

creditor's contract. It can only be made where all the parties are before the court, and the whole subject is within its juris-

Edward Gibson's portion, now owned by Fayette Gibson, it will be seen, that the contingency has happened which was contemplated and provided for by the Court of Appeals. Edward Gibson's part of Marengo sold for \$10,500 00; to pay its portion of costs, \$291 25; commissions, \$534 55; mortgage debt, \$7,730 09; McCormick's claim, \$1,266 06; to pay Lloyd's portion of the mortgage debt, \$3,205 29; of costs, \$120 77; and of McCormick's claim, \$397 79; amounting altogether to \$13,045 80. Loss to the Bank of \$3,045 80.

But the auditor finds from the testimony, that Lloyd, after his purchase, paid a large sum for debts due by the estate, amounting to the sum of \$3,161 53, with interest from the 6th February, 1822, to the 27th March, 1839, \$3,235 83; making \$6,397 36—which is greater than the sums assessed upon his portion of the devise and Edward Gibson's. The auditor has, in apportioning the complainant's debts amongst the devisees, included Lloyd, although he appears to have paid more than his proper proportion; because that is no defence against a creditor. The creditor, it is conceived, has also a right to require this assessment to be made as against the Bank, because there does not appear to be any reason for allowing the Bank, by its agreement with the owners of any part of the mortgaged property to alter the situation, or change the rights of any other creditor. In respect to the complainant's claim, therefore, the property has been charged as if the agreement for the sale of Lloyd's portion had not been assented to by them. Although the auditor has excluded Blake's heirs, and Lloyd, from contribution towards the payment of the complainant's claim, the former being already excluded, and the Bank being substituted in the place of the latter, as will be seen hereafter, they have been charged with their proper proportion of costs, inasmuch as the decree went against them in common with the other devisees; and a payment of one creditor is no just defence against the claim of another; unless the assets have been consumed. But in giving the Bank the substitution above mentioned, the other devisees pay only to the extent of the benefit they have received from the payment made by the Bank, so as to leave the Bank to stand in the same situation in which the complainant would have stood, if he were seeking from them the payment of his claim. If then, the Bank seeks from the other devisees payment of the portions of that debt paid by Edward Gibson's interest, the following will be the result: Loss to the Bank as above, \$3,045 50; of which Mrs. Tilton would repay \$176 07; Mrs. Reynolds, \$807 89; Bennett's heirs, \$155 86; and Lloyd's heirs for proportion of costs, \$120 77; amounting to \$1,260 50; leaving an eventual loss of \$1,785 21.

The auditor now proceeds to distribute the funds in the hands of the trustee amongst the several parties according to the views heretofore presented in his report; and in doing so will assess upon the property sold, all the commissions and expenses of the sale; and the other costs upon all the property; except Mrs. Tilton's interest and the devise to Clara Tilton. He will then assign all of Mrs. Tilton's interest that may remain, after discharging its appropriate liabilities, to the complainant, in payment of so much of his claim, leaving to her a remedy against the other devisees. He will then proceed to shew in what proportions the devisees ought to pay the balance of the complainant's debt, and repay Mrs. Tilton. In apportioning the debt of the complainant amongst the devisees, the only motive of the auditor is to shew by what payments the other devisees may avoid a sale; and, if any one should pay the whole, what his equity against the others would be.

Credit for the whole amount of sales as per auditor's report, filed on the 8th of May, 1840, \$15,637 36. Against which debit: Commissions and expenses of trus-