

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. This, however, is to be understood of the proceedings of the parties to the case, and not of the acts of any of the officers of the court. The auditor has always been considered as the mere ministerial officer of the court, whose powers and duties extend no farther than to prepare and put in order the materials upon which the Chancellor is to adjudicate. Hence, no statement, report, or act of the auditor can affect the rights or interests of a party, plaintiff, or defendant, claimant, or opponent. (*f*)

Upon this ground it has always been held, that the statute of limitations may be presented as a defence, at any time after the claim has been filed or brought before the court, either before the case has gone to the auditor, or after he has made a report on it. (*g*)

(*f*) *Dorsey v. Hammond*, 1 Bland, 469; *Fenwick v. Gibbes*, 2 Desau, 635.

(*g*) *THE STATE v. BROOKES*.—This bill, filed on the 24th of April, 1793, by Luther Martin, the attorney-general on behalf of the state, sets forth, that John Beall was appointed collector of the taxes for Prince George's county, and as such, gave bond with Humphrey Belt and Benjamin Brookes, as his sureties; that Beall having failed to pay over the money he had collected, suits were brought on his bond, and judgment obtained against Benjamin Brookes for a considerable amount, which was then due. That afterwards, Brookes died, having previously, by his will, devised his real estate to his son Robert in tail, remainder to his son Benjamin in tail, subject to a right given to his wife and daughter, as described in the will, of using it and taking a certain portion of the rents and profits thereof; by which will, he appointed his wife Sarah and his brother Henry his executors. The bill further states, that the testator's personal estate was insufficient to pay his debts. Prayer, that the executors might account for the personalty; and that, if it should be insufficient, the real estate might be sold to pay this debt due by the deceased to the state.

The executors and the devisee Robert Brookes, were the only persons made defendants.

9th March, 1796.—HANSON, Chancellor.—The claim of the state aforesaid against the deceased, and the insufficiency of the personal estate to discharge it being established to the Chancellor's satisfaction, and it appearing reasonable under all circumstances, that the land in the bill and answers mentioned, which hath been devised by the deceased to the defendant Robert Brookes, be sold for the payment of the just debts of the deceased. Decreed, that they be sold, &c. &c. and that the trustee give notice to the creditors of the deceased to bring in their claims, &c.

A sale was accordingly made, and before it was reported, the defendant Sarah petitioned that it might not be ratified; because of the objections therein stated. On the 2d of May, 1796, an order was passed appointing a day for hearing, and allowing the parties to take testimony in the usual manner.