

custom-house bond, who had paid the whole debt, to take the place of the government, and thus secure to himself the high and overruling preference to \* which such a creditor is entitled.

**201** *Mickle v. Taylor*, 1806, per KILTY, Chancellor, MS.; *Theob. Prin. and Sur.* 259. These principles, in regard to those who stand properly in the relation to each other of principal debtor and surety, have been extended for the benefit of an executor or administrator, who may have been induced through mistake to pay debts of the deceased beyond the amount of the assets which came to his hands; in which case he has always been allowed in this Court, as in England, to take the place of the creditors, and obtain reimbursement out of the real assets of the deceased, so far as they were liable; or if the debt so overpaid was on a judgment against the deceased, operating as a subsisting lien upon his realty, the executor or administrator is permitted to take the place of such judgment creditor, and to have a preference in the distribution of the real assets over creditors of an inferior grade. *Robinson v. Tonge*, 3 P. Will. 400; *Theob. Prin. and Sur.* 233; *Ex parte Street*, 1 Bland, 532, note.

The doctrine of substitution embraces only those cases where there is a principal debtor and a surety by express or implied contract; or where, for the benefit of commerce, a man is allowed officiously to place himself in the condition of a surety; or where he has by mistake, as in the case of an executor, made payment as

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Mr. Meluy, however, hearing of the application, has filed a petition against it. Perhaps this petition may be considered as a voluntary answer to the petition of Mr. and Miss Cooper by Mr. Atkinson, calling himself their guardian. Mr. Meluy has, in his petition, made a proposition which appears reasonable, viz. to have an account stated by the auditor.

And it is, therefore, adjudged and ordered, that the auditor of this Court, on the 15th day of June next, proceed to state an account between the deceased, father of the petitioners, Thomas and Ann Cooper; provided the said Atkinson shall come before the auditor for that purpose; and that the said trustee, appointed to sell the said property, shall not proceed to a sale until further order.

The Chancellor thinks proper to declare, that he passes this order merely because the said Meluy has, by his petition, offered to have the sale postponed, and to have an account stated. If the parties shall choose to come before the auditor, before the said day, to have the said account stated, the auditor may proceed accordingly; or if the said parties, by writing to be here filed, shall agree to the appointment of any person or persons more convenient to them than the auditor, an account by the said person or persons stated, will be received by the Chancellor as an account stated by the auditor; provided the said person or persons proceed on or before the 15th of June next.

On the 16th of June, 1804, the parties not having appeared before the auditor, the foregoing order was annulled, and the trustee ordered to sell. &c.