

the assets shewn to be in the hands of *Joseph Allender*, on the 23d of January, 1824, had been consumed chiefly or altogether by these very heirs and next of kin of the deceased, who are now here as defendants resisting the payment of this claim from the real estate in their hands. (s)

A creditor cannot be held bound to guarantee the faithful and proper administration of his deceased debtor's estate; and therefore where, without any fault or connivance of his, the executor or administrator wastes the personalty, the entire residue of the estate real and personal must be held as absolutely liable to such creditor, in all respects, as if no such waste had been committed, or as if the estate had been justly applied in a due course of administration. (t) But here, under these circumstances, a court of equity cannot, certainly, tolerate such a defence as this, that there was originally a sufficiency of personal estate to pay all the debts of the deceased, coming, as it does, from defendants who are both heirs and next of kin, and for whose maintenance and education the personal estate had been thus reduced, so as to exclude a creditor from the real estate in their hands, upon the ground of there having been originally a sufficiency of personal estate to pay the debt. Because if there has been, in contemplation of law, a waste of the personal estate, it was a misapplication of it in which they have largely participated; and because, if there has been any negligence in the plaintiff *Tessier*, it was a sort of indulgence by which they have been greatly benefited. Such a defence comes with an exceedingly ill grace from those of these defendants who are the heirs and next of kin of the deceased; and therefore cannot, under the circumstances in which they stand, be allowed to avail them, or the defendant *Riston* who claims under them, in any way whatever; (u) but the real estate in their hands must be held liable, as in cases where a third person is held liable, because of his collusion with the administrator in misapplying the assets. (w)

It is here stated and admitted, that the administratrix *Rachel Wyse* had in her hands all the personal estate of the debtor *William Wyse* deceased; and that she died without having accounted for what she admitted she had in her hands on the 29th of June, 1816.

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(s) *Allender v Riston*, 2 G. & J. 86.—(t) *Hardwick v. Mynd*, 1 Anstr. 112.—(u) *Williams v. Williams*, 9 Mod. 300; *Daniel v. Skipwith*, 2 Bro. C. C. 155.—(w) *Elmalie v. M'Aulay*, 3 Bro. C. C. 624; *Doran v. Simpson*, 4 Ves. 651; *Alsager v. Rowley*, 6 Ves. 749; *Benfield v. Solomons*, 9 Ves. 86.