THE

AMERICAN LAW REGISTER.

MARCH, 1866.

APPLICATION OF PAYMENTS.

No. 2.

THERE is now presented to us the consideration of cases where neither the debtor nor the creditor has made any application, and where consequently the law is invoked to make it in accordance with its own principles of justice and equity. It is upon this ground mainly that the great battle between the civil and the common law has been and is still being fought. There is, however, a branch of this subject, embracing a well-defined class of cases, in which these systems of law both agree in doctrine. These cases are where money is realized under execution, or under an assignment of property for the benefit of creditors. It is necessary to the raising of this point that the judgment upon which the execution issues should embrace different and distinct debts or demands, and the presentation of it would be much clearer if on some of the debts or demands there were sureties, and on others not. In such case the law makes a judicial application by applying the money realized on all the debts rateably: *Bardwell* v. *Lydall*, 7 Bing. 489; *Blackstone Bank* v. *Hill*, 10 Pick. 129, 133. The law will in such case recognise no equity in favor of a surety so as to enable him to apply the money realized on a debt for which he is surety, to the exclusion of other debts not secured, nor will it permit the creditor to apply it to

the latter in exclusion of the former. It adopts here the equitable maxim that equality is equity. In *Commercial Bank* v. *Cunningham*, 24 Pick. 270, 276, a creditor received money from the assignee of an insolvent debtor to apply on different debts, some of which were secured and others not; and it was held that the creditor could not make the application to the latter, but that the money must be applied to all the debts rateably. This distinction between an involuntary and a voluntary payment seems to have been overlooked in Maine, in the case of *Bank of Portland* v. *Brown*, 22 Me. 295, in which the creditor having failed to apply, the law undertook to carry out his presumed intention, and made the application accordingly.

There are cases somewhat analogous to those just mentioned, in which a mortgage or deed of trust is given to secure several notes due at different times. Here the general principle is to apply the money received under the instrument to all the notes rateably, if all are due at the time the money is made: *Parker* v. *Mercer*, 6 Howard's Miss. Rep. 320. But in *Bank of the United States* v. *Singer*, 13 Ohio 240, where a mortgage was given to secure several notes due at successive times, the court held that the earliest due are to be first paid in full out of the proceeds of the mortgage; and the reason assigned is, that the payment of the first might have been enforced before any default in the latter payments. This principle would undoubtedly be conceded where there were liens attaching successively: *Newton* v. *Nunnally*, 4 Ga. 356. But not when the lien accrues at one time for successive debts. But this seems to have been lost sight of in Connecticut, in *Stamford Bank* v. *Benedict*, 15 Conn. 438, in which the application of moneys made under a mortgage, given to secure several debts, was made according to the presumed will or interest of the creditor.

The application made by the law when the payment has been voluntary, proceeds upon a totally different principle. It is said that the law directs the application "according to equity," or "according to the dictates of reason and justice." How is this to be understood? or what is meant by such an application? The better opinion seems to be that the law, in order to accomplish this, refers to the intention or understanding of the parties, before or at the time, whenever the circumstances are such as to make it well known. And when the circumstances of the case will not

justify any particular inference, the court will be controlled by a general presumption of intention founded on reason, probability, and justice. Most of the authorities agree that it is the presumed intention either of the debtor or the creditor which is to control, and the all-important question is, which? The civil law protects the interests of the debtor; the common, that of the creditor.

The civil law, in thus assuming to carry out the presumed intention of the debtor, acts in consistency with itself throughout. Having first given the power absolutely to the debtor, and, on his neglecting to exercise it, compelling the creditor to apply it in accordance with his presumed intention, what else could be expected but that on default of both parties, the same law would take as its guide the presumed intention of the debtor? On the other hand, the common law, having released the creditor from the necessity of his acting in subservience to the interests of the debtor, and allowed him to possess and carry out an intent of his own, would only be acting in consistency with itself when it carried out the presumed intention of the creditor, the actual one having failed.

If it be conceded that the common law doctrine is established giving to the creditor, in case of the debtor's default, the right to make the application at any time before suit brought, and that even the mode in which he framed his action might be received as evidence of the manner in which he would make it (*Peters* v. *Anderson*, 5 Taunt. 596), the cases would probably be very few in number in which it could be said that the creditor had made no application, and it was therefore left for the law to make it.

There is, it is true, a class of cases, an instance of which is found in *Pattison* v. *Hull*, 9 Cow. 747, in which the creditor, having the right to appropriate, not only fails but declines to avail himself of it, claiming the right to hold on with the view of making such future application as shall best subserve his interests. Whether in such cases the courts will consider the creditor as intentionally waiving his right, and that the same then reverts to the debtor, so far as to justify and even require them to assume the presumed intention of the debtor in making the application, remains still open for determination. In the case just alluded to (9 Cow. 747), the court made such application, but it was avowedly upon the principles of the civil law, claiming their adoption into the common law. It is apprehended that most of the instances

that have occurred, and the cases cited in illustration of applications made by the court, are those in which it is really the creditor and not the court that makes the application. It is difficult to conceive on what grounds of equity or justice or reason, outside of the real or presumed intentions of the parties, the court can possibly act in its decision. Those intentions, taken in their largest scope, must really embrace all the equities that can possibly be conceived of.

As these intentions are antagonistic to each other, it is obvious that the court must be called upon to elect which of the two it will select and carry out. I will now proceed to present some of the instances which are claimed to illustrate the action of the law in making the application upon its own principles, although many of them may be found to be the same as those in which the creditor may, if he chooses, direct the application. In the first place, this limitation is to be noticed, viz., that the demand or debt, upon which the application is to be made, must be certain, or must be capable of being rendered so, and must not be for uncertain or unliquidated damages: *Ramsour* v. *Thomas*, 10 Iredell 165, 168.

The case in which the question is generally presented is where the creditor holds two distinct demands, or debts against the debtor; the one of which is secured by a surety, or by a judgment, bond, mortgage, or pledge of property, while the other rests only upon simple contract, and upon the sole responsibility of the debtor. It also makes some difference whether the former be older than the latter, and whether the latter be a debt bearing interest, or an open account and without interest. It is clear here that the interest of the creditor is to have a general payment applied upon the latter, and of the debtor upon the former. The intentions of the parties must be presumed to be in accordance with their interests. The debtor may evidence his intentions either by directing the application himself at the time of the payment, or by paying the precise amount due upon the latter, in which case the law will consider such act as equivalent to an application. But if neither of these be done, then the right passes to the creditor, and his intention, actual and expressed by him, or presumed and unexpressed, is to prevail. In case it rests upon presumption, and hence becomes the act of the law, all the motives that would be likely to enter into and to control his intention,

come up and present their claim for consideration. The most prominent of these are the motive to prevent the bar of the Statute of Limitations upon the simple contract debt, to avoid the loss contingent upon the failure of the debtor, or to extinguish a liability upon which he was receiving no interest. As in such cases the question can only arise where partial payments have been made, one strong ground in favor of the creditor is, that as he is not compellable to receive any sum in payment short of the whole amount due, if he do receive any such it must be presumed that it is upon his own terms, and that his presumed intention must therefore prevail. In the judicial settlement of these questions there will be found to be some conflict in the cases, although the balance of authority clearly sustains the common law view. In *Field* v. *Holland*, 6 Cranch 8–29, there were debts evidenced by judgments, and others by instruments on which there were no judgments, and general payments were made, the application of which devolved upon the court. It was held that the money should first be appropriated to the demands on which there was no judgment—Chief Justice MARSHALL saying: "It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious." In *Briggs* v. *Williams*, 2 Verm. 283, 286, the court said: "If neither party elect, the law will make the application, which requires that the debts which have the most precarious security should be first extinguished, and the court are bound to carry into effect the object of the law; that is, so to apply the payment that the creditor may obtain satisfaction of his debt."

In New Hampshire the question came up in *Hilton* v. *Burley*, 2 N. H. 143, 196, in which WOODBURY, J., says: "That when no express appropriation is made by the creditor or debtor, the court, at the trial, if more than one debt exists, should direct the payment to be applied to the debt not secured, if one of them be secured." This principle is also admitted as the prevailing one in Massachusetts, in *Blackstone Bank* v. *Hill*, 10 Pick. 129, 133, and also in *Capen* v. *Alden & Trustee*, 5 Met. 268. In South Carolina the question is presented in *Jones* v. *Kilgore*, 2 Richardson's Eq. 64, 65, in which the court say that "If neither party has fixed the application, it devolves upon the court, and will be made *pro rata* to the demands held by him who receives the money against him who paid it; or if one of the demands be

less secured than the other, the application will be made to it in the first instance." In North Carolina the same principle is fully settled in a case in which the whole doctrine has undergone a thorough investigation, viz., *Moss* v. *Adams*, 4 Iredell's Eq. 42.

In a case where one debt is evidenced by bond, or bond with sureties, and the other by simple contract, and payments made generally, it was held in *Hammer's Adm'r.* v. *Rochester*, 2 J. J. Marshall 144, that "in case of litigation, the chancellor would see that the payments were applied so as to effectuate justice. Thus the chancellor should not apply the credits to the specialty debts, and leave unpaid a simple contract, which would thereafter be barred by the Statute of Limitations. The payment of debts, likewise, in the order of time they become due, is a circumstance which should not be without its influence." In *Blanton* v. *Rice*, 5 Monroe 253, the complainant was a surety and came into court to ask the court to direct certain payments to be applied upon the debt for which he was surety rather than to a simple contract debt due from the same debtor. But the court said, "it is evident that the demand which the complainant insists upon to be first extinguished, is best secured, and in such a case it is deemed equitable to apply the credit to the debt the security of which is most precarious—according to the case of *Field* v. *Holland*, 6 Cranch 8." The same doctrine is also settled in Connecticut in the case of *Stamford Bank* v. *Benedict*, 15 Conn. 438, 443, 445.

These cases are claimed to be sufficient to establish in this country the common-law doctrine, that the court, in making itself an application of payments, will carry out the presumed intention of the creditor rather than that of the debtor. But this doctrine is not universally acquiesced in. There are cases which adopt the doctrine of the civil law, and apply such payments in accordance with the presumed intention of the debtor. Such are *Gass* v. *Stinson*, 3 Sumner 99, 110; *Milliken* v. *Tuffs*, 31 Maine 500; *Bussy* v. *Gant's Adm'r.*, 10 Humphreys 242; *Dorsay* v. *Gassaway*, 2 Harris & Johnson 402, 412, and *Pattison* v. *Hull*, 9 Cowen 747, 764, 772. Of these cases the one last referred to, together with the note which is attached to it, may be best consulted to get at the civil-law doctrine, the reasons upon which it rests, and the authorities that sustain it. Although a case arising in the 4th Circuit of the state of New York, and decided by Judge COWEN, then sitting as circuit judge and vice-chancellor, yet the

elaborateness of the discussion, and the decision, has undoubtedly given to it a great if not a controlling influence in the jurisprudence of the state of New York. It may be well, however, to examine some of the more recent cases to determine whether, upon authority, the civil-law rule is to be considered as adopted in that state or not. Where some of the debts are guaranteed and others not, the right of the creditor is conceded to apply a payment made by the debtor as he pleases, where the debtor has failed to make the application: *Clark* v. *Burdett*, 2 Hall 197. But this is a right given by the civil law. As between debts which have accrued at different times the court will apply a general payment so as to extinguish the debt first due: *Dows* vs. *Morewood*, 10 Barb. 183. In respect to time of application by the creditor a much more liberal rule than that required by the civil law is adopted in *Marsh* v. *Oneida Central Bank*, 34 Barb. 298, in which it was held that a bank is not bound to apply a deposit made by the maker of the note immediately on the note's falling due, but may postpone it until after judgment recovered upon the note, and may then make the application. It is believed, however, that the principle settled in *Pattison* v. *Hull*, 9 Cowen 747, and subsequently approved in *Dows* v. *Morewood*, 10 Barb. 183, may still be considered as the prevailing one in the state of New York. The general doctrine of the application or appropriation of payments was much discussed in the Court of Errors in the case of *Stone* v. *Seymour & Bouck*, 15 Wend. 19, and the case is one of great interest, but it was decided upon grounds not connected with this controversy. The Maryland case, *Dorsay* v. *Gassaway*, pretty clearly establishes the doctrine in that state that where one debt is by mortgage or judgment, and another by simple contract, the appropriation, if referred to the law, shall be made to the former, as being the more burdensome to the debtor. But these, together with the others I have referred to as holding the same doctrine, although presenting strong claims to attention, can hardly be claimed, in view of the array of authorities on the other side, to establish in this country the doctrines of the civil law. The common law proceeds upon the principle, which it is certainly very difficult to deny, that it is the ownership of the money which determines the right of appropriation. Consequently while the money was the debtor's, which it was before payment, he could apply it to whichever debt he chose; but that after

payment, it was, and ever continued to be, the property of the creditor, to use as he should choose, and it should, therefore, be his expressed or presumed intention that should control in its application.

It is an interesting subject of inquiry, and one also connected with the present discussion, what the rule is where there is a single account, which is open and current, running between the parties, or even where different accounts are treated as one by the parties, or are agreed to be blended together into one account, and payments are made generally by the debtor. In such case the principle is universally conceded that the payments shall be applied, as they are paid, to the charges in the order of time in which they accrue. The earliest items are the first to be extinguished by the payments although those items have been abundantly secured, while the subsequent ones rest on the individual liability of the debtor. This has been definitively settled by the highest authority in the state of New York: *Truscott* v. *King*, 2 Seld. 147. The same rule will apply to accounts with a partnership, of which there is some change in the members, provided the account goes on as one continuous, open, and current account. But if its continuity be broken, that is, if a new account be opened by or with the firm, upon the coming in or going out of a member, distinct from the old account, the creditor may apply a general unapplied payment to the new account if he pleases: *Simson* v. *Ingham*, 2 Barn. & Cress. 65; *Logan* v. *Mason*, 6 Watts & Serg. 9. There is a limitation, however, of this principle found in the fact that both parties, or the debtor, be shown to have, at the time, a different intention, or where one can be inferred from the course of dealing, or from the particular circumstances of the case, or where the fund from which the payment is made requires a different application: *Taylor* v. *Kymer*, 3 Barn. & Adol. 320, 333; *Thompson* v. *Brown*, 1 Moody & Mal. 40.

One other inquiry only remains, and that has reference to interest-bearing debts. The general rule here is that where a general payment is made upon a debt which bears interest, the law applies it first to the interest, and afterwards to the principal, even though the amount of the payment is precisely equal to the principal. This, although favorable to the creditor, and not the debtor, is nevertheless found settled in the jurisprudence of New York: *People* v. *County of New York*, 5 Cow. 331. So, also,