No 145. duties.—The pursuer *answered* to the *first*, an offer *non relevat* without consignation; neither was compensation competent against feu-duties, wherein the acknowledging of the superior, by an address of an yearly payment, is more considered than the value of the feu-duties; neither can clauses irritant, exprest in infeftments, be purged at the bar; for they differ therein from the irritancy introduced by law, that these may be purged; but where the investiture contains the clause 'to be null in case of three terms unpaid,' the same cannot be purged.

THE LORDS did not sustain purging at the bar, nor the compensation; but found the payment to the pursuer's servant without contradiction, and the offer *debito tempore*, though without consignation, being now made furthcoming at the bar, relevant to purge the clause irritant, albeit the offer, without consignation, cannot stop the course of annualrents.

Fol. Dic. v. 1. *p.* 168. *Stair, v.* 2. *p.* 642.

*** Fountainhall reports the same case:

THE LORDS inclined to think, the vassal should not compense his feu-duties, with any debt his superior is owing him; but it being a recognizance, it should be offered with humility.

Fountainhall, MS.

*** Lord Kames cites a case, 17th July 1625, Lord Touch against Fairbairn, from Haddington, importing, that, contrary to the above, compensation had been sustained to purge an irritant clause.—Lord Haddington's MS. in the Advocate's Library, does not come down to so late a date. If the case shall be found, it will be inserted in the Appendix relative to this Title. *See* IRRITANCY.

1687. *February* 2. ROBERT WEMYS *against* GOODSIR.

No 146.

THE price of spuilzied goods found to compense, and sist the course of annualrents of a debt due to the spuilzier, from the time of the liquidation, and not from the time of committing the spuilzie.

Fol. Dic. v. 1. *p.* 167. *Harcarse*, (COMPENSATION.) *No* 264. *p.* 63

No 147. In a suspension of a charge on a bond, the suspender craved compensation of a sum due to him by

1711. *July* 10. IRVINE *against* MENZIES.

CHARLES MENZIES, writer to the signet, being debtor to Mr Alexander Irvine of Saphock in L. 319, by bond, and charged thereon, suspends, that he must have compensation for L. 212, contained in a bill due by Irvine, to which he has right.—*Answered*, Your compensation cannot extinguish my debt; because I

recompense you again, in so far as I am cautioner for you in a 3000 merks bond, whereof you are bound to relieve me; and so I must have retention of your L. 212, whereon you ground your compensation, till you relieve me of that debt. —*Replied*, There can neither be retention nor recompensation, unless you were distressed and had paid the debt. And seeing the concourse of the two debts does, *ipso jure*, extinguish one another, no pretence of retention can make a debt extinct to revive; the bond of relief being only an obligement *ad factum præstandum*, and so illiquid.—*Duplied*, His claim of retention is founded both in the common law, in reason, and in the analogy of our municipal law; and *first*, the Roman law is plain, in *l. unica C. etiam ob chirograph. pecun. pignus retineri posse*; though you pay me the debt for which I had the pledge, yet I'll retain it if you owe me any sum, till that be likewise paid or secured. Next, this retention is founded in reason; for, if I have your effects in my hand, and you owe me money, you cannot draw them out till you pay; it being *tutius rei inhærere quam in personam agere*; 3*tio*, As to our own law, a creditor in relief cannot, by any diligence [of arrestment or otherwise, affect the subject in his own hands, as if it were in another's; for supplying which difficulty, law has allowed retention; and was so found betwixt Ballenden and Sinclair *, and 14th February 1708, Mr Patrick Strachan and the Town of Aberdeen, No 60. p. 2609. And though he be not yet distressed, he knows not how soon he may be overtaken, the creditor having *paratam executionem* against him when he pleases; so that it is more than a mere *factum præstandum*.——THE LORDS found, That the retention took place against the liquid compensation, and that he was not bound to let this debt be extinguished by the compensation, till he was relieved of his cautionry.

Fol. Dic. v. 1. p. 168. Fountainhall, v. 2. p. 657.

No 147.
the charger *per* bill. The charger proponed recompensation, because he was cautioner for the suspender in a bond for a greater sum, and therefore must have retention of the sum in the bill till he be relieved, though the charger was not yet distressed. The Lords found, that the retention took place against the liquid compensation, and that he was not bound to let the debt be extinguished by compensation, till he was relieved of his cautionry.

1711. *November* 23.

ALEXANDER MURRAY of Brughtoun, *against* WILLIAM M'GUFFOG of Ruscoe.

No 148.
A man, for security of a sum due by heritable bond, getting a tack of some lands, for a duty equal to the annualrent of the sums, at six *per cent.* and being besides obliged to pay yearly two wedders, and two stones of butter, dur-

RICHARD MURRAY of Brughtoun, debtor to the deceased William M'Guffog of Ruscoe, in 4000 merks, by an heritable bond dated in *anno* 1675, did, by a tack of the same date, narrating the bond, set to him the lands of Murraytoun and Cullindoch, for payment of 240 merks, two wedders and two stone of butter yearly; with this provision, 'That the tacksman should retain in his own 'hands of the foresaid tack-duty, in so far as will compense and satisfy his an-'nualrents yearly and termly during the not payment of the principal sum.' Alexander Murray, now of Burghtoun, heir to Richard his grand-father, pursued a reduction and declarator of extinction of the heritable bond, by Ruscoe the defender, and his predecessor's possession of the lands several years without paying any tack-duty; and *contended*, That the prices of the wedders and but-

* Examine GENERAL LIST of NAMES.