After which, on the 29th of June, 1829, the auditor reported a statement distributing the proceeds, first in payment of the costs, commissions and expenses, next in satisfaction of the plaintiff's claim in full; and then the balance or surplus among the widow and heirs of the deceased. But the auditor suggested, that no notice appeared to have been given to the creditors of the deceased to exhibit their claims against the estate, as there should have been before any part of the balance was paid over to the heirs.

BLAND, C., 6th July, 1829.—This case having been submitted, on the auditor's report without argument, the proceedings were read and considered.

The plaintiff founds his claim to relief on an equitable, or vendor's lien upon the real estate designated in the proceedings. He is here, in effect, as a mortgagee seeking relief against a mortgagor; but as a mortgagee, or the holder of an equitable lien has no common interest with the general creditors of the debtor, he cannot in his and on their behalf institute a creditors' suit. *Burney* v. *Morgan*, 1 *Cond. Chan. Rep.* 183. Although this bill alleges, "that the personal estate of the intestate will be greatly insufficient to pay his debts;" yet the plaintiff does * not claim as one having
**245** a common interest with the other creditors of Nicholas Welch, deceased; or as one who was only entitled to obtain immediate satisfaction here out of his real estate in the hands of his infant heirs, upon the ground that his personal estate was insufficient or had been exhausted. There is, therefore, nothing in the pleadings, as they stand, which shews this to be a creditor's bill under which all the other creditors of the deceased should be notified to bring in their claims.

It is true, that this might have been converted into a creditor's suit; and that this surplus distributed among these heirs, exclusive of the widow's share, might, before it was paid over to them, have been thus intercepted for the benefit of the general creditors of the deceased. But that could only have been done at the instance and on the petition of a creditor having a common interest with others, and on the ground of the insufficiency of the personal estate of the deceased; *Latimer* v. *Hanson*, 1 *Bland*, 51; *Fenwick* v. *Laughlin*, 1 *Bland*, 474; or on the application of one, who, from the peril in which he stood, had a right to be substituted for, and to be considered, as such a creditor. As where an executor or administrator, who had paid away all the personal assets, was actually sued, and against whom judgment was likely soon to be recovered by a creditor of the deceased, petitioned to have the surplus applied to the satisfaction of such claims to which he was in danger of being made liable; *O'Brien* v. *Bennet*, 1 *Bland*, 86, *note;* or where a judgment had been obtained against the surety in a bond, such surety, before he had paid any part of the debt was allowed to sustain a