for which the doctors give this reason, that all contracts must take their origin *ex nostra persona*, and where they do not, *non habet obligatio radicem unde fluat in paciscentem, nec basin ubi stabit; vide l. unic, C. Ne uxor pro martito*; and in these cases, some maintain they are obliged no further but to do their utmost diligence and endeavours to cause the other perform; but generally, they conclude he incurs the penalty expressed, *et ejus solutione liberatur*, unless where it bears *salvo manente pacto*, which we call over and above the premisses; and then both are due, and paying the penalty does not exoner. No 13.

Fol. Dic. v. 2. *p.* 54. *Fountainhall, v.* 2. *p.* 136. & 150.

1706. *July* 27.

THOMAS BAIRDINER of Cultmill, *against* WILLIAM DRYSDALE, Tenant there.

No 14.
The debtor in an obligation *ad factum præstandum*, under a penalty, without the clause, 'by 'and attour 'the imple-'ment of the 'premises,' found liable only, in case of non-performance, for the penalty.

THOMAS BAIRDINER having acquired the lands of Cultmill by an adjudication against the heritor, did enter into a contract with William Drysdale the tenant, who had married one of the heritor's two daughters and heirs portioners, whereby the said Thomas Bairdiner was obliged to renew the tack for the space of 19 years upon payment of the former tack-duty, and to grant him a discharge of a year's rent then due; and William Drysdale obliged himself to grant a disposition with consent of his wife, of all pretence or claim that she had to the lands, and to cause her sister to do the like betwixt and a certain day, under the penalty of 100 merks in case of failzie. William Drysdale being charged to implement his obligement, he suspended upon this reason, That to procure his sistet-in-law's consent to the disposition, was *factum imprestabile*, for she would by no means consent; and therefore the charger could only seek damage and interest, which he liquidated in the obligement to 100 merks of penalty; upon payment whereof the suspender is free, seeing the clause, by and attour the implement of the premisses, was not adjected.

Answered for the charger; as the sanction of a law is only to enforce the observation of it, by subjecting transgressors to the penalty; so the adjecting of a penalty to an obligation is only designed as a compulsatory upon the debtor to fulfil, and to render the obligation effectual; the words by and attour implement of the premisses, being only added ordinarily *ob majorem cautelam*. And if it had been intended that the suspender should be liberated upon payment of the penalty, that would have been exprest, as also that all things done in contemplation of the foresaid obligation should be restored. It is of no moment that the suspender pretends he cannot procure his sister-in-law to consent to the disposition; for he ought to have foreseen that difficulty before his engagement. And persons obliged to consent of third parties, were not liberated from the principal obligation, even where no penalty was adjected, but found liable to fulfil *in forma specifica*; Purie against Couper, *voce* WARRANDICE;

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.* 1. *T.* 17. § 20. *in fin.*

Replied for the suspender; The cited decisions do no meet the case in hand, where the penalty is not conceived by and attour performance; but adjected in place of fulfilling the obligement.

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 consignation.

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 *inesse* 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-