

trimonia sunt libera quidem liberis, but Oliver has not that benefit by reason of the decret, whereby he is decerned to marry her. THE LORDS repelled the whole three allegances.

No 4.

Fol. Dic. v. 2. p. 53. Spottiswood, (MARRIAGE.) p. 203.

* * Durie reports this case :

ONE Margaret Craig having obtained a decret before the Commissaries of Edinburgh against Oliver Sinclair, decerning him to take her to his lawful wife, and to complete the bond of marriage with her, before the face of holy kirk ; after which sentence he gives bond to her, to solemnize the said marriage betwixt and a certain day, and in case of failzie, to pay to her 500 merks ; which bond being registered, she thereupon arrested certain monies owing by the Lady Lothian to him, and thereupon pursues to make the same forthcoming ; which action was sustained for payment of the sum adjected in the bond, for a penalty, after the expiring of the day prescribed by the bond, and to make the sums arrested forthcoming therefor ; notwithstanding, that it was *alleged*, that it was evident by the decreets and writs produced, that the said Oliver was the pursuer's husband, and so she cannot have action against her own husband. And next, it was *alleged*, that no declarator was obtained upon the failzie. *3dly*, It was *alleged*, that pains adjected for fulfilling marriage are not allowed in law, *quia matrimonia debent esse libera* ; which allegances were all repelled, and the action sustained at the woman's instance without declarator, seeing it was not subsumed that they were married ; and the action was allowed and sustained for payment of the sum adjected in case of failzie, because whenever he should complete the marriage, the sum would return to himself.

Act. Craig.

Alt. Belshes.

Clerk, Gibson.

Durie, p. 409.

1630. March 19.

CRICHTON against PIRIE.

PIRIE being charged to deliver certain quantities of straw to Crichton, conform to his bond, and the other suspending, because, by his bond, he was obliged only to deliver the same betwixt and May, which was not as yet come, and, in case of failzie, to pay a penal liquid sum, which he was content to pay at the day, and so he could not be compelled to pay, or deliver the straw ; the LORDS found, that the subjoining of the foresaid penal sum, in case of non-delivery, liberated not the debtor from fulfilling of that, which was principally deduced in the obligation ; but that, notwithstanding of the provision of the

No 5.

Payment of the penalty does not liberate from performance.

No 5. failzie, he ought to fulfil the obligation, by and attour the paying of the failzie; but superseded the execution, while the day came.

Clerk, *Hay*.

Fol. Dic. v. 2. p. 53. Durie, p. 510.

1632. June 14. ALEXANDER CLARK *against* CAIRNCROSS, &c.

No 6.

GEORGE LAMBIE of Dunkenny having borrowed from Alexander Clark of Logie 1000 merks, for which there should have been cautioners for him, William Halyburton, and other two, who, because they were not present the time of subscribing of the bond, Dunkenny and Nicol Cairncross with him, and other two, obliged themselves to cause the absent cautioners subscribe the bond betwixt and the 15th of August following, 1629; and, failing thereof, to content and pay to Alexander L. 100. Alexander charged Cairncross, &c. for fulfilling of their bond; who suspended upon this reason, that they could not make the cautioners subscribe, but were content to pay the L. 100 *loco pena*.—THE LORDS found the letters orderly proceeded, for fulfilling of the whole bond, and would not free them for paying of the L. 100 of penalty.

Fol. Dic. v. 2. p. 54. Spottiswood, (CONTRACTS, &c.) p. 69.

* * * Auchinlock reports this case.

ALEXANDER CLARK charges Nicol Cairncross of Balmasharmor, Thomas Anand of Persie, and James Lyal, to fulfil a bond made to him by the Laird of Dunkenny and the foresaid persons, wherein the Laird of Dunkenny obliges him, and the said persons, to cause certain persons subscribe a bond of 1000 merks to the said Alexander Clark, as cautioners for the said George Lambie of Dunkenny, betwixt the date of the bond and Lammas thereafter; and, failing thereof, bound and obliged them to content and pay to the said Alexander Clark the sum of L. 100 at Martinmas thereafter. They suspended; and are content to pay the penalty of L. 100, as the said bond bears; but the LORDS found the letters orderly proceeded, for causing the cautioners subscribe, notwithstanding of the adjacent penalty.

Auchinleck, MS. p. 149.

1634. March 5. MURRAY *against* LORD BLANTYRE.

No 7.
Found in conformity with Aiton against Paterson, No 3. p. 10034.

By a minute of contract subscribed betwixt these parties, the Lord Blantyre sells the lands of Calderhall, &c. to Ronald Murray, for a sum, and the parties