

to the Point of Fact, unless the Sufficiency of a Thing be warrandice. Nor doth Warrandice that a Thing disposed is sufficient, extend to any visible or notour Defect, which the Purchaser is presumed to know: For accidental Prejudice therein lies upon the Acquirer who must take his Hazard of such Losses. Thus a Lady was not allowed Recourse to Warrandice Lands, for making up to her what she owed in the Years of Famine of the yearly Rent of her jointure Lands, & up-hold which effectually the real Warrandice was granted to March 1656 Lady Dunipace contra Lady Lauriston. Nor was a Cautioner for Principal for any accidental Damage sustained thro his being taken Prisoner in a private Ship when obliged to appear to answer his Navigation Obligation, Hair Fid. p. 46. Vers. As to the first.

Tit. 5
of Penalties.

A Penalty is a particular Fine of Money set for Default or Nonperformance of that which is agreed on. To enforce the Payment or Performance of Obligations or Rights, Penalties used to be exacted, that they may stand in Reparation of Expenses and Damages: The penal Clause is not always executed to the Rigour, nor found to be incurred in every Moment express'd in the Contract. Which Reparation ought to be no greater than the Damage sustained; so that the Penalty if greater than the Damage sustained, may be lessend; and if the Damage exceeds it, it may be tightend by the Prudence of the Judge according to Circumstances; if it is not for Example expressly said, that the Penalty shall stand in Lieu of all Damages, or if the Agreement has been contravened thro some Fraud or Fault of a different Nature from those which the Contract did foresee, and had a Mind to prevent. Les Loix Civiles de Tom. 1. Part. 1. Liv. 1. Tit. 8. Sect. 2. p. 10. The Lords of Session may ex officio nobili modify greater or exorbitant Penalties, and restrict them to the real Expenses and Damages. Which Cost, tho not necessary, are allowed, and slender Proof thereof is sustained.

The Debtor in an Obligation ad factum prastandum under a Penalty with the Clause by and attour implement of the premises, or by and attour Performance, is liable both for the Value and the Penalty. Yea even where a Penalty was adjected in a Minute of Contract, in Case of Nonperformance, viz. to sell Lands for

for a certain Sum, it was found that the Party might secede both the Penalty and implement of the Minute, tho it wanted the Word by and attour Performance &c. V. h. 1634. Murray contra L. Barclay. And a Person oblig'd by his Bond to deliver certain Quantities of Straw to another betwixt and a certain Day, and in Case of Failure to pay a certain penal sum, the Debtor was found oblig'd to fulfil the obligation to deliver the Straw, by and attour Payment of the penalty in Case of non Delivery 19. March 1634. Fletcher contra D. v. D. Agrimens having oblig'd themselves to give Subscribers a certain Sum of Money to subscribe the Bond to erect and erect a certain Day, and in Case of Failure to pay in Bond to be erected, the Debtor having refused to subscribe the Bond, the Subscribers were found oblig'd to fulfil the whole Sum, and not free to require the Debtor to do so. 4 June 1632. Clerk of Logy contra Cairncroft observed by Spotswood Prall. Tit. Contracts and Obligations. But yet the Debtor in an Obligation ad factum prastandum viz. to procure a third Party's consent to a Disposition betwixt and a certain Day, under the Penalty of a certain Sum in Case of Failure, was found liable in Case of Nonperformance, for the Penalty 27 July 1706. But in a contra Draydale. Lands being disposed to one with this Provision, that it should not be lawful for him to alienate them during the Disposer's Life, or if he did that he should be oblig'd to pay to the Disposer a certain Sum for Damage and Interest as p'elo convento; that Sum was found not to be a Liquid Penalty by and attour the principal Obligation, but to be a Liquidation of the Value of the principal Obligation itself, and the Provision was found to resolve into an alternative Obligation either to forbear to sell, or to pay the Sum, 4 Feb. 1663. L. Filorth contra L. Frazer.

Tit. 6.
The Registration of Rights.

Registration of a Right, is the recording or entering it in the Books or Registers of the Session, or other Judge competent where the Grantor lives. Rights made in any Place of Scotland may be registrate in the Books of the Lords of Session, whose Authority is universal, and transcendent, and can be registrate in no inferior Court Books except where the Grantor lives. Registration of Rights in an inferior Incompetent Jurisdiction is null, and the Clerk who enter'd them in such a Record liable to be deprived of his Office, and fined in 500 Marks, Half to the King, and half to the Pursuer. Act. 38. Sept. 1. Part. 1. J.