No 21.

*** Gosford reports this case :

IN a declarator of nullity, pursued at the said Anna and her husband's instance, against Major Biggar and his wife, and the rest of the daughters of Wolmet, to hear and see it found, that a minute of contract of marriage, made in *anno* 1641 was void and null *super hoc medio*, that by the said minute the said Anna Raith's good-sire was bound to pay in tocher the sum of L. 10,000 to Wolmet's eldest son, who should be married with the eldest daughter of James Edmonstone, fiar of Edmonstone, or, failing of her by decease, to any other of his daughters ; as likewise to advance upon good security other L. 10,000 for relief of a wadset granted to James Loch, and all other real burdens upon the estate, to the effect that Edmonstone's daughter, who was to be married, and the heirs of the marriage, might be provided to the estate free of all burden ; which never having been performed in Wolmet and Edmonstone's lifetime, and it being now imprestable by the heirs of Wolmet, whose estate was settled in the person of Major Biggar, as a singular successor, and that Wolmet's son did not marry that daughter, who was first designed, but on the contrary, without the father or good-sire's consent, did take away another daughter, and was clandestinely married ;—it was *alleged* by the defenders, That the minute of contract, besides the provisions of tocher to be paid by Edmonstone, and of the fee of the estate of Wolmet to be secured to his eldest son and his wife, and the heirs of the marriage, the said minute contained likewise provisions made by Wolmet with consent of his Lady to the rest of the children besides the heir, wherein the pursuer was not concerned, the minute could not be declared null at the pursuer's instance, as to the whole heads and clauses thereof. THE LORDS found the defence relevant, and refused to declare the minute null in itself, but decerned only that it should not be obligatory against the heirs of Edmonstone, as to any obligement upon his part, seeing Wolmet and his heirs neither had, nor were now in a possibility to perform the conditions on their part, and so found that Edmonstone's obligation was only null, as being *causa data causa non secuta*.

Gosford, MS. No 301. *p.* 131.

1671. *June* 14.

LADY WOOLMET and DANKEITH her Spouse *against* MAJOR BIGGAR.

No 22.
Effects of mutual prestations in a contract of marriage, debated, but not determined.

JEAN DOUGLAS Lady Woolmet being by her contract of marriage infeft in the half of the lands of Woolmet, did with her husband consent to a wadset of the whole lands for 28,000 merks, wherein there is a back-back setting the lands and coal to her husband and her the longest liver of them two for pay-

No 22. ment of the annualrent of the money; which wadset the said Jean in her viduity as tutrix renewed to the first wadsetter's assignee, and became personally obliged, both for the principal sum and back-tack duty, and took the back-tack, half to herself and half to her son the heir; but after the first wadset, her husband set a tack of the whole coal to his seven children, for twelve years, they paying twelve hundred merks yearly to the wadsetter, and two merks yearly to his heir; which tack expired in *anno* 1663; after which the said Jean Douglas and David Cunningham of Dankeith her husband, pursue Major Biggar as intromitter with the coal for the half of the profit thereof conform to the back tack, who *alleged* absolvitor, because the back-tack, in so far as it exceeded the Lady's jointure, was a donation between man and wife, and was revoked by the children's tack, and being once revoked, remained for ever revoked, because the ground of law prohibiting donations between man and wife, and anulling the same *nisi morte confirmentur*, is introduced *ne mutuo amore se spolient*, and therefore nothing can make them effectual but the husband's continuing in the same mind to his death; but any signification of alteration of his mind, directly or indirectly, though it were in his testament or codicil, or by any deed whereby he owns the thing disposed, as still at his disposal, is sufficient to annul the wife's right; as if he should grant a wadset of the same lands, though without mention of his prior liferent, given gratis *stante matrimonio*, it would revoke the same; so that though the husband redeemed the wadset, the wife's right could not revive. So here the bairn' tack being of the whole coal for twelve years, doth wholly revoke the back-tack, as to the wife, not only during these years, but for ever; 2*do*, There is a minute of contract betwixt the husband, his wife, and Raith of Edmonstone, clearly showing the change of his mind, and restricting the Lady to her first liferent. It was *answered*, that albeit *in jure donationis*, or where there was a clear and liquid excess of the right received, exceeding the right quite, any deed evidencing the change of the husband's will, might be sufficient to recall it; yet that holds not here, where the Lady quited a certainty for a casualty, viz. the profit of a coal, which might many ways have been ruined and unprofitable, in which case she would have nothing for her jointure, and so it was *permutatio spei*, *aut jactus retis*, and at the time of the wadset, was not of more value, in buying and selling, than the jointure of the lands, being certain; 2*do*, This not being a pure donation, the husband could not recal it till he had restored his wife to her first liferent, and relieved her of all burden and distress she had sustained by the wadset; neither had he shown his mind to change, but only in part. And as to the contract with Raith, it was in contemplation of a marriage, and was all founded on advancing sums to redeem the wadset, whereby the back-tack ceased; 3*tio*, The defender cannot exclude the pursuer, unless he pay her all by-gone years of her jointure she wants, from 1654 to 1667, by arrestments and processes upon the back-tack, and free her of the principal sum and annualrent, and satisfy her of the damage she has sustained by lying out of her

liferent, for all these years, and sustaining a long pursuit, wherein she is willling to acquiesce. No 22.

THE LORDS, in respect of this offer, and that the defender did also offer to free and relieve her, rested therein, and did not proceed to advise the former points, *in jure*.

Stair, *v.* 1. *p.* 733.

*** Gosford reports this case:

IN a declarator at Dankeith's instance, against the Major, to hear and see it found, that the Lady Woolmet his spouse, having, as liferentrix of the half lands of Woolmet, consented to a wadset, both of the lands and coal of Woolmet, wherein there was a back-tack granted to Woolmet and her, for payment of the annualrent of 28,000 merks, lent upon the wadset; which back-tack being revoked by Woolmet, by setting a tack of twelve years of the coal to his children, for their provisions, the said twelve years being expired, that the back-tack did revive, and that she had a right to the whole benefit of the coal, ay and while the wadset was redeemed;—it was *alleged* for the defender, That by a former decreet of the LORDS, it was found that the tack set to the children was a revocation of the back-tack granted to the Lady, as being *donatio inter virum et uxorem*, in so far as it exceeded the worth of her liferent-lands, to which she was provided by her contract of marriage, and therefore could never revive it, being once extinguished, seeing the setting of a tack for twelve years, to begin after Woolmet's decease, which might be thought equivalent to the liferent of a widow, ought to be interpreted in law, a total revocation, it being such, *in indicium mutatæ voluntatis*, that the husband thereby intended that she should have no benefit thereby; likeas thereafter, by a minute of a contract of marriage to which the Lady had consented, the estate of Woolmet was provided to the eldest son, and the coal appointed for the bairns' provisions, and the Lady was only to enjoy her liferent-lands contained in her contract of marriage, by which there not only was a total revocation, but it was homologated by the Lady herself. It was *replied* for the pursuer, That the tack set to the children being only for twelve years, was only a revocation *ad tempus*, but not absolute, and so did revive after expiration of the tack; and for the minute of the contract, seeing it was only in order to a marriage, which was never perfected in the father's lifetime, and was done in contemplation of a tocher of L. 10,000, whereby the wadset should have been relieved *pro tanto*, which was never paid, but on the contrary, the heir of Edmonstone, who was party-contractor, was declared free of the tocher by a decreet; therefore nothing could be founded upon that minute which never took effect; but in law this back-tack could not be reputed *donatio inter virum et uxorem*, seeing it was remuneratory, viz. for consenting to the wadset of her liferent-lands, and the lady being obliged to pay the back-tack duties, as likewise the principal sum,

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