

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 concurrence 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 obligation *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 retincri 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 inhærerere quam in personam agere*; 3tio, 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. Fountainball, v. 2. p. 657.

1711. November 23.

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

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 annualrents 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-

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.

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-

* EXAMINE GENERAL LIST OF NAMES.

No 148.
 ing the 21
 years that the
 tack was to
 last ; and he
 never having
 paid these ;
 in a decla-
 rator of ex-
 tinction and
 payment, the
 Lords having
 first caused
 liquidate the
 prices of the
 widders and
 butter, did
 then find that
 they could
 only compen-
 sate and im-
 pute from the
 time of the
 liquidation,
 and not year-
 ly when they
 fell due.

ter, liquidated in this process, ought to be imputed in payment and satisfaction of Roscoe's principal sum, at the terms they fell due by the tack.

Answered for the defender ; *Species* or *corpora* cannot compensate money till once they be liquidated, and then the compensation takes place only from the date of the liquidation, 4th December 1675, Watson against Cunningham, No 144. p. 2684 ; consequently the butter and widders can compensate and extinguish the defender's principal sum only from the time of the liquidation.

Replied for the pursuer ; Where a creditor intromits with goods and effects of his debtor, upon some extrinsic cause, the rules of compensation and liquidation ought to take place ; but it is otherwise in the case of intromission with a subject given in security and payment ; as here, where the tacksman was just in the case of an improper wadsetter, whose intromission with the rents doth still impute from the time they are uplifted ; and in effect, this extinction doth not so much arise upon the ground of compensation, as of payment.

Duplied for the pursuer ; It is frivolous to fancy Ruscoe in the case of an improper wadsetter, for he never entered to possession by virtue of the heritable bond, (which was a transcendent heritable right upon Brughtoun's whole estate) but only by virtue of his tack ; by which he had indeed power to retain the tack-duty, in so far as would satisfy his annualrents, but not for payment of his principal sum.

THE LORDS found, That the compensation upon the butter and widders, takes effect only from the time of the liquidation.

Fol. Dic. v. 1. p. 167. Forbes, p. 549.

* * * Fountainhall reports the same case :

LORD ORMISTON reported Murray of Brughton *contra* M'Guffog of Ruscoe. Brughton being debtor to Ruscoe in 4.000 merks, he gives him an heritable bond ; and, towards his farther security, he sets him a tack of some lands for 21 years, for payment of 240 merks, with two widders and two stones of butter ; but containing this clause, that he shall retain the said 240 merks of tack-duty, to compensate and satisfy the annualrent during the not payment of the said principal sum. Ruscoe having retained the said 240 merks yearly, being the full annualrent of the said 4,000 merks, at six merks per cent. then the current interest ; but retention having taken place ever since 1678, some times at five per cent., and then at five and a half ; and never having paid the widders and butter, during the 21 years of the tack, Brughton raises a declarator of payment and extinction of this bond, in so far as Ruscoe had more than the annualrent ; *imo*, By the retention ; and then by the widders and butter, which two articles behaved to deduct off the principal sum, and extinguish it *pro tanto*. A term was assigned to Brughton, to prove the value and price of the widders and butter. Which being liquidate, he then craved they might be imputed in

payment and satisfaction of Ruscoe's principal sum, at each term as they fell due by the tack, to defalk *pro tanto*; for where one intromits with a *corpus* or a fungible, the liquidation *ex post facto* must retract and draw back to the time it fell due, especially if there was a *mora* in paying it *debito tempore*; for then *obligatio crescit ratione moræ*. Answered, The value can only be imputed from the time of the liquidation of the price of the butter and widders, conform to the probation, and the Lords' interlocutor thereon; for money can never be compensated with a *species* till it be estimate, and so converted into money; and it was so found, 4th December 1675, Watson *contra* Cunningham, No 144. p. 2684. And Stair, *tit. LIBERATION FROM OBLIGATIONS*, is express, that farms and services can only compensate clear bonds from the date of their liquidation, and no sooner, unless it were money-rent. Put the case, a master is owing his tenant 1,000 merks by bond, the tenant is again debtor to him in a year's rent, (of ten chalders of victual), the tenant requires his money, will any lawyer say, the master will get immediate compensation to stop execution on his bond because his tenant owes him? For a *corpus* and a liquid sum are not compensable, being of different kinds; and therefore the master must first obtain the sentence of a Judge, liquidating the victual to a certain price, and then only, and not till then, will the compensation meet. THE LORDS found, the widders and butter could only compensate and impute from the time of the liquidation, and not yearly, when they fell due. This imputation makes a great difference in the way of counting; for, as Brughton pleaded, it would have extinguished every year so much of the principal *sors*; but by this interlocutor, it only diminishes from the time of advising the liquidation; whereas in 21 years time (which was the currency of the tack), an annual imputation would have absorbed much of the sum, which an application now from this date leaves yet entire.

No 148.

Fountainhall, v. 2. p. 676.

1729. *June.* MARQUIS of Clidsdale *against* COCHRAN of Ochiltree.

No 149.

A debtor, who stood also bound for his creditor in greater sums, refused to pay, unless he were relieved of his whole engagements; THE LORDS found the defender liable to apply the sum wherein he was debtor for payment of the debts for which he stood bound, but gave him his option to pay one or other, as he thought proper, so far as the sum in question would extend, and that at the sight of the Lord Ordinary. See APPENDIX.

Fol. Dic. v. 1. p. 168.

1733. *January.* GRAHAM *against* DUKE of MONTROSE.

No 150.

A nobleman's commissioners having compted with his factor, struck a balance upon the whole save as to six articles, which were kept open to be adjusted by the con-