

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 annulrenter 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-