

terms he pleased. THE LORDS inclined to grant it, but had no occasion, in regard the parties agreed among themselves.

No 17.

Fountainhall, v. 2. p. 449.

1725. February 3.

WILLIAM HUTTON and the CREDITORS of THOMAS WHITE *against* JAMES GRAY
Writer to the Signet.

THOMAS WHITE elder disposed to his son in his contract of marriage certain lands and tenements, with the burden of his son's paying to Elizabeth White his eldest daughter of the first marriage 3000 merks; and this burden was repeated in the procuratory of resignation and precept of sasine upon which the son was infeft. The 3000 merks were assigned by the daughter; and the creditors of the assignee having adjudged, they craved preference to the creditors of the son, upon this ground, that the burden was real, not only by the conception of the clause, but from its being repeated in the procuratory and precept, upon which the son's infeftment was taken.

No 18.

It was *answered*, That the clause being only with the burden of payment, it could have no stronger effect, than if the son, by the quality of the right, had obliged himself to pay; and therefore though it was inserted in the procuratory and precept, yet it was no real burden.

THE LORDS found, that the obligation on Thomas White younger to pay 3000 merks to his sister Elizabeth was only personal.

Reporter, Lord Cullen. Act. H. Dalrymple. sen. Alt. Ch. Binning. Clerk, Mackenzie.
Edgar, p. 163.

1751. January 29. HENRY ALLAN *against* the KING'S ADVOCATE.

HENRY ALLAN writer in Edinburgh, was cautioner for James Lord Balmerino, in a considerable sum, which he was obliged to pay, together with the interest due thereon, and with L. 7 of expense of diligence used against him. This payment was made after the principal debtor's death, and after a forfeiture incurred by his brother and heir Arthur Lord Balmerino.

No 19.

Mr Allan claimed upon the Lord Balmerino's estate. for the sums paid by him.

Answered, His claim can only be sustained for the principal and interest; but with regard to the expenses recovered against him out of the penalty in which he was bound, it is enacted, 'that no decree shall be made for any sum

No 19. ' or sums on account of penalties, for failure of payment, at the day it became due, or for any other penalty whatsoever.'

Replied, Mr Allan will recover no part of the penalty in his bond of relief; but what he has paid of the penalty of his own bond the Lord Balmerino was bound to relieve him of; and it is no penalty.

THE LORDS sustained the claim.

D. Falconer, v. 2. No 188. p. 227.

S E C T. IV.

Whether an obligation or a resolution only?

No 20. 1662. July 25. NASMYTH *against* JEFFREY.

A LEGACY left in terms 'I wish, &c.' was found sufficient, and was not considered as a desire only, or recommendation left in the option of the heir.

Fol. Dic. v. 2. p. 16. Stair.

* * * This case is No 53. p. 5483, *voce* HERITBLE AND MOVEABLE.

No 21. 1681. December.
BEATRIX TUNNO and BROTHERSTONS *against* ANDREW TUNNO.

ONE having received a letter abroad from his friend, that there was a treaty of marriage with his sister on foot, and the man desired 400 merks of portion; he wrote back to that friend, that he was willing to give 200 merks to forward the design; who giving the letter to the suitor, the parties were afterwards married, and they pursued the brother upon it for payment of the 200 merks. It was *alleged* for the defender, That the letter was no positive obligation, but the declaration of a bare resolution, and though it were thought to import a promise, the offer was not accepted.

THE LORDS decerned the defender to pay the 200 merks.

Fol. Dic. v. 2. p. 16. Harcarse, (CONTRACTS OF MARRIAGE.) No 339. p. 82.