ment, albeit it was a bounding evident of property, yet it could not be obtruded to prejudge Tunnel's right of commonty, or to be a ground of declarator of Sir Robert's property; because the said infeftment was only granted *in anno* 1613, upon Hempsfield's own resignation; which is long posterior to the Act of Parliament 1592, bearing, that all such bounding evidents, upon the vassal's resignation, cannot prejudge any third party, either of property or commonty: Likeas, he remitted himself to the depositions of the witnesses; whereby it would appear, that, notwithstanding thereof, he had been in constant and immemorial possession of common pasturage, and casting feal and divots, and winning peats out of the moss, past memory of man. And, as to the interruptions, they are but very few deeds, and that *via facti;* but no legal interruption within these forty years; except within these four or five years bygone, by Sir Robert himself: neither were the payment of the fowls by Tunnel's tenants proven, but when Hempsfield was tutor or curator to the Laird of Tunnel many years ago; and the assertion of the witnesses could not prove the cause of payment thereof, which they only had *ex auditu.*

The Lords, after reading of the depositions of the witnesses adduced by both parties, did find, 1*st.* That Sir Robert had the only right of property, by the said charter granted by the King; against which Tunnel being only infeft *cum communi pastura,* could give him only a right of servitude, which was consistent with the right of property, which undoubtedly, before the said bounding-charter, was in the king's person. 2*d.* As to the right of pasturage, with the privilege of casting divots and peats out of the moss, they did likewise find, That Tunnel, being interrupted within the forty years, and by payment of moss-fowls, which could be attributed to no other cause but for a licence or tolerance, his declarator of commonty could not be sustained. Which was very hard as to the privilege of pasturage; seeing the witnesses for both parties did clearly prove the same to have been constant, and of a very long endurance, and that the interruption thereof by Hempsfield was only proven by a very few witnesses, and those were only that once he had threatened a tenant who was casting divots; and once offered to drive the goods off, which was forty years ago; and, notwithstanding, did suffer him continually to pasture without any legal diligence by intenting an action of declarator or contravention. And as to the payment of the kain-fowls, it was only done very long ago, and they being designed moss-fowls, and exacted by Hempsfield from the tenants, who had never warrant from Tunnel, whatever might be inferred from thence to evince that they had thereby a licence to win peats in the moss, yet that could be no ground to evince that the right of common pasture was by tolerance; seeing Tunnel was infeft expressly in his lands, *cum communi pastura,* which lay contiguous to the said muir as to a part thereof, which had a clear entry thereto by the space of two pair of butts and a loaning, wherein there is no bounding or mark to divide them; and accordingly had free ish and entry daily to pasture and to cast divots, notwithstanding of any alleged interruption. *Page* 371.

1673. *December* 6. Laird of Grange *against* Robert Smith.

In a reduction of a decreet-arbitral, at Grange's instance, upon this reason,—

That the arbiter had committed iniquity in decerning him to pay annualrent for a sum only due upon a decreet, which could bear no annualrent, which, in law, is only due *ex pacto vel lege :*

It was ANSWERED, That the pursuer having subscribed the commission, the arbiter might justly decern the annualrent to be paid for a sum which, in law, did bear no annualrent; and the same cannot be reduced but upon great lesion, *ultra dimidium.*

The Lords did assoilyie from the reasons of reduction; and found, That arbiters, upon just consideration, might decern annualrent to be paid for a sum or bond not bearing the same; seeing the subscribing of the commission gave him full power and effect, *ex pacto cum promisso*, which was equivalent, the annualrent was due by the decreet-arbitral. *Page* 374.

1673. *December* 6. MR JOHN INGLIS of CRAMOND *against* The ARCHBISHOP of ST ANDREW'S.

MR John Inglis of Cramond, being assigned to a bond granted by the Archbishop to Inglis of Kingask, whereby the Archbishop was obliged, that, in case Thomas Montcreif of Randerstoun should die without heirs of his own body, in that case the Archbishop should count to him for the half of the sum of 20,000 merks, for which the Archbishop was debtor, by bond, to the said Thomas; bearing the return of the monies, in case the said Thomas died without heirs, to the Archbishop: As likewise, for farther security, the said Thomas had given a back-bond never to uplift the sum, nor dispose thereof without the Bishop's consent.

After the death of the said Thomas, the Bishop, being charged, did SUSPEND upon this reason,—That he could not be countable for the half of the said sum; because, notwithstanding of the narrative of the bond, bearing, that the monies were put in the Archbishop's hand upon his proper bond, albeit it was at that time so intended, the monies were otherwise disposed of, and an heritable security taken therefor upon the Lands of Old Cambus; and thereupon a new back-bond gotten from the said Thomas, bearing a return, in case Thomas should die without heirs, and an obligement not to uplift but with consent of the Bishop: notwithstanding whereof, the said Thomas had affected the said sum, by borrowing of money, and giving of security unto creditors for payment of a great part of the said sum; so that the Archbishop cannot be countable but for what is not exhausted upon the said wadset.

It was ANSWERED, That Inglis of Kingask, having gotten bond, in contemplation that the Archbishop himself was debtor, did rely thereupon; seeing, by a back-bond, Thomas Montcreif could never affect the said sum without the Archbishop's consent, which he was ordained not to give: and, contrary thereto, he had agreed that the money should be secured by a wadset; and so he ought to have served an inhibition upon the new back-bond, whereby the wadset could never have been affected; and, not having done the same, he ought to be liable.

It was REPLIED, that the said 20,000 merks, having been a part of the price of the lands of Randerstoun, wherein neither the Archbishop nor Kingask had any interest; but, having married two sisters of the said Thomas, who, out of kind-