

This being so, I can see no reason why the heirs at law of Samuel Hayes may not insist, that his personal estate, as between his personal representatives and themselves, shall be applied in exoneration of the real. And as both the personal and the real estate are now in this court, brought here by the act of the administratrix, it seems to me, this court may now see, that the proper application is made.

If this mortgage debt should be paid by the heirs, they would have a clear right to reimbursement out of the personal estate, and the latter being in this court, no good reason suggests itself, why the proper application should not be made at once, to prevent circuitry, and save expense and delay. It is not that this court usurps the powers of the Orphans Court, but upon a principle of equity, which regards the personal estate as the primary, and natural fund for the payment of debts; and the court will—having both funds under its control—apply them in the order in which, as between the heir and executor, they are liable. 1 *Story's Eq.*, sec. 571.

I think, therefore, this mortgage debt, or the principle thereof, must be paid out of the personal estate, if it is sufficient for the purpose.

I have said, that the principal sums due upon the mortgage to William Seal, should be paid out of the personal estate of Hayes, the mortgagor; but I do not think the interest should be, which accrued between the death of Hayes, and the sales of the property in 1845. During that period the defendants were in possession of the mortgaged property, and acknowledged that they received some profits; though, in their answer they say they received very little;—the profits being applied, as they represent, to keeping in repair, and enlarging the establishment. It appears to me, however, that they ought to have kept down the interest upon the debt, and that the payments which they made on account of interest, and which are stated in the Auditor's statement G. No. 6, must be assumed to have been made out of the profits.

There is another reason why the interest upon the bonds and mortgage to Seal should not be thrown upon the personal estate in the hands of the administratrix of Hayes.