

within his reach a double fund to disappoint another creditor of his satisfaction. And this principle has been applied in all such cases,

7th December, 1840.—BLAND, Chancellor.—This case standing ready for hearing on the auditor's report, filed on the 8th of May last, and having been submitted on notes by the solicitors of the parties, the proceedings were read and considered.

It must be recollected, that, according to the decree of the Court of Appeals, no sale is to be made of that part of the real estate to which the defendant Clara Tilton is entitled, and that the rights of the defendants James Tilton and Rebecca Gibson, are to be expressly reserved. The effect of which being to close the suit as to them, and to prevent any funds of theirs from being brought into court, there can be no claim made by any one, either as creditor or surety, against the interests of all or of any one of them; nor can they, or either of them, whose interests in the subject in controversy have been so finally and conclusively protected, have any standing here to plead the statute of limitations against any one else. Subject to the rights, thus declared, of these three defendants, the claims of the plaintiff McCormick, and the defendant the Bank, having been finally established, by the decree of the Court of Appeals, they cannot be affected by any plea of limitations which may have been since directed against them by any other creditor or party. The mortgage debt due to the Bank must be first satisfied out of the proceeds of the sale of the mortgaged estate, leaving the surplus, if any, to be charged as a portion of the property of the devisee to whom that estate had been devised; but, if the proceeds of the sale of the mortgaged estate should not be sufficient to pay the mortgage debt, then the Bank must be let in among the general creditors for such balance;—2 *Mad. Chan. Pra.* 655; *Greenwood v. Taylor*, 4 *Cond. Chan. Rep.* 381; *Hammond v. Hammond*, 2 *Bland*, 384; and, for the protection of that balance, be allowed to have the benefit of its plea of limitations against any other of the general creditors of the deceased.

In making the distribution of the proceeds of the sale of the real estate to the satisfaction of the creditors of the deceased, it is indispensably necessary to have a correct statement made of the amount of the claim of each creditor; and also to shew the fund upon which alone those claims are chargeable. Rebecca Gibson's interest in the estate of the deceased being in the nature, and in lieu of dower; and, as such, expressly reserved, must, therefore be first ascertained, and set apart as forming no portion of that fund upon which any creditor of the deceased can have any claim whatever. And the interests, other than the mortgaged estate liable for the mortgage debt, of Clara Tilton and James Tilton, having been placed, by the decree of the Court of Appeals, beyond the reach of this court in this suit, cannot be deemed a part of that fund out of which any creditor, now here, can have awarded to him payment of any portion of his claim.

A claim for contribution, either at law or in equity, can only arise as between or among co-sureties on the failure or insolvency of their principal; or where two or more being liable, in respect of, and in due proportion to the assets or effects respectively held by them, and one has paid the whole, or more than his due proportion of the debt. A claim for contribution being a secondary one, arising among co-debtors or those chargeable as such, can never be made or adjusted to the prejudice of a creditor in any way whatever. And therefore, as there has not been, as yet, any case of contribution brought before the court, no further notice need be taken of the principles of law or equity, in relation to such a case; and especially as it can only be made after all the claims of the creditors of the deceased have been definitively adjusted.—*Harbert's case*, 3 *Co.* 12; *Long v. Short*, 1 *P. Will.* 403; *Harris v. Ingle-dew*, 3 *P. Will.* 98; *Lingard v. Bromley*, 1 *Ves. & B.* 116; *Dering v. Winchelsea*, 1 *Cox*, 318; *Headley v. Readhead*, *Coop.* 50; *Mayhew v. Crickett*, 2 *Swan.* 192; *Cheese-brough v. Millard*, 1 *John. Ch. Ca.* 415; 1 *Mad. Cha. Pra.* 233.