

used within that time, which is a privileged prescription in favours of the subject against the Crown.

No 43

*Fountainhall, v. 2. p. 590.*

1712. June 24.

ROBERT SINCLAIR of Quendal *against* DAVID MURRAY of Clarden.

IN the action of compt and reckoning at the instance of Robert Sinclair against David Murray, the defender proponed compensation upon two receipts, whereby Captain Andrew Dick, the pursuer's author, acknowledged the receipt of money from the defender's father, and obliged himself to allow the same to him at compting.

*Replied* for the pursuer; The two receipts are prescribed.

*Duplied* for the defender; Though obligations, upon which action may be raised when the creditor pleaseth, be *temporalia quoad agendum*, and do prescribe; yet discharges or receipts affording ground of defence, which the receiver cannot found on till he be pursued, are *perpetua ad excipiendum*, and cannot prescribe.

THE LORDS found, That the exception on the two receipts is perpetual.

Thereafter, 10th July 1712, the pursuer proponed recompensation upon other two sums due by the defender's father to Captain Dick.

*Alleged* for the defender; *1mo*, These debts are prescribed. *2do*, He hath right to apply the indefinite receipts upon which he founds his compensation, to any sums wherein he is debtor to the pursuer, conform to the rule *electio est debitoris*; and doth apply them to extinguish other effectual debts not prescribed, 13th February 1680, M'Rieth *contra* Campbell, No 3. p. 6801.

*Replied* for the pursuer; *1mo*, The receipts founded on by the defender to instruct his ground of compensation, *laborant eodem vitio* with those produced to prove the recompensation; therefore if the one be perpetual *ad excipiendum*, the other must be also perpetual *ad replicandum*; and albeit regularly in payments *electio* be *debitoris*, yet if he make not his election when he pays, *electio est creditoris*, L. 8. C. De Solution. The defender cannot be heard to quarrel the recompensation upon any ground that was not competent to him at the time when these two receipts were granted to the pursuer's author; and, as prescription could not have been objected then, neither can it now. Besides, as *reus excipiendo fit actor*; so by proponing recompensation the first pursuer turns defender, and gets the power of election how to apply the payments.

THE LORDS found that the reply of recompensation was also perpetual.

*Ed. Dic. v. 2. p. 99. Forbes, p. 605.*

No 44

An exception on receipts and discharges to extinguish a debt pursued for, is perpetual and not liable to prescription, and a reply of recompensation to elide such an exception is also perpetual.