

- No 30.

*Pleaded* in a reclaiming bill; The intent of the clause was to have it in the power of the father to provide for the children of the first marriage, notwithstanding the obligation he came under by the contract with his second wife, but not to bind him up to give them these sums; and accordingly there is no obligation in their favour, but a faculty reserved to him of granting bonds of provision. To consider this as an obligation would infer an inconsistency, as it is stipulated in favour of the children of Anna Smart, that they should succeed to the shares of those that should fail. Now, as the power of division behoved to remain with him, he could elude this substitution, by allotting the whole sum, or near it, to the survivors; but considering it as a faculty, there arose no debt, and consequently no substitution till the bond was actually granted.

No inference can be drawn from the submission betwixt Thomas Mercer and his daughter Jean, of her right of substitution, as she submitted all pretences, and her claim was the same, whether the shares of the deceased never were a burden on the sums in her mother's contract, or returned to her by the substitution. The bond, in fact, was never granted to Thomas Mercer, in regard of his having received more from his father in his life.

*Answered*; Thomas Mercer's intentions, when he entered into the second marriage, was to provide the children of the first, as it was reasonable he should, and therefore he burdened the contract with 6000 merks to them, over which he reserved no power of division, as he substituted the children of the second marriage *per capita* to the deceasers. A substitution to a right is proper, but a substitution to a faculty is something unheard of; and Jean having right to this substitution, he entered into a submission with her upon that right. There could have been no dubiety, if the clause had not referred to a bond to be granted, which does not appear; but this is only *falsa demonstratio*, and there is no evidence the debt was satisfied in the lifetime of young Thomas Mercer.

THE LORDS adhered.

Act. Lockhart.

Alt. Ferguson.

Clerk, Kirkpatrick.

Fol. Dic. v. 2. p. 24. D. Falconer, v. 2. No 46. p. 44.

No 31.

1753. August 11.

STEPHEN BROOMFIELD of Mains *against* JOHN YOUNG of Shankfoot.

By minute of tack, dated 9th April 1750, Stephen Broomfield set to John Young the lands of Hassendean for the space of five years, for which Young was to pay a certain yearly tack-duty; and the minute concludes with these words, 'And all parties agree, that this minute be extended on stamped paper, betwixt and the first of May, under the penalty of L. 10 Sterling, to be paid by the party failer to the party observer or willing to observe.'

A few days after the date of the said minute, John Young intimated under form of instrument to Stephen Broomfield, that he resiled from the agreement of entering into a five years tack; whereupon Stephen Broomfield brought a

A minute obliging parties to extend a tack on stamped paper, under a penalty, but not bearing 'attour per- formance,' is binding, and cannot be resiled from on paying the penalty.

process against him, concluding that he should be obliged to enter into a tack of the said lands, and to perform all the stipulations incumbent on him by the said minute.

*Pleaded* for the defender, That he can be no further liable than to pay the penalty of L. 10 Sterling, as the minute does not bear that the penalty was to be paid by and attour performance; and therefore each party was at liberty to resile from the bargain upon payment of the penalty. Penalties were first introduced by the Roman lawyers in obligations of this kind, *quæ in facto consistunt*; because if the fact was not performed, the creditor had an action *ad damnum et interesse*; but as this damage was always uncertain and illiquid, and depended upon a difficult proof; to prevent these questions, penalties were adjoined to such contracts; which penalties were understood to come in place of and to liquidate the *damnum et interesse*, as is plain from § 7. *Inst. De verb. oblig.* From the example of the Roman law, penalties are with us usually adjoined to contracts which consist in performing any thing; and the same construction must take place that these penalties stand for the damage in case of not performance; and therefore where performance is to be insisted for, it is provided by the contract, that the penalty shall be paid by and attour performance; and where that clause is not added, the Lords have found that the penalty only is due; Forbes, 27th July 1706, Bairdner against Drysdale, *voce* PENALTY.

*Answered* for the pursuer, That the adding of a penalty does not give the parties an election of either performing the obligation or paying the penalty as they please, Stair, *Inst. L. 1. T. 17. § 20.* the penalty being only added as a compulsive on the debtor to fulfil, and to be a fund for paying the expenses of compelling performance; though these words 'by and attour performance,' be commonly added, yet that is only *ob majorem cautelam*; and though they be not added, yet the parties are obliged to perform their contract if it be in their power, as it is only *loco facti impræstabilis*, that *damnum et interesse* succeeds. The case cited by the defender from Forbes, was a fact of this last kind, the defender having obliged himself under a penalty to cause a third party subscribe a disposition to lands; and as the defender could not compel the third party to subscribe the disposition, he could only be liable in the penalty; but where the fact is prestable by the defender, he must perform it, if the pursuer insist for performance, as the Lords have frequently found; particularly 19th March 1630, Crichton *contra* Pirie, *voce* PENALTY; and 27th December 1695, Beattie *contra* Lambie, *IBIDEM.*

"THE LORDS repelled the defence, that the defender was only obliged to extend the minute on stamped paper, under the penalty of L. 10 Sterling, and found him liable in that penalty, the same being expended; and also found him liable in payment of the bygone rents already fallen due, and of the rents which shall become due in time coming, in terms of the minute of tack."

Act. Geo. Pringle.

Alt. And. Pringle.

B.

*Fol. Dic. v. 4. p. 24. Fac. Col. No 89. p. 134.*