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

he was thereafter forfaulted *in anno* 1661; and so was incapable by the law to grant any discharge.

DUPLIED, The said acts of treason committed by him, for which thereafter he was forfaulted, being most latent and secret, neither could I, nor indeed was I obliged to know them, unless they had been notour to the whole country, as they were not; and thus was it determined in Regent Morton's case, who, sixteen years after the fact, being accused for the treasonable concealing of King Henry's murder, no dispositions nor other deeds whatsomever, made by him all that time before his accusation, were quarrelled, and of all necessity and reason it must be so, where the crimes are latent and not obvious to every man's capacity, as was in Morton's case; and so also here, else what a horrible uncertainty would men be put to, to know the most privy and close intrigues of those with whom they contract, or have otherwise to do, lest they be lying in the guilt of treason. *2do*, He can never pretend that his father could not then grant a valid discharge, as being *astrictus crimine læsæ majestatis*, because, by the decreet of forfaulture given against him, it appears that the main acts and crimes for which he was forfaulted were all committed by him after his granting the said discharge, viz. in 1654, in which he complied mightily with the usurper; for though in his criminal libel there were many other things accumulated against him which were perpetrated before the date of the said discharge, yet his compliance in 1654 was the thing the advocate then insisted only on, and he declared he restricted his summons thereto. *3tio, Craig page* 86, *in initio*, tells that payment may be lawfully made to one guilty of treason at any time before sentence, which he may also discharge; but *ita est* this discharge proceeded upon payment made to this pursuer's father of the rents of the lands intromitted with by him; *Ergo, vide infra, No.* 406. [*June*, 1673, *Dalzell* against *the Tenants of Caldwell.*]

The Earl also alleged, that notwithstanding of this discharge, the defender must count to him for some particulars of his intromission that he should pitch upon, because he offered him to prove by the defender's oath, that he had not counted for the same. To this it was ANSWERED, That the discharge behoved to liberate him from giving his oath anent any intromission with the granter's rents before the date of the same, and that it were a very dangerous thing if men were put to their oath where they sufficiently instruct by writ, especially considering that it is now twenty years and more since he counted, and gave up all his instructions to this pursuer's father, upon which exact account followed this discharge; and that *tanti temporis intervallum* produces in law probable oblivion, yea, the half of it suffices. Mascardius *de Probationibus conclus.* 1128.

REPLIED, The defender had no prejudice to give his oath, though it was *in facto antiquo;* because if he should depone *non memini*, whether I counted for such or such particulars, but for aught I know I did, this will assoilyie the defender, in regard his deposition proves not the pursuer's reply.

The Lords ordained the defender to depone.

This was my Lord President's doing, he being my Lord Argyle's great confidant. It was admired by all, that he blushed not to make a reply upon his father's forfaulture, and how he had committed many treasonable crimes before the discharge; and to see him, rather than tyne his cause, suffer his father to be reproached and demeaned as a traitor of new again by his own advocates.

L. 19. *D. de R. Juris unusquisque debet scire conditionem ejus, &c. See* 6*th December,* 1609, *Cunyghame and Home. See Balfour's Collection of Practiques, Tit.* 19 *of Payment, in principio, folio* 34. *Reo majestatis non recte solvit debitor, L.* 6. *C. ad L.* 3. *majestatis; L.* 41. *et seq. D. de solutionibus. See Hope, Tit. of treason, folio mihi* 246; *see Craig, page* 86, *No.* 446 *and* 479; *Connanus, libro* 5. *Commentariorum capite ultimo.*

Advocates' MS. No. 122, *folio* 88.

1671. *February* 2. THOMAS WATSONE, Merchant in Edinburgh, *against* JOHNSTONES of Coreheid.

IN this cause it was debated, whether a prorogation granted to a principal debtor will be profitable to a cautioner; and if such a prorogation will infer a novation so as simply to liberate the cautioner; and if a novation of the sum contained in a former bond may be also made use of by the cautioner in the same, though it seems not to be introduced in the cautioner's favours. *See* Mascardus *conclus.* 1113. *Vide etiam,* Schotanum *de constitut. Principum, page* 28, *de Rescriptis moratoriis* made in favours of the principal, but not of the cautioner. *Vide Notas D. van Tien super eo loco ibique Freundergerbium.*

Advocates' MS. No. 123, *folio* 89.

1671. *February* 1. LORD DUMFERMLING *against* the VASSALS of that Lordship.

HE having given in a bill to the Exchequer, desiring they might not enter any of the vassals of that Lordship, but that they might all pass by him, as having a three nineteen years tack of the whole casualties, obventions, and feu farms thereof; at least that they would enter none till they produced a certificate, under his hand, that he was satisfied anent their composition.

It was ALLEGED for the vassals, That the Earl's right was null, because of the law long tacks, such as this was, are equivalent to an alienation; and all alienations of the King's annexed property, and proper patrimony of the crown, are discharged by many acts of Parliament; but *ita est* the lordship and abbacy of Dumfermling is of the property annexed to the crown, though not by the general act 1587, yet by a posterior act in 1593 it is specially annexed, and it must also be supposed to be comprehended in the act of annexation 1633. *2do,* The tack being granted in 1641, and his Majesty considering that many things had escaped both his own and his royal father's hands, during the time of these confusions, he has, in 1661, revoked all deeds done by him then: and though by a particular act in 1661 this tack be excepted from his Majesty's revocation, yet it must fall under the same, because, 1*mo,* The act *salvo,* according to its explication in 1633, reserves all parties interests as they were before the making of these