

No 38.
Exorbitant
penalty.

time the charter was expedite, the rights belonging to the said Earl, were, by the act Quarto Georgii, vested in the person of the Commissioners of Enquiry.

THE LORDS sustained both objections.

A&C. Alex. Nairn.

Alt. John Ogilvie.

Clerk, Mackenzie.

Fol. Dic. v. 3. p. 4 Edgar, p. 48.

No 39.
Exorbitant
penalty.

An apprising led for termly failzies, in an infestment of annualrent, sustained only to the extent of the true interest and damage of the apprifer.

1677. November 29.

ORROCK against MORRIS.

WILLIAM ORROCK of Balram, having used an order of redemption of several apprisings against his estate, pursues a declarator against David Morris, That the apprisings, in so far as not satisfied by intromission within the legal, are yet unexpired by the order, and satisfiable by payment of the surplus; which coming to an account, it was *alleged* for the pursuer, That the sums whereupon these apprisings proceeded, were secured by infestment; which, though they bore requisition, yet in the clause of requisition, there was only an obligation to pay the principal sum, annualrent, and penalty; but not to pay any termly failzies; and yet the apprisings were led for all the termly failzies, which should have abidden declarator; albeit they had been in the clause of requisition. *2do*, Such failzies, even after apprisings, are modifiable by the Lords.—The defender *answered*, That penalties in bonds, after apprisings, which is the ultimate diligence, are not accustomed to be modified, or the apprising to be quarrelled on that ground; and the termly failzies are but a penalty for the annualrent.

THE LORDS found, That if the termly failzies were not mentioned in the clause of requisition, for which the apprising proceeded, they should not at all be sustained in the account, but deduced; and though they were in that clause, that they ought to be modified according to the true damage and interest of the apprifer, and that they were not in the case of ordinary penalties in principal sums.

Fol. Dic. v. 1. p. 9. Stair, v. 2. p. 568.

No 40.
Exorbitant
penalty.

A penalty on a principal sum, where exorbitant, was restricted to the tenth part of the principal sum; and this after ad-

1680. November 30.

EARL OF PANMUIR against DURHAM.

THE Earl of Panmuir having wadset Durham of Grange's lands, for 26000 merks of principal, and 5000 merks of penalty; containing a clause, That seeing Panmuir had supported him in money, and lent him in his necessity, that if he happened to sell his land, he should give my Lord the first offer, and prefer him, he paying as great a price as another would give. Panmuir adjudges for the same sums, and pursues for removing. The defender offers the principal and annualrent at the bar, and so much of the penalty, as the Lords should modify, providing that the pursuer should renounce the clause of preference. The pur-

lives and lives, That the decret of adjudication, made principal and annualrent into one sum, bearing annualrent; after which there could be no modification, which was never sustained in appraisings; in place of which adjudications are now come.—It was *replied*, That the Lords had been frequently in use to modify penalties in appraisings, and adjudications, if they be exorbitant, especially before they attain possession, or come to singular successors; and it were against reason, that if an indigent debtor should make a penalty equivalent to the principal, that the single sentence of adjudication, proceeding upon a summons of six days, should exclude all remedy against the common privilege of all foreign courts, to modify exorbitant penalties; which cannot be hindered, though parties should, upon never so peremptory terms, renounce the same; and, therefore, the Lords always modify terms failzies and penalties in adjudications and appraisings; and, as to the clause of preference, it is an unjust monopoly, for who would ever enter in terms of buying the defender's land, if he knew it were to no purpose, but that Panmuir would get it: But seeing this clause is contained in the contract of wadset; if Panmuir should prevail and reserve it, it would infer taking of usury more than the annualrent; but, being in the wadset, it can only be understood to be in the same, while it stands unredeemed.

THE LORDS found this penalty exorbitant; the ordinary penalties being 100 pounds for 1000 merks, which doth not so increase when sums become great; and therefore they modified the penalty to the tenth part of the principal, and the annualrent thereof since the adjudication, and decerned Panmuir to renounce simply all contained in the wadset, without exception of the clause of preference.

Fol. Dic. v. 1. p. 9. Stair, v. 2. p. 806.

1757. August 5. CREDITORS OF KINMINITY against JOHN GORDON of Cluny.

UPON the 2d of February 1737, Sutherland of Kinminity, granted an heritable bond to Thomas Arrot, for L. 3000 Sterling; upon which he was infest. This debt, Arrot conveyed to John Gordon; who was also infest.

In February 1744, Gordon led an adjudication for the debt itself, and L. 415 of annualrents then due, and L. 600 of penalty, making in all L. 4015.

In June 1744, the lands of Kinminity were sequestrated, and a factor appointed, with the burden of paying to John Gordon, the annualrents of his principal sum; which were regularly paid after the sequestration.

When the creditors came to be ranked, Mr Gordon, being the preferable creditor, claimed the whole sum in his adjudication, including the penalty.

The other creditors *objected* to this; because, in that manner, Mr Gordon would not only receive his principal sum, with the L. 415 of interest, and the expence of his charter, and interest of that expence, but also L. 600 of penalty, and fourteen years interest, upon that sum, amounting in all to L. 1020, while, at the same time, the other creditors would receive no part of their debts.

No 40.
judication
had been led.

No 41.
Whether the
penalty of an
adjudication
can be re-
stricted to the
real expences?