

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 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.

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

Sel. Dec. No 53. p. 67.

No 140.

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.

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 absolutor, 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 compensate Sir William, and did actually compensate 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 decret, where there were no process, nor adminicle to be seen. 2dly, Though the minute of the decret were lying before the Lords, not be-

No 141.
Before liti-
contestation
or decree,
the defender
may pass from
his defence of
compensa-
tion, so as to
be at liberty
to use the
writ upon
which he
might com-
pensate to
any other pur-
pose.

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