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.

To the *third*, That infeftment is given for the penalty, which is held to be an existing debt, though the LORDS, from their *nobile officium*, generally restrict it to the expenses really debursed. No 18.

"THE LORDS found, That William Duff was entitled to be preferred for his penalty, to the extent of the expenses in recovering his debt."

Act. *Hamilton Gordon.* Alt. *Burnet.* Clerk, *Kirkpatrick.*

Fac. Col. No 142. *p.* 213.

1757. *December* 23.

JOSEPH ALLAN, Portioner of Littlegovan, *against* JAMES YOUNG of Netherfield, and JOHN MILLER, Portioner of Hazzledean.

No 19.
The penalty of a mutual contract upon which adjudication has not followed, cannot be exacted, for indemnification of expenses incurred in discussing a suspension of the contract, where the other party has not been specially found liable in such expenses.

IN January 1750, Young and Miller entered into a contract with Allan, whereby Allan became bound to dispone to them certain heritable subjects which had belonged to George Arkle, dyer in Strathaven, and were conveyed to Allan in security of a debt. On the other hand, Young and Miller obliged themselves to pay to Allan the principal sum of his debt, extending to 2950 merks, with the bygone interest, and expenses incurred in securing the same, all to be accumulated at Whitsunday 1750, "with a fifth part of the said sum so accumulated, of penalty and liquidated expenses, in case of failzie." The contract contained other conditions; and concluded with an obligation on both parties to perform the premises *hinc inde*, "under the penalty of L. 10 Sterling."

The purpose of this contract was, that Young and Miller, as trustees for Arkle and his personal creditors, should, with Young's concurrence, bring the subjects to a roup; and in case of their yielding more than Allan's debt, apply the surplus for payment of the other creditors. By the contract itself, John Marshall, Allan's agent, was appointed clerk to the intended roup; and by a separate missive addressed by Allan to Young and Miller, he declared, that in case the subjects should not sell above the extent of his debt, he would, upon their application, free them from the engagements they had undertaken by the contract; but thus qualified, "I always being put *in statu quo* as I was preceding this date, you making intimation to me of your not chusing to hold bargain with me, on or betwixt and the 25th of March next.

The subjects were, in the beginning of March 1750, exposed to roup. John Scot offered for them 3820 merks; and James Stevenson having offered 3900, was preferred to the purchase. Both these offers considerably exceeded the extent of Allan's debt; but no caution was found by Stevenson, in terms of the articles of roup; nor did Marshal, the clerk, insist against Scot, the next bidder, agreeable to those articles. Young and Miller thereupon resolved to throw up their concern, and get free of the contract. They made an intima-