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

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[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.

Alexandria, for the use of John G. Ladd, against Thomas Patten and his sureties, on a bond given for the performance of his duty as vendue-master.

The object of the suit was to recover a sum of money alleged to remain in his hands as vendue-master, on account of goods sold for Ladd. Patten was also the debtor of Ladd, for goods sold by him to Patten, who gave in evidence payments which exceeded the amount due upon the latter account, and which, if applied to the former account, would nearly, if not entirely, discharge that debt. The payments were attended by circumstances which the defendants considered as evidence of a clear intention to apply them to the debt due from Patten as vendue-master; "whereupon, the counsel for the plaintiffs prayed the opinion of the court whether, from the manner in which the payments were made as aforesaid, the said John G. Ladd had not a right to apply so much of the money, paid to him as aforesaid, as would discharge the debt due to him as aforesaid, for goods sold as aforesaid, to the said Thomas Patten, to the discharge of the same. Whereupon, the court instructed the jury, that if they should be satisfied by the evidence, that the payments of the money by the defendant Patten were *318] *made on account of the goods sold at vendue, and so understood by both parties at the time of the payments, they must be applied to that account.

"If Mr. Patten, at the time of paying the money, did not direct to which account it should be applied, and if it was not understood by the parties, at the time of payment, on which account it was made, the plaintiff had a right *immediately* to make the application to which account he pleased; but such application must have been recent, and before any alteration had taken place in the circumstances of Mr. Patten. If neither of the parties made the application as aforesaid, and if the parties did not then understand on which account it was made, then the payments ought in law to be applied to the discharge of the vendue account, the non-payment of which is alleged as the breach of the bond upon which the present suit is brought."

To this opinion, the plaintiffs excepted, and the verdict and judgment being against them, brought their writ of error.

Swann, for the plaintiffs in error, contended, that where there are different debts due by a debtor to his creditor, and a payment be made generally on account, the creditor has a right to apply the payment, whenever he pleases, to which account he pleases, and cited the case of *Goddard* v. *Cox*, 2 Str. 1194.

Youngs, contrà.—It is admitted, that the defendant had the right, at the time of payment, to direct its application, and that if he did not then exercise that right, it devolved upon the plaintiff. But the question is, when is the plaintiff to exercise the right? Can he, at any indefinite period after the payment, and under any change of circumstances, apply the payment as he pleases? Can he, at the moment of trial, when the defendant produces evidence of payments, say, I choose to apply these payments to the other account? The rules of law are all founded in reason. Some reasonable *319] limit must be supposed to the *exercise of this right. In the present case, the interests of third persons are involved. The sureties may have been lulled into security by the evidence of these payments.

The court below was bound to decide according to the laws of Virginia,

which have been adopted by congress for the government of the county of Alexandria. The law is conclusively settled in Virginia, by the highest tribunal in that state, in the case of *Braxton* v. *Southerland*, 1 Wash. 133, where the president of the court of appeals, in delivering the opinion of the court, says, "Although, if the debtor neglect to make the application, at the time of payment, the election is then cast upon the creditor, yet it is incumbent upon the latter, in such a case, to make a recent application, by entries in books or papers, and not to keep parties and securities in suspense, changing their situation from time to time, as his interest, governed by events, might dictate." And upon this principle, the decree of the court in that case was founded. It was not a mere *dictum*, but the very ground of the court's decision. This, then, being the law of Virginia, the court below was bound by it.

If the opinion of the court of appeals of Virginia needed support, it would be found in 2 Pothier on Obligations 45, who gives it as a rule of the civil law, that "when the debtor in paying makes no application, the creditor, to whom money is due for different causes, may apply it to the discharge of which he pleases." But he goes on to say, "It is necessary, 1st. That this application should have been made at the time; and 2d. That the application which the creditor makes should be equitable." Another rule, in p. 49, is, that "when the application has not been made either by the debtor or the creditor, the application ought to be made to that debt which the debtor had, at the time, most interest to discharge." And as a corollary, he says, "the application is made rather to the debt, for which the debtor has given a surety, than to those which he owes alone. The reason is, that in paying the former, he discharges himself towards two creditors—his principal creditor, and his surety, whom he is bound to indemnify." *These principles are confirmed by 1 Domat 287, tit. *De Solutione*. [*320

The case of *Goddard* v. *Cox*, cited for the plaintiffs, is a mere *nisi prius* case, before Chief Justice LEE, in Middlesex; and it only decides the principle, that where a defendant is indebted to the plaintiff, on two simple contracts, of equal dignity and of the same nature, and for neither of which is any other person bound, and the payment is made generally, on account, without any application having been made by the defendant, the right to make the application devolves on the plaintiff. It does not decide the question now before the court, which is, whether the plaintiff is not bound to make a recent application, in cases where the interests of sureties are concerned.

All the cases in which the plaintiff has been permitted at law to make his election, are cases where the debts were of equal dignity and of similar nature, and where it did not appear to be important to the debtor, or any other person, to which debt the payment should be applied. Esp. N. P. 229. There is, in truth, no difference in principle between the rule in equity and the rule at law, as to the application of payments.

March 7th, 1808. MARSHALL, Ch. J., after stating the case, delivered the opinion of the court, as follows:—

It is a clear principle of law, that a person owing money on two several accounts, as upon bond and simple contract, may elect to apply his pay-

ments to which account he pleases; but if he fails to make the application, the election passes from him to the creditor. No principle is recollected, which obliges the creditor to make this election immediately. After having made it, he is bound by it; but until he makes it, he is free to credit either the bond or simple contract.

*321] *Unquestionably, circumstances may occur, and perhaps did occur in this case, which would be equivalent to the declaration of his election on the part of the debtor, and therefore, the court was correct in instructing the jury, that if they should be satisfied, that the payments were understood to be made on account of the goods sold at vendue, they ought to apply them to the discharge of that account; but in declaring that the election, which they supposed to devolve on the plaintiff, if the application of the money was not understood, at the time, by the parties, was lost, if not immediately exercised, that court erred.

Their judgment, therefore, must be reversed, and the cause remanded for a new trial.

Dawson's Lessee *v.* Godfrey.

Alienage.

A person born in England, before the year 1775, and who always resided there, and never was in the United States, is an alien, and could not, in the year 1793, take lands in Maryland, by descent, from a citizen of the United States.[1]

Error to the Circuit Court of the district of Columbia, sitting at Washington.

Russell Lee, a citizen of the United States, in the year 1793, died seised in fee of a tract of land called Argyle, Cowall and Lorn, situated in that part of the district of Columbia which was ceded to the United States by the state of Maryland. Mrs. Dawson, the lessor of the plaintiff, would be entitled to the land by descent, unless prevented by the application of the principle of alienage. She was born in England, before the year 1775, always remained a British subject, and was never in the United States.

The court below instructed the jury, that she was an alien, and could not take the land, by descent, from Russell Lee, in the year 1793.

The question having been fully argued, but not decided, in the cases of *322] *Lambert's Lessee* v. *Paine* (3 Cr. 97), *and *McIlvaine* v. *Coxe's Lessee* (2 Ibid. 280), the counsel (viz., *Morsell* and *Jones*, for the plaintiff in error, and *P. B. Key*, for the defendant), agreed to submit it to the court, without further argument.

Johnson, J.,(*a*) delivered the opinion of the court, as follows:—This case rests upon the single question, whether a subject of Great Britain, born before the declaration of independence, can now inherit lands in this country? The general doctrine is admitted, that in the state of Maryland, in which the land lies, an alien cannot take by descent; but it is contended,

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(*a*) The judges present were, Chase, Johnson, Livingston and Todd.

[1] Carter *v.* Godfrey, 1 Cr. C. C. 479.