

1775. July 27. JOHN ANDERSON *against* MARGARET BUCHANAN.

HUSBAND AND WIFE.

Execution may be used against a wife's person upon her obligation *ad factum præstandum*.

[*Faculty Collection*, VII. 111; *Dictionary*, 6081.]

JUSTICE-CLERK. It is strange if a wife cannot be bound along with her husband by a deed, as much as by the operation of the law.

HAILES. As the case now stands, we must hold that the obligation under which the woman came, was fair and onerous. She can perform it, and it is unjust and obstinate in her to refuse to perform it. There must be a remedy.

On the 27th July 1775, "the Lords found the letters orderly proceeded."

Act. J. Boswell. *Alt.* H. Erskine.

Reporter, Coalston.

1775. July 27. ANDREW PITCAIRN *against* UMPHRY and ANDERSON.

DAMAGE AND INTEREST.

One who has been imprisoned upon a recognizance entered into for another person, has no claim for a *solatium*.

[*Fac. Coll.*, VII. 113; *Dictionary*, 3,161.]

KAIMES. I doubt how far consequential damages are to be allowed as well as direct. There is a case to this purpose in the Roman law. If a man purchased wheat for his slaves, and the wheat not being delivered, the slaves died of famine; in that case the seller was not liable, because the damage was only consequential.

MONBODDO. The cautioner was bound to pay: Why did he not pay?

COALSTON. This poor man has been most cruelly used. There can be no doubt as to the expenses of the recognizance. The other claims of damages, for imprisonment, and for a *solatium*, are founded in equity; but I doubt how far there is law to support them.

COVINGTON. I agree as to the general rule of law; but this case is different, for Umphry and his associates ought to have taken up the recognizance when they settled with the officers of the revenue.

COALSTON. A cautioner ought to pay; and if he does not, he cannot lay the loss on the principal debtor. But here both debtor and cautioner were disput-

ing the claim, and the debtor ought not to have neglected the interest of the cautioner : hence this case may merit a separate consideration from the common case.

PRESIDENT. The damage here is rather direct than consequential.

On the 27th July 1775, "The Lords found no damages or *solatium* due ;" altering Lord Pitfour's interlocutor.

Act. A. Crosbie. *Alt.* Alexander Abercrombie.

Diss. Coalston, Auchinleck, Stonefield, Hailes, Covington, President.

Non liquet,—Justice-Clerk.

1775. July 27. WILLIAM HART *against* JOHN and JAMES NAESMITH.

ADJUDICATION—*PLURIS PETITIO*.

Inferred from adjudging from the termly failyies as well as the penalty in the bond.

[*Faculty Collection*, VII. p. 112 ; *Dictionary*, 119.]

KAIMES. Termly failyies are the operation of parties, as much as penalties : why should the one part of their contract be less effectual than the other.

COVINGTON. Termly failyies and penalties are calculated for different purposes. Termly failyies are intended for answering the expense incurred in levying the annualrent. Now that expense does not appear, and therefore the adjudication contains a *pluris petitio*. This will prevent the legal from expiring.

PRESIDENT. In the case of *Dr Park* this was found to be irregular.

COALSTON. Here penalties are twice demanded.

KAIMES. While an adjudication is only a *pignus prætorium*, every objection may be listened to ; but when once there is an expiry of the legal, the adjudger is no longer creditor, but proprietor.

JUSTICE-CLERK. A penalty is commonly one-fifth part of the principal, but there is no law for this. A creditor, however, cannot take an adjudication for exorbitant termly failyies to the amount of 40 *per cent.* as in this case.

On the 27th July 1775, "The Lords found that the defenders have not the benefit of an expired legal, but must account for their intromissions ;" altering Lord Kennet's interlocutor. On the 10th August 1775, they adhered to their interlocutor.

Act. R. M'Queen. *Alt.* J. Morthland.

Diss. Kaimes, Stonefield, Kennet.