

No 92.

THE LORDS found that the presumption was not sufficient to infer annualrent, seeing the term of payment was within five weeks.

All the parties and witnesses were dead, and Linthill was examined; whether he knew that the bond bore annualrent, which he denied. There was also compensation proponed upon an apprising led against Colonel Home, to which Linthill was assignee; and upon a wadset.

THE LORDS sustained the compensation upon the apprising for the principal sum and annualrent; but in respect the ground of it was one of the bonds given by the friends of the Earl of Home, for purchasing a right of teinds, whereof Linthill was one, and got the disposition in his name; therefore the LORDS allowed no further Sheriff-fee nor penalty than Linthill should depone he gave out. They did also refuse to sustain compensation upon the wadset, if it contained a clause of requisition, unless requisition were made, as not being liquid.

Fol. Dic. v. 1. p. 164. Stair, v. 2. p. 368.

1676. June 22.

— against SHEIL.

No 93.

A comprising was deduced at the instance of an assignee, against the representatives of a debtor. Pleaded, the cedent was debtor to the defunct. Objected, compensation is only of personal rights, and not receivable in cases of real right. Not decided.

A comprising being deduced at the instance of an assignee, against the representative of the debtor as lawfully charged; and the comprising upon his infertment having intented a pursuit for mails and duties;

It was *alleged*, That the cedent was debtor to the defunct, so that the debt due to the defunct, did compensate the debt due by him; and the ground of the comprising being satisfied, the comprising is extinguished: Which case being reported to the Lords, they had these points in debate and consideration amongst themselves; viz. *imo*, That compensation is only of personal debts, and of sums of money, *de liquido in liquidum*; but is not receivable in the case of real rights and lands, and pursuits upon the same; seeing in such processes there is no debt craved, but the pursuit is founded upon a real right: And some of the LORDS being inclined to think, that the allegiance is not founded upon compensation, but upon payment or the equivalent, viz. That the cedent *habebat intus*; and in effect, and upon the matter was satisfied, being debtor in as much as was due to him by the defunct; and the LORDS are in use to favour debtors whose lands are comprised; and, in order to extinguish comprising, to sustain process for count and reckoning; and declaring the same to be extinct, not only by intromission but by compensation; others were of the opinion, that though compensation *ipso jure minuit et tollit obligationem*, where it is proponed; yet if the same be not proponed before the decret, whereupon the comprising proceeds, and when both debts are *in finibus* of a personal obligation, the debt contained in the comprising cannot be said to have been paid before the comprising, and after the comprising is deduced it cannot be extinguished but either by intromission within the years of the legal, or by redemption. *2do*,

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