

gence, they certainly might have brought before the court in this suit, in a course of thirty-two years, which has elapsed since his death, every particle of that competent and sufficient testimony which the petitioner says might even yet be obtained. It is not enough to shew that injustice has been done in any instance, even supposing a case of that sort to have been exhibited by the petitioner, but that it has been done under circumstances which authorize the court to interfere. The court must see that injustice has been done, not merely through the inattention of a party, but that owing to some peculiar state of things, he could not have sooner availed himself of his means of relief; that he was ignorant of his proofs, or that the matter on which he relies, could not have been sooner or otherwise brought before a court of justice for adjudication. (u) In fine, I am entirely satisfied that the prayer of the petitioner ought not to be granted.

Whereupon it is *Ordered*, that the said petition, filed by *John Glenn*, administrator *de bonis non* of the late *Stephen Casenave*, and also the said supplemental petition, be and the same are hereby dismissed, with costs to be taxed by the register.

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TESSIER v. WYSE.

A creditor is not bound to use active diligence against his debtor. The plaintiff in a creditor's suit is not bound to allege and shew, that he had used any degree of active diligence, or that the personal estate of his deceased debtor was insufficient to pay his debts in order to have his real estate sold for that purpose. The sufficiency of the personal estate of the deceased to pay his debts, giving that ground of equity upon which the realty is saved for the benefit of the heir or devisee, it is with him alone to allege and shew that fact. The liability of heirs as tenants, and the equity between them as to contribution. Where the obligor binds himself and his heirs, the land descended is liable in the hands of the heir; but if there be personal estate, and the heir pays the debt, he may be reimbursed from such personalty, upon the ground of its being the primary and natural fund for the payment of debts. The cases in which the parol shall demur during the infancy of a party.

In a creditor's suit, by a bond creditor, independently of any statutory provision, the personal estate was always first applied, as far as it would go, to save the realty; and the statute making lands liable to be taken in execution and sold for the payment of debts, has made no alteration as to any creditors in that respect;

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(u) *Bateman v. Willoe*, 1 Scho. & Lefr. 204; *Kemp v. Squire*, 1 Ves. 206; *Stanard v. Rogers*, 4 Hen. & Mun. 439; *Winston v. Johnson's executors*, 2 Mun. 305; *Erwin v. Vint*, 6 Mun. 267.