

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.

*Gosford, MS. p. 37.*

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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

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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.

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reason resolving into a compensation could not now be admitted, unless the warrantice had been made liquid by a decret against the said Nicolas, as having contravened; neither is there any intimation produced, or diligence done by the suspender, upon the said assignation, whereupon only he could have had his recourse against the said Nicolas; and she being now dead, the reason cannot be sustained against her assignee, at least if it were found a ground of compensation. It can only be sustained against the charger, who is a singular successor, from the time of the raising that suspension, and insisting upon that reason. —THE LORDS, finding that the reason of suspension being founded upon writ, making the charger's cedent debtor upon the clause of warrantice, and the contravening thereof, which was proven *scripto*, did sustain the same against the charger, who was assignee, unless he could allege against the discharges produced, for instructing of contravention of the warrantice; but the reason resolving in a compensation, there was debate among the LORDS *a quo tempore* it should be sustained, whether from the date of the assignation bearing the warrantice, or from the time that it was insisted on in the suspension; and at last it was voted to be only sustained from the raising of the suspension, and insisting thereon, upon these reasons, That the charger was a singular successor, and did intimate his assignation during the cedent's lifetime, who might have elided the same in law, there being nothing produced but extracts of her discharges; likeas the charger being assigned for an onerous cause, and having intimate his right to the suspender, did never make mention of this compensation until after the death of the cedent; so that it ought not to militate against him but from the date it was insisted on, albeit it would have been sustained against the cedent since the date of the assignation and warrantice.

*Gosford, MS. No 791. p. 498.*

1675. December 4. WATSON against CUNNINGHAM.

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It was found, that money may be compensated by debursements of money from the time of debursement, or intromission with money-rent, but not by victual or any prestation, until that be liquidated or reduced to money.

WATSON of Glentop having charged Robert Cunningham upon a bond of borrowed money, which he suspends upon compensation of debursements by him for the charger, in reducing an apprising, and several other affairs, and for allowances to his own servants of meat and drink that the charger got in his house, and for his own service; which being referred by the charger to the suspender's own oath, he deponed; which being advised by the LORDS, this question arose, *a quo tempore* the compensation should take effect, whether only from the date of the sentence, by which it is liquidate, or from the time the oath prove it was due; the ground of the doubt being, that compensation is only competent *de liquido in liquidum*, and therefore can have no effect till the liquidation, which was not till this sentence; for by our custom, no debt is counted liquid till it be determined by a sentence, and thereby have *paratam executionem*.