

No 14.

Wedderburn against M'Pherson, *voce* SURROGATUM. Far less can it be conceived, how the adjecting of a small penalty, (which is only done for defraying the charges of diligence in, case of not performance) should render it arbitrary to the debtor to perform or not as he pleases; when the principal obligation may be ten times more valuable than the penalty. *Vide* Stair, Instit. L. I. T. 17. § 20. *in fin.*

*Replied* for the suspender; The cited decisions do not meet the case in hand, where the penalty is not conceived by and attour performance; but adjected in place of fulfilling the obligation.

THE LORDS found the letters orderly proceeded for the penalty; but suspended them as to the principal obligation.

*Fol. Dic. v. 2. p. 54. Forbes, p. 132.*

1739. February 2. TRUSTEES of MENZIES *against* DENHAM.

No 15.  
Penalty and termly failzies found not preferable in a ranking.

WHERE a creditor was infeft upon an heritable bond for security of his annualrents, which contained this usual clause of reversion, 'Redeemable always and under reversion, by payment of the principal sum and annualrents, with the penalty and termly failzies if incurred, and expenses of infeftment to follow hereupon,' it was found in a ranking for the price, that the creditor in said bond was only preferable for his principal sum and annualrents, but not for his penalty or termly failzies, &c.

*N. B.*—Though the annulreuter has no preference for the penalty, termly failzies, or even expense of his infeftment, not being infeft for security of any of these, yet by the quality of the clause of reversion, he cannot be obliged to denude or convey till he be satisfied of all; in which if he persist, the only remedy is consignment.

*Fol. Dic. v. 4. p. 56. Kilkerran, (PENALTY.) No 1. p. 375.*

No 16.

1740. January 4. COUPER *against* STUART and his SPOUSE.

WHERE a bond containing a penalty is suspended, there is no avoiding finding the letters orderly proceeded for the penalty, unless the suspender pay at the bar; for it may be necessary to use diligence upon the decree, which may exhaust the penalty: But if thereafter payment shall be offered of principal sum and annualrents, together with the necessary expense, and the same shall be refused, it will be the ground of a second suspension.

This is understood *in esse* in all decrees, finding the letters orderly proceeded for the penalty: Wherefore a petition having been given in against an interlocutor, so far as it found the letters orderly proceeded for the penalty, the refusing whereof simply might have done the petitioner more harm than was intend-

ed, the deliverance was, ' to refuse *in hoc statu*, reserving to the suspender, if payment of principal, annualrents, and necessary charges should be offered and refused, to suspend as accords.'

No 16.

*Kilkerran, (PENALTY.) No 2. p. 275.*

1742: December 20. ROBERT ARNOT of Balsilly *against* Sir JOHN ARNOT.

SIR JOHN set a tack of a mill for 19 years to the charger, for the yearly rent of 2000 merks, to commence at Martinmas 1742; and the tack concluded with the following usual clause: And, lastly, " Both parties bind and oblige themselves, and their foresaids, to perform the hail premisses to others, under the penalty of L. 100 Sterling, payable by the party failzier to the party observer, or willing to observe, by and attour performance."

Sir John having forgot to warn the tenant, who possessed the mill, to remove, he took advantage thereof, in order to keep possession for another year; whereupon Balsilly charged Sir John with horning for the whole penalty, who suspended upon this ground, That a conventional penalty could not be exacted further than to make up the real damage the party sustains by failure of implement. The Lord Ordinary on the bills passed the bill for L. 50 Sterling, but refused as to the remainder.

Sir John reclaimed, and *pleaded*, That as he was bred to the military life, and had been much out of the kingdom, he was ignorant of the necessity of warning the tenant who was in possession; and though this was not sufficient for a legal diligence, it ought to have some weight in the present argument; more especially as there was a solid difference in law betwixt a penalty stipulated, in case of not-performance, and a penalty stipulated by and attour performance. In the *first* case, The party has his option; and if he choose not to perform, he ought to pay. In the *latter*, the bargain is what is principally in view, which the parties mutually bind themselves in all events to implement, and the penalty is only to enforce performance; it is not supposed to be the meaning of parties, that either of them should put any money in his pocket, or catch at any *lucrum* by means of the stipulated penalty; it is indeed a good fund to make up what either has suffered by the other's failure, that is, for expenses and damages, but it can go no further. However, supposing a conventional penalty were to be strictly interpreted, the whole can only be due in case of a total failure; if the tacksman in possession could not be got removed for a week, or a month, it is not possible to plead the whole penalty could be incurred in that event; just so, in the present question, the delay of one year of nineteen cannot infer that the whole is incurred, for a partial failure should only imply a claim for a proportional part of the penalty; and this doctrine ought to hold, whatever the occasional damages may be. It is true, that where

No 17.  
Is a conventional penalty wholly incurred, where there is only a partial or temporary failure?