

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 duriolem 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 decret 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*