

purpose for which it was introduced. But it is said to afford a safe and just means of urging on another point; and that is the lapse of time as evidence of payment.

41 *The presumption of payment, arising from lapse of time, is a point of defence, which may be pressed with effect, either at law, or in equity, where it can be made to bear upon the asserted claim; but, in this instance, the claim is sustained by the deed of trust; and if the lapse of time could have been used at all, as a point of defence, it should have been presented in some form substantially as a plea of limitations; and in that way it has been presented; but it has been offered entirely too late.

The filing of a creditor's bill in England, it is said, enures to the benefit of all creditors who may come in under the decree, so as to take their claims out of the operation of the Statute of Limitation, from the day of the filing the bill. *Sterndale v. Hankinson*, 2 *Cond. Chan. Rep.* 198. But here no such presumption or fiction has been adopted. As to all creditors coming in after the institution of the suit, or under the decree, the day of filing the petition to be admitted as a creditor, or the day of filing the voucher or evidence of the claim is considered as the commencement of the suit as to such a creditor; and as that day on which the further running of the Statute of Limitations as against his claim is to cease. And where a claim is made in the ordinary mode by bill, and the defendant, by his answer, in any manner contests it, without relying on the Statute of Limitations, he cannot be permitted to resort to that defence after having thus tacitly waived it.

The principle of this practice is applied wherever it can be brought properly to bear upon the course of proceedings. A creditor who comes; or is brought in, as in this instance, under a creditor's bill, is considered in many respects as a co-plaintiff, from the time his claim has been filed or brought before the Court, and all other creditors, as well as the original defendants, with whose interests such claim may come in conflict, may oppose it, in any legal manner they may deem most available. In doing so, the creditor, who, by reason of his claim, has been invited, or summoned to appear before the Court, and the party who contests it, assume the relative positions of plaintiff and defendant; or, as they may be called, in contradistinction from the original plaintiff and defendant, that of claimant and opponent; and as standing in those relative positions, the controversy between them has always been considered. In this view of the matter, it has been long established, that if an opponent means so to defend his interest,

42 *he must put in the plea, or rely upon the Statute of Limitations in due season; for, if he suffers the proper stage of the case to pass by, or if he himself does, or stands by and suffers an act to be done, which necessarily implies a waiver of that defence on his part, he cannot afterwards have recourse to it.