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

wholly groundless here; for to keep up claims of rents or ministers stipends, mill-multures, house-mails, merchants or tradesmens accounts, for 30 or 40 years, under pretence of compensation, would not only evacuate this quinquennial prescription introduced in favours of tenants' rusticity, but all the other short prescriptions provided by law. The consequence of which doctrine is so dangerous to our securities, that it needs little illustration. And could he give a more categorical answer, than to tell any rent they owed was all paid to Sir George, his creditors, or factors? that being as intrinsic and essential a quality as any can be. THE LORDS considered, if the possession and rent had been instructed by a written tack, there might have been more difficulty; but all being referred to oath, both the possession and rent, he might very well depone if it was resting owing; and therefore repelled the compensation, and refused to divide his oath. In some cases, where masters owe money to their tenants, they allow them to retain their rents till they be paid. But it did not appear there was any such paction here. Neither did Sir George's strait circumstances at that time leave ground to presume that he would want his rent so long.

No 391.

Fol. Dic. v. 2. p. 126. Fountainhall, v. 2. p. 709.

*** Forbes's report of this case is No 138. p. 2677. *voce* COMPENSATION.

SECT. VI.

The effect of Prescription cannot be obtained by a person against himself.

1695. *December* 31. INNES *against* INNES of Auchluncart.

THE investitures of an estate, standing in favour of heirs whatsomever, the proprietor, *anno* 1641, executed a bond of entail, in favour of heirs-male. From this period, the heirs-male continued to be the same with the heirs whatsomever, till the 1692, that they came to split; and then the heir-male claimed the estate upon the said bond of tailzie. The LORDS sustained the defence of the positive prescription, there being a connected series of services, in favour of heirs of line, standing together for 40 years since the date of the bond, which established the right of the heirs of line.

No 392.

Fol. Dic. v. 2. p. 126.

*** This case is No 386. p. 11212.