No 388. in respect of the said Gideon Murray's tacitunity in not pursuing the executors of John Wright, for the space of 5 years, for the wares furnished *in anno* 1649, of the presumption of payment, Gideon's bond being granted *in anno* 1650, repelled that compensation; and found that, albeit it was a concluded cause, and probation renounced, they would yet repair Beatrix Thomson the pursuer to her reply of prescription, the debt for the merchant ware not being pursued *debito tempore*, which was omitted the time of the dispute; which, in my opinion was *durum*, being against the form of process, and which was *acriter contraversum*. But the Lords had respect to equity, and the presumption of payment.

Newbyth, MS. p. 27.

No 389.

1683. *November* James Balfour *against* Landails.

A debtor by a bond pursued at the instance of an assignee, proponed compensation, upon his having alimented the cedent several years before intimation of the pursuer's right.

Alleged for the pursuer; That aliment falling under King James VI.'s act of Parliament about mens ordinaries, merchant accounts, and the like, prescribes *quoad modum probandi* by witnesses, unless pursued within three years after the alimenting.

Answered for the defender; That he being debtor *intus habens*, he needed not to pursue. And though he could not pursue after three years, and prove his libel by witnesses, yet he could prove the alimenting by way of defence *prout de jure*, even after the three years.

The Lords repelled the answer, and found the defence probable only *scripto vel juramento* of the pursuer.

Harcarse, (Prescription.) *No* 765. *p.* 216.

1711. *February* 16.

Margaret Bourboun and her Husband *against* James Mongomery, Merchant in Glasgow.

No 390.
The septennial prescription being alleged against a cautionry obligation, the charger answered, that for a part of the time he

Margaret Bourboun having, as executrix to Archibald Bourboun, caused charge James Montgomery for payment of L. 113 : 6 : 8, contained in in a bond granted to the defunct by him, as cautioner for William Boig, John Crawford, and John Boig; James Montgomery suspended, upon this ground, That the bond *quoad* him a cautioner was prescribed, no diligence having been done thereon within seven years after the date, in the terms of the act of Parliament 1695.

No 390.
lay open to a ground of compensation, and so was *non valens agere*. This answer was repelled.

Answered for the charger; The seven years prescription cannot operate in favour of the suspender; because, within the seven years, compensation was competent to him against the creditor in the bond, which did interrupt the prescription during the competency thereof; January 1705, Sir John Gordon of Park *contra* Hay of Ranes, No 137. p. 2675. For since it was in vain for the creditor to pursue, while the debtor had a clear defence of compensation to exclude him, the seven years can only run from the time that the ground of comsation was taken off.

Replied for the suspender; A ground of compensation is never to be regarded, unless where it is applied; and here the cautioner never pretended to apply his ground of compensation to the payment of the debt charged on; but, on the contrary, without regard thereto, took payment of what was owing to him by the creditor in the bond; so that it cannot be pretended that the creditor was *non valens agere*.

THE LORDS sustained the reason of suspension upon the allegeance of prescription, in respect the compensation was not applied.

Forbes, p. 501.

*** Fountainhall reports this case:

1711. *February* 20.—BOIG and Crawford grant bond, in February 1702, to Archibald Bourboun for L. 113 Scots, wherein James Montgomery, merchant in Glasgow, is cautioner; who being charged for the debt, suspends, on this reason, that he is free by the 5th act 1695, declaring all cautioners free if not insisted against within seven years; and this will be five or six months more. *Answered*, Offered to prove interrupted; because, within the said seven years, James Montgomery had a ground of compensation competent to him against Bourboun, the creditor, in so far as he was his factor, and by uplifting his rents was his debtor; and though he afterwards counted for them, and got a discharge, yet during the time he had my money in his hands, he could not have pursued me *quia intus habuit*; and so that time must be deducted from the prescription; for *contra non valentes agere nulla currit præscriptio*, as was found betwixt Lauderdale and Tweeddale, No 374. p. 11193.; and on the 22d June 1675, Earl of Wemyss *contra* Gall, No 364. p. 11183. that a bound might prescribe against the husband's *jus mariti*, but not against the wife, she not being *valens agere stante matrimonio*; and that pressription does not run against a creditor, while the debtor has a ground of compensation arising to him, was found in January 1705, betwixt Sir John Gordon and Hay, No 137. p. 2675. where the long prescription was found excluded by a compensation. *Answered*, It was never heard that compensation extinguished any debt till it was applied; and much less where it ceased by payment before it was proponed; and such doctrine were to pay one with logic. Then it was *alleged*, 2*do*, Interrupted by the acts of Parliament adjourning the Session; which being all

No 390.

discounted, will bring the pursuit within the seven years. *Answered*, All these recesses do only relate to annual prescriptions allenarly, and so can never be extended to this septennial one. The adjournment in 1702 does indeed speak of short prescriptions in general; but that was only for 18 days; which deduction will not serve the turn. The Lords repelled both the allegeances, and found the bond prescribed *quoad* the cautioner; though the act deserves little favour or extension.

Fountainhall, v. 2. p. 639.

1712. *January* 23. Sir George Maxwel *against* Herries.

No 391.
When a debtor, sued by an assignee, alleged that bygone rents were due to him by the cedent, they were found sopite by the quinquennial prescription, unless proved resting owing by the pursuer's oath.

Sir George Maxwel of Orchardton being debtor to Herries in Torborligget in L. 260 Scots by an old bond, and pursued for it by an assignee, he *alleged* the debt was satisfied and paid, in so far as your cedent possessed a room for several years as my tenant, the rent whereof did more than satisfy, pay, and compense the sum in the bond; and offered to prove both the possession and quantity of the rent due by his mother, the cedent, and that by the pursuer's oath; so that *ipso momento* that the rents fell due my bond was extinguished; for as you was creditor to me *per* bond, so I was creditor to you *per* the tack-duty; and so the *concursus debiti et crediti* meeting, they *ipso jure* compensed one another, unless you can prove that you paid the rent *aliunde*. *Answered*, However this compensation might be obtruded against the parties themselves, yet it cannot meet the pursuer, who is an assignee for an onerous cause. 2*do*, This bond is acknowledged to have been originally blank, and so must exclude all compensation, being conceived blank for that very end, as was solemnly decided 27th February 1668, Henderson *contra* Birnie, No 2. p. 1653. and confirmed by Stair, lib. 1. tit. 18 3*tio*, By the 9th act 1669, tenants prescribe within 5 years after they remove from the lands, unless it be offered to be proved, by their writ or oath, that they are still resting owing; but so it is, it is more than 20 years since the pursuer's father and mother, his cedents, left that land; and if the foresaid act presumes a master will not let his rent lie over 5 years after his tenant goes off his ground, what shall we say after 20 years? *Replied*, That compensation meets the assignee as well as the cedent, and applies itself *ipso jure*. To the second, *non constat* it was blank. And to the third, It is confessed, if he were pursuing for payment of that rent, the prescription introduced by that act would cut him off, unless he proved resting owing; but where it is proponed by way of exception and compensation, it is perpetual; and your deponing it was paid, cannot liberate, without some farther instruction than your oath; that quality being extrinsic, and resolving in a defence, and must be otherwise proved. *Duplied*, After so long a time, it is not to be supposed that poor tenants can show their discharges, who were secured by the foresaid law; and the distinction of *via actionis et exceptionis* is