

satisfy them, goes to their merits, and unless clearly obviated, they must be rejected. These claimants do not allege, that it will be in their power to remove this objection, by any means whatever, but rest their case entirely upon the fact of its having no foundation in equity. It is certain, that an absolute judgment, obtained without mistake or fraud, is conclusive evidence of a sufficiency of assets in the hands of the executor to satisfy such judgment.<sup>(p)</sup> The admission of the defendants in this case of the insufficiency of the personal estate was made with reference to none other than the claim of the originally suing creditor by whom it was called for. Now it may be perfectly true, that the executor has actually reserved assets to pay claims No. 3, 4, and 5; and, yet no less true, that he has nothing left to meet the claim of this plaintiff.

There is then nothing in this objection of the auditor incompatible with the previous proceedings or acts of the court; or which, as has been urged, militates against the decree which was grounded upon an alleged and admitted insufficiency of personal estate to satisfy the claim of the plaintiff; for these claims No. 3, 4, and 5, were not then before the court.

But it is said to be an established principle of this court, that where it appears, upon the face of the voucher, that the creditor may or can obtain payment, by pursuing another and more proper person or fund, he shall not be permitted to come here, and partake of the realty to the prejudice of the heir or of other creditors. It is upon this ground, that an obligee is turned aside to seek payment of the whole or a proportion from a principal, or a co-surety who is solvent. These creditors have established their claims as against the personalty, or natural fund, of the sufficiency of which to satisfy them, their judgments afford conclusive evidence. If they now leave it and obtain satisfaction from the realty, what is to become of the amount of personalty which their judgments prove to exist in the hands of the executors? Is the executor to be suffered to retain it, or is the heir to be allowed, upon the principle of substitution, to obtain it? But the demand of a creditor upon the heir is always and must necessarily be founded upon the fact, that the personalty is not sufficient to satisfy the claim. These considerations have convinced me, that the auditor's objection is correct, and that these

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(p) *Wheatly v. Lane*, 1 Saund. 219 n. 9; *Skelton v. Hawling*, 1 Wils. 258; *Stufolk v. Harding*, 3 Rep. Chan. 88; *Ramsden v. Jackson*, 1 Atk. 292; *Greerside v. Benson*, 3 Atk. 248; *Robinson v. Bell*, 2 Vern. 146; *Ruggles v. Sherman*, 14 John. 446; *Giles v. Perryman*, 1 H. & G. 168; *Gaither v. Welch*, 3 G. & J. 259.