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.

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

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. one refuses to implement the bargain, there damages ought to ensue without limitation; but it is believed the legal construction of a stipulation for penalty is to liquidate the damages, that they shall not exceed that sum in case of inability to perform. To illustrate this, suppose the mill in question had been evicted, whereby performance became impossible, it is believed the charger's claim for damages could not exceed the L. 100 Sterling, whatever proof he might offer of great profits on his tack. For the same reason, where there is a partial failure, without the suspender's fault, whereby the charger's entry is delayed for a year, his claim of damages ought not to be sustained beyond a proportion of the penalty. See a case observed by Sinclair, 1549, Home *contra* Hepburn, No 1. p. 10033.; and the 20th June 1710, Hamilton, No 7. p. 3153.; 22d February 1639, Johnston, No 9. p. 10037.

THE LORDS remitted to the LORD ORDINARY to pass the bill; and what was the issue of this question the collector knows not.

C. Home, No 220. p. 362.

1755. *February* 19. DUFF *against* CHAPMAN.

No 18.
An heritable creditor found preferable in a ranking not only for principal and interest, but for the penalty, to the extent of all expenses incurred in recovering the debt.

IN a process of ranking of the creditors of Alterlies, William Duff being preferred, *primo loco*, for the principal and interest contained in an heritable bond and infeftment; he also claimed preference for the penalty, to the extent of the expenses of infeftment, of the costs of suit in this competition, and further, of the costs of suit in a former competition for the same debt, upon another estate, which belonged to a co-obligant in the bond, but wherein he had been cast.

Chapman admitted that Duff should be preferred for the expenses of the infeftment, and of diligence, if any, against the debtor; but objected to the costs of suit in both competitions; 1*mo*, For that the terms of this bond were, "for security of the principal sum, annualrents thereof, that shall happen to fall due, and penalty if incurred, and the other sums, charges, and expenses, contained in the reversion, if they be debursed and expended in the debtor's default. Now, the expenses in neither of the competitions were incurred through the debtor's default; and, 2*do*, The expenses of the first competition were incurred in a different ranking with other creditors upon an estate belonging to another person, and were incurred by reason of the pursuer's litigiousness; for he was postponed. 3*tio*, Granting he had a claim against the debtor for the penalty, to the extent of these costs, yet he ought to have no preference in competition with other creditors; because it was an absurdity that lands should be affected by an infeftment for a debt taken before the debt existed.

Answered to the *first* and *second*, That all the costs justly expended in the recovery of the debt, and by consequence the expense of competition, are incurred through the debtor's default.