand liable.—*Answered*, The letter is conceived in the most strong and obligatory terms of his design and willingness to continue a partner, and is further strengthened and adminiculate by his proxy given to Brownhill. In the reasoning among the LORDS a decision was cited, (No 25. p. 8411.) between Sir Robert Montgomery and one Brown, where, notwithstanding of a letter declaring he intended to adhere to the bargain, yet there was found room to resile, *et locus pœnitentiæ*; but here the LORDS found Lord Montgomery liable for his 22d part upon his letter and commission.—Then my Lord *alleged*, in the *third* place, That the most he could be found liable in was only for L. 50 Sterling, as the penalty annexed to his non-acceptance, in so far as, by an express quality and condition of the contract, it is appointed that all the partners are, betwixt and the 6th of August 1694, to grant bond and caution for their proportion, and in case of failzie, their share is to be void and null as to them, but to accresce to the rest, and to be liable in L. 50 Sterling of penalty.—*Answered*, This being adjected in further corroboration of the contract, can never be de-torted to liberate them from the same, but must be interpreted *modo habili* to be over and above implement; and if by your own fault you did not give bond and caution, you ought to reap no benefit thereby, else after your entering into the society it should be in your power to be a partner or not.—THE LORDS found, by the foresaid quality and conception of the contract, my Lord Montgomery was free upon his paying the L. 50 Sterling of penalty, by which interlocutor he was relieved of L. 200; for his 22d share amounted to L. 250 Sterling. As to the being liable *in solidum* or *pro rata*, I remember some decisions in the *Rota Gennensis* shews cases where *socius non tenetur socio in solidum*.

1702. February 21.—SIR JOHN COCHRAN having reclaimed, by bill, against the interlocutor marked 9th January 1702, betwixt the Lord Montgomery and him, and the LORDS adhering, he gave in his protestation for remedy of law to the Parliament; as also against the interlocutor assolizing Tarbet and Prestonhall, his brother, from being partners of the poll, on the like or parallel grounds; for my Lord Tarbet, in absence of his brother, having signed for him, and he, on his coming to town, declining to accept, the LORDS found Tarbet's obligation *pro alio* resolved only into the penalty, *Vide* § 3. *Institut. De inutil stipulat.*

for which the doctors give this reason, that all contracts must take their origin *ex nostra persona*, and where they do not, *non habet obligatio radicem unde fluat in paciscentem, nec basin ubi stabit*; vide *l. unic. C. Ne uxor pro marito*; and in these cases, some maintain they are obliged no further but to do their utmost diligence and endeavours to cause the other perform; but generally, they conclude he incurs the penalty expressed, *et ejus solutione liberatur*, unless where it bears *salvo manente pacto*, which we call over and above the premisses; and then both are due, and paying the penalty does not exoner.

*Fol. Dic. v. 2. p. 54. Fountainball, v. 2. p. 136. & 150.*

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1706. July 27.

THOMAS BAIRDINER of Cultmill, against WILLIAM DRYSDALE, Tenant there.

THOMAS BAIRDINER having acquired the lands of Cultmill by an adjudication against the heritor, did enter into a contract with William Drysdale the tenant, who had married one of the heritor's two daughters and heirs portioners, whereby the said Thomas Bairdiner was obliged to renew the tack for the space of 19 years upon payment of the former tack-duty, and to grant him a discharge of a year's rent then due; and William Drysdale obliged himself to grant a disposition with consent of his wife, of all pretence or claim that she had to the lands, and to cause her sister to do the like betwixt and a certain day, under the penalty of 100 merks in case of failzie. William Drysdale being charged to implement his obligation, he suspended upon this reason, That to procure his sister-in-law's consent to the disposition, was *factum imprestable*, for she would by no means consent; and therefore the charger could only seek damage and interest, which he liquidated in the obligation to 100 merks of penalty; upon payment whereof the suspender is free, seeing the clause, by and attour implement of the premisses, was not adjected.

*Answered* for the charger; as the sanction of a law is only to enforce the observation of it, by subjecting transgressors to the penalty; so the adjecting of a penalty to an obligation is only designed as a compulsory upon the debtor to fulfil, and to render the obligation effectual; the words by and attour implement of the premisses, being only added ordinarily *ob majorem cautelam*. And if it had been intended that the suspender should be liberated upon payment of the penalty, that would have been exprest, as also that all things done in contemplation of the foresaid obligation should be restored. It is of no moment that the suspender pretends he cannot procure his sister-in-law to consent to the disposition; for he ought to have foreseen that difficulty before his engagement. And persons obliged to consent of third parties, were not liberated from the principal obligation, even where no penalty was adjected, but found liable to fulfil *in forma specifica*; Purie against Couper, *voce WARRANDICE*;

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The debtor in an obligation *ad factum prastandum*, under a penalty, without the clause, 'by and attour' the implement of the premisses, found liable only, in case of non-performance, for the penalty.