

It was observed, that the by-law in question was merely corroborative of the common law.

THE LORDS unanimously 'assoilzied the defenders.'

A reclaiming petition was (11th March) refused, without answers.

Reporter, *Lord Methven.* Act. *Jo. Clerk.* Alt. *H. Erskine.* Clerk, *Sinclair.*
D. D. *Fac. Col. No 19. p. 42.*

. Two other cases, in similar circumstances, were decided in the same manner.

SECT. XVI.

Effect relative to Prescribed Debts.

1705. *January 31.*

SIR JOHN GORDON of Park, and ANDERSON of Auchinreath, his Assignee,
against HAY of Ranas.

SIR JOHN GORDON of Park, and Anderson of Auchinreath, his assignee, pursue Hay of Ranas, on his predecessor's bond.—*Alleged*, Park's father was debtor in 6000 merks of tocher, by a contract of marriage betwixt his daughter and Ranas's father, and thereon he craved compensation.—*Answered*, The contract of marriage whereon the compensation is craved is long ago prescribed, the last document taken being in 1659.—*Replied*, However actions prescribe in 40 years, yet the exception of compensation is always competent to be proponed, and never prescribes, because *ipso jure* there is *concurus et contributio debiti et crediti*, and operates from the concurrence whenever it is opponed, unless the concurrence of the two debts were without the 40 years; and thus it was lately found, between Crawford and Creditors of Cornwall of Bonhard, that a debt prescribed *quoad actionem*, yet was receiveable *per exceptionem recompensationis*. See PROCESS.—*Duplied*, That exceptions are likewise the ground and foundation whereon actions, either of declarator or payment, may proceed; and therefore, no such actions being intended within the 40 years, the exception expires, as well as the action on the principal writ founded on; and if Ranas were now pursuing Park for the 6000 merks of tocher on that contract, he would be excluded, because not pursued for within 40 years; so, by the same rule, he cannot claim compensation for that tocher contained in that contract, for *sublato fundamento totum opus corruit*, and it has no ground to stand upon; and he ought to have craved

No 137.

The Lords sustained compensation by way of exception, although it could not be pursued by way of action, the ground of compensation being long since prescribed.

No. 137.

it within the time limited by law, which not having done, *sibi imputet*.—*Answered*, That defence is *juris naturalis*, and may be used at all times whenever one is attacked, and is a privilege which never prescribes; yea it may be proponed by one who has no right to the debt whereon the compensation is sought; as in heirs and executors, if the credit-part belong to the heir, and the executor be convened, he may found on a compensation belonging to the heir; and so in compensations betwixt arresters and adjudgers.—THE LORDS considered this point as nice, *et in apicibus juris*, yet being formerly decided, they would not vary, but found the compensation was not prescribed, and so yet receiveable. See PROCESS.

Fol. Dic. v. 1. p. 165. Fountainball, v. 2. p. 263.

* * * Dalrymple reports the same case :

ANDERSON of Auchinreath, as assignee by Gordon of Park, pursues Hay of Ranas for payment of a sum contained in his grand-father's bond, upon which he had obtained a decret against the defender's father.

The defender *alleged* compensation upon a contract of marriage betwixt the defender's said father, and Park the cedent's sister, whereby Park was bound to pay a tocher exceeding the sum libelled, deducting all payments of the tocher.

It was *answered*; The contract was prescribed.

It was *replied*; No course of time could exclude the defence of compensation, which was competent before prescription run, and does operate *ipso jure*, and extinguishes the debt *a momento concursus debiti et crediti*, and cannot revive by the course of time; and generally all defences and exceptions are perpetual, however actions may prescribe; and so it was lately found in the case of Crawford against the Lady Bonhard, where recompensation was sustained upon a holograph writ after 20 years, on that special ground, that it was founded upon not by action, but by exception and reply; and the defender's predecessor had no reason to pursue for the remainder of the portion, knowing that he was also debtor, and thereby his claim was compensated. See PROCESS.

It was *duplicated*; That compensation operates indeed *ipso jure, si opponatur*; but if the debt on which compensation is craved can be elided by any reply, it takes no place; for compensation must be on a debt at the time it is alleged upon, and then it operates from the concurrence; but if there be any *medium impedimentum* before it be applied, it takes no place.

THE LORDS found, That compensation being proponed by way of defence, was competent, notwithstanding the contract, which was the ground thereof, was prescribed *quoad actionem*.

Dalrymple, No 56. p. 71.

* * * The same was found, No 106. p. 2642.