

Whatever may be pretended as to the cedent, that he could not be in *bona fide* to comprise for a debt due to him, having as much in his hand as would satisfy the same, yet such pretences are not competent against the third person having *bona fide* comprised, or having *jus quæsitum*; as in the case of a horning upon a decreet, it could not be obtruded to the donatar, that the debt was satisfied, the obtainer of the decreet being debtor to the defender. And if this should be sustained, expired comprisings and infestments thereupon, being now a most ordinary surety, may be easily subverted, upon pretence that the cedent was debtor, in sums equivalent, to the person against whom the comprising is deduced: And there is a great difference betwixt payment and satisfaction, either by actual payment of the debt, or by intromission with the mails and duties of the lands comprised, which is obvious and easy to be known; and betwixt the pretence of satisfaction by compensation; seeing payment is *exceptio in rem*, and extinguisheth debts as to all effects; and intromission is so notour, that the buyer may and ought to take notice of the same; whereas compensation is but *quasi solutio*, and it has never effect until it be proponed.

That point was also in consideration with the LORDS, Whether compensation can be proponed by any person, but such as has right to the debt? And as to this point, there were different opinions, and some of the LORDS were of the judgment, that any person, having interest to defend against comprisings and pursuits upon the same, might allege they were satisfied in manner foresaid: But others were of the opinion, that no person can pretend to compensate, but he that could discharge the debt, whereupon he would compensate; and consequently must have right to the same: And in the case in question, neither a confirmed testament, containing the debt due to the defunct, nor any right to the same was produced.

The act of Parliament, King Ja. VI. Parl. 12th, cap. 143, being so positive, that compensation is only *de liquido in liquidum*, before the giving of decreets, and never after the giving thereof; some of the LORDS were of opinion, that though the defender had right to the debt due to the defunct, compensation could not be received: But some of the LORDS having desired, that the advising of these points, being so considerable, should be delayed till to-morrow, they were not decided.

Reporter, *Treasurer Depute.*

Clerk, *Gibson.*

*Dirleton, No 362. p. 176.*

1682. *February.*

ARNOT *against* RANKINE.

IN an action of pointing the ground, at the instance of David Arnot against Rankine of Pettie, THE LORDS found, that compensation founded upon personal bonds, tickets or other obligements, and tacks for payment of tack-duties,

No 93.

No 94.

In an infestment of annualrent according to the new form, where there is both a subsisting personal obligation, and an accessory infestment in security, compensation was

No 95.  
not admitted  
against a sin-  
gular succes-  
sor, unless up-  
on debts due  
by the cedent  
before infeft-  
ment, when  
the bond was  
merely per-  
sonal.

could not be sustained to extinguish an infeftment of annualrent against a singular successor.

*Fol. Dic. v. 1. p. 164. Sir P. Home, v. 1. No 142.*

\* \* \* See this case by Stair, No 11. p. 572.

1682. *March.* The LORD SALINE and his CHILDREN *against* CALLENDER.

No 96.  
The Lords  
sustained  
compensation  
of the sums  
in an adjudi-  
cation, by ex-  
trinsic intru-  
sions and  
debts other-  
wise due, as  
well as by in-  
troussion  
with the rents  
of the lands, so  
as to extin-  
guish the ad-  
judication,  
these debts  
existing  
before ex-  
piring of the  
legal of the  
adjudication.

WILLIAM STIRLING of Herbertshire, having led an adjudication against James Short, of certain teinds and acres in Stirling, for 3,000 merks; which being disposed to Oliver Murray and ——— Callender, his spouse, whereupon they were infeft; and after her husband's decease, she having pursued for mails and duties; and there being compearance made for the Lord Saline and his children, who had likewise an interest in the lands; and, it was *alleged* for them, That the sum whereupon the adjudication was led was satisfied and extinguished by compensation, in so far as William Stirling the defender was debtor to James Short, the Lord Saline and his children their author, in sums equivalent to the sums contained in the adjudication. *Answered*, That albeit introussion with the rents of the lands will extinguish the adjudication, yet extrinsic debts and personal obligements, wherein the adjudgers stood engaged to the defenders or their author, cannot extinguish the adjudication whereupon infeftment had followed, especially in prejudice of the pursuer, who is a singular successor: For, as compensation will not be sustained to extinguish an infeftment of annualrent or wadset, being heritable rights, except as to the bygone annualrents, as was decided Oliphant against Hamilton, No 90. p. 2633.; and Home of Plendergaist against Home of Lentill, No 92. p. 2633.; unless requisition had been made or the sums made otherwise moveable; so neither ought the same to be sustained to extinguish comprising or adjudication. *Replied*, That comprising and adjudications are extinguished as well by extrinsic grounds of compensation as introussion. The debts and grounds of compensation being existing the time of the leading the adjudication or apprising; and it does not alter the case that infeftment followed upon the adjudication, or that the pursuer was a singular successor, seeing the grounds of compensation against Stirling his author were existing before he acquired a right to the comprising; it being a principle in law, *compensatio ipso jure tollit obligationem*; and the reason of law is, because an apprising or adjudication is but a legal diligence for the creditor's farther security before the legal be expired, and does not so alter the nature of the debt, but that it may be extinguished by extrinsic payments or compensation, as well as by introussion with rents of the lands, as was decided, the Laird of Leyes against Forbes of Blacktoun, No 91. p. 2633.; and there is great difference between an infeftment of annualrent or wadset, and an apprising or adjudication; for an infeftment of annualrent or wadset are in themselves principal rights and securities, and are not considered as sums of money but as heritage, unless requisition be made, or that the sum be otherways made