

P E N A L T Y.

1549. *March 22.*HOME *against* HEPBURN.

IN causa Georgius Home de Broxntouth *contra* Jacobum Hepburn de Kirklandhill, Dominum de Waddel et alios duos penes 4 lib. monetæ Scotiæ sibi promiss. per illos pro portionibus, viribusque, casu quo, infra certum tempus non deliberaverunt dicto Georgio quendam Anglum ad personam ipsius Georgii, in qua re ipsi defecerunt et exceperunt, quod dicta summa apposita erat nomine pœnæ adjecta, et quod de practica Scotiæ pœnæ non prestantur nisi quatenus interest, et ipsi offerebant interesse actoris in hoc casu, et ejus liquidationem petierunt ab eo ipso; quia hoc casu pœnam simpliciter petebat. Interlocuti sunt domini in re presenti, penes deliberationem angli promissam sub pœna, hanc pœnam præcise peti posse in odium anglorum, in favorem republicæ, nec actorem cogendum accipere interesse, cumque in hoc casu difficillima foret probatio ipsi actori. Et ita definitive condemnarunt reos in dicta pœna, licet regulariter, extra hunc casum, de practica regni, pœnæ conventionales non possunt exigi, nisi quatenus interest actores, quia sapiunt quendam usuram et inhonestum questum, quod de jure canonico vide in cap. "Suam," exa. de pœnis, et in cap. "Abbas," exa. de iis quævis metusve causa gesta sunt.

Fol. Dic. v. 2. p. 53. Sinclair's MS. p. 96.

1622. *November 29.*SEMPLÉ *against* SEMPLÉ.

MR GEORGE SEMPLÉ having charged Bryce Semplé as cautioner to pay a sum contained in a bond made to Mr George for the penalty, the letters were found orderly proceeded for the principal sum of 500 merks. The question be-

No 1.

Conventional penalties no further eligible than for the real damage.

No 2.

Penalty modified against a cautioner in a bond to the ordinary au-

No 2.
annual rent of
the sum, the
bond bearing
no annual-
rent.

ing for the penalty, I proponed, that albeit the cautioner was bound conjunctly and severally, yet it was notour by the bond that the debt was not his, and the cautioner so long as he was not charged, had probable opinion that the principal had been paid; and finding the contractor by the charge, did his duty by offer and consignment of the principal. But, it being known by the process, that Bryce had known that the principal was not paid, because he had paid two years annual for continuation; albeit, the bond contained no annual, the LORDS found the letters orderly proceeded for so much of the penalty as answered to the annual unpaid.

Fol. Dic. v. 2. p. 53. Haddington, MS. No 2683.

No 3.

1627. *March 28.*

AYTON *against* PATERSON.

MR JAMES PATERSON is charged to fulfil a minute made betwixt him and Mr Robert Ayton, whereby the said Mr James was obliged to pay 4200 merks to the said Mr Robert, for the discharge of the reversion of Craigfuthie, and both the parties are obliged to fulfil this minute to each other under the pain of L. 1000. Mr James alleges he might resile from the minute paying the pain.—THE LORDS found he might not resile.

Fol. Dic. v. 2. p. 54. Auchinleck, MS. p. 148.

No 4.

1628. *December 16.*

MARGARET CRAIG *against* OLIVER SINCLAIR.

MARGARET CRAIG obtained a decret before the Commissaries of Edinburgh against Oliver Sinclair, decerning him to solemnize the bond of marriage with her. Thereafter, Oliver gives her a bond whereby he obliged himself to complete the marriage with her betwixt and a certain day, and in case of failzie to pay to her 300 merks. She registrates this bond, and the day being past, raiseth letters of arrestment, and arrests certain sums owing by the Lady Lothian to the said Oliver, and conveneth her and him for his interest for making the same forthcoming. *Alleged*, No process at the pursuer's instance, because she is cloathed with a husband, (viz. the said Oliver who is decerned to marry her) and so she could not pursue her own husband. *2do*, No process for the failzie before it be declared. *3tio*, No process for the sum acclaimed, it being a penalty for not completing the marriage, to which a man could not bind himself by law, *quia matrimonia debent esse libera*. *Answered*, *imo*, Albeit the Commissaries have decerned Oliver to marry the pursuer, yet so long as the same is not accomplished, it is but *in fieri*, and he is not her husband. *2do*, No necessity of a declarator, because there being a special day set down in the bond, *dies interpellat*, and the day being past she may pursue for the penalty. *3tio*, *Ma-*