

No 141.

ing extracted, the Lord Balmerino might pass from his reason of compensation, and take up his disposition, which is always permitted before litiscontestation, or decret; and litiscontestation is never accounted until the act be extracted: So that there being no act of litiscontestation extracted in the said process, but only an alleged minute of a decret without an act, neither party might resile. *3dly*, Though the suspender might not resile *simpliciter*, yet it is still competent to him, to propone a several reason of suspension before extract, being instantly verified; and now he propones this reason, that the debt owing by him to Sir William Dick, is a public debt, and the Parliament has suspended all execution thereupon, till the next Parliament; which by consequence liberates him from making use of, or instructing his reason of compensation. The creditors *answered*, It was most ordinary for the Lords to make up minutes by the testimonies of the clerks, when they were lost. So that William Downie being a famous clerk, his testimony must make up the minute, after which the Lord Balmerino cannot resile from his reason of compensation, or take back the disposition, seeing it was his own fault he did not extract it, and cannot make use now of a supervenient exception, that was not at ~~that~~ time competent, in prejudice of their creditors, Balmerino being now in a much worse condition.

THE LORDS found, That the Lord Balmerino might now propone a reason of suspension emergent on the late act of Parliament, and pass from his reason of compensation, and take up his disposition, seeing it did not appear that the process was miscarried through Balmerino's fault, or that the disposition was delivered to Mr Dick, neither of which did appear by William Downie's testimony.

Fol. Dic. v. 1. p. 168. Stair, v. 1. p. 214.

1669. February 5.

CLELAND *against* STEVENSON.

No 142.

Compensation being sustained upon a decree, liquidating a quantity of victual, due by the charger to the suspender, the same was found to operate from the time the victual became due, and was not restricted to the date of the decret.

WILLIAM CLELAND charges John Stevenson upon a bond of 400 merks, bearing annualrent. He suspends on this reason, That the charger was owing him more for victual, being his tenant, which was now liquidated before this time, but after the date of this bond, and craved compensation thereupon, not only from the date of the liquidation, but from the time the victual-rent was due.

Which the LORDS sustained.

Fol. Dic. v. 1. p. 167. Stair, v. 1. p. 598.

* * * Gosford reports the same case:

STEVENSON being charged upon a bond granted to Cleland, for 400 merks, in *anno* 1646, did suspend upon this reason, That he was assigned to a tack-duty for the said year, due by Cleland to his father, whereupon he had obtained a decret of liquidation in *anno* 1664, which ought to be drawn back to the year

1646, which was the time the tack-duty was owing; and so the question was, if the tack-duty, not being liquidate till the year 1664, should liberate from all bygone annualrents of the 400 merks, preceding the liquidation.—THE LORDS did find, That it ought to be drawn back and liberate from all annualrents, notwithstanding it was alleged, that until the liquidation there could be no compensation, which was only competent *de liquido in liquidum*; for albeit before the liquidation they could not have suspended to hinder payment, yet they found, that liquidation being made before the charge, it ought to be drawn back to its first cause to save from usury, which was odious; as likewise, because the charger, during all that time, had the benefit of the product of the victual, which was the tack-duty.

No 142.

Gosford, MS. p. 37.

1675. July 23.

CRUICKSHANK *against* KER.

ALEXANDER CRUICKSHANK having right by translation to a bond granted by Ker of Littledean, charged him thereupon. He suspended upon this reason, That he had compensation against the cedent, who assigned him to a greater sum; and, contrary to his assignation, and the warrandice therein, had discharged the same himself. This reason was sustained, but the question arose *a quo tempore* the compensation should take effect, whether from the date of the discharges, or from the time that the discharges were produced.

THE LORDS found, That the warrandice was not liquid to found a compensation on of itself, till it was liquidated by application thereof to the discharges produced, by which the warrandice was contravened; and therefore allowed the charger's sum to be accumulate with annualrents, till the production of the discharges, and then to be compensated by the discharges.

Fol. Dic. v. 1. p. 167. Stair, v. 2. p. 361.

*** Gosford reports the same case:

ALEXANDER CRUICKSHANKS, as having right by translation to a bond granted by Ker of Littledean, to Nicolas Turnbull, for the sum of 250 merks, contained in a bond, bearing annualrent from Whitsunday 1658, did charge Littledean for payment, who did raise suspension upon this reason, That the said Nicolas was debtor to the suspender in greater sums before her assignation to the charger's author, in so far as she had assigned the suspender to a bond of 700 merks, bearing annualrent, due by Andrew Crombie of Cruilly, with absolute warrandice; and notwithstanding she had granted two discharges, one of the whole bygone annualrents, and another of L. 100 of the principal sum before the assignation, so that by the obligation of warrandice, she was debtor in these sums, which did exceed the sums charged for.—It was answered for the charger, That the

No 143.

A debtor opening compensation to an assignee, upon a claim of warrandice, incurred by the cedent, the compensation was found not to take place from the time the warrandice was incurred, but only from the liquidation.