

ings and proofs, as they now stand, and upon which all parties have united in calling for a decision of the court, it would be utterly impossible to make any such distinction as regards their claim; because it does not appear, nor has the court been furnished with any means of ascertaining what proportion of the purchase money, now about to be distributed, was agreed to be paid for the *real estate*, and what proportion for the *personalty*.

Therefore those who have thus stood by, and acquiesced in these two different kinds of the estate of their debtor being undistinguishably blended and mingled, must abide the consequences; and as the rights of these judgment creditors cannot be jeopardized or impaired by any fault, not their own, they must be allowed to obtain satisfaction, to the full extent of their respective liens in preference to all others, from the whole amount now about to be distributed.

These plaintiffs and several of these claimants have, by their exceptions to the auditor's report, relied upon the statute of limitations as a bar to some of the claims made against *The Cape Sable Company*. But the statute of limitations, or any other defence, cannot be resorted to by him who has already chosen his defence, rested his case upon it; and suffered the case so to proceed; or had a hearing or decision upon such defence; because if a party were allowed to avail himself first of one defence and then of another, there would be no end to litigation. (t) Therefore all these exceptions against the claims of *Oliver* and *Carroll*, must be rejected; even supposing they were now open to such an objection as the statute of limitations, as they are not.

According to the rule laid down for the government of this court, however, a plea of the statute of limitations can only be allowed to enure to the advantage of him by whom it is pleaded. (u) But, if upon this principle the full operation of the plea, or indeed of any other objection, would completely exclude a claim; and yet would afford to him by whom it was pleaded or made, no sort of benefit; either because his own claim could not be sustained, or because, being established, it could not be in any way affected by the allowance or rejection of the claim against which the plea or objection was directed, then it would be tolerating mere wanton mischief to allow such a creditor to disappoint his co-creditor from

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(t) *Bennet v. Lee*, 2 Atk. 529; *Welch v. Stewart*, 2 Bland, 37.—(u) *McCormick v. Gibson*, ante 499, note.