No. 3.

'the cause as he shall see just; but find the petitioner liable in the expenses 'of process already incurred; and for ascertaining the same, ordain an ac- 'count thereof to be given into Court.'

But upon a second reclaiming petition for Mr. Brodie with answers for Murdoch, the Court pronounced this interlocutor, (25th Jan. 1777:) 'Find, 'that the defender having been removed from the meadow at Whitsunday 1775, 'is not entitled to the corn crop in question; but the same belongs to the pur- 'suer, upon paying of the price and expense of seed and labour; and remit 'to the Lord Ordinary to proceed accordingly, and further to do as he shall 'see just.' And to this interlocutor the Court (7th February 1777,) adhered, upon advising a reclaiming petition for Murdoch, without answers.

Lord Ordinary, *Elliock.* For Brodie, *Hay Campbell.* For Murdoch, *B. W. M'Leod.*

D. C.

1777. *July* 24. SIR ROBERT POLLOCK *against* THOMAS PATON.

No. 4.

The effect of a paction that the tenant should pay at the rate of 100*l.* Scots per acre, in case he should plough more than a certain given quantity.

See No. 144. p. 15262.

In the missive by which Sir Robert Pollock had let the lands of Flock and Flockside to Thomas Paton, for one year, there was contained the following clause: 'Further give you leave to plough what ground you had in potatoes last crop, 'lying in that division or inclosure in which your meadow lies, *and if you shall 'plough any more there, you hereby agree to pay me £100 Scots for each acre, and 'proportionally for more or less.*' And the missive on the part of the tenant contains these words. 'I hereby accept of the offers made me in said mis- 'sives.'

The tenant having thought proper to plough up in the meadow ground not only what had been in potatoes, but about an acre and a half more, which he was no doubt at liberty to do by the missives upon paying at the rate of £100 Scots per acre, Sir Robert demanded additional rent at that rate for what had been so ploughed. He refused to comply.

After various proceedings, the Sheriff-Depute of Renfrewshire pronounced the following interlocutor: 'In regard the £100 Scots per acre for what the 'defender should plough, more than what he is expressly allowed by the mis- 'sive containing the bargain, is not said to be of yearly rent, find that there- 'fore it must be understood to be penalty; restricts the same to what da- 'mage the pursuer sustained by the said ploughing, and allows him a proof 'thereof.' The question afterward came to this Court by advocation, and being reported upon memorials, it was argued for the tenant, that if any one principle can be said to be fixed in the law and practice of Scot-

land, it seems to be this, that all conventional penalties are restricted to the real damage and interest of the party. That the £100 Scots or £8. 6*s*. 8*d*. Sterling, stipulated in the missive, is a penal sum, there can be no doubt, as the lands in question are part of a barren muir, not worth more than a very few shillings per acre, and in general the very best ground, even in the neighbourhood of the capital, brings no more than £2 per acre. That if instead of £100 Scots, £100,000 had been inserted in that clause, the Court would certainly have interfered, and restricted the penalty to the actual damage received. *Majus et minus non variant*, therefore, the real damage received must be the precise reparation which the party is entitled to recover, and the excrescence being greater or smaller, must always be lopped off. The Court, however, adopted the reasoning of the pursuer, and considered this clause not so much in the view of a penalty, as of a fair and legal stipulation entered into between the parties, and to which they were bound as a court of law to give effect. It was said, that if the tenant's plea be successful, there must be an end of all improvements in this country; because if the master cannot preserve a certain mode of culture, the money laid out in improving his estate must be totally lost, as it is hardly possible to ascertain the exact damage which he may have received from the tenant adopting another mode of culture than what had been prescribed. No. 3.

But even considering the clause founded on in the view of a penalty, a distinction was made between conventional penalties, which were said to be of two kinds. First, where a person bound *ad factum præstandum*, agrees in case of failure to pay a sum of money in lieu of it. The other is, where a sum is stipulated to enforce the performance of any obligation, which is much more strictly penal than the other. With regard to the first, Justinian has said, '*optimum erit pœnam subjicere, ne quantitas stipulationis in incerto sit, ac necesse sit* '*actori probare quid ejus intersit.*' See also Stair, B. 4. Tit. 3. § 2. The very purpose of such a stipulation, then, is to prevent the necessity of proving an uncertain amount of damges, and the sum fixed on by the parties must be the rule without any modification. This is well illustrated in the Principles of Equity, B. 3. Chap. 2. With regard to the £100,000, it would be absurd in the highest degree and out of all bounds, and to such a stipulation, therefore, the Court might with some justice apply their *nobile officium*. It was also contended, that the £100 Scots per acre was not claimed as a penalty, but according to paction; for a penalty can only be annexed to a *transgression*. Here there was no *transgression*; because the tenant did no more than he was entitled to do, and therefore there can be no *penalty*. Much also was founded on an English case of Rolph *contra* Paterson, 18th February 1772, decided in the House of Lords, where effect had been given to a similar stipulation. The Court, therefore, determined in favour of Sir Robert Pollock, and found the tenant liable at the rate of £100 Scots per acre of rent for the whole of the

No. 4. ground in the meadow, which he had ploughed, over and above what had been in potatoes, as due by an express stipulation in the missive.

Lord Reporter, *Westhall.* Act. *Ilay Campbell.* Alt. *G. Wallace.*

D. C.

1798. *February* 1.

ÆNEAS MACKINTOSH *against* CAPTAIN ALEXANDER MACDONELL.

No. 5.
A clause enforced, which stipulated double rent for every year which a tenant should remain in possession after the expiration of his lease.

CAPTAIN ALEXANDER MACDONELL held a lease of the lands of Keppoch, under Mr. Mackintosh of Mackintosh, which expired at Whitsunday 1795.

Captain Macdonell thereby 'obliged him, at the expiry of his tack, to flit 'and remove from the lands hereby set, without any warning, or process of 'removing, for that effect, wherein if he fails, he shall be liable in double the 'said yearly rent, for each year he continues thereafter.'

Mr. Mackintosh recorded the lease in the burgh court-books of Inverness, in terms of the clause of registration, contained in it; and on the 14th Feb. 1795, executed a charge against Captain Macdonell, at the pier and shore of Leith; and on the 16th May 1795, Mr. Mackintosh's factor wrote the Captain's agent in Edinburgh, mentioning, that the farm had been let to a new tenant, and desiring that he might be allowed to enter to it on the 26th of that month.

On this, a bill of suspension was presented for Captain Macdonell, in which it was contended, that the tack being recorded in the court-books of a burgh, the extract did not warrant a charge at the pier and shore of Leith, 1685, C. 38; and consequently, that letters of ejection could not proceed on it.

The bill having been passed, in order that the point might be deliberately considered, Mr. Mackintosh, in place of proceeding in the suspension, brought an action against Captain Macdonell, narrating the clause in the lease above inserted, and concluding for double rent, from Whitsunday 1795 to Whitsunday 1796, and that the defender should be ordained to remove at the last of these terms.

The Lord Ordinary, of consent, 'decerned in the removing;' and afterward his Lordship 'decerned for the rents and interest, as libelled, in respect 'that the stipulation in the tack libelled, obliging the tenant to remove at the 'ish thereof, without warning or process of removing, wherein if he fails, he 'shall be liable in double the yearly rent, for each year he continues thereafter, 'is not a penal clause.'

In a petition against this interlocutor, the defender contended, That the double rent pursued for was of the nature of a penalty, and consequently subject to the modification of the Court: That, therefore, even if he had remained