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compensation took place, *ipso momento* there came to be a *concursum debiti et crediti* between the parties; and though it cannot be applied, without being sought and proponed, yet how soon it is founded on, it draws back to the time when the two rights came to be together: And the LORDS found it so, that it commenced from the date that Hilton acquired the debt, wherein he was cautioner for Wamphray, and did not begin at the bond of corroboration, which being no innovation of the debt, cuts off no defence of payment, or other defence competent against the bond corroborated, unless it expressly renounced the compensation. THE LORDS also found a moveable debt might compensate, and extinguish an heritable one due by a comprising, but not *e contra*, unless it were loosed and made moveable by a requisition or charge.

Fol. Dic. v. 1. p. 164. Fountainball, v. 1. p. 754.

*** See Keith against Herriot, No 51. p. 2601.

SECT. XIV.

Compensation or Retention not Proponable after Decree.

1626. December 1. VISCOUNT OF STORMONT *against* DUNCAN.

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The Lords refused to admit compensation by way of suspension tho' instantly verified, since it was not proponed before sentence, tho' the suspender had then compared, but proponed it not.

IN a suspension at the instance of the Viscount of Stormont, against a man of Mr Harry Chaip's, wherein the suspender offered compensation to a part of the sum contained in the sentence, which was suspended with a like sum owing to him, by the obtainer of the sentence; and which debt he instantly verified by production of the writ, bearing the debt subscribed by the charger, or by his cedent, before the assignation made to the charger, which was all one; for the Lords are in use to admit compensation *eodem modo* against the assignee, as against the cedent's self; THE LORDS would not admit this compensation by way of suspension, albeit instantly verified; seeing it was not proponed before the obtaining of the decret, which the LORDS found should be then proponed, and was not admissible after sentence; specially the sentence being given against the suspender, at what time it was competent, and should have been proponed, and he comparing then, and then not proponing it. The LORDS found it not admissible by way of suspension, in respect of the 143d act, 12th Parl. James VI. which prohibits the same to be received by way of suspension (as was offered in this case), or by way of reduction. ' *I. C. Compensatio admitti potest post sententiam aliquando; nam est regula, quod ea peremptoria, quæ venit ad limitandam sententiam tantum, sed non impugnandam, potest opponentiam post sententiam, videtur etiam post sententiam opponi posse compensationem, ubi non requiritur altior indago, nam ibi actio est instar exceptionis.*'

This decision agrees with the act of Parliament; but the same was never observed to my memory before this time; for the LORDS have ever been in use to admit compensation by way of suspension, notwithstanding of this act of Parliament, which while now was not *in viridi observantia*. The like was done January 17th 1632, ———— *contra* ————, where compensation in a suspension was not received, after sentence given against the party compearing, the compensation being then competent before the sentence, and not then proponed. See SUSPENSION. •

Act. *Chaip.*

Alt. ————

Clerk, *Hay.**Fol. Dic. v. 1. p. 165. Durie, p. 240.*

* * Spottiswood reports the same case :

In a suspension raised by the Viscount of Stormont against William Duncan, the LORDS would not sustain compensation, albeit *de liquido in liquidum*, in respect the decret sought to be suspended, was given *in foro contradictorio*, and that compensation being then competent, was not proponed before the giving of the said decret. *Fol. Dic. v. 1. p. 165. Spottiswood, (COMPENSATION.) p. 40.*

1632. February 17.

WALKER against MAINQUHAIR.

In an action pursued by one Walker against Mainquhair, wherein decret was obtained by the pursuer, the defender raises suspension and craves compensation of a just debt alleged, owing by the pursuer to the defender, which he instantly verified. It was *alleged*, By the act of Parliament, Ja. VI, Parl. 12th, cap. 143, no compensation ought to be allowed after decret; which allegiance the LORDS sustained, in respect of the act of Parliament, although it was thought by many that the act was hardly conceived. *Fol. Dic. v. 1. p. 165. Auchinleck, MS. p. 30.*

No 100.
Found as
above.

1662. June.

The EARL of MARSHAL against BRAG.

THE Earl of Marshal obtains a decret in his own court, against his tenant Charles Brag, for payment of a certain quantity of farm; which was suspended upon this reason, That he ought to have compensation of a liquid debt owing by the Earl to him. It was *answered*, That the compensation is not receivable *post sententiam* by the act of Parliament 1592. It was *replied*, That an act of a baron court is not to be repute such a sentence as that act means by; seeing such sentences are only against tenants for their masters' duties, wherein defences consisting *in jure*, are proper to be disputed, neither can tenants have the benefit of advocates in such courts.

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Compensation received
in a suspension of a decret
of a baron court.

THE LORDS sustained the compensation by way of suspension.

Fol. Dic. v. 1. p. 165. Gilmour, No 41. p. 31.