

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.

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, prejudice the cautioners.

Reporter, *Lord Pollock.*  
Alt. *Ja. Graham.*

For the Dutchess, *Alex. Hay & Ch. Areskine.*  
Clerk, *Mackenzie.*

*Edgar, p. 165.*

No 9.

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 annual rent, 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. I. 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 Crawford'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 allegiance that Innes's debt was extinguished by several payments made to him by Robert Gordon, Innes appeared, 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.

No 10. These being the facts, the question betwixt the parties was shortly, Whether Mr Innes could apply and impute the indefinite payments made by Robert Gordon, to the extinction of Sir John Gordon's debt in the first place, without giving any credit to Robert Gordon for what he was owing on his own account.

For Innes it was *contended*, That his party had no right to quarrel the application of the payments; for he had no title to the promissory note in question, in regard the indorsation in his favours appears to have been blank, and his name filled up with his own hand; so that the indorsation thereto fell under the act anent blank writs. And with respect to the indefinite payments, it was *observed*, That there was no express constitution relating thereto; the matter rested upon natural equity; and that there it was put by the Roman law alternarily, which did not expressly ordain how indefinite payments were to be applied, but laid down this rule of natural equity, that the application should be in such manner as was least to the prejudice of either party; and here it would be manifestly to the prejudice of the creditor, to apply all the payments in the way contended for by Mr Forbes to elude the effect of Mr Innes's diligence. See the first four laws, *D. De solut.* In the *next* place, the rules touching indefinite payments do not at all apply to this case; for that no payment can be condescended on but what was directly applied, and a receipt given for it, declaring that the same was imputed to accompt. And here it fell to be taken notice of, that Robert Gordon's letter could not be interpreted, as if he had undertaken as cautioner for his brother, Sir John, to be liable in case of his not paying; the contrary appears, for that, in the same letter wherein he undertakes the debt, he mentions his intention of making immediate payment, and that he was to pay Sir John's debt out of a cargo of corn which he was then sending to London, the proceeds of which having failed, he was in use thereafter of impressing funds into Mr Innes's hands, which funds Robert considered as coming in place of the proceeds of corn which had failed; so that he looked on himself as in the course of paying his brother's debt as well as his own.

On the other hand, it was *argued* for Daniel Forbes, That the obligation in the missive letter was only conditional, and afforded no more at best but a subsidiary action against Robert Gordon, in the event that Mr Innes did not recover his payment from Sir John, since it could not be pretended that the obligation was a constitution of Sir John's debt against Robert; and therefore Mr Innes could not post these payments regularly to the credit of a debt not due by him, or constituted against him. *2do*, Even supposing the obligation was binding, nevertheless the application ought to have been made to the extinction of Robert's proper debt; *1st*, Because the payment being indefinite and to account, and neither party having expressed themselves at the time of the payment, how the same should be applied, the law rules the application, and imputes it rather to the extinction of a debt owing *proprio nomine*, whereof the term of payment was come, than for what was owing *alieno nomine*. And

as in this case Mr Innes *non statum dixit* when he received the indefinite payments, but only posted them in general to account, the imputation ought to be made to the extinction of that debt, *ex qua tanquam solvebat ad solvendum compelli poterat*. See Voet. tit. De solu. et liber. § 16. ; l. i. §. 2. D. h. t. ; l. i. C. h. t. Ant. Fab. Cod. lib. 8. tit. 30. Dis. 31. And Carps. defin. in forens. part 2. const. 29. defin. 17. Juris c. Holl. part 3. vol. i. consil. 145. quest. ult.

THE LORDS found, That the imputation of the payments made both before and after the arrestments, must be to Sir John Gordon's debt, and not to the debt on which the arrestment was used,

*C. Home, No 133. p. 226.*

1779. *March 2.* JOHN STRETTTEL *against* JAMES POTTS.

IN 1763, James Potts and John Elliot engaged in a company trade at Quebec, and commissioned from John Strettel merchant in London different articles, for which it was agreed that they should have nine months credit from the time of furnishing. This company turned out unsuccessful, and Potts and Elliot were obliged to leave off trade ; at which time they were in considerable arrear to Strettel. Potts having returned to Scotland, his native country, Strettel brought an action against him for payment of L. 498, as the balance due by the company. In the state of accounts made up by the pursuer, from which the balance was struck, he had charged interest upon the goods furnished, from the period of nine months after they were shipped, and had applied the remittances from Potts and Elliot at the time of receiving them to the extinction of these interests in the first place, and the remainder only to extinction of the price.

*Objected* by the defender to this mode of stating the accounts ; When a debt is constituted by bond or bill, it is no doubt the rule of law, that partial payments must be applied to extinction of the interest before they can affect the capital sum. But, in the case of mercantile accounts, a different method is followed, both in this country and in England, where the transaction took place, and by the law of which, therefore, the question ought to be determined. The partial payment is, at the time when received, applied to extinction of the capital, and interest is charged thereafter only on such part of the capital as remains after deduction of that payment. The interests are kept in a separate column, until the account is finally closed, when they are added to the principal sums.

Merchants adopt this method of settling accounts for an obvious reason. If they were to apply the partial payments to extinction of interest in the first place, their correspondents would have no encouragement to make remittances. They would be losers by remitting ; for, if they kept the money in their own hands, they would have the use of it until they were able to pay off the whole

No 10.

No 11.  
Where a merchant's account has been long due, and interest is current upon it, an indefinite payment imputes to the extinction of the interest, and not of the principal.