There of 28 June 1717 Nathaniell Ducks of Leaths contra Maxwell
of Cuil. Albeit the Bond was the Durior Sors quoad the Debtor.
Because Altho the Law gives the Debtor first, and then the Creditor, the
Application in order After other; it is with this Equitable Quali-
Dummodo in re Constituat in quod ipse si deberet Esset Soluturus.
Effectibat. Which plainly points that in the General Choice of the Application of
What was most Equal for both parties is to be considered, and
Application to be made by Either party to the Manifest prejudice
of the other. Now it is not Supposable, that any prudent man would
have Received payment of a Debt secured by writ, and allowed sums
Equally Onerous to stand out without any security given for it and
thereby Liable to prescribe quoad Modum probandi, In [illegible]
2° Since the Common Interest is determined by the Law as a just
Equivalent for the Use of Money, it is Unequal for a Debtor to [illegible]
it him wanting interest, while he retains in his hand another
that affords none. So that he agitur de damno vitando on the
Creditors part, and the Debtor Certat de Lucro Captando. The [illegible]
Why the Application was Restricted to the payment of [illegible]
bought within three Years of the Indefinite Receipts, [illegible]
the price of these bought before that time is prescribed quoad Mo-
:dum probandi: and Debts so prescribed cannot be payed [illegible]
Either by way of Action or Exception, 5 July 1681 Dickson contra
McAulay 18 January 1712. Harris contra Maxwell of Orchardton
A factor upon two Estates belonging to the same person, who found
Caution for his Management of the One, and not of the other, having
Intromitted with the Rents of both at the same time, and Made par-
:tial payments from time to time to his Constituent upon getting
Indefinite Receipts, and at fitting accounts when he was Bankrupt,
All the indefinite payments being Ascribed to his Intromissions with
that Estate for which he had given no Surety, and thereby a
great Ballance Stated due by the factor for his Intromissions
with the other estate, for which the factors Cautioner was
Charged: He suspended upon this reason, that the Indefinite re-
:ceipts of payment ought to be Applied in Stating the Accounts
Proportionably to the factors Intromissions with the two
Estates, and he being Bankrupt could not by any other
Method of Stating wrong his Cautioner, who could there-
for

For be Liable only for a proportion of the Ballance effeiring
to the factors intromission with the estate for which he was Surety.
It was Answered for the Charger, 1° in the Application of Indefinite
Payment Electio est Debitoris, and here both Debtor and Creditor
Concurred in the Application. So that by the fitted Accounts the
Preceeding rents of the estate for which the Factor had no Surety
being discharged, his obligation to Account for these was Utterly
Extinguished, and the Creditor could Claim the Ballance only
upon the Account of his intromission with the other estate.
If a Bankrupt cannot apply indefinite payment to an obligation
with Cautioners, to the prejudice of his Creditor to whom he owes
a Sum without Caution 13 feb. 1680. McLeith contra Campbell,
Much more, when he has actually applied the Indefinite Receipts
to the obligation wanting Surety, must the Application be Sus-
:tained. 2° granting there had been no application or fitted Ac-
:count, the Judge should make the application so, as the parties
would probably have made it, that is Equally for the Creditor
and Debtor, and least to the Detriment of Either. It appears
to be plain, that neither the Debtor nor Creditor has separate-
:ly the application of payments, but Jointly: For as Debts are
Contracted by the Mutual consent of parties, so they must be
the same way Dissolved, the offer of payment by the Debtor
Dissolves not the obligation, without the Creditors Acceptance
in Solutum. Therefore where parties differ about the Application,
that Rule ought to be followed which is most Equal for both Debtor
and Creditor, and least to the hurt of Either; and in this Case he
is more to be Considered qui Certat de damno vitando, quam qui
Certat de Lucro Captando. No Regard can be had to the Cautioners
Interest, who has no vote in the Application of payment by the
Principal Debtor. Nor was the Maxim Electio est Debitoris,
Ever Designed for an Universal rule, tho it hold in Many
Cases, as in these where there is Durior Sors, and the Creditor to be
Hindered from getting an Odious or Unequal Advantage. So
That in the present Case, the Indefinite payments should be
Applied to the Debt without a Cautioner: It being all a Matter
to the Debtor which of these two Debts be Extinguished, and
A Clear loss to the Creditor to Apply them otherwise. It's
true