

1712. *January 18.*ROBERT HERRIES in Forberliggit, *against* SIR GEORGE MAXWELL of Orchard-toun.

IN the action at the instance of Robert Herries, against Sir George Maxwell, as representing Sir Robert Maxwell his father, for payment of L. 260 of principal, with penalty and annualrent contained in a bond granted by him to Janet Affleck in Midtoun of Spots, and assigned by her to the pursuer her son. The defender proponed compensation, upon this ground, That he offered to prove by the pursuer's oath, that his cedent possessed the lands of Spots, as tenant to the defender's father, for more years than the rent thereof would satisfy the bond.

*Alleged* for the pursuer; It being more as 30 years since his cedent possessed these lands, the defence of compensation upon her possession ought to be repelled; unless it be offered to be proven by the pursuer's oath, that these years rents of the lands possessed by his cedent are still resting owing, they being prescribed *quoad modum probationis*.

*Answered* for the defender; From the very terms the rents fell due, they compensated and extinguished the bond, by the course of debit and credit betwixt the parties, as effectually as if the pursuer's father had got a discharge thereof; and though action for these rents be prescribed as to the manner of probation, the defence of compensation thereon is perpetual, and must be sustained, unless that the pursuer can prove that the rents were *aliunde* paid.

THE LORDS repelled the defence of compensation, unless the defender offer to prove by the pursuer's oath, that the rents of the lands possessed by his cedent are still resting owing.

*Forbes, p. 579.*1719. *July.*SIR JAMES CARMICHAEL of Borfington *against* CARMICHAEL of Mauldsly.

SIR JAMES CARMICHAEL pursues Mauldsly upon several grounds of debt, owing by Mauldsly's predecessors to his predecessors; Mauldsly propones compensation upon greater sums due by the pursuer's grandfather to his predecessor, as executor confirmed in a testament made by Captain John Carmichael, anno 1644, wherein he nominates his two brothers, Sir Daniel and Sir James Carmichaels', predecessors to the parties in this process, his executors, and wherein Sir James, the pursuer's predecessor, was the sole intromitter. It was *objected* for the pursuer, That this reciprocal claim founded on the testament, was prescribed by the lapse of forty years, no document having been taken thereon; and being thereby extinguished, it could neither be the foundation of an action or exception.

It was *answered* for the defender, That the nature of compensation is such, that where there is a concurrence betwixt two debts, there necessarily must arise a mutual extinction; and if once there be an extinction, then without doubt,

No 138.

In an action for payment of a bond, the defence of compensation upon a debt once due by the creditor pursuing to the debtor, prescribed *quoad modum probationis*, and referred to the pursuer's oath, was repelled; unless the defender would offer to prove, also by the pursuer's oath, that this debt is still resting.

No 139.

Compensation found not proponable upon a debt despite by the forty years prescription, and this tho' there was a *concurus debiti et crediti* long before the running of prescription.