

No 9.

the setter obtained decret before the Sheriff of Aberdeen, for payment of the said L. 100, because the tacksman, the last year of the tack, gooded not the ground; and, therefore, he was decerned to pay the sum: Which decret being suspended, the LORDS found, that the decret before the Sheriff being given upon probation of the not-gooding the ground the last year of the tack, could not import condemnator for payment of the whole penalty, albeit the clause of the tack bore, to pay the same, in case of failzie, indefinitely, and did not astrict the payment of the whole to the failzie of all the years; and, therefore, found, that for the failzie of one year, no more could be decerned by the Sheriff but the fifth part of the penalty, which answered in proportion to the five years of the tack; and suspended the letters *simpliciter* for the rest of the L. 100, notwithstanding of the sentence given against the party compearing, and a sentence of the LORDS upon an anterior suspension, where the letters were found orderly proceeded for the whole.

*Fol. Dic. v. 2. p. 53. Durie, p. 877.*

1688. July 28.

LEARMONT against GORDON.

No 10.

Whether the whole penalty can be sought where part of the debt is paid?

THE LORDS advised the process betwixt the Earl of Balcarras, as assignee constituted by Mr Robert Learmont of Balcomie, (contrary to that title of law, *ne quis in potentiorum titulos suos transferat*.) and Mr William Gordon, Advocate, who, to balance it, had assigned to the Duke of Gordon a year ago; and who founded on an expired comprising of the lands of Balcomie, mentioned 12th January 1686. The reason of reduction was, that, though the apprising defaulted a part of the sum as paid, yet it was led for the hail penalty, which it should also have deducted proportionally. *Answered, Pana est jus indivisibile*, as Calvin in his Lexicon, *voce POENA*, affirms; so that how long any part of the principal sum is due, the hail penalty *in rigore* is exigible. Yet Durie, 22d February 1639, Johnston, No 9. p. 10037. observes the LORDS divided the penalty. Before answer here, the LORDS declared they would call for some of the oldest Writers to the Signet, who had as Clerks led apprisings, and would advise what had been the custom: And they all, generally, (except Mr Thomas Gordon,) resolved, that, in such a case, the penalty should have been restricted; whereon the LORDS reduced the comprising *quoad* the legal, and found it only a security for the sums therein contained, and no further, which was all Balcomie was seeking.

*Fol. Dic. v. 2. p. 55. Fountainball, v. 1. p. 515.*