

No 3.  
*est debitoris*  
holds not  
where the  
debtor is  
bankrupt.

to Mr Man in Norwich, to whom M'Reith was factor, he produces a receipt of L. 600 Sterling from Man, of the sums due to him by Mr M'Neil, with an application thereof by M'Neil to this sum before any diligence; and it is a certain maxim in law, that payment made and accepted indefinitely by a debtor to a creditor, to whom he owes several sums, *electio est debitoris*, and the debtor may apply the payment to which sum he pleases, and he has done so in this case. It was answered, That the payment could not be ascribed to this bond, being made a day before the day of payment of this bond, but behoved to be ascribed to the other anterior debts, whereof the term was past. *2do*, Though ordinarily the debtor has election, that cannot hold here, because the debtor was broken and insolvent before the election, after which he could not, to the creditor's prejudice, apply the indefinite payment to a sum secured by caution, and leave the creditor to seek sums unsecured from a bankrupt.

THE LORDS sustained the election by the debtor, if he was solvent and entire the time of the election, albeit the indefinite payment was a day before the term of payment of this bond, to which the debtor had applied it.

*Fol. Dic. v. 1. p. 460. Stair, v. 2. p. 757.*

No 4.

1687. November. SMITH against JAMES OSWALD.

THE debtor in a 1000 merks bond having, after the term of payment, paid 700 merks without any application to the bond, or to a quantity of wine resting also by him; and thereafter having received more wine, and applied the payment wholly to the wine, and not to the bond; and the cautioner in the bond being pursued, he *alleged* upon the payment of the 700 merks, which behoved to be applied to extinguish the bond *pro tanto*, as the *durior sors*, especially considering that merchants use to allow year and day for the payment of wines.

*Answered*, It was in the debtor's power to apply the payment.

THE LORDS found, that the debtor might, *ex post facto*, apply so much of the 700 merks as effeired to the price of the wines furnished before the payment, unless the term of payment of the wine's price was not come when the money was paid; but that he could not apply it to wine furnished after the said payment, in prejudice of the cautioner in the bond.

*Fol. Dic. v. 1. p. 461. Harcarse, (CAUTIONERS.) No 250. p. 59.*

No 5.

1693. January 17.

Sir JOHN HALL of Dunglass against Bailie ALEXANDER BRAND.

THE LORDS shunned that question, Whether the L. 500 Scots as the exchange, at 10 per cent. should bear annual rent? for the act 1681, cap. 20. allows damage and

interest when exchange is not paid, but here it was converted into a bond; so the question was stated, if Provost Hall could ascribe the partial payment made to him by Bailie Brand to the annualrent and exchange in the first place, and to the principal sum only after both, or if the exchange should come *ultimo loco*; and the Lords found, he might impute it to the exchange before the principal sum, and that the said method was the most natural way of counting. See Duck against Maxwell, No 7. p. 6804.

*Fol. Dic. v. 1. p. 461. Fountainball, v. 1. p. 546.*

No 5.

1705. July 13.

LADY SEMPLE against LADY COMISTOUN.

THE Laird of Comistoun having granted to the Lady Semple an heritable bond upon his estate for L. 24,000, the granter's Lady, after his decease, did, by her bond of corroboration, as tutrix for her son, oblige herself personally for L. 3691 of bygone annualrents of the foresaid principal sum, resting by him, as heir to his father; but, at the same time, got a backbond from the Lady Semple, suspending personal execution against herself for seven years, and reserving all manner of execution against Comistoun and his estate; so be, that the current annualrents of the corroborated sum, and the whole L. 24,000, were duly paid.

The Lady Comistoun being charged upon her bond of corroboration, after she had made several partial payments indefinitely, and having suspended, the Lords found these partial payments applicable to the sums charged for, and not to be imputed in satisfaction of the annualrents of the L. 24,000, which the payer was liable for, *tutorio nomine*.

Albeit it was *alleged* for the charger, That the payments should be ascribed in satisfaction of the sum and annualrents, which, by the backbond, were to be punctually paid, and the suspender was liable for, as tutrix to her son, and could not be imputed to extinguish any part of the bond charged for; in regard the same stood suspended, as to execution, for seven years, upon the condition of punctual payment of the annualrents of all sums due by her, or her son, to the charger. For, albeit a debtor hath the election to impute indefinite payments to what debt he will, yet that election is restricted by *l. 3. sect. 1. D. De Solut.* so that he cannot apply his payment by emulation, in prejudice of the creditor, to extinguish a principal sum, while any annualrents are due; all payments being first ascribed to annualrents.

In respect it was *answered* for the suspender, That she, a debtor, having paid indefinitely, hath *jus applicandi*, and doth apply the payment to extinguish the bond charged on, bearing annualrent, as the *durior sors*, which she may do, more especially in this case, where the bond bears to have been granted for annualrents due by her son, the uplifting of whose rents, and applying them to satisfy the said bond, was an application in payment of the

No 6.

A tutrix granted a personal bond of corroboration for a sum of bygone annualrents, in an heritable bond upon her pupil's estate. Found that partial payments were to be imputed in satisfaction of the bond of corroboration in which she was personally bound, and not of the subsequent annualrents of the heritable bond, for which she was liable only *tutorio nomine*.