1709. *January* 4.

JOHN IRVING of Drumcoltran, *against* JOHN and ROBERT CORBETS, and Partners.

No 5.
Members of a Company decerned to relieve the keeper of the books and cash, *ante redditas rationes*, of certain sums of money borrowed by him for their and the Company's use, *ex eorum mandato*.

IN the process at the instance of John Irving against John and Robert Corbets and partners, for repayment of certain debts he had borrowed, by their warrant, for the use of the Company, while he was concerned in the management of their affairs,

Alleged for the defenders; The pursuer being both their factor and cash-keeper, he is obliged to count and reckon before he could seek any relief: Seeing *ante redditas rationes* he was presumed to have sufficient effects of theirs in his hands to answer all his disbursements.

Answered for the pursuer; It were unaccountable hardship to leave the pursuer to immediate distress for money borrowed by him *ex mandato* of the defenders, for their use, without relief till the issue of a count and reckoning, which may depend some years: And if mandates of this kind did not import a renouncing of any compensation or retention, upon the account of a society-debt, till accounts be stated and cleared, and a liquid balance in the mandatary's hand, no manager would ever engage his private credit for the Company.

THE LORDS repelled the defence, and decerned against the defenders for the sums commissioned by them to be borrowed by the pursuer; he always finding caution to pay what should be found due to them in the event of the count and reckoning.

Forbes, p. 297.

No 6.
An illiquid claim not sustainable either in compensation or in retention.

1735. *December* 9. CRAWFORD of Bridgend *against* HAMILTON of Grange.

A CHARGE upon a bond being suspended upon this ground of retention, that the suspender was confirmed executor to the charger's defunct spouse, and was entitled to her share of the moveables in the charger's possession; it was *answered*, That, by act 1592, cap. 143, liquid debts only are allowed to be pleaded upon by way of exception The act speaks not of compensation more than of retention; and, as it is *triti juris*, then an illiquid claim cannot be offered in the way of compensation; to sustain it under the name of retention, would be truly giving it the whole effect it could have when pleaded as a compensation, which would be allowing the thing under another name.

THE LORDS repelled the reason of suspension.

Fol. Dic. v. 1. *p.* 159.

*** C. Home reports the same case :

No 6.

COLLECTOR CRAWFORD, having right to a debt due by Hamilton of Grange, charged him for payment thereof; who suspended, upon this ground, that he had a claim for a share of the executry belonging to the charger at the decease of his last Lady, who was the suspender's mother by a former marriage; and therefore he ought to be allowed to retain in his hands the sum charged for, until the charger account to him for his share of his mother's executry, to whom he is decerned executor-dative.

Answered for the charger; The demand is new and unprecedented, that payment of a liquid claim should be stopped upon pretence of an illiquid one; nor can any instance, it is believed, be given, where it was ever sustained. And, if the matter is thoroughly considered, neither compensation nor retention has any place in strict law; seeing every one ought to pay his debt, conform to the precise tenor of his obligation, without regard to the mutual claim he may have against his creditor. Accordingly, compensation or retention is only admitted in those countries where it is introduced by statute, or where the Roman law prevails, and had no place with us before the act 1592, which allows debts *de liquido in liquidum* to be pleaded by way of exception. When this obtained, it was natural to admit those claims by way of exception, though not liquid, if instantly performable; such as relief of cautionry, and other obligations *ad factum præstandum*. But, if the obligation be not instantly performable, or not liquid, which comes to the same, because time is necessary for liquidation, there is no reason why a demand instantly performable should be delayed on that account; and therefore, in such a case, neither compensation nor retention ought to be allowed. Besides, it is a point established in practice, that an illiquid claim cannot be pleaded by way of compensation against a liquid debt; and, to sustain it in the shape of retention, would be allowing the thing, changing only the name. It is true, that illiquid claims are admitted, where they are instantly offered to be liquidated by the charger's oath; which, no doubt is competent, here. But it would be extremely hard to stop payment of a liquid debt until the event of a count and reckoning, which may be protracted for several years.

Replied; It is the charger's fault that the quantity of the executry due to the suspender is not already liquid, seeing he has hitherto omitted to give in a condescendence thereof; which he alone can do, as the vouchers are in his own hands. If indeed the liquidation depended upon any other, the charger's reasoning would be conclusive, that his liquid claim should not be deferred on account of an illiquid ground of exception; but, where the vouchers are in his own custody, and the proof in a great measure depends upon his own count-books and oath, such a case must surely admit of a different consideration; so that the want of liquidation should not be objected, as it arises from an act which the charger is obliged to perform, but which he has hitherto declined to do. The

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

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 compense 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 cteditors, 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-