

It has been urged, that the reliance upon the statute of limitations by *The Bank of the United States*, comes too late after the auditor has made a report in favour of the claims they have thus attempted to oppose.

The auditor can be considered in no other point of view than as a ministerial officer of the court; upon whom the Legislature has not, nor cannot confer any portion of the judicial power assigned by the constitution to the Chancellor. The auditor is not only subject to the control of the court, but it is also made his duty to state such accounts as may be desired by either party. The auditor adjudicates upon nothing; but merely puts in order and prepares the materials upon which the court is to decide. His report, therefore, either for or against any claim, can in no manner affect the rights of any party. (l)

According to the course of the court, in a creditor's suit the statute of limitations may be relied on, at any time, by a party or a creditor who has neither done nor permitted any act to be done which must be considered as an express or tacit waiver of such a ground of defence or opposition to the claim. (m) In this case the right to rely upon the statute of limitations has been, in no manner, waived by *The Bank of the United States*, or by any other of the claimants by whom it has been insisted upon.

From this general review it appears, that claims, No. 1, 2, 3, 4, 5, 11, 14, 20, 25, 27, 28 and 37, cannot be affected by any reliance upon the statute of limitations in opposition to them; that claims No. 8, 16, 17, 22, 32, 33, 35 and 36, may be barred as against the whole estate so far as the statute of limitations has been relied upon against them; that claims No. 6, 9, 10, 12, 13, 15, 18, 19, 20, 21, 23, 24, 26, 29, 34 and 37, cannot be barred from having recourse to the personal estate by a reliance on the statute of limitations in opposition to them, although they may be barred as against the realty; and that claims No. 5, 6, 14, 18, 19, 20 and 28, having been established by absolute judgments against the administrator of the deceased have a right to go against the personal estate upon that foundation.

Upon recurring to the exceptions of the parties, it will be seen, that on the 2d of March, 1831, the day on which the auditor's report was filed, the claimants No. 1, 2 and 3, relied on the statute

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(l) *Dorsey v. Hammond*, 1 Bland, 464; *Townshend v. Duncan*, 2 Bland, 45.—(m) *Walch v. Stewart*, 2 Bland, 41.