

creditor himself. (a) Had *Walter Clagett*, who thus became a creditor of *Samuel W. Clagett*, made this claim; the circumstance of his having delivered up the surplus, and the great length of time which had elapsed, from the delivery on the 9th of April 1819 until the institution of this suit, without accounting for the unqualified manner of the delivery, and the delay, would have been considered as a complete bar. But, in this case, the statute of limitations, as such, cannot properly be applied; because, that statute is a defence given to a debtor against a creditor; and here it is not the creditor himself who makes the claim. Yet the result of what this defendant claims a right to do would be the same as if the executor of *Walter Clagett* were here, as plaintiff, asking payment and to have his claim sustained against these parties as defendants. And, consequently, whatever defence they would, in such case, be permitted to make, they ought, as plaintiffs, to be allowed to have the benefit of in the form in which the matter is now presented, at least so far as to bind this defendant.

I am therefore of opinion, that the circumstances, and lapse of time raise a conclusive presumption, that this claim of *Walter Clagett* either never existed or has been satisfied.

Whereupon it is *decreed*, that the injunction heretofore granted in this case be and the same is hereby made perpetual; and it is further decreed that the defendant pay unto the plaintiffs their costs to be taxed by the register.

(a) *Robinson v. Tonge*, 3 P. Will. 400; *Gist v. Cockey*, 7 H. & J. 139.

EX PARTE STREET.—This petition was filed by John Street on the 3d of April 1806, under the act of 1735, ch. 72, s. 4, stating, that John Cook deceased had devised his land to be sold for the payment of his debts without authorizing any one to make the sale; that the personal estate of Cook had been exhausted; and that the petitioner, as his executor, had paid debts to a much greater amount than the assets which came to his hands. The real estate was accordingly decreed to be sold. After which the case having been brought before the court for further directions, as to the distribution of the proceeds of sale among the creditors:

17th June, 1809.—KILTY, Chancellor.—The rule as stated by the auditor, of giving a priority to claims against the deceased to those which arise to the executor from an overpayment of the personal estate, was established by the late Chancellor. It has been departed from since, in cases where such overpayment was made on account of a judgment or other lien; even so far as to put the executor in the place of such creditor to the extent of his lien. In the present case the overpayment does not appear to have been made expressly on account of any such judgment; but inasmuch as there were claims on judgments paid by the executor exceeding the amount of the overpayment, and the other claims now exhibited are not entitled to any preference, it is thought proper to let the executor's claim come in equally with others.