

might have obtained satisfaction from the personal estate of the deceased, he has now, by his negligence and misconduct, lost his right to have recourse to the deceased's real estate.

The nature of the negligence and misconduct of the plaintiff Tessier, thus relied on as a bar to his claim, have not been distinctly described; but, from all the circumstances of the case, it is evident, that none can be imputed to him, other than that of having failed to exert more active diligence for the recovery of his claim, either against the personal representatives, or the heirs of his deceased debtor, or both of them.

But a creditor is, under no circumstances, bound in behalf of his principal debtor, to use any degree of active diligence. Considering the debt as an incumbrance, or as an inconvenience in any way, it is in the power of the debtor at pleasure to remove it by making payment according to the terms of his own stipulation. If the creditor should remain inactive so long as to afford a legal presumption, that the debt had, in truth, never existed, or had been paid, the debtor may protect himself by relying on the Statute of Limitations, or the lapse of time as conclusive evidence in support of such presumption in bar of the plaintiff's claim. Apart from the Statute of Limitations, or lapse of time as a bar, upon which none of these defendants have relied, no debtor is ever permitted to complain of the mere inactivity of his creditor. And, unless in cases where a creditor can be charged as a trustee, guilty of a breach of trust in not claiming, his merely neglecting to sue can never be imputed to him as a wilful default, or as injurious conduct towards any one. *Heath v. Percival*, 1 P. Will. 683; *Powell v. Evans*, 5 Ves. 839; *Wright v. Simpson*, 6 Ves. 726; *Tebbs v. Carpenter*, 1 Mad. Rep. 290.

Here the debtor is dead, and the claim is made against his personal representative, and his heirs in respect of the personal and *real assets which have come to their hands. It is a mortgagee from some of the heirs, and an heir who makes this defence against this claim. 36

As regards the mortgagee, it is perfectly clear, that he might, at any time, have sued for and recovered his claim by bill for a foreclosure and sale, or otherwise; or he might, by a creditor's suit, have called before the Court the creditors of the deceased, in order to have the property, so far as it had been mortgaged to him, relieved from their prior claims, by having them satisfied or rejected, so as to have the surplus applied in satisfaction of his claim. This mortgagee cannot, therefore, be permitted to complain of the negligence of this creditor, when it is so perfectly obvious, that he might have had him called before the Court, and thus compelled to receive satisfaction for his, this mortgagee's benefit. It is equally well settled, that a next of kin or heir may, by a creditor's suit, have the personal and real estate administered in equity, in