

in fee by error ; and that, by the personal obligation, William was to have been in fee ; and therefore they resign in favours of William : whereupon he is infeft, and now pursues a pointing of the ground.

It was ALLEGED for the Earl of Crawford, That there was a transaction betwixt the mother and grandmother and him, whereby they accepted lands for the sum, and entered in possession thereof. So that, if they had the right of fee, the satisfaction made to them must evacuate this right ; and the pursuer cannot quarrel the same ; because he acknowledges their right of fee, being infeft upon the resignation. And, if they had no right of fee, he hath no real right, but only the personal obligation ; which is no title for pointing of the ground.

The pursuer ANSWERED, That the mother and grandmother had, in their person, by their infeftment, a title of fee ; but which being by error and ignorance of the writer, might, upon that ground, be legally reduced ; and they ordained to denude themselves in favours of the pursuer : and they having done the same of consent, acknowledging the error, the pursuer hath acknowledged their title of fee *de facto*, but not *de jure*. So that the defender cannot quarrel the infeftment that he himself had given ; and, if the pursuer's title should not be sustained, but be put back to take a new infeftment, it would be ineffectual ; because the Earl's estate is carried away by expired apprisings.

The Lords sustained the pursuer's title for pointing of the ground.

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1676. *February 16.* The EARL of DUMFERMLING *against* The EARL of CALLENDAR.

THE late Earl of Callendar having married the Countess of Dumfermling, he became obliged, That the half of the conquest should belong to the Lady and her heirs, if there were no children to succeed thereto ; and did also renounce his *jus mariti* to her liferent lands, that she might dispose thereupon at her pleasure. This Earl of Dumfermling, as having right by progress to these provisions, did pursue the late Earl of Callendar and this Earl, then Lord Almond, to whom he had disposed his estate with the burden of his debt, at least without a cause onerous, concluding against both to denude of the half of the conquest ; and against the late Earl, to pay his intromissions with the Lady's jointure lands ; and against the Lord Almond, that the same might affect the estate. The late Earl being dead, Dumfermling insists against this Earl.

It was ALLEGED, No process against this Earl, till the late Earl's heir, or apparent heir, were called to liquidate these obligations against them ; or until the process were transferred. *2do.* That this Earl, having right by disposition, was in as good case as an heir of tailyie, against whom no process is sustained till the heir of line be discussed.

It was ANSWERED, That the conclusions against this Earl, being either upon his own obligation, to pay his uncle's debt, whereof both the said provisions were a part ; or otherwise being *declaratoriè*, that his disposition being gratuitous, the lands might be affected with anterior debts by apprising, and the same might be liquidate, there is no necessity to call any other : for, albeit, in a re-

duction before certification, authors must be called to produce, yet, in a declarator, there is no necessity thereof.

The Lords repelled both the defences, and sustained the process.

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1676. *July 5.* The LAIRD of GIGHT *against* The LORD ABOYN and PITTRICHIE.

THE Laird of Pittrichie, younger, having obtained a gift of recognition of the estate of Gight, and declared the same; and having also obtained a decret of declarator, declaring a minute of agreement betwixt him and Gight null; because Gight, being required by instrument to fulfil, did not the same: and having taken several diets to fulfil, was found not to be in a capacity to fulfil; and therefore the minute was declared null, after several diets for two years' time, allowing Gight to fulfil. Whereupon Pittrichie pursued for maills and duties of the estate of Gight; and Gight raised a reduction of the declarator and nullity: and, during the dependence of that reduction, Pittrichie disposed the estate of Gight to the Earl of Aboyn, who was thereupon publicly infest. In which reduction the Lords inclined to repon Gight, if he were found in a capacity yet to perform the minute; but declared, that the maills and duties of land should belong to Pittrichie, until performance were made. And now Gight, having made a further production, ALLEGED, That he ought to be reponed to fulfil the minute, and the decret of declarator ought to be reduced; because, by the law of this and all other countries, decreets proceeding upon penal certifications, are always to be reponed against, *ex instrumentis de novo repertis*, which do fully purge delay and contumacy: and there was never any certification more penal than that whereupon this declarator proceeds; whereby threescore chalders of victual were lost, for not securing the teinds of that part thereof disposed to Pittrichie by the minute; which was the only ground whereupon the decret proceeded, and now is satisfied, without any remaining objection, by a full progress of the right of these teinds, which was found in the hands of the sheriff-clerk of Aberdene; and which was offered to be proven by famous witnesses, who were employed to search for the said writs, and found them in the said clerk's hands.

It was ANSWERED for the defenders, That there is nothing can be more secure than a solemn decret of a sovereign court, wherein parties have compeared and long terms granted and circumduced; especially as to the Earl of Aboyn, who is now publicly infest, and is a singular successor, resting upon the security of that solemn decret. *2do.* Albeit now, the right of the teinds be cleared, yet the right of property of the lands provided to Pittrichie by the minute, are neither secure by a public infestment, holden of the king, conform to the minute, nor can he be secure by what is offered or produced for the lands provided to Pittrichie; being an old wadset by the Lairds of Gight, his predecessors, and holden of Gight, he is neither secured in the right of reversion, nor in the superiority: for any thing produced is a charter from certain apprisers of the estate of Gight, to the Laird of Fredret, *à se*, not confirmed, and a charter