the marquis's clerk compeared and repledged. It was answered, That the pursuer had pursued first before the regality court, but, being denied justice there, and, after probation, the cause not being advised, though often desired, the charger did justly and necessarily pursue before the sheriff; and, for the repledging, it was not till sentence was pronounced; and, though an instrument bear that the marquis's charter was produced, it is offered to be proven, *per membra curiæ*, it was not produced. It was answered, That the repledging was the same day the decreet was pronounced, before the court rose; so the decreet being unextracted, and in the sheriff's power, he ought to have admitted the repledging; and, though the marquis's charter had not been produced, the being of his regality was *notorium* in that place. The Lords would not sustain the decreet, but turned it unto a libel; and, that neither party might be preferred in the sole probation of the stent or over-sums, they granted commission to examine witnesses upon the place for either party.

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1671. *December* 19. CUMMING of COULTER *against* GORDON of ACHINDANIE and GORDON of TALPERSIE.

THERE is a decreet-arbitral pronounced betwixt Cumming of Coulter and Gordon of Talpersie, whereof Cumming of Coulter raises suspension and reduction, and insists on this reason, That the decreet-arbitral was most unjust, and he enormly lesed, against both law and equity; because the suspender, having married Talpersie's daughter, he promised him 2000 merks of tocher; and, upon his refusal to pay the same, Coulter took the gift of his escheat: and there being some debts due by Coulter to Talpersie, a submission was made to two friends, and, in case of variance, to an oversman; which oversman not only decerned Talpersie to discharge the escheat, and any further claim which extends to the said additional tocher, but also to discharge a bond of 3000 merks, wherein Talpersie was debtor to Coulter, and which was not submitted; and only decerns Coulter to discharge a bond of 1080 pound, a ticket of fourscore pound, and a ticket of 100 merks, and that upon payment of 300 merks; the value of which escheat was worth 12,000 merks, and the bond of 3000 merks, with annualrents, was come to 9000 merks. It was answered, That there was no injustice or enorm lesion in the decreet-arbitral; because, as for the escheat, it being taken by Coulter, the arbiters might justly decern him to discharge it in favours of his own good-father, being satisfied of his just interest; and they have decerned him more than his interest, both for that and for the pretence of additional tocher, for which he had nothing to instruct; nor did he put the matter to Talpersie's oath before the arbiters; and, though he had, the three tickets, with their annualrents, would have balanced both; and, as for the bond of 3000 merks, Talpersie produced a discharge from ——— Keith, who was Coulter's agent, upon payment of the sum, thirty-seven years ago, since which there was no pursuing of the debt; and though the assignation be lost, the oversman, upon trial of the case, and the common fame that the debt was paid, might justly decern the same to be discharged; for though, in strict law, writ or oath of party doth only take away bonds, yet,

amongst arbiters, other evidences may be sufficient; and there were adminicles extant of the assignation, that might have given ground to prove the tenor thereof by witnesses; and though this bond be not, *per expressum*, submitted, yet all clags and controversies, concerning any bonds or debts, are submitted; which might well comprehend this, especially being so old and controverted a right. It was answered, That, if the submission had been wholly general, relating to claims, or, if it had borne a clause conform to claims to be given in, it might have comprehended this sum; but, being special as to the matters of less moment, without the said clause, it cannot be extended to this sum, especially seeing the oversman is a cautioner in this bond. The Lords found none of the reasons of reduction relevant, but adhered to the decreet-arbitral.

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1672. *January 5.* JACK *against* JACKS.

IN the cause mentioned betwixt these persons, debated the thirteenth day of December 1671, it being represented by bill, That the contract of marriage betwixt Jack and his second wife was lost; and desiring, that,—seeing the bond of provision to the bairns of the second marriage did bear to be "in satisfaction of all that the bairns could have by any contract betwixt their father and mother;" which did import that there was a contract of marriage; and this being a provision to children of a second marriage, who ordinarily have provisions by contract; and that it is a natural duty to provide children,—less solemnities in writs by a father, *inter liberos*, may suffice than the greatest requisites required by the Act of Parliament, of two notaries and four witnesses, there being here two notaries and three witnesses. The Lords did also take in consideration another reason of reduction of this bond, That it being clandestine, lying in the father's hand, who, by a public solemn contract of marriage, disponed his lands to his eldest son, and had reservations of liferents for himself and his wife, and a provision in favours of the eldest son of the second marriage; the said contract doth import a revocation of this bond of provision, which was in the father's custody, neither delivered nor registrate: and it would be an act of great fraud if the same, being latent, and not mentioned among the reservations in the son's contract of marriage with a stranger, for a tocher, that upon that latent bond the bairns of that marriage should be excluded or burdened; as was formerly found in the case of the Laird of Glencorss: so that, this bond being so little favourable, the nullity thereof ought not to be supplied. It was answered, That there were specialities in Glencorss his case, not quadrating with this; and that the onerosity of the son's contract could only be *in quantum* it were onerous: and that the presumed revocation of the father cannot be inferred by disponing to his son; because it is offered to be proven, that the father, long thereafter, upon his own expenses, caused deduce an apprising upon this same bond, which doth evidently both adminiculate the subscription, and take off the presumption of revocation. It was answered, That it does not import that the father revoked not this bond of provision by his son's contract, though thereafter he has caused apprise upon this bond; but only that he changed his mind, likely by insinuation of his second wife; which he could not do, after the contract, by the most