

43 3 *Atk.* 406. But if any one of the heirs, or, according to *our Act of Assembly, any other person claiming the real estate by purchase, be a minor, he cannot be compelled to answer the suit, but the parol shall demur as to all, until each infant attains his full age. 1729, ch. 24, s. 16; *Co. Litt.* 290; 3 *Blac. Com.* 300; *Markal's Case*, 6 *Co.* 4.

It must, however, be borne in mind, that this mode of administering the assets of a deceased debtor, by applying his personal estate first to the payment of his debts, can only be done on a creditor's bill filed in this Court; and according to all the authorities, it is only adopted here for the purpose of preventing that circuitry of action, which would be occasioned if the creditor were permitted to obtain satisfaction from the real estate, and thereby leave the heir to take his place, and go against the personalty for reimbursement. It is founded upon that equity alone, which subsists between the real and personal representatives of the deceased, to have the personal estate, as the primary and natural fund for the payment of debts, first applied for that purpose. And being an equity which arises only as between the heir and executor, it is one by which the rights of a creditor can in no way be affected, and with which he can have no concern; since it is well settled, that upon the establishment of his claim in point of fact, he has a clear legal right to enforce satisfaction, at his election, from either the heir or the executor. The Court has but two points to consider. First, that there is a debt presently due—and secondly, not to sell real estate, while there is personalty available. But this does not mean, that if debts are due to the estate, the creditor is not to be satisfied until they are collected. The Court will order immediate application of such funds as are immediately available, and then resort to the real estate, without waiting for the coming in of other personal effects, which may become capable of being applied, within a shorter or longer period of time. *Clanmorris v. Bingham*, 12 *Cond. Chan. Rep.* 254.

And, therefore, as it is not necessary at law for a creditor to found this title to recover upon any allegation or proof, that the executor has not a sufficiency of assets, *Davy v. Pepys*, *Plow.* 439; so it cannot be necessary, that he, the creditor, should make and sustain any such allegation to enable him to obtain satisfaction out of the real estate by the aid of a Court of Chancery. On the contrary, according to the English precedent, so far from the creditors alleging an insufficiency of the personal estate for the payments of debts, as a foundation * for a sale of the realty for **44** that purpose, it is there usually charged, in a creditor's bill, that the deceased's personal estate was more than sufficient to satisfy all his debts, as well those due by specialty as by simple contract, &c.; but, that if the personal estate be insufficient, that then the specialty debts be paid out of the deceased's real estate,