

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 intromissions and
debts other-
wise due, as
well as by in-
tromission
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 intromission 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 intromission. 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 intromission 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

moveable; whereas a comprising or adjudication being a legal diligence for the creditor's farther security, is considered in law as an accessory right, which does not hinder but that the sum contained in the adjudication may be extinguished by liquid debts existing before the legal be expired; as also the expiring of the legal of apprisings being odious, many things may be allowed to extinguish the sum contained in the adjudication and comprising that will not be allowed in other cases. THE LORDS sustained the reason of compensation by extrinsic intrusions to extinguish the adjudication, being before the expiring of the legal of the adjudication.

Fel. Dic. v. 1. p. 164. Sir P. Home, v. 1. No 241.

* * Harcarse reports the same case :

EXTRINSIC grounds of compensation, existing during the legal of an apprising, though after the appriser was infest, found to extinguish the apprising, even against singular successors after the compensation existed, just as intruission, or selling, or wadsetting a part of the apprised lands; though real rights, after infestment, are not regularly compensable with personal rights, which are not *ejusdem qualitatis*. But this point was not fully considered.

Harcarse, (COMPRISINGS.) No 272. p. 65.

1682. March 17. BAILLIE against HISLESIDE.

INTRUSSION with a debtor's executry sustained to extinguish an apprising of his lands. *Fel. Dic. v. 1. p. 164. Harcarse, (COMPRISINGS.) No 273. p. 65.*

1697. January 13.

JAMES DAES of Coldingknows against JOHNSTON of Hilton and MOTHER.

I reported James Daes of Coldingknows against Johnston of Hilton, and his mother, for the teind-duties of Huttonhall; out of which Hilton craved allowance and compensation for the sum of 3,650 merks he had paid as cautioner for Wamphray, Mr James's author, in the right of the teinds. *Alleged*, The compensation can only begin after the date of the bond of corroboration given for that debt by Wamphray to Hilton in 1678, wherein the bygone annualrents are accumulate, and Wamphray acknowledges himself then debtor in the sum, which is an evident renunciation and passing from any ground of compensation he then had; for *quorsum* all this security of a corroboration, if the debt was extinct by compensation before granting the same? And it was not Hilton's fault, that the teind-duties lay in his hand; for they were arrested, and he knew not whom to pay to, till he raised a multiple-pounding, and called all the competitors: And compensation is presumed from the tacit acquiescence of parties, but not that they would insensibly moulder away a sum bearing annualrent with one that carried none. *Answered*, The principles of law were clear, that

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Found that a moveable bond might compensate and extinguish one heritable, by decree of comprising, but not *e contra*, unless it were loosed and made moveable by a requisition or charge.