

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

No 96.

No 97.

No 98.

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.

No 98.

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.

No 99.

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.*'