No 21.

upon premonition, whereby she was distressed, and forced to pay the back-tack duties of several years, and yet had nothing in recompence, but the hazard and uncertainty of a coal rent. To which it being *duplied*, That as to all damage and hazard either as to bygone tack-duties, which were paid, and might be due in time coming, or distress for the principal sum, the defenders were willing to relieve and secure the pursver by compensation upon her intromissions as tutrix, and giving real surety out of the lands, or by an assignation to a comprising and decreet-arbitral, whereby Major Biggar had right to the wadset;

THE LORDS did find the offer relevant, and ordained count and reckoning to go on for the Lady's intromission, and her prejudice by payment of back-tack duties, or lying out of her liferent lands, and that sufficient surety should be given for freeing her of all damage and prejudice in time coming, at the sight of two of their number; and this they did without deciding the debate and point of law, which if they had done, it is thought that the foresaid deeds of revocation, with the relief of all loss, and security for the future, was sufficient to revoke all benefit of the back-tack, in so far as it might exceed the value of her liferent lands.

Gosford, MS. No 348. *p.* 167.

1675. *July* 20. Sir RICHARD MAITLAND *against* The LAIRD of GIGHT.

No 22.
In mutual contracts of either party be unable to perform, the other has a double remedy, either a process for damage and interest, or a declarator, concluding, that the contract should be void.

SIR RICHARD MAITLAND of Pittrichie having obtained a gift of recognition of the estate of Gight, doth thereafter enter into a minute with Gight on these terms, That Gight should concur with him in obtaining declarator of recognition, and that Gight should dispone to Pittrichie some lands wadset to Pittrichie's predecessors, and whereof Pittrichie is now in possession, together with the teinds thereof, and should pay him 4,000 merks; upon performance of which conditions, Pittrichie was obliged to dispone the rest of the estate of Gight, whereupon declarator followed after the articles; thereafter Pittrichie did by instrument require Gight to fulfil the articles, and protested, that if he did not, Pittrichie should be free thereof, and either party restored, and thereupon did pursue a declarator of the nullity of the minute. In which process, it was *alleged* for Gight, That the minute could not be declared null for not performance, because it contained no clause irritant in case of not performance, but only annualrent and penalty in case of failzie; neither had Pittrichie proceeded by all competent diligence against Gight to fulfil, and had then recourse to the Lords, that as they do ordinarily in adjudications upon dispositions where the disponer will not fulfil, adjudge the lands and teinds disponed.

THE LORDS sustained this defence, and sustained the summons, considering that in such minutes it was a just certification against the party unwilling or unable to fufil, that if he could not, or would not fulfil, the minute should be declared null, and either party restored as they were before the minute; yet

the Lords declared conditionally, that if Gight within a certain time should fulfil, the same should be received, and so the extract of the decreet was superseded from February 1673 to November 1674; but it was declared, that seeing that Pittrichie had the right of the lands by a recognition, and was only to dispone it to Gight so soon as Gight performed his part, so that Gight could have no right to the duties of the lands till he got the disposition, that therefore Pittrichie should enjoy the rents until Gight should perform his part. In November 1674, Gight consigned the 4000 merks, and by bill craved that the writs he had produced to instruct the wadset and teinds which he was to dispone to Pittrichie, might be remitted to the Ordinary, who heard the cause, which accordingly was done. And as to the right of the lands, there was found no question, but as to the right of the teinds, this was the progress, the teinds were a part of the Abbacy of Aberbrothick, and were with the said Abbacy erected into a temporal lordship to the Marquis of Hamilton, who was infeft therein: He disponed to Gight's goodsire, which disposition was produced. Certain merchants in Aberdeen apprised from Gight the lands and teinds, who being publicly infeft, disponed to the Laird of Frendraught, Gight's good-father, and he to Gight younger his oye; but by the merchants' disposition to Frendraught, he was only basely infeft, whereupon the recognition was declared; but as to the teinds, the recognition reached not them as not being ward; but the infeftment to Gight's goodsire upon the disposition to the teinds from the Marquis of Hamilton was not produced; and so it was found that Gight could not make a right of these teinds to Pittrichie, and therefore a further time was yet assigned to perform; so that after the space of 15 months, and no more produced, the decreet was ordained to be extracted. Pittrichie having disponed the right of these lands to Sir Richard Maitland his son, he pursues a removing against the tenants of Gight, and Gight raiseth a reduction of the declarator of nullity, which he repeated by way of defence, and insisted upon the same grounds contained in the decreet, and specially alleged, that there was no clause irritant in the minute, and that he had consigned the money, and performed all except what concerned the teind; he offered to infeft Pittrichie in his whole estate for warrandice thereof; and seeing he could not perform that point *in forma specifica*, he ought to be admitted to perform the same *per equivalentiam*, seeing 'locum 'facti impræstabilis supplet damnum et interesse;' and further *alleged*, that the decreet was null, as *ultra petita*, decerning the mails and duties, though the nullity of the decreet was only libelled; and that the decreet did bear a circumduction of the term, for not instructing a right to the teinds; whereas it appeared by the minutes, that Gight produced six pieces of writ to instruct his right to the teinds, which were rejected by the Sub-clerk in the Outerhouse, and were never advised by the Lords; and by the unquestionable form, writs produced for stopping certification can only be advised by the whole Lords. And last, Gight insisted mainly upon this, that though nothing should be found

No 22.

No 22. defective in the decreet in matter of form, yet it was a decreet upon certification, which the lawyers call *sententia comminitoria*, and look not upon it as a solemn sentence, being but *ex arbitrio judicis*, as appears *C. lib. 7. tit. 57. De Comminationibus, &c.* in which *quælibet excusatio sufficit*; and therefore in all decreets upon certification, the Lords, *ex nobili officio*, may and use to repone parties where there appeared no contumacy or fraud; as in the certification in reductions, writs are only reduced till they be produced; and it is advantage enough that the reducer get possession and bruik unaccountably till his right be again reduced upon production of the writs; and in the certification as being holden as confest, where terms are taken to produce parties to depone, though the term be circumduced, yet the Lords do ordinarily repone such parties upon purging their contumacy; and albeit in certifications in improbations, parties be not easily reponed *ex intervallo*, because the ground of that certification is, lest writs be kept up till the witnesses die, and seeing without it men cannot be secure of their estates, yet sometimes the Lords have reponed against certifications in improbations, where the rights were not devolved to singular successors acquiring *bona fide ex justo pretio*, as was done in the case of ——— Campbell, against whom improbation was obtained when he was prisoner with the Irish in Ireland, July 25th 1668, Campbell *contra* Glenurchy, *voce* POSSESSION; and now in this case Gight produceth his goodsire's sasine that was wanting before the decreet, and offers to make faith that he could not find it, and searched both his own writs and the registers for it, and offers now to fulfil the whole conditions of the minute, and therefore humbly implores, *ex nobili officio judicis*, to be reponed, seeing that it is very ordinary not only in certifications, but even in exceptions of payment, or renunciation, of wadsets or resignations of lands, when terms are assigned, and diligences ordinary and incident run, and the term circumduced, and the decreet extracted, yet thereafter if the party decerned shall find the same writ, and make faith that he used diligence for it, and found it not before, the Lords will repone, and therefore ought to do it in this case, where a great estate of three or fourscore chalders of victual is carried away for not fulfilling this article of the teinds that exceeds not 2000 merks in value, Gight having suffered much for his loyalty, and his writs being all dispersed the time of the troubles. It was *answered*, That to the first reasons, the decreet *in foro* is opponed, where the same are proponed, and most justly repelled, so that the decreet is not quarrellable on these grounds, for that the Lords sustained the certification to annul the articles upon Gight's inability or unwillingness to perform. It is a most necessary and proportionable certification, by which either party is but *in statu quo prius*, and the Lords do grant certifications far more heavy and unequal, as in improbations, taking away men's whole rights for not production thereof irrecoverably, or when parties pursue any process, and insist not, the defender may pursue a process against the pursuer to insist, with certification never to be heard thereafter, whereby his right, though never so valid, is forever excluded. 2*do*, It is

an unquestionable ground in law to reduce all mutual contracts *ex causa data non secuta*; so here Gight's part being imprestable, Pittrichie's obligements behoved to cease; and the brocard 'locum facti impræstabilis supplet damnum et 'interesse,' is not in mutual contracts, but in simple obligements; and albeit where the greatest part is performed, and a small part only remains, the same might be supplied by equivalence in contracts fully onerous, where their mutual prestations are of equal value; yet it can never be extended to gratuitous contracts, where a great benefit is granted upon terms of small importance; for these must be performed *in forma specifica*, seeing no man's gratuity can be in other terms than as he grants it, as in this case; for before the minute, Pittrichie had the gift of declarator, and was infeft thereon, whereby the property of the estate was in his person, and there was no antecedent communing, but the terms were granted when Pittrichie might have enjoyed the whole; neither did Gight contribute any thing by his concourse, for though he produced the base disposition to Frendraught, his sasine out of the register would have been sufficient; and that the lands were ward, the law presumes it without further probation; and, therefore, seeing Gight could not give the right of the teinds, he should not grudge that either party was restored. And whereas it is *alleged*, That the decreet is *ultra petita*, it is a great mistake, for the full nullity of the minute being libelled, the Lords qualified their own sentence, and suffered Gight to purge his failzie by fulfilling and satisfying the mails and duties *medio tempore* till he fulfilled, which is much less than the conclusion of the summons, and doth most ordinarily occur, as when parties are pursued as vicious intromitters, or behaving as heir, or in spuilzies, colourable titles will found defences, which the Lords do sustain, but still with the quality of refunding the true value; neither is there in this decreet any term assigned that needed circumduction, but the legal being a negative, proving itself, viz. that Gight had not performed, decreet was pronounced *ab initio qualificate*, but the extract was still superseded, and the writs produced by Gight according to the form, and upon his own desire debated before the Ordinary, and were reported, and found to be no ground whereupon Gight could fulfil; so that the same individual writs could not be received again, nor could they stop the circumduction of the term to be advised by the Lords; and albeit the decreet mentions a circumduction of the term, that is *ex super abundante*, for where decreet is pronounced, and no litiscontestation made, there is no act to be extracted, nor needs a term to be circumduced, but after the day to which the decreet is superseded, the decreet may be summarily extracted; and as to the desire to be reponed *ex nobili officio*, it cannot be pleaded *in jure*, but is *in arbitrio judicis*, and ought not to be granted in this case, where 15 months were granted to the party to perform before sentence; otherwise though he should now be reponed, and should not be able yet to fulfil, he might upon pretence of new writs still disquiet the pursuer; and the infeftment now produced was his own

No 22.

No 22.

writ, and the register in which it is found, was in order and patent, so that it was his own fault and neglect.

THE LORDS repelled the reasons of reduction, and adhered unto the decreet, both as to the matter and form of it; but as to Gight's desire to be reponed upon present performance, Pittrichie enjoying the profits in the mean time; the LORDS inclined thereto; but because it did not appear whether Gight could now fulfil or not, they before answer, ordained Gight to condescend how he could fulfil, and how he did now come to the knowledge of the infeftments of the teinds produced, and what diligence he did for searching for the same, and what hinderance he met with in not finding it.

Fol. Dic. v. 1. *p.* 595. *Stair, v.* 2. *p.* 353.

1676. *February* 11. TURNBULL *against* RUTHERFORD.

No 23.
A purchaser having demanded performance by an instrument after the term was come, this was not found to void the bargain, he not having insisted in a declarator, but performance thereafter was sustained.

BY minute of contract, Rutherford is obliged to deliver to William Turnbull a disposition of the lands of Bankhead, subscribed by Bankhead and his spouse, and by the Laird of Gladstanes his tutors and curators, before the first day of September 1673, to William Turnbull, and to enter him in possession of the lands at Whitsunday 1674, and to purge all incumbrances before that term; upon which Turnbull is obliged to pay 15,400 merks for the price at the said Whitsunday, the incumbrances being first purged; whereupon Bankhead having charged, Turnbull suspends on this reason, that the mutual cause was not performed, albeit the suspender by instrument did require the disposition, and a progress with purging the incumbrances, and that before the first day of September, which is the term contained in the minute. It was *answered*, That the charger made offer by instrument of a disposition, conform to the minute, with a progress of right, and to give the void possession, and that 40 days before Whitsunday, which was sufficient, albeit the term was the first day of September before, because the suspender had no prejudice, and therefore his instrument of requisition could not annul the minute, having no clause irritant, and where performance was offered without prejudice, likeas now the disposition and progress are produced. It was *replied* for the suspender, That he was not obliged to receive the disposition now, it not having been offered at the term appointed. 2*do*, The disposition produced, by ocular inspection, appears to have had the first sheet taken off, and a new sheet put on, which is far cleaner than the rest of the sheets; and, therefore, it must be presumed that the disposition, when offered, was not then sufficient; and though it were now receivable, as it is not, because it may be quarrelled upon falshood, the first sheet not being subscribed of the date it bears, yet the lands having lien waste since Whitsunday 1674, the loss must lie upon the charger, with the suspender's damage by not getting the disposition before September 1673. 3*tio*, The disposition is not conform to the minute, bearing it to be subscribed by Gladstanes,