1712. *January* 18.
ROBERT HERRIES in Forberliggit, *against* SIR GEORGE MAXWELL of Orchyardtoun.

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 probandi*, 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.

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 Bonington *against* CARMICHAEL of Mauldsly.

No 139.
Compensation found not proponable upon a debt sopite by the forty years prescription, and this tho' there was a *concursus debiti et crediti* long before the running of prescription.

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 concourse betwixt two debts, there necessarily must arise a mutual extinction; and if once there be an extinction, then without doubt,

No 139. the allegeance that the debt pursued on is extinguished, must be competent to the defender at any time when that extinguished debt comes to be pursued upon; or any other way brought in judgment against him: It is very true, that where there is a mutual concourse of debts, there is a double effect; each party, if he pleases, may pursue upon his own debt, and oblige the other either to pay, or to take the benefit of the compensation; and that other has it again in his option, whether he will make use of the benefit of the compensation, and propone the extinction, or if he will neglect it, and pay the debt pursued for: But then he cannot do this without the other's consent, because that other, if he will, may force an extinction, by insisting to have it declared, That from the time of the concourse, the debts were mutually satisfied; the force of which conclusion the other party cannot evade. But if both parties expressly, or tacitly, agree, That the debts shall not mutually extinguish one another, then indeed the concourse has not its legal effect: But still it is plain, there is really an extinction *ipso jure*. In the same manner the exception of payment itself may be passed from, where both parties agree to it, and where there is no *medium impedimentum*, or damage arising to a third party: So if a discharge be granted, that discharge may be passed from and delivered up, and the debt continue a good debt; and, of late years it was found, that where there was a renunciation granted of an infeftment, that renunciation might warrantably be given up, and the old infeftment take place, there being no *medium impedimentum* or after creditor prejudged, All this is to prevent an objection, as if compensation could not operate *ipso jure*, because it may be passed from; for so may any other instruction of payment. Nor is there any inconsistency in what is commonly said, That compensation must be proponed, otherwise it has no place; for it must be proponed, not in order to make the extinction, but as the lawyers express it, *ad manifestandum*, and, in order to have the extinction, which had before taken place, ascertained by a legal sentence; and so the matter is very well explained by the learned *Voet, tit. de Compensationibus, num.* 2. This then being the nature of compensation, it is not conceivable how the prescription of any one of the concurring debts, should take away the benefit of the exception from the creditor, since at proponing the exception, he does not found upon the debt as a subsisting debt, but as a document of the extinction of the other debt.

It was *replied* for the pursuer, That in our law, compensation operates not *ipso jure* upon the mutual existence and concourse of the debts, until the ground of compensation be proponed and applied; then indeed it operates *retro:* But till proponing, the mutual debts remain unextinguished. For the more full understanding of this scheme, it is to be observed, compensation is not by our law allowed in the same extent that it was in the later times of the Roman law. The learned *Vinnius* observes, in his Commentary upon the Institutes, *tit. Action,* § 30., That the privilege of compensation was at first only introduced *in bonæ fidei judiciis, ex bono et æquo;* thereafter, by the constitution of *Divus Marcus* allowed *in stricti juris judiciis, opposita doli mali excep-*

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tione; and lastly by *Justinian*, introduced in all cases *ipso jure*. It is adopted by us in the middle way, *opposita exceptione;* which the statute Ja. VI. Parl. 12. c. 143. in terms bears, 'That any debt *de liquido in liquidum*, before giving decreet, be admitted by all judges within this realm by way of exception; but not after the giving thereof in the suspension, or in the reduction of the same decreet:' And so indeed is introduced no otherwise but as a *reconvention* privileged to be proponed by way of exception; for of its proper nature it is not even an exception, as Lord Stair observes, where he says, 'It is neither payment formally nor materially:' For when a creditor borroweth from his debtor, and obliges himself to pay at a day, a mutual credit arising, from the nature of the thing, affords no exception against payment, but each party must insist for his own claim. Accordingly compensation has place only in those countries where it is introduced by statute, or where the Roman law prevails, and had no place with us before the act 1592; and established by positive law, for utility's sake alone, to shun multiplicity of pleas, upon the principle, *Frustra petit quod mox est restituturus*. Hence it is that the effects of compensation are not so full in our law, as with the Romans; for among them it was competent after sentence, *l. 2. Cod. Compensat.* not so with us: When one paid who had a ground of compensation, he had a *condictio indebiti;* which would not obtain with us: Horning is not taken away by compensation, by a sum due to the party denounced, equal to that in the horning, not being actually applied by process or contract, as Lord Stair observes, l. 3. t. 3. § 12. which yet it would, did compensation extinguish *ipso jure*. And indeed the rule is general, that where a debt is not taken away *ipso jure*, but only *ope exceptionis*, the debt still remains unextinguished till the exception be proponed; and at the time of proponing, the validity of the exception is to be considered.

Duplied for the defender, To hold that compensation operates not *ipso jure*, is to go against a principle; for, if it has no effect before it be proponed, how could it stop the course of interest? Relieve a cautioner? Be good against an assignee even for an onerous cause? Or against an arrester arresting after the concourse? These are all *media impedimenta*, such as would hinder the proponing of compensation, if it was to take effect only from the time of proponing, and not from the time of the concourse. Nor is the observation of any use, that by express statute, compensation is not admitted after decreet: An act of Parliament might have appointed that a discharge should not be received after a decreet, and might have left the party discharged, to his action of repetition *indebiti condictione;* but that would not have altered the nature of payment, or hindered it to be an *ipso jure* extinction. No more does the statute founded on alter the nature of compensation; it bars indeed the proponing of it after sentence; and so in that case, the act of Parliament has the same effect, that the mutual consent of parties renouncing or passing from the compensation would have: But still the nature of the exception remains the same, and when warrantably proponed, must operate *ipso jure*, so as to extinguish from the time of the concourse.

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Triplied for the pursuer, Though compensation is proponable against assignees, voluntary and legal, and that *retro* the *cursus usurarum* is stopped; that is no proof of its operating *ipso jure* before proponing: For, as to the first, it arises from another rule, viz. *Quisque utitur jure auctoris;* what is competent against the cedent, is competent against the assignee, because assignees and arresters are only mandatars *in rem suam;* they act in their author's name, and upon his right, and must consequently sustain all objections competent against him. *Vide* Stewart and Nisbet, *voce* EXCEPTION. And the other of operating *retro*, is *ex officio judicis* from the equity of the thing, and not at all *ipso jure*.

Quadruplied, Though the old style of assignations run as they were only mandates, yet in our present practice, assignation with intimation is looked upon as a complete conveyance *funditus* denuding the cedent; the assignee accordingly can act in his own name, and the cedent must be reinstated in his former right, upon the medium of a new conveyance from the assignee; which are each of them demonstrations, that an assignation is somewhat beyond a mandate, and no less than a complete conveyance.

There was a separate ground insisted on for the pursuer, in this shape, That allowing compensation operates *ipso jure*, yet the testament pretended to compense on, being prescribed *quoad modum probandi* by the lapse of forty years, there was no legal evidence remaining, that ever there was such a debt, that ever there was a concourse, or mutual extinction: For it was *pleaded* in general, That all obligatory writs prescribe, and are not *instrumenta probatoria* after forty years. To which it was *answered*, 1*mo*, The law has not said so. 2*do*, It is not conceivable how it can be so, That a writing completed with all solemnities that law requires, should be probative to-day, and not to-morrow. It does indeed sometimes happen by force of express statute, that a writ not having all the solemnities which law requires, should, after such a limited time, need to be further supported, as happens in the case of holograph writs; but it never was heard, that a deed fully complete, with all its solemnities, should not be probative after currency of whatever number of years. *See* PRESCRIPTION.

'THE LORDS found, That compensation cannot be proponed upon a debt after running of the forty years prescription.'

Fol. Dic. v. 1. *p.* 165. *Rem. Dec. v.* 2. *No* 17. *p.* 35.

No 140.
Tack-duties extinguished by the quinquennial prescription upon act 1669, not proponable as a ground of compensation.

1753. *August* 10. JOHN BAILLIE *against* M'INTOSH of Aberarder.

IN the year 1730, M'Intosh of Aberarder accepted a bill for 500 merks to Duncan M'Intosh. In the year 1731, Duncan took a nine years tack from Aberarder of certain lands, at a tack-duty of 200 merks yearly. Before the close of the tack, Duncan turned a notour bankrupt, and fled the country. Returning several years after, he conveyed the sum in the above mentioned bill to one of his creditors; who, in a process against Aberarder's son and heir,