

No 4947 Equity

first assumed control over the subject matter of Controversy is entitled to obtain it." Books vs Delaplaine 1 Md. Ch. Dec 351 + 375. 2 Md. Ch. Dec 42. Withers et al vs Jennead 22 Md 146
It has always been the practice of the Courts of Chancery in this state, to exercise the jurisdiction involved by the petitioner in this case. As early as the year 1800 in *Officer vs Bennett* reported in 1 Blaud 86, the old Court of Chancery (to whose power and jurisdiction this Court has succeeded) where a Bill was filed to foreclose a mortgage Chancellor *Harrison* by a decree, divided the surplus among the creditors of the deceased mortgagor, who had come in by petition, and ordered a further surplus to be paid to the devisee under the will of the mortgagor. And this too after the husband of the devisee, who was the executor, had applied by petition to have the surplus paid over to him as the executor. This is a case almost identical in its facts, with the one now before this Court for determination.

In 1813 in *Spurrer vs Spurrer* reported in 1 Blaud 477 where real estate was sold for the purpose of partition among heirs, Chancellor *Kelly*, by a decree, directed the creditors who had come in by petition, on due proof of their claims, to be paid out of the proceeds of sale, and distributed the balance among the heirs of the deceased. And such has been the unvarying practice of the Courts of Equity in this State. In *Farrick vs Laughlin* 1 Blaud 475 (decided in 1828) Chancellor *Blond* says - "Where a bill has been filed against the heirs of a deceased mortgagor to obtain payment by a sale of the mortgaged property; or where a bill has been filed to obtain a partition of an intestate's real estate among his heirs; or where a deceased's real estate has been decreed to be sold in any other manner than by a creditor's bill; any creditor of such deceased person may be permitted to come in by petition, and have his claim allowed and paid out of the whole or surplus of the proceeds of the realty of the deceased so far as they will go; on the ground of the insufficiency of the deceased's personal estate, considering the surplus as a residuum of real assets which had been taken from the hands of the heirs at law." The precedents in 1 Blaud having been long acted upon are considered by the profession and followed by the Courts as authority. The insufficiency of the deceased's personal estate, in this cause is admitted. The only difference between the cases just cited, and the one now under consideration by this Court is, that the sales in those cases were made under a decree of Court and in this under a power of sale contained in the mortgage. So far as the power and jurisdiction of the Court is concerned the legal effect and consequence of the sale is the same in either case, because as the Court of Appeals say in *Coddy vs Cole* "instead of a regular proceeding for foreclosure the agreement of parties as expressed in the power contained in the deed of mortgage, is substituted for a decree of sale and upon report to, and final ratification by the Court the sale has all the judicial sanction that it could have on more formal proceedings."

This Court, therefore, is of opinion, that it has jurisdiction to make a full and final distribution of this fund among all the parties interested therein, and will decree accordingly. This course is not only legal and proper, but it will be a saving of time to the creditors, and the avoiding of considerable cost and expense to the heirs at law.

The Court is also of opinion that *Nicholas H. Claman* under the agreement and order filed as exhibits 8 & 9 is entitled to have audited to him the amount as claimed in his petition filed in this case April 26. 1884. It is therefore this 26th day of April A.D. 1884 by the Circuit Court for Frederick County, as a Court of Equity, adjudged, ordered and decreed that this case be and is hereby referred to the auditor to state an account, and he is directed to allow *Bennie H. Maynard* the amount of his mortgage debt, interest, commissions, expenses and costs; and then allow all just claims against said deceased mortgagor, that may be duly proved and filed according to their legal preferences or priorities; then to allow to *Nicholas H. Claman* his claim of Five hundred dollars (\$500) and interest thereon from the 5th day of January A.D. 1884, and then divide the balance equally, between the said son and daughter of the deceased, and before stating said account the auditor is required to give the usual notice to creditors to file their claims duly authenticated with the Clerk of this Court.

Filed April 26th 1884

John H. Lynch
Judge of the Cir. Court.