of the four children, and so had right to a fourth part of the whole moveable estate due to her and the rest.

It was REPLIED, That the pursuer, Andrew Harlaw, pursuing as sole executor to Thomas Harlaw, upon two bonds granted by the curator to him *proprio nomine*, any payment of tocher to Agnes Harlaw cannot exoner him.

It was ANSWERED for the curator, That any bond granted by him to Thomas, being only for his intromission with money and goods, which belonged equally to four children, he could not be liable to Thomas but for his proportion thereof, if it should amount to the bonds which is the ground of the pursuit.

The Lords, having ordained the conjunct curator with Afleck to be examined upon the value of the estate; who deponed, That by the death of the father, there fell to the children above 7000 merks, so that Thomas's proportion did amount near to the whole sums contained in the bonds: Notwithstanding whereof, they did ordain, That Harlaw should prove the whole value of the defunct's estate, and that Thomas's proportion was no less than the sums contained in the bond. Which was hard; seeing that a curator intromitting, and being major, *sciens et prudens*, it cannot be presumed that he would have granted a bond to any of the children, unless he had been their debtor in so much; and that, after twenty years, to ordain children to prove the value of their own estate, against their own curator, who had acknowledged and given bond without any restriction or provision, it was not to be expected it was consisting in their knowledge.

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1672. *December* 13. MR JAMES MURRAY *against* ROBERT FRENCH of FRENCHLAND.

ROBERT French, being pursued for payment of the whole debt contained in a bond granted to Murray, as having deforced the messenger in the execution of his caption against the debtor;—it was ALLEGED,—by the Acts of Parliament 1587 and 1592, it was statuted, That deforcers of messengers shall escheat their whole moveables, the one half to the King and the other to the party wronged; so that this being a penal action, and the punishment expressly determined by law, there is no power left to the Judges to extend the same. *2do.* The Acts of Parliament allowing that deforcers may be either civilly or criminally pursued, *una electa non recurritur ad aliam;* but so it is that the defender was pursued criminally before the justice for the same fault.

It was REPLIED, to the *first*, That the Acts of Parliament do only add a further pain than what is done by the common law; and that defenders, before these Acts of Parliament, being liable to the whole debt for deterring of deforcers, the escheat of their moveables was statuted to belong to the King, and the creditor who suffered thereby; and hath been so determined by the Lords, 25th July 1633, Mitchell against Barclay.—It was REPLIED, to the *second*, That albeit the deforcer was pursued criminally before the justice for his violence and breach of the peace, yet that hindereth not the pursuer to intent a civil process for his damage and loss, both these actions being consistent, and for divers causes; and the law doth not allow to recur where two actions are competent,—only where they are for one and the same cause, and where *pinguior actio electa, alia extinguitur.*

The Lords did repel the defences; notwithstanding that the Acts of Parliament bear that the creditor, *quoad* the debt whereof he is frustrated, should be first satisfied before the fisk can have any right; but statutes nothing for payment of the debt by the deforcer; as to which the debtor himself is still liable. But, in respect of the foresaid practick, and that if the libel had been expressly founded upon damage and interest, undoubtedly it would have been sustained upon that ground; and, therefore, they found the defender liable for the debt: seeing, otherwise, the creditor might be altogether frustrated, the debtor being freed from the caption, and so in a capacity to go away; and the deforcer might be a man of no fortune, and his moveables inconsiderable.

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1672. *December* 13. The LADY MILNTOUN *against* The LAIRD of MILNTOUN.

IN the reprobator, pursued at the Laird of Milntoun's instance against the Lady, for corrupting of the witnesses who had deponed in a process of divorcement, wherein she had obtained decreet before the commissary against her husband;—it was craved for the lady, by a bill, That she might have diligence for citing of witnesses to prove that the Laird himself had corrupted those witnesses; which, being proven, will incapacitate him to pursue this action of reprobator against her.

It was ANSWERED, That the desire of the petition could not be granted; because the Lady, having obtained decreet upon the depositions of the same witnesses, unless she would renounce the benefit thereof, she could not pursue a reprobator before the Lords against the Laird of Milntoun; for they are only pursued before the Lords *ad civilem effectum*, to take away decreets which are only founded upon the depositions of these witnesses.

The Lords refused to grant the desire of the bill; and found, That the Lady, craving the same only *ad vindictam*, and, notwithstanding, pursuing her interest upon the said decreet, which she would not renounce, could only pursue the reprobator before the justice.

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1672. *December* 17. The EARL of MARSHALL and LORD ARBUTHNOT *against* BARCLAY of JOHNSTOUN.

ARBUTHNOT, as assignee, by the Earl of Marshall, in and to a bond of 6500 merks, granted to the deceased Earl of Marshall by Barclay, bearing, that it was for a part of the price of the lands of Cletton, disponed in feu,—having charged Barclay for payment, he did suspend upon this reason, That, by a posterior contract of wadset of these same lands, wherein the first right of feu was resigned,—it was DECLARED, That the whole sums of money due as the price of the said lands were satisfied and paid; and, therefore, the bond being granted for that same cause, must of necessity be interpreted to be paid, and should have been delivered back to the suspender: which likewise may be evinced, in so far as the Earl did pay the 500 merks more than the 6000 contained in the bond.