interest in the subject, or that it was identical with one afterwards brought by A., in his own name, for the same property. It was the exercise of a summary power to compel what, under the circumstances of the particular case, the court consider to be justice to a party, in defending himself against an unfounded claim. The case before the circuit court was a proper one for the exercise of their discretionary powers, but their rule can have no possible bearing on the question in issue between the parties in the action.

It is, therefore, the opinion of the court, that there is no error in the record; the judgment of the circuit court is affirmed, with costs.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of South Carolina, and was argued by counsel: On consideration whereof, it is the opinion of this court, that there is no error in the judgment of the said circuit court; whereupon, it is considered, ordered and adjudged, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*John Backhouse, surviving Administrator *de bonis non* of John Backhouse, deceased, James Hunter and Martha [*160
Hunter, and James Hunter and John M. Garnett, Executors of Muscoe G. Hunter, Archibald Hunter and Adam Hunter, George W. Spotswood and William L. Spotswood, Executors of Alexander Spotswood, and Margaret Jones, Executrix of Gabriel Jones, who was Executor of Thomas, Lord Fairfax, *v.* Robert Patton, Administrator *de bonis non, cum testamento annexo* of James Hunter, deceased, Joseph Ennever, Administrator of Adam Hunter, deceased, James Hunter, son of John Hunter, deceased, who was heir of Adam Hunter, Robert Dunbar, the said Robert Dunbar, Administrator of Alexander Vass, John Strode, Robert Randolph, Executor of William Fitzhugh, deceased, Hugh Mercer and Robert Hening.

Legal and equitable assets.—Application of payments

In Virginia, the moneys arising from the sale of personal property are called legal assets, in the hands of an executor or administrator; and those which arise from the sale of real property are denominated equitable assets. By the law, the executor or administrator is required, out of the legal assets, to pay the creditors of the estate, according to the dignity of their demands but the equitable assets are applied equally to all the creditors, in proportion to their claims.

Legal and equitable assets were in the hands of an administrator, he being also commissioner to sell the real estate of a deceased person; and by decree of the court of chancery he was directed to make payment of debts due by the intestate, out of the funds in his hands, without directing in what manner the two funds should be applied; payments were made under this decree, to the creditors, by the administrator and commissioner, without his stating, or in any way making known, whether the same were made from the equitable or legal assets—a balance remaining in his hands, unpaid to those entitled to the same, the sureties of the administrator, after his decease, claimed to have the whole of the payments made under the decree credited to the legal assets, in order to obtain a discharge from their liability for the due administration of the legal assets: *Held*, that their principal having omitted to designate the fund out of which the payments were made, they could not do so.

Where debts of different dignities are due to a creditor of the estate of an intestate, and on specific application of the payment made by an administrator is directed by him, if the creditor

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applies the payment to either of his debts, by some unequivocal act, his right to do so cannot be questioned. *Quære?* Whether the application must be made by the creditor, at the time, or within a reasonable time afterwards?

*161] * There may be cases where no indication having been given as to the application of the payment, by the debtor or creditor, the law will make it; but it cannot be admitted, that in such cases, the payment will be uniformly applied to the extinguishment of a debt of the highest dignity; that there have been authorities which favor such an application, is true; but they have been controverted by other adjudications. Where an administrator has had a reasonable time to make his election, as to the appropriation of payments made by him, it is too late to do so, after a controversy has arisen; and it is not competent for the sureties of the administrator to exonerate themselves from responsibility, by attempting to give a construction to his acts, which seems not to have been given by himself.

This cause came before the Court on a certificate of a division of opinion in the Circuit Court of the United States for the eastern district of Virginia. In that court, a bill was filed on the equity side of the court, for the recovery of debts, by John Backhouse's administrator and others. The facts of the case, as agreed on the argument, were:

James Hunter died testate and insolvent, charging his estate, both real and personal, with the payment of debts. This suit was originally brought by Rebecca Backhouse, administratrix of John Backhouse, deceased, one of the creditors, in the circuit court of the United States for the middle circuit of Virginia, against said Hunter's executor; who dying during its pendency, Robert Patton, the defendant, was appointed administrator *de bonis non*, with the will annexed, and gave bond and security accordingly. The suit having abated by the death of the executor, was revived against Patton. In 1803, it was decreed, that the real estate should be sold for the payment of debts, and Patton and others were appointed commissioners for that purpose, to hold the proceeds of such sale, subject to the order of court.

In the management of the estate, divers sums of money came into the hands of Patton, both as commissioner and administrator. After various alterations of the parties, by death and otherwise, and divers interlocutory decrees, ordering payments to be made ratably to creditors, as their claims were ascertained by the court, a decree was made, on the 12th of June 1820, against Patton, as commissioner and administrator; whereby it was ordered and adjudged, that he should pay a certain sum, to be ratably apportioned

*162] among certain creditors therein mentioned. *It was also ordered by said decree, that a commissioner of court should examine and report upon the administration accounts of said defendant. This examination was had, and a report made, on the 24th of November 1820. After the return of this report, to wit, on the 15th of June 1821, it was decreed, that the said defendant should pay a further sum, to be apportioned among the creditors as therein directed. Upon this decree, executions were issued and returned "*nulla bona.*" Whereupon, a supplemental bill was filed, seeking to make the sureties for the faithful administration of Patton accountable for his waste.

One of the sureties failed to appear and answer, and the bill, as to him, was taken *pro confesso;* the other appeared and answered. When the cause came on for hearing against the sureties, the insolvency of Patton, and the amount of assets which came to his hands to be administered on, were not controverted. Patton having made satisfactory arrangements to

secure the payment of the sum adjudged against him by the decree of the 12th day of June 1820, as to the present question, it was considered as paid. It was contended by the defendant, that the whole sum adjudged to be paid by Patton, under the decree of the 12th of June 1820, amounting to $23,322.56, should go to his credit as administrator.

At the hearing in the circuit court, the questions presented by the counsel of the parties, and argued before the court were the following, to wit:

1. Whether the whole of the said payments made by the said Robert Patton, under the said decree of the 12th of June 1820, was to be applied entirely to the debt due from him as commissioner of the court for the sale of the real estate, so as to leave his sureties for due administration liable for the whole balance in his hands as administrator *de bonis non?* or—

2. Whether the payment ought to be applied to the debt due from R. Patton, as administrator, on his administration account? or—

3. Whether the payment ought to be applied to the debts due by him in both characters, as commissioner of the court, and as administrator *de bonis non*, ratably, in proportion to the amounts of those responsibilities?

*The court holding the negative on the first question, and being divided on the second and third, they were adjourned to the supreme court. [*163

The complainants, by their counsel, contended, in the circuit court, that the whole sum of $23,322.56, adjudged against Patton by the decree of the 12th of June 1820, ought not to go to the credit of his responsibility as administrator; and that his sureties cannot claim more than its ratable apportionment, according to the amount of their respective responsibilities of commissioner and administrator.

Haynes, for the complainants, argued:—1. That the sureties of Patton as administrator could not avail themselves of any defence which could not avail their principal. 2. If the whole amount of the decree of 1820 should be placed to the credit of Patton's responsibility as administrator, it would give his sureties an illegal and inequitable priority over the other creditors. 3. It would virtually repeal the law requiring bonds and security for administrators. 4. It would make the realty a guarantee for the faithful administration of the personalty, by releasing the sureties for such administrators.

Patton, on the part of the representatives and sureties, read the argument of Mr. *Chapman Johnson.*

The argument urged, that the true question before the court is, whether the payment as made shall be applied first in satisfaction of the balance due from the administrator; and next, in satisfaction of that due from the commissioner; or shall be applied ratably to the satisfaction of both. The rule for the decision of this question must be found either in the decrees of the circuit court, or in the general principles of law governing the application of payments. It was admitted, that the court had the whole fund under its control, as well the legal asserts, which, under the law of Virginia, are the personal estate of the intestate, as the equitable assets, the proceeds of the real estate; and could have directed *the payment out of either fund. But it was argued, that no directions had been given by the court on [*164

this point; and therefore, the inquiry was as to the manner the amount of the decree should be applied by the law.

The authorities from the common and civil law, and the general doctrine as to the appropriation of payments, established the following principles by an entire harmony between those codes. 1. The debtor making the payment has the primary right to direct its application. 2. If he does not exercise this right, it devolves on the creditor. 3. If neither exercises it, within the time allowed by law, the law itself makes the application. 1 Evans's Pothier on Obligations (Lond. ed.), part 3, art. 7, rules 1–5, and notes, page 363–74; Comyn on Contracts, part 2, ch. 2, § 8, page 216–28; 16 Vin. Abr. Payment, M, 277; 1 Meriv. 585; 2 Str. 1195. The debtor's right to make the application, however limited in point of time, is not restrained as to the manner. It is not necessary, that he should declare the application in express terms; it is sufficient, if, from circumstances, it may be fairly inferred, that the payment was made in satisfaction of one of the debts. *Newmarch* v. *Clay*, 14 East 239; *Tayloe* v. *Sandiford*, 7 Wheat. 14. Although, by the civil law, as stated by Pothier, the debtor is required to make the application, at the time of the payment, this is not the doctrine and rule of the common law. This has been so decided by this court in the *Mayor of Alexandria* v. *Patton*, 4 Cranch 317; see also, 1 Wash. 128; *United States* v. *Kirkpatrick*, 9 Wheat. 720; 2 Barn. & Cres. 65.

It cannot be contended, that Patten was indebted to the creditors of Hunter, as administrator and as commissioner of the court. The only debt due by him, before the decree, was as administrator. As commissioner of the court, he owed them nothing, and was not authorized to pay them anything, except as directed by the decree of the court.

*165] When the decree of 1820 directed him, the administrator *and commissioner, to pay specific sums, this was a personal decree, and he became indebted to them as an individual; his fiduciary character was merged in the decree, and to each creditor, he became indebted separately. When the debts so made due were paid, the creditor had no election to make, no application to declare. The right of the creditors to appropriate the payments had then nothing to do with the case; and the right of the debtor to appropriate continued, on the authorities referred to, up to the period of the decrees in the circuit court.

As to the rule, "that if both the debtor and creditor omit to appropriate payments, the law will apply them according to its own notions of justice," the following cases were referred to: 1 Vern. 24; 2 Brownl. 207; 12 Mod. 559; 1 Ld. Raym. 287. The application contended for is warranted by the situation in which the administrator was placed. He was bound to appropriate the fund to the discharge of his obligations as administrator, in preference to any claims on him as commissioner; and the law will look at these considerations, and make the same application. As administrator, he had given bond, which subjected him to many actions. Duties as administrator, exposed him to heavier responsibilities than as commissioner; his oath of office obliged him to pay the debts of the intestate out of the legal assets. It was also contended, that the fifth rule in Pothier (374), which declares, "that if different debts are of the same date, and in other respects equal, the application should be made proportionably to each," was applicable to this case. For this rule was also cited, 1 Vern. 34; 2 Ch. Cas. 83.

Backhouse v. Patton.

McLEAN, Justice, delivered the opinion of the court.—This cause is brought before the court on a certificate of a division of opinion, in the circuit court of the United States for the eastern district of Virginia. The question presented for decision relates to the application of certain payments made by Patton, one of the defendants. The facts in the case are, substantially, as follows:

James Hunter, by his last will, devised his estate, real and *personal, to certain relatives, subject to the payment of his debts. [*166 Patrick Home, one of the devisees and executors, being the surviving executor named in the will, having taken upon himself the execution of it, sold a part of the real estate to one Dunbar. The complainants, creditors of Hunter, brought their suit in the circuit court against Home, as executor and devisee, and against others, to set aside the sale to Dunbar, and obtain satisfaction of their debts. After having answered, Home died, in the spring of 1803; and administration *de bonis non*, on Hunter's estate, was granted to Patton. Being made defendant, he filed his answer in 1803, and a decree was made, appointing him, John Minor, and another, commissioners, to sell, on twelve months' credit, the unsold lands of Hunter, and to hold the proceeds subject to the order of the court. As administrator, Patton received personal property to a considerable amount; and in June 1803, sold such part of it as was salable, on a credit of twelve months. The remaining lands of Hunter's estate, he and Minor, acting as the commissioners of the court, sold on the same credit, in December 1803. In the progress of the cause, an amended bill was filed by the complainants, waiving all objections to Dunbar's purchase.

Patton, as commissioner, in 1813, reported a balance on the administration account of about 3312*l.*, including interest. On this report, in June 1815, the court directed payment by Patton and Minor, as commissioners, of one dollar in the pound to the creditors named; and on the 3d of December following, ordered a provisional payment to the complainants to be made out of the moneys in the hands of Patton, as administrator, if any he hath, and that he and Minor, as commissioners, do pay, &c. This decree seems not to have been acted on. On the 12th of June 1820, the claims of the complainants having been established, the court, with a view, as expressed, to put them on an equality with the creditors named in the decree of 1815, ordered, "that out of the funds of the estate of James Hunter, at the disposition of the court, *Robert Patton, one of the commissioners, and [*167 administrator *de bonis non*, do pay the sum of $23,322.56." This sum was paid. The decree of 1820 having directed a further account, it was taken, and the sums in the hands of Patton, as commissioner and administrator, were stated. After the correction of various errors by the court, in the reports made, it was ascertained, in 1821, that after paying the sum of $23,322.56, there was still a balance in the hands of Patton of 6040*l.* 4*s.* 4*d.*; and the court decreed, that he should pay that sum to the creditors of the estate, as administrator, and as one of the commissioners of the court.

Patton had given security as administrator, but none as commissioner. To make the securities liable, he being insolvent, a supplemental bill was filed against them, and by the answer of one of them, the question of liability is raised. The point presented for consideration is, whether the payment shall first be applied to the credit of the administration fund, or

ratably to both funds? If the payment shall be decided to have been made out of the administration fund, the sureties are discharged; as the sum paid was greater than the amount Patton held in his hand as administrator. The payment also exceeded the sum he held as commissioner, though this fund was larger than the other. It is earnestly contended, in the learned and able argument in writing submitted to the court by the defendants' counsel, that the administration fund must first be exhausted. To determine the question raised, it is not important to ascertain the precise sum which Patton held in his hands in each capacity; as the amount paid exceeded his liability in either.

In Virginia, the moneys arising from the sale of personal property are called legal assets, in the hands of an executor or administrator; and those which arise from the sale of real property are denominated equitable assets. By the law, the executor or administrator is required, out of the legal assets,
*168] *to pay the creditors of the estate, according to the dignity of their demands; but the equitable assets are applied equally to all the creditors, in proportion to their claims. The payment was made under the decree of 1820; and if the court did not direct specifically in what manner the two funds should be applied, it is contended, that Patton had a right himself to determine; and consequently, by applying first the legal assets, to discharge his sureties. If the correctness of this argument were admitted, it would still be important to show, that the payment was made by Patton, as administrator. This fact might be established by an unequivocal act, or by circumstances.

This is clearly not a case in which the creditor may apply the payment, no specific directions having been given by the debtor. To each of the creditors, there was but one debt due, on which the payment was made; it could, therefore, be applied only to the payment of such debt. Had debts of different dignities been due to each creditor, and no specific application of the payment had been directed by Patton, and the creditor had applied it by some unequivocal act, his right to do so would not, perhaps, be questioned. Whether the application must be made by the creditor, at the time the money is received, or within a reasonable time afterwards, it can be of no importance in this case to inquire. There may be cases, where no indication having been given, as to the application of the payment by the debtor or creditor, the law will make it. But it cannot be admitted, that in such cases, the payment will be uniformly applied to the extinguishment of a debt of the highest dignity. That there are authorities which favor such an application is true, but they have been controverted by other adjudications.

From the terms of the decree of December 1815, the court undoubtedly intended, that the legal assets should first be applied in making the payments directed; and then the equitable assets. But no such direction is given in the decree of 1820. The payment is directed to be made out of both funds in the hands of Patton, without any indication that either should
*169] be first applied in preference to the other. *If, in making the payment, Patton could exercise his discretion, in first applying the legal assets, has he afforded any evidence of having done so? Has he, by any entry in his accounts, or by a return to the court, or in any other manner, shown a special application of the money? Within what time, was it necessary for him to make his election? His intention is attempted to be adduced

from his interest, aided by the principles of law referred to. As administrator, it is said, he was responsible for the funds in his hands, by various modes of proceeding, summary in their character; and from this, it is inferred, that he intended to relieve himself from such a responsibility. To relieve his securities, it is urged, must have formed an additional motive, to which might be superadded, the oath he had taken as administrator. But, on the other hand, it may be urged, that the motives were not less strong; as commissioner, if unfaithful to his trust, he was subject to the penalties which a court of chancery might impose. It would seem, therefore, that the circumstances of the case do not authorize an inference that any determination was made by Patton on the subject.

When, in 1821, the decree was rendered against him, as administrator and as commissioner, for the payment of the balance which appeared to be in his hands, no objection seems to have been made to the decree. It could not have been entered, without giving a construction to the decree of 1820; for if the $23,322.56 had been paid, by first applying the legal assets, the decree of 1821 must have directed the balance to be paid as commissioner. This decree, therefore, goes very strongly to show in what light the above payment was considered by the court and the administrator. Can it be supposed, that when the decree of 1821 was about being entered against Patton, holding him responsible in both capacities, that he would have remained silent, if his liability as administrator had ceased? The rendition of this decree must clearly refute any presumption, attempted to be raised either from the facts or circumstances of the case, that the legal assets were considered as having been first applied by the administrator in making the payment.

*Having had a reasonable time to make his election, is it not too late to do so, after the controversy has arisen? And is it competent for the sureties of the administrator, to exonerate themselves from responsibility, by attempting to give a construction to his acts, which seems not to have been given by himself? They first raise the question as to the fund out of which the payment was made. If, then, Patton did no act which showed an intention to apply first the legal assets, in making the payment; and if it was not the right of the creditor to make the application; does the law make it, as contended for, under all the circumstances of the case? Had Patton made the application, a question might have been raised, whether it was competent for him to do so. [*170

Jurisdiction over the legal fund was assumed by a court of chancery. It was for that court, by its decree, to make the application of the fund as the law required; and having done so, the administrator could exercise no discretion over it. The same may be said as to the priorities of the claims set up by the complainants, and established by a decree of the court. That the administrator was limited in making payment, by the terms of the decree, will not be denied. It was not for him to pay more in the pound than was directed, nor to give a preference to one of the claims over another, on account of its higher dignity. The decree placed them on an equality, as to the payment; and this was clearly within the province of the court, the estate of Hunter being insolvent. The entire fund, in the hands of Patton, was subject to the distribution of the court. That part of the fund which,

in the hands of the administrator, constituted legal assets, and under the law, was directed to be applied in a special manner to the extinguishment of debts, was taken from his control by the court of chancery. The fund was applied by the court, and not by the administrator. His official capacity was only noticed, to ascertain the extent of his responsibility, and the payment was directed accordingly. He had no discretion to exercise, no rule to observe, but that which the decree laid down. As administrator and commissioner, he was directed to make the payment, because in these capacities, he had received an amount greater than the sum directed to be paid. The payment was made in pursuance of the decree.

*171] *Suppose, Patton, as commissioner, had given sureties, who were now before the court, and objecting to the application of the money as contended for. This would present a question between sureties. The insolvency of their principal renders a loss inevitable, and the inquiry would be, how shall this loss be sustained? Under such circumstances, could any substantial reason be given, why the sureties to the administration bond should be exonerated, in preference to the others? No distinguishing quality exists, either in the fund as it now stands, or the debts to be paid, to determine this preference. It is not found in the act of Patton, if his discretion might have been exercised on the subject. The law has fixed no rule applicable to the case. By the decree, both funds are placed on an equality; payment is directed to be made from both. Although Patton gave no security as commissioner, yet the question, in principle, is the same. A loss must be sustained, and by whom shall it be borne? The sureties on the administration bond, as has been shown, cannot claim an exemption from responsibility, under the payment made in pursuance of the decree; nor can the creditors escape a portion of the loss.

If this were a question of responsibility between sureties, under the decree of the court, the payment would be considered as having been made from each fund, in the hands of Patton, in proportion to its amount. This rule will apply, with the same justice, to the parties interested, under the circumstances of this case. Indeed, it would seem, that no other construction could be given, with equal propriety, to the decree of the court. It is consonant to the principles of justice, and within the equitable powers of the court. On a view of the facts and circumstances of this case, the court think, that the payment of $23,322.56 should be deducted ratably from each of the funds in the hands of Patton, at the time it was made.

*172] This cause came on to be heard, on the transcript of the *record from the circuit court of the United States for the eastern district of Virginia, and on the questions and points on which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion, in pursuance of the act of congress for that purpose made and provided, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the payment of $23,322.56 should be deducted ratably from each of the funds in the hands of Patton, at the time the decree of the 12th day of June, in the year of our Lord 1820, was made. Whereupon, it is ordered and decreed by this court to be certified to the judges of the said circuit court for the eastern district of Virginia, that the

payment of $23,322.56 should be deducted ratably from each of the funds in the hands of Patton, at the time the decree of the 12th day of June, in the year of our Lord 1820, was made.

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*William Hunter, Appellant, *v.* United States, Appellees. [*173

Priority of the United States.—Assignments in insolvency.—Discharge of debt.—Release from imprisonment.—Laches of public officer.

In the original bill, filed by the United States in the circuit court of Rhode Island, the claim of the United States to payment of a debt due to them, was asserted, on the ground of an assignment made to the United States by an insolvent debtor, who was discharged from imprisonment, on the condition, that he should make such an assignment; the debtor had been previously discharged under the insolvent law of Rhode Island, and had made, on such discharge, a general assignment for the benefit of his creditors. Afterwards, an amended bill was filed, in which the claim of the United States was placed upon the priority given to the United States, by the act of congress, against their debtors who have become insolvent; it was objected, that the United States could not change the ground of their claim, but must rest it, as presented by the original bill, on the special assignment made to them. It is true, as the defendant insists, that the original bill still remains on the record, and forms a part of the case; but the amendment presents a new state of facts, which it was competent for the complainants to do; and on the hearing, they may rely on the whole case made in the bill, or may abandon some of the special prayers it contains.

The same right of priority which belongs to the government, attaches to the claim of an individual who, as surety, has paid money to the government.

The assignment under the insolvent law of Rhode Island could only take effect from the time it was made; until the court, in the exercise of their judgment, determine that the applicant is entitled to the benefit of the law, and in pursuance of its requisitions, he assigns his property, the proceedings are inchoate, and do not relieve the party; it is the transfer which vests in the assignee the property of the insolvent, for the benefit of his creditors. If, before the judgment of the court, the petitioner fail to prosecute his petition, or discontinue it, his property and person are liable to execution, as though he had not applied for the benefit of the law; and if, after the judgment of the court, he fail to assign his property, it will be liable to be taken by his creditors on execution.

The property placed in the inventory of an insolvent may be protected from execution, while he prosecutes his petition; but this cannot exclude the claim of a creditor who obtains a judgment before the assignment.

The United States obtained a judgment against Smith, an insolvent debtor, previous to his assignment under the insolvent laws of Rhode Island; under his assignment, debt for money paid by him to the United States, as surety on duty bonds for the Crarys, passed to his assignee; the Crarys had claims upon Spain, which were afterwards paid under the Florida treaty; and the assignee of Smith received the amount of the said Spanish claim, in satisfaction of the payments made for the duty bonds by Smith. The judgment by the United States against Smith, having preceded the assignment, and the receipt and distribution of the money received from the Spanish claim, under the insolvent law; the government having an unquestionable right of priority on all the property of Smith, it extended to the claim of Smith on the Crarys; if the right of *the United States to a priority of payment covers any part of the property [*174
of an insolvent, it must extend to the whole, until the debt is paid.

The claim of Smith on the Crarys was properly included in his assignment under the insolvent laws, however remote the probability may have been, at the time, of realizing the demand; it was an assignable interest. If, at the time of the assignment, this claim was contingent, it is no longer so; it has been reduced into possession, and is now in the hands of the representative of the debtor to the general government; if, under such circumstances, the priority of the government does not exist, it would be difficult to present a stronger case for the operation of this prerogative.

By a special act of congress, the principal debtor was discharged from imprisonment, and the expression was omitted in this act, which is used in the general act passed June 6th, 1798, "pro-