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? No 7.

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.

No 8.
Compensation operates not *retro*, unless where it can be pleaded by either party against the other.

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 infeft the creditor in an annualrent 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 annualrent 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 8.

of making compensation operate *retro* arises from this circumstance, that compensation may be pleaded by both parties; so that if either make a demand, the other can retain by the exception of compensation. Thus both of them being equally secure that the money cannot be drawn out of his hands, each has the full use of the others money from the time of the concourse; and hence it follows, in equity, that both ought to pay interest, or neither. If the one is entitled by paction to have interest, he in effect receives that interest by having the use of the others money. But this holds only where the privilege of compensing is mutual. This was not the case of Carruthers. He was bound to pay the surplus tack-duty regularly; because, not to mention the transaction which entitled him to retain for payment only of his interest, he had in truth no claim against Longboddom upon which he could found a defence of compensation; the payment of the sum in the heritable bond being suspended during the currency of the tack. In this situation, it would be gross injustice to oblige Carruthers to pay interest for rents that he must hold in his hand ready to be paid upon demand; and it would be equally unjust to cut down the heritable bond gradually by these rents, which comes to the same with making them bear interest.

Sel. Dec. No 112. *p.* 158.

1798. *May* 22.

THOMAS CRANSTOUN *against* JAMES-ANN M'DOWAL, and her Factor *loco tutoris*.

No 9.

A. and B. were mutually cautioners for each other. A. died insolvent, but was never rendered bankrupt under any of the statutes. His creditors chose a trustee, and brought a multiplepoinding for the division of his funds. The creditors of B. to whom A. was cautioner, claimed in the multiplepoinding, and drew a proportional dividend with A.'s proper

DR JOHN M'FARLANE was joint obligant with James M'Dowal elder, and James M'Dowal younger, in bonds for L. 3630. The Doctor, however, was only cautioner for the others, who granted him a bond of relief.

James M'Dowal elder, and Archibald M'Dowal, were cautioners for Dr M'Farlane, in a bond for L. 1000, to Dr John Trotter.

Dr M'Farlane and James M'Dowal younger, were cautioners for Archibald M'Dowal, as treasurer of Heriot's Hospital, and in a cash-account which he held with the Royal Bank; and Archibald M'Dowal having become bankrupt, his cautioners were made liable to the Hospital for a balance of L. 757 : 4 : 4, and to the Bank for a balance of L. 243 : 19 : 5.

Dr M'Farlane, in 1788, died insolvent; but he was never rendered bankrupt under any of the statutes. His son, Mr John M'Farlane, having served heir to him *cum beneficio*, and expede a confirmation as his executor, disposed of his whole heritable and moveable property, except an entailed estate, which was not liable for his debts. These funds were insufficient to pay 10s. a-pound of his debts.

Mr M'Farlane brought a multiplepoinding, in which he called both the proper creditors of his father, and those to whom he was bound as cautioner for the