No 139.

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,

insisted for payment. The defence was compensation upon the tack-duties, which had never been cleared. *Answered*, The tack-duties are prescribed by the act 1669, it being more than five years since the tacksman's removal. *Replied*, The act only bars an action for payment after the five years, but not an exception as in the present case, where payment is not demanded of the rent, but only in extinction of a separate obligation by compensation. *Duplied*, The genuine effect of the statute is to presume payment of rents which are not claimed for five years, till the contrary be proved by writ or oath. It may be be true that Aberarder would put nothing in his pocket by claiming payment of the rents, when he was owing to the tacksman an equivalent sum by bill. But this circumstance, whatever effect it may have with regard to presumption founded upon circumstances, ought not to be regarded against a statutory presumption, with which judges can take no liberty. No 140.

THE LORDS were unanimous, that compensation is not relevant in this case, more than where the compensing debt is sopite by the long prescription.*

Sel. Dec. No 53. p. 67.

SECT. XVII.

Effect of Compensation, of Retention, of Re-compensation in instances not included in the Preceding Sections.

1664. *July* 14. BALMERINO *against* Sir WILLIAM DICK's Creditors.

No 141.
Before litis-contestation or decree, the defender may pass from his defence of compensation, so as to be at liberty to use the writ upon which he might compensate to any other purpose.

JAMES GILMOR, for the use of the Lord Balmerino, being infeft in the lands of North Berwick, upon a right from Sir John Smith, who had right from Sir William Dick, pursues the tenants for mails and duties. Compearance is made for Sir William's other creditors, wadsetters and apprisers, who allege absolvitor, because the pursuer's right is extinct, in so far as Balmerino being debtor to Sir William Dick, and charged by him, had acquired this right from Sir John Smith, to compense Sir William, and did actually compense him, by alleging the same reason of compensation, producing the disposition then blank in the assignee's name; whereupon the letters were suspended *simpliciter*, and my Lord assoilzied; and the disposition given up to Mr Alexander Dick, which is instructed by the testimony of William Downie, clerk at that time. Balmerino *answered*, *First*, That William Downie's testimony could not make up a minute of decreet, where there were no process, nor adminicle to be seen. *2dly*, Though the minute of the decreet were lying before the Lords, not be-