

deceased; although as against all the other creditors, now before the court, except claim No. 4, they would, if not opposed by a plea of limitations, be clearly entitled to a preference; even against claim No. 11, whose right to issue an execution upon his judgment, existing at the time when these two judgments were obtained, having been suffered to expire, could not be revived so as to overreach an intermediate lien or conveyance, which during its lapse, had taken full effect. (u)

The personal estate is the fund primarily liable for the payment of debts; and therefore, if the real estate be mortgaged, the personal estate must be applied in discharge of the mortgage in relief of the realty. But where there are simple contract creditors who cannot resort to the mortgaged estate, the mortgage debt may be thrown entirely upon it, so as to leave the personalty for the benefit of the simple contract creditors. But by our law, on the personal estate being exhausted, all creditors may resort to the realty; and therefore, in administering the assets of a deceased debtor, in this court, there can rarely be any necessity for such a marshalling of the funds for that purpose, since all the assets, real and personal, are to be applied to the satisfaction of the creditors according to the priorities of their respective liens; and then in satisfaction of the rest in due proportion; applying the personalty first, so that if there be any surplus it shall be left as of the realty, and go to the heirs.

If there was here no other distinction among these creditors, than that arising from the nature of the securities of their claims as derived from the deceased debtor himself, the distribution of these assets might be made among them upon principles the most simple and obvious. But, it must be recollected, that, according to the recently established rules, an absolute judgment against an executor or administrator, although conclusive as between the creditor and executor or administrator, is not so as between the creditor and the heir or devisee; and that a plea of the statute of limitations, if established as a bar, can only enure to the benefit of him who pleads it; and besides, that although a creditor who has obtained an absolute judgment at law against an executor or administrator, will not be permitted to levy his debt by a *fiery facias* after a decree to account; yet he cannot, on coming in, under the decree, be compelled to part with any advantage his judgment has

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(u) 1823, ch. 194; *Coombs v. Jordan*, ante 284.