

It was ALLEGED for the defender, That both the said bonds were granted *intuitu* of a right, made to Morphie, of Dunn's estate, who was the only debtor ; and, that the posterior bond, bearing, in the obligatory part, that he was only obliged to pay the said debt in case the price of the said lands disposed would satisfy Morphie and the Earl of Ethie's own debts, he was not obliged to make payment but in the case foresaid : which could never be made appear, the estate not amounting to the payment of all other debts, which were first to be paid before this debt.

It was REPLIED, That, by the first bond granted to the Earl of Ethie, albeit, in the narrative, Morphie became obliged, *intuitu* of the Laird of Dunn's estate disposed to him ; yet, in the obligatory part, he becomes simply obliged to pay all sums to which Ethie was assigned, which did comprehend this debt ; which is clear by the bond of corroboration, wherein it is expressly set down : and Morphie, of new, becomes obliged in corroboration of the first bond, and but any derogation thereto, to pay the said debt, which cannot be taken away by any declaration of the manner of payment out of the price of the lands.

The Lords did find, That the posterior bond of corroboration, notwithstanding that it did bear noways to derogate from the first bond, yet, in the obligatory part, being special and positive as to the way of payment out of the price of the lands, after the payment of Morphie's own debt, it did in effect derogate from the absolute obligation in the first bond ; and qualified the manner of payment, that unless the estate of Dunn being sold, all private debts could be satisfied, and the debt now in question, Morphie was not liable ; upon this reason, that *posteriora derogant prioribus*.

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1673. December 3. SIR ROBERT DALZELL *against* MAXWELL of TUNNEL.

THERE being mutual declarators pursued betwixt the said parties, one at the instance of the said Sir Robert Dalzell, for declaring the property of the Muir of Auchnean, and the moss therein contained ; and the other at Tunnel's instance, for declaring that he had a right of commonty in the said muir, as being infest in his lands of Tunnel, *cum communi pastura*, and in continual possession, past memory of man ;—the Lords, having granted a commission for examining of witnesses for both parties anent the manner of the possession, after report whereof, the cause being heard *in præsentia* :—

It was ALLEGED for Sir Robert, That his declarator of property ought to be sustained ; and Tunnel's right of commonty could never be declared ; because he stood infest in the barony of Hemsfield and the lands of Auchnean, as proper parts and pertinents thereof, by a special charter granted by the King, whereby the said lands are particularly bounded, and wherein the said muir and moss now in question did locally lie ; and, by virtue thereof, he and his authors have been in the possession of the said muir as their property, by tilling and labouring of some parts thereof, and by debarring the Lairds of Tunnel, and their servants from pasturage, and receiving a yearly duty of kain fowls from his tenants for a tolerance, when they were not debarred.

It was ALLEGED for the Laird of Tunnel, That the said Sir Robert's infest-

ment, albeit it was a bounding evident of property, yet it could not be obtruded to prejudice Tunnel's right of commony, or to be a ground of declarator of Sir Robert's property; because the said infestment was only granted *in anno* 1613, upon Hemsfield'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 prejudice any third party, either of property or commony: 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 Hemsfield 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, 1st. That Sir Robert had the only right of property, by the said charter granted by the King; against which Tunnel being only infest *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. 2d. 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 commony 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 Hemsfield 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 Hemsfield 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 infest 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.

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1673. December 6. LAIRD OF GRANGE *against* ROBERT SMITH.

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