*Alexander v. Harris, bailiff of Crammond.

Pleading and practice in replevin.

An averment of a demise for three years, is not supported by proof of a lease for one year certain, and two years further possession, on the same terms, by consent of the landlord.[1]
The plea of no rent arrear, admits the demise, as laid in the avowry.[2]
The court is bound to give judgment for double rent, under the statute of Virginia.
Alexander *v.* Harris, 1 Cr. C. C. 243, affirmed.

Error to the Circuit Court of the district of Columbia, sitting at Alexandria, in an action of replevin.

Avowry by the defendant, stating that Crammond was seised in fee of the *locus in quo*, and demised the same to the plaintiff for the term of three years, at a certain rent, and that because $111.67 of the rent was in arrear and unpaid, he acknowledged the taking as bailiff of Crammond, &c., and prayed judgment for double rent. Plea, ought not to avow, &c., because, he says, that the said sum of $111.67 of the rent aforesaid, at the time when, &c., was not in arrear and unpaid to the said W. Crammond, nor was any part thereof in arrear, &c., and this he prays may be inquired of by the country, &c.

On the trial, the defendant produced a letter from the plaintiff, to the defendant's agent, agreeing to take the house for one year, at the rent of $120, payable half-yearly, and proved by witnesses, that the plaintiff took the house upon the terms mentioned in the letter, and remained in possession three years; that at the end of the first year, no new express agreement was made, but the plaintiff continued in possession, with the consent of the defendant's agent. The letter did not contain any agreement for renewing the lease, at the end of the term, by consent of the parties; whereupon, at the prayer of the defendant, the court below instructed the jury, that if they believed, from the evidence, that the plaintiff took the house for one year, by his letter, and afterwards, with the consent of the defendant's agent, continued to hold the house for two years longer, under the letter, and without any new agreement, then the defendant was entitled to recover on his avowry; but that if the terms of the letter were relinquished, and a new agreement made for the two years, the avowry was not supported by the evidence.

*The plaintiff also produced to the court, after the verdict was rendered for the rent in arrear, as stated in the avowry, the replevin-bond given by the plaintiff, as evidence, to satisfy the court, that the defendant had distrained for more rent than he had avowed for, and more than the jury had found in arrear, and objected to the rendition of judgment for double rent, under the statute. But the court overruled the objection, and rendered judgment for double the rent found in arrear by the verdict. [*300

To which opinions of the court, the plaintiff excepted, and the verdict and judgment being against him, he brought his writ of error.

E. J. Lee, for the plaintiff in error, contended—1. That it was necessary

[1] The demise must be proved as laid. Barr *v.* Hughes, 44 Penn. St. 516. See Phipps *v.* Boyd, 54 Id. 342.

[2] Hill *v.* Miller, 5 S. & R. 355; Williams *v.* Smith, 10 Id. 202; Bloomer *v.* Juhels, 8 Wend. 448; White *v.* Cross, 2 Cr. C. C. 17; Green *v.* Nourse, 4 Id. 527.

that the landlord, on the issue of no rent arrear, should prove his title in fee, according to the averment in the avowry.

2. That he should prove the demise as laid; and that the evidence, in the present case, did not prove the demise stated in the avowry; and—

3. That the landlord was not entitled to double rent, because it appeared by the penalty of the replevin-bond given by the tenant, which was more than double the rent avowed for, that the landlord had distrained for more rent than was actually due. In support of these points, he cited Esp. N. P. 358; *Bristow* v. *Wright*, Doug. 640; and the Virginia Laws, New Rev. Code, 155.

Hiort and *Youngs*, contrà.—A lease for a year, and so from year to year, if the tenant occupies for three years, may be laid as a demise for three years. *Birch* v. *Wright*, 1 T. R. 378; 4 Bac. Abr. 182.

The bill of exceptions does not state that it contains the whole evidence offered at the trial.

The replevin-bond was the act of the plaintiff himself, and he might gra-
*301] tuitously give a bond in a larger penalty *than the law requires. The act of assembly says it shall be at least in double the amount of the rent distrained for, but does not say it shall not be in a greater sum. Besides, the bond does not appear in the record.

The plaintiff's plea to the avowry does not deny the avowant's title, nor the demise. It is simply the plea of no rent arrear, which admits the title and the demise, as laid in the avowry. By taking issue upon the rent arrear, the plea admits every other allegation in the avowry of the defendant. But if it does not, it is not competent for the tenant, who has enjoyed the land, to dispute the title under which he held. In ejectment, possession alone is a good title against all but the rightful owner. If the plaintiff would deny the demise as laid, he must plead non-tenure. 4 Bac. Abr. 8, 55, 64, 67, 71, 87, 104; 10 Viner 486.

E. J. Lee, in reply.—If the defendant was not owner of the land, no rent was in arrear to him. The avowment must prove his case as laid. The case of *Birch* v. *Wright* is not like this, and the opinion of Judge Buller is extra-judicial.

Marshall, Ch. J.—The only doubt is, whether the plea of no rent arreal admits the demise as laid in the avowry.

E. J. Lee.—Nothing in arrear is the general issue in an action of debt for rent; and like the pleas *nil debet*, *non detinet*, and not guilty, puts the avowant upon the proof of his whole case. *Warner* v. *Theobald*, Cowp. 588; Buller's N. P. 302.

March 2d, 1808. Marshall, Ch. J., delivered the opinion of the court as follows, viz:—In this case, two errors are alleged by the plaintiff in error.
*302] 1st. That the circuit court misdirected the jury. *2d. That judgment for double damages ought not to have been rendered on the verdict.

1. The avowry, which sets forth the title under which the distress was made, states a lease for three years certain. The plea to this avowry was, "nothing in arrear," and on this plea, issue was joined. At the trial of the

cause, the avowant gave in evidence a lease for one year certain, and a subsequent possession for two years. On motion to instruct the jury that this lease did not support the avowry, the court said, that if the jury should be of opinion, that the subsequent possession was under the original contract, and without any new agreement, then the avowant was entitled to recover, otherwise not. The jury found a verdict for the avowant.

The lease stated in the avowry is obviously a different lease from that which was given in evidence. A lease for three years, is not a lease for one year. But it is contended, that a subsequent possession, without any new express agreement, amounts to an extension of the original lease, and for this Bacon's Abridgment, and a *dictum* of Judge BULLER, in the case of *Birch* v. *Wright*, 1 T. R. 378, have been cited. But those cases do not prove the point they were supposed to establish. In those cases, the original terms of the lease admit of the extension which was afterwards made by consent of parties. The lease was made for one year, and afterwards from year to year, as long as both parties should please. The principle of continuance is introduced into the original contract, and the occupation for three years is evidence, that the circumstance had occurred, by force of which the contract should be a lease for three years. But in this case, the original contract contains no principle of continuance. It is for a limited time, and can only be extended by a new contract, either express or implied. The lease, therefore, offered in evidence, does not support the avowry.

But a question on which the court has felt more difficulty is this: Does the plea admit the demise, or is the avowant bound to prove it? If the plea admits the demise, then, notwithstanding the variance, the verdict is right, and *the court has not erred in that part of the opinion which [*303 is against the party taking the exception. The issue gives notice to the parties of the point which is to be tried, and which the testimony must support. That which is admitted by the pleadings, need not be proved. If the plea in this case controverts the allegation in the avowry, that the tenant held under a lease for three years, reserving the rent stated to be reserved, then the avowant would be bound to prove the demise as laid. But if the plea admits the demise, then the avowant is not bound to prove it.

The plea is, that the sum distrained for of the rent aforesaid (that is, of the rent claimed under the lease stated in the avowry), was not in arrear and unpaid, nor was any part thereof in arrear and unpaid, at the time when the distress was made, as the avowant in his avowry hath alleged. This plea avers the single proposition that the rent was not in arrear, when the distress was made, and it is this averment alone that the party making the distress is to meet. The averment that the rent claimed in the avowry was not in arrear, when the distress was made, admits the contract by which the rent might accrue, and only denies that anything, at the time of the distress, remained due upon that contract. Upon principle, then, it would seem, that the plea had dispensed with proof of the demise laid in the avowry, by admitting it.

No case has been found in which the point has been expressly decided. It is said in Buller's Nisi Prius, p. 59, "If the plaintiff plead *riens in arrere* in bar to an avowry, he cannot, upon such issue, give in evidence non-tenure;" consequently, the defendant cannot be required to show the tenure; for if it was necessary to show it, the tenant would be at liberty to

produce opposing testimony. It is also laid down in Buller, p. 166, that in covenant for non-payment of rent, *riens in arrear*, or payment at the day, *304] is a good plea ; but *riens in arrear*, generally, *would not be a good plea ; and the reason appears to be, that *riens in arrear* generally, admits the breach laid in the declaration, and that the rent was not paid on the day. This principle is decided in *Hare* v. *Saville*, reported by Brownlow (2 Brownl. 273). Nothing in arrear on the day on which the rent is stated to have accrued, seems to be considered as equivalent to payment on the day ; but nothing in arrear on a subsequent day admits that the covenant was broken, and consequently, admits the covenant. It is not a good plea, because it admits the right of the plaintiff to recover damages. This furnishes a strong argument in favor of the opinion, that nothing in arrear on the day when the distress was made, admits that the rent accrued as stated in the avowry.

The case of *Warner* v. *Theobald*, Cowp. 588, was an action of debt for rent, by an assignee against an assignee. The plea of *riens in arrear* was demurred to, and consequently, the question to be decided by the court was, not what the plea admitted, but whether it was a bar to the action. Mr. Buller objected to this plea, because the plaintiff could not come prepared to know what it would be necessary to prove. The defendant might object to the assignment, or give in evidence payment before or after action brought. In answer to Buller, Wood said, "The form of the plea is *nil debet*, in the present tense ; but in this case, *riens in arrere* is a fairer plea than *nil debet ;* because *nil debet* puts the whole declaration in issue, whereas, this confines the question to the single fact whether such rent was due." In giving his opinion in support of the plea, Lord MANSFIELD certainly had not in view the question now under consideration ; for he uses expressions which would apply differently to that question. He says, " saying nothing is due, is the same as if he had said *nil debet ;*" and immediately adds, " besides, it is a more favorable plea for the plaintiff ;" he must then have applied the first assertion solely to the sufficiency of the plea as a bar, for it could not be a more favorable plea for the plaintiff, *305] if it contested the whole declaration, *and admitted nothing, as is the case with *nil debet.*" He concludes with observing, "if the rent was due, and is not, at the time of the plea, it could not have ceased to be due, by the plaintiff's accepting it." This case appears to the court to decide nothing further than that the plea pleaded was a good bar to the declaration in debt for rent, and to leave the question, how far it admits the demise laid in the avowry, open for consideration.

It is thought important in the inquiry, that the law appropriates a different plea, which controverts the demise, if the tenant means to contest it —the plea of *non demisit.* The court is of opinion, that the plea admits the demise ; and that there is no error in the instruction given to the jury, which is injurious to the party taking the exception.

In the judgment for double damages, there is no error. The law directs it positively.

Judgment affirmed, with costs.

*Chappedelaine, residuary legatee, and Closriviere, administrator *de bonis non* of Chappedelaine, complainants, *v.* Dechenaux, executor of Dumoussay, defendant.

Plea of account stated.

If an account stated be pleaded in bar to a bill in equity, such plea will be sustained, except so far as the complainant can show it to be erroneous.[1]

Error to the Circuit Court for the district of Georgia, in a suit in equity.

The bill stated that the complainants' testator and the defendant's testator, together with three others, viz., Boisfeillet, Du Bignon and Grand Closmesle, became joint purchasers of the islands of Sapelo, Blackbeard, Jekyll, and half of St. Catharine, on the coast of Georgia; that Dumoussay was the acting partner, and kept all the accounts, &c. That an account was stated and signed by the two testators, Chappedelaine and Dumoussay, on the 30th of April 1792, by which the former acknowledged a balance of 667*l.* 10*s.* 1¾*d.* due to the latter; but that the account was erroneous in sundry items particularly set forth in the bill; that there were sundry debits which had accrued since that settlement, and that Chappedelaine had been obliged, by a suit in equity, to refund to Boisfeillet a large sum which Dumoussay had overcharged him. That Dechenaux was the executor of the estate of Chappedelaine as well as of Dumoussay, and, as executor of Chappedelaine, had defended the suit of Boisfeillet. The bill contained a prayer that the defendant might account touching all moneys due, on rectifying the errors; and for all other sums due by Dumoussay in his lifetime, not credited nor accounted for, or which had come to the hands of the defendant, and that he pay over such balance as should appear on settlement of all accounts; and for general relief. The defendant pleaded the settled account in bar of so much of the bill as sought to open the account, and by answer, denied all fraud and error.

*Upon hearing, the conrt below ordered a reference to auditors, with directions "to make a general statement of accounts between the parties, rejecting any erroneous charges which may appear in their settlement, and adding such as may have been omitted." [*307

The auditors, on the 23d of April 1805, instead of stating an account, reported that they found "a balance due from the defendant to the complainants, including interest upon the liquidated account, up to this date, $15,586.22." They stated that they had not taken into consideration a claim of the complainants of 1000*l.* which the estate of Chappedelaine was condemned to pay to Boisfeillet, by decree of the court, nor their claim for indemnity for damages said to have been sustained by sale of lands, conceiving those claims not submitted to them, but reserved for the decision of the court.

Exceptions being taken to this report, the court ordered the auditors to "make a statement showing the items of the general account, which they rejected, in whole or in part, and the reasons of their rejection, and also such items as were added as omissions, and their reasons for so doing."

[1] Nourse *v.* Prime, 7 Johns. Ch. 69; Leycroft *v.* Dempsey, 15 Wend. 83; McIntyre *v.* Warren, 3 Keyes 185.

In obedience to this order, the auditors made an explanatory report, whereupon, the court decreed, that 604*l.* 6*s.*, and 579*l.* 8*s.* 1*d.* be deducted from the liquidated account of the 30th of April 1792; that interest be allowed on the balance at eight per cent. from that date, and that the defendant pay, out of the assets, that balance and interest, and the further sum of $3823, being the amount stated by the auditors as having accrued since the 30th of April 1792, and costs.

The errors assigned in the record were: 1. That the bill was insufficient in law. 2. That the court had not jurisdiction; because, although the bill stated the complainants to be French citizens, and the defendant a citizen
*308] of Georgia, yet the two testators were citizens of Georgia. *3. That I. Trubert, who was stated in the answer to be residuary legatee of Dumoussay, was not made a party; and because the other legatees were not made parties. 4. That the stated account has been partially opened, and abatements made to the injury of the legatee. 5. That the exceptions to the report of the auditors ought to have been sustained.

P. B. Key, for the defendant, on opening the question of jurisdiction, was stopped by the court.

Marshall, Ch. J.—The present impression of the court is, that the case is clearly within the jurisdiction of the courts of the United States. The plaintiffs are aliens, and although they sue as trustees, yet they are entitled to sue in the circuit court.[1]

Winder, for the complainants.—As to the allegation of want of parties, it can only be noticed on being pleaded. The defendant cannot now take advantage of it.

We are not, in examining the account, confined to the errors stated in the bill. But if the general nature of the errors is stated in the bill, it is sufficient; and if such errors are proved, it is sufficient to set aside the account as a bar, and to have it referred to auditors; who are not confined to the precise errors alleged in the bill.

Marshall, Ch. J., said, he understood the practice in chancery to be, that the court will notice only those errors in the report of the auditors which appear upon the face of the report, or those expressly set down in the exceptions; and then the evidence on which the items were allowed must appear on the record.

Harper and *P. B. Key*, for the defendant, contended, that an account stated and settled by the parties was conclusive, unless the party complain-
*309] ing can show fraud *or error; and upon him lies the burden of proof. That when a defendant relies upon an account stated, he shall never be compelled to go into a general account. The settled account can only be opened to the extent of the items charged as erroneous. *Summer* v. *Thorpe*, 2 Atk. 1; *Pitt* v. *Cholmondely*, 2 Ves. 565.

March 4th, 1808. Marshall, Ch. J., delivered the opinion of the court as follows:—The bill in this case is brought to set aside a stated account

[1] Childress *v.* Emory, 8 Wheat. 642; Coal Co. *v.* Blatchford, 11 Wall. 172; Carter *v.* Treadwell, 3 Story 25.

which was signed by Dumoussay and Chappedelaine, in July 1792, on the suggestion of fraud on the part of Dumoussay; or, if it be not set aside, to correct its errors, and to obtain a settlement of transactions subsequent to that account. The stated account is pleaded in bar of so much of the bill as requires that the subject should again be opened; and the particular errors assigned, with the exception of one in the addition, are denied in the answer.

That the plea in bar must be sustained, except so far as it may be in the power of the representatives of Chappedelaine to show clearly that errors have been committed, is a proposition about which no member of the court has doubted for an instant. No practice could be more dangerous, than that of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful or by only probable testimony. But if palpable errors be shown, errors which cannot be misunderstood, the settlement must so far be considered as made upon absolute mistake or imposition, and ought not to be obligatory on the injured party or his representatives, because such items cannot be supposed to have received his assent. The whole labor of proof lies upon the party objecting to the account, and errors which he does not plainly establish cannot be supposed to exist. Upon this principle, the report of the auditors in this case, and the exceptions to that report, *so far as respects the stated account, are to be considered. [*310

The first exception relates only to the manner in which the auditors understood the order referring the accounts to them, and need not be considered, since the sole inquiry will be, whether they have, in fact, made any deduction from the stated account, which was not warranted by the interlocutory order—an order made on the principles which this court has already declared to be correct.

The second exception refers to the particular deductions made by the auditors. The first is, that the item in the stated account of 604*l.* 6*s.* 5*d.* is reduced to 333*l.* 0*s.* 8*d.* The stated account between the parties, marked in the proceedings as the exhibit A., contains this item, and states it to be one-fifth of the expenses for disbursements on the island of Sapelo, which was the joint property of a company consisting of five, of which Dumoussay and Chappedelaine were partners. The items which composed this general account are all contained in exhibit F., stated by Dumoussay, on the 3d of May 1792, and assented to by Chappedelaine, on the 23d of July 1792, when the stated account was signed. The total of those disbursements is 4224*l.* 3*s.* 8½*d.* and the balance upon the account is 3021*l.* 12*s.* 1½*d.*, the fifth of which is 604*l.* 6*s.* 5*d.*

In their explanatory report, they auditors say that they took as the basis of this reduction, an account settled by auditors, in a suit decided in the circuit court of Georgia, which was instituted by Boisfeillet, one of the absent partners, against Dechenaux, who was executor both of Dumoussay and Chappedelaine. The auditors in that case were examined, and they depose that their corrections were made on the proof of double entries, false charges, omissions acknowledged by the executor of Dumoussay, and charges not proper to be made against Boisfeillet. This testimony would, of itself, be sufficient to convince the court that injustice was done in the settlement *of July 1792, but would not show explicitly the amount of [*311

that injustice, and enable them to say what deductions from that settlement ought to be allowed, because, as was well observed by the counsel for Dechenaux, items might be properly chargeable to Chappedelaine, of which Boisfeillet ought not to bear a part.

The court, therefore, sought, in the documents connected with the report, for that more explicit information. Upon looking into the exhibit F., there are, upon the face of the paper, obvious errors, which demonstrate the incorrectness of that statement, and the excessive inattention of Chappedelaine. The first item on the debit side of this exhibit, is the sum of 3571*l.* 3*s.* 8½*d.* disbursed for Sapelo. The funds for this disbursement were in part in the hands of Dumoussay, as the remnant of advances previously made by the partners. To this remnant he states himself to have added 2368*l.* 12*s.* 0½*d.* from his private funds. On this advance, made by himself, in Georgia, he charges the company 15 per cent. amounting to 354*l.*, on account of the difference of exchange between money in France and in Georgia, or, as he expresses it, for exchange, freight and insurance. This charge has been rejected in the accounts of all the partners for many obvious reasons. It is sufficient to observe, that as this money was advanced in Georgia, by Dumoussay, and repaid to him, in Georgia, by the partners, there was as much reason for making these charges on the repayment, as on the original advance; and with respect to Chappedelaine, it is still more inadmissible, because he had previously advanced his portion of this money to Dumoussay, and had allowed him 15 per cent. for these charges, in a deduction from that advance, so that this charge, with respect to Chappedelaine, is double.

The third item in this exhibit is a charge of 299*l.* as one year's interest on 2368*l.* 12*s.* 0½*d.* This is more than double the real amount of interest.

*312] *There is also in the credit side of the account, an error of 100*l.* in the addition. The errors apparent on the face of the exhibit F. amount to 611*l.* and these errors are of such a description as strongly to characterize the stated account of July 1792. In the account stated by the auditors, there are omissions of moneys received by Dumoussay, and admitted to be chargeable to him in this account with the company, amounting to 189*l.* 10*s.* 10*d.*

The account containing these incontestable errors was submitted to auditors, and still further reduced by them. Several of the small errors which they have detected are perceived, but the whole cannot be traced by this court, without engaging in the laborious task of auditors, which is incompatible with their duties. To that account, the executor of Dumoussay, who was also the executor of Chappedelaine, was a party, and had a right, with respect to Boisfeillet, to rely upon the stated account of July 1792, signed by Chappedelaine; because Chappedelaine was the attorney in fact of Boisfeillet, and because Boisfeillet had sanctioned that settlement, and had assumed the payment of his part. Yet, in that case, the deductions from that account were made, which the auditors in this case have taken as the basis of their settlement, and those deductions were made in conquence of double entries, false charges, and charges not admissible against Boisfeillet.

The great difficulty in admitting such an account, under such circumstances, consists in the uncertainty of the amount of those charges which were rejected as being inapplicable to Boisfeillet. This difficulty is removed,

in a great measure, by inspecting the report in the present case. In that report, the auditors take up the items which were rejected on this principle, and charge them to Chappedelaine; so that, in truth, the alterations made in this item are all founded on errors which the auditors have corrected.

The second item of this exception is, that the auditors reduced the sum of 336*l.* 16*s.* 8*d.* admitted in the stated account, as being one-fourth of the purchase and expense of Jekyll, to 311*l.* 9*s.* 6*d.* making a difference of 25*l.* 7*s.* 2*d.* *This item in the exhibit A., which is the stated account, is the result of the exhibit G., which is the account of Jekyll, [*313 as settled between Dumoussay and Chappedelaine. There is an obvious error of 4*l.* 19*s.* 10*d.* in the division of 3*l.* 10*s.* in the hire of negroes, and the residue of the sum deducted is on account of the same charges on the moneys advanced for Jekyll, which were made on the moneys advanced for Sapelo, and which are rejected, for the same reasons which were assigned for their rejection in that item of the account.

The auditors also reduced the sum of 990*l.* 3*s.* 1*d.* assumed by Chappedelaine for Boisfeillet, to the sum of 410*l.* making a difference of 580*l.* 3*s.* 1*d.* Nothing can be more obvious, than the propriety of this reduction. Dumoussay charges Chappedelaine with the debt of Boisfeillet, amounting, as he says, to 990*l.* 3*s.* 1*d.*, which Chappedelaine assumes as the attorney of Boisfeillet. In a suit to which the executor of Dumoussay is a party, this debt appears to have been only 410*l.* No man can hesitate to admit, that Chappedelaine must have credit with Dumoussay for the difference between the sum alleged to be due, and the sum actually due from Boisfeillet.

The auditors also struck out of the stated account the sum of 554*l.* 9*s.* 4*d.* assumed by Chappedelaine for one of the absent partners, that being considered, by mistake, as the share of that absent partner in the expenses of Sapelo. The sum actually due by that partner was afterwards paid by himself to the executor of Dumoussay. The court is satisfied from the evidence, that this payment was made to Dechenaux, as the executor of Dumoussay. The *assumpsit* of Chappedelaine was essentially as security for the absent partner, who still remained a debtor; and when the principal did himself pay what he owed to the original creditor, the *assumpsit* of Chappedelaine was of no further obligation. Although this was not an error in the account, when settled, except so far as this charge exceeded the sum with which the absent partner was really chargeable, yet it becomes an item which can no longer be retained as a charge against Chappedelaine, [*314 and in reforming *their accounts, it must be excluded from them.

There is also added to the credits of Chappedelaine the sum of 26*l.* 18*s.* which the auditors state to be the difference between the amount of a receipt given by Dumoussay and the sum actually debited to him in the accounts between the parties.

These several errors make up the sum of 1457*l.* 8*s.* 4*d.*, from which is to be deducted the sum of 667*l.* 10*s.* 1¾*d.*, admitted in the stated account to be due from Chappedelaine to Dumoussay. The balance standing to the credit of Chappedelaine would be, on the 30th of April 1792, 789*l.* 18*s.* 2¼*d.*

The auditors state this balance at 1346*l.* 10*s.* 7*d.* But from this balance reported by the auditors is to be taken the sum of 305*l.* 13*s.* allowed by Chappedelaine on the repayment, in Georgia, of money lent by him to Du-

moussay in France. This sum has been disallowed by the auditors, but was allowed by the circuit court, and is allowed by this court. This would reduce the report of the auditors to 1030*l.* 17*s.* 7*d.* exceeding the balance which is here supposed, by the sum of 240*l.* 19*s.* $4\frac{3}{4}$*d.*

The greatest part of this excess is produced by one-third of merchandise sold, and not entered in the account, and by a credit for continuing interest up to the 30th of April 1792, on Chappedelaine's money in the hands of Dumoussay, which credits had been omitted in the stated account, without any apparent reason, and must, therefore, have been among the numerous inaccuracies of that account. The residue of this excess is said by the auditors to be produced by numerous minute errors detected by a laborious investigation of all the accounts between the parties. This court cannot pursue them in that investigation. But in a case so replete with errors, which mark excessive negligence on the one side, and which can scarcely be ascribed to mistake on the other, the court is of opinion, that the report of the auditors, stating that these corrections were made on the inspection of the vouchers and entries which *were laid before them, ought to be received unless the person taking the exception had himself required the testimony on any particular point to which he objected, to be submitted to the court, or had required a special statement from the auditors, exhibiting the reasons for their opinion on the particular point.

*315]

The balance due to Chappedelaine on the 30th of April 1792, is so much of the loan made by him to Dumoussay in France, which remains unpaid. By the contract between the parties, that loan was to carry an interest of six per cent. per annum, until paid. The court, therefore, cannot consider it as a claim on an unsettled account, or as carrying interest at the rate established in Georgia. It is still governed by the law of the contract, and must carry interest at the rate of six per cent. per annum.

To the report, so far as it respects the accounts subsequent to the 30th of April 1792, a general exception is taken, which is sufficiently repelled by the answer of the auditors. They say, if, in the opinion of the defendant below, the auditors admitted any charge against Dumoussay, which was not sufficiently supported by testimony, he ought to have obtained a special statement from the auditors, or have made a special exception, which would bring the testimony on the particular point before the court. The only objection which the court can notice, is the allegation in the exception, that the auditors have proceeded on accounts rendered by Dechenaux, without allowing him a credit which he claimed in those accounts. That credit is the balance appearing to be due to Dumoussay by the stated account of July 1792. But that balance was entirely changed. The item was fully disproved by the testimony laid before the auditors. Dechenaux did not then withdraw his account, and require the plaintiff below to support his claims by other vouchers. It was clearly in the power of the plaintiff to have done this, for he might have forced Dechenaux to produce the entries and vouchers from which he had made out the account exhibited by himself. By leaving this account with the auditors, without objection, he acquiesced in their considering as correct the items it admitted.

*316] *This bill was brought to correct the stated account of July 1792, and to settle the accounts between the parties subsequent to that period. The defendant exhibits the accounts subsequent to that period, but

claims to set against them the balance due to his testator under the settlement of 1792. On those subsequent accounts, that balance has no influence. By introducing it into an account he was compellable to render, he cannot destroy the effect of that account. Had he intended to rely on this circumstance, he ought to have made the point before the auditors, and thus have enabled the plaintiffs to take other measures to substantiate his claim. The auditors say, they "admitted the account presented by the defendant;" but this must be understood, with the exception of the balance which he claimed under the settlement of July 1792. It does not appear, from their report, that the claims of the plaintiff below rested on that account so far as it went; but it is probable, that further research was deemed unnecessary. The court cannot say that in this the auditors erred.

The decree of the circuit court is affirmed, so far as it accords with this opinion, and is reversed as to the residue.

United States *v.* McDowell.

Jurisdiction in error.

In deciding whether the matter in dispute be sufficient to sustain the jurisdiction of this court, it will look to the sum due upon the condition of a bond, and not to the penalty.

Error to the District Court for the district of Kentucky, in an action of debt for $20,000, the penalty of an official bond given by the defendant, as marshal of that district, for the faithful execution of the duties of his office by himself and his deputies. The defendant pleaded performance generally. The United States, in their replication, assigned a special breach of the condition of the bond, in not paying over to the United States the sum of $328. *The judgment below was against the United States, who sued out the present writ of error. But— [*317

This Court, without argument, decided that it had no jurisdiction, the matter in dispute being of less value than $2000.

Mayor and Commonalty of Alexandria *v.* Patten and others.

Application of payments.

If a debtor, at the time of making a partial payment, does not direct to which account the payment shall be applied, the creditor may, at any time, apply it to which account he pleases.[1]

Error to the Circuit Court of the district of Columbia, sitting at Alexandria, in an action of debt brought by the Mayor and Commonalty of

[1] This point is settled by numerous decisions. Cremer *v.* Higginson, 1 Mason 323; United States *v.* Wardwell, 5 Id. 82; Gordon *v.* Hobart, 2 Story 243; United States *v.* Linn, 2 McLean 501; United States *v.* Bradbury, 2 Ware 146; Postmaster-General *v.* Norvell, Gilp. 106; Mann *v.* Marsh, 2 Caines 99; Allen *v.* Culver, 3 Den. 284; Sheppard *v.* Steele, 43 N. Y. 52. But, it seems, that the creditor ought at once to exercise the option given to him by law. Logan *v.* Mason, 6 W. & S. 9; Watt *v.* Hoch, 25 Penn. St. 411. Otherwise, the law will make the application in the way most beneficial to the creditor. Pierce *v.* Sweet, 33 Id. 151; Ege *v.* Watts, 55 Id. 321; Foster *v.* McGraw, 64 Id. 464; Woods *v.* Sherman, 71 Id. 100; Field *v.* Holland, 6 Cr. 8.