

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.

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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 obligation 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-

ness, failing of heirs of his own body, provided the return of the monies to them, as the said Archbishop was not bound to serve inhibition: So it had been against reason and gratitude to have done the same; and he never being debtor for the money, but *ab initio*, the same being secured upon the foresaid wadset, it were against all law and conscience to make him liable for any more than what he could recover, he being a naked trustee.

The Lords, having examined witnesses, and taken the Archbishop's oath, who did all declare that the Archbishop was never debtor by bond, and that the monies were lent upon a wadset taken in name of the said Thomas, to whom properly the sum did belong; and that the Archbishop, being only obliged not to consent, was not thereby bound to serve inhibition;—did suspend the letters, and found,—That all he was obliged to do was to communicate the right he had to the back-bond, and return the money in so far as was not affected: and that the narrative of the bond, being a clear mistake, and conceived upon an intention that never took effect, all that could be required was, that the Laird of Kingask should be in as good condition as the Bishop should be himself, who should communicate his right, as said is.

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1673. December 17. WILLIAM HAMILTON of Wishaw against ANDREW LUNDIE.

IN a declarator, pursued by Hamilton of Wishaw, against Andrew Lundie, to hear and see him found liable for six or seven years' rents of the lands of Forde, upon a discharge subscribed by him to the tenants, bearing a receipt of two years' duty; and therefore that the said Lundie, as tutor, did discharge the said tenants thereof, and of all preceding years since the death of Sir John Brown, with absolute warrandice: Likeas, it being referred to his oath what years he intromitted with, he did depone that all intromissions he had, he did profitably expend the same for the use of his pupil; which was an acknowledgment of his intromission with the whole years libelled.

It was ANSWERED, That the general discharge of all bygones, being subjoined to the particular receipt of two years only, could not infer actual intromission of all these years; and the most it could import was to secure the tenants upon the warrandice, in case they should be troubled. And, as to the oath and quality subjoined, it did not bear intromission with the whole years libelled.

The Lords did find, That the discharge did only import the receipt of two years' duty, and that the oath and deposition, being qualified as said is, did not import actual intromission of the whole years libelled; and, therefore, that the pursuer ought to prove otherwise, the defender's actual intromission with the duties of all years, preceding the two years contained in the discharge.

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1673. December 18. WALTER CORBET of Towcrose against HUGH CORBET of HARDGRAY.

IN a reduction and suspension of a decret, recovered at Towcrose's instance, against Hardgray, as executor nominated by Towcrose's mother, upon this rea-