

consign the produce of his estate to Cunningham, Dougal, and Company, and to put it on-board their ships; and, in case of failure, he was bound, in lieu of the fact he ought to have performed, to pay the same freight and commission as if the stipulation had been complied with, and is thereby liberated from performing it. This was nothing more than substituting one obligation in place of another, and cannot be considered as a penalty; it is a sum fixed upon by the parties to be the rule in settling between them, if the obligation is not performed; and is subject to no restriction, agreeable to the rule of the civil law, § 7. *Inst. De verborum obligationibus.* The distinction between this case, and that of a penalty to enforce an obligation, is explained in Principles of Equity, b. 3. c. 2.

The judgment of the COURT was,

' In respect William Marshall failed to implement his part of the contract, although Messrs Cunningham, Dougal, and Company, fulfilled their part thereof, the LORDS find Mr Marshall liable to Messrs Cunningham, Dougal, and Company, for the freight and commission claimed upon the cargo consigned by Messrs Campbells of Tobago to Millikin, Hunter, and Company, of Port Glasgow, in the same way as if it had been consigned to Messrs Cunningham, Dougal, and Company, in terms of the contract; and remit to the Ordinary to proceed accordingly.'

For Mr Marshall, *Ilay Campbell, Matthew Ross.* Alt. *William Gray.* Clerk, *Tait.*
Fol. Dic. v. 4. p. 18. Fac. Col. No 10. p. 19.

* * * This case was appealed :

THE HOUSE OF LORDS, 5th May 1781, ' ORDERED and ADJUDGED, That the appeal be dismissed, and the interlocutors complained of be affirmed.'

1786. *March 3.* WILLIAM SHAW against DUNCAN M'DONELL, and Others.

SHAW gave out proposals for publishing, by subscription, a literary work, which he described as follows: ' A Dictionary of the Gaelic and English, and English and Gaelic languages; together with a Glossary of proper names of men and things, and Accounts of battles, warriors, affinities and feuds between great chiefs and clans; with Descriptions of mountains, rivers, vallies, islands, &c. in Scotland; proper references being made to the Welsh and other ancient dialects of the Celtic.'

The book, however, was published without any attempt having been made by the author to fulfil that part of his proposals respecting the glossary, the historical accounts, or the references. In consideration of these defects, and of alleged imperfections in those parts of the proposed work which was executed,

No 40.

A literary work having been announced in proposals for publishing by subscription, as consisting of different parts, the subscribers found free from their engagement, some of those not being executed.

No 40.

several of the subscribers returned the copies delivered to them, and refused payment of the price,

Shaw having on that ground instituted an action against them,

THE COURT considered the author's total failure in performing a part of the work announced in his proposals, as sufficient to liberate the subscribers from their engagement to him; at the same time that the allegation of the other parts of the book being less perfectly executed than was to have been expected, did not, so far as *mala fides* or gross negligence was not implied, appear to be deemed a relevant defence.

THE LORDS therefore assoilzied the defenders.

Reporter, *Lord Swinton*.
Clerk, *Orme*.

Act. *Solicitor-General*, et *Tait*.

Alt. *J. Grant*, *W. Campbell*.

S.

Fol. Dic. v. 4. p. 13. Fac. Col. No 263. p. 401.

No 41.

A collier having enlisted after entering into a verbal agreement to serve his master for a year, the enlistment was found to be suspended till the expiration of his previous engagement.

1799. *January 19.* JOHN CLERK *against* LIEUTENANT KENNETH MURCHISON.

WILLIAM SAMUEL and John Cook, in summer 1798, entered into a verbal agreement, to serve John Clerk, as colliers, for a year, and received a guinea of their wages in advance. They had been for several preceding years in Mr Clerk's employment.

On the 18th October 1798, Samuel and Cook enlisted with Lieutenant Murchison. They were afterwards attested, and received a large proportion of their bounty.

On the 25th October, Mr Clerk presented a petition to the Sheriff of Edinburgh, stating, that Samuel and Cook were his indented servants, and considerably in his debt; therefore craving the Sheriff 'to declare them free from the said enlistment.'

The Sheriff found 'the said John Cook and William Samuel are bound colliers to the petitioner, and that the petitioner cannot be deprived of their services, by their having enlisted as soldiers with the defender, and therefore ordained them immediately to return to the petitioner's work, and to serve him faithfully thereat, till the expiry of their engagements; and failing of their doing so, ordained them to be imprisoned in the tolbooth of Edinburgh, until they find caution to that effect; reserving always to Colonel Murray of the Clanalpine Fencibles, or Lieutenant Murchison, the defender, either to claim from the said John Cook and William Samuel, immediate payment of the sums advanced to them for bounty and pay, and what expenses they have been put to, or to claim them as soldiers after the expiry of their present engagements with the petitioner.'

Lieutenant Murchison complained of this judgment, by a bill of advocacy, which the Lord Ordinary refused.