287 *costs to be levied on the assets in hand, or as they should accrue in a due course of administration.

Taking all the proof together then, including this solemn formulary of a judgment, and the authenticity of this alleged claim of James Dawson, rests upon mere hearsay, and a great portion of that hearsay derived from the defendant Eleanor Dawson herself. There is no direct competent proof, that James Dawson ever, by himself, or his attorney, or agent, asserted, that he had such a claim against the estate of his father. And it is even left somewhat doubtful, from what is said of his being in a remote region of the earth, whether he was actually alive when this judgment was got up on his behalf. The question whether any debt was due, and to what extent, has never been tried with that searching attention which these plaintiffs had a right to expect from this executrix. *Alsager* v. *Rowley*, 6 *Ves.* 751. It is true, that an executor is allowed to pay any creditor of his testator; and is not bound to contest the claim; but, under color of satisfying a creditor, he cannot be permitted to retain without control, or to give away the assets of his testator. *Watlington* v. *Howley*, 1 *Desau.* 167.

In short, looking to all the circumstances, in relation to this debt, said to be due to James Dawson, I cannot consider it to be such a claim as ought to be allowed to diminish or exhaust the assets of the testator William Dawson, to the prejudice of these legatees, who also stand here upon the strong ground of being his creditors. Laying aside this claim of James Dawson, there is certainly no allegation or proof of any deficiency of assets; and consequently the argument, that all these legatees, children of Margaret Russell Clerklee, must be parties to this suit to receive now their respective proportions of the assets; because of their not being enough to pay all, must entirely fail, and there is an end to all objections on that ground.

Advancing now to the consideration of the merits of this controversy, after having cleared away the preliminary objections, the first inquiry which presents itself is as to the nature of the interest which has been given in this legacy to the children of the late Margaret Russell Clerklee.

It is very clear, that no other interest vested in the mother, than the right to receive the annual fruits or dividends during her life; and after her death, which has happened, the whole principal and interest or dividends passed to her children. She left six daughters *and no son. Three of her daughters have been married; one has since attained the age of twenty-one years; and two are yet unmarried infants. By the terms of the will of Ann Russell, a right to a share of this legacy could only vest in any of these daughters on the occurrence of one of four circumstances in addition to that of her having survived her mother; first, she must then have attained the age of twenty-one years; or secondly, she

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