prize: Which was hard, there being *litiscontestation* in the cause, act and commission extracted for proving the allegeances for both parties; so that, in form of process, no decreet ought to have been pronounced for either party, but upon the advising of the depositions of the witnesses; and finding, that they who had been most pregnant and fully proven ought to have had decreet pronounced in their favour.

Page 440.

1674. *December* 23. SIR RICHARD MAITLAND, Younger of PITTRICHIE, *against* SIR GEORGE GORDON of GIGHT.

IN a removing, pursued at the said Sir Richard's instance, as having obtained a declarator of recognition, as donatar from the King, as is before mentioned;—it was ALLEGED for the Laird of Gight, That the foresaid gift and declarator could be no title whereupon to pursue a removing; because they were obtained by the assistance and concurrence of the Laird of Gight himself, in prosecution of articles of agreement betwixt Gight and the pursuer's father, long prior to the gift of declarator; by which Gight had given security for 4000 merks to Pittrichie; and was to give him an irredeemable right of lands, whereof he had a reversion for 6000 merks; as likewise the heritable right of the teinds of the said lands; all which he was willing to perform: and farther, he had furnished the evidents and charters of that base infeftment which was the ground of the recognition to Pittrichie, who was absolute in that declarator of recognition; which, by the articles of agreement, was to be security only to Pittrichie of these lands and teinds disponed to him; and to the Laird of Gight, for the rest of the lands and barony.

It was ALLEGED for Pittrichie, That the allegeance founded upon the agreement could not be obtruded; because these articles were declared void and null for not performance of the Laird of Gight his part, *viz.* in not granting him a perfect and absolute security of the teinds of the lands disponed to him irredeemably, which were formerly wadset.

It was DUPLIED for the defender, That if these articles were declared void, then Pittrichie could not found thereupon; nor have any right of recognition or declarator, which was only the effects thereof, and obtained by concurrence of the Laird of Gight; and, therefore, they ought to be heard to debate as if they were *in prima instantia;* whereupon he desired to be heard *in præsentia:* Likeas, upon a reduction which he had of that decreet, declaring the articles of agreement to be void and null:—

The Lords did consider this case as of great consequence; seeing that, upon pretence that the heritable right of teinds of a small parcel of lands was not secured, Pittrichie should have right to the whole barony of Gight, and remove the whole tenants: but, having two decreets, one of recognition, and a declarator of the nullity of the articles standing unreduced, they did decern in the removing; but superseded all execution until the defender should be heard in the reduction of that decreet of nullity, how far it ought to take effect, or could be extended any farther than to damage and interest, for not giving an absolute security to the teinds of these lands, as being all that in reason could be demanded.

Page 442.

1675. *July* 20.

The reduction of the first decreet of declarator of the nullity of the articles was insisted upon, upon these reasons: 1*mo*. That the decreet was null, as being *ultra petita*, bearing payment of the maills and duties; whereas they were not libelled in the summons. 2*do*. The decreet proceeded upon circumduction of the term; whereas Gight, having produced several papers and writs, for instructing that Gight had an undoubted right to the teinds of the lands, whereof Pittrichie was to have an irredeemable right; which writs were never advised by the Lords, nor the party heard to debate thereupon: and if they had been heard, they would have alleged, that they, having produced a disposition of the teinds from the Marquis of Hamiltoun, as having right to the abbacy of Arbroath, whereof these teinds were a part, the same could only belong to Gight, or any having right from him; and, albeit the seasine was not in Gight's possession, yet, it being given above sixty years ago; and the Lairds of Gight, since that time, having been great sufferers for the King, and forced to intrust their evidents to several persons; for recovery whereof he had done exact diligence to get the principals, and to look out all registers where the seasines could be gotten.—The Lords could have granted a competent time to have done more diligence; Likeas now, of late, he hath recovered an extract of the said seasine, which will make a complete right of the teinds of the lands in question; which being but of an inconsiderable value, the decreet of nullity, taking him away from his whole estate, which is worth, of yearly rent, fourscore chalders of victual, and giving Pittrichie the irredeemable right thereof, by the decreet of recognition, it were against all law and conscience, upon a mere punctilio, or circumducing of a term, to deprive the pursuer of his ancient inheritance; and therefore the said decreet ought to be reduced, especially, the articles of agreement, which is the ground thereof, bearing no clause irritant.

It was ANSWERED for Pittrichie, That he did oppone his decreet *in foro contentiosissimo*, whereby he, having *jus adquisitum*, and as great a security as any of the lieges could have, the same could never be reduced. Albeit there be no clause irritant in the article of agreement, yet the estate of Gight belonged to Pittrichie by a gift of recognition, and a decreet obtained thereupon; any obligation therein contained being in a contemplation of several deeds to have been performed, being in the case of *causa data causa non secuta*; and whereupon the decreet of nullity was well founded in law: likeas, the Lords having remitted the writs produced to be considered by one of their number, upon his report that Gight had no right to the teinds, decreet was pronounced; and, unless that iniquity were libelled, which were a great reproach upon the whole House, the same could not be reduced.

It was DUPLIED, That the law makes a great difference betwixt *sententias comminatorias et definitivas*; and this decreet being a circumduction of the term for not production, all lawyers are of the opinion, that the party, having recovered the writs, upon diligence, after sentence, the party ought to be reponed against the same; which is consonant to our law and practique; for, if a debtor, for want of a discharge, should be decerned to pay, he would get *condictionem indebiti* upon recovering thereof, notwithstanding of any decreet.

The Lords having considered this case, after a long debate *in præsentia*, did

assoilyie from the reduction upon any alleged error in extracting of the decreet: but repone the Laird of Gight, notwithstanding of the decreet, to be yet heard upon the disposition and seasine now produced, if thereby he could make an undoubted right to the teinds of the lands disponed, and thereby fulfil all his part of the articles of agreement; to which they were moved upon these reasons:—That this decreet was *sententia comminatoria*, and that by our law, both upon emergencies and *noviter veniens ad notitiam*, the party purging himself that he did not of purpose keep up any writs founded upon, *animo protelandi litem;* and that he being truly ignorant where the writs were, he had recovered the same by exact diligence, in all conscience and reason they ought to be reponed against so severe a sentence; where it being impossible for a time to perform an article of so inconsiderable a value, the punishment was no less than the forefaulture of a great and ancient estate, where the law defines that *loco facti imprestabilis succedit tantum damnum et interesse;* and it was clearly made appear, that the Laird of Gight was neither *in culpa* nor *in mora*, his whole evidents during his minority being intrusted by his father, when he durst not own his estate.

Page 443.

1675. *January 5.* The EARL of NORTHESK *against* The LAIRD of PITTARRO.

THE Laird of Pittarro being charged, at the instance of Northesk, for payment of two thousand merks, contained in his bond, did SUSPEND, upon these two reasons:—1*st*. That he ought to have compensation for a thousand merks, and annualrents since 1667 year of God, because he was assignee to a back-bond granted by Northesk to Mr James and John Arbuthnots; whereby he being assigned by them to a bond granted by the Laird of Craigie, and Earl of Dundee, did thereupon lead a comprising in his own name, of their estate; and did dispone the same to the Lord Hatton: and, by the back-bond, being obliged to make payment as soon as he should recover payment, he is now debtor in those sums, which ought to compense the bond charged upon, *pro tanto*. 2*d*. He ought to have compensation for eight hundred merks, because Gray of Bracko, being infeft in the lands of ——————, which were bought by Northesk, Bracko, by his missive letter, did write to Northesk, that Pittarro might make use of eight hundred merks thereof.

It was ANSWERED to the first, That the back-bond could be no ground of compensation, because Northesk had never gotten payment of the sums assigned, contained in the back-bond; but, on the contrary, the estate of Craigie and Dundee being affected with several apprisings and infeftments, prior to that apprising; for which sum assigned, and several others, he had led a new comprising; unless it could be subsumed that he had gotten payment, the back-bond could not oblige him: but so it is, that if the sums of money paid to Northesk for his whole right were calculated, which were prior to that apprising, it would be found that he had received no payment thereof: likeas by the back-bond he was not bound not to dispone that last apprising; but only in case he should be paid of that sum assigned to him by the debtor, in that case he should make payment to the cedent.