

No 6. maxim therefore should take place here, that *pro facto habetur per quem stetit quo minus fieri*.

THE LORDS found the letters orderly proceeded.

C. Home, No 2. p. 9.

1738. November 15.

SIR WILLIAM MAXWELL of Monreith *against* CREDITORS of SIR GODFREY M'CULLOCH.

No 7.

Found, that a creditor in more debts than one, has the option to use either he chuses, in compensation.

IN a question of compensation and recompensation, the LORDS abstracted from the specialties that were pleaded in the case; and the dispute turned upon the general point, Whether compensation was the operation of the law or of the Judge? Some of the LORDS were for the first, that it operated *ipso jure, eo ipso* that the parties became mutual creditors; and appealed to Stair, who lays down the rules for compensation and recompensation, as received with us, from the civil law. Others maintained, that compensation had no effect till it was proponed and applied by the Judge; that when compensation is sustained, our law, upon principles of equity, gives it an operation *retro* to stop the course of annualrent, and in that sense only is the common maxim to be understood, that compensation operates *retro et ipso jure*. Upon these principles, it was urged to be optional to the party to propone it or not, or to propone it upon one or other debt; and supposing one debt better secured than another, why should he not be entitled to compensate upon the debt least secure? The vote was stated in these precise words, 'Whether, to the party creditor in more debts, it was optional which of them to make use of by way of compensation?' and it carried in the affirmative.

Fol. Dic. v. 4. p. 158.

* * * Kilkerran observes the same case thus :

It had been generally held, that how soon parties became mutual creditors, compensation did that moment take place *retro et ipso jure*; in other words, that it was the operation of the law: And such had been Lord Stair's notion of it, appears from his having laid down the rules for compensation and recompensation as received with us from the civil law.

But, upon a more mature consideration of the nature of compensation, and the reason of the thing, in this case, a very different notion prevailed; namely, that compensation is not the operation of the law, but of the Judge; and that it has no effect till it is applied by the Judge: That it is true, when it is applied, the law, upon principles of equity, gives it effect *retro* to stop the course of annualrent; and that, in that sense only, is the common maxim to be understood, that compen-

sation operates *retro et ipso jure*; and this being so, that it is optional to the party to plead it or not, or, if he be creditor in more debts, to plead it on which of them he pleases: And that, as this was agreeable to principles, it was just in the reason of the thing; for, where one lends his money to his creditor, and for which the creditor, in place of applying it in payment, has agreed to give his bond for it, why should the law put it out of his power to pay what he owes, and continue his money so lent in his former creditor's hand, where he thinks it a good security? Or, where one is creditor in more debts, why should he not have it in his power to compensate upon the debt which is least secure?

And, accordingly, in this case, where the last happened to be the point in dispute, the abstract point was determined, that a party, creditor in more debts, has it in his option which of them he shall make use of by way of compensation.

Kilkerran, (COMPENSATION.) No 1. p. 133.

1756. July 21.

CAMPBELL against CARRUTHERS.

IN the year 1718, Graham of Longboddom set a 21 years tack of certain lands, for 300 merks of rent, to his brother William Graham, who, *anno* 1723, conveyed the same to William Carruthers. Of the same date with the assignment, Longboddom granted an heritable bond to the said William Carruthers for 4200 merks, made payable at the expiration of the tack, being Whitsunday 1739; obliging himself to infest the creditor in an annual rent of 210 merks out of the lands of Longboddom, of which the lands in the tack made a part. Then follows a clause, declaring, 'That it shall be lawful for William Carruthers to retain the said yearly annual rent of 210 merks out of the first and readiest of the said 300 merks of tack-duty contained in the said tack.' By this transaction, Carruthers, on the one hand, was secure of drawing his interest yearly, and, on the other hand, Longboddom, during the endurance of the tack, was secure that the sum in the heritable bond could not be drawn out of his hands; and consequently, that Carruthers could not, upon the pretext of compensation, retain any more of the rent than what answered the interest of his money.

Longboddom's affairs going into disorder, his estate was vested in trustees for behoof of his creditors, and a very confused management was carried on for many years. Carruthers paid his surplus rents whenever they were demanded. But, at the long run, a considerable arrear remaining in his hands, an argument was built upon it to cut down the heritable bond by compensation; it being urged that the bygone rents must impute for extinction of the said heritable bond from time to time as they became due. This was accordingly found. But, upon a petition and answers, the interlocutor was altered, and the compensation found to have no *retro* operation, upon the following ground; the equity

No 7.

No 8.

Compensation operates not *retro*, unless where it can be pleaded by either party against the other.