

from time to time, were properly applied in the first instance to the extinguishment of the interest due upon the whole capital, the excess of such payments only being applicable to the payment of the capital itself. But the mode of stating the claim, contended for by the counsel of Thomas T. Wheeler, would defeat this incontestible right of the creditor; for by splitting it up, and applying the payments to the satisfaction, not of the sum due for interest on the whole debt, but on that portion of it assumed to be due from the party making the payment, it is obvious, the creditor would not receive as much for principal and interest as he was clearly entitled to. It is not asserted, that the creditor has received more than he had a right to demand, and I therefore think it must follow, that Hilleary has a right to recover from his co-debtor, Thomas T. Wheeler, the excess which he Hilleary, has paid, beyond that proportion of the debt for which he was liable.

The remaining question relates to the extent to which Hilleary has a right to use the judgment, for his protection and indemnity. That he has a right to use it to some extent, is settled by authority. *Sells vs. Admrs. of Hubbell*, 2 *Johns. Chan. Rep.*, 397; *Scribner vs. Hickok*, 4 *ib.*, 530.

The only sums credited upon the judgment at the time of its assignment to Hilleary, is the \$570, paid by his intestate on the 7th May, 1829. The subsequent payments are not credited, and I can see no reason why the judgment may not be used for the protection of Hilleary, so far, in the language of Chancellor Kent, as it clearly and certainly appears that the other party ought to contribute.

What difference can it make, so far as this question is concerned, whether the party paying more than his proportion of the debt, pays it from time to time in partial amounts or pays all at once? If, to be sure, these partial payments had been credited upon the judgment, it might, *pro tanto*, be regarded as satisfied, and when the final payment came to be made, the party making it must take and use the judgment, only for what remained due upon it. But when the judgment stands open, I cannot see why a co-debtor paying more than his due proportion may not avail himself of the judgment, for his indemnity.