

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 failzie, he ought to fulfil the obligation, by and attour the paying of the failzie; but superseded the execution, while the day came.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

PENALTY.

10037

agree that a contract be extended thereon, and if they fail, the failer to pay 2000 merks; which minute being desired to be registered, that execution might pass thereon; the defender *alleged*, That, seeing the minute was never perfected, and that the same resolved in a failzie of 2000 merks, and that the party had no interest by the not-perfecting thereof; therefore, he *alleged*, That it could not be registered, seeing it was *factum impræstabile* to give him security of the lands, which he had sold since to another, being certified that this pursuer had refused the bargain, and he had neither debursed arles nor money; so that *nihil illi deerat*, and he was instantly content to offer and satisfy all his damage and interest, and which now ought to be received, seeing the minute was desired to be registered, not for extention, but for execution; and this offer was competent against the execution.—THE LORDS repelled the allegiance, and found, that the adjection of the penalty in the minute resolved not the contract, so that the same was appointed to come in place of the perfecting of the minute; but, notwithstanding of the said penalty, the parties might also seek implement of the minute, and whole articles thereof, beside and attour the said failzie: And they repelled the offer of the interest in this place against the registration, without prejudice of the same to be received, and discussed by way of suspension.

No 7.

Act. *Advocatus & Morat.*

Alt. *Stuart & Lermont.*

Clerk, *Hay.*

Fol. Dic. v. 2. p. 54. Durie, p. 708.

1637. July 15.

SKENE against ———.

LANDS being verbally let to a tenant, under a penalty, that, if he entered not, he should pay a year's rent; the whole penalty was found due, though the tenant resided *rebus integris*.

No 8.

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

*** This case is No 10. p. 8401. *voce LOCUS POENITENTIÆ.*

1639. February 22.

JOHNSTON against FORBES.

ROBERT JOHNSTON sets in tack, for five years, the lands of Robert Forbes, wherein the said Robert Forbes is obliged, by a special clause, to pasture his whole goods upon the said lands yearly, during the said space, and to hold his goods within the byres and stables, and to hold the thatch within the town, and to ware the whole gooding within the town, during the years of the tack; and, in case of failzie, to pay L. 100; upon the which tack

No 9.
Where a tenant had failed in performance only as to the last year of his tack, found not liable for the whole penalty.