

which may properly be considered as the contract between debtor and creditor, but is founded on a natural and moral equity, that it

premises. But, as the Court of Appeals, in their opinion delivered in this cause, at the December Term, 1838, a copy of which is filed, say, that there may exist a state of things in which this mortgage claim may be reduced, certain statements are submitted in illustration of this point. That part of the opinion is as follows: "If it should turn out, that the residue of that part of Marengo, devised to Fayette Gibson, and not by him conveyed to Edward Lloyd or John Blake, united with the other parts of Marengo, to which Fayette Gibson was entitled, after paying their just contribution towards the mortgage debt, and all other debts of the deceased, shall prove inadequate to the payment of that portion of the mortgage which the part of Marengo devised to Fayette Gibson was bound to contribute; then with reference to the other devisees, owners of Marengo, the mortgage debt of the bank must be deemed satisfied and paid to the extent of such inadequacy." Statement No. 1, shews the value of Jacob Gibson's real estate at the time of his death. Statement No. 2, shews the value of the same, as of the time of taking the testimony in relation thereto. Statement No. 3 and 5, by which it appears, in these views of the proof, there will be such a deficiency as is intimated in the opinion of the Court of Appeals. And statement No. 4, by which, in another view of the proof, there will be no such deficiency. The proof, in relation to all these statement, is vague, and much of it derived from papers filed in this cause without a commission; moreover, it is applicable to different periods of time, much of it founded on estimates merely, and omits the valuation of some real estate of which, it would seem, the deceased died seised. These statements, 3 and 4, assume, that all the debts filed are to be paid; whereas to the most of them the Statute of Limitations has been pleaded by the devisees, and other parties, the bank among the rest: and if it apply to them, then even the deficiency appearing on the statement No. 3 would be reduced to a small sum, if not entirely disappear.

The auditor further says, that in the event of the Chancellor's being of opinion, that these statements make it doubtful if the bank can now receive the whole of its mortgage debt, it would seem, this doubt may be removed by the effect of the right of the bank to claim by way of substitution, in the stead of the unpreferred creditors who have been paid off by the Orphans' Court accounts, as is recognized by the opinion of the Court of Appeals. For, as the personal estate of Jacob Gibson, deceased, which would, if properly administered, have paid to all the unpreferred creditors thereof \$0.61106 in the dollar, as per account A, has been illegally administered, with the approbation of the devisees of the testator, whereby the creditors, the bank among the rest, have lost this dividend, they are entitled to claim the same now, by way of substitution to the rights of these creditors so paid off; so that the bank, for its claim No. 6, \$13,739.55, should be entitled to \$8,395.89, as against all the devisees; and according to statement No. 1, to upwards of \$3,000: and according to statement No. 2, about \$4,000, as against these proceeds of sale, either sum exceeding the deficiency estimated by statement No. 3 and 5.

It is therefore submitted, that, in this view of the case, the bank has a claim against the mortgaged estate sold, by way of substitution to the rights of the creditors paid off out of the personal estate, to a much larger sum than can be the deficiency of its contribution by reason of the release to Lloyd: and, therefore, none of the parties to these proceedings are injured by the payment to the bank of its entire claim out of these proceeds. Again,