

## INDEFINITE PAYMENT.

1565. January 6. A FRENCHMAN against FLEMING.

No 1.

IN an action, moved by a Frenchman against Mr Thomas Fleming, as cautioner for umquhile Lord Fleming, for the sum of ———, which the said Mr Thomas obliged him to pay, or cause the said Lord pay the same, it was answered, that the said umquhile Lord Fleming had paid to the said Frenchman. It was replied, That the said Lord was owing to him as much by an obligation of an older date, and the said payment was to be understood for the oldest debt; and was answered, that the debt, wherefore he had found caution, was more hard and painful, and therefore of the law it is to be interpreted, that the debtor would first have relieved the same, L. 89. § 2. D. De solutionibus. THE LORDS admitted the reply to probation, notwithstanding the said law, which had not been received in this realm.

*Fol. Dic. v. 1. p. 460. Mailland, MS. p. 204.*

1592. December 14. JAMES HARVIE against The EARL of MURRAY.

No 2.

IN the action pursued by James Harvie, advocate, against the Earl of Murray, it was found, by the Lords interlocutor, that a party who is obliged *pluribus nominibus* for sundry debts and sums of money, if he makes payment of a sum of silver *indefinite* to his creditors, he may ascribe it to the payment of any of the debts the debtor pleases, *et eo casu debitoris est optio in ejus potissimum obligationis liberationem imputari velit solutionem.*

*Fol. Dic. v. 1. p. 460. Haddington, MS. No 54.*

1680. February 13. M<sup>R</sup>REITH against CAMPBELL.

SAMUEL M<sup>R</sup>REITH pursues Donald Campbell, as cautioner for Hector M<sup>R</sup>Neil, in a sum of L. 300 Sterling, who *alleged* absolvitor, because this sum being due

No 3.  
In indefinite  
payment the  
brocard *electio*

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