

by a sale of such real estate, to order the whole or part of the real estate, so descended or devised, to be sold for the payment of the debts due by the deceased." 1785, ch. 72, s. 5.

On advertng to the law as it has been shewn to have existed when this Act of Assembly was passed, it will be seen, that a specialty creditor, to whom the heir was bound by the contract, had an unquestionable right to proceed, at his election, against the heir, or the executor of his deceased debtor; that there being a sufficiency of personal estate to pay the debt was no defence for the heir; that if the heir paid the debt he might, by bill in \* equity, obtain reimbursement from the personal estate, if any, in the hands of the executor or administrator; that if a creditor sued in equity, and it was alleged and shewn, by the heir, that there was personal estate, then that estate was first applied, and the realty only sold to make up the deficiency; and that in all cases, where any one of the claimants of the real estate was an infant the parol should demur as to all until such minor attained his full age. **49**

Hence it appears, that a creditor's right to proceed against the real estate of his debtor in no way depended upon the insufficiency of his personalty, and it is most manifest, from a fair reading of this Act of Assembly, obviously made for the benefit of creditors, that the Legislature could not have intended to throw in the way of a creditor any new obstacle or hindrance to the recovery of his debt in any form whatever. It could not have been intended to engraft upon the former law a condition precedent, requiring a creditor to show, as a foundation of his claim to obtain satisfaction from the realty, that the personalty had been exhausted; or to require him first to shew the amount to be raised by a sale of the realty to make up for the deficiency of the personalty; although the Court may, to avoid unnecessary injury to the heir, and at his instance, first call in the creditors and have an account of the personal estate taken, in order to ascertain how much of the real estate should be sold. *Strike's Case*, 1 *Bland*, 85; *Galphin v. McKinney*, 1 *McCord*, 294; *Clanmorris v. Bingham*, 12 *Cond. Chan. Rep.* 254. A specialty creditor might, at his election, by an action at common law, enforce payment from the heir, without regard to the amount of the personal assets held by the executor or administrator. And, if such specialty creditor went into a Court of equity for relief, he carried with him there this legal right to obtain satisfaction unembarrassed by any question as to assets between the heir and executor. The Court of Chancery, recognizing the existence of such legal right, always so regulated its proceedings, as, in doing justice between the heir and executor, in no way materially to delay or prejudice the claims of creditors.

Simple contract creditors having, by the British Statute of 1732, been put upon a footing with specialty creditors, the Court of