

real assets which have come to their hands. It is a mortgagee from some of the heirs, and an heir who makes this defence against this claim.

As regards the mortgagee, it is perfectly clear, that he might, at any time, have sued for and recovered his claim by bill for a foreclosure and sale, or otherwise; or he might, by a creditor's suit, have called before the court the creditors of the deceased, in order to have the property, so far as it had been mortgaged to him, relieved from their prior claims, by having them satisfied or rejected, so as to have the surplus applied in satisfaction of his claim. This mortgagee cannot, therefore, be permitted to complain of the negligence of this creditor, when it is so perfectly obvious, that he might have had him called before the court, and thus compelled to receive satisfaction for his, this mortgagee's, benefit. It is equally well settled, that a next of kin or heir may, by a creditor's suit, have the personal and real estate administered in equity, in order to have the estate cleared of the claims of creditors, so that what remains, may be at once awarded to him, or distributed among all such next of kin or heirs of the deceased. And, consequently, it is no less clear, that a next of kin, or an heir, can in no way, be allowed to complain of the mere negligence of a creditor in not enforcing payment from the personal or real assets of his deceased debtor. (b)

And even supposing these defendants to stand in any way as sureties for the payment of this debt to the plaintiff *Tessier*; then, as sureties, they might by a bill *quia timet*, have compelled these plaintiffs to have sued and obtained satisfaction from the person first liable, or from the proper fund, so as to save them, these defendants, harmless. Therefore, considered even as sureties, these defendants cannot complain of the mere forbearance of their creditors; and thus have shewn no cause to impute to these plaintiffs negligence or misconduct of any kind whatever.

Perhaps these defendants by the charge of negligence and misconduct, and by the averment, that the plaintiffs have no such claim as the testator's real estate can be charged with, intend to take defence upon the ground, that having failed to allege and shew the insufficiency of the personalty, the real estate of the testator cannot be made liable for the payment of this debt. This is a case in which a creditor, in behalf of himself and other credi-