1671. *January* 28. Anent *pari passu* preference of APPRISINGS.

IT went to interlocutor, whether or no the third compriser, who has comprised within year and day of the second, but not of the first effectual comprising, will come in *pari passu* with the second as the second comes in *pari passu* with the first, conform to the act of Parliament? Though there may seem the same parity of reason, yet I think he will not. It may also be questioned from what time the year begins to run, whether from the date of the decreet of apprising, or of the infeftment rather, since it can scarce be called an effectual comprising till then; and so if a man shall have the benefit of the act of Parliament, who comprises within year and day from the date of the seasine, or if it must be from the date of the decreet, or of the allowance, as is found in a like case, 11*th November*, 1630, *Laird of Limpitlaw*. *Item*, it seems that if the denunciation of the second appriser be within year and day, it will be sufficient though the rest of it be without the year; for in *favorabilibus* (such as is the case of creditors contending *damno vitando*) *actio incæpta habetur pro completa, et initium est spectandum*. *Vide infra, No.* 196.

Advocates' MS. No. 116, *folio* 87.

1671. *January* 31. WHYTHEAD *against* THOMAS LIDDERDAILL.

IT was alleged that he could not answer till he was of new summoned, because any citation given against him was upon sixty days at the pier and shore of Leith, &c. as use is, against one that is out of the country; whereas he neither at that time, nor ever since, nor before, was he out of the country. ANSWERED, Let it be so, a citation as if he had been out of the country is more than a citation at one's dwelling house, and at least it must be repute equivalent to the same. *Quæ superabundant non nocent. In majori continetur et minus.*

My Lord Gosford would not sustain the citation, but found he must be summoned of new. The cause of this mistake was, that this defender had a brother who was truly out of the country, and who was also called in the process, and they thought it one work to cite both on the sixty days. See a case somewhat parallel, 4th June, 1631, *Chrystie* against *Jack*.

Advocates' MS. No. 117, *folio* 87.

1671. *January* 31. TAILFER *against* ———.

THIS was a suspension upon the reason of payment verified by a discharge produced, which bore only the receipt of L.40 in part of a greater due to the giver of the discharge. ALLEGED, The discharge did not meet this charge, and was not a discharge of any part of the sum contained in the bond charged on, though it be posterior to it, but of a decreet recovered by the charger against the sus-

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*