True in the Roman Law a bond with a Cautioner is Reckoned Durior, which would upon that account seem to give the Election to the Debtor. But there is no Apparent Reason for Judging a debt with Surety to be durior, bris upon the principall Debtor, then his Single bond without a Cautioner, the it would heighly concern the Creditor, that the Latter be first Disolved. It was Replyed for the suspender 1o That The payments being drawn out of the Common Stock Consisting of the Rents of both the Estates, they must be imputed proportionably to Relinquish the Distinct Obligations the factor lay under to account for these Rents: Just as if the Receipts had born in Part payment of the Rents of both. Nay, supposing the factor not to have been Bankrupt, by his severall partial payments out of the two estates, the rents of that for which the suspender is Cautioner were in so far paid up, and both principal and Surety pro tanto Exonered of their obligation, that the factor Could not thereafter apply these payments wholly to his Intromissions with the other Estate in prejudice of his Cautioner, than he Could Effectually Retire an Express Receipt of the Rents of the former Estate, and take in Lieu thereof a new Receipt of the Rents of the Latter. 2o It may be Indifferent to the Debtor, whither he apply his indefinite payment to sattisfy the one Debt or the other, in so far as Relates to him and the Creditor alone, But not where a third party is Concerned, viz. the Cautioner who is Creditor for his Relief and has as good Interest to see for his security, as the principal Creditor has to whom he is Bound as Cautioner. In which Competition about Application of the Indefinite payments betwixt these two Creditors Equally Certantes de damno Vitando and in pari Casu, neither can be preferred in the Application but the same must be made proportionably. And as in the Case of Mc Keith contra Campbell, The Bankrupts Application of his Indefinite payment to the prejudice of his Creditor was Justly set aside: So the Bankrupt factors application here in favour of his principall Creditor to the prejudice of his Cautioner, who is also Creditor for his Relief, falls to be rejected; seing he could not thereby prefer the One Creditor To Another. The Lords found the Indefinite Receipts of payment Ought To have been Applied proportionably, and that the factor could

Could not by Accounting in Another Manner prejudge the Cautioner feb. 1723 Dutches of Buckleugh contra Donal. But partial Payment of a Debt bearing Annualrent, is applied in the first place to discharge the bygone Interest, and the overplus to Extinguish part of the principal Sum, Even when the Creditors Discharge runs indistinctly in part of payment of principal Sum and Annualrents, albeit the principal be causa Durior l. 5. Ult. l. 48. ff de Solut. l. 35 pr. ff de pign. Act. Because men Use to gather the fruits before they pull up the tree. Scaccia §2 gloss 5 n. 99. Carpzov. Juris prud. forens. part 2 Cons 6. 29. def. 17 Les Loix Civiles &c. Tom. 1. part 1 lib. 3 Tit. 1 Sect. 3 art. 15 lib. 4 Tit. 1. Sect. 4. art 586. 14 July 1687. E. Nithsdale contra D. Buccleugh.

Payment regulariter is not presumed l. ult. C. de Solut. But Must be proved according to the nature of the Debt by Witnesses, Oath of party or writ. for as he who pretends to be a Creditor ought to establish his Right, so he who acknowledges the debt, and alledges that he hath paid it, ought to make proof of it. Payment via facti, as by the Creditors intromission with actual rents of the Debtors Lands &c. may be proved by Witnesses. And thus the Lords found that as the payment of Annualrents, so the payment of few-Duties may be proved prout de Jure 9 July 1667 Grange Hamiltoun contra Smith. As accords of the Law, that is by all the Means that Law allowes, viz. Witnesses, writ, or oath of party. But payment of Mony, must be Cleared by writ or Oath of party. Thus a bag of Mony Lying by a person at his death being given up in Inventary by one of his two Daughters his Executrix: It was not relevant for her Executor to discharge himself of the said Mony in a Count and reckoning with her sisters Representatives, by offering to prove by Witnesses, that the said Mony was before Confirmation Equally Divided betwixt the two Sisters of Consent and Each got her own share 20 December 1709 Mc Kenzie of frazerdale contra Lord Elibank. Albeit it was there Alledged, that a bag of Mony was a Corpus Exposed to the Senses of Witnesses who Might prove Intromitting with it, tho they cannot prove borrowing of Mony, which was Repelled. Partial payments marked upon the foot of a Bill of Exchange, and a Ballance Stated as due

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