pender of another sum. It was permitted to the creditor to ascribe the payment to what cause he pleased; for the discharge not bearing which of them it was in satisfaction of, *semper in duriorem causam imputabitur.*

L. 1. 2. *usque ad* 8. *D. de solutionibus. L.* 1. *C. eodem ibique* Vesembecius *et* Perezius. *Vide infra No.* 334. [*January*, 1672, *Aytoun* against *Lauder.*]

Solution is ay computed to cut off that debt which is *durior* to the debtor, *v. g.* he owes one sum on annualrent, another without it, indefinite payment will be ascribed to cut off the debt upon annual.

Advocates' MS. No. 118, *folio* 88.

1671. *January* 31. Anent COMPETENT and OMITTED.

ONE alleging exhausted, it was ANSWERED, That the said defence was competent to have been proponed before the commissaries, and being omitted there, it could not be received now *in secunda instantia.* REPLIED, That he could not propone it before the commissaries, because they nor no inferior Judge sustain this defence, exhausted by lawful sentences before the intention of your cause, unless they say obtained a decreet of exoneration, (though it be relevant before the Lords;) and why should he have proponed that which would have been repelled? DUPLIED, That having proponed it, and being repelled, he should have advocated upon that ground.

Vide Hope's Minor Practicks, Cap. 2. of confirmation of testaments; page apud me No. 13; *7th December*, 1609, *Aikman.*

Advocates' MS. No. 119, *folio* 88.

1671. *January* 31. BLAIR *against* BLAIR of Balgillo.

BALGILLO being debtor to the Laird of Denhead in a certain sum of money, he assigns it, in 1632, to Guthry of Coliston, who, in 1633, charges as assignee. This charge Balgillo suspends upon divers reasons, and debates it then with the assignee. The matter lies over; and, in the mean time, the assignation to Guthry perishes through the iniquity of the times. In 1648 Denhead makes a second assignation of it to Coliston, narrating, that where he had made him a former, and that the same was now lost, therefore he made him over a new right of the same. Coliston's assignee craving this bond and assignations to be transferred against this defender; it was ALLEGED, The same can never transfer, because the same was paid to Denhead the cedent, before the date of your assignation in 1648. To which it was REPLIED, That Denhead's discharge produced could never exoner him, but he behoved yet to make payment of it to the pursuer; unless he would say the discharge was anterior to his assignation or intimation of it *in anno* 1632. DUPLIED, He needed not say that, because *non constat* if there were such an assignation, seeing it now cannot be shown, *et de non apparentibus et non existentibus idem est*

judicium. TRIPLIED, He could never be heard to deny that assignation, seeing 1*mo*, The second assignation taken in 1648, proports the same to have been, and to have been lost. 2*do*, His reason of a suspension was a sufficient acknowledgment of the assignation which they produce, together with sundry minutes in a dispute that followed thereon in 1635. QUADRUPLIED, That the said assignation in 1648, and the raising of suspension in 1635, will be good adminicles for making up the said assignation in an action for proving the tenor of it; but that it should prejudge the debitor now when the same cannot be shown, is against all reason; for *esto* it were produced it might be null for many reasons; it might be so questionable that it would not be sustained for the ground of a pursuit or charge; or *dato* it had been a valid assignation, yet it might have been given back to the cedent, and he retrocessed.

They were to have the Lords' answer upon this. See something like in Papon's *arreists, Lib.* 10, *T.* 5, *des payments Cap.* 4*to.* where a man craving to be reponed against the discharge, and in the pursuit the discharge being found to be lost, the libel was found no acknowledgment of the acquittance. *Vide supra,* 28*th January,* 1671, *Gibsone.*

Advocates' MS. No. 120, *folio* 88.

1671. *February* 2. Anent SUMMONSES.

A SUMMONS must be executed within year and day after the same is raised, else that summons is null. Being executed, if year and day elapse without doing any thing thereon, the same is said to sleep, and we cannot insist upon it without it be again wakened; but a continuation of the summons, though ten years after the raising of the first summons, will be reputed equivalent to a wakening; as the Lords have oft found. *See Haddington,* 13*th December,* 1609, *Boig* against *Home.*

Advocates' MS. No. 121, *folio* 88.

1671. *February* 2. The EARL of ARGYLE *against* GEORGE CAMBELL.

THE Earl pursues the Sheriff, as having been chamberlain to his father the space of divers years, to count for his intromission with the rents of his lands.

Against which it was ALLEGED, That he could not count for his intromission these years, in respect he had a general discharge of the then Marquis, posterior to all the intromissions libelled, viz. *vide in anno* 1649, wherein this very pursuer is a witness.

To which it was REPLIED, That the sheriff was *in mala fide* to take a discharge of the then Marquis this pursuer's father, because before the same he was involved in sundry heinous, enormous, and atrocious acts of treason, for which