No 6.

charger's annualrents. 2*do*, 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 Max- " wel'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 condescended 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, 1*mo*, 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. 2*do*, 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 duriorem sortem*, take only place where the circumstances of the debts are other-

No 7.

wise equal; but law allows not application to be made by either party, to the manifest prejudice of the other: And for that reason it was, that the Lords would not allow an indefinite payment to be applied to a sum secured by caution, where the debtor was insolvent; whereby another sum, for which there was no cautioner, would have been lost, Macreith against Campbell, No 3. p. 6801. And just so here, the suspender cannot now, after the other debts are prescribed, pretend to apply this receipt to the extinction of the bond, and then cut the charger off from his other debts, on pretence of prescription; but the charger having got payment indefinitely, and the bond still unretired and undischarged, he was *in optima fide* to rely thereon, as a standing security, and could not, with a good conscience, have insisted for payment of the other cattle furnished, which were looked upon to be paid *pro tanto*, by the receipt of that L. 60. But further, the law lays down very equitable grounds for supporting the charger's plea; for, although it gives the debtor first, and then the creditor, the application, in order after other, it is with this equitable caution, *dum in re agenda hoc fiat, ut vel creditori liberum sit non accipere, vel debitori non dare, si alio nomine exsolutum quis eorum velit.* And *dummodo sic constituemus, ut in re sua quis constituerit;* which plainly points, that, in the application of the general rules of law, it is to be considered what was *actum et tractatum* at the time, " and what application is most " equal for both parties." And here, all the circumstances concur in the charger's favour: For, 1*mo*, At the date of the receipt both debts were due, that which was constituted by the bond, and that which arose from furnishing of cattle without writ; and no prescription could then have been obtruded against either: Now, it is not supposable, that any prudent man would have received payment of a debt secured by writ, and allowed another equally onerous, but not secured by writ, to stand out without any security given therefor. 2*do*, Equity infers the presumption, that indefinite payments are applied rather to sums not bearing interest; for, since the common interest is determined by the law, as a just equivalent for the use of money, it is manifestly unequal for a debtor to pay a sum bearing interest, while he retains in his hands another sum that bears none; whereby the creditor has neither the use of his money, nor an equivalent for it: So that, in this question, *agitur de damno evitando* upon the creditor's part; whereas, the debtor is *certans de lucro adquirendo;* which is manifestly unequal. To the *second*, *answered*, The prescription mentioned bars the charger from making use of a proof by witnesses, to establish his right against the suspender, so as to found a claim either by way of action or exception; for there, indeed, the act and the decisions would meet him: But, seeing the whole import of the proof will be, to give evidence that there was once such a debt existing, in order that the receipt may be applied there to, and not to another debt that is still standing out, there is nothing in the act or decisions to hinder a proof for that end.

No 7.

'THE LORDS found it relevant to apply the sum, contained in the receipt, 'to the payment of black cattle bought by the suspender from the charger, 'for the use of Sir George Maxwel's parks, within the three years of the date 'of the receipt; and they found it relevant for the charger to prove, in the 'terms of his condescendence, *prout de jure*.'

Act. *Ro. Dundas.* Alt. *Ja. Boswell.*

Fol. Dic. v. 1. *p.* 461. *Rem. Dec. v.* 1. *No* 5. *p.* 8.

1724. *July* 16.

WILLIAM NICOLSON of Glenbervie *against* The LADY TRABROUN.

No 8.

A Lady, infeft in a liferent of lands, consented to an heritable bond, granted by her husband to a creditor, who afterwards adjudged, and drew a partial payment from the purchaser of the lands. Found that this payment must be imputed in extinction, *pro tanto*, of the principal sum in the heritable bond, and not of the accumulations in the adjudication.

THE Lady being infeft in the barony of Trabroun, for a liferent provision, consented to an heritable bond, granted by her husband to the Lord Kemney, for the principal sum of 5500 merks, upon which the Lord Kemney was infeft; whereby he had the preference to the Lady's liferent, and upon which he obtained a decreet of poinding the ground against the tenants.

The Lord Kemney was likewise creditor to Trabroun in a sum of L. 416 Scots, by a personal bond; upon which, and the heritable bond, he adjudged the barony of Trabroun, and likewise an interest which Trabroun had upon the estate of Kirkton in Fife, stated and preferred in the ranking and sale of that estate for L. 17,254 Scots; but, because Trabroun was not in such circumstances, as that he could convey his debt and preference to Gillespie, the purchaser of Kirkton, Gillespie raised a multiplepoinding against Trabroun's creditors; at discussing of which, Glenbervie, as having right from my Lord Kemney, his father, received of his claims from the purchaser L. 2396 Scots, in virtue of the said preference.

Mr Nicolson insisted thereafter in executing his letters of poinding against the tenants, which being suspended, there arose a question betwixt him and the liferentrix, whether the partial payment, out of the price of Kirkton, ought to be applied in extinction of the accumulated sum in the adjudication, or to the principal sums and annualrents, contained in the respective bonds.

It was *contended* for Mr Nicolson, That adjudications were necessary diligences, and that his was a good one, and laboured under no nullity; that, although the Lords do sometimes restrict adjudications, and, in order to prevent carrying off great estates for small sums, find the legal current upon slight nullities, yet the security always remains good for principal sum, annualrents, and accumulations, and must continue to do so as long as the law introducing that diligence stands unrepealed; and, consequently, the sums contained in the adjudication were due, and the partial payment might be applied by Glenbervie to any of them.

It was *argued* for the Lady, That it was by no means equitable in Glen-