

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*.

No 6.

charger's annualrents. *2do*, Some of the payments expressly relate to sums due by the suspender herself; and so it is, that she owes not a sixpence to the charger, beside the sums charged for; nor yet is the L. 24,000 debt so much as constituted against her pupil.

*Fol. Dic. v. 1. p. 461. Forbes, p. 25.*

1717. June 28. NATHANIEL DUCK of Leaths *against* MAXWEL of Cuil.

No 7.

An indefinite payment was in the first place, ascribed to a debt not bearing interest, and the remainder applied to a separate debt bearing interest. See Hall against Brand, No 5. p. 6802.

THOMAS MAXWEL of Cuil having, in the 1712, granted bond to Nathaniel Duck of Leaths, and partners, for L. 147 Sterling, bearing, "For a parcel of black cattle bought from them, for furnishing the parks belonging to Sir George Maxwel of Orchardton;" after several payments, he charged for L. 63 Sterling, as the remainder of the bond. Cuil suspended, on pretence of payment; and, at discussing, produced a receipt for L. 60 Sterling, bearing, "In part payment of cattle bought by Cuil for the use of Sir George Maxwel's parks;" alleging the receipt ought to be sustained as an extinction of the bond *pro tanto*. The charger *replied*, That, prior to the date of the receipt, the said Cuil was his debtor for more than L. 60 Sterling for black cattle, furnished likewise for the use of Sir George Maxwel's parks; and descended on parcels furnished both before and after the parcel for which the bond was granted. The debate upon this arising, Whether this indefinite receipt ought to be ascribed to the bond, or to the other parcels of cattle, alleged likewise furnished?

It was *contended* for the suspender, *imo*, Allowing such cattle to have been furnished, the receipt, notwithstanding, must be applied to the bond, as *durior sors*; which is plain from *l. 3. sec. 1. et seq. D. De solut.* where these rules are laid down, *Si a neutro dictum, in graviorem causam videri solutum, et potius quod cum pœna, quam quod sine pœna debetur, aut in antiquius debitum.* All these rules concur in the suspender's favour; the sum in the bond was the *gravior causa*, as bearing annualrent, and having summary execution; it was due under a penalty, and by the charger's acknowledgment, also *antiquius debitum*, who pretends to apply this receipt mostly to goods said to be sold after the date of the bond. *2do*, The suspender refuses the alleged furnishing; and it is not now competent to lead a proof *prout de jure*, being prescribed, *quoad modum probandi*, by the lapse of three years, which supersedes entirely the first point: And it appears to be a certain rule in our practice, that debts prescribed, *quoad modum probandi de jure*, cannot be founded on, either by way of action or exception, unless offered to be proved resting owing by the debtor's oath. See 5th July, 1681, Dickson against Macaulay, *voce* PRESCRIPTION; 18th January, 1712, Harris against Maxwel, *IBIDEM*.

*Answered* to the first, The rules anent applying indefinite payments *in durio-riorem sortem*, take only place where the circumstances of the debts are other-