bervie to endeavour to apply the partial payment to the accumulations; at least to apply it so far, as to keep up the principal sum in the heritable bond, and thereby lay the weight of that debt upon the subject of her liferent, especially considering that there was no less a penalty than L. 1000 in the heritable bond, to which he could make the application. *2do*, Though she had consented to the granting of that bond to Kemney, yet that could go no farther than to the yearly annualrent of the principal sum. *3tio*, Upon her renouncing in favour of Kemney, she got an assignation to the claim her husband had upon the estate of Kirkton, out of which the partial payment had been recovered. And, *4to*, That, however unexceptionable Mr Nicolson's adjudication might be, yet the payment ought to be applied to the extinction of the principal sum and annualrents, but not to the accumulations. *1mo*, Because Mr Nicolson had already acquiesced in that method of application, by a writing under his hand, in which he approved a scheme of division amongst the creditors of Trabroun, wherein he is only stated as a creditor for his principal sum and annualrents. *2do*, Because, by a subscribed account in process, (two years after leading the adjudication) my Lord Kemney restricted his heritable bond to principal sum and annualrents, without accumulations. No 8.

It was *answered* to Mr Nicolson's having subscribed the scheme of division, That the estate of Kirkton was not sufficient to pay the principal sums that affected it, with their annualrents; for which reason, the creditors agreed that the scheme should be made out, dividing the price in proportion to their principal sums and annualrents, without regard to the accumulations; but from thence it could not be inferred, that any (even of Kirkton's own) creditor did quit or renounce his accumulations, as to the common debtor; for, whatever the creditors might do amongst themselves, to expedite the scheme of division, yet they still stood creditors to the representatives of that estate, for the remainder of the sums which they could not at that time recover.

The Lords found, that the partial payment, received out of the price of Kirkton's estate, conform to the scheme of division thereof, signed by Glenbervie, was to be imputed in part payment of the principal sum in the heritable bond, and that the relict's liferent was preferable to the accumulations.

Reporter, *Lord Justice Clerk.* Act. *Jo. Dundas.* Alt. *Ja. Colvill.* Clerk, *Mackenzie.*

Edgar, p. 87.

1725. *February.* Dutchess of Buccleugh *against* Patrick Doul.

No 9.
A bankrupt cannot apply an indefinite payment to a debt in which he stands singly bound, in defraud of his cautioners

William Innes was appointed chamberlain of the estate of Dalkeith, in the year 1711, by the Dutchess of Buccleugh, who relied upon his personal security for his management. Thereafter, in the year 1714, the Dutchess having purchased the feu duties of Inveresk and Musselburgh, granted a factory to the said William Innes, for uplifting these feu duties; and John Doul became

No 9.
in a separate obligation, but the application must be made proportionally to both debts.

cautioner for him. Mr Innes made payment from time to time, of the rents, both of the estate of Dalkeith and Inveresk, taking receipts from her Grace's receiver, indefinitely; and at clearing accounts in the year 1717, these indefinite receipts were ascribed proportionally to the intromissions with the two estates, and Mr Innes thereupon discharged. Mr Innes continuing his intromissions with both estates, made his payments, and took indefinite receipts as formerly; and in the year 1723, there is a second account fitted, but in a quite different manner from the other; for in this, all the indefinite payments are ascribed to the factor's intromissions with the estate of Dalkeith, and none of them to that of Inveresk; in consequence whereof, there is a balance stated due by the factor Mr Innes, for his intromissions with the feuduties of Inveresk and Musselburgh, for the year 1718, and downwards, of the sum of L. 984 Sterling. The deceased John Doul, the factor's cautioner, having been charged for this sum, he suspended, and his reason was, that the indefinite receipts of payment ought to have been applied in stating the second account 1723, proportionally to the factor's intromissions with the two separate estates, as in the first account; and that the factor (especially being bankrupt) could not by any other method of stating, prejudge his cautioner; and therefore the cautioner could not be liable for the whole balance, but only for a proportion effeiring to the factor's intromission with the estate of Inveresk since the 1717.

Her Grace endeavoured to support her plea from this maxim, "In the application of indefinite payments, *electio est debitoris*." And here both debtor and creditor had concurred in the application, which puts the case beyond dispute: It is certain, that by the fitted account 1723, payment being offered and accepted, of the bygone rests of the estate of Dalkeith, and the factor discharged accordingly, his obligation to account for these rests became *funditus* extinguished, and the dutchess at present has no remaining claim for any of his intromissions with that estate; the balance therefore due by the factor, can only be for his intromissions with the estate of Inveresk, which concludes directly against the suspenders. The alleged circumstance of bankruptcy makes rather for the pursuer; had the factor been endeavouring to apply his indefinite receipts to the estate of Inveresk, instead of Dalkeith, the Lords would find, in terms of the decision, 13th February 1680, Macreith *contra* Campbell, No 3. p. 6801., That a bankrupt cannot apply an indefinite payment to an obligation with cautioners, in defraud of his creditor, to whom he is also due a sum, without cautioners; much more when he has actually applied the indefinite receipts to the obligation wanting cautioners, must the application be sustained. But, 2*do*, Granting there had been no application, no fitted account, it must have come to the same thing; for where the parties themselves neglect to apply, the judge will certainly make the application accordingly, as it is presumed the parties themselves would have made it; that is, in other words, "accordingly as would have been most equal for the creditor and

debtor, and least to the detriment of either." To take this matter to the bottom, it appears to be plain, that neither the debtor nor creditor has separately the application of payments, but conjunctly; for as debts are contracted by the mutual consent of the parties, so must they be dissolved by their mutual consent; *unumquodque eo modo tollitur quo colligatum fuit*; and therefore it is, that the offer of payment dissolves not the obligation, but that together with acceptance *in solutum*; whence it must follow of necessity, that where the parties differ about the application, there must be some rule to determine who has the choice; which may be readily drawn from the principle of equity, just now mentioned, which teaches, "That that ought to be followed,which is most equal both for debtor and creditor, and least for the hurt of either." And hence this rule of practice, "That he of the two should have the choice, in whose case, *agitur de damno evitando*;" agreeably to the maxim, *Potior debet esse conditio ejus, qui certat de damno evitando, quam ejus qui certat de lucro adquirendo.* And here by the way it appears evident, that the cautioner's interest cannot come in to the account, who has no vote in the application of his principal the debtor's payments. It is noways inconsistent with this doctrine, what is commonly held, that *electio est debitoris*; for this was never designed to be an universal rule, though it holds in abundance of cases, as in all these, where there is a *durior sors*; for example, where a debt is due under a penalty; and it is this very law of equity, which gives the debtor the choice, in order to prevent the creditors getting an unequal or odious advantage. Another example is, where an adjudication has been led upon one of the debts, and the legal near expiring; there equity again dictates, that the debtor has the choice in the application of his payment, to prevent his estate being carried off, likely for a small debt, in both which examples it is evident, the debtor is *certans de damno evitando*, whereas the creditor is *certans de lucro acquirendo.* To apply this rule of equity to the case in hand, it will conclude, that the indefinite payments ought to be applied to the debt without a cautioner, rather than that with a cautioner; it being precisely the same to the debtor, which of the debts they be applied to, and a manifest detriment to the creditor to apply them otherwise, which squares exactly with the rule, "That the application be made so, as least for the hurt of either." The pursuer concluded, she was sensible the Roman law, though for her as her case in fact stands, is against her in this shape of her argument; see *l* 3. *et* 4. *D. De solut.* where amongst other examples, a bond with a cautioner is reckoned a *durior sors*, in which, of consequence the debtor has the election; but this truly seems to have slipped from a hasty pen, for there is no apparent reason for judging a debt with a cautioner, to be a *durior sors* upon the principal debtor, than where it is constituted by his single obligation; it makes no difference in his circumstances, which of the obligations be first dissolved, though it does in the creditor's, who in such a dispute is plainly *certans de damno evitando.*

No 9.

No 9.

It was *answered* for the defender, whatever may be in the general point, his reason of suspension is certainly good, from the circumstances of his case. Mr Innes, the factor, intromitted with the rents of both the estates at the same time; he did not, nor was there occasion to keep his intromissions in distinct stocks; he made partial payments out of the common stock, and took indefinite receipts; and the presumption is, which was certainly the fact, that accordingly these payments were partly out of the rents of Dalkeith, and partly out of the rents of Inveresk. It will be obvious, that this view of the case takes the dispute entirely off the footing of indefinite payments. Here the payments were in no proper sense indefinite; for as they were drawn out of the common stock, which was composed partly of the rents of Dalkeith, and partly of the rents of Inveresk, they must impute proportionally, in the distinct obligations the factor lay under to account for these rents. This case then falls to be the same, as if the receipts had born an express clause, in part payment of the rents of Dalkeith and Inveresk; and the law here makes the application as distinctly, as where it is expressed. Taking the matter upon this footing, it was contended for the defender, that even supposing the factor not to have been bankrupt, there was no liberty left to make up the accounts, as was done in the 1723: By the several partial payments made by the factor, proportionally out of the two estates, the rents of Inveresk were in so far paid up, and both principal and cautioner in so far exonered of their obligation; and the factor thereafter could no more apply these partial payments, wholly to his intromissions with the estate of Dalkeith, in prejudice of his cautioner, than he could retire a receipt expressly relating to the rents of Inveresk, and take a new receipt for the said sum, as part of the rents of Dalkeith. But, 2*do*, (to follow the pursuer in her argument) allowing all these payments had been strictly indefinite; still it is contended, that equity would never allow the bankrupt, even with concurrence of his creditor, to apply these indefinite payments to the manifest prejudice of his cautioner. It appears to be a plain case, that the bankrupt could not directly make payment to his creditor in prejudice of his cautioner, who is also his creditor for relief; for this would be a partial preference of one creditor to another: And there is precisely the same reason, that neither should he have it in his power, by applying an indefinite payment, to prefer one creditor to another; since in any strict sense, it is the application only that makes the payment. The rule of equity laid down by the pursuer is good in so far as relates to the creditor and debtor alone, but will not apply when third parties are concerned; for in the present case, it will never be allowed indifferent to the debtor, whether he apply his indefinite payment to the obligation with or without the cautioner: The cautioner is his creditor for relief, and he is as much bound to satisfy that obligation, as the other; and if the debtor should go about to defraud him of his relief, the cautioner has as proper an interest to see to his security, as the principal creditor has, to whom he is bound as cautioner. In

this competition then, betwixt the two creditors, about the application of the indefinite payments; according to the pursuer's rule, since they are equally *certantes de damno evitando*, neither can be preferred in the application; but being *in pari casu*, the application must be made proportionally. The decision Macreith *contra* Campbell is cited on the other side; but it makes nothing against the defender: It was found only in that decision, that the bankrupt's application of his indefinite payment must be set aside; which was most just: But it goes not on to determine what fell to be the legal application, though it may readily enough be inferred from the decision agreeably to the above doctrine. Thus, upon the same principles, the bankrupt's application was set aside in prejudice of his creditor, and in favours of his cautioner; upon the same fell it to be set aside, if made, as in the present case, in favours of his creditor, and in prejudice of his cautioner: What is to be inferred from this, but that they were *in pari casu*, and of consequence had a legal title to have the application made proportionally to their respective interests? No 9.

"The Lords found the indefinite receipts of payment made to the Dutchess's receiver ought to have been applied proportionally, and that Mr Innes could not, by accounting in another manner, prejudge the cautioner."

Fol. Dic. v. 1. *p.* 460. *Rem. Dec. v.* 1. *No* 58. *p.* 110.

*** Edgar reports this case:

1725. *February* 11.

William Innes was appointed factor on the estate of Dalkeith by the Dutchess of Buccleugh; thereafter her Grace, having purchased the feu-duties of Inveresk and Musselburgh, granted another factory to the said William Innes for managing that subject, and John Douall became cautioner for him in that last factory.

Mr Innes accordingly made payment from time to time both of the rents of the estate of Dalkeith and Inveresk, and took receipts from her Grace's receiver indefinitely; and at clearing of accompts in the year 1717, these indefinite receipts were ascribed proportionally to the intromissions with the estate of Dalkeith and Inveresk, and he was thereupon discharged.

Mr Innes continued his intromissions with both the estates, made his payments, and took receipts in the same manner as formerly; and in the year 1723, there was an accompt fitted, wherein all the indefinite payments were ascribed to the factor's intromissions with the estate of Dalkeith, and there remained a balance due by Mr Innes, by virtue of his intromissions with the feu-duties of Inveresk and Musselburgh for the year 1718 and downwards, extending to the sum of L. 984 Sterling.

Mr Douall, as cautioner, being charged for this sum, suspended upon the following ground, That the indefinite payments made by the factor, must be understood to be made proportionally out of both the estates, and that her

No 9. Grace's commissioners could not warrantably apply the whole payments to the factor's intromissions with the estate of Dalkeith, especially since, in former accountings, those indefinite payments were applied to the factor's intromissions with both estates.

It was *answered* for the Charger, That in the year 1723, the application of the indefinite payments was made particularly to the rents of the lordship of Dalkeith by mutual consent; therefore, according to the principles of law, the factor could not thereafter return to plead upon the indefinite payments after the same was renounced by a particular application; and the cautioner must be in the same case with the factor, his bond being only of the nature of an accessory obligation, which must be regulated by the principle to which it accedes, consequently the suspender can be in no better case than the principal. 2*do*, However a debtor, in good circumstances, may apply indefinite payments to any one of two sums due by him, yet it is otherwise when he becomes insolvent; and that this was Lord Stair's opinion, lib. 1. tit. 18. § 3. who cites a decision, 13th February 1680, Macreith against Campbell, No 3. p. 6801.

To which it was *replied* for the suspender; 1*mo*, That it was needless to dispute the general point, whether cautioners in every case are to be bound by the deeds of the principal; it was the same thing to the principal, in the present case, whether the balance did arise by his intromissions with the estate of Dalkeith or that of Inveresk, he would not have been a shilling richer or poorer whatever way they were stated; but it was far otherwise with regard to the suspender, who was cautioner only for the intromissions out of the estate of Inveresk; and therefore the factor could not, in prejudice of the cautioner, alter the former rule of counting, which supposing there had been no former accompts fitted establishing the method, was the legal rule. As matters stood with respect to the indefinite payments, the factor was equally debtor as to both the estates, the fund of the payments which he made was drawn from the one as well as the other; when he made these payments he took the receipts to account, and supposing that there had been no accompt made, but that Mr Innes's representatives and cautioners had been to make them up, the chargers could not dispute but that the accompt behoved to be made up, imputing the indefinite payments to the intromissions out of both the estates. From all which it was evident, that there was hereby a *jus quæsitum* to the cautioner, which no voluntary deed of the factor's could deprive him of.

To the 2*d* it was *replied*, That neither the decision nor the Lord Stair have any where said, that after a debtor becomes bankrupt, the creditor has the application of any payment made by him; after a party is become bankrupt, he can act nothing of himself by his voluntary deed, but the law must act for him, and apply the deeds according to the state they were in before his bankruptcy; and so the LORDS determined in Macreith's case above cited, that the voluntary application of an indefinite receipt ought to be set aside; and therefore, the accompts fitted in the year 1723, whereby the factor inverted the na-

tural order of the application of the indefinite payments, ought not to be regarded; and the payments by the factor being made with his intromissions with both the estates, such indefinite payments ought to be ascribed to both promiscuously. No 9.

THE LORDS found the indefinite receipts of payment made to the receivers ought to be applied proportionally, and that Mr Innes could not, by counting with the commissioners in any other manner, prejudge the cautioners.

Reporter, *Lord Pollock.* For the Dutchess, *Alex. Hay & Ch. Areskine.*
Alt. *Ja. Graham.* Clerk, *Mackenzie.*

Edgar, p. 165.

1739. *November* 9. FORBES *against* INNES. No 10.

WE have receded much from the civil law in the matter of indefinite payment; with us it has been understood to be applied to the debt worst secured, and to the debt not bearing annualrent, to which, as the *durior sors*, it was applied by the civil law; nay, we have now gone so far, as instead of the rule of the civil law, that *electio* was *debitoris*, we have gone into the direct contrary, that *electio* is *creditoris*; and accordingly it was in this case found, "That the indefinite payments were to be imputed as the creditor thought fit."

The like was found, November 7. 1742, the Creditors of Martin *contra* Paterson.

Fol. Dic. v 3. *p.* 314. *Kilkerran*, (INDEFINITE PAYMENT.) *No* 1. *p.* 284.

*** C. Home reports the same case:

PATRICK CRAWFURD being debtor to Robert Gordon, by a promissory note, he indorsed the same to Daniel Forbes; and Alexander Innes being creditor to Robert Gordon, arrested in Mr Crawfurd's hands the money due by him to Robert Gordon on the promissory note; whereupon a competition ensued betwixt the indorsee and arrester, in which, upon an allegeance that Innes's debt was extinguished by several payments made to him by Robert Gordon, Innes compeared, and acknowledged the payments, but *contended*, That the debt acclaimed by him was not thereby extinguished, since he had applied these payments to a debt due by Sir John Gordon of Embo to him; for payment of which debt Robert Gordon also stood bound, conform to a letter addressed to Mr Innes, of the following tenor: 'You'll sist diligence against my brother, and I, 'by these presents, become bound to you to see the utmost shilling (of his 'bill) paid, if you signify the same to me by a letter in the course of the post,' &c. In consequence of this letter, Mr Innes discharged the proceeding in diligence against Sir John, and acquainted Robert Gordon that he had done so.