

No 2.
annual rent of
the sum, the
bond bearing
no annual-
rent.

ing for the penalty, I proponed, that albeit the cautioner was bound conjunctly and severally, yet it was notour by the bond that the debt was not his, and the cautioner so long as he was not charged, had probable opinion that the principal had been paid; and finding the contractor by the charge, did his duty by offer and consignment of the principal. But, it being known by the process, that Bryce had known that the principal was not paid, because he had paid two years annual for continuation; albeit, the bond contained no annual, the LORDS found the letters orderly proceeded for so much of the penalty as answered to the annual unpaid.

Fol. Dic. v. 2. p. 53. Haddington, MS. No 2683.

No 3.

1627. *March 28.*

AYTON *against* PATERSON.

MR JAMES PATERSON is charged to fulfil a minute made betwixt him and Mr Robert Ayton, whereby the said Mr James was obliged to pay 4200 merks to the said Mr Robert, for the discharge of the reversion of Craigfuthie, and both the parties are obliged to fulfil this minute to each other under the pain of L. 1000. Mr James alleges he might resile from the minute paying the pain.—THE LORDS found he might not resile.

Fol. Dic. v. 2. p. 54. Auchinleck, MS. p. 148.

No 4.

1628. *December 16.*

MARGARET CRAIG *against* OLIVER SINCLAIR.

MARGARET CRAIG obtained a decret before the Commissaries of Edinburgh against Oliver Sinclair, decerning him to solemnize the bond of marriage with her. Thereafter, Oliver gives her a bond whereby he obliged himself to complete the marriage with her betwixt and a certain day, and in case of failzie to pay to her 300 merks. She registrates this bond, and the day being past, raiseth letters of arrestment, and arrests certain sums owing by the Lady Lothian to the said Oliver, and conveneth her and him for his interest for making the same forthcoming. *Alleged*, No process at the pursuer's instance, because she is cloathed with a husband, (viz. the said Oliver who is decerned to marry her) and so she could not pursue her own husband. *2do*, No process for the failzie before it be declared. *3tio*, No process for the sum acclaimed, it being a penalty for not completing the marriage, to which a man could not bind himself by law, *quia matrimonia debent esse libera*. *Answered*, *imo*, Albeit the Commissaries have decerned Oliver to marry the pursuer, yet so long as the same is not accomplished, it is but *in fieri*, and he is not her husband. *2do*, No necessity of a declarator, because there being a special day set down in the bond, *dies interpellat*, and the day being past she may pursue for the penalty. *3tio*, *Ma-*

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.