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A TREATISE

ON

THE LAW

OF

EXECUTORS AND ADMINISTRATORS.

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EXECUTORS AND ADMINISTRATORS.

BY

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(NOW ONE OF THE JUDGES OF HER MAJESTY'S COURT OF COMMON PLEAS).

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PART THE THIRD.

OF THE POWERS AND DUTIES OF AN EXECUTOR OR ADMINISTRATOR.

BOOK THE FIRST.

OF THE POWER AND AUTHORITY OF AN EXECUTOR OR ADMINISTRATOR.

CHAPTER THE FIRST.

OF THE POWER AND AUTHORITY OF AN EXECUTOR OR ADMINISTRATOR GENERALLY.

AFTER the administration is granted, the power of an administrator is equal to, and with, the power of an executor (*a*).

Power of executor or administrator to bring actions.

It has already appeared in the course of the inquiry into the quality and quantity of the estate of an executor or administrator, that, as an executor or administrator has the same property in the personal effects as the deceased had when living, so he has the same power to bring actions to recover them (*b*).

(*a*) Touchst. 474.

(*b*) *Ante*, p. 663, *et seq.* In Cobbett, Executor of Boxall *v.* Clutton and another, 2 C. & P. 471, a relation of the defendants had in his possession a box containing papers belonging to the deceased: The box, with its contents, was sent by him to the office of the defendants, who were solicitors, to be delivered to the plaintiff, as executor, on his giving a schedule of the deeds contained in the box: The plaintiff demanded the box and its

It is clear that an executor *de son tort* cannot bring any action in right of the deceased (*c*).

Power of executor to enter the house of the heir.

Within a convenient time after the testator's death, or the grant of administration, the executor or administrator has a right to enter the house descended to the heir, in order to remove the goods of the deceased (*d*); provided he do so without violence; as, if the door be open, or at least the key be in the door; and, although the door of entrance into the hall and parlour be open, he cannot therefore justify forcing the door of any chamber, to take the goods contained in it; but is empowered to take those only which are in such rooms as are unlocked, or in the door of which he shall find the key (*e*). He has, also, a right to take deeds and other writings relative to the personal estate out of a chest in the house if it be unlocked, or the key be in it; but he has no right to break open even a chest. If he cannot take possession of the effects without force, he must desist, and resort to his action (*f*). On the other hand, if the executor or administrator, on his part, be remiss in removing the goods within a reasonable time, the heir may distrain them as *damage feasant* (*g*).

Power of executor to distrain.

Where a lessee for years underlets the land and dies, his

contents from the defendants, but they refused to deliver it up, unless the plaintiff would give them a schedule of its contents: And Lord Tenterden held that the defendants had no right to insist on the inventory, before they gave up the box; that the plaintiff, as executor, was entitled to the possession of the papers of the deceased; and that being so, he was entitled to bring an action of trover, on the defendants' refusal to give them up.

(*c*) Bro. Abr. Admon. 8. It should, however, be observed, that an executor *de son tort*, being in possession of goods of the deceased, has sufficient title to maintain an action for taking them away, or injuring them, against a mere wrong doer. See *ante*, p. 243.

(*d*) Wentw. Off. Ex. 202, 14th edit.

(*e*) *Ibid.* Toller, 255.

(*f*) Wentw. Off. Ex. 81, 202, 14th edit.

(*g*) Wentw. Off. Ex. 202, 14th edit. Plowd. 280, 281. Stodden v. Harvey, Cro. Jac. 204.

personal representative may distrain, at common law, for the arrears of rent which became due in the lifetime of the deceased; because these arrears were never severed from the reversion, but the executor or administrator has the reversion, and the rent annexed thereto, in the same plight as the deceased himself had it: and it is not like a reversion which descends to the heir, while the arrears go to the executor or administrator (*h*).

But, at common law, the executors or administrators of a man seised of a rent-service, rent-charge, rent-seck, or fee-farm, in fee-simple, or fee-tail, or for his own life or *pur auter vie*, could not distrain for the arrears incurred in the lifetime of the testator or intestate (*i*). To remedy this, the statute 32 Hen. VIII. c. 37, was passed, which, after reciting that, "Forasmuch as by the order of the common law, the executors or administrators of tenants in fee-simple, tenants in fee-tail, and tenants for term of lives, of rent-services, rent-charges, rent-secks, and fee-farms, have no remedy to recover such arrearages of the said rents or fee-farms as were due unto their testators in their lives, nor yet the heirs of such testator, nor any person having the reversion of his estate after his decease may distrain, or have any lawful action, to levy any such arrearages of rents or fee-farms due unto him, in his life as is aforesaid; by reason whereof the tenants of the demesne of such lands, tenements or hereditaments, out of the which such rents were due and payable, who of right ought to pay their rents and farms at such days and terms as they were due, do many times keep, hold, and retain such arrearages in their own hands, so that the executors and administrators of the persons to whom such rents or fee-farms were due, cannot have or come by the said arrearages of the same towards the payment of the debts and performance of the Will of the said testator;" proceeds to enact, "That the executors and administrators of every such person or persons unto whom any such rent or fee-farm, is or shall be due, and

32 H. VIII. c. 37:

Executors, &c. may have action, and distrain for rent due to their testator in his lifetime:

(*h*) Wade *v.* Marsh, 1 Roll. Abr. 672, tit. Distress, (O.) 13. S. C. Latch. 211.

(*i*) Co. Lit. 162, *a*.

32 H. VIII. c. 37.

not paid at the time of his death, shall and may have an action of debt for all such arrearages, against the tenant or tenants, that ought to have paid the said rent or fee-farms so being behind in the life of their testator, or against the executors and administrators of the said tenants; and also, furthermore, it shall be lawful to every such executor and administrator of any such person or persons unto whom such rent or fee-farm is or shall be due, and not paid at the time of his death as is aforesaid, to *distrain* for the arrearages of all such rents and fee-farms, upon the lands, tenements, and other hereditaments which were charged with the payment of such rents or fee-farms, and chargeable to the distress of the said testator, so long as the said lands, tenements or hereditaments continue, remain and be in the seisin or possession of the said tenant in demesne, who ought immediately to have paid the said rent or fee-farm so being behind, to the said testator in his life, or in the seisin or possession of any other person or persons claiming the said lands, tenements and hereditaments, only by and from the same tenant by purchase, gift, or descent, in like manner and form as their said testator might or ought to have done in his lifetime, and the said executors and administrators shall, for the same distress, lawfully make avowry upon their matter aforesaid."

distress for a rent, the estate whereof dependeth upon another's life being dead.

And by section 4. of the statute, it is enacted, that, "if any person or persons which now have, or hereafter shall have, any rents or fee-farms for term of life or lives of any other person or persons, and the said rent or fee-farm, now be, or hereafter shall be due, behind, and unpaid in the life of such person or persons for whose life or lives the estate of the said rent or fee-farm did depend or continue, and after the said person or persons do die, then he unto whom the said rent or fee-farm was in due form aforesaid, his executors or administrators, shall and may have an action of debt against the tenant in demesne, that ought to have paid the same when it was first due, his executors and administrators, and also distrain for the same arrearages upon such lands and tenements, out of the which the said rents or fee-farms were issuing

and payable, in such like manner and form as he ought or might have done, if such person or persons by whose death the aforesaid estate in the said rents and fee-farms was determined and expired, had been in full life and not dead; and the avowry for the taking of the same distress to be made in manner and form aforesaid."

In an early case (*k*) upon the construction of this statute, it was considered, that it did not extend the remedy by distress to those persons who had remedy by action of debt at common law; and therefore it was said, that the executors of tenant for life could not distrain (*l*). However, in Hil. Term, 8 & 9 Wm. III., the Court of C. B. denied the resolution in the above case to be law; and laid down that the statute is remedial, and shall extend to all tenants for life; And that the law had always been taken to be so since the statute, and had never been questioned (*m*).

The statute applies only to cases in which the owner of the rent, if he had lived, might have distrained; and, therefore, if the rent be in arrear, and the owner grants away his interest and dies, his executors or administrators shall have no remedy for these arrearages (*n*).

The statute gives the power of distress upon the lands out of which the rent is reserved, so long as they continue in the hands of him from whom the rent is due, or of any person representing or claiming title through or under him, by purchase, gift, or descent, *ad infinitum* (*o*): But they cannot be distrained upon for such rent, if they be in the hands of one claiming paramount to him; and therefore, if the lord enter upon the grantor for an escheat, the land shall not be distrained upon for arrears of rent (*p*). So where a man makes a lease for life, rendering rent, remainder for life, remainder in fee, and after the accruing of rent from the first

(*k*) Turner *v.* Lee, Cro. Car. 471.

(*l*) See *ante*, p. 697, that executors of tenant for life of a rent could bring debt at common law.

(*m*) Hool *v.* Bell, 1 Lord Raym. 172. See Co. Lit. 162, *a*. 162, *b*. and Mr. Hargrave's notes, (298,) (299.)

(*n*) Co. Lit. 162, *b*. Ognell's case, 4 Co. 50, *b*.

(*o*) Co. Lit. 162, *b*. Ognell's case, 4 Co. 50, *b*.

(*p*) Co. Lit. 162, *b*.

tenant for life, the lord dies and then the tenant for life dies, the executors cannot distrain upon the remainder-man; because he claims not by or from the tenant for life (*q*). And if tenant in tail grants a rent for life, and die, the executor of the grantee cannot distrain upon the issue in tail, who comes in under the original gift in tail, and not under the grantor of the rent (*r*). But if a man grant a rent-charge to A. for the life of B., and lets the land to C. for life, the remainder to D. in fee, the rent is in arrear for many years, B. dies, and afterwards C. dies; A. may distrain D. in remainder for all the arrears, by the latter branch of the statute (*s*).

All manner of arrears of rent issuing out of a freehold or inheritance, whether they be in money, or in corn, cattle, fowls, pepper, spurs, gloves, or any other profit to be delivered, are within the statute, and that whether they be annual, or every two, three, or four years; but work-days, or any corporal service or the like, are not within it (*t*). Neither are arrears of a *nomine pœnæ* (*u*).

It has been holden, that rents issuing out of freehold lands are alone within the statute; consequently that it does not extend to enable executors or administrators to distrain for the arrears of rents issuing out of copyhold (*v*).

(*q*) Co. Lit. 162, *b*.

(*r*) Lambert *v*. Austin, Cro. Eliz. 333. Lord Fairfax *v*. Lord Derby, 2 Vern. 612.

(*s*) Co. Lit. 162, *b*. Edrich's case, 5 Co. 118.

(*t*) Co. Lit. 162, *b*.

(*u*) *Ibid.*

(*v*) Appleton *v*. Doily, Yelv. 135. Bull. N. P. 57. But in Gilb. Ten. 186, 187, 188, there is the following passage: "In the supplement to my Lord Coke's Treatise of Copyholds, (s. 21, Tracts 216,) it is said that the 32 Hen. VIII. c. 8, concerning remedies for arrears of rent, extends not to copyholds. To prove which, a case is cited in 2 Leon. 109, which is this: A lord of a manor, whereof were divers copyholders, granted a rent-charge for life, and afterwards made a feoffment of the manor to J. S. in fee, who granted a copyhold for life to B.; J. S. died, and the grantee of the rent died, and his executors distrained for the arrears in B.'s copyhold lands; and it is there said, it was held by the Court, that the distress was not well taken; and the reason is, because the words of the statute are *claiming only by and from him;* and the copyholder doth not only claim by his grantor, but by custom. This opinion, as it seems, was upon the first hearing of the cause; for the very case is reported quite contrary

Distress by executor of lessor who has leased for a [term] or at will.

If a man makes a lease for life or lives, or a gift in tail, reserving a rent, this is a rent-service within the statute of Hen. VIII. (*w*) But whether if a person seised in fee of land demises it for years, reserving rent, his executor or administrators could, under this statute, distrain for arrears of rent incurred in his lifetime, was a question which had been much discussed (*x*), and was not settled until the cases of ***Prescott*** v. ***Boucher*** (*y*), and ***Jones*** v. ***Jones*** (*z*), which decided the point in the negative; on the ground that the deceased was not tenant in fee simple, or indeed tenant at all, ***of the rent.***

3 & 4 W. IV. c. 42.

But now by statute 3 & 4 Wm. IV. c. 42, s. 37, it is enacted, "that it shall be lawful for the executors or administrators of any lessor or landlord to distrain upon the lands demised for any term, or at will, for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime."

By sect. 38, it is further enacted, "that such arrearages

by the same reporter, 2 Leon. 152. 3 Leon. 59. Moor. 812; and it is said to be resolved by all the Judges but Fenner, that the copyhold should be charged with the rent-charge; for the custom is no part of his title, but only appoints how he shall hold; and since it was charged in the lord's hands, it is plainly within the intent and meaning of the Act, as well as the words, to be charged in the copyholder's hands; and to this purpose there is a case in Dyer, 270, *b.* adjudged. But if the case were adjudged, that the lands should not be charged in the copyholder's hands on that reason, that he doth not claim only by and from, &c., but by custom; yet that would never warrant so general a conclusion, that the statute in no other part should extend to copyholds, and that if a rent were granted out of a copyhold in fee, and the grantee died, that his executors should not have debt or distrain. But turn the tables, and if the Act of Parliament doth in point extend to copyholds, as lands that are claimed by, &c., and that which in this case only doth make a doubt, is overruled, then this is a strong argument, that in other cases, where that is not which occasioned the doubt, the statute shall extend to copyholds, especially since the Act was made to remedy an apparent wrong, and doth no harm either to lord or tenant."

(*w*) Co. Lit. 162, *b.*

(*x*) Renvin *v.* Watkin, Selw. N. P. 678, 8th edit. Powell *v.* Killick, *ibid.* Bull. N. P. 57. Crockerell *v.* Owerell, Holt, 417. Meriton *v.* Gilbee, 8 Taunt. 159. S. C. 2 Moore, 48. Martin *v.* Burton, 1 Brod. & Bingh. 279. S. C. 3 Moore, 608. Staniford *v.* Sinclair, 2 Bingh. 193. S. C. 9 Moore, 376.

(*y*) 3 B. & Adol. 849.

(*z*) 3 B. & Adol. 967.

may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined, provided that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due; provided also, that all and every the powers and provisions in the several statutes made relating to distresses for rent shall be applicable to the distresses so made as aforesaid."

Executor of administrator who has underlet.

If an administrator makes an underlease of a term of years of the deceased, reserving rent to himself, his executors, &c., it has been held that his executors, and not the administrator *de bonis non*, shall have the rent; but it should seem that they cannot distrain for it (*a*); because the reversion belongs to the administrator *de bonis non;* and a reversion is necessary to found the remedy by distress (*b*).

The executor has an absolute power over the whole personal estate:

It is a general rule of law and equity, that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate; and that they cannot be followed by creditors, much less by legatees, either general or specific, into the hands of the alienee (*c*). The principle is, that the executor or administrator, in many instances, *must* sell, in order to perform his duty in paying debts, &c.: and no one would deal with an executor or administrator, if liable afterwards to be called to account (*d*).

(*a*) Drue *v.* Baylye, 1 Freem. 392, 403. S. C. 2 Lev. 100. 1 Ventr. 275. 3 Keb. 298, 427, 463, 495, 549. See *ante*, p. 783, 784.

(*b*) See Brawley *v.* Wade, 1 M'Clel. 664. Preece *v.* Corrie, 5 Bingh. 24. Pluck *v.* Digges, 2 Dow. & Clark, 180. Burne *v.* Richardson, 4 Taunt. 720.

(*c*) Whale *v.* Booth, 4 T. R. 625, note to Farr *v.* Newman. Nugent *v.* Giffard, 1 Atk. 463. See also Spackman *v.* Timbrell, 8 Sim. 260, where a testator bequeathed leaseholds to his son, and appointed him and another person his executors: Three years after the testator's death, the son settled the leaseholds, on his marriage: And Sir L. Shadwell, V. C., held that as against the son's wife and children, the property was not liable to the testator's creditors.

(*d*) By Lord Mansfield in Whale

The power of the executors to dispose of a chattel specifically bequeathed seems to have been formerly questioned (*e*); but succeeding cases appear to have established it beyond dispute (*f*).

even specific legacies:

As an executor may absolutely dispose of the testator's assets for the general purposes of the Will, there seems no good reason why, in the exercise of a sound discretion, and presuming the language of the Will does not peremptorily require an absolute sale, the executor may not raise the

he may mortgage the assets:

v. Booth. So if a temporary executor or administrator has sold the goods there is no remedy against the vendees: Chandler *v.* Thompson, Hob. 266: unless the transaction be fraudulent, as where an administrator *durante minore ætate* sold East India stock, and the buyer had full notice that it was the stock of the infant: Munn *v.* Dunkin, Finch. R. 298. See *infra*, p. 799.

(*e*) Humble *v.* Bill, 2 Vern. 444. This case was decided in favour of the power of the executor in the Court of Chancery, but the decree was reversed in the House of Lords. That reversal, however, has been dissented from by Sir J. Jekyll in Ewer *v.* Corbet, 2 P. Wms. 149, and by Lord Alvanley in Andrew *v.* Wrigley, 4 Bro. C. C. 137, where his Lordship observed, that when the decree was set aside, there was no lawyer in the House of Lords, except, *perhaps*, Lord Somers.

(*f*) Ewer *v.* Corbet, 2 P. Wms. 149. Burting *v.* Stonard, 2 P. Wms. 150. Langley *v.* Lord Oxford, Ambl. 17. Sir E. Sugden in his Treatise on Vendors and Purchasers, (vol. ii. p. 56, 9th edit.) considers it doubtful whether it is safe to take an assignment of a specific legacy from the executor without the concurrence of the specific legatee, lest the executor should have assented to the bequest: and he cites Tomlinson *v.* Smith, Finch. 378. But Mr. Coote (Mortg. 178, n. (*e*),) observes that that was a case of gross fraud; and concludes from all the cases, that if a purchaser or mortgagee shall *bonâ fide* deal with an executor, within a reasonable time after the testator's death, and obtain possession of the muniments of title, a specific legatee would never be permitted, at law or in equity, to set up the executor's assent against the sale or mortgage; for by sale and delivery, the title of the purchaser or mortgagee is complete. However, the general rule certainly is that, at law, the title to any specific thing bequeathed, vests, upon the assent of the executor, absolutely in the legatee, so as to enable him to bring an action of ejectment for a chattel leasehold, or trover for the goods which are the subject of the legacy. (See *post*, Pt. v. Bk. II. Ch. I.) And even in equity, if the legatee, after the assent, were to assign to a *bonâ fide* purchaser, the title of such an assignee would, it should seem, be better than that of any subsequent purchaser from the executors. (See *post*, Pt. III. Bk. III. Ch. IV. § III.)

money required by a partial sale or mortgage of the assets (*g*). And, accordingly, the power of an executor or administrator to mortgage the assets has been recognised by high authorities, on several occasions (*h*). The mortgage may be either of legal or equitable assets (*i*), or of mere *choses in action* (*k*), and may be by actual assignment, or by deposit (*l*).

a purchaser from an executor is not bound to see to the application of the purchase-money:

Again, it is not incumbent on the purchaser or mortgagee of the assets to see the money properly applied, although he knew he was dealing with an executor (*m*). "It is of great consequence," said Lord Thurlow, in *Scott* v. *Tyler* (*n*), "that no rule should be laid down here which may impede executors in their administration, or render their disposition of the testator's effects unsafe or uncertain to a purchaser: His title is complete by sale and delivery: *what becomes of the price is of no concern to him.* This observation applies equally to mortgages or pledges, and even to the present instances where assignable bonds were merely pledged without assignment" (*o*).

(*g*) Coote on Mortg. 179.

(*h*) By Lord Hardwicke in Mead *v.* Orrery, 3 Atk. 239: by Lord Thurlow in Scott *v.* Tyler, 2 Dick. 725: and by Lord Eldon in M'Leod *v.* Drummond, 17 Ves. 154: but see the remark of Lord Loughborough in Andrew *v.* Wrigley, 4 Bro. C. C. 138.

(*i*) Nugent *v.* Giffard, 1 Atk. 463. Coote on Mortg. 180.

(*k*) Scott *v.* Tyler, 2 Dick. 724.

(*l*) *Ibid.* Coote on Mortg. 180.

(*m*) Macleod *v.* Drummond, 17 Ves. 154. It is clear, therefore, that in the purchase or mortgage-deed, a recital of the purpose for which the money was raised is unnecessary: Bonney *v.* Ridgard, cited in 4 Bro. C. C. 130. S. C. 1 Cox, 148.

(*n*) 2 Dick. 725.

(*o*) It was indeed said by the M. R., in Elliot *v.* Merriman, Barnard. Ch. Rep. 81, that "personal estate may be clothed with such a particular trust, that it is possible the Court of Chancery, in some cases, may require a purchaser to see the money rightly applied; and Lord Kenyon, in Bonney *v.* Ridgard, 4 Bro. C. C. 101. 1 Cox, 147, seems to have approved this *dictum.* But see the observation of Lord Hardwicke in Mead *v.* Orrery, 3 Atk. 235, 239, and 1 Rop. Leg. 379, 3rd edit. It has been lately held by Lord Lyndhurst, C., that if an authority is given to sell real estate for the payment of debts and legacies, the purchaser is not bound to see to the application of the purchase-money, even though he knows that the debts are paid. Forbes *v.* Peacock, 1 Phill. 717, (reversing the decision of Shadwell, V. C., 12 Sim. 528.) See also Page *v.* Adam, 4 Beav. 269.

Exceptions to the general power of the executor or administrator to dispose of the estate of the testator or intestate will be found in those cases only where *collusion* exists between the purchaser, or mortgagee, and the personal representative. That an executor may waste the money is not alone sufficient to invalidate the sale or mortgage; it must further appear that the purchaser or mortgagee participated in the *devastavit*, or breach of duty in the executor (*p*).

exception where there is collusion between the purchaser and the executor:

Fraud and covin will vitiate any transaction, and turn it to a mere colour. If, therefore, a man concerts with an executor, by obtaining the testator's effects at a nominal price, or at a fraudulent undervalue, or by applying the real value to the purchase of other subjects, for his own behoof, *or in any other manner*, contrary to the duty of the office of executor, such concert will involve the seeming purchaser or pawnee, and make him liable to the full value (*q*).

Thus, where the person to whom the executor collusively passes the property, knows that the executor is acting in violation of his trust, and in fraud of the persons interested in the due administration of the assets, the fraud vitiates the transaction, and the attempt to transfer the property is ineffectual and void: Therefore, in *Doe* v. *Fallows* (*r*), where an administratrix, being indebted to an attorney for rent, executed to him a mortgage of leasehold property belonging to her intestate, which falsely recited that *300l.* was paid as a consideration; and the next of kin, not knowing the facts, were induced by misrepresentation, to execute the mortgage; and the jury at the trial found that the deed had not been fairly obtained; the Court of Exchequer held, that the mortgagee was not entitled to recover in ejectment against the next of kin, because of the fraud; nor against the administratrix, who was the widow of the intestate, as to her

(*p*) Whale *v.* Booth, 4 T. R. 625, note.

(*q*) By Lord Thurlow in Scott *v.* Tyler, 2 Dick. 725. See also the stat. 43 Eliz. c. 8, (*ante*, p. 212,) as to treating the collusive purchaser as an executor *de son tort*.

(*r*) 2 Crompt. & Jerv. 481. S. C. Tyrwh. 460.

share of the term, because, as the accounts of the estate had not been wound up, it could not be ascertained whether there would be any surplus, or any part which would belong to the widow (*s*).

whether a sale in satisfaction of executor's private debt be valid:

Whether in the instance of the executor or administrator aliening the property of the deceased to pay his own debt to the alienee, that circumstance in itself shall be considered conclusive as to the collusion, is a point upon which the decisions of law and equity must, perhaps, be considered at variance. At law, (although it is allowed, that if there be any *contrivance* between an executor or administrator and his own creditor, to enable the former to commit a *devastavit*, that fact excepts the case out of the general power of the executor or administrator to dispose of the estate) (*t*), it has been laid down, that the executor may make a valid sale of the effects in satisfaction of his own private debt, although the purchaser knew the goods sold were the goods of the testator or intestate (*u*). But in equity it seems to be now established, (in contradiction, as it should appear, to some former cases) (*v*), that, generally speaking, the executor or administrator can make no valid sale or pledge of the assets as a security for, or in payment of his own debt: on the principle that the transaction itself gives the

(*s*) It is submitted, with great deference, that the correctness of this decision may be doubted. Surely the assignment of the term passed the legal estate from the administratrix to the lessor of the plaintiff; and, therefore, he was entitled to recover at law, though the assignment might be void *at law* as against the execution of the creditors of the intestate, against the goods of the intestate; or, *in equity* as against the next of kin.

(*t*) See the observations of Lord Mansfield, in Whale *v.* Booth; and of Bayley, B., in Doe *v.* Fallows, 2 Cr. & J. 483. 2 Tyrwh. 462.

(*u*) Whale *v.* Booth, 4 T. R. 625, in notes. Farr *v.* Newmann, 4 T. R. 642, 645. But Lord Mansfield intimated, in Whale *v.* Booth, that if the purchaser *knew the debts were unpaid*, it would be a fraud and vitiate the sale. The rule, as laid down by Bayley, B., in delivering the judgment of the Court in Doe *v.* Fallows, 2 C. & J. 483. 2 Tyrwh. 462, is, that the executor may make an effectual disposal of the assets in consideration of a debt of his own, and to discharge his own debt, if there be no fraud in the creditor in accepting of such disposal.

(*v*) Nugent *v.* Gifford, 1 Atk. 463. 4 Bro. C. C. 136. Mead *v.* Lord Orrery, 3 Atk. 235. Ithell *v.* Beane, 1 Ves. Sen. 215.

purchaser or mortgagee notice of the misapplication, and necessarily involves his participation in the breach of duty (*w*).

If the executor be also specific legatee, a sale or mortgage from him of the specific legacy for satisfaction of his private debt will be safe, unless it can be shown that the purchaser or mortgagee knew there were debts unpaid (*x*).

where there is collusion, legatees as well as creditors may follow the assets:

Where there exists such collusion as to render the dealing invalid, not only a creditor, but a legatee, whether general or specific, is entitled to follow the assets (*y*). But they must enforce their right within a reasonable time, or it will be barred by their acquiescence (*z*).

an executor cannot purchase the assets from himself.

An executor cannot be allowed, either immediately or by means of a trustee, to be the purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased (*a*).

Power of executors to assign leases:

It is a general rule, deducible from the principles which have been above investigated, that executors and administrators may, by virtue of their office, dispose absolutely of terms for years, which are vested in them in right of their testators or intestates (*b*); and may make a good title, even against a specific legatee, unless the disposition be fraudu-

(*w*) Bonney *v.* Ridgard, 1 Cox, 145, 148. Scott *v.* Tyler, 2 Dick. 724. S. C. 2 Bro. C. C. 433. Hill *v.* Simpson, 7 Ves. 152. Andrew *v.* Wrigley, 4 Bro. C. C. 136, by Lord Alvanley. M'Leod *v.* Drummond, 17 Ves. 154, 170, by Lord Eldon. Keane *v.* Robarts, 4 Madd. 357, 358, by Sir J. Leach. Watkins *v.* Cheek, 2 Sim. & Stu. 205. Cubbidge *v.* Boatwright, 1 Russ. Chanc. Cas. 549. Wilson *v.* Moore, 1 M. & K. 337. Eland *v.* Eland, 4 M. & Cr. 427, *per* Lord Cottenham. Pannell *v.* Hurley, 2 Coll. 241.

(*x*) Tayler *v.* Hawkins, 8 Ves. 209. Coote on Mortg. 185.

(*y*) Hill *v.* Simpson, 7 Ves. 152. M'Leod *v.* Drummond, 17 Ves. 169. Wilson *v.* Moore, 1 M. & K. 337.

(*z*) Elliott *v.* Merriman, 2 Atk. 41. S. C. Barnard. Chanc. Rep. 82. Andrew *v.* Rigley, 4 Bro. C. C. 125. M'Leod *v.* Drummond, before Sir W. Grant, 14 Ves. 353, 359, 363. S. C. before Lord Eldon, 17 Ves. 152.

(*a*) Hall *v.* Hallett, 1 Cox, 134. Watson *v.* Toone, 6 Madd. 153: but see Mackintosh *v.* Barber, 1 Bingh. 50. S. C. 7 Moore, 315. *Post*, p. 817.

(*b*) Bac. Abr. Leases, (I.) 7.

lent: So an executor or administrator may make an underlease of such term by leasing it for a fewer number of years, and the rent reserved shall be assets in his hands, and go in a course of administration (*c*). And if the executor or administrator dies without having administered the whole estate, it is not in the power of the executor of such executor, or the administrator *de bonis non*, to avoid any such disposition made by the executor or administrator during his life.

and make underleases:

what underleases by executors are good in equity:

But in a case in the Court of Chancery in Ireland (*d*), where the children and widow of an intestate had agreed to divide his personal estate, including a lease of a farm for years, according to the Statute of Distributions, and afterwards the widow, not being disposed to abide the arrangement, took out administration, and leased the farm at an undervalue to a person who had express notice of the agreement between the widow and children, and that she was by them called on to sell the intestate's interest in the farm; Lord Manners, C., set aside the lease on the application of the children, and expressed his opinion that even if the lease were at full value, yet, being taken by a person having notice that a sale was called for, it could not be sustained.

In another case in the same Court (*e*), a testator being possessed of a house and other leasehold property, directed that the rents of the house should be applied to discharge the head-rent payable for the other premises: In the year 1794, one of his executors granted a lease of the house for thirty years: In the year 1809, the other executor granted a reversionary lease of the house, which was to take effect on the expiration of the lease of 1794, to a lessee with full notice: And Sir E. Sugden, Chancellor, set the latter lease aside: And, in giving his judgment, his Lordship observed, that many circumstances would justify an executor in equity in granting a lease, instead of selling the premises; and he

(*c*) *Ibid.* But see Magrane *v.* Archbold, 1 Dow. 107.

(*d*) Drohan *v.* Drohan, 1 Ball & Beat. 185.

(*e*) Keating *v.* Keating, 1 Lloyd & Goold, 133.

(the learned Judge) would sustain such a lease by an executor simply acting in a due administration of the assets: but that a person could not be permitted to hold a reversionary lease from an executor with full notice, without showing that such lease was properly granted by the executor in the due administration of his office.

It should be observed, that it has been held that a bequest of leaseholds to executors, *upon trust to sell*, and to invest the proceeds for the benefit of persons, some of whom are infants, will not enable them to grant an underlease: And the Court of Chancery will not enforce performance of an agreement to take such underlease (*f*).

when the power of an executor to assign or underlet is restrained by a condition not to assign, &c.

It remains to consider how far this power of the executor or administrator to assign or underlet may be restrained by the provisions contained in the lease itself. If a lease be made for a term of years, *upon condition*, that if the lessee shall assign his term without the assent of the lessor, it shall be lawful for the lessor to re-enter, the term shall nevertheless vest in the executor or administrator of the lessee, without any breach of such condition (*g*): But a question arises, whether when a lease for years with a condition or covenant restraining alienation or underletting, comes into the hands of the executor or administrator, he is warranted in assigning or making an underlease of it. Where the executor or administrator is *named* in the condition or covenant, he is bound thereby: Therefore, if a lease contain a proviso, that the lessee, his executors and administrators shall not set, let, or assign over the whole or part of the premises, without leave in writing, on pain of forfeiting the lease, the executor or administrator of the lessee cannot assign or underlet, unless

(*f*) Evans *v.* Jackson, 8 Sim. 217.

(*g*) Parry *v.* Harbert, Dyer, 45, *b.* S. C. 4 Leon. 5. Windsor *v.* Burry, Dyer, 4, 15, *in margine.* S. C. cited in Pannel *v.* Fen, Moor. 351. It has been questioned, whether a bequest of a term by Will to a *specific legatee* is not a breach of a condition not to alien: *Ibid.* Knight *v.* Mory, Cro. Eliz. 60. Barry *v.* Stanton, Cro. Eliz. 330. Berry *v.* Taunton, *ibid.* 331: but see Fox *v.* Swann, Style, 483. Crusoe *v.* Bugby, 3 Wils. 237. Doe *v.* Bevan, 3 M. & S. 361.

by leave in writing, without incurring a forfeiture (*h*). So if the lessee covenant that he, his executors or administrators, shall not assign, without license, except by his or their last Will and testament, and the lessee makes his Will and dies, the executors will be bound by the covenant, and cannot sell the term for payment of debts without the license of the lessor (*i*). But if the executors or administrators are not *named* in the proviso or covenant, it may be doubted whether the restriction will extend to them (*k*). Thus, in an anonymous case in Dyer (*l*), a question was asked upon these words in a lease, "And it shall not be lawful for the lessee to give, sell, or grant his estate and term to any person without the leave of the lessor, upon pain of forfeiture of his said term;" the lessor and lessee die, and the executor sells the term without the leave of the heir: And it was holden, that this is out of the case of forfeiture, because the restraint was only during the lives of the lessor and lessee: And yet it was agreed in the bench, that the words above make a condition (*m*). So in *Seers* v. *Hind* (*n*), a point arose whether executors were warranted in disposing of a lease, as assets of the testator, where there was a proviso against alienation by the lessee: And Lord Thurlow said, "if A. lets a farm to B. with covenant not to alien, and B. dies, may not his executors dispose of it? I think it has been determined that they may; and I have always taken it as clear law. It is an alienation by the act of God. I remember, Lord Camden entered into the question much in the same way. He took it to be clear law, that an alienation by death could not be a forfeiture. In case of a lease for years to A., it goes to his executor, not by way of limitation, as in the case of a remainder over, &c. but as coming in the place of the lessee. I understood it to be well settled, as I have stated." But

(*h*) Roe *v.* Harrison, 2 T. R. 425. See also Doe *v.* Bevan, 3 M. & S. 357.

(*i*) Lloyd *v.* Crispe, 5 Taunt. 249.

(*k*) 2 T. R. 429, by Ashhurst, J. See also Phillips *v.* Everard, 5 Sim. 102.

(*l*) P. 66, *a.* pl. 8.

(*m*) See also Touchst. 133.

(*n*) 1 Ves. Jun. 294.

where a lease was made for years upon condition that the lessee, his executors or *assigns*, should not alien without the consent of the lessor, an assignment by the *administrator* of the lessee, was held a breach of the condition; on the ground of the administrator being an assignee within the condition (*o*).

It was laid down by Lord Chancellor Northington, in *Northcote* v. *Duke* (*p*), that, in order to operate a forfeiture for a breach of the condition not to assign, the executor must have notice of the condition: In that case the lease was for ninety-nine years, determinable upon three lives, and it contained a proviso, that if the lessee, his executors, administrators or assigns, should lease for more than seven years without a license, the lessor might re-enter: The lease itself was in the hands of a third person, and the executor, in ignorance of the proviso, granted a lease for fourteen years: His Lordship said, that the party taking the estate as executor, was like the case of an heir taking a freehold, and ought to have notice of the condition, in order to affect his interest by way of forfeiture for breach of the condition. But the authority of this case has been doubted (*q*).

As to the question, whether in case a term for years be forfeited by reason of the executor or administrator assigning or underletting without license, relief can be obtained in equity; the general rule is, that a Court of Equity will not afford any relief against a forfeiture occasioned by assigning without license (*r*). However, where a lease contained a covenant, that if the lessees should let the premises for any longer period than three years, except to the wife or children of the lessee, without license of the lessor and his assigns first had, then the said lease should be void, and the exe-

(*o*) Sir Wm. More's case, Cro. Eliz. 26. S. C. And. 123. S. P. by Walmsley, J., in Thornhil *v.* Adams, Cro. Eliz. 757. See also Anon. Moor. 44, pl. 136.

(*p*) 2 Eden. 319. S. C. Ambl. 511.

(*q*) See The Touchstone by Atherley, p. 284, note ¶.

(*r*) Lovat *v.* Lord Ranelagh, 3 Ves. & Beam. 24. White *v.* Warner, 2 Meriv. 459. Reynolds *v.* Pitt, 19 Ves. 14.

cutor of the lessee sold the lease for the payment of the debts of his testator, the plaintiff, the purchaser, was relieved against the forfeiture (*s*).

Executor may indorse a bill of exchange.

A promissory note or bill of exchange made payable to the deceased or his order, may be indorsed by his executor or administrator (*t*). And, generally speaking, there is no difference between an indorsement of a note by the deceased and one by his personal representative (*u*).

Executor may sign a bankrupt certificate.

An executor may sign a bankrupt certificate: but a person who has a debt in his own right, and another debt as executor, cannot sign the certificate twice in two distinct rights; for both are to be considered as his own particular debt (*v*).

Bankrupt executor cannot, without an order, prove against his own estate:

Again, a bankrupt who is the executor of his creditor, cannot, without an order of the Court, prove under his own commission; nor can he vote in the choice of assignees; nor, it has been said, sign his own certificate; for it has been considered a rule, that where an order is necessary to enable the party to prove, he cannot vote or sign the certificate (*w*).

Quære, whether he may vote, or sign his own certificate.

But in a late case (*x*), where one of two executors and trustees had proved under an order of the Court, against the estate of his co-executor, and afterwards died, it was held by the Court of Review, that the bankrupt, as surviving executor, might sign his own certificate. In a case where a bankrupt executor had proved under his own commission, without an order, and upon that proof signed and carried his certificate,

(*s*) Cox *v.* Brown, 1 Chanc. Rep. 170: but *quære*, whether there was any forfeiture in this case: see *ante*, p. 804.

(*t*) Rawlinson *v.* Stone, 3 Wils. 1. S. C. 2 Stra. 1260.

(*u*) Watkins *v.* Maule, 2 Jac. & Walk. 243.

(*v*) *Ex parte* De Sausmarez, 1 Atk. 85. *Ex parte* Stracey, 1 Rose, 66.

(*w*) *Ex parte* Shaw, 1 Glyn & Jam. 127. *Ex parte* Wyatt, 2 Deac. & Ch. 211.

(*x*) *In re* Lawrence, 1 Mont. & A. 453.

Lord Chancellor Eldon ordered the proof to be expunged, and sent the certificate back to the commissioners (*y*). Where the bankrupt is one of several executors, and has before his bankruptcy received a part of the assets, the other executors may obtain an order to prove the amount under the commission (*z*).

Executor of bankrupt cannot take out a commission for debt due to testator.

The executor of a bankrupt, unless the commission against his testator has been superseded, cannot take out a commission of bankrupt for a debt due to his testator; for such debt vested in the assignees, and consequently, the executor is not entitled at law to be the petitioning creditor (*a*).

Executors cannot exercise a power of sale by attorney.

Wherever a power is given, if a personal trust and confidence be thereby reposed in the donee to exercise his own judgment and discretion, he cannot refer the power to the execution of another: for *delegatus non potest delegare:* Therefore, where a power of sale is given to executors, they cannot sell by attorney (*b*).

Power of executors of assurer to re-assure.

By the statute 19 Geo. II. c. 37, s. 4, re-insurance on ships is declared generally unlawful; but in case the assurer shall die, his executors or administrators may make re-assurance to the amount of the sum before by him assured, provided it shall be expressed in the policy to be a re-assurance. The intention of the legislature, in making this exception in favour of executors and administrators, seems to have been to provide a fund to satisfy the assured in case of a loss, without it's falling on the estate of the deceased (*c*).

(*y*) *Ex parte* Marshal, 1 Glyn. & Jam. 163, note (*a*). In *Ex parte* Colman, 2 Deac. & Ch. 584, the assignees were ordered to pay the dividends into the hands of the Accountant General, to the credit of a cause pending for the administration of the assets.

(*z*) *Ex parte* Brown, 1 Deac. & Ch. 118. And in *Ex parte* Phillips, 2 Deac. 334, it was laid down by the Court of Review, that an executor may prove against a bankrupt co-executor, without an order.

(*a*) *Ex parte* Goodwin, 1 Atk. 100.

(*b*) Combe's case, 9 Co. 75, *b*. 1 Sugd. Powers, 222, 6th edit.

(*c*) See Park on Insurance, 421, 7th edition.

Power of executors of assured to procure indorsement of policy.

In the case of a person insured against fire, the policy of insurance and interest therein shall continue to his heir, executor, or administrator respectively, to whom the property insured shall belong, provided, before any new payment be made, such heir, executor, or administrator, shall procure his right to be endorsed on the policy at the office, or the premium be paid in the name of the heir, executor or administrator (*d*).

Power of election by executor.

An executor may in some cases claim by election; as where the testator, at the time of his death, was entitled out of several chattels to take his choice of one or more to his own use (*e*). If the thing, of which the election is given, is to be done *unicâ vice*, the election ought to be at the time (*f*): So if nothing passed or vested in the grantee, &c., before his election, it ought to be made in the life of the parties (*g*): As if a man gives to A. such of his horses, as A. and B. shall choose, the election ought to be in the life of A. (*h*) But where an interest vests immediately by the grant, &c., election may be made by the heir or executor, as well as by the party himself (*i*). As if a fine be of one hundred acres, and the conusee renders fifty to the conusor for years, his executor may choose which fifty he will have (*j*). If a man gives one of his horses to A. and B., after the death of A., B. may choose which he will take; for an interest vested in them immediately by the gift (*k*). So if the election determines only the manner or degree in which the grantee shall have the thing, his heir or executor, as well as the party himself, may make it; for in such case the interest vests immediately (*l*).

(*d*) Park on Insurance, 662, 7th edition.

(*e*) Toller, 174.

(*f*) Com. Dig. Election (B.) Co. Lit. 145, *a*.

(*g*) *Ibid.*

(*h*) Morris *v.* Levesay, 1 Roll. Abr. 726, tit. Election (C.) pl. 6. Com. Dig. Election (B.)

(*i*) Com. Dig. Election (B.)

(*j*) 1 Roll. Abr. 725, tit. Election, (C.) pl. 4. Com. Dig. *ubi supra.*

(*k*) 1 Roll. Abr. 725, tit. Election, (C.) pl. 5. Com. Dig. *ubi supra.*

(*l*) Com. Dig. *ubi supra.* Co. Lit. 145, *a*.

As if a lease be granted to A. for ten or twenty years, as he shall elect, the executor is entitled to the election (*m*). So if A. makes a lease for years to B. of forty acres, parcel of sixty, the election may be made by B.'s executor (*n*). So if the thing, of which election is given, is annual, and to have continuance, the heir or executor may make the election (*o*).

(*m*) Toller, 174.

(*n*) Jones *v.* Cherney, 1 Freem. 530.

(*o*) Com. Dig. *ubi supra.* Co. Lit. 145, *a*.

CHAPTER THE SECOND.

OF THE POWER AND AUTHORITY OF ONE OF SEVERAL EXECUTORS OR ADMINISTRATORS.

Co-executors.

CO-EXECUTORS, however numerous, are regarded in law as an individual person; and, by consequence, the acts of any one of them, in respect of the administration of the effects, are deemed to be the acts of all (*a*); for they have all a joint and entire authority over the whole property (*b*). Hence a release of a debt by one of several executors is valid, and shall bind the rest (*c*). So a grant or a surrender of the term by one executor shall be equally available (*d*). So the attornment of one shall be the attornment of the other (*e*).

(*a*) Touchst. 484. 3 Bac. Abr. 30. Exors. (C.) 1. Wentw. Off. Ex. 206, 14th edition. *Ex parte* Rigby, 19 Ves. 462. "As between executors," says Lord Hardwicke, "there can be no division of their interest or authority; for though a man may appoint executors in such a manner, that their authority may commence or determine at different times, yet he cannot nominate persons executors, and confine one of them to one branch of his estate, and another to another; for they have a joint authority, which extends to the testator's whole estate, and cannot be divided into distinct and separate powers: Owen *v.* Owen, 1 Atk. 495. But see *ante*, p. 205.

(*b*) 3 Bac. Abr. 30, tit. Executors, (D.) 1. Wentw. Off. Ex. 213, 14th edition. 1 Roll. Abr. 924. Exors. (O.) Com. Dig. Administration, (B. 12.) Owen *v.* Owen, 1 Atk. 495.

(*c*) Anon. Dyer, 23, *b. in margine,* Jacomb *v.* Harwood, 2 Ves. Sen. 267. Where an action was brought by two out of four executors, and the two executors, who were not joined in the action, released the defendant, who pleaded the release *puis darrein continuance;* the Court of Exchequer refused to set aside the plea, the plaintiffs having failed to make out a case of fraud: Herbert and another *v.* Pigott, 2 Cr. & M. 384. S. C. 4 Tyrwh. 285.

(*d*) Dyer, 23, *b., in margine,* Simpson *v.* Gutteridge, 1 Madd. 616. See Turner *v.* Hardey, 9 M. & W. 770. *Post*, p. 813, n. (*x*).

(*e*) *Ibid.* So if one executor gets possession of the goods, and pays debts with his own money as far as the amount of them, this is a conversion of the goods of the testator to his own use, and justifiable by this executor against his co-executor: Dyer, 23, *b. in margine.*

And the sale or gift of one of several executors, of the goods and chattels of the deceased, is the sale and gift of them all (*f*). Again, it is said, in the marginal notes of Lord Chief Justice Treby to Dyer (*g*), that if one of several executors confess the action, judgment shall be given against all (*h*): But in a case decided, Mich. T. 3 Geo. I. (*i*), there were three executors, one of whom gave a warrant of attorney to confess a judgment against himself and his co-executors, pursuant to which a judgment was entered against all the executors *de bonis testatoris* for the debt, and against the executor who gave the warrant, *de bonis propriis* for the costs; upon motion to set this aside, it was held to be ill: for executors may plead different pleas (*k*), and that which is most for the testator's advantage shall be received (*l*). Further, it has been held that if one of two executors appointed by the obligee delivers a bond to a stranger in satisfaction of a debt due from himself and dies, although the debt, as a *chose in action*, could not pass by the assignment, yet by this delivery the party has such an interest in the instrument, that he may justify the detention of it as against the surviving executor (*m*).

In a modern case (*n*), where one of several executors assigned to a creditor of the testator a debt due to the testator's estate, it was holden by Sir W. Grant, that such an assignment was not available against the dissent of the other executors: His Honor observed, that if the single

(*f*) Touchst. 484. Kelsock *v.* Nicholson, Cro. Eliz. 478, 496. Dyer, 23, *b. in margine.* Murrell *v.* Cox, 2 Vern. 570.

(*g*) P. 23, *b.*

(*h*) See also the judgment of Sir John Leach, V. C., in Simpson *v.* Gutteridge, 1 Madd. 616: and Lepard *v.* Vernon, 2 V. & B. 54.

(*i*) Elwell *v.* Quash, Stra. 20.

(*k*) See *infra,* Pt. v. Bk. II. Ch. I.

(*l*) See Baldwin *v.* Church, 10 Mod. 323.

(*m*) Kelsock *v.* Nicholson, Cro. Eliz. 478, 496. S. C. Moor. 422. Dyer, 23, *b. in margine.* If there be any fraud between the executor and the creditor, and there be not assets besides to pay all the debts and legacies, there, perhaps the other executor may have remedy in equity against his co-executor and the creditor: Touchst. 484. See *ante,* p. 799, *et seq.*

(*n*) Lepard *v.* Vernon, 2 V. & B. 51.

executor had parted with any portion of the property to the particular creditor, who by such an assignment had obtained a *legal* advantage, it could not, perhaps, be taken from him; but in the present case there was merely an assignment of a *chose in action*, of which no use could be made without the assistance of a Court of Equity; and that a Court of Equity would not interfere to give a particular creditor an advantage against the other executors and the general creditors.

An assent to a legacy by one of several executors is sufficient (*o*). So, also, if one of several executors be a legatee, his single assent to his own legacy will vest the complete title in himself (*p*). Again, if the subject be entire, and be given to all the executors, the assent of one of them to his own proportion will be sufficient (*q*).

If one executor sign the certificate of a bankrupt, his co-executor will be bound (*r*).

By stat. 8 & 9 Vict. c. 91, the Bank of England may require all the executors, who have proved the Will, to join and concur in any transfer of stock standing in the name of their testator (*s*).

how far the act of one executor can impose a charge on his companion.

Again, there has already been occasion to show (*t*), that the act of one of two executors, in possessing himself of the testator's effects, is the act of the other, so as to entitle him to a joint interest in possession, and a joint right of action, if the effects are afterwards taken away: But it should be observed, that the act of one in taking possession of a chattel real or personal of the testator, cannot create a new *liability*, and impose a charge on the other personally, and in his own individual character, which, without such act, would never have existed. Therefore, if one executor takes possession of and uses a personal chattel, the other is not liable to the

(*o*) Godolph. Pt. 2, c. 30, s. 8, p. 245. Wentw. Off. Ex. 413, 14th edition. Com. Dig. Administration, (C. 8.)

(*p*) 1 Roll. Abr. 618, tit. Devise, (B.) pl. 2. Townson *v.* Tickell, 3 B. & A. 40.

(*q*) Pannel *v.* Fen, 1 Roll. Abr. 618, Devise, (B.) pl. 3. 1 Rop. Leg. 734, 3d edition.

(*r*) Powell *v.* Evans, 5 Ves. 844. Eden. B. L. 397, 2d edition.

(*s*) See *ante*, p. 689.

(*t*) *Ante*, p. 778.

creditors for such act of his co-executor. So if one executor enter and enjoy land demised, and take the profits beyond the rent, the other executor will not be chargeable with the amount as assets to the creditors; but the one who actually received will alone be responsible (*u*). Hence, it appears, that with respect to the creditors, the actual possession and use by one of two executors is not in law the possession and use by both, so as to attach a liability upon both: Accordingly if, instead of disposing of a term of the testator, one of the executors takes the actual possession of and enjoys the land demised, such enjoyment is not by law the possession and enjoyment by both, and it does not render both chargeable to the lessor to pay a compensation to him for it, as joint occupiers in their own right (*v*).

The question how far a *devastavit* or receipt of assets by one of several executors can create a liability and impose a charge on his companions, will be considered hereafter, when the subject of the Liabilities of Executors occurs (*w*).

One of several executors cannot bind the others by his contract.

It should be further observed, that though one of several executors may dispose of the assets so as to bind the assets, it is not to be inferred that one of several executors is the agent of the others, so as to bind them by his several contracts (*x*).

(*u*) See *post*, Pt. IV. Bk. II. Ch. II. § II.

(*v*) Nation *v.* Tozer, 1 Crompt. M. & R. 172. S. C. 4 Tyrwh. 561.

(*w*) *Post*, Pt. IV. Bk. II. § II.

(*x*) Turner *v.* Hardey, 9 M. & W. 770. This was an action for use and occupation, for a quarter's rent from Lady-day to Midsummer, 1841, to which the defendant pleaded that by an agreement made between the plaintiffs, executors of T., and the defendant, the defendant agreed to take of the plaintiffs, executors as aforesaid, the premises in question; and that it was afterwards agreed between them and W., that W. should become tenant to the plaintiffs from Lady-day, 1841, and that the defendant should be discharged from all liability to subsequent rent; and that the defendant accordingly gave up possession to W., and the plaintiffs accepted him as tenant; and it was held, that this plea was not proved by evidence that *one* of the plaintiffs had so agreed to accept W. as tenant in lieu of the defendant. But this case must not be understood as deciding that one of several executors may not alone accept a surrender of a term, the reversion of which belongs to them as executors. See 11 M. & W. 773, *per* Parke, B.

Co-administrators.

A distinction was taken by Lord Hardwicke in *Hudson* v. *Hudson* (*y*), between the power of one of several administrators, and one of several executors, with reference to the latter arising wholly from the testator, and the former wholly from the Ordinary: And his Lordship laid down, on the authority of Lord Bacon (*z*), that as an administration was in the nature of an office, so if granted to several, they must join in executing the acts of their office; and, therefore, the release of one would not bind the others, as in the case of co-executors. But in the subsequent case of *Willand* v. *Fenn* (*a*), it was held in the King's Bench, after three arguments, that one of several administrators stands on the same ground and foundation with one of several executors. And this decision was recognized by Sir John Strange, M. R., in *Jacomb* v. *Harwood* (*b*).

Survivor of several executors or administrators.

The power of an executor is not determined by the death of his co-executor, but survives to him (*c*). And so likewise, if administration has been granted to two, and one dies, the other will be sole administrator, and all the power of the office will survive to him (*d*).

Exercise of power given to several executors to sell land:

when one of them renounces:

The ordinary functions incident to the office of executor may be exercised by one of several appointed executors, although the others renounce: Yet, at common law, where a power was given by Will to executors to sell land, and one of them refused the trust, it was clear that the others could not sell (*e*). But the statute 21 Hen. VIII. c. 4, provides, that where lands are willed to be sold by executors, and part of

(*y*) 1 Atk. 460.

(*z*) Elements, vol. iv. p. 83.

(*a*) Cited by Sir John Strange, M. R., in 2 Ves. Sen. 267. See a MS. report of the case in Selw. N. P. 767, note (8), 6th edition.

(*b*) 2 Ves. Sen. 267, 268. See also Touchst. 485, 486. However, Sir John Nicholl seems, on more than one occasion, to have adverted to the distinction as still existing: See Warwick *v.* Greville, 1 Phillim. 126. Stanley *v.* Bernes, 1 Hagg. 222.

(*c*) Flanders *v.* Clarke, 3 Atk. 509. S. C. 1 Ves. Sen. 9.

(*d*) Hudson *v.* Hudson, Cas. temp. Talb. 127. *Ante*, p. 390.

(*e*) Co. Lit. 113, *a*.

them refuse to be executors, and to accept the administration of the Will, all sales by the executors that accept such administration shall be as valid as if all the executors had joined. The terms of the statute are, that where part of the executors named in a Will, declaring lands, tenements, or hereditaments to be sold by executors "do refuse to take upon him or them the administration and charge of the same testament and last Will wherein they be so named to be executors, and the residue of the same executors do accept and take upon them the cure and charge of the same testament and last Will, that then all bargains and sales of such lands, tenements, or other hereditaments, so willed to be sold by the executors of any such testator, as well heretofore made, as hereafter to be made by him or them only of the said executors, that so doth accept, or that heretofore hath accepted, and taken upon him or them any such cure or charge of administration of any such Will or testament, shall be as good and as effectual in the law as if all the residue of the same executors named in the said testament, so refusing the administration of the same testament, had joined with him or them in making of the bargain and sale of such lands, tenements, or other hereditaments so willed to be sold by the executors of any such testator which heretofore hath made or declared, or that hereafter shall make or declare any such Will of any such lands, tenements or other hereditaments, after his decease, to be sold by his executors." Upon this statute, Lord Coke observes (*f*), that although the letter of it extend only to cases where executors have a power to sell, yet being a beneficial law, it is by construction extended to cases where lands are devised to executors to be sold (*g*).

In the case of *Denne* v. *Judge* (*h*), a testator devised land to five trustees to sell and apply the money to certain uses, and afterwards made the same persons executors; the question was, whether the land passed under deeds of lease and release, purporting to have been executed by all the five

(*f*) Co. Lit. 113, *a*.

(*g*) See *ante*, p. 549.

(*h*) 11 East, 288

trustees, but in fact executed by three of them only: and it was urged that the case was within the above statute of 21 Hen. VIII. c. 4: But Lord Ellenborough said, that the statute was passed to remedy the inconvenience where some of the executors refuse to act; but in the present case there was no such refusal: Besides, the estate was not devised to them as executors, to be sold, but as devisees, though they were also appointed executors: They had nothing to do with the land as executors (*i*).

If, however, the fund, when raised, had been distributable by them in that character, it would have been otherwise, as far as respects the latter objection to the application of the statute. Thus in *Bonifaut* v. *Greenfield* (*k*), where the testator devised land to four persons and their heirs to sell, and apply the money to the performance of the Will, and, in the conclusion of the Will he appointed the four his executors, it was held, that, on the refusal of one of them to act, a sale by the other three was good.

It is said by Lord Coke (*l*), that although one executor refuses, the others cannot sell to him, because he is party and privy to the Will, and remains executor still. But that position must now be considered as overruled by the late decision of the Court of Common Pleas, in *Mackintosh* v. *Barber* (*m*): In which case it was further decided, that executors to whom a power is given to sell, may, at law, sell to a trustee for themselves, or may sell to one of themselves; and an appointment accordingly cannot be impeached at law. Whether such an appointment can be supported in equity, must depend upon the circumstances under which the sale was made (*n*).

exercise of power by sur-

Again, it has appeared that if one of two executors dies,

(*i*) But taking the conveyance to be by the three trustees only, it severed the joint-tenancy, and conveyed three-fifths of the estate to be held in common with the two remaining parts.

(*k*) Cro. Eliz. 80.

(*l*) Co. Lit. 113, *a*.

(*m*) 1 Bingh. 50. S. C. 7 Moore, 315.

(*n*) 1 Sugd. on Powers, 141, 6th edit.

the office survives to his co-executor (*o*). But it is necessary further to inquire, whether, if a power is given to several executors, and one of them dies, the power can be exercised by the survivors or survivor. It is regularly true at common law, that a naked authority given to several cannot survive (*p*). Therefore, if a man devise his lands to A. for life, and that after his decease the estate shall be sold by the executors, naming them, as by B. and C. his executors, or by B. and C. who are not named executors, in that case, if one of them die during the life of A., the other cannot sell; because the words of the testator would not be satisfied (*q*). But where this can be effected, a Court of law will relax the rule. Therefore, if three or more executors are appointed, and the devise is, that the estate shall be sold by the executors generally, there the survivors may sell because the plural number of executors remains (*r*).

viving executors:

Again, although the authorities are conflicting (*s*), there are not wanting cases to support the validity of the exercise of a power given to executors by a single survivor (*t*). Mr. Hargrave in a note to Co. Lit. (*u*) strongly contends that where a power of selling is given to *executors*, or to persons *nominatim* in *that character*, the survivor may sell, as the power is annexed to them *ratione officii;* and as the office survives, by parity of reason the authority should also survive. And the author of the "Treatise on Powers" (*v*) observes, that the liberality of modern times will probably induce the Courts to hold, that in every case where the power is given *to executors*, as the office survives, so may the power (*w*). The same distinguished writer proceeds to state

by a single survivor.

(*o*) *Ante*, p. 814.

(*p*) 1 Sugd. Pow. 141, 6th edit.

(*q*) Co. Lit. 113, *a.* 1 Sugd. Pow. 141, 6th edit.

(*r*) Co. Lit. 113, *a.* 1 Sugd. Pow. 142, 6th edit.

(*s*) See a case in Dyer, 219, pl. 8, *in margine.* Lock *v.* Loggin, 1 And. 145.

(*t*) Houel *v.* Barnes, Cro. Car. 382. S. C. *nom.* Barnes' case, W. Jones, 352, pl. 3. Anon. 2 Leon. 220, pl. 276. Milward *v.* Moore, Sav. 72: and see Anon. Dyer, 371, *b.* pl. 3. 1 Sugd. Pow. 142, 6th edit. See also Eaton *v.* Smith, 2 Beav. 236.

(*u*) 113, *a.*

(*v*) 1 Sugd. Pow. 144, 6th edit.

(*w*) So where the power to exe-

as the result of the cases, that where the authority is given to "executors," and the will does not expressly point to a joint exercise of it, even a single surviving executor may execute it: But where the authority is given to them *nominatim*, though in the character of executors, yet it is at least doubtful whether it will survive (*x*).

equitable relief.

However, in cases where the power is extinguished, it is well established that equity will interpose to prevent the consequences (*y*). "This," says Mr. Hargrave, "has long been the practice of our Courts of Equity; these rightly deeming the purposes for which the testator directs the money arising from the sale to be applied, to be the substantial part of the devise, and the persons named to execute the power of selling to be mere trustees; which brings the case within the general rule of equity, that a trust shall never fail of execution for want of a trustee, and that if one is wanting, the Court shall execute the office. The relief is administered by considering the land, in whatever person vested, as bound by the trust, and compelling the heir, or other person having the legal estate, to perform it."

Executors must all join in bringing actions.

If there are several executors appointed by the Will, they must all join in bringing actions (*z*); even though some be

cutors to sell arises by implication, (see *ante*, p. 549, 550,) the power to the survivor to sell will arise in the same way. Forbes *v.* Peacock, 11 M. & W. 630.

(*x*) In the case of Townsend *v.* Wilson, 1 B. & Ald. 608. S. C. 3 Madd. 261, where a power of sale was reserved by a settlement to three trustees, and *their heirs*, and there was a power to appoint new trustees, it was held by the Court of King's Bench that two surviving trustees could *not* execute the power, although the money was directed to be paid to the trustees, or the survivor or survivors of them, or the executors, administrators or assigns of such survivor. The decision was disapproved by Lord Eldon in Hall *v.* Dewes, Jacob. 189: but acted upon by the Vice Chancellor in Bradford *v.* Belfield, 2 Sim. 271, and in Cooke *v.* Crawford, 13 Sim. 91, 98. See Smith *v.* Leigh, 6 Moore, 214. Jones *v.* Price, 11 Sim. 557.

(*y*) 1 Sugd. Pow. 144. 2 Sugd. Pow. 173, 174, 6th edit.

(*z*) Bro. Exors. 88.

infants (*a*), or have not proved the Will (*b*), or have refused before the Ordinary (*c*). But if one of several executors should sue alone, the defendant can only take advantage of it by pleading in abatement, after oyer of the probate, that the other executor mentioned therein is alive not named (*d*). If the defendant pleads the general issue, he is too late; he cannot then come at the fact of there being another executor (*e*).

when one executor may sue the other:

Generally speaking, it is clear that one executor cannot sue or be sued by his co-executor (*f*): neither, after the death of one of several executors, can his executor be sued by the surviving co-executors for a debt due to their testator (*g*). Nevertheless, if a debtor makes his creditor and another his executors, and the creditor neither proves the Will, nor acts as executor, he may bring an action against the other executor (*h*): nor is it necessary, to enable him so to do, that he should renounce before the Ordinary (*i*).

on bond given as a security on loan of assets by one to the other.

In *Gleadow* v. *Atkin* (*k*) an action of debt, on a common money bond, was brought by the executor of the obligee against the executor of the obligor: The defendant pleaded that the money mentioned in the condition was part of the personal estate of Cuthbert Thew, deceased, by whom it had been bequeathed to the testator of the plaintiff and the testator of the defendant, and the survivor of them, and the executors and administrators of such survivor, upon trust to put and place the same out at interest, upon such real or

(*a*) Smith *v.* Smith, Yelv. 130. As to one of several executors making a summary application to the Court, see *in re* Bunting, 2 Adol. & Ell. 467.

(*b*) Brookes *v.* Stroud, 1 Salk. 3.

(*c*) Hensloe's case, 9 Co. 37, *a.* Creswick *v.* Woodhead, 4 M. & Gr. 811. The rule is different in equity: See Davies *v.* Williams, 1 Sim. 8, where Sir J. Leach, V. C. is reported to have said, that if one executor has alone proved, he may sue in equity, *as well as law*, without naming the others as parties.

(*d*) 1 Saund. 291, *i.* note to Cabell *v.* Vaughan.

(*e*) *Ibid.*

(*f*) Wentw. Off. Ex. 75, 14th edit. *Ante*, p. 778, 779.

(*g*) Wentw. Off. Ex. 75, 14th edition.

(*h*) Dorchester *v.* Webb, W. Jones, 345.

(*i*) Rawlinson *v.* Shaw, 3 T. R. 557.

(*k*) 2 Crompt. & Jerv. 548. S. C. 2 Tyrwh. 593.

other sufficient security as they might approve of, and to pay the interest, &c. &c.; that the testator of the plaintiff died, leaving the testator of the defendant surviving; whereupon the said personal estate of Cuthbert Thew vested in the defendant's testator, to be by him and his executors and administrators applied according to the trust of the Will of Cuthbert Thew: And it was held, by the Court of Exchequer, on general demurrer, that the plea was bad: the barons being of opinion that the loan by one of the executors to the other was a misappropriation of the fund, for which the executor of the obligee was liable until the money was laid out on real and sufficient security; and consequently that he had a right to sue on the bond to protect himself.

An executor may prove under co-executor's bankruptcy.

In *Ex parte Shakeshaft* (*l*), where a bankrupt and another were executors of the creditor of the bankrupt, Lord Thurlow permitted the solvent executor to prove under the commission, pending a suit in the Ecclesiastical Court as to the executorship, the dividends to be paid into the Bank (*m*). And it has been lately laid down, in the Court of Review, that an executor may prove against a bankrupt co-executor, without an order (*n*).

(*l*) 3 Bro. C. C. 198.

(*m*) See also *Ex parte* Brown, 1 Deac. & Ch. 118. *Ante*, p. 807.

(*n*) *Ex parte* Phillips, 2 Deac. 334.

CHAPTER THE THIRD.

OF THE POWER AND AUTHORITY OF AN EXECUTOR OF AN EXECUTOR:—OF AN ADMINISTRATOR DE BONIS NON: AND OF A LIMITED ADMINISTRATOR.

Executor of executor:

As to the power and authority of the executor of an executor: In all cases, except of special trust and authority without the office of executorship, the executor of an executor, how far soever in degree remote, stands as to the points both of being, having, and doing, in the same state and plight as the first and immediate executor (*a*).

when he can execute a power:

"But where, by a Will," says the author of the Office of an Executor (*b*), "a special trust is recommended to an executor, as to sell land, this not performed in his lifetime shall not be performable by his executor: contrariwise of an interest, as to take the profits of lands for certain years towards payment of debts and legacies" (*c*). In the case of *Cole* v. *Wade* (*d*), real and personal estate were by Will given to two trustees, who were appointed executors, their executors, administrators, and assigns, for the benefit of such relations of the testator as the trustees and executors in their discretion should think proper: And it was declared that the disposition should be entirely in the discretion of the said trustees and executors, and the heirs, executors, and administrators of the survivor of them; and the testator gave power to his trustees and executors, and the survivor of them, and the heirs, executors, and administrators of such

(*a*) Wentw. Off. Ex. c. 20, p. 462, 14th edit.

(*b*) C. 20, p. 462, 14th edit.

(*c*) See also as to this distinction between an interest and an authority only, Stile *v.* Tomson, Dyer, 210, *a.*

(*d*) 16 Ves. 27.

survivor, to sell or mortgage the estates; and the trustees (by name), or the survivor of them, or the heirs, executors, or administrators of such survivor, were to convey and pay the whole to the relations within fifteen years: The surviving trustee, by his Will, devised the first testator's real estate to A. and B., their heirs and assigns, and his personal estate to them, their executors, administrators, and assigns, upon the trusts of the first Will, and appointed them his trustees for that specific purpose only: and it was contended, that they might execute the power: The Master of the Rolls (Sir W. Grant), decided the contrary: he said, that wherever a power is of a kind that indicates a personal confidence, it must *primâ facie* be understood to be confined to the individual to whom it is given, and will not, except by express words, pass to others, to whom, by legal transmission, the same character may happen to belong: The power was not appendant to the estate; by itself it was incapable of alienation; and it was only *quasi personæ designatæ* that it could go to the heir: The devisees did not answer that description: The power, therefore, was not vested in them (*e*).

a personal trust:

In *Down* v. *Worral* (*f*), a testator gave his residuary personal estate to the trustees named in his Will, their executors, administrators, and assigns, upon trust to apply the same as he should appoint; and in default of appointment as to any part, he directed *the trustees* to settle such part at their discretion, either for pious and charitable purposes, or otherwise for the benefit of the testator's sister and her children: And it was held, by Sir J. Leach, M. R., that this was a personal trust, which a representative of the surviving trustee could not execute, and that a sum which remained at the decease of the surviving trustee, and which had not been applied either to charitable purposes, or for the benefit of the testator's sister and her children, was undisposed of, and belonged to the testator's next of kin (*g*).

(*e*) 1 Sugd. Pow. 148, 6th edit. This opinion of Sir W. Grant was approved of by Lord Eldon, in Walter *v.* Maunde, 19 Ves. 425.

(*f*) 2 M. & K. 561.

(*g*) This case, it should seem,

With respect, however, to a power to sell land, Mr. Hargrave, in a note to Coke upon Littleton (*h*), cites some authorities (*i*) to show that such a power given to the executors shall pass to their executors or administrators. Again, it has appeared in a former part of this Treatise, that a power in a Will to sell or mortgage, without naming a donee, will, unless a contrary intention appear, vest in the executor, if the fund is to be distributable by him (*k*): And it seems, that in such case, the executor of the executor may sell, the intent being, that the power shall be executed by him to whose hands the money is to come (*l*).

a power annexed to an interest.

Where a power is annexed to an interest in the donee, and is originally authorized to be executed by the donee of the power *and his assigns*, the power will pass with the interest to any person who comes to the estate under him, although there be twenty mesne assignments; and whether the claimant is an assignee in fact, or an assignee in law, as an heir or executor (*m*). In a case where, upon a fine, the use of lands was limited to A. for eighty years, with a power to A. and his assigns to make leases for lives; and A. assigned over to B., who died, and made C. his executor, and then the executor assigned over to D.; it was holden, that D. might well exercise the power (*n*).

Power of administrator *de bonis non.*

With regard to the power and authority of an administrator *de bonis non*: By the grant of that species of administration, the administrator becomes the only personal representative of the original deceased: and, with respect to the estate left unadministered by the former executor or administrator, he has the same power and authority as the original represen-

turns on the circumstance that there was a mere personal direction given to the trustees. See Titley *v.* Wolstenholme, 7 Beav. 425, 433. See further on this subject, Cooke *v.* Crawford, 13 Sim. 91.

(*h*) 113, *a.*

(*i*) Kelw. 44. 2 Brownl. 194.

(*k*) *Ante*, p. 549. See also Tylden *v.* Hyde, 2 Sim. & Stu. 238.

(*l*) 1 Sugd. Pow. 134, 6th edit. 1 Pow. Dev. 243, Jarman's edit.

(*m*) 1 Sugd. Pow. 223, 6th edit.

(*n*) Howe *v.* Whitebank, 1 Freem. 476. S. C. 1 Ventr. 338, 339. T. Jones, 110. 2 Show. 57.

tative; for he succeeds to all the legal rights which belonged to the former executor or administrator in his representative character (*o*).

Power of limited and of special administrators.

With regard to the power and authority of limited and of special administrators, it is difficult to lay down any general proposition: and little more can be done than to refer to the authorities upon the subject which have already been adduced, in treating of the constitution of these several kinds of administration, with respect to the power of an administrator *durante minore ætate* (*p*), of an administrator *pendente lite* (*q*), and of an administrator limited to substantiate proceedings in equity (*r*).

It is enacted by statute 38 Geo. III. c. 87, s. 7, that the person to whom administration *durante absentiâ* (*s*) shall be granted under the provisions of the Act, shall have the same powers vested in him as an administrator hath by virtue of an administration granted to him *durante minore ætate* of the next of kin.

(*o*) Catherwood *v.* Chabaud, 1 B. & C. 154, by Bayley, J. See *ante*, p. 781—786.

(*p*) *Ante*, p. 403—405.

(*q*) *Ante*, p. 411.

(*r*) *Ante*, p. 435.

(*s*) See *ante*, p. 414.

CHAPTER THE FOURTH.

OF THE POWER OF A FEME COVERT EXECUTRIX OR ADMINISTRATRIX.

THIS subject may be considered in two divisions: 1st, As to the power of a wife, who is appointed executrix or administratrix: 2ndly, As to the power of a husband when his wife is invested with that character.

1. Power of a feme covert executrix.

1. As to the power of a *feme covert* executrix or administratrix. It has appeared in a former part of this Treatise, that a wife cannot, by our law, take upon her the office of executrix or administratrix without the consent of her husband (*a*): And it is now further established, in contradiction to some early authorities (*b*), that since the husband is answerable for the wife's acts, she is not capable, when she has, by his permission, assumed the office of executrix or administratrix, of doing any act of administration to the deceased, which may be to the prejudice of her husband, without his concurrence (*c*). Thus, in *Russel's Case* (*d*), it was resolved, that a release by a *feme covert* executrix is not good. So in *Cookes* v. *Bellamy* (*e*), the Court held, that though anciently it had been a point whether a *feme covert* might not assent to a legacy, yet since *Russel's Case*, they thought it settled that she cannot assent, and they were of the same opinion (*f*). So the gifts and grants of a *feme covert* executrix or adminis-

(*a*) *Ante*, p. 190, 369.

(*b*) Bro. Exors. pl. 178, citing 16 Hen. VII. 5, 6. *Ibid.* pl. 150. *Ibid.* pl. 113. *Ibid.* pl. 101. Bro. Coverture, pl. 52, citing 18 Ed. IV. 10. Kelw. 122, pl. 24. Anon. 1 And. 117, pl. 164.

(*c*) Wentw. Off. Ex. 380, 14th edit. Wankford *v.* Wankford, 1 Salk. 306, by Holt, C. J.

(*d*) 5 Co. 27, *b*.

(*e*) 1 Sid. 188

(*f*) See also Fenner *v.* Dives, 1 Sid. 31.

tratrix are void (*g*); for she cannot, without her husband, dispose of any of the goods of the deceased (*h*).

An executrix may in some instances sell to her husband (*i*). Thus it is laid down by Lord Coke (*k*), "if *cestui que use* had devised that his wife should sell his land and made her executrix and died, and she took another husband, she might sell the land to her husband; for she did it *in auter droit*, and her husband should be in by the devisor."

In the Spiritual Court, the husband need not be joined with the wife as a party to the suit: and it was formerly contended, that, even in the Courts of Common Law, a *feme covert* executrix might sue without her husband (*l*); but the rule is now clearly established there, that a *feme covert* cannot in any case sue alone, with certain known specific exceptions, which do not include the case of a *feme covert* executrix or administratrix (*m*). And the wife must be supposed to be under the control of the husband in the conduct of the suit (*n*).

In a late case in the Prerogative Court (*o*), a married woman, party in a testamentary cause, was permitted to appoint a proctor, in the absence of her husband, on giving security for costs to the other party: The application was founded on an affidavit, that the husband had left this country for the Cape of Good Hope eleven years before, since which time the wife had received no funds from him; that he was believed to have taken up his permanent residence at the Cape; and that he had refused to execute the necessary documents for enabling her to proceed in the cause (*p*). But

(*g*) Wentw. Off. Ex. 381, 14th edit. Jenkins *v*. Plombe, 6 Mod. 93.

(*h*) Com. Dig. Admon. (D.)

(*i*) Bro. Exors. 175.

(*k*) Co. Lit. 112, *a*.

(*l*) Wentw. Off. Ex. 381, 14th edit.

(*m*) Marshall *v*. Rutton, 8 T. R. 945. Boggett *v*. Frier, 11 East, 303.

(*n*) Lee *v*. Armstrong, 9 M. & W. 14. Therefore where a peremptory undertaking to try at a specified time had been given, and the husband afterwards died, it was held that the undertaking was not binding on the wife. *Ibid.*

(*o*) Suter *v*. Christie, 2 Add. 150.

(*p*) See Da Rosa *v*. Da Pinna, 2 Cas. temp. Lee, 390. *Ante*, p. 369.

in a subsequent case (*p*), a motion for administration with the Will annexed to the attorney of a residuary legatee, a married woman, upon her proxy alone, and her husband refusing to join, was rejected.

2. Power of the baron of feme executrix.

2. As to power of the husband of an executrix or administratrix: Since the husband is entitled to administer in his wife's right for his own safety, it follows, that incident to this marital privilege, he has the power of disposition over the personal estate vested in his wife as executrix or administratrix (*q*). Thus, in *Arnold* v. *Bidgood* (*r*), the husband being possessed of a lease of tithes, in right of his wife as executrix, granted all his right, title, and interest in them, and it was determined that they passed to the grantee. So in *Thrustout* v. *Coppin* (*s*) the residue of a term of years being vested in the wife as administratrix, her husband released it to the plaintiff, and the release was held to be good. Upon the same principle the husband may release debts owing to the estate of the testator or intestate (*t*), or may make valid grants or gifts of any part of the personal property of the deceased (*u*). So if a feme executrix takes baron, and the baron puts himself in arbitrement for a debt of the testator, and an award is made, and the baron dies, the feme shall be barred (*v*). So where a stranger laid claim to a term the wife had as executrix to her husband, and her second husband, by writing, submitted the title and interest of his wife to an award, and the arbitrator awarded one moiety to the claimant, and the other moiety to the husband and wife, and the second husband died; it was held, that the wife was bound by the award; for if the husband had granted over the term, such grant would have bound the wife; and consequently the submission in this case, being for the title

(*p*) Bubbers *v.* Harby, 3 Curt. 50.

(*q*) Jenk. Cent. 2, case 79.

(*r*) Cro. Jac. 318.

(*s*) 2 W. Bl. 801. S. C. 3 Wils. 277.

(*t*) Bro. Releases, pl. 29. Bro. Baron and Feme, pl. 80. Russel's case, 5 Co. 27, *b*. Wentw. Off. Ex. 381, 14th edit. 1 Roper, Husb. & Wife, 188, 2d edit.

(*u*) Wentw. Off. Ex. 381, 14th edit.

(*v*) Bro. Releases, pl. 79.

and interest of the term, was the same in effect as if the husband had granted the term over (*w*).

It must be observed, however, that the husband cannot sue in right of the testator or intestate, without joining his wife as a party to the suit (*x*). But this rule admits of exceptions; for if the husband alter the nature of the debt owing to his wife in the character of executrix or administratrix, he alone may bring the action for recovering it. Thus, if he should indulge the debtor with further time, in consideration of an express promise to pay the husband, &c., the money, by the promise, becomes in law his own, and he alone may compel payment of it by action, although the recovery will be a *devastavit*, if the money be not properly administered; so that joining the wife in the action would be error (*y*). He may also sue alone, if the note or security be given to them jointly, as to him and to his wife as executrix or administratrix (*z*).

If the husband and wife recover judgment for a debt owing to the wife as executrix or administratrix, and she die, the succeeding executor or administrator, and not the husband, will be entitled to a *scire facias* upon such judgment; because the wife was entitled to the demand in *auter droit*, and the debt belongs to the new executor or administrator of the testator or intestate (*a*).

(*w*) Dyer, 183, pl. 57, *in margine*.

(*x*) Wentw. Off. Ex. 382, 14th edit. Anon. 1 Salk. 282. Com. Dig. Admon. (D.)

(*y*) Yard *v.* Ellard, 1 Salk. 117. S. C. Carth. 463. 1 Sid. 299. 1 Lord Raym. 368. 1 Rop. Husb. and Wife, 190, 2d edit.

(*z*) Ankerstein *v.* Clarke, 4 T. R. 616.

(*a*) Beamond *v.* Long, Cro. Car. 298.

BOOK THE SECOND.

OF THE DUTIES OF AN EXECUTOR OR ADMINISTRATOR, WITH RESPECT TO THE FUNERAL; THE PROVING OF THE WILL AND THE TAKING OUT ADMINISTRATION; THE INVENTORY; AND THE PAYMENT OF DEBTS.

CHAPTER THE FIRST.

OF THE FUNERAL: OF PROVING THE WILL, AND TAKING OUT ADMINISTRATION: AND OF THE INVENTORY.

SECT. I.

Of the Funeral.

IT is now proposed to consider the Duties of an executor or administrator. And first: He must *bury* the deceased in a manner suitable to the estate he leaves behind him (*a*). Funeral expenses, says Lord Coke (*b*), according to the degree and quality of the deceased, are to be allowed of the goods of the deceased, before any debt or duty whatsoever. But the executor or administrator is not justified in incurring such as are extravagant, even as it respects legatees or next of kin entitled in distribution (*c*): Nor, as against creditors, shall he be warranted in more than are absolutely necessary. In strictness, said Lord Holt, no funeral expenses are allowed in the case of an insolvent estate, except for the coffin, ringing the bell, and the fees of the parson, clerk, and bearers; but

What expenses are allowable as against creditors:

(*a*) 2 Black. Comm. 508.

(*b*) 3 Inst. 202.

(*c*) See Stackpoole *v.* Stackpoole, 4 Dow. 227.

not for the pall or ornaments (*d*); And in the year 1695, it was stated, that Baron Powel, on his circuit, would allow but 11*s*. 6*d*. under a plea of *plene administravit;* which he said was all the necessary charge (*e*). However, it appears that Lord Holt, where, under that plea, 150*l*. was charged for the testator's funeral, said, that at least 140*l*. ought to be deducted; for 10*l*. is enough to be allowed for the funeral of one in debt (*f*).

Lord Hardwicke in *Stag* v. *Punter* (*g*), upon exceptions to a Master's report for not allowing 60*l*. for the testator's funeral, said, "At law, where a person dies insolvent, the rule is, that no more shall be allowed for a funeral than is necessary; at first only 40*s*., then 5*l*., and at last 10*l*. (*h*). I have often thought it a hard rule, even at law, as an executor is obliged to bury his testator before he can possibly know whether his assets are sufficient to pay his debts: But this Court is not bound down by such strict rules, especially when a testator leaves great sums in legacies, which is a reasonable ground for an executor to believe the estate is solvent: As this is the case here, I am of opinion that sixty pounds is not too much for the funeral expenses, especially as the testator had directed his corpse should be buried at a church thirty miles from the place of his death."

In *Hancock* v. *Podmore* (*i*), issue was taken, in an action by a creditor against an executor, on a plea of *plene administravit*, and it was proved that assets to the amount of 129*l*. had come to the hands of the defendant, and that he had paid 55*l*. for probate duty, and 79*l*. for funeral expenses: The deceased had been a captain in the army, and the

(*d*) Shelly's case, 1 Salk. 296. Perhaps, observes Dr. Burn, the expenses of the shroud and digging the grave ought to have been added: 4 Burn. E. L. 348, 8th edit.

(*e*) Anon. Comberb. 342.

(*f*) *Ibid.*

(*g*) 3 Atk. 119.

(*h*) But in Buller's N. P. 143, it is said, that the usual method is to allow five pounds; and in Selwyn's N. P. 776, *n.* 18, 6th edit., a MS. case of Smith *v.* Davies, Middlesex Sittings after M. T. 10 Geo. II., is mentioned, where this latter sum was allowed by Lord Hardwicke himself.

(*i*) 1 Barn. & Adol. 260.

question was, whether the defendant could, as against a creditor, apply so large a sum as 79*l.* to such a purpose: The Court of King's Bench was of opinion that the sum was too great to be allowed: But Mr. Justice Bayley, in delivering the judgment of the Court, observed, that although the rule is, that, as against a creditor, no more shall be allowed for a funeral than is necessary, yet in considering what is necessary, regard must undoubtedly be had to the degree and condition in life of the party; and his Lordship observed that the sum of 10*l.*, mentioned by Lord Hardwicke as the established allowance in his time, might perhaps, at the present day, be less than what should be reasonably allowed for a person of condition: The learned Judge proceeded to intimate, that the Court thought 20*l.* would be a proper sum for the funeral of a person in the degree and consideration of life of this testator (*j*).

It must not, however, be understood, that the Court, in *Hancock* v. *Podmore*, laid it down as a rule, that even the sum of 20*l.* should be the limit of the allowance, where the estate is insolvent; but that it was the proper limit under the circumstances of that case: The rule appears to be, that the executor is entitled to be allowed reasonable expenses, according to the testator's condition in life; and if he exceeds those, he is to take the chance of the estate turning out insolvent: No precise sum can be fixed to govern executors in all cases: It must obviously vary in every instance, not only with the station in life of each particular testator, but also with the price of the requisite articles at the particular place (*k*).

In *Bisset* v. *Antrobus* (*l*), Sir L. Shadwell, V. C., refused to allow 2,210*l.* for the funeral expenses of a deceased nobleman, whose personal estate was believed to be solvent at his death, but, ultimately, from unforeseen circumstances, proved

(*j*) See Yardley *v.* Arnold, 1 Carr. & M. 434, 438, *per* Parke, B. Accord.

(*k*) Edwards *v.* Edwards, 2 Cr. & M. 612. S. C. 4 Tyrwh. 438. See also Reeves *v.* Ward, 2 Scott, 395.

(*l*) 4 Sim. 512.

to be insolvent: And his Honor referred it to the Master to inquire and state what sum ought to be allowed.

as against legatees, &c.

With respect to allowances for funeral expenses, where there are assets sufficient, as against other persons than creditors: In *Offley* v. *Offlley* (m), there had been 600*l.* laid out in Mr. Offley's funeral, and the Court decreed that sum to be a debt to affect the trust estate, Mr. Offley being a man of great estate and reputation in his county, and being buried there: but if he had been buried elsewhere, it seemed his funeral might have been more private, and the Court would not have allowed so much (n).

In *Paice* v. *the Archbishop of Canterbury* (o), a payment of 93*l.* 12*s.* 6*d.* for mourning rings distributed among the relations and friends of the deceased, was allowed by Lord Eldon to the executors: The Will had not given any directions on the subject, but committed "any thing not specified" to the discretion of the executors (p).

In *Mullick* v. *Mullick* (q), on an appeal to the Privy Council from an order of the Supreme Court at Bengal, it was held, with respect to the expenses of the funeral obsequies of a Hindoo testator, that, as the Will gave no directions how they were to be performed, the only question to be considered was, whether the sums allowed for their performance were more than had usually been expended at the funerals of persons of the same rank and fortune as the deceased.

(m) Prec. Chanc. 261.

(n) See Stackpoole *v.* Stackpoole, 4 Dow. 227. Bridge *v.* Brown, 2 Y. & Coll. C. C. 181.

(o) 14 Ves. 364.

(p) In Johnson *v.* Baker, 2 Carr. & Payne, 207, Best, C. J., held that a demand for mourning, furnished to the widow and family of the testator, is not a funeral expense, such as can be claimed against the estate by the executor, if he gives the order for it; and, consequently, that a legatee, who had not received his legacy, was a competent witness on behalf of the executor in an action brought against him for the recovery of such demand. See also Bridge *v.* Brown, 2 Y. & Coll. C. C. 181, 186. In Pitt *v.* Pitt, 2 Cas. temp. Lee, 508, Sir G. Lee allowed a widow for her mourning, in her account, an administratrix, in the Ecclesiastical Court.

(q) 1 Knapp, 245.

In a case, (before the statute 11 Geo. I. c. 18, enabling freemen of London to bequeath their whole personal estate) where a citizen of London by Will had devised 700*l.* for mourning, the question was, whether this 700*l.* should come out of the whole estate, or only out of the legatory part; for it was insisted, if there had been no direction by the Will, or if the Will had only directed that the expenses of the funeral should not exceed such a sum, there the deduction must have been out of the whole estate: *Per Cur.:* Mourning devised by the Will must come out of the legatory part, and not lessen the orphanage and customary share (*r*). Since the above statute, the point cannot arise, except perhaps in a case where the freeman has agreed before marriage that his personal estate shall, at his death, go according to the custom. In case a freeman of London dies intestate, his funeral expenses are to be paid out of the general personal estate and not the dead man's part merely (*s*).

Liability of executor for funeral expenses.

The question of the liability of an executor or administrator, for the expenses of the funeral of the deceased, will be considered in a subsequent part of this Treatise (*t*).

SECT. II.

Of Proving the Will and taking out Administration.

55 G. III. c. 184. penalty for not proving Wills or taking letters of administration, within a given time.

By stat. 55 Geo. III. c. 184, s. 37, it is enacted, "that if any person shall take possession of, and in any manner administer, any part of the personal estate and effects of any person deceased, without obtaining probate of the Will or letters of administration of the estate and effects of the deceased within six calendar months after his or her decease, or within two calendar months, after the termination of any

(*r*) Deakins *v.* Buckley, 2 Vern. 240. S. C. 1 Eq. Ca. Abr. 159, pl. 1.

(*s*) Swinb. Pt. 3, c. 16, pl. 3. *Infra*, Pt. III. Bk. IV. Ch. II.

(*t*) *Post*, Pt. IV. Bk. II. Ch. II. § I.

suit or dispute respecting the Will, or the right to letters of administration, if there shall be any such, which shall not be ended within four calendar months after the death of the deceased; every person so offending shall forfeit the sum of one hundred pounds, and also a further sum, at and after the rate of ten pounds per centum on the amount of the stamp duty payable on the probate of the Will or letters of administration of the estate and effects of the deceased."

The power of an executor to compel the production of Wills, and other testamentary papers, for the purposes of probate, and the mode of doing so, when the instruments happen to be in the custody of other persons, have been pointed out in a previous part of this Work (*u*).

Sect. III.

Of the making of an Inventory by the Executor or Administrator.

By stat. 21 Hen. VIII. c. 5, s. 4. "The executor and executors named by the testator or person so deceased, or such other person or persons to whom such administration shall be committed where any person dieth intestate or by way of intestate, calling or taking to him or them such person or persons, two at the least, to whom the said person so dying was indebted, or made any legacy, and upon their refusal or absence, two other honest persons, being next of kin to the person so dying, and in their default and absence two other honest persons, and in their presence and by their discretion shall make or cause to be made a true and perfect inventory of all the goods, chattels, wares, merchandizes, as well moveable as not moveable, whatsoever, that were of the said person so deceased, and the same shall cause to be indented, whereof the one part shall be by the said executor or executors, administrator or administrators, upon his or their oath or

(*u*) *Ante*, p. 272, 273.

oaths, to be taken before the said bishops, or ordinaries, their officials or commissaries, or other persons having power to take probate of testaments, upon the Holy Evangelists, to be good and true, and the same one part indented shall present and deliver into the keeping of the said bishop, ordinary or ordinaries, or other person having power to take probate of testaments, and the other part thereof to remain with the said executor or executors, administrator or administrators; and that no bishop, ordinary, or other whatsoever person having authority to take probate of testament or testaments, as is above said, upon the pain in this statute hereafter contained, refuse to take any such inventory or inventories to him or them presented or tendered to be delivered as aforesaid."

Likewise, as it has already appeared (*v*), by the statute 22 & 23 Car. II. c. 10, s. 1, an administrator must enter into a bond, conditioned, among other things, for his exhibiting into the registry of the Court, at or before a day specified, a true and perfect inventory of the goods, chattels, and credits of the deceased come to his possession.

The ancient Ecclesiastical Law was very strict with respect to the making of inventories (*w*); and it will be observed, that the statute requires executors or administrators to exhibit inventories, as part of their duty, without any proceeding to call upon them to do so. Moreover, it has already appeared (*x*), that if an administrator neglect to exhibit his inventory by the time specified in his bond, he will thereby incur a breach of the condition, without any citation. The old practice of the Prerogative Court of Canterbury was to require an inventory to be exhibited *before* probate was granted; and this is still prevalent in some country jurisdictions (*y*).

(*v*) *Ante*, p. 439.

(*w*) See Swinb. Pt. 6, s. 6, s. 8, s. 9: and the consequence of neglecting to make one, seems to have been to prevent the executor from relying on want of assets: See *ibid.* Pt. 3, s. 17, pl. 8. Even the temporal Courts formerly considered the neglect of this duty in a light unfavourable to the party, especially where there was a deficiency of assets; and although not conclusive on him, yet exposing him to imputation: Orr *v.* Kaines, 2 Ves. Sen. 193.

(*x*) *Ante*, p. 444, 445. See also Ritchie *v.* Rees, 1 Add. 152.

(*y*) Phillips *v.* Bignell, 1 Phillim.

In what cases and by whom the exhibiting an inventory compellable.

According to the modern practice, however, neither the executor or administrator, in general cases, exhibits any inventory whatsoever, unless he be cited for that purpose in the Spiritual Court, at the instance of a party interested (*z*). But, although inventories are not now required in practice to be exhibited without being so called for, yet still an executor or administrator is compellable to exhibit one at the prayer of any person having an interest, or even the *appearance* of an interest (*a*). Thus, the personal representative of the residuary legatee of him who was the residuary legatee of the original testator, has sufficient interest for the purpose of

240, by Sir John Nicholl. And the Prerogative Court will also, in special cases, at the instance of a party interested, decree an inventory to be exhibited by the executor or administrator, before the issuing of the probate, or letters of administration, under seal, and such inventory must also be substantiated by a special oath: 1 Ought. tit. 233, sect. 2, note d. 3. Also, under particular circumstances, before the granting of the probate, or letters of administration, the Court will, on the petition of a party interested, instead of requiring such inventory, issue a *Commission* for the *Appraisement* and valuation of the goods, rights, and credits, and inspection of the bonds, leases, and other writings, relative to the personal estate of the deceased, at his house or elsewhere, on the day specified, with such continuation of time and place as may be necessary: *Ibid.* note d. 4. A Commission of Appraisement is only a more solemn inventory: Watson *v.* Milward, 2 Cas. temp. Lee, 333. And it may be prayed after an inventory has been exhibited, if the latter has not been accepted and allowed to be complete: *Ibid.* It is, in some cases, more convenient than an inventory; because that cannot be given in but by a party in possession of the effects; whereas a Commission of Appraisement may be executed, whoever is possessed of them: Stote *v.* Tyndall, 2 Cas. temp. Lee, 405: And persons in possession of the effects of the deceased may be admonished to shew them to the commissioners: Smith *v.* Oram, 2 Cas. temp. Lee, 256. See further, as to Commissions of Appraisement, Franco *v.* Alverenza, 1 Cas. temp. Lee, 187. Leggatt *v.* Leggatt, *ibid.* 408. Clark *v.* Clark, 2 Cas. temp. Lee, 269. Pickering *v.* Towers, *ibid.* 413. Haselfoot *v.* Haselfoot, *ibid.* 477. Beebee *v.* Beebee, *ibid.* 546. Rex *v.* Bettesworth, Stra. 857. *Ante*, p. 320.

(*z*) 1 Phillim. 240. Toller, 250. However, the Court may, in some instances, require, *ex officio*, that an inventory shall be exhibited: 1 Phillim. 240. In the goods of Williams, 3 Hagg. 217. And in order to exonerate himself from all liability, it is always most prudent for the executor or administrator to exhibit it before a final settlement. Kenny *v.* Jackson, 1 Hagg. 106.

(*a*) Phillips *v.* Bignell, 1 Phillim. 241. Gale *v.* Luttrell, 2 Add. 236.

calling on his personal representative to exhibit an inventory (*b*). Again, it has been laid down in a variety of cases, that a probable or contingent interest will justify a party in calling for an inventory and account (*c*).

Thus, if a creditor swears to certain sums due from the deceased to him, it is enough to entitle him to an inventory, though the debt be contested (*d*). So where the assignees of a bankrupt made an affidavit of a debt due from the deceased to the bankrupt, the administrator was assigned to exhibit an inventory, notwithstanding the Statute of Limitations had run out since the administration was granted (*e*).

So the Court will compel an executor to bring in an inventory, &c., at the suit of a creditor by a bond of the testator, notwithstanding it's alleged invalidity; and though a suit is actually commenced on the bond, and then depending, at common law (*f*). And the Court will not notice the effect of any release which a legatee may have given (*g*). Nor will a Court of Equity restrain the next of kin from compelling an administrator to exhibit an inventory, on the ground that he has an equitable demand against the personal

(*b*) Winchlow *v.* Smith, 1 Cas. temp. Lee, 417.

(*c*) Salter *v.* Sladen, Prerog. M.T. 1792. Snow *v.* Strutt, Prerog. H.T. 1793, cited 1 Phillim. 241, *per curiam.* Myddleton *v.* Rushout, 1 Phillim. 244. Reeves *v.* Freeling, 2 Phillim. 57. Burgess *v.* Marriott, 3 Curt. 424.

(*d*) Smith *v.* Pryce, 1 Cas. temp. Lee, 569. Hackman *v.* Black, 2 Cas. temp. Lee, 251.

(*e*) Philipson *v.* Harvey, 2 Cas. temp. Lee, 344. See also Wainford *v.* Barker, 1 Ld. Raym. 232.

(*f*) Gale *v.* Luttrell, 2 Add. 234. See also Oughton, tit. 240, s. 9, 10. Accordingly, in a late case, an inventory and account was ordered on the application of a party, who, twenty-four years after the death of the testator, had commenced an action against his executors on a covenant by him by way of guarantee, the object of the applicant being to ascertain whether there were any assets before he incurred further expense: And Sir H. Jenner Fust said it was the duty of the executors, notwithstanding they insisted that the estate of their testator was not liable, either to exhibit an inventory and account, or to admit assets sufficient to answer the demand. Jickling *v.* Bircham, 2 Notes of Cas. 463.

(*g*) Kenny *v.* Jackson, 1 Hagg. 105.

estate of his intestate (*h*). And where an executrix, in custody under a writ *de excommunicato capiendo*, for not appearing to a citation by a creditor to exhibit an inventory, moved, in the Court of Chancery, for a *supersedeas*, disputing the debt on equitable grounds; the motion was refused, as tending totally to destroy the jurisdiction of the Ecclesiastical Court (*i*). Likewise, an executor, who is also residuary legatee, may call on his co-executor for an inventory (*k*): and so he may, perhaps, without any such special interest (*l*).

But in *Boon's Case* (*m*), where a legacy was to be paid at three several payments, and the executor having made two, and tendered the third, was cited by the legatee to bring in an inventory, it was holden by the Delegates, and also on a Commission of Review, that there was no need of an inventory at his instance. So in *Fleet* v. *Holmes* (*n*), in a suit for the recovery of a legacy, Sir G. Lee refused to decree an inventory, thinking it useless; because the executrix had, in her answers, confessed assets sufficient to cover the legacy, and the interest claimed thereon, and the costs of the suit. Again in *Leighton* v. *Leighton* (*o*), where an executrix, being cited to exhibit an inventory, gave in a declaration *loco inventorii*, in which she declared that the deceased, by a bill of sale, in consideration of a debt due to her, granted to her by bill of sale all the personal estate of which he should die possessed, Sir G. Lee held that the declaration was sufficient, and refused to compel an inventory. So where a party shews sufficient interest for calling on the executor to exhibit an

(*h*) Backhouse *v.* Hunter, 1 Cox, 342.

(*i*) R. *v.* Blatch, 5 Ves. 113.

(*k*) Paul *v.* Nettleford, 2 Add. 237.

(*l*) Huggins *v.* Alexander, Prerog. 1736. 2 Add. 238, note (*a*). There is only one case in which the application of a party having any kind of interest is refused: *viz.* if a creditor has brought a suit in Chancery for the discovery of assets, the party shall not proceed in both Courts: Myddleton *v.* Rushout, 1 Phillim. 247. Brotherton *v.* Hellier, 2 Cas. temp. Lee, 134.

(*m*) Sir T. Raym. 470.

(*n*) 2 Cas. temp. Lee, 101.

(*o*) 2 Cas. temp. Lee, 356.

inventory, but not to see portions allotted, and distribution made, the Court will accept an admission of assets in lieu of an inventory, or any other admission which will enable the Court to exercise a discretion and not to call for an inventory (*p*).

After what lapse of time an inventory may be compelled.

Although no statute, or rule of positive law, has fixed any time certain, within which an inventory and account must be sued, and time alone is not to be considered a bar (*q*), still reason and justice prescribe some limitation: And in cases where there has been a great lapse of time between the death of the party, and the citation calling for the inventory, the Court has frequently refused to enforce the exhibition of an inventory (*r*). Thus, in a modern case (*s*), it was held, that the lapse of forty-five years, in conjunction with circumstances, afforded a reasonable presumption of the estate's having been fully administered; and that therefore the inventory and account might be dispensed with. So where, twenty-four years after the death of the intestate, eleven years after the youngest child attained twenty-one, and seven years after his insolvency, his provisional assignee sued the administratrix for an inventory and account; and it appeared, that shortly after the intestate's death, a valuation and inventory had been made, and facts were shown from which it might be fairly presumed that the insolvent had received more than his share; the Court refused the application (*t*). So in *Bowles* v. *Harvey* (*u*), a party having, after a lapse of thirty-five years, called for an inventory and account of an insolvent estate, the executor, who appeared under protest, was dismissed with costs. Again in *Scurrah* v. *Scurrah* (*v*), an application to compel an administratrix to exhibit an inventory after the lapse of eighteen years, was rejected, and the applicant, under the circumstances, was condemned in costs.

(*p*) Burgess *v.* Marriott, 3 Curt. 424.

(*q*) Jickling *v.* Bircham, 2 Notes of Cas. 463, stated *ante*, 837, n. (*f*).

(*r*) 3 Curt. 426, Burgess *v.* Marriott.

(*s*) Ritchie *v.* Rees, 1 Add. 144.

(*t*) Pitt *v.* Woodham, 1 Hagg. 247.

(*u*) 4 Hagg. 241.

(*v*) 2 Curt. 919.

And on another occasion (*w*), in a case of inventory and account brought by a legatee, a declaration (instead of an inventory) setting forth desperate debts due to, and large debts due from the estate, but annexing no vouchers nor accounts, was held sufficient after a lapse of seventeen years: and Sir John Nicholl laid down that in such a suit the Court cannot decide whether debts alleged to be due from the estate are a legal set-off (*x*).

What persons are compellable to exhibit an inventory.

The parties who may be cited to exhibit an inventory and account, are not confined to the executor or administrator himself, or even to those who, upon the death of the executor or administrator, succeed to the representation of the original testator or intestate. Thus, in *Ritchie* v. *Rees* (*y*), Sir John Nicholl held, that the representatives of a deceased administrator *cum testamento annexo*, although not at the same time those of the first testator, were liable to be called on for an inventory and account, upon a reasonable presumption being raised that any part of the effects of the first testator had travelled into their hands (*z*): The learned judge was further of opinion that a party, having an interest in the effects, was entitled to call upon such representatives for the inventory, without first taking a *de bonis non* grant of the effects of the first testator. So the executors of a deceased executor, though not the personal representatives of the original testator, (there being an executor of the original testator still surviving), are compellable to bring in an inventory of the effects of the original testator (*a*).

An administrator *durante minoritate* may be compelled to give in an inventory, although his administration has expired (*b*).

An administrator *pendente lite* may be compelled to exhibit

(*w*) Higgins *v.* Higgins, 4 Hagg. 242.

(*x*) See further, as to the fulness requisite for a declaration, Leighton *v.* Leighton, 2 Cas. temp. Lee, 356. *Ante*, p. 838. Akerman *v.* Gybbon, 2 Cas. temp. Lee, 511.

(*y*) 1 Add. 158.

(*z*) See Holland *v.* Prior, 1 M. & K. 245, 246, 247.

(*a*) Gale *v.* Luttrell, 2 Add. 234.

(*b*) Taylor *v.* Newton, 1 Cas. temp. Lee, 15.

an inventory, although a bill in Chancery for a discovery has been filed against him by another party (*c*). But his executors cannot be called on for such an inventory, in a suit respecting his Will, by the representatives of a party claiming an interest, not pronounced for in the suit pending which he was appointed administrator

consequences of hanging back when an inventory assigned.

The Ecclesiastical Court discourages all hanging back with respect to the production of an inventory when called for; and generally condemns the parties who are guilty of it in costs (*e*). Where probate of a Will had passed in August, 1815, and the inventory had been assigned since the first session of Hilary Term, 1816, the Court in Easter Term of that year pronounced the executrixes contumacious (*f*).

Form and contents of an inventory.

The inventory exhibited by an executor or administrator ought to contain a full, true, and perfect description and estimate of all the chattels, real and personal, in possession and in action, to which the executor or administrator is entitled in that character, as distinguished from the heir, the widow, and the donee *mortis causâ* of the testator or intestate (*g*). It must also distinguish such debts as are sperate from those which are doubtful or desperate (*h*). But it is not necessary, according to the modern practice, that the appraisement and inventory should be made pursuant to the letter of the statute; and it is sufficient if the goods of the deceased shall be appraised by any honest persons in the neighbourhood, and reduced into an inventory (*i*), which, when exhibited at the instance of a party interested, must be verified by special oath, either personally or by virtue of a

(*c*) Brotherton *v.* Hellier, 2 Cas. temp. Lee, 131.

(*d*) Lascelles *v.* Jobber, 1 Cas. temp. Lee, 443.

(*e*) Phillips *v.* Bignell, 1 Phillim. 241, 243.

(*f*) Griffiths *v.* Bennet, 2 Phillim. 364.

(*g*) Toller, 248. The usual form of the head of the inventory was stated by Sir G. Lee, in Plunket *v.* Sharpe, 1 Cas. temp. Lee, 624, to be "a true and perfect inventory of all the goods, chattels, and credits of the deceased, that have come to the hands, possession, or knowledge" of the party.

(*h*) Toller, 248.

(*i*) 1 Oughton, tit. 233, s. 1, 2. 4 Burn. E. L. 310, 8th edit.

commission; for the former general oath of the executor or administrator will not be sufficient (*k*).

The Spiritual Court can only require, that all the deceased died possessed of should be included in the inventory: It cannot call for an account of the subsequent profits in his business (*l*). The Ecclesiastical Court has no jurisdiction over leaseholds of the deceased for lives held by a creditor on mortgage: and therefore the inventory need not contain any reference to such property, or the rents thereof (*m*). Again, it is not competent for the Prerogative Court of Canterbury to require an inventory of personal estate situate in a foreign country; for foreign estates are out of the jurisdiction and cognizance of the archbishop (*n*): And the law is the same as to effects lying in the province of York, or in Ireland (*o*). In some instance, particularly in complicated cases, the Court will exercise a discretion as to the sort of inventory it will accept (*p*).

Whether the Spiritual Court can entertain objections to an inventory.

The Court of Queen's Bench has, on more than one occasion decided, that, after an inventory is exhibited, the Ecclesiastical Court can entertain no objections to it. Thus, in *Hinton* v. *Parker* (*q*), the widow of the testator exhibited an inventory in the Prerogative Court; to which objection was made by a *legatee*, that several goods of the testator were omitted, and an account was demanded; whereupon the defendant moved in K. B. for a prohibition, on a suggestion that the Prerogative Court were proceeding to falsify an inventory, which they had not power to do, because by the exhibiting thereof their jurisdiction was determined: And the Court of King's Bench was of opinion, that the Spiritual Court could not falsify an inventory at the suit of a creditor; but at the suit of a legatee they might. In *Catchside* v.

(*k*) 1 Oughton, *ubi supra*, note (*d*.) 2. Toller, 250.

(*l*) Pitt *v*. Woodham, 1 Hagg. 250.

(*m*) Saville *v*. Morgan, 1 Cas. temp. Lee, 431.

(*n*) Raymond *v*. Von Watteville, 2 Cas. temp. Lee, 551.

(*o*) Wilson *v*. Ogle, Prerog. 1737 cited 2 Cas. temp. Lee, 555.

(*p*) Reeves *v*. Freeling, 2 Phillim. 56.

(*q*) 8 Mod. 168.

Ovington (*r*), the administratrix was cited into an inferior Ecclesiastical Court at the promotion of a creditor, to exhibit an inventory: She brought one in, and the creditor objected to it: There was a decree for the creditor: Upon which the administratrix appealed to the superior Ecclesiastical Court, who affirmed the decree: whereupon a prohibition was prayed in B. R.: And Lord Mansfield said, that it appeared upon the face of the proceedings, that the Spiritual Court had no jurisdiction: and a prohibition was granted (*s*). This decision has been followed by *Henderson* v. *French* (*t*), where an executrix had exhibited, at the instance of a creditor, an inventory in the Consistory Court of Carlisle, and a prohibition was granted on the suggestion that the Ecclesiastical Court was proceeding to hear exceptions to the inventory, and to compel her to exhibit a fresh one: The Court of K. B. was of opinion, that as the statute directs the executor, for the security of creditors and legatees, to make an inventory, to be delivered to the Bishop or Ordinary, and that no Bishop or Ordinary shall, under pain of 10*l.*, refuse to take such inventory, his office is merely ministerial to receive it when tendered; and that if the statute had intended more, it would have so said. Again, the authority of *Henderson* v. *French* was recognized and acted upon, by granting a prohibition, in the recent case of *Griffiths* v. *Anthony* (*u*). It will be observed, that the principle upon which *Henderson* v. *French* was determined, namely, that the Ecclesiastical Court is merely ministerial in the matter of inventories, goes to deprive that Court of the power of entertaining objections to an inventory altogether, whether at the suit of a creditor or

(*r*) 3 Burr. 1922.

(*s*) In a note to this report, a case of Bewick *v.* Ord is mentioned, as having been decided accordingly in B. R. in the year 1742.

(*t*) 5 M. & S. 406.

(*u*) 5 A. & E. 623. S. C. 1 Nev. & P. 72. It must, however, be observed, that in this case, it appeared, by the affidavits on which the prohibition was granted, that the Ecclesiastical Court had permitted *witnesses to be examined* in support of the allegations given in objection to the Inventory; which was clearly an excess of jurisdiction: so that, in fact, it was not necessary to decide the point which occurred in Henderson *v.* French. See *post*, p. 845, 846.

that of a legatee; and consequently overrules the distinction taken in *Hinton* v. *Parker.*

Notwithstanding these decisions of the Court of King's Bench, it has always been, and still continues, the practice of the Prerogative Court of Canterbury to entertain objections to inventories (*v*). Thus, in the case of *Shackleton* v. *Barrymore* (*w*) there was a suit in that Court, in Hilary Term, 1798, by Shackleton, a creditor, against Lord Barrymore, as administrator of his brother the late Lord, for an inventory: Lord B. exhibited an inventory: The creditor then gave in an allegation pleading *omissa:* The counsel for Lord B. cited the case of *Catchside* v. *Ovington,* in objection: But Sir Wm. Wynne, upon mature deliberation, ordered a fuller inventory, as with reference to assets, the omission of which was deducible from Lord B.'s answers to the allegations. Again, in the case of *Telford* v. *Morison* (*x*), which was decided after the case of *Henderson* v. *French,* Sir John Nicholl laid down, that a creditor or legatee *may* object to an inventory given in by an executor or administrator; and may file an allegation pleading *omissa,* in order to take the answers of the executor or administrator. The learned Judge, in the very powerful judgment which he delivered on the occasion, observed, that the Court of King's Bench seems to have considered the subject as if both the obligation of exhibiting inventories, and the jurisdiction of the Spiritual Courts over them, rested solely upon the statute of Hen. VIII.: whereas, in truth, neither inventories themselves, nor the jurisdiction of those Courts over them, is at all to be traced up or ascribed to that statute: Lyndewood, who wrote long before the statute, shews them to have been, in his time, under the cognizance of the Spiritual Courts: The learned Judge then proceeds to shew, that the statute was in no way intended to

(*v*) Butler *v.* Butler, 2 Phillim. 37. Barclay *v.* Marshall, 2 Phillim. 188. Telford *v.* Morison, 2 Add. 329. Hunter *v.* Byrn, 2 Add. 311. Brogden *v.* Brown, 2 Add. 336. See also Winchlow *v.* Smith, 1 Cas. temp. Lee, 416. Plunket *v.* Sharpe, *ibid.* 623. Watson *v.* Milward, 2 Cas. temp. Lee, 332.

(*w*) Cited *per curiam,* in Telford *v.* Morison, 2 Add. 329.

(*x*) 2 Add. 319.

abridge the jurisdiction of the Ecclesiastical Courts; it's principal, if not sole object, being the restriction of fees (*y*); that the mention in the statute of the penalty on the Ordinary, for refusing to receive the inventory, has reference to his exaction of additional fees; that the penalty of 10*l.* referred to by the Court of K. B., in *Henderson* v. *French*, is not a special penalty imposed on the Ordinary in the matter of inventories, but a general penalty imposed by a subsequent general section, enacting that every bishop, &c. that shall do or attempt, &c. against the Act in anything, shall forfeit, &c. to the party grieved, "*so much money as he shall take contrary to the present Act*," and 10*l.* over and above: and that the conclusion of the statute, "Provided always, that this present Act be not prejudicial to any Ordinary or any other person which now have or hereafter shall have authority for probate of testaments, but that every of them shall and may convent before them, all and every person or persons made and named executor or executors of any testament to the intent to prove or refuse the testament or testaments of their testator or testators, and to bring in inventories, and to do every other thing concerning the same as they might do before the making of this Act," puts it beyond all doubt that the statute reserved to the Spiritual Court all the powers in the matter of inventories, which it had before the Act; of which powers that of examining alleged omissions indisputably was one.

But although the Ecclesiastical Court will allow an allegation to be given in objection to an inventory, and answers to be taken upon that allegation: yet it will not permit *witnesses* to be examined upon that allegation, in order to falsify the inventory (*z*). The foundation for this distinction is, that if the answers confess more assets than were inserted in the inventory, the Court may order the inventory to be amended by the insertion of these; but if further assets might be established by witnesses in opposition to the answers, the

(*y*) See Hallam's Constitutional History, Ch. II.

(*z*) Telford *v.* Morison, 2 Add. 331.

Court could not order them to be inserted in the inventory, which is required by the statute to be upon oath; nor could it compel the executor or administrator to swear to assets, the possession of which he has twice already upon oath denied (*a*).

Effect of inventory in temporal Courts.

An important question arises, with respect to the effect of inventories in the Temporal Courts, *viz.*, how far an inventory exhibited by an executor or administrator in the Spiritual Court is evidence against him, as proof of assets. But it will be more convenient to consider this point in a subsequent part of this Treatise, together with the subject of Remedies generally (*b*).

Custom of London.

By the custom of London, if any man or woman free of the city, die, leaving an orphan within age, and not married, the mayor and aldermen may compel the executor or administrator to appear at a Court of Orphanage, and exhibit an inventory; and in case any debt appear to be outstanding, to give security to the chamberlain to render upon oath a true account of the same when received; and on his refusal, may commit him till compliance. Nor shall his having given security to the Spiritual Courts, as above mentioned, release him from the obligation of the custom (*c*).

Sect. IV.

Of Collecting the Effects.

The next duty of the executor or administrator is to collect all the goods and chattels so inventoried. For that purpose

(*a*) *Ibid.* It is suggested in a note to Brogden *v.* Brown, 2 Add. 340, by the reporter, that *where the executor is also the party before the Court propounding the Will*, the Court might perhaps permit depositions to be taken on the allegation, if the answers should prove unsatisfactory.

(*b*) See *post*, Pt. v. Bk. II. Ch. I.

(*c*) Com. Dig. Guardian, (G. 1.) 1 Roll. Abr. 550. Luch's case, Hob. 247. Toller, 254.

the law invests him with large powers, (as it has already appeared, in considering the quantity of his estate, as well in action as possession): And it is incumbent on him to avail himself of his authority with reasonable diligence in the collection of the effects of the deceased. Therefore, if by unduly delaying to bring an action, the executor or administrator has enabled a creditor of the deceased to avail himself of the Statute of Limitations, the executor or administrator will be personally liable (*d*). So the executor or administrator must within a convenient time, remove all the personal property of the deceased, which he may have left on any land which goes to the heir, or to a reversioner or remainder-man: otherwise such property may be distrained damage feasant (*e*). In the case of *Stodden* v. *Harvey* (*f*), a lessee for life of a house and pasture land died; his executors suffered his cattle to go there for six days after his death, and then removed them; and in trespass justified for that time, averring that in the space of six days they could not procure any other land or place whereon to put the cattle: The plaintiff demurred; and whether that were a convenient time to move them, was the question: The Court inclined to be of opinion that six days was but a convenient time for removing, especially it being averred, that they had not any other place to remove them to: but for a fault in the plea, wherein the defendants pleaded a lease of the house, but not of the land in the declaration mentioned, it was adjudged for the plaintiff.

(*d*) Hayward *v.* Kinsey, 12 Mod. 573.

(*e*) See *ante*, p. 790.

(*f*) Cro. Jac. 204.

CHAPTER THE SECOND.

OF THE PAYMENT OF DEBTS BY THE EXECUTOR OR ADMINISTRATOR ACCORDING TO THEIR PRIORITY OF DEGREE.

SECT. I.

1. *Of the Payment of the Expenses of the Funeral, and of the Probate or Administration.* 2. *Of Debts due to the Crown.* 3. *Of Debts to which particular Statutes give Priority of Payment.*

HAVING considered in a previous part of this Treatise the quantity of the estate of an executor or administrator, it is now necessary to treat of his duty in the application of that estate, according to the order prescribed by the law.

1. Funeral expenses.

1. Before any debt or duty whatsoever, funeral expenses, with the proper limitation as to the amount, are, as it has already appeared (*a*), to be allowed out of the estate of the deceased. These expenses are to be preferred, even to a debt due to the Crown (*b*).

Expenses of probate, &c.

The next thing to justify and occasion expense is the proving of the Will or taking out administration (*c*); but a greater disbursement, says the author of "The Office of an Executor" (*d*), will not stand allowable, than is prescribed by the statute of 21 Hen. VIII. c. 5 (*e*).

(*a*) *Ante*, p. 829.
(*b*) R. *v.* Wade, 5 Price, 627, by Richards, C. B.
(*c*) 2 Black. Comm. 511.
(*d*) P. 260, 14th edit.
(*e*) With respect to the proper fees for probates and letters of administration, see Burn's Eccles. Law, tit. Fees, and tit. Wills, vol. 4, p. 264, 291, 8th edit. "St. "Germaine, (the author of the Doc- "tor and Student, dial. 2, c. 10.)

The costs of a suit in Equity are to be considered as expenses in administering the estate, and are the first charge upon an estate, whether administered in or out of Court (*f*). But in a case where a Will provides for the payment of "testamentary expenses" out of a specific bequest, this provision does not include the costs of a suit occasioned by the Will: for the words "testamentary expenses" are confined to the usual charges of the probate, &c.; and such costs must therefore, be paid out of the residuary estate (*g*).

Costs of administration suit.

2. The third occasion of disbursement by the executor or administrator is the payment of debts; and in such payment he must be careful to observe the rules of priority; for if he pay those of a lower degree first, he must, on a deficiency of assets, answer those of a higher out of his own estate (*h*). So an executor or administrator is *bound* to plead a debt of a higher nature in bar of an action brought against him for a debt of inferior degree, and *riens ultra*, if he has not assets for both; otherwise it will be an admission of assets to satisfy both debts (*i*).

2. Payment of debts.

Rules of priority.

A question of no little difficulty is raised in Story's Conflict of Laws, § 524, *viz.*, Suppose a debtor dies domiciled in England, and leaves assets in a foreign country by the law of which all debts stand in an equal rank, and administration is duly taken out in the place of his domicil and also in the place of the *situs* of the assets. What rule is to govern in the administration of the assets? The law of the domicil? or the law of the *situs?* That eminent writer states his own opinion to be (in accordance with the decisions of the American

With respect to foreign assets.

"who was no stranger to the canon and civil law, as appears by his book, saith, that the Ordinary ought to take nothing for probate, if the goods suffice not for funeral and debts; but he means only that conscience is against it." Wentw. Off. Ex. 260, 14th edit.

(*f*) Loomes *v.* Stotherd, 1 Sim. & Stu. 461, by Sir J. Leach. Tipping *v.* Power, 1 Hare, 405, 411. Gaunt *v.* Taylor, 2 Hare, 413.

(*g*) Browne *v.* Groombridge, 4 Madd. 495.

(*h*) 2 Black. Comm. 511.

(*i*) Rock *v.* Leighton, 1 Salk. 310. 1 Saund. 333, *a.* note (8).

Courts, but at variance with that of many foreign jurists) that in regard to creditors the administration of assets of deceased persons is to be governed altogether by the law of the country where the executor or administrator acts, and from which he derives his authority to collect them.

Priority of solicitor's lien.

It should be observed, that by the constant rule the Court of Chancery, a solicitor, in consideration of his trouble, and the money in disburse for his client, has a right to be paid out of the duty decreed or fund recovered for the plaintiff, and a lien upon it, before the specialty creditors of the deceased plaintiff; neither can his executor or administrator controvert this rule, by insisting upon applying the assets in a course of administration (*k*).

Debts due to the Crown.

To all other debts of whatever nature, as well of a prior as of a subsequent date, such as are due to the Crown by record or specialty, claim the precedence (*l*). So that if there be not come to the executor or administrator goods of greater value than will suffice for the satisfaction of these, he is not to pay any debt to a subject: and if he be sued for any such, he may plead in bar of this suit that his testator or intestate died thus much indebted to the king, showing how, &c., and that he hath not goods surmounting the value of that debt (*m*). Or if the subject's pursuit be not so by way of action, as that the executor or administrator hath day in Court to plead, but be by way of suing execution, as upon statute staple or merchant, then is the administrator put to his *audita querela*, wherein he must set forth this matter (*n*).

But the debts due to the Crown, which are so privileged, are confined to such as are due by matter of record, or by

(*k*) Turwin *v.* Gibson, 3 Atk. 720. Lloyd *v.* Mason, 4 Hare, 132.

(*l*) Magna Charta, c. 18. 2 Inst. 32. Littleton *v.* Hibbins, Cro. Eliz. 793. Swinb. Pt. 6, s. 16. Wentw. Off. Ex. 261, 14th edit. Com. Dig. Admon. (C. 2.)

(*m*) Wentw. Off. Ex. 261, 14th edit. Godolph. Pt. 2, c. 28, s. 3.

(*n*) *Ibid.* Perhaps, at the present day, he might be relieved on motion.

specialty, &c. (*o*) (which are of the same nature; for by statute 33 Hen. VIII. c. 39, it is enacted, that all obligations and specialties, taken to the use of the king, shall be of the same nature as a statute staple). And, therefore, sums of money owing to the king on wood sales, or sales of tin, or other his minerals, for which no specialty is given, shall not be preferred to a debt due to a subject by matter of record (*p*). So though fines and amercements in the King's Courts of Record are clearly debts of record (*q*), and entitled to such preference, yet amercements in the King's Courts Baron, or Courts of his Honours, which are not of record, have no such priority (*r*); nor have fines for copyhold estate, nor money arising from the sale of estrays within his manors or liberties; for these are not debts of record (*s*). Again, whatever accrues to the king by attainder or outlawry is considered as a debt by simple contract, before office found; and although debts due to the person outlawed or attainted be by obligation or other specialty, and the outlawry or attainder be of record, yet the law does not recognise the king's title before office found: for till then it does not appear by record that any such debt was due to the party (*t*).

So if the king's debtor by simple contract be outlawed on mesne process, the debt is not altered in it's nature, nor shall it have precedence as if the outlawry were subsequent to the judgment, and the debt, therefore, of record (*u*). Nor does the prerogative extend to a debt assigned to the king: Therefore it was held, where the obligee of a bond, after the death of the obligor, assigned it to the king, that the obligor's executors were warranted in satisfying a judgment, recovered against him in his lifetime, in preference to the bond (*v*). So

(*o*) Wentw. Off. Ex. 262, 14th edit. Godolph. Pt. 2, c. 28, s. 3. Com. Dig. Admon. (C. 2.)

(*p*) *Ibid.* 3 Bac. Abr. 79, 80, tit. Exors. (L.) 2.

(*q*) Godolph. Pt. 2, c. 28, s. 3.

(*r*) Wentw. Off. Ex. 263, 14th edit. Com. Dig. Admon. (C. 2.) 3 Bac. Abr. 80, tit. Exors. (L.) 2.

(*s*) *Ibid.*

(*t*) Wentw. Off. Ex. 263, 14th edit. Bac. Abr. *ubi supra.*

(*u*) Com. Dig. Admon. (C. 2.) Erby *v.* Erby, 1 Salk. 80. Toller, 261.

(*v*) Com. Dig. Admon. (C. 2.)

also the arrears of rent due to the Crown, whether it be a fee-farm rent, or a rent reserved on a lease for years, shall, it appears, be regarded in the light of a debt by simple contract (*w*).

Again, it has been held, that a recognizance in the Court of Chancery by a guardian in the matter of a minor, is not to be considered a debt due to the Crown (*x*).

But it seems, that if the king's debt, and likewise that of a subject, be both inferior to debts of record, the king shall be preferred (*y*).

By statute 55 Geo. III. c. 184, s. 45, the commissioners of stamps are authorised, in certain cases, to give credit for the duties on probates and administrations; and by s. 48, it is provided, that the duty for which credit shall be so given shall be a debt to the Crown, and shall be paid in preference to any other debt whatsoever.

3. Debts to which particular statutes give priority:

3. Next in order are certain specific debts, which are, by particular statutes, to be preferred to all others. Such were formerly forfeitures for not burying in woollen under the statute of Charles, now repealed by stat. 54 Geo. III. c. 108; and such are debts for letters, not exceeding 5*l.* to the Post Office (*z*).

money due to parish by overseers of the poor:

Again, by stat. 17 Geo. II. c. 38, s. 3, it is enacted, that if any overseer shall die before the expiration of his office, "his "executors or administrators shall, within forty days after his "decease, deliver over all things concerning his office to some "churchwarden, or other overseer of the same place; and "shall pay out of the assets left by such overseer, all sums "of money remaining due, which he received by virtue of his "said office, *before any of his other debts are paid and* "*satisfied.*"

Dimock's case, Lane, 65, by Tanfield, C. B., which was granted by the Court.

(*w*) Com. Dig. Admon. (C. 2.) Wentw. Off. Ex. 264, 14th edit.: but see *infra*, p. 868.

(*x*) *Ex parte* Usher, 1 Ball & Beat. 199.

(*y*) Bac. Abr. *ubi supra*, n. (*a*).

(*z*) 9 Ann. c. 13, s. 30. 2 Black. Comm. 511.

Officers of a Friendly Society.

Likewise, it was provided by statute 33 Geo. III. c. 54, s. 10 (*a*), that if any person appointed to any office by any Friendly Society, and having in his hands any money, or effects or securities belonging to the same, shall die, or become a bankrupt or insolvent, his executors, administrators, or assignees shall, within forty days after demand made by the order of any such society, or the major part of them assembled at any meeting, deliver all things belonging to such society to such persons as they shall appoint, and shall pay out of the assets or effects of such person all sums of money remaining due, which such person received by virtue of his said office, before any of his other debts are paid, and all such assets and effects shall be bound to the payment thereof accordingly.

This provision of the statute, preferring the claim of Friendly Societies to those of all other creditors, it should seem, is not favoured (*b*); and it has been held to be confined to persons duly and formally appointed officers of the society; and that it does not extend to any person to whom the money of the society has been paid as banker, or to whom the money has been lent upon security, paying interest (*c*). And money *lent* to any officer of the society duly appointed, or suffered to remain in his hands upon giving security, has been determined not to be within the preference given by the Act; the preference being given only in respect of money which got into the hands of officers, independent of contract (*d*).

Notwithstanding the censures which this enactment has met from eminent Judges, the subsequent statute for the con-

(*a*) This statute was repealed by the stat. 10 Geo. IV. c. 56. But by the stat. 4 & 5 Wm. IV. c. 20, s. 14, the provisions of the repealed Act shall continue in force as to all societies established under it before the passing of the statute 10 Geo. IV. c. 56.

(*b*) See the remarks of Lord Eldon in *Ex parte* Ross, 6 Ves. 804. *Ex parte* Stamford Society, 15 Ves. 281.

(*c*) *Ex parte* Lancaster Society, 6 Ves. 98. *Ex parte* Ashley, 6 Ves. 441. *Ex parte* Corser, *ibid.* *Ex parte* Ross, 6 Ves. 802.

(*d*) *Ex parte* Stamford Society, 15 Ves. 280. *Ex parte* Buckland, Buck. 214.

solidation and amendment of the laws relating to Friendly Societies, 10 Geo. IV. c. 56, s. 20, contained a similar provision. And although this was repealed by the statute 4 & 5 Wm. IV. c. 40, s. 1, still by the latter Act, s. 12, it is enacted, that "if any person already appointed, or who may hereafter be appointed, to any office in a society established under the said recited Act, (10 Geo. 4, c. 56), or this Act, and being entrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his said office or employment, any monies or effects belonging to such society, or any deeds or securities relating to the same, shall die, or become a bankrupt or insolvent, or have any execution or attachment, or other process issued, or action or diligence raised, against his lands goods, chattels, or effects, or property, or estate, heritable, or moveable, or make any assignment, disposition, assignation, or other conveyance thereof, for the benefit of his creditors, his heirs, executors, administrators, or assignees, or other persons having legal right, or the sheriff or other officer executing such process, or the party using such action or diligence shall, within forty days after demand made in writing by the order of any such society or committee thereof, or the major part of them assembled at any meeting thereof, deliver and pay over all monies and other things belonging to such society to such person as such society or committee shall appoint, and shall pay, out of the estates, assets, or effects, heritable, or moveable, of such person, all sums of money remaining due, which such person received by virtue of his said office or employment, before any other of his debts are paid or satisfied, or before the money directed to be levied by such process as aforesaid, or which may be recovered or recoverable under such diligence, is paid over to the party issuing such process, or using such diligence; and all such assets, lands, goods, chattels, property, estates, and effects, shall be bound to the payment and discharge thereof accordingly."

Executors, &c. of officers of Friendly Society to pay money due to society before any other debts:

Regimental debts.

By stat. 58 Geo. III. c. 73, s. 1 and 2, all regimental debts shall be paid out of the effects of any officer or soldier dying

while in the service, in such proportion as shall be ordered by the secretary at war, in preference to any other debts of such officer or soldier (*e*).

Treasurer, &c. to paving commissioners:

Another instance may be adduced in the case of money due from the deceased as treasurer or collector to paving commissioners under the Metropolis Act, 57 Geo. III. c. XXIX. s. 51 (local act), by which it is enacted, that the executors or administrators, &c. of any treasurer, collector, or other officer, &c. shall, out of the estate and effects, pay the commissioners, &c. all such sums of money as shall have been collected by the deceased, and due to the commissioners, in preference to any other debt or debts (*except debts due to the king's majesty*).

Whether these debts have precedence of the Crown.

It may here be observed, that the words of these Acts, excepting the last, are very large, sufficient, as it seems, to give to the debts, which are the subject of them, precedence to those due to the Crown: but, perhaps they would not be so construed (*f*).

Priority of debts when the deceased has taken the benefit of the Insolvent Act.

In *Barton* v. *Tattersall* (*g*), a person who had taken the benefit of the Act for the relief of insolvent debtors, first in 1814, and a second time in 1820, died in 1826, leaving assets more than sufficient for the payment of all the debts which he had contracted subsequently to his second insolvency: The mode prescribed by the Insolvent Acts, for applying the assets in discharge of the debts from which he had been relieved under those Acts, had not been followed: And it was held, by Sir J. Leach, M. R., that the assets ought to be applied in payment, first of these subsequent debts; and secondly of the debts scheduled under the second insolvency; and thirdly, of the debts scheduled under the first insolvency (*h*).

(*e*) See *ante*, p. 377. See also the stat. 2 Wm. IV. c. 53, as to Army Prize Money.

(*f*) 6 Ves. 99, by Lord Alvanley, in *Ex parte* The Lancaster Society.

(*g*) 1 Russ. & M. 237.

(*h*) See also S. C. and Curtis *v.* Sheffield, 8 Sim. 176. Ward *v.* Painter, 2 Beav. 85, as to the jurisdiction of a Court of Equity to administer the fund.

Sect. II.

Of the Payment of Debts of Record.—1. *Judgments.* 2. *Decrees.* 3. *Statutes and Recognizances.*

Next in priority, in the order prescribed for payment of debts, come those which are debts of record (*i*): And debts of this nature are of two sorts, to which belongs a subdivision of precedence.—1. Judgments in Courts of Record; 2. Recognizances and statutes.

1. Judgments: their precedence to recognizances and other debts of record, as well as to specialties:

Judgments in Courts of Record, whether obtained compulsorily against the testator or intestate, or confessed by him, are in a precedent degree, not only to all debts by specialty, but to recognizances and statutes, (though the latter are also debts of record), and must be preferred by the executor or administrator, whether prior in point of time or not (*k*). Therefore, he must discharge a latter or more puisne judgment in preference to a statute or recognizance in time precedent (*l*). And if the creditor by recognizance should sue out a *scire facias*, or the creditor by statute sue execution against the executor, he must in the former case, plead the judgment unsatisfied, and in the latter is bound to have recourse to an *audita querela* (*m*).

What sort of judgments are entitled to this precedence:

The next consideration is, what shall be considered judgments, so as to be entitled to this precedence. The privilege is not confined to judgments in the Courts of Westminster Hall, but extends itself to judgments in all other Courts of Record: that is to say, Courts in cities or towns corporate

(*i*) Wentw. Off. Ex. 265, 14th edit.

(*k*) The Sadler's case, 4 Co. 59, *b.* 60, *a.* Harrison's case, 5 Co. 28, *b.* Wentw. Off. Ex. 266, 270, 14th edit. 1 Roll. Abr. 926. Exors. (R.) pl. 1, 2. Bond & Baile's case, 1 Leon. 328. 3 Leon. 270.

(*l*) Wentw. Off. Ex. 267, 14th edit.

(*m*) Wentw. Off. Ex. 266, 267, 14th edit. Instead of resorting to an *audita querela*, probably the executor might, at this day, obtain relief on motion.

having power by charter to hold plea of debt above forty shillings, as in London, Oxford, and other places (*n*). So a judgment in a Court of Pie Poudre, which is a Court incident to every fair and market, and is the lowest Court of Justice known to the law of England, claims the same preference (*o*).

But a judgment in the Lord Mayor's Court, obtained against a garnishee by foreign attachment, does not entitle the plaintiff to rank as a judgment creditor in the administration of the garnishee's assets (*p*).

A judgment, which is entered up (by virtue of the statute 17 Car. II. c. 8, s. 1), against the testator or intestate after his death, when that happens between verdict and judgment (*q*), shall be considered as if entered up in his lifetime, and entitled to priority of payment by his executors or administrators accordingly (*r*). But where his death happens between interlocutory and final judgment, and the latter is entered up by virtue of the statute 8 & 9 Wm. III. (*s*) it is otherwise; for such judgment is not to be entered against the testator or intestate, but against his executor or administrator (*t*). And it is the same, where the death happens after the writ of inquiry is executed, and before final judgment (*u*).

Formerly, a judgment signed after the testator's death, at any time during the term in which he died, or the subsequent vacation, was, by relation, a judgment of the first day of the term (*v*). But now by rule of all the Courts, all judgments shall be entered of record of the day of the month and year when assigned, and shall not have relation to any other day (*w*).

(*n*) Wentw. Off. Ex. 271, 14th edit.

(*o*) Searle *v.* Lane, 2 Vern. 89. S. C. 2 Freem. 103.

(*p*) Holt *v.* Murray, 1 Sim. 485.

(*q*) See *ante*, p. 761.

(*r*) Burnet *v.* Holden, 1 Lev. 277. S. C. 1 Mod. 6. Sir T. Raym. 210. Colebeck *v.* Peck, 2 Lord Raym. 1280.

(*s*) See *ante*, p. 764.

(*t*) Weston *v.* James, 1 Salk. 42. 2 Saund. 72, *r*, 6th edit. 1 Com. Dig. Pleader, (2 D. 9.) Smith *v.* Eyles, 2 Atk. 386, by Lord Hardwicke.

(*u*) Goldsworthy *v.* Southcott, 1 Wils. 243.

(*v*) Bragner *v.* Langmead, 7 Term Rep. 20.

(*w*) See *ante*, p. 766.

what are not:

A judgment, *quod computet*, in the nearly obsolete action of account, is of a nature too incomplete to be privileged like other judgments (*x*); but a judgment on a *scire facias*, *quod executionem habeat*, is equal to a judgment *quod recuperet* (*y*).

A judgment in a foreign country is considered, in our Courts, merely as a debt by simple contract (*z*). And it is settled that an Irish judgment is not, since the Union, entitled to priority as an English judgment (*a*).

A judgment against the executor or administrator himself is not to be considered within the same class as those which are recovered against the deceased (*b*). Such a judgment stands altogether on a different footing. It may be briefly stated in this place, that, with respect to other creditors of the deceased, a creditor, who has obtained a judgment against the executor, has no priority, except with regard to debts of equal degree with that upon which he has obtained judgment. Among such, his debt is allowed the precedence, because the executor ought to pay that creditor first who uses the first diligence (*c*). Therefore, the executor may plead in bar to an action by a simple contract creditor, that there is a judgment unsatisfied which another simple contract creditor has obtained against him, the executor, and that it will exhaust the assets to satisfy that judgment: But such a plea is not allowable in an action by a creditor of superior degree, as upon a bond of which the executor had notice, or a judgment which has been docketed (*d*). It must, however, be observed, that as between the executor himself, and the creditor who has obtained judgment against him, such judgment (except in the instance of judgment of assets *in futuro*,) must be satisfied, at all events, without reference to the state of the assets, or the claims of superior creditors: for if the

(*x*) Searle *v.* Lane, 2 Freem. 103.

(*y*) Wentw. Off. Ex. 272, 14th edit.

(*z*) Dupleix *v.* De Roven, 2 Vern. 540. Walker *v.* Witter, Dougl. 1.

(*a*) Harris *v.* Saunders, 4 B. & C. 411. Ferguson *v.* Mahon, 11 A. & E. 179.

(*b*) Wentw. Off. Ex. 270, 14th edit.

(*c*) Ashley *v.* Pocock, 3 Atk. 308.

(*d*) See *infra*, p. 860—862.

estate of the deceased is insufficient to satisfy it, the executor may be compelled to do so *de bonis propriis* (*e*).

If a judgment be satisfied, and is only kept on foot to wrong other creditors; or if there be a defeasance of the judgment yet in force; then this judgment will not avail to keep off other creditors from their debts (*f*).

4 & 5 W. & M. c. 20: judgments not docketed to have no priority:

It is enacted by stat. 4 & 5 Wm. & M. c. 20, s. 3, (made perpetual by the 7 & 8 Wm. III. c. 36,) that no judgment not docketed and entered in the books kept for that purpose, according to that Act, shall affect any lands or tenements, as to purchasers or mortgagees, or *have any preference against heirs, executors or administrators*, in the administration of their ancestors', testators', or intestates' effects. It has been held, that, both in law (*g*) and in equity (*h*), in the administration of the ancestor's or testator's estates, a judgment not docketed, pursuant to this statute, is to be considered only as a simple contract debt; and on the issue of *plene administravit* the executor may give in evidence that he has applied all the assets in payment of bond or simple contract debts before the commencement of the action (*i*). And if an heir or executor should plead, to an action on a bond or simple contract, an outstanding judgment, the plaintiff may reply, that it was not docketed and entered according to the provisions of the statute (*j*).

Docketing *the issue* is not a sufficient docketing of a judgment within this statute (*k*). And in a modern case (*l*), issue had been entered in a cause, and docketed according to the practice of the office of judgments; the plaintiff, in 1820, had

(*e*) See *infra*, Pt. v. Bk. II. Ch. I. Abbis *v.* Winter, 3 Swanst. 579, note.

(*f*) Wentw. Off. Ex. 268, 14th edit. See *infra*, Pt. v. Bk. II. Ch. I.

(*g*) Hickey *v.* Hayter, 6 Term Rep. 384. Hall *v.* Tapper, 3 B. & Adol. 655.

(*h*) Landon *v.* Ferguson, 3 Russ. Chanc. Cas. 349.

(*i*) Hickey *v.* Hayter, 6 Term Rep. 384. 2 Saund. 9, *c*, note to Jefferson *v.* Morton. Hall *v.* Tapper, 3 B. & Adol. 655.

(*j*) Steel *v.* Rorke, 1 Bos. & Pull. 307. 2 Saund. 9, *c*.

(*k*) Braithwaite *v.* Watts, 2 Cr. & Jerv. 318.

(*l*) Hopwood *v.* Watts, 5 B. & Adol. 1056.

recovered damages and costs, and entered final judgment on the roll, but the judgment, according to a practice said to have prevailed for a century, was not docketed as required by the statute; in the year 1834, an application was made to the Court of K. B. to order the judgment to be docketed *nunc pro tunc:* But it was held, that the Court had no power to make such an order.

This statute, it will be remarked, is, in its terms, confined to the Courts at Westminster, and does not extend to judgments of inferior Courts of record, which, it has already been observed, are equally entitled to precedence with the judgments of the Courts above (*m*). And the Act applies only to judgments obtained against the testator or intestate, and not to judgments obtained against the executor or administrator (*n*).

2 Vict. c. 11: no judgments to be hereafter docketed under the provisions of the 4 & 5 W. & M. c. 20.

And now, by statute 2 Vict. c. 11, (*Act for the better Protection of Purchasers against Judgments, Crown Debts, Lis Pendens, and Fiats in Bankruptcy*) after reciting that "it is desirable that further protection should be afforded to purchasers against judgments, Crown debts, and *lis pendens*," it is enacted, "That no judgment shall hereafter be docketed under the provisions of an Act passed in the fourth and fifth years of the reign of their late Majesties William and Mary, entitled, &c. [stat. 4 & 5 Wm. & M. c. 20,] but that all such dockets shall be finally closed immediately after the passing of this Act, without prejudice to the operation of any judgment already docketed and entered under the said recited Act, except so far as any such judgment may be affected by the provisions hereinafter contained."

It had been previously provided by the stat. 1 Vict. c. 110. (*Act for Abolishing Arrest on Mesne Process*), s. 19, that no judgment, &c. should, by virtue of the Act, *affect any lands, tenements, or hereditaments*, unless and until a memorandum or minute, containing the name and place of abode, and title, and trade or profession of the person whose estate

(*m*) *Ante*, p. 856, 857.

(*n*) Gaunt *v.* Taylor, 3 M. & Gr. 886.

is intended to be effected thereby, and the Court and title of the cause in which the judgment, &c. shall have obtained, and the date of the judgment, &c. and the account of the debt, &c. recovered, shall be left with the senior Master of the Court of C. P. at Westminster, who shall forthwith enter the same in a book in alphabetical order, by the name of the person whose estate is intended to be affected by the judgment, &c.

And it is further enacted by the stat. 2 Vict. c. 11, s. 2, that no judgments already docketed and entered under the said recited Act of William and Mary, shall, after August, 1st, 1841, affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until such memorandum or minute thereof as is prescribed by the stat. 1 Vict. c. 110, shall be left with the senior Master of the Court of Common Pleas at Westminster, who shall forthwith enter the same in manner thereby directed in regard to judgments. And further, by sect. 4, all judgments of any of the superior Courts, &c., which, after the recited Act of Victoria, have been or shall be registered under the provisions therein contained, shall, after the expiration of five years from the date of the entry thereof, be null and void *as against lands, tenements, and other hereditaments,* as to purchasers, mortgagees, or creditors, unless a like memorandum or minute is again left with the senior Master of the Court of Common Pleas, within five years before the execution of the conveyance, &c. vesting or transferring the right, title, &c. in or to such purchaser or mortgagee, &c., or as to creditors within five years before the right of such creditors accrued, and so *toties quoties,* at the expiration of every succeeding five years.

It may be questioned whether these enactments will not be attended with a serious consequence (perhaps overlooked by the legislature) with reference to the subject now under discussion: for it may be contended, that the effect of them is that a judgment, recovered subsequently to the passing of the Act, will be entitled to precedence, as at common law, in the

administration of assets by an executor or administrator, notwithstanding it be neither registered, as prescribed by the statutes of Victoria, nor docketed as required by the statute of William and Mary: Because it is no longer possible to docket the judgment under the statute of William and Mary; and the only penalty imposed by the statutes of Victoria, for neglecting to register it, is, that it shall not affect any lands, tenements, and hereditaments. The statutes omit to enact (as they ought to have done, in order to conform with the statute of William and Mary), that a judgment, not registered, shall not have any precedence against executors or administrators, in the administration of their testator's or intestate's effects.

Judgments have no precedence among themselves.

Between one judgment and another obtained against the deceased, as they stand among themselves, precedency or priority of time is not material, as far as regards the personal estate (*n*). Nor is there preference to be claimed by the creditor with respect to the original cause of action; for a judgment against the testator on a debt by simple contract, is of the same nature as a judgment on a specialty (*o*).

Of several judgment creditors, therefore, he who first sues out execution must be preferred; and before any execution sued, it is at the election of the executor or administrator to pay whom he will first (*p*). Even if each bring a *scire facias* upon his judgment, the executor or administrator may yet confess the action of which he will first, notwithstanding the *scire facias* was brought by the one before the other (*q*).

Whether the executor may postpone payment of a judgment by a writ of error.

It was held, in *Bereblock* v. *Read* (*r*), after great difference of opinion among the judges, that an executor or administrator, by bringing a writ of error on a judgment, might postpone it to a statute; and the satisfying the debt on the statute, if pending the writ of error, should be no *devastavit*,

(*n*) Wentw. Off. Ex. 269, 14th edit.

(*o*) Toller, 264.

(*p*) Wentw. Off. Ex. 269, 14th edit.

(*q*) *Ibid.* See *infra*, sect. v.

(*r*) Cro. Eliz. 734, 822. S. C. Yelv. 29. 2 Brownl. 39, 81. 2 Anders. 157.

because it was out of his power to withstand the payment of it; the effect of the judgment being by the writ of error wholly suspended. But now, by stat. 6 Geo. IV. c. 96, s. 1, for preventing frivolous writs of error, execution shall not be staid or delayed by writ of error thereupon, without the special order of the Court, or some judge thereof, unless the person, in whose name the writ of error is brought, is bound with two sureties in a recognizance to prosecute with effect, and satisfy the debt, damages, and costs, if the judgment be affirmed.

Decree in equity: equal to a judgment at law:

A decree in a Court of Equity, obtained against the testator or intestate, is, in respect to the course of administering assets, equivalent to a judgment at law against him, and shall stand in the same order of payment (*s*).

the executor cannot plead it at law, but must have an injunction:

However an executor or administrator, if sued at law for a debt of inferior degree, cannot plead or give in evidence a decree of a Court of Equity (*t*). But he may relieve himself by a bill in equity, and have an injunction (*u*).

what sort of decree entitled to this precedence.

If a decree be not conclusive of the matters in question, as if it be merely to account, and do not ascertain the sum to be paid, it is analogous to a judgment *quod computet* at law, and that is no complete judgment till the account be stated. Therefore, it has been holden, that, pending a bill in equity, and after such decree against his testator, an executor may pay any other debt of a higher or equal nature, in case the assets be legal, although he has no power to do so, as against a final decree (*v*).

3. Recognizances and statutes:

3. Recognizances and statutes. Next in rank to judgments and decrees, are recognizances and statutes.

A recognizance is an obligation of record; it may be

(*s*) Shafto *v*. Powel, 3 Lev. 355. Peploe *v*. Swinburn, Bunb. 48. Stasby *v*. Powell, 1 Freem. 333. Bishop *v*. Godfrey, Prec. Chan. 79. Scarle *v*. Lane, 2 Vern. 89. S. C. 2 Freem. 103. Astley *v*. Powis, 1 Ves. Sen. 496. 3 P. Wms. 401, note to Robinson *v*. Tonge.

(*t*) Stasby *v*. Powell, 1 Freem. 334.

(*u*) *Ibid.* Harding *v*. Edge, 1 Vern. 143.

(*v*) Smith *v*. Eyles, 2 Atk. 385.

entered into by the party before a Court of Record, or a magistrate duly authorized, conditioned for the performance of a particular act; as, to appear at the assizes, to keep the peace, to pay a debt or the like (*w*). A recognizance is, in most respects, like another bond. The chief distinction between them is, that the latter is the creation of a new debt, or an obligation *de novo*, the former is an acknowledgment on record of a prior debt, of which the form is: "That A. B. doth acknowledge to owe to our lord the king (to the plaintiff, to C. D. or the like), the sum of ten pounds," with condition to be void on performance of the thing stipulated. And in such case, the king (the plaintiff, or C. D.) is called the cognizee, "*is cui cognoscitur*," as he that enters into the cognizance is called the cognizor, "*is qui cognoscit.*" This instrument being either certified to, or taken by the officer of some Court, is authenticated only by the record of such Court, and not by the party's seal (*x*).

recognizance:

A recognizance is not a record until it is enrolled (*y*), and will not, without enrollment, be entitled to precedence over specialty debts (*z*). However, the creditor claiming under a recognizance not enrolled, will still be considered as a bond creditor, the sealing and acknowledging thereof supplying the want of delivery (*a*).

If a recognizance be enrolled by special order of Court, after the time for the enrolling of it has elapsed, that makes the recognizance effectual from the time of the date (*b*). But whenever the Court permits the enrolling of a recognizance, after the time elapsed, it always takes care not to hurt an intervening purchaser (*c*).

securities by statute:

Of securities by statute, there are three species; statutes merchant, statutes staple, and recognizances in the nature of statutes staple; and though they are fallen into disuse, yet,

(*w*) 2 Black. Comm. 341.

(*x*) *Ibid.*

(*y*) Glynn *v.* Thorpe, 1 Barn. & Ald. 158.

(*z*) Bothomly *v.* Fairfax, 1 P. Wms. 334. S. C. 2 Vern. 751.

(*a*) 1 P. Wms. 340.

(*b*) Fothergill *v.* Kendrick, 2 Vern. 234.

(*c*) 1 P. Wms. 340. 2 Vern. 234.

as they are frequently alluded to in argument, especially on this subject, it seems necessary to give some explanation of them.

statute merchant:

A statute merchant is a bond of record acknowledged before the Mayor of London, or chief warden of some other city or town, or other discreet men, chosen and sworn for that purpose, when the mayor or chief warden cannot attend, or before one of the clerks of the statute merchant nominated by the king, pursuant to the statute of Acton Burnell, 11 Edw. I., (enforced and amended by statute 13 Edw. I. st. 3, *de mercatoribus*). This recognizance is to be entered by the clerk on a roll, which must be double, one part to remain with the mayor or chief warden, and the other with the clerk, who shall write with his own hand an obligation, to which the debtor's seal, together with the seal of the king appointed for that purpose, shall be affixed (*d*). The design of this security was to encourage trade, by providing a sure and speedy remedy for merchants, strangers as well as natives, to recover their debts at the day assigned for payment. Afterward, other persons, observing that it was much of the same nature with a judgment, but obtained with infinitely less trouble and expense, frequently entered into this species of contract, until, by degrees, it became a common assurance, as we find it at this day. The addition of the king's seal was to authenticate the security, and to make it of so high a nature, that, on failure of payment by the debtor at the day assigned, execution might be awarded without any mesne process to summon him, or the trouble or charge of bringing in proof of the debt.

statute staple:

A statute staple is a bond of record, acknowledged before the mayor of the staple, in the presence of the constables of the staple, or one of them, pursuant to statute 27 Edw. III. c. 9. To this end the statute requires, that there shall be a seal ordained, which shall be affixed to all obligations made on such recognizances acknowledged in the staple, and the

(*d*) Bac. Abr. Execution, 331.

seal shall remain in the custody of the mayor of the staple, under the seals of the constables (*e*). This security was also only designed for the merchants of the staple, and for debts on the sale of merchandizes brought there; but, in time, others began to apply it to their own ends; and the mayor and constables would take recognizances from strangers, surmising it was made for the payment of money for merchandizes brought to the staple. To prevent this mischief, the Parliament, by statute 23 Hen. VIII. c. 6, s. 11, reduced the statute staple to it's former channel, and laid a penalty of 40*l.* on the mayor and constables who should extend the benefit of the statute to any but those of the staple.

Recognizance in nature of statute staple:

But though that statute deprived them of this benefit, yet it framed a new sort of security, to be used by all persons, known by the name of a recognizance on 23 Hen. VIII. c. 6, or a recognizance in the nature of a statute staple, so called, because this Act limits and appoints the same process, execution, and advantage in every particular, as is provided for the statute staple (*f*). A recognizance, therefore, in nature of a statute staple, as the words of the Act declare, is the same with the statute staple, only acknowledged before other persons; for, as the statute runs, the chief justices of the King's Bench and Common Pleas, or in their absence out of term, the mayor of the staple at Westminster, and the recorder of London jointly together, shall have power to take recognizances for payment of debts in the form set down by the statute (which see in section 2, of the statute 23 Hen. VIII. c. 6). In this, as in the former cases, the king appoints a seal to attest the contract, and each of the justices has the keeping of one such seal, and the mayor of the staple at Westminster and recorder another, of the like print and fashion; and every obligation made and acknowledged before either of the justices, or the mayor and recorder, must be sealed with the seal of the conusor, the king's seal, and the seal of the chief justice, or the seals of the mayor and

(*e*) Bac. Abr. Execution, 331, 332. (*f*) Bac. Abr. Execution, 332.

recorder, before whom it is taken, who are likewise obliged to subscribe their names.

A statute, which is void for the want of the formalities required by the Act of Parliament, shall be considered a bond, and have the same rank among debts as to payment (*g*).

Although recognizances are entered on the rolls of the king's Courts, while statutes are consigned to the custody of the party, and hence are called pocket records (*h*), yet both species of securities, having been entered into voluntarily and privately, are regarded as equal in their nature, and payable in the same order (*i*). Nor is it material, in regard to payment by the executor, which of them are prior or subsequent in point of date: Therefore, where there are many cognizees, he may prefer a subsequent to a prior statute or recognizance; for they all equally affect the personal estate, although, as to lands, the first in point of time shall have the preference (*k*).

If a statute be joint and several, the cognizee may elect to sue either the surviving obligor, or the executor of him who is dead, or both, in separate actions: If it be joint only, the survivor alone is liable (*l*): And, therefore, the executor of the deceased conusor cannot set up any payment of such a statute (*m*).

With respect to recognizances and statutes for the payment of money on a future day, or on a contingency, they will be considered more conveniently hereafter together with debts by specialty of the same nature (*n*).

(*g*) Hollingworth *v.* Ascue, Cro. Eliz. 355, 461, 494, 544. S. C. Moor, 405. 2 Roll. Abr. 149. Obligation, (I.)

(*h*) Harrison's case, 5 Co. 28, *b.*

(*i*) Wentw. Off. Ex. 273, 14th edit. Toller, 275.

(*k*) Wentw. Off. Ex. 273, 14th edit. 3 Bac. Abr. 81, tit. Exors. (L.) 2. Com. Dig. Admon. (C. 2.)

(*l*) Rogers *v.* Danvers, 1 Mod. 165. S. C. 1 Freem. 127.

(*m*) *Infra*, p. 869.

(*n*) *Infra*, p. 876—880.

SECT. III.

Of Debts by Specialty, and by Simple Contract.

Next in precedence in the order of payment are debts by special contract; as on bonds, covenants, and other instruments under the seal of the party: all these must be paid by an executor or administrator before debts by simple contract (*o*).

It must be observed, however, that when there is a sufficiency of assets for payment of debts, an executor may pay simple contract debts not bearing interest before specialty debts bearing interest, if not objected to by the specialty creditors; and the legatees are not at liberty to complain of the order of payment (*p*).

Rent.

A debt for rent also ranks in the same degree as a debt by obligation, or other instrument under seal (*q*). Nor does it make any difference whether the rent be reserved by lease in writing or by parol; for in the latter case, the rent arises equally from the profits of the land, and is regarded as a debt by specialty (*r*). Nor is the nature of a debt changed by the determination of the lease; for the contract remains in the realty, though the right of distress be gone (*s*).

It was holden by the Court of Exchequer in *Thompson* v. *Thompson* (*t*), that rent due for the half-year commencing before, and ending since the death of the testator or intestate, is a debt of the same degree as rent in arrear before his

(*o*) Pinchon's case, 9 Co. 88, *b*.

(*p*) Turner *v*. Turner, 1 Jac. & Walk. 39.

(*q*) Wentw. Off. Ex. 284, 14th edit. Com. Dig. Admon. (C. 2.)

(*r*) Willett *v*. Earle, 1 Vern. 490. Phillips *v*. Lee, 1 Freem. 262. Gage *v*. Acton, 1 Freem. 512. S. C. Com. Rep. 67. Carth. 511. 1 Salk. 325. 12 Mod. 288. 1 Lord Raym. 515. Holt, 309. Thompson *v*. Thompson, 9 Price, 471, by Wood, Baron. The rule is the same in equity. Clough *v*. French, 2 Coll. 277.

(*s*) Newport *v*. Godfrey, 3 Lev. 267. Thompson *v*. Thompson, 9 Price, 476.

(*t*) 9 Price, 464.

death: And it would appear, from the expressions of the judges in that case (*u*), that the law was the same with respect to rent incurred wholly after the death of the testator or intestate, upon a lease made to him. But it is laid down in Wentworth's Office of an Executor (*v*), that an executor sued for debt upon a bond cannot plead a payment of rent grown due since the testator's death, unless where the rent is greater than the profits of the land in the executor's time; in which case so much of the rent as exceeds such profits shall stand in equal degree the testator's debt with other debts by specialty (*w*).

What is a specialty debt:

The recital of a debt under hand and seal has been held to be no specialty debt, although recited in a deed; for it must stand on it's own force (*x*).

Joint and several bond of testator:

If the testator or intestate were bound in a joint *and several* obligation, his executor or administrator may pay it out of the estate of the deceased, and plead the payment to other actions on debts of equal degree, or it's being outstanding to actions on simple contracts (*y*). So when two are bound jointly and severally, and one dies, and makes his co-obligor his executor, it shall be in the power of such executor to discharge his debt, which he himself is bound for, out of the testator's estate, and plead it, or give it in evidence in bar to other creditors (*z*). And in *Rogers* v. *Danvers* (*a*), the Court said, it was very common when a man is bound as surety for another, to make the surety executor, that he may have the power to pay the debt and indemnify himself.

Executor co-obligor:

Joint bond of testator:

But if the testator or intestate be bound in a joint obligation only, there the survivor must be charged out of his own

9 Price, 471, 476.

(*v*) Ch. 12, p. 286, 14th edit.

(*w*) Wentw. Off. Ex. ch. 12, p. 286, 290, 14th edit. If the executor enters, he may be charged in the debet and detinet for the current half-year's rent, which commenced before the testator died: The Bailiffs of Ipswich *v*. Martin, Cro. Jac. 411. Jevens *v*. Harridge, 1 Saund. 1. See *infra*, Pt. IV. Bk. II. Ch. I. § II.

(*x*) Lacam *v*. Mertins, 1 Ves. Sen. 313.

(*y*) Rogers *v*. Danvers, 1 Freem. 128. Enys *v*. Donnithorne, 2 Burr. 1190.

(*z*) Rogers *v*. Danvers, 1 Freem. 128. S. C. 1 Mod. 165.

(*a*) 1 Freem. 128.

estate, and the executors or administrators of the deceased co-obligor are not liable at law, nor, generally speaking, in equity, on the instrument, nor can they set up any payment of it (*b*). But in equity the representative of the deceased joint obligor will, in many cases, be charged *pari passu* with the survivor; for, in equity, a joint bond may be considered a joint and several one, where there has been a credit previously given to the different persons who have entered into the obligation (*c*).

Testator's co-obligor having paid the bond, is not a specialty creditor:

Where the testator or intestate and another person give a joint, or a joint and several bond, the one as principal, and the other as surety, and the surety pays the bond, either in the lifetime of the principal, or after his death, the surety is only a simple contract creditor of the deceased (*d*). Nor shall it make any difference, that the bond has been assigned to the surety (*e*); for after the assignment, the action on the bond must be brought in the name of the obligee, and payment by the surety would be an answer to the demand (*f*). But where the bond debt of the testator has been paid, not by the surety bound in the same obligation with the principal, but by a third party who has by a separate instrument made himself liable for the same debt, this reason altogether fails; because the

Ibid. Richardson *v.* Horton, 6 Beav. 185.

(*c*) Primrose *v.* Bromley, 1 Atk. 90. Bishop *v.* Church, 2 Ves. Sen. 100, 371. Hoare *v.* Contencin, 1 Bro. C. C. 27. *Ex parte* Kendall, 17 Ves. 525. Sumner *v.* Powell, 2 Mer. 30. 1 Turn. & Russ. 423. But it is not a principle in equity that every joint obligation shall be considered as if it were joint and several: Therefore a joint covenant of indemnity shall not be extended in equity beyond its legal operation, where there is no ground to infer mistake in the nature of the instrument, and no previous equity entitling the covenantee to a several indemnity from each of the covenantors; 2 Mer. 30. 1 Turn. & R. 423. Rawstone *v.* Parr, 3 Russ. 539. Richardson *v.* Horton, 6 Beav. 185. Clarke *v.* Bickers, 14 Sim. 639. See *post*, Pt. IV. Bk. II. Ch. I. § II.

(*d*) Copis *v.* Middleton, 1 Turn. & Russ. 224. Jones *v.* Davids, 4 Russ. Chanc. Cas. 277. Warwick *v.* Richardson, 14 Sim. 281. Caulfield *v.* Maguire, 2 Jones & L. 164.

(*e*) Jones *v.* Davids, 4 Russ. Ch. Cas. 277.

(*f*) Gammon *v.* Stone, 1 Ves. Sen. 339. Woffington *v.* Sparks, 2 Ves. Sen. 569. See also Dowbiggen *v.* Bourne, 2 Younge & C. 462. Armitage *v.* Baldwin, 5 Beav. 278.

original bond subsists, and if an action were brought upon it, payment could not be pleaded. Thus, in *Hodgson* v. *Shaw* (*g*), Richard Shaw and Henry Shaw, in February, 1812, had executed a joint and several bond to secure the sum of 2220*l.* and interest as principals to one Wilkinson: In March 1813, Wilkinson died, and, in the following August, Richard Shaw died: In January, 1816, the executors of Wilkinson obtained from Henry Shaw, as principal, and John Whaley as his surety, another bond for 2420*l.*, being part of the sum of 2523*l.* then due on the original bond, with interest: Whaley died in July 1818, having previously made some payments on account of the bond of 1816, to Wilkinson's executors; and after Whaley's death, other payments were from time to time made by his representatives out of his estate in discharge of what was due in respect of that bond; and in consideration of those payments, Wilkinson's executors, in June 1830, assigned the original bond to Whaley's representatives: And it was held by Lord Brougham, (reversing the decree of Sir J. Leach, M. R.), on a suit to administer the estate of Richard Shaw, that they were entitled, by virtue of this assignment, to rank as specialty creditors of Richard Shaw's estate, in respect of the payments made by Whaley, or out of his estate, on the second bond, to the extent of the penalty in the assigned bond.

Sum due on an administration bond.

A sum due from an administrator, who has entered into an administration bond, at his death to the estate of his intestate, is not a specialty debt due to the administrator *de bonis non* (*h*).

Voluntary bonds or covenants.

A bond or covenant merely voluntary shall be postponed to simple contract debts, which are *bonâ fide* owing for valuable consideration; but such bond or covenant, if not to the prejudice of creditors, must be paid by the executor, and in preference to legacies (*i*). For a bond or covenant, however

(*g*) 3 M. & K. 183.

(*h*) Parker *v.* Young, 6 Beav. 261. *Ante*, p. 443.

(*i*) Jones *v.* Powell, 1 Eq. Cas. Abr. 84, pl. 2. Cray *v.* Rooke, Cas. temp. Talb. 156. Loeffes *v.* Lewen, Prec. Chan. 370. Lechmere *v.* Carlisle, 3 P. Wms. 222. Lady

voluntary, transfers a right in the lifetime of the obligor; whereas legacies arise from the Will, which takes effect only from the testator's death, and, therefore they ought to be postponed to a right created in his lifetime (*j*).

Accordingly it has been held, that the payment of the expenses of the reconveyance of mortgaged premises to the real representative, and the costs of an ejectment to recover the mortgaged premises, ought to be postponed by an executor to the payment of an annuity creditor by voluntary deed: And further, that an executor cannot, as against such voluntary creditor, be allowed a payment made out of the assets on account of a mortgage debt, created by an ancestor of the testator, to whom the mortgaged estate had descended (*k*).

In a modern case (*l*), a husband made a post-nuptial settlement of 4000*l.* in favour of his wife and children; and then, in consideration of the 4000*l.*, expressed to have been lent to him by the trustees of the settlement, he made a mortgage to them of a real estate to secure that sum, and covenanted to repay it: The husband never, in fact, paid the 4000*l.* to the trustees; nevertheless, it was holden by Sir John Leach, V.C. that they were specialty creditors of the husband.

bond usurious or *ex turpi causâ.*

An executor has no authority to pay a bond founded on an usurious contract, or a bond *ex turpi causâ:* such payment will amount to a *devastavit,* as well against legatees as against creditors (*m*).

bond due from *feme covert.*

In the distribution of the separate property of a married woman, as assets after her death, a bond debt is not entitled to a priority; for the bond merely as a bond is void (*n*).

Cox's case, 3 P. Wms. 339. Lomas *v.* Wright, 2 M. & K. 769. Watson *v.* Parker, 6 Beav. 283. Creditors by specialty, who are mere volunteers, as against the devisees of the debtor, have a right to stand in the place of mortgagees: 2 M. & K. 769.

(*j*) Toller, 283.

(*k*) Edwards *v.* Edwards, 2 Cr. & Mees. 612. S. C. 4 Tyrwh. 438.

(*l*) Tanner *v.* Byne, 1 Sim. 160.

(*m*) Winchcombe *v.* Bishop of Winchester, Hob. 167, cited 1 Brownl. 33. Robinson *v.* Gee, 1 Ves. Sen. 254.

(*n*) Anon. 18 Ves. 258.

Covenants, debts due by.

A demand arising from a covenant, is a specialty debt of the same nature as one due on bond (*o*). Thus, if a contract be entered into, under hand and seal, for the purchase of an estate, and the vendee dies, the vendor is a creditor by specialty; and if the whole personal estate be not more than adequate to pay for the estate, at law he may compel the executor to exhaust the assets in his favour to the disappointment of all the simple contract creditors, while the purchased estate will descend to the heir free from all simple contract debts (*p*): though (as will hereafter appear) equity might marshal the assets in their favour (*q*). A demand arising from a covenant is equally a debt by specialty, whether it be for a specific sum, or whether it sound merely in damages (*r*).

In *Bailey* v. *Lloyd* (*s*), the deceased, in the year 1779, in contemplation of his marriage, covenanted for the payment of 3000*l.* within three months after his decease, for the benefit of the children of the marriage; in 1815, upon the marriage of one of such children (a daughter), he executed a deed, which recited, that it had been agreed, that by way of additional portion for her, he should enter into a covenant that she should have an equal share at least with his other children, of the real and personal estate which he should be entitled to at his decease, *after payment of his debts:* This

(*o*) Where A. covenanted with B. to pay him a certain sum, by bills of exchange to be drawn by B. upon and, accepted by A., and A. only gave B. a bill for part of the sum, and that bill was dishonoured; it was held that B. was a specialty creditor of A. for the whole sum: Copland *v.* Martin, 9 Sim. 433.

(*p*) Broome *v.* Monck, 10 Ves. 620, 621. But see the stat. 3 & 4 Wm. IV. c. 104. *Post,* Pt. IV. Bk. I. Ch. II. § I.

(*q*) *Infra,* Pt. IV. Bk. I. Ch. II. § II.

(*r*) Plumer *v.* Marchant, 3 Burr. 1380, (cited 3 A. & E. 858.) Fremoult *v.* Dedire, 1 P. Wms. 429. Langley *v.* Furlong, 1 Dick. 315. Chevely *v.* Stone, 2 Dick. 782. Musson *v.* May, 3 V. & B. 197. Watson *v.* Parker, 6 Beav. 283. But see De Tastet *v.* Shaw, *post*, p. 899. Where a testator has entered into a voluntary covenant to pay an annuity, the annuitant has been held a specialty creditor on his real estates, though the annuity did not become in arrear till after the testator's death: Jenkins *v.* Briant, 6 Sim. 603.

(*s*) 5 Russ. 330.

recital was followed by a covenant, that his heirs, &c., should within three calendar months after his death convey to the trustees of her settlement a share of his real and personal estate, equal to the share which any other of his children should have had or be entitled to: Upon his death a question arose, whether the two covenants ought to be satisfied rateably, or whether the 3000*l.* due under the covenant in the deed of 1779, was to be paid in full, before any part of the assets could be applied in satisfaction of the covenant in the daughter's marriage settlement: And it was held by Sir John Leach, M. R., that the 3000*l.* due under the covenant of 1779, was to be paid before any part of the assets could be applied in satisfying the covenant contained in the deed of 1815.

Breaches of trust.

Breaches of trust are, generally speaking, considered as simple contract debts (*t*); but, in some cases, they amount to breaches of agreement under hand and seal; and they will, in such instances, be regarded as debts by specialty. Thus in *Gifford* v. *Manley* (*u*), two persons named Buckingham and Jones were trustees of a sum of money, to be put out at interest, under a deed by which neither of them was to answer for the other: Buckingham received a sum of money under the trust, and gave a writing under hand and seal, acknowledging it, and that Jones had received no part of it: Buckingham died, having never placed out the money he had so received: The question was, whether this was to be looked upon as a simple contract debt only, or as a specialty debt: And Lord Talbot, C., held clearly that it was the latter. So in *Benson* v. *Benson* (*v*), it was agreed, by articles before marriage, that a sum of money should be invested in a purchase of lands to be settled on the husband and wife for their lives; remainder to the heirs of the body of the wife

(*t*) Cas. temp. Talb. 110. Vernon *v.* Vawdry, 2 Atk. 119. Baily *v.* Ekins, 2 Dick. 632. The party injured by a *devastavit* is but a simple contract creditor of the executor: Charlton *v.* Low, 3 P. Wms. 331.

(*u*) Cas. temp. Talb. 109.

(*v*) 1 P. Wms. 130.

by the husband; remainder to the heirs of the husband: The husband received the whole sum; the wife died, leaving a son and three daughters: after which the husband died intestate, and the eldest daughter took out administration to him: The son brought a bill against his sister (the administratrix) to have the money paid to him, electing that it should not be laid out in land (*w*): An objection was then raised, that this was not a debt by specialty from the intestate, but only by simple contract, there being no express contract from the intestate by the articles to pay it; so that it was, at most, but a breach of trust, as money received and misapplied: But the Master of the Rolls (Sir John Trevor) held, that it was a debt by specialty, and to be paid in that degree; for it was agreed by the articles, (to which the husband was a party) that it should be, within such a time, laid out in land; and the husband having received it, and not having laid it out, had broken that agreement; and an agreement under hand and seal, by deed, was a covenant, and, consequently, a specialty. So in a modern case of *Mavor* v. *Davenport* (*x*), it was agreed by deed between A. and B. that a sum in the hands of A., but belonging to B., should be laid out in the funds in A.'s name, in trust for B.: A. died, never having invested the money; and it was holden, that B. was a specialty creditor of A. for the amount. Again, in *Turner* v. *Wardle* (*y*), a testator bequeathed his personal estate to A., B., and C., his executors, in trust to invest two sums of 600*l.* in their names, for his daughters for life, and after their deaths, for their children: A. and B. alone acted: A. paid the interest of the two sums to the daughters, but did not invest the principal: B. executed a mortgage to A. and C. for securing 1300*l.* part of the testator's estates possessed by him, and died: His executors paid off the 1300*l.*, and A. and C. joined in assigning the mortgage to them, and in signing a receipt for the money: A. died, having executed a deed poll, reciting that the testator gave all his personal estate to A.,

(*w*) See *ante*, p. 552, note (*c*).
(*x*) 2 Sim. 227.
(*y*) 7 Sim. 80.

B., and C., upon certain trusts mentioned in his Will, and acknowledging that A. had received the whole 1300*l.* and that C. joined in the assignment and receipt, for conformity only: And it was held by Sir L. Shadwell, V. C., that under the deed poll, the *cestui que trusts* of the two sums of 600*l.* were specialty creditors of A. (*z*)

Debts by mortgage.

In the class of debts by specialty are also debts by mortgage, where there is a bond or covenant for the payment of the money (*a*). If there be neither the one nor the other, still the mortgage debt is payable out of the personal assets, since every loan creates a debt from the borrower, whether there be a bond or covenant for payment or not (*b*). But such a debt, it should seem, will only rank as one by simple contract (*c*).

Future debts by specialty.

With regard to debts by bond, the executor or administrator is bound to pay such a debt before debts by simple contract, although the bond be not yet due (*d*). Hence, if an action be brought against an executor on the simple contract of his testator, he may plead that his testator entered into a bond payable at a future day, and it shall cover assets. to the amount of the sum payable by the condition (*e*).

(*z*) See also Wood *v.* Hardisty, 2 Coll. 542. Accord.

(*a*) Galton *v.* Hancock, 2 Atk. 435.

(*b*) Howell *v.* Price, 1 P. Wms. 291, 294. Cope *v.* Cope, 2 Salk. 449. Balsh *v.* Hyham, 2 P. Wms. 455. King *v.* King, 3 P. Wms. 358.

(*c*) Coote, Mortg. 509. A man, said Lord Thurlow, in Ancaster *v.* Mayer, 1 Bro. C. C. 464, 465, mortgages his estate without covenant, yet, because the money is borrowed, the mortgagee becomes a simple contract creditor.

(*d*) Woodshaw *v.* Fulmerstone, 1 Leon. 187. Lemun *v.* Fooke, 3 Lev. 57.

(*e*) Buckland *v.* Brook, Cro. Eliz. 315. Lemun *v.* Fooke, 3 Lev. 57. Bank of England *v.* Morrice, Cas. temp. Hardw. 228. However, in Norman *v.* Baldry, 6 Sim. 622, Sir L. Shadwell, V. C., is reported to have said, that he had always understood the law to be, that an executor who had paid simple contract debts of his testator, a bond being in existence, but not then payable, ought to be allowed those payments. Probably the learned Judge did not intend to apply the observation so generally as it is stated in the Report; but to confine it to the case of a bond payable *on a contingency;* with respect to which the law so understood is in accordance with all the authorities. The true rule, it is submitted, appears

So if a statute or recognizance be for the payment of a sum of money at a day certain, although the day be not arrived, yet it is a debt of the same class with other statutes; for it is a present and immediate duty to be discharged at a future period (*f*).

But where there are two debts upon specialties, and of one the day of payment is past, and of the other the day of payment is not come, the executor may not pay the latter debt before the former (*g*).

Contingent debts by specialty.

With respect to contingent securities, such as bonds to save harmless, they shall not stand in the way of debts of inferior degree: Therefore a debt by bond shall be satisfied before a statute to perform covenants, which covenants are not broken (*h*). It has further been held, that if the condition of a recognizance be for the payment of 100*l.* to an infant when he comes to his full age, the recognizance during the infancy is no bar to debt upon bond, because it is uncertain whether ever anything shall be paid upon the recognizance; for the infant may die before his full age, and then nothing shall be paid (*i*). So the payment of a simple contract debt before a bond conditioned for indemnity, is good, if no breach of the condition has taken place (*j*): And if subsequently to

to be, that where it is uncertain whether anything will ever become payable on the special security, it shall not stand in the way of the payment of simple contract debts; but where a sum will certainly become due, though on a future day, the special security is entitled to priority, like any other obligation of its class.

(*f*) Robson *v.* Francis, 1 Roll. Abr. 925. Exors. (Q.) 2. S. C. Bridgm. 79. 1 Roll. Rep. 405, pl. 36. S. C. cited by Vaughan, C. J. Vaugh. 103. Goldsmith *v.* Sidnor, 1 Roll. Abr. 925, 926, pl. 4. S. C. Cro. Car. 362.

(*g*) 1 Roll. Abr. 927, tit. Exors. (R.) pl. 5, (citing Doctor and Stud. 77, *b.* 9 E. 4, 13.) Wentw. Off. Ex. Ch. 12, p. 277, 278, 14th edition. Treat. on Eq. Bk. 4, Pt. 2, c. 2, s. 2.

(*h*) Harrison's case, 5 Co. 28, *b.* Philips *v.* Echard, Cro. Jac. 8. Milles *v.* Sherfield, Cro. Jac. 102. Woodcock *v.* Hern, Goldsb. 142, pl. 57.

(*i*) Holden by Doderidge and Haughton, Justices, Mountague, Justice, *dissentiente*, in Robinson *v.* Francis, Bridgm. 79. S. C. 1 Roll. Abr. 925, tit. Exors. (Q.) pl. 3. 1 Roll. Rep. 405, pl. 36.

(*j*) Eeles *v.* Lambert, Aleyn, 40. S. C. cited in Lancy *v.* Fairechild, 2 Vern. 101. Hawkins *v.* Day, Ambl. 160. S. C. Dick. 155. S. C.

the payment of the simple contract debt, the contingency should happen, and the bond be put in suit, it will be a good defence for the executor, that he has paid the simple contract debt, and has no more assets wherewith to satisfy the bond (*k*).

In a late case (*l*), the testator had entered into a covenant with the plaintiff, for securing to him an annuity for his life, and had executed a warrant of attorney, as a further security, but judgment had not been entered up under it: The bill prayed for an account of the testator's assets, and that the defendants, his executors, might be ordered to set apart a sufficient part of the assets, to answer the future payments of the annuity; and that in the meantime they might be restrained from parting with any of the assets, either to the creditors or legatees of the testator: Some of the testator's simple contract debts remained unpaid, but the annuity was not in arrear, and the executors had a balance in hand: And it was contended that the relief asked was frequently granted in the case of legatees (*m*): But Sir L. Shadwell, V. C., refused the motion for an injunction, and said, that "if there was anything like misapplication of assets in this case, that would be a reason for the Court interfering: The executors may, by law, the day before an instalment of the annuity becomes due, apply the whole of the assets to pay the simple contract debts (*n*): The case of a bond creditor is different;

Harg. MSS. No. 471, p. 218. Ambl. 803, in Mr. Blunt's edition.

(*k*) Philips *v.* Echard, Cro. Jac. 8, where all the Court agreed, that if an executor pay debts upon an obligation, before a statute is broken, and afterwards a covenant is broken whereby suit is upon that statute, payment of the debt upon the obligation, and that he hath no more in his hands of the testator's goods, is a good bar against the statute. However, in Woodcock *v.* Hern, Goldsb. 142, pl. 57, the reporter assumes, that if the executor pays the debt and the statute is broken, he would be chargeable by a *devastavit* of his own proper goods.

(*l*) Read *v.* Blunt, 5 Sim. 567.

(*m*) Slanning *v.* Style, 3 P. Wms. 336. The question, whether an annuitant, *under a Will*, has a right to have an adequate portion of the assets set aside for the satisfaction of his legacy, turns on an entirely different principle, connected with the appropriation of legacies payable *in futuro*. As to which, see *post*, Pt. III. Bk. III. Ch. IV. § IV.

(*n*) As the law stood, at the time of this decision, the annuity

for, when the condition of a bond is broken, the whole penalty is due: Here no case has been made out of probable misapplication of assets; and certainly none has been made out of the past misapplication."

However, where the contingency has taken place by a breach of the condition, the securities will stand in the same rank as other specialties, and the conusees, obligees, or covenantees may enforce their claims under them, as specialty creditors, whether the debt is ascertained, or the damages are unliquidated: Thus in *Cox* v. *Joseph* (*o*), the testator had executed a bond in 2800*l.* conditioned to indemnify the obligee against another bond for 800*l.* which he had executed jointly with the testator as surety for the debt of the testator, in whose lifetime the 800*l.* had become due, and were still unpaid: And it was held a good plea in bar by the executrix, to a simple contract creditor, that the bond for 2800*l.* was unpaid, and that she had not assets more than sufficient to satisfy the penalty of it. So in *Musson* v. *May* (*p*), the intestate and another were jointly indebted as partners, and the intestate, for a valuable consideration, on dissolving partnership, covenanted that he alone would pay the joint debts, and indemnify his partner against them: The intestate died, leaving partnership debts undischarged: And Sir Wm. Grant held, that the covenantee was to be considered as a specialty creditor under the covenant, at the time of the death of the intestate.

An early decision (*q*) appears to regard securities for indemnity given to a surety by his principal, in respect of a

could not have been apportioned; and therefore, the debt was *contingent* on the event of the annuitant living till the day of payment; and the case fell within the rule (above stated) as to the priority of simple contract debts payable *in præsenti* to contingent debts by specialty. But since the stat. 4 Wm. IV c. 22, s. 2, (see *ante*, p. 707) the claim of the personal representatives of the annuitant for an apportionment may, perhaps, stand on a different footing, and be entitled to priority, as being a debt certain by specialty. (See *ante*, p. 876, 877, note (*e*)).

(*o*) 5 T. R. 307.

(*p*) 3 V. & B. 194.

(*q*) Goldsmith *v.* Sidnor, 1 Roll. Abr. 925, tit. Exors. (Q.) pl. 4. S. C. Cro. Car. 362.

bond already jointly entered into by them, rather as specialty debts due *in futuro*, than as contingent debts. In that case the testator acknowledged a recognizance in the nature of a statute staple, whereof the defeasance was, that, whereas the conusee and testator were bound in a bond to B., a stranger, for the debt of the testator, and as his surety, with condition for payment of 100*l.* at a day yet to come, it was granted by the said defeasance, that if the testator, his executors or assigns, paid the 100*l.* to B. at the day, then the statute should be void: And it was holden, that, though in this case the day of payment was not yet come, and though it was a collateral sum to be paid to a stranger to the statute, and not to the conusee, and so no duty to the conusee, and peradventure, the heir of the testator would pay the money at the day, yet, inasmuch as it was for payment of the money certain, for which, by intendment, the executor would be charged, the executor might plead this statute, in bar of an action of debt upon a bond, before the day of payment came.

Debts by simple contract.

Last in order of payment are debts on simple contract; as on bills or notes not under seal, and verbal promises, or such as are implied in law.

Of debts of this nature, those due to the king, shall, it seems, be satisfied before debts due to subjects (*r*). The wages, also, of domestic servants and of labourers, are considered by some authorities to be entitled to a preference (*s*).

It was resolved in *Snelling's Case* (*t*), that the custom of

(*r*) 3 Bac. Abr. 80, tit. Exors. (L.) 2.

(*s*) 2 Black. Comm. 511. Toller, 286. It is difficult to point out any legal ground on which such preference can be claimed. Blackstone refers to 1 Roll. Abr. 927, where it is said that debts for servants' wages, *within the Statute of Labourers*, shall be paid before simple contracts, "*come moi semble.*" This distinction as to wages within the statute seems to refer to the doctrine, that an action of *debt* would lie for them, against an executor, but not for other wages. That difference, however, appears to have ceased to be of any importance, since it has been established that *assumpsit* lies against an executor on the simple contract of his testator. See *post*, Pt. v. Bk. II. Ch. I.

(*t*) 5 Co. 82, *b*. S. C. 1 Roll.

London was good, that if a citizen of London dies intestate, indebted to another citizen by simple contract made within the city, the administrator shall be bound to pay the debt as if it were by bond; and further, that such custom was good to bind a bond creditor of the deceased, although a stranger and no citizen (*u*). However, it was said, by Holt, C. J., in *Masters* v. *Lewis* (*v*), that *Snelling's Case*, where it is said that the administrator is bound by the custom to pay a debt by simple contract, as if it were by bond, is not sound law: In the subsequent case of *Scuddamore* v. *Hearn* (*w*), the custom was defectively pleaded, so that the Court was not called upon to give any opinion as to the validity of it: In that case, besides the defect in the plea upon which judgment was given for the plaintiff, Lee, C. J., also observed, that it was a strong exception to the plea, that it did not shew that the contract was made within the city, it being said only, that the intestate was indebted to the party within the city; so that the contract might have been made elsewhere.

Damages for injuries done by deceased to the real or personal property of another.

The damages recovered in an action against an executor or administrator, under the stat. 3 & 4 Wm. IV. c. 42, s. 2, in respect of any injury by the deceased to the real or the personal property of another (*x*), are, by that statute, directed to be payable in like order of administration as the simple contract debts of the deceased.

Dilapidations.

It seems that damages for dilapidations, payable by the executors or administrators of the late incumbent of a benefice to his successor, are to be postponed, in order of payment, to the debts of the deceased of every description (*y*).

Payment of legacies before contingent

A very important question arises with respect to contingent debts; *viz.*, whether an executor or administrator can pay

Abr. 557, (N.) pl. 1. S. C. *nomine* Snelling *v.* Norton, Cro. Eliz. 409.

(*u*) This custom is also recognised by Hobart, C. J., in Day *v.* Savadge, Hob. 86.

(*v*) 1 Lord Raym. 57.

(*w*) Andrews, 340.

(*x*) See *post*, Pt. IV. Bk. II. Ch. I. § I.

(*y*) Degge's Parson's Counsellor, p. 91.

debts or debts of which an executor has no notice.

legacies, or deliver over a residue, where there is an outstanding covenant, or like obligation of the testator, which may or may not be broken hereafter: And a further question occurs, connected in some degree with the present inquiry, *viz.*, whether, under any circumstances, an executor can be allowed payments made to legatees, as against creditors of whose claims he had no notice. But it will be more convenient to consider these points hereafter, together with the subject of the Payment of Legacies generally (*z*).

Priority of debts with respect to an executor *de son tort.*

It may be proper, in conclusion, to consider the subject of the priority of the debts of the deceased with reference to the character of an executor *de son tort.* It has appeared in a former part of this Work, that if a creditor brings an action against such an executor, the defendant may give in evidence, under a plea of *plene administravit*, payments by himself of just debts of the deceased which have exhausted all the assets which have come to his hands (*a*), although it will afford him no defence, that *after action brought*, and before plea pleaded, he delivered over such assets to the rightful executor or administrator (*b*). Nevertheless, he is justified, even after action brought, in applying the assets which are in his hands, to the payment *of a debt of a superior degree.* Thus in the case of *Oxenham* v. *Clapp* (*c*), the plaintiff declared in assumpsit against the defendant as executrix for work and labour done by him as the attorney of the deceased: The defendant pleaded that *since the exhibiting of the bill*, she had exhausted the assets which had come to her hands in the payment of a bond debt of her testator: The plaintiff replied, that the defendant was executrix of her own wrong, that she had never been called on to pay, nor had paid the money due upon the bond, and that at the time of exhibiting the bill she had sufficient assets to satisfy the plaintiff: The defendant's rejoinder merely

(*z*) *Post*, Pt. III. Bk. III. Ch. IV. § I.

(*a*) *Ante*, p. 218, 219.

(*b*) *Ante*, p. 219.

(*c*) 2 B. & Adol. 309.

repeated the allegation in the plea, that she had paid the money due on the bond: whereupon the plaintiff demurred; and, after argument, the Court of K. B. gave judgment upon the demurrer for the defendant.

However, Lord Tenterden observed in this case, that he was not prepared to say, that if it had been alleged that the payment had been voluntary, the defendant could have justified paying a debt of equal degree with that of the plaintiff: because that might have been taking an undue advantage of her own wrong.

It may be inferred from that which has been shown in this section, with respect to a rightful executor, that when it is laid down that an executor *de son tort* may defend himself, in an action by a creditor, by shewing that he has applied all the assets come to his hands in the payment of debts, it must be intended that such debts were of equal or superior degree to those upon which the action is brought (*d*).

Sect. IV.

Of the Payment of an inferior Debt by an Executor or Administrator before a superior, without notice; and of suffering Judgment, on an inferior Debt, without notice of a superior.

Having thus considered the priority in degree of the different sort of debts due from the deceased, it remains to point out more particularly how this precedence operates in the course of administration of assets by the executor or administrator.

An executor may voluntarily pay an inferior debt before a superior without notice.

It has already been stated generally, that if an executor or administrator pays a debt of a lower degree before one of a higher, he must, on a deficiency of assets, answer that of a higher out of his own estate (*e*). But it must be understood,

(*d*) 2 Black. Comm. 507, 508. (*e*) *Ante*, p. 849.

that at the time of such payment, *he had notice* of the existence of the superior debt: For an executor may voluntarily pay a debt of inferior nature before one of a superior, of which he had no notice (*f*): otherwise it would be in the power of a superior creditor to ruin an executor, by suppressing his security till all the assets were exhausted in the payment of debts of inferior degree (*g*).

An executor who has suffered judgment on an inferior debt, without notice of a superior, may plead the judgment in bar to the superior creditor.

Again, it is a general rule, that an executor or administrator is bound to plead a debt of higher nature in a bar of an action brought against him for a debt of an inferior nature, and *riens ultra*, if he has not assets for both: otherwise it will be an admission of assets to satisfy both debts (*h*). But it is obvious, that this must also be understood with the qualification that the executor or administrator *had notice* of the superior debt. Accordingly, it is established, that an executor or administrator may, to an action by a specialty creditor, plead a judgment recovered against him on a simple contract, without notice of the specialty debt, and *riens ultra* (*i*): For, by reason of having had no notice, it was not in the power of the executor or administrator to prevent the recovery of such judgment, by pleading the outstanding

(*f*) Harman *v.* Harman, 2 Show. 492. S. C. 3 Mod. 115. (S. C. misreported, *semble*, Comberb. 35.) Brooking *v.* Jennings, 1 Mod. 175, by Vaughan, C. J., and two other judges. Hawkins *v.* Day, 1 Dick. 155. S. C. Ambl. 162: Provided a reasonable time has elapsed since the testator's death: for such payment, if precipitate, would be evidence of fraud: Toller, 192.

(*g*) 3 Bac. Abr. 82, tit. Exors. (L.) 2. Fonbl. Treat. Eq. B. 4, Pt. 2, c. 2, s. 2, note (*n*).

(*h*) Rock *v.* Leighton, 1 Salk. 310. Britton *v.* Batthurst, 3 Lev. 114. 1 Saund. 333, *a.* note. The law gives no opportunity of setting up any debts of a superior nature to that of an inferior, except before a plea pleaded: Abbis *v.* Winter, 3 Swanst. 578, note.

(*i*) Davies *v.* Monkhouse, Fitzgib. 76. Bull. N. P. 178. Magworth *v.* Davis, cited in Scudamore *v.* Hearne, Andrews, 340. The executor, if he has not assets to satisfy both judgments, *must* plead as above; for it is held, that, if ignorant of the existence of a bond, an executor confess a judgment on a simple contract, and afterwards judgment be given against him on the bond, he is bound, however insufficient the assets, to satisfy both judgments; since he might have pleaded the first, if he had not assets for both: Britton *v.* Batthurst, 3 Lev. 114.

superior debt. But in the plea of judgment recovered, to the action by the specialty creditor, it must be expressly averred that the executor or administrator had no notice of the specialty debt (*k*).

What shall be sufficient notice to bind the executor.

With respect to what shall be sufficient notice, there is a most important distinction between debts of record, and other debts. For of debts of record, an executor or administrator is bound to take notice at his peril: on the principle that every one is presumed to have cognizance of the proceedings in the King's Courts (*l*). Thus, in *Littleton* v. *Hibbins* (*m*), a *scire facias* was brought against executors, upon a judgment against their testator in debt: They pleaded, that before they had any conuzance of this judgment, they had fully administered all their testator's goods in paying debts upon obligations: And it was thereupon demurred; and after argument, adjudged for the plaintiff, that the plea was bad; for the executors at their peril ought to take conuzance of debts upon record.

The difficulty and hardship upon personal representatives, of finding such judgments, was the occasion of the passing of the statute of 4 & 5 Wm. & M. c. 20, which there has lately been occasion to mention (*n*), respecting the docketing of judgments entered in the Courts at Westminster. Of debts by judgments docketed in pursuance of that statute, and of debts by judgments in inferior Courts of Record, of debts due by recognizance or statute, and other debts of record, such constructive notice to an executor or administrator is sufficient, and he must at his peril give them precedence in payment to debts of inferior degree (*o*).

(*k*) Sawyer *v.* Mercer, 1 Term Rep. 690.

(*l*) Littleton *v.* Hibbins, Cro. Eliz. 793, recognised by Lawrence, J., in Hickey *v.* Hayter, 6 T. R. 388. Dyer, 32, *a. in marg.* Searle *v.* Lane, 2 Freem. 104. S. C. 2 Vern. 89. Fonbl. Treat. Eq. B. 4, Pt. 2, c. 2, s 2, note (*n*): and see the observations of Sir J. Jekyll, in Herbert's case, 3 P. Wms. 117. The contrary was laid down in Anon. 2 Anders. 157, pl. 87, and in Harman *v.* Harman, 3 Mod. 115.

(*m*) Cro. Eliz. 793.

(*n*) *Ante*, p. 859.

(*o*) Toller, 278, 292.

It must here be observed, that where a judgment has not been docketed pursuant to the statute, the circumstance that *actual notice* of it has been received by the executor or administrator will not entitle it to any priority or preference in administration; because the effect of the statute is, that a judgment not docketed in pursuance of it, is to be considered only as a simple contract debt (*p*). Accordingly in *Hall* v. *Tapper* (*q*), to a declaration in *scire facias* against an executrix on a judgment obtained against her testator, the defendant pleaded, that after the testator's death, and before the issuing of the writ, *and before the defendant had any notice of the recovery of* the debt and damages as in the writ mentioned, she had fully administered, &c.; and that she had not, nor had *at the time when she first had notice of the said recovery*, or at any time afterwards, any goods or chattels which were of the testator, &c.: The plaintiff replied, that after the recovery, and after the testator's death, and before the writ issued, to wit, on &c., the defendant *had notice* of the recovery; and that *after she so had notice*, she had goods of the testator in her hands to be administered, wherewith she could and ought to have satisfied the debt, &c.: And on general demurrer to this replication, it was held, that the averment of the defendant as to the notice of the recovery was mere surplusage, and the same as if it had been pleaded that she administered before any other event quite collateral to the matter in question; and that the replication was bad, as leading to an immaterial issue; because a judgment, to be entitled to preference in administration, must be docketed pursuant to the statute 4 & 5 Wm. & M. c. 20: and notice of it in any other way is of no consequence.

The law, however, appears to have been materially altered in this respect by the statute 2 Vict. c. 11; for since that statute, judgments cannot be docketed under the statute of Wm. & M.; and it may be questioned, whether, notwithstanding they be not registered pursuant to the statute of

(*p*) See *ante*, p. 859. (*q*) 3 B. & Adol. 655.

1 Vict. c. 110, s. 19, an executor or administrator is not bound to take notice of them, at his peril, as at common law (*r*).

In like manner, executors and administrators are presumed to have notice of decrees in equity (*s*); and, therefore, where an executor paid a debt due by specialty before a debt due by a decree, of which he had no actual notice, he was decreed to pay it over again out of his own estate (*t*).

But with respect to other species of debts, there must be actual notice; and it has been asserted, that such notice must be by suit (*u*). But it seems clear, that an executor, if he be by any means apprised of a debt of a higher nature, would not be justified in exhausting the assets in the discharge of one which is inferior (*v*).

Sect. V.

Of the Power of Preference by an Executor or Administrator among Creditors of equal degree.

The situation of an executor or administrator is frequently one of great difficulty. The law imposes on him the burthen of paying the debts of the testator or intestate in a particular order. On the other hand, it confers on him certain privileges. One of those privileges is, that among creditors of equal degree, he may pay one in preference to another (*w*).

But this election may, in some measure, be controlled by legal or equitable proceedings against him, of which it will be proper to take notice in this place.

1. Of controlling the executor's preference by proceeding at law.

If one of several creditors of equal degree sues the executor or administrator, and obtains judgment against him, such

(*r*) See *ante*, p. 861, 862.

(*s*) Searle *v.* Lane, 2 Freem. 104. S. C. 2 Vern. 89. Sorrell *v.* Carpenter, 2 P. Wms. 483.

(*t*) Searle *v.* Lane, *ubi supra.*

(*u*) Brooking *v.* Jennings, 1 Mod. 175.

(*v*) Toller, 292. Oxenham *v.* Clapp, 2 B. & Adol. 312, *per* J. Parke and Patteson, JJs.

(*w*) By Abbott, C. J., in Lyttleton *v.* Cross, 3 B. & C. 322.

creditor must be satisfied before the rest: and thus the preference of the executor or administrator is altogether precluded (*x*).

Again, if one creditor of the deceased *commence* an action against the executor or administrator, of which he has notice, he is restrained from making a *voluntary* payment to any other creditor of equal degree (*y*).

Yet, if another creditor of equal degree commence a subsequent action, and first recover judgment, he must be first satisfied (*z*). Hence an executor or administrator, even after action commenced, has it in his election to give a preference, by confessing judgment to another creditor of equal degree (*a*): And even after the executor or administrator has

(*x*) Wentw. Off. Ex. 282, 14th edit. Ashley *v.* Pocock, 3 Atk. 208. Abbis *v.* Winter, 3 Swanst. 578, note.

(*y*) Anon. Dyer, 32, *a.* Wentw. Off. Ex. 282, 14th edit. 1 Saund. 333, *a.* note (8). And see the observations of Lord Ellenborough and Bayley, J., in Tolput *v.* Wells, 1 M. & S. 403, 407. But after suit commenced, the executor may voluntarily pay another creditor of equal degree, till he has notice of the suit, and then plead *plene administravit* before notice: Dyer, 32, *a. in marg.* Wentw. Off. Ex. Ch. 12, p. 282, 14th edit. Com. Dig. Admon. (C. 2.) Nightingale *v.* Lee, 1 Freem. 54. Parker *v.* Dee, 3 Swanst. 531, note to Drewry *v.* Thacker. But see *contrà,* Touchs. 479. A question may arise, even since the Uniformity of Process Act, (2 Wm. IV. c. 39), as to what shall amount to notice of the suit; *e. g.* where the writ of summons omits to describe the defendant as executor. It was held, before that statute, that the sheriff's return of summons or distress was not sufficient notice, if the defendant were not personally summoned: Wentw. Off. Ex. 282, 283, 14th edit. Com. Dig. Admon. (C. 2.) Nor an arrest upon a latitat, or subpœna out of the Exchequer, if it did not express the cause of action: *Ibid.* See Lord Nottingham's judgment in Parker *v.* Dee, 2 Swanst. 531, note.

(*z*) So if a *scire facias* be sued out on a recognizance, an executor shall not defeat it by a voluntary payment of a debt by statute; but if, before judgment on a *scire facias,* execution be sued out against him on the statute, it shall prevail: Went. Off. Ex. 273, 14th edit.

(*a*) Blundivell *v.* Loverdall, 1 Sid. 21. Edgcomb *v.* Dee, Vaugh. 95. Wentw. Off. Ex. 282, 14th edit. Parker *v.* Dee, 3 Swanst. 531, note to Drewry *v.* Thacker. Prince *v.* Nicholson, 5 Taunt. 665. S. C. 1 Marsh. 280. Lyttleton *v.* Cross, 3 Barn. & Cress. 217. 1 Saund. 333, *a.* note to Hancocke *v.* Prowd. The reason why the executor is permitted to confess such judgment, is said to be, because he is not bound to charge his testator's estate with costs, by defending the action, when he knows the debt to be due.

pleaded the general issue, he may confess a judgment to another creditor, and plead it *puis darrein continuance* (*b*): Nor will it make any difference that the executor or administrator had knowledge of the debt, upon which the judgment was confessed, before the commencement of the action (*c*).

It is not necessary that process should be taken out by the creditor to whom judgment is confessed (*d*).

Equity will not interpose to prevent the preference thus given by an executor, in confessing judgments (*e*), even although the judgments be given on *quantum meruits*, without any writs of inquiry to ascertain the damages, if they be so laid as not to exceed the debt which is really due (*f*).

But the executor or administrator cannot confess a judgment to another creditor for a larger sum than is due to him individually: Thus it has been holden, that a judgment confessed by an executor to a creditor, as well for his own debt as in trust for the debts of many of the creditors, cannot be pleaded in bar to an action brought against him by another creditor of the testator (*g*).

(*b*) Prince *v.* Nicholson, 5 Taunt. 333, 665. S. C. 1 Marsh. 280. Lyttleton *v.* Cross, 3 Barn. & Cress. 317. Where an action of covenant against executors, to which they had pleaded *plene administravit*, was referred by order, and while the reference was pending, an action of debt on a bond of the testator was brought against them, and they confessed the action, Williams, J., made a rule absolute, which they had obtained for revoking the order of reference, unless the plaintiff would consent that they should be at liberty to plead the judgment recovered, *puis darrein continuance*, before the arbitrator: Alder *v.* Park, 5 Dowl. 16.

(*c*) 5 Taunt. 333, 665. 1 Marsh. 280. 3 Barn. & Cress. 317.

(*d*) Mackreth *v.* Jackson, 1 M. & S. 408, in note.

(*e*) See the judgment of Sir Wm. Grant, in Lepard *v.* Vernon, 3 V. & B. 53, 54.

(*f*) Waring *v.* Danvers, 1 P. Wms. 295. 2 Saund. 51, note (3). But see Parker *v.* Dee, 3 Swanst. 328, note (*a*). S. C. 2 Ch. Ca. 200. In Barker *v.* Dumeres, Barnard. Chanc. Cas. 277, Lord Hardwicke, where a creditor sued the executor both at law and equity at the same time, refused to put him to his election, according to the general rule, on the ground that the executor was confessing judgments.

(*g*) Tolputt *v.* Wells, 1 M. & S. 395, overruling the *dictum* of Lawrence, J., in Meux *v.* Howell, 4 East, 9.

It may further be observed, that after one creditor of the deceased has commenced an action against the executor or administrator, another creditor of equal degree may gain a preference, not only as it has just appeared, by getting a prior judgment, but also by greater vigilance in obtaining, in an action commenced by himself, a prior plea confessing assets to a certain amount (*h*). Thus it has been held, that if an executor or administrator has pleaded *plene administravit, præter* a certain sum, to one action, he may well plead in bar to an action by another creditor, *plene administravit præter* the same sum, and as to that sum that he has confessed it in another action (*i*).

2. Of controlling the preference of the executor by proceedings in equity:

With respect to controlling the preference of an executor or administrator by proceedings in equity:—It has been settled, after a considerable struggle, that a decree of a Court of Equity against an executor or administrator is equal to a judgment at law against him. Hence, where a bill is filed against an executor or administrator, by a creditor on his own behalf only, and he proves his debt, and has a final decree, the preference of the executor or administrator is precluded, and that creditor must be first satisfied, as if he had obtained a judgment at law against the executor or administrator for his debt (*k*). Such a decree is, therefore, entitled to payment before judgments subsequently obtained against the executor or administrator: who, although he cannot at law plead such a decree (*l*) as he could a judgment, shall be protected and indemnified by the Court of Equity in paying due obedience to it, and all proceedings against him at law will be stayed by injunction (*m*). And as

(*h*) Waters *v.* Ogden, 2 Dougl. 455, by Buller, J.

(*i*) 2 Dougl. 453.

(*k*) Joseph *v.* Mott, Prec. Chanc. 79. Mason *v.* Williams, 2 Salk. 507. Morrice *v.* Bank of England, Cas. temp. Talb. 217. S. C. 2 Bro. P. C. 465. Toml. edit. S. C. 3 Swanst. 573. Martin *v.* Martin, 1 Ves. Sen. 214. Goate *v.* Fryer, 3 Bro. C. C. 22. S. C. 2 Cox, 202. Perry *v.* Phelips, 10 Ves. 34.

(*l*) Cas. temp. Talb. 223.

(*m*) Morrice *v.* Bank of England, *ubi supra.* 3 P. Wms. 401, note to Robinson *v.* Tonge. And the Court of Equity will take notice of real priority in point of time, without

an executor may confess a judgment to one creditor, and plead it in bar to another; so by parity of reason, an executor may suffer a decree to be against him as it were by confession; and if it be for a just debt, it must be paid according to its priority (*n*).

an executor cannot pay in preference, after a decree *to account* in a suit by one creditor for himself and all others:

Again, where a creditor of the deceased sues the executor or administrator in equity, not for his own debt alone, but *for himself and all other creditors*, and a decree is obtained for an account and a distribution; this is considered as in the nature of a judgment for all the creditors (*o*): and after such a decree, although the legal priorities of creditors are not affected thereby (*p*), the power of preference, which the executor or administrator enjoys at law among creditors of equal degree, no longer exists: for no payment to any creditor made after notice of the decree, will be allowed in his account (*q*). And in modern times suits of this latter kind have become the usual means of compelling an equal distribution of assets among the creditors of a deceased insolvent (*r*).

secus, in a suit for his own debt alone:

But a mere decree for an account *of the demand of the plaintiff*, and of the personal estate come to the hands of the defendant, with a mere direction for payment out of the result of that account, is not a decree to prevent the payment of a judgment by an executor: There must be a report and a final decree upon it (*s*).

whether an executor, after bill filed, can *voluntarily* pay another

With respect to controlling the preference of an executor, by the mere filing of a bill in equity by a creditor: Since, after the commencement of an action at law by one creditor,

regarding the fictitious relation of judgments to the first day of term: Cas. temp. Talb. 224. (See *ante*, p. 857.)

(*n*) Cas. temp. Talb. 225.

(*o*) Goate *v*. Fryer, 3 Bro. C. C. 22. S. C. 2 Cox, 202. Paxton *v*. Douglas, 8 Ves. 520. Perry *v*. Phelips, 10 Ves. 40.

(*p*) Nunn *v*. Barlow, 1 Sim. & Stu. 588.

(*q*) Jones *v*. Jukes, 2 Ves. jun. 518. Mitchelson *v*. Piper, 8 Sim. 64. But in taking the account, the executor or administrator has a right to stand in the place of the creditors he has paid: 2 Ves. jun. 518.

(*r*) See the observations of Sir James Mansfield, in Brady *v*. Shiel, 1 Campb. 148.

(*s*) Perry *v*. Phelips, 10 Ves. 41.

creditor of equal degree:

a voluntary payment by the executor to another creditor is not warranted, it should seem, by analogy, that after a suit in Chancery is instituted by one creditor against the executor, he cannot justify a ***voluntary*** payment to another. And so it was decreed by Lord Keeper Wright, in ***Darston*** v. ***Lord Orford***(*t*), where A. and B. were both creditors by specialty of J. S., who died, and left an executor, against whom A. brought a bill in equity for a discovery of assets and to be paid his debt, and pending such suit, the executor voluntarily, and without suit, paid B.'s debt: Upon an account decreed on A.'s bill, against the executor, the latter craved an allowance of the payment; but it was decreed by the Lord Keeper Wright, that the executor should not have an allowance thereof; seeing, that before payment made, a bill in equity was brought by A., of which the executor had notice; and that a bill in equity is equivalent to an action at law, pending which action an executor cannot make a voluntary payment of any debt. This decree, however, was afterwards reversed on appeal to the House of Peers. And in a modern case (*v*), Sir John Leach, V. C., thought himself bound by the authority of this decision of the Lords, and accordingly held, that an executor or administrator may, after a suit is instituted against him for an account, and before a decree, pay any particular creditor in preference, and will be allowed such payment in passing his accounts (*w*).

(*t*) Prec. Chanc. 188. S. C. in Error, Colles. 229. See also Parker *v.* Dee, 2 Chanc. Cas. 200. S. C. 3 Swanst. 529, note. Bright *v.* Woodward, 1 Vern. 369. 3 P. Wms. 401, note to Robinson *v.* Tonge.

(*v*) Maltby *v.* Russell, 2 Sim. & Stu. 227.

(*w*) It should seem, however, that the judgment of his Honor would have been different, had he not felt himself bound by the decision of the Lords in Darston *v.* Lord Orford. But it is submitted, with the greatest deference to so eminent a judge, that the authority of that case is of no extreme stringency; since the foundation of the reversal by the House of Lords, *viz.* that a decree of the Court of Chancery could not be pleaded to an action at law, brought against the executor for a debt of an equal nature, is equally applicable to authorize the allowance of payments after a *final* decree, and has lost all consistency since the doctrine of enforcing the equality of decrees and judgments by injunction has been established:

judgments obtained after bill filed:

As to judgments obtained, after bill filed: In *Larkins* v. *Paxton* (*x*), it appeared that in 1811, a creditor's suit was instituted by a simple contract creditor; in 1820, the answers were got in, and the plaintiff's debt was admitted, and thereupon the assets were brought into Court; in 1823, another simple contract creditor obtained judgment by confession against the executors; no decree was made in the cause until 1829: And it was held that the judgment thus obtained had priority over all the simple contract debts (*y*). Where, however, the plaintiff in a creditor's suit did not satisfactorily prove his debt, and the bill was retained with liberty to establish the debt at law, Lord Langdale expressed his surprise that it could be supposed that a judgment obtained under such circumstances, would give any priority over the other simple contract creditors (*z*

a creditor who has been partly

It may here be observed that where an executor or admi-

(See Robinson *v.* Tonge, 3 P. Wms. 401.) With respect to the other consideration, which seemed to constrain the opinion of the learned judge in Maltby *v.* Russell, *viz.* that Darston *v.* Lord Orford was referred to in Waring *v.* Danvers, 1 P. Wms. 295, as establishing the point, that an executor may give a preference after suit instituted, it must be remarked, that the point which it was necessary to establish, in Waring *v.* Danvers, was, not that an executor may give a preference after suit instituted by a *voluntary* payment, but by confessing a judgment, which is considered a payment by constraint. In conclusion, it may be observed, that in Abbis *v.* Winter, May, 1733, 3 Swanst. 578, note (*a*), a case some years subsequent to Waring *v.* Danvers, Lord Chancellor King says—"At law, after an action is brought, executors cannot pay any debts of an equal nature; it is no plea that he hath not assets *præter* sufficient to satisfy a debt of equal nature; therefore, by suing out a writ, the plaintiff obtains preference to all other creditors of an equal nature, and is to be paid before them, according to a legal course of administration: Serving a subpœna and filing a bill are equivalent in equity to writ and declaration; and, as equity follows the law, it must give the like preference to the plaintiffs, as an action doth at law, to all debts of like nature." However, in the late case of Mitchelson *v.* Piper, 8 Sim. 64, it appears to have been admitted that the executor ought to be allowed payments made to creditors after filing a bill for administering the debtor's estate but before the decree.

(*x*) 2 Beav. 219.

(*y*) As to confessing judgments after suit commenced, see Parker *v.* Dee, 3 Swanst. 529, note to Drewry *v.* Thacker. Pigott *v.* Nower, *ibid.* 535, 536.

(*z*) Gibert *v.* Hales, 8 Beav. 236.

paid by an exe- ... all not any further payment from the Court, until all the other creditors are paid proportionably.

nistrator, before a suit has been commenced for the administration of the estate of the deceased, has paid some of the creditors a certain proportion of their debts, the Court will not make any further payment to them, out of either the legal or equitable assets, until all the other creditors are paid proportionably: This point was decided by Sir L. Shadwell, V. C., on the ground, that when a creditor goes into the Master's Office to establish his debt, he must shew what was the amount due at the death of his debtor and what he has received since; and as it is one of the leading maxims of a Court of Equity, that equality is equity, the creditors who have been paid in part, ought not to receive any further part either of the legal or equitable assets, until the other creditors have been paid the same proportion of their debts (*a*).

Sect. VI.

Of the Right of the Executor or Administrator to retain a Debt due to him from the Testator or Intestate.

As an executor or administrator, among creditors of equal degree, may pay one in preference to another, so it is another of his privileges that he has a right to retain for his own debt due to him from the deceased, in preference to all other creditors of equal degree (*b*).

He cannot, in any case, retain against a creditor of superior degree.

This remedy arises from the mere operation of law, on the ground, that it were absurd and incongruous that he should sue himself, or that the same hand should at once pay and receive the same debt: And, therefore, he may appropriate a sufficient part of the assets in satisfaction of his own demand;

(*a*) Wilson *v.* Paul, 8 Sim. 63. Mitchelson *v.* Piper, *ibid.* 64.

(*b*) Woodward *v.* Lord Darcy, Plowd. 184. Dyer, 2, *a. in marg.* as to an Executor: And Warner *v.* Wainford, Hob. 127. Bond *v.* Green, 1 Brownl. 75. S. C. Godb. 217, pl. 310, as to an Administrator.

otherwise he would be exposed to the greatest hardship; for since the creditor who first commences a suit is entitled to a preference in payment, and the executor can commence no suit, he must, in case of an insolvent estate, necessarily lose his debt, unless he has the right of retaining. Thus, from the legal principle of the priority of such creditor as first commences an action, the doctrine of retainer is a natural deduction (*c*). But the privilege is accompanied with this limitation, that he should not retain his own debt as against those of a higher degree; for the law places him merely in the same situation as if he had sued himself as executor, and recovered his debt, which there could be no room to suppose during the existence of those of a superior order (*d*).

Executor may retain out of assets received after a decree for an account.

This privilege of the personal representative to retain for his own debt, exists, notwithstanding a decree for an account has been made, in a suit by the other creditors for the administration of the assets; and notwithstanding the assets out of which he seeks to retain his debt came to his hands after the decree; for the decree does not affect the legal priorities of creditors; and there is no distinction in this respect between assets possessed prior to the decree, and subsequent to it (*e*).

The right to retain is not lost by payment of the money into Court.

The right of retainer is not lost by the circumstance of the executor or administrator having paid into Court, in a creditor's suit, the money which has been received on account of the assets of the deceased: And where the fund in Court is insufficient to discharge the debt of the executor or administrator, his right of retainer will prevail against the plaintiff's right to have the costs of the suit satisfied (*f*).

(*c*) 2 Black. Com. 511. 3 Black. Com. 18. Toller, 295. Godolph. Pt. 2, c. 11, s. 3.

(*d*) 3 Black. Com. 18. Com. Dig. Admon. (C. 2.) 1 Saund. 333, (note (6), to Hancocke *v.* Prowd,) Godolph. *ubi supra.* Toller, 295. However, according to the opinion of other writers, the principle on which the executor's right to retain is founded, is, "*In Equali jure potior est conditio possidentis*:" Fonblanq. Treat. Eq. B. 4, Pt. 2, c. 2, s. 2, note (*m*).

(*e*) Nunn *v.* Barlow, 1 Sim. & Stu. 588.

(*f*) Chissum *v.* Dewes, 5 Russ. 29. Langton *v.* Higgs, 5 Sim. 228. Tipping *v.* Power, 1 Hare, 405, 411. Hall *v.* McDonald, 14 Sim. 1.

No retainer allowed out of equitable assets.

It should seem, however, that an executor cannot retain, out of such of the assets as are merely *equitable*, to pay the whole of a debt due to him from the deceased, but only a proportionable part with the other creditors (*g*): For in equity all debts are equal; and a Court of Equity will never assist a retainer (*h*).

The executor may retain for debts due to him as trustee:

An executor or administrator may retain not only for debts which he claims beneficially, but also for those to which he is entitled as trustee. Thus in *Plumer* v. *Marchant* (*i*), A., before his marriage, covenanted with B. and C. to leave them by his Will, or that his executors, within six months after his death, should pay them 700*l*., in trust to pay the interest to his wife for life, and on her death, to divide the principal among his children, and, in default of children, as he should appoint, and bound himself, his heirs, executors, and administrators, in a penalty for performance: On his dying before his wife, without issue and intestate, it was holden that B., in the character of administrator, might retain assets to that amount during the life of the widow, against a bond creditor who sued before the six months were elapsed.

he may retain for debts due to him as *cestui que trust*.

Conversely, the executor or administrator may retain (at all events, in equity) for debts due to another in trust for him. Thus, in *Cockroft* v. *Black* (*k*), where the testator, before marriage, gave a bond to a trustee for his wife, to leave her 100*l*. at his death if she survived him; Lord King, C., held that she, as executrix of her husband, might retain this 100*l*. so due to her trustee, out of the assets. The same doctrine was acted upon by Lord Loughborough, in *Franks* v.

(*g*) As to the distinction between equitable and legal assets, see *post*, Pt. IV. Bk. I. Ch. I.

(*h*) Anon. 2 Cas. Chanc. 54. Hopton *v.* Dryden, Prec. Chanc. 181. S. C. 2 Eq. Cas. Abr. 450. Baily *v.* Ploughman, Mosely, 95. Chambers *v.* Harvest, *ibid.* 123. Hall *v.* Kendall, *ibid.* 328. It was stated by Verney, M. R., that "the rule of this Court in cases of retainer is, unless the party can shew a *legal* right to retain, we never give it him; if he can shew a legal right, we never take it away from him:" Chapman *v.* Turner, Vin. Abr. Exors. (D. 2.) pl. 2.

(*i*) 3 Burr. 1380, (cited 3 A. & E. 858, *per curiam.*)

(*k*) 2 P. Wms. 298.

Cooper (*l*), where it was holden that an administratrix might retain in respect of a bond given by the intestate to another person, as her trustee, to secure an annuity to her (*m*); And by Sir John Leach, V. C., in *Loomes* v. *Stotherd* (*n*); in which last case his Honor held, that, as an executor may retain his own debt or the debt of his trustee, so a devisee of the realty may retain for his own specialty debt, or the debt of his trustee (*o*).

The executor's right of retainer, under an obligation made to his trustee, has also been recognised in the Courts of Common Law. Thus in *Roskelley* v. *Godolphin* (*p*), a husband, on marriage, gave a bond to trustees conditioned to pay 3000*l.* to the wife, if she survived him: The husband died, leaving a daughter and the wife living: The wife administered *durante minore ætate* of the daughter: and it was holden by the Court of King's Bench that she might retain for the money due on the bond. So in *Marriot* v. *Thompson* (*q*), a husband prior to his marriage gave a bond to two trustees conditioned to leave to his wife 400*l.* at his death: The marriage took place, and he afterwards died, having appointed her his executrix; and the Court of Common Pleas held, that she might retain for the sum due on the bond, and plead such retainer to an action brought against her by another bond creditor of the husband. So in *Loane* v. *Casey* (*r*), a widow, who was sued as executrix of her husband, was allowed, by the same Court, to retain out of his personal assets sufficient to answer the breach of a covenant entered into by her husband, previous to the marriage, with

(*l*) 4 Ves. 763.

(*m*) There being in this case a deficiency of assets, it was directed that a value should be set on the annuity at the time of the death of the intestate, not including the arrears since.

(*n*) 1 Sim. & Stu. 461.

(*o*) See further on the right of the heir to retain, Player *v.* Foxhall, 1 Russ. Chanc. Cas. 538.

(*p*) Sir T. Raymond, 483. S. C. *nomine* Boskellet *v.* Godolphin, Skinner, 214. S. C. *nomine* Rookelley *v.* Godolphin, 2 Show. 403.

(*q*) Willes, 186.

(*r*) 2 W. Black. 965.

a trustee for securing a provision for herself: And De Grey, C. J., said, that Lord Hardwicke had determined to the same effect in the case of a child's portion: and that wherever an executor had a right to a sum of money, whether it were strictly a debt due to himself, or nominally to another, he might retain it: The Chief Justice also mentioned a case before Eyre, C. J., where a widow executrix was allowed to retain the money with which she had paid a mortgage on her jointure, the husband having covenanted it to be free from incumbrances; this being a satisfaction for his breach of covenant.

It must, however, be observed, that in the two earlier of the decisions at law above stated, the Court took a distinction, with respect to the executor's right to retain, between cases where the payment, under the contract with the trustee, is to be made to the party seeking to retain, and those in which the payment is to be made to the trustee, in trust for the executor or administrator. Thus in *Roskelly* v. *Godolphin* (s), Raymond, J., said, that if the *payment had been to be made to the trustees,* though in trust for the wife, there could have been no retainer. So in *Marriot* v. *Thompson* (t), the Court, in giving judgment, laid down, that if the money in the condition *had been to be paid to the trustees,* and not to the executrix herself, she could not in that case have retained.

It must be further remarked, that where the *corpus* of the trust money is to be paid to the trustees, in trust, not to pay the capital sum to the executor or administrator, but to provide him an annuity by means of the interest or other proceeds, it has been holden that the right of retainer for the principal sum does not exist at law: Thus, where a covenant was made with trustees in a deed of settlement before marriage, that the executors or administrators of the intended husband should pay to the trustees the sum of 400*l.*, to remain vested in them, in trust to satisfy out of the proceeds an annuity of 20*l.* to the wife for her life: it was holden that

(s) Sir T. Raym. 484. *Ante,* p. 897. (t) *Ante,* p. 897.

such a covenant would not enable her to retain the 400*l.* as administratrix of her husband (*u*).

Again, although a Court of Law will to the extent above mentioned, take a notice of equitable claims, yet an executor or administrator cannot, in an action brought against him at law, retain for a demand, of which no account can be taken by a jury, and where, consequently, the amount of the debt, on which the executor or administrator relies, cannot be controverted by the other party. Thus in *De Tastet* v. *Shaw* (*v*), A. being indebted in his individual capacity to a house in trade, of which he himself was a partner, in a sum of money, the amount of which could not be exactly ascertained, covenanted to pay the firm all his then debts, and such other debts as should subsequently accrue: A. died, without having satisfied the original debt, and having contracted further debts subsequently to the execution of the deed: The Court of K. B. held, that his executors, two of whom were partners in the house of trade, could not plead either of these debts as an outstanding specialty debt, or by way of retainer: It was argued, on the behalf of the defendants, that, although no action could have been maintained upon the deed, in a Court of Law, against the testator while living, or against his executors after his decease, yet that the deed showed a debt in equity, of which, according to *Loane* v. *Casey* (*w*), a Court of Law ought to take notice: But Lord Ellenborough, in delivering the judgment of the Court, observed (*x*), "It is obvious that justice cannot be administered without affording the plaintiff an opportunity of controverting the amount of the debt; and the only mode in which a fact can be controverted in an action at law, *viz.* by taking an issue to be tried by a jury, is impracticable in the present case; because the debt constitutes an item in a partnership account, and the partnership account must be taken in order to ascertain how much was due at the execution of

(*u*) Thompson *v.* Thompson, 9 Price, 464. See also a case cited by Richards, C. B., 9 Price, 473.

(*v*) 1 B. & A. 664.

(*w*) See *ante*, p. 897.

(*x*) 1 B. & A. 669.

the deed, and whether the sum then due has been reduced in any, and what degree, by the intermediate gains of the partnership business: Such an account cannot be taken by a jury, and, consequently, no issue could be taken on the debt, on which the defendants rely; and in this respect the present case differs from those cases of debts in trust which were quoted at the bar: There is no more difficulty in ascertaining the amount of a sum of money due under a bond or covenant to A. for the use of B., than if it were due to A. for his own benefit: There was no difficulty, much less impracticability, of trial in those cases as there is in this."

Retainer by an administrator *durante minoritate*:

Where the person entitled to administration is an infant, and an administration *durante minoritate* is granted, not only may the administrator retain for his own debt (*y*), but also if the infant in point of right has a title to retain for a debt due to himself, the administrator may insist on that right (*z*). So where the creditor is a lunatic, and administration has been granted to the defendant for the use of the lunatic, the right of retainer shall not be prejudiced (*a*).

by an administrator *durante dementia*:

by a creditor administrator:

If administration be granted to a creditor, as such, and afterwards be repealed at the suit of the next of kin, such creditor shall retain against the rightful administrator (*b*). On the petition, however, of the other creditors, the Ecclesiastical Court, on granting administration to a particular creditor, as such, will compel him to enter into articles to pay debts of equal degree in equal proportions, without any preference of his own (*c*); and administration to a creditor is generally so granted (*d*). But under the common decree against an administrator, who has obtained the letters of administration as a creditor, directing the accounts to be taken in the usual way, and the assets to be applied in a due course of administration

(*y*) Roskelly *v.* Godolphin, T. Raym. 483. Com. Dig. Admon. (F.)

(*z*) Franks *v.* Cooper, 4 Ves. 764.

(*a*) *Ibid.* 763.

(*b*) Blackborough *v.* Davis, 1 Salk. 38.

(*c*) Toller, 106.

(*d*) Fonbl. Treat. on Eq. Bk. 4, Pt. 2, c. 2, s. 2, note (*m*).

in payment of the intestate's debts, the Master has no authority to disallow the administrator's claim to retain, on proof by affidavits that there has been a waiver of the right on his part, by arrangement with the other creditors: In order to justify such a departure from the ordinary course of administering assets in a Court of Equity, there ought to be a specific instruction to the Master to that effect (*e*).

by executor of executor:

An executor of an executor is entitled to retain, out of the assets, debts due from the testator, either in his own right, or as the executor of the deceased executor (*f*). So where a bond creditor took out administration *de bonis non* to his debtor, and died before he had made any election in what particular effects he would have the property altered by retainer; it was held that the executor of the creditor, in accounting for the assets of the debtor, might deduct the debt (*g*).

by executor of administrator:

by executor to whom a debt is due jointly with another:

But it was lately held (*h*), that the administrator *cum testamento annexo* of a deceased executor, in accounting for the executor's receipts of the assets, was not entitled, by way of discharge, to the amount of a debt owing from the testator to the executor jointly with another person as partner, the executor having predeceased such partner, without having, in point of fact, done any act in the exercise of his right of retainer. It was not, however, at all questioned in this case, but indeed conceded by the Court (Wigram, V. C.), that one of two partners to whom a debt is due, being made an executor, might retain that debt. But it was ruled, that if such an executor dies, so that the interest in the debt wholly

(*e*) Spicer *v.* James, 2 Myl. & K. 387. Thompson *v.* Cooper, 1 Coll. 81.

(*f*) Hopton *v.* Dryden, Prec. Ch. 180. Thomson *v.* Grant, 1 Russ. Chanc. Cas. 540, *in notis*: But not the executor of one of several executors, one or more of whom is still living: Prec. Ch. 181. See *ante*, p. 208, 209.

(*g*) Weeks *v.* Gore, 3 P. Wms. 184, note to Croft *v.* Pyke, in which latter case a point arose, but was not decided, *viz.* whether if a debtor dies, having made his creditor executor, and then the executor dies, having intermeddled with the goods, but before probate, and before any election made, his executor can retain.

(*h*) Burge *v.* Brutton, 2 Hare, 373.

devolves on his surviving partner, the right of retainer ceases, and cannot be exercised by the representative of the executor.

by husband of *feme* executrix:

In case a married woman be executrix, the husband may retain, if the testator was indebted to him, or which is the same thing, to the wife before marriage (*i*). So it seems clear, that if the husband be executor, he may retain for a debt contracted by the testator with the wife *dum sola* (*k*).

by husband for debt to wife:

by executor *de son tort*:

It is clear, as there has already been occasion to show (*l*), that an executor *de son tort* cannot retain for his own debt, even of a superior degree to that upon which he is sued. There is, indeed, one exception to this rule: for a party who by stat. 43 Eliz. c. 8, becomes executor *de son tort*, in consequence of a gift to him of the intestate's effects by an administrator who has obtained the grant fraudulently (*m*), is, by the express provision of that Act, allowed to retain (*n*).

case where the representative of the creditor is also the representative of the debtor:

If the same person be the personal representative, both of the creditor and of the debtor, he may retain out of the effects of which he is possessed as the representative of the debtor to satisfy the debts due to him as the representative of the creditor (*o*).

if two are jointly and severally bound, and one makes the obligee his executor, he may either retain or sue the survivor.

If there are two joint and several obligors, and one of them dies, having made the obligee his executor, in such case the obligee, if he has not received satisfaction out of the assets of the deceased obligor, may sue the survivor: for, being jointly and severally bound, he may sue which of them he pleases, and though the debt be one, yet the obligations are several; and no assets appear of the value of the debt to retain; and there might be a judgment against which he could not retain (*p*).

(*i*) Toller, 359.

(*k*) Prince *v.* Rowson, 1 Mod. 208. 2 Mod. 51.

(*l*) *Ante*, p. 220.

(*m*) *Ante*, p. 212, 213.

(*n*) Com. Dig. tit. Administrator, (C. 3.) Wentw. Off. Ex. Ch. 14, p. 336, 14th edit. Vernon *v.* Curtis, 2 H. Black. 26, note (*b*). Toller, 366.

(*o*) Burnet *v.* Dixe, 1 Roll. Abr. 922. Exors. (L.) 2. S. C. *semble*, *nomine* Burdet *v.* Pix, 2 Brownl. 50. Fryer *v.* Gildridge, Hob. 10. Thompson *v.* Cooper, 1 Coll. 85.

(*p*) Crosse *v.* Cocke, 3 Keb. 116. Cock *v.* Cross, 2 Lev. 73. S. C. *semble*, 1 Freem. 49, 50. 3 Bac. Abr. 10, tit. Exors. (A.) 9. *Infra*, Pt. III. Bk. III. Ch. II. § IX.

So if the obligor appoint the obligee his executor, and there are no assets out of which he may retain, the obligee may sue the heir if he is bound (*q*).

Whether a surety, executor of principal who is jointly bound, can retain.

If two are *jointly* bound in an obligation, the one as principal, and the other as surety, and on the principal's death, the surety becomes his personal representative, and on forfeiture of the bond, discharges the debt; it has been held, that he cannot retain: for, by joining in the bond with the principal, it became his own debt (*r*). Yet, in such case, it should seem, that he might retain for the money paid as constituting a simple contract debt (*s*). Indeed, in *Bathurst* v. *De la Zouch* (*t*), where the executor had become bound with his testator in a bond for another person, Lord Bathurst, C., held, that the executor was entitled to retain out of the testator's estate the whole of what was due on the bond.

Damages on *tort* cannot be retained.

Damages, which in their nature are arbitrary, such as damages founded on *tort*, cannot be retained (*u*).

An executor cannot retain against his co-executor;

Where there are co-executors or co-administrators, each being a creditor of the deceased, the one cannot retain for his own debt to the prejudice of the other; for several joint executors or administrators are considered but as one person in law; the possession of one is the possession of the other; the receipt of one is the receipt of the other; and, therefore, the retainer of one must be considered as the retainer of the other, and must enure, for their mutual benefit, in the discharge of the debts of both in proportion (*v*).

he may retain out of a balance found to be due from himself and his co-executor to the estate.

In *Kent* v. *Pickering* (*w*), where, in a creditor's suit, a balance had been found, by the Master's report, to be jointly due from two executors to their testator's estate, and one of the executors was a creditor, it was held by Lord Langdale, M. R., that such executor had a right to retain his

(*q*) Wankford *v.* Wankford, 1 Salk. 304. See further on this subject, *infra*, Pt. III. Bk. III. Ch. III. § IX.

(*r*) Anon. Godb. 149, pl. 194. 4 Leon. 236, pl. 362.

(*s*) Toller, 298.

(*t*) 2 Dick. 460.

(*u*) Loane *v.* Casey, 2 W. Black. 968, by Blackstone, J.

(*v*) Chapman *v.* Turner, 11 Vin. Abr. 72, tit. Exors. (D.) 2. S. C. 9 Mod. 268.

(*w*) 2 Keen. 1.

debt out of the assets consisting of the balance due from himself and his co-executor.

Retainer of debt more than six years old.

It should seem, that an executor or administrator may retain for a debt due to himself, though it may be more than six years old; for as an executor may pay a debt to another, though he might have pleaded the Statute of Limitations, why may he not pay himself? (*x*) In *Hopkinson* v. *Leach* (*y*), Sir John Leach, V. C., was of opinion that the executor might retain in such a case: But his Honor directed the opinion of a Court of Law to be taken.

Pleading a retainer.

It is held to be optional in an executor or administrator, either to *plead* a retainer of a debt due to him, or give it in evidence on a plea of *plene administravit* (*z*).

(*x*) But see Shewen *v.* Vandenhorst, 1 Russ. & M. 349. 2 Russ. & M. 75. *Post,* Pt. IV. Bk. II. Ch. II. § II.

(*y*) 7 May, 1819. MS. Madd. Pract. 583, 2d edit.

(*z*) Bond *v.* Green, 1 Brownl. 75. Plumer *v.* Marchant, 3 Burr. 1380, 1385. Loane *v.* Casey, 2 W. Black. 965.

BOOK THE THIRD.

OF THE DUTIES OF AN EXECUTOR WITH RESPECT TO LEGACIES.

HAVING thus considered the office of an executor, in regard to the payment of debts according to the order prescribed by law, it now becomes necessary to treat of the duties which next demand his attention, *viz.* those which respect the payment of legacies.

Definition of legacy.

A legacy is defined to be "some particular thing or things given or left, either by a testator in his testament, wherein an executor is appointed, to be paid or performed by his executor, or by an intestate in a codicil or last Will, wherein no executor is appointed, to be paid or performed by an administrator" (*a*).

CHAPTER THE FIRST.

WHO IS CAPABLE OF BEING A LEGATEE: AND HEREWITH OF BEQUESTS TO CHARITABLE USES.

SECT. I.

Who is capable of being a Legatee.

The subject of the present Section has been in some degree anticipated, by the inquiry as to the capability for the

(*a*) Godolph. Pt. 3, c. 1, s. 1.

office of executor. The same rule applies in both matters, that every person is capable, excepting such as are expressly forbidden (*b*).

Persons disabled by statute.

Most of the prohibitions which have been pointed out, as existing with respect to the office of executor, apply also to the capability of being a legatee. Thus persons twice denying the Christian religion to be true (*c*), and persons not qualifying for office (*d*), are disabled from being legatees, as well as from being executors.

Bankrupt.

A bankrupt may be a legatee; but if the testator dies at any time before the certificate is allowed, even pending an unfounded petition to stay it, the interest in the legacy belongs to the assignees, unless it can be shown that the petition was presented with that object (*e*).

Alien.

An alien friend may be a legatee of personal chattels (*f*); but any legacy to an alien enemy will be forfeited to the king (*g*).

Subscribing witness.

It was holden by Sir William Grant, in *Lees* v. *Summergill* (*h*), that a legacy given to a subscribing witness to a Will of personal estate, was an interest which such person could not legally claim, by reason of the statute 25 Geo. II. c. 6. But a contrary doctrine was maintained by Sir John Nicholl, in *Brett* v. *Brett* (*i*), in which case that learned Judge held, that the statute is limited, in point of true construction, to

(*b*) *Ante*, p. 186.

(*c*) 9 & 10 Wm. III. c. 32. *Ante*, p. 194.

(*d*) *Ante*, p. 194.

(*e*) *Ex parte* Ansell, 19 Ves. 208. But where a testatrix bequeathed a share of the residue of her estate in trust for her nephew for life; and by a codicil reciting that he had become a bankrupt and insane, she directed the trustees to apply, during his life, the whole or such part of the interest of the fund at such times and in such manner for his maintenance and support, and for no other purpose whatever, as they, in their discretion, should think most expedient; it was held by Shadwell, V. C., that the assignees of the nephew, though he was uncertificated, were not entitled to any portion of the provision made for him. Twopeny *v.* Peyton, 10 Sim. 487. See also Goddin *v.* Crowhurst, *ibid.* 642, and *post*, Pt. III. Bk. III. Ch. II. § VI.

(*f*) Calvin's case, 7 Co. 17.

(*g*) Atty. Gen. *v.* Weedon, Parker, 267; but see *ante*, p. 187.

(*h*) 17 Ves. 508.

(*i*) 3 Add. 210.

Wills and codicils of real estate, and, consequently, that a legacy to a subscribing witness to a mere Will or codicil of personalty, is a good legacy. This decision of Sir John Nicholl was afterwards affirmed on appeal to the Delegates (*k*); and has been followed by Sir John Leach, M. R., in *Emanuel* v. *Constable* (*l*), and by Sir L. Shadwell, V. C., in *Foster* v. *Banbury* (*m*).

1 Vict. c. 26.

But now by stat. 1 Vict. c. 26, s. 15, (which, however, does not extend to any Will made before January 1st, 1838), it is enacted, "that if any person shall attest the execution of any Will [or testament or codicil or any other testamentary instrument] to whom, or to whose wife or husband, any beneficial (*n*) devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such Will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such Will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such Will."

This clause follows almost verbatim the language of the stat. 25 Geo. II. c. 6, except that the stat. of Geo. II. did not contain the words "or to whose wife or husband" in the earlier part, or the words "or to prove the validity or invalidity thereof," towards the close of the section. Consequently the case of *Doe* v. *Mills* (*o*), which was decided upon,

(*k*) See 3 Russ. Ch. C. 437, note.

(*l*) *Ibid.* 436.

(*m*) 3 Sim. 40.

(*n*) The interest must be a beneficial interest to the witness to render the bequest void. Therefore, where an attesting witness was made universal legatee in trust for the testator's widow, it was held that the bequest was not null and void under this statute. In the goods of Ryder, Prerog. 2 Notes of Cas. 462.

(*o*) 1 Mood. & Rob. 288.

the earlier statute, appears to be an authority applicable to the construction of the statute of Victoria. It was there held by Lord Denman and Bolland, B., as Judges of the Court of Common Pleas at Lancaster, that the statute of Geo. II. makes void a devise to an attesting witness, although there be three other attesting witnesses to the Will.

Wife of testator.

It may be observed, that although a man cannot make a grant to his wife, nor enter into a covenant with her, (for such grant would be to suppose her separate existence, and to covenant with her would be to covenant with himself); yet he may bequeath any thing to her by Will; since that cannot take effect till after the coverture is determined by death (*p*).

Sect. II.

Of Bequests to Superstitious and Charitable Uses.

All bequests to *superstitious* uses are illegal and void; but bequests to *charitable* uses are not only legal and valid, but are, in some measure, favoured in our law, provided that they are of personal property, in no way connected with land.

Bequests to superstitious uses.

With respect to what shall be regarded as superstitious uses, the effect of the statute 1 Edw. VI. c. 14, (although it relates only to superstitious uses of a particular description, existing at the time it passed) (*q*), has been taken to be, that if any real or personal property whatever, shall have been, or shall be, given, assigned, limited, or appointed to have continuance, for ever, or for a time only, towards or for the finding or maintenance of a stipendiary priest, or for the maintenance of an anniversary or obit, or of any light or lamp in any church or chapel, or other like intent, these and such

(*p*) 1 Black. Comm. 442. Co. Lit. 112.

(*q*) By Sir Wm. Grant, in Cary *v*. Abbot, 7 Ves. 495. The statute 23 Hen. VIII. c. 10, relates only to assurances of land to churches and chapels, which, if for a longer term than twenty years, it declares absolutely void: *Ibid.* See Doe *v*. Hawthorn, 2 B. & A. 103.

like gifts and dispositions as these, are to be accounted within the superstitious uses intended to be suppressed by the Act (*r*).

Other bequests to superstitious uses, not mentioned by the Act, are deemed void by the general policy of the law: As a devise for the good of the soul of the devisor (*s*); or a bequest of sums to be paid to certain Roman Catholic priests and chapels, as soon as possible after the death of the testator, that he may have the benefit of their prayers and masses (*t*); or a bequest of a fund to be applied for a Jesuba or assembly for reading the law, and instructing the people in the Jewish religion (*u*); or in trust to apply the proceeds of a fund in printing and promoting the circulation of a treatise, in a foreign language, which inculcates the doctrine of the absolute and inalienable supremacy of the Pope in ecclesiastical matters (*v*).

So, before the passing of the statute of 2 & 3 Wm. IV. c. 115, it was held that a bequest for the education of persons in the Roman Catholic faith was invalid (*w*). But that statute appears to put persons professing the Roman Catholic religion upon the same footing with respect to their schools, places for religious worship, education, and charitable purposes, as Protestant Dissenters: And, therefore, since the passing of

(*r*) Duke on Charitable Uses, 106, p. 349, Bridgman's edition. West *v.* Shuttleworth, 2 M. & K. 697: So it was held by Lord Langdale, in Atty. Gen. *v.* The Fishmongers' Company, 2 Beav. 151, that establishments or foundations for securing prayers for the souls of the dead are to be deemed superstitious, and within the statute of Edw. VI. And this decision was affirmed by Lord Cottenham, 5 M. & Cr. 11.

(*s*) R. *v.* Lady Portington, 1 Salk. 162.

(*t*) West *v.* Shuttleworth, 2 M. & K. 684.

(*u*) De Costa *v.* De Pas, Ambl. 228. S. C. Dick. 258. 2 Swanst. 487. 2 Jac. & Walk. 308. But a bequest for the support of poor Jews is valid: 2 Swanst. 490: And in Straus *v.* Goldsmid, 8 Sim. 614, it was held by Sir L. Shadwell, V.C., that a bequest to enable persons professing the Jewish religion to observe it's rites, is good.

(*v*) De Themmines *v.* De Bonneval, 5 Russ. 288.

(*w*) Cary *v.* Abbot, 7 Ves. 490. See also Gates *v.* Jones, cited 2 Vern. 266. Smart *v.* Prujean, 6 Ves. 567. Atty. Gen. *v.* Power, 1 Ball & B. 145.

the Act, (which has been held to be retrospective) (*x*), a legacy given to trustees to appropriate the money in such way as they may judge best calculated to promote the knowledge of the Catholic Christian religion among the poor and ignorant inhabitants of a particular district, is valid (*y*).

With respect to bequests relating to Protestant Dissenters, it was said by Lord Eldon, in *The Attorney-General* v. *Pearson* (*z*), that the Court will administer a fund given to maintain a society of Protestant Dissenters promoting no doctrine contrary to law, although such as may be at variance with the doctrine of the established church. So in the *Attorney-General* v. *Hickman* (*a*), a legacy was established, which was given for encouraging such non-conforming preachers as preach God's word in places where the people are not able to allow them a sufficient and suitable maintenance, and for encouraging the bringing up some to the work of the ministry who are designed to labour in God's vineyard among the Dissenters, leaving the particular mode to the trustees (*b*).

There is a distinction, with respect to the application of the fund bequeathed, between bequests made in favour of uses comprised within the statute 1 Edw. VI., and bequests of the nature above mentioned, which are merely void as bequests to superstitious uses. That statute provides that the bequests made void by it shall vest in the Crown beneficially (*c*): But where the bequest, although not within the statute, is merely void, as being to superstitious uses, the king shall not take it

(*x*) Bradshaw *v.* Tasker, 2 M. & K. 221. But see *contrà*, Atty. Gen. *v.* Todd, 1 Keen, 803.

(*y*) West *v.* Shuttleworth, 2 M. & K. 684.

(*z*) 3 Meriv. 353.

(*a*) 2 Eq. Cas. Abr. 193.

(*b*) See further on the subject of bequests relating to Dissenters, Atty. Gen. *v.* Baxter, 1 Vern. 248. Waller *v.* Childs, Ambl. 524. Doe *v.* Aldridge, 4 T. R. 264. Doe *v.* Copestake, 6 East, 328. Moggridge *v.* Thackwell, 7 Ves. 36. Atty. Gen. *v.* Fowler, 15 Ves. 85. Atty. Gen. *v.* Wansay, *ibid.* 231. Davis *v.* Jenkins, 3 Ves. & B. 158. Atty. Gen. *v.* Pearson, 7 Sim. 290.

(*c*) Where the gift is for the benefit of the poor, but connected *indivisibly* with supersitious uses made void by the Act, the whole goes to the Crown. 5 M. & Cr. 15, 16. See also Atty. Gen. *v.* Vivian, 1 Russ. 226. De Themmines *v.* De Bonneval, 5 Russ. 288.

beneficially; yet if it be of a *charitable* nature, it shall not be so far void, as that it shall result to the heir or next of kin of the testator; but the king, by sign manual directed to the Attorney-General, may order to what charitable purpose it shall be disposed (*d*): Where, however, there is nothing of charity in the object of a legacy, which, not being within the terms of the statute of Edw. VI., fails merely on account of it's illegality, (as in the instance put above of money to be paid to Roman Catholic priests, in order that the testator's soul may have the benefit of their prayers and masses), the next of kin are entitled to the benefit of the failure (*e*).

Bequests to charitable uses:

With respect to bequests to charitable uses, testamentary dispositions to charitable or public purposes, of money or other personal estate, not connected with real property, are valid. But with regard to bequests of land, or affecting land, it is enacted by the statute 9 Geo. II. c. 36, "That from and after the 24th June, 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned or appointed, or any ways conveyed, or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or encumbered by any person or persons whatsoever, in trust, or for the benefit of any charitable uses whatsoever, unless such gift, &c., of any such lands, &c., (other than

stat. 9 Geo. II. c. 36 (of charitable uses:)

(*d*) R. *v.* Lady Portington, 1 Salk. 162. De Costa *v.* De Pas, Ambl. 228. S. C. Dick. 258. 2 Swanst. 487. Cary *v.* Abbot, 7 Ves. 490. De Themmines *v.* De Bonneval, 5 Russ. 292, 293. Atty. Gen. *v.* Todd, 1 Keen, 803. See also Gates *v.* Jones, cited in Atty. Gen. *v.* Guise, 2 Vern. 266, and *infra*, p. 924. But the testator may prevent the application of this rule by a proviso in his Will that if the trusts should be held void, the trustees should stand possessed in trust for his executors or administrators. 5 Russ. 288.

(*e*) West *v.* Shuttleworth, 2 M. & K. 684.

stocks in the public funds) be and be made by deed indented, sealed, and delivered, in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor, including the days of the execution and death, and be enrolled in his Majesty's High Court of Chancery within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of stocks, six calendar months at least before the death of such donor or grantor, including the days of the transfer and death, and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor, or grantor, or of any person or persons claiming under him." The second section provides that such limitations, &c., shall not be construed to extend to any purchase or transfer made for valuable consideration. The third section then enacts, "That all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting, or to affect any lands, &c., &c., to or in trust for any charitable uses whatsoever, which shall at any time, from and after, &c., be made in any other manner or form than by this Act is directed and appointed, shall be absolutely, and to all intents and purposes, null and void." The fourth section then provides, that the Act shall not be construed to extend to the two Universities of England and their colleges, or the scholars upon the foundation of the Colleges of Eton, Winchester, or Westminster: with a further proviso, in section the fifth, that no college shall be at liberty to purchase, acquire, receive, take, or hold, more advowsons than are equal in number to one moiety of the fellows or students upon the respective foundations (*f*). And

(*f*) This part of the statute is repealed by stat. 45 Geo. III. c. 101.

the Act also provides, in the sixth section, "That nothing in this Act contained shall extend or be construed to extend to the disposition, grant, or settlement of any estate, real or personal, lying or being within that part of Great Britain called Scotland."

to what sort of property it applies:

Although this statute contains no restriction upon any one from leaving a sum of money, or any other estate purely personal, to charitable uses (*g*), yet, in the construction of it, it has been adjudged, that not only devises of land, copyhold (*h*) as well as freehold, and bequests of money to be invested in land, are void, but also such bequests as in any manner affect or relate to interests in real property. Thus, bequests to charities of money charged on real estate (*i*), or of money to arise from the sale of real estate (*j*), bequests of terms for years (*k*), or of money due on mortgage (*l*), or of money secured on turnpike tolls (*m*), or of money secured upon the poor or county rates (*n*), or of a judgment debt due to a testator, which, in his lifetime, has been reported, in a creditor's suit, to be an incumbrance affecting the real estate of the debtor, (*o*), are within the statute, and void. So,

(*g*) By Lord Hardwicke, in Soresby *v.* Hollins, Highm. 174, in which case his Lordship afterwards observed—"As it is often said in old books, that 'I was by at the making of the Act of Parliament, and the meaning and intention of it was then said to be this or that,' so I was by at the making of this statute, and it was at that very time said by the legislators, that it would not hinder any charitable disposition of a personal estate."

(*h*) Arnold *v.* Chapman, 1 Ves. Sen. 108. Doe *v.* Waterton, 3 B. & A. 149.

(*i*) Arnold *v.* Chapman, 1 Ves. Sen. 108. See Atty. Gen. *v.* Harley, 5 Madd. 321.

(*j*) Atty. Gen. *v.* Weymouth, Ambl. 20. Waite *v.* Webb, Madd. & Geld. 71.

(*k*) Atty. Gen. *v.* Graves, Ambl. 155. Atty. Gen. *v.* Tomkins, Ambl. 216. Johnston *v.* Swann, 3 Madd. 457. But fixtures in a house will pass by a bequest to a charity: 3 Madd. 457.

(*l*) Atty. Gen. *v.* Meyrick, 2 Ves. Sen. 44. Atty. Gen. *v.* Caldwell, Ambl. 635. White *v.* Evans, 4 Ves. 21. Johnston *v.* Swann, 3 Madd. 457.

(*m*) Knapp *v.* Williams, 4 Ves. 30, note.

(*n*) Finch *v.* Squire, 10 Ves. 41. So a grant by the Crown of the right to lay chains in part of the Thames to moor ships, is an interest in land within the Statute of Mortmain: Negus *v.* Coulter, Ambl. 367.

(*o*) Collinson *v.* Pater, 2 Russ. & M. 344.

where a testator, who has given his personal estate to charitable uses, contracts to sell real estate, but the sale is not completed in his lifetime, his lien upon the estate for the amount of the purchase-money is an interest in land within the statute, and the purchase-money will not pass by his Will to the charity (*p*). But policies of assurance, by which the directors engage to "pay out of the funds," or "that the funds shall be liable," or that "a share of the funds shall be paid," are not so connected with land as to fall within the Act, although the assets of the assurance company consist partly of real estate. And the rule is the same, though by the policy, sealed with the company's corporate seal, the assured becomes a member (*q*). So it has been held that shares in the London Gas-light and Coke Company are not within the statute (*r*).

Likewise, if a testator gives money to a legatee, provided he will furnish lands for charitable purposes, the bequest is void (*s*): or if he gives a real estate to A., he paying a sum of money to the executors, who are to apply the residue of the real and personal estate to a charity; although the land is well charged, the bequest is void, and the money will result to the heir (*t*).

Again, a bequest of money to *exonerate* lands in mortmain, is within the statute (*u*): but a bequest of money to be applied simply in the *amelioration* of lands in mortmain, or for building upon them, or repairing buildings already erected, is not within the statute, the object of which was merely to prevent any addition to the quantity of land already

(*p*) Harrison *v.* Harrison, 1 Russ. & M. 71.

(*q*) March *v.* Atty. Gen. 5 Beav. 433.

(*r*) Thompson *v.* Thompson, 1 Coll. 381.

(*s*) Atty. Gen. *v.* Davies, 9 Ves. 535.

(*t*) Arnold *v.* Chapman, 1 Ves. Sen. 108. But where there was a bequest of leasehold property, on condition to assign part to a charity, Sir John Leach, V. C., held, that the legatee took, discharged of the condition: Poor *v.* Mial, Madd. & Geld. 32.

(*u*) Corbyn *v.* French, 4 Ves. 418. So a bequest of a sum of money to pay off a debt secured by an equitable charge only on a meeting-house, is void: Waterhouse *v.* Holmes, 2 Sim. 162.

in mortmain (*v*). And in one case, Lord Hardwicke extended this principle so far as to lay down, that a bequest of money for the erection of a school would be good, if a piece of ground, already in mortmain, could be obtained for the purpose (*w*). But that opinion has been overruled by a great number of subsequent decisions, and it is now clearly established, that, in order to make such a bequest valid, the testator must point out the land in mortmain on which the erection is to take place (*x*). Accordingly, in *Giblett* v. *Hobson* (*y*), a testator bequeathed 5000*l.* to a charitable institution towards building alms-houses: The testator, who was a member of the institution, knew that it was intended to build the alms-houses, and that a piece of land had been offered to and accepted by the institution for that purpose, but no conveyance of the land had been executed, though the trustees were in possession at the testator's death; and, afterwards, the land was duly conveyed to the trustees: And it was held that the bequest was void. Yet, although it is now perfectly well settled by these decisions, that if a testator gives personal property to erect and endow a school or hospital, it must be considered, unless it be otherwise declared, that it was his intention that land should be acquired, and buildings made, as necessary parts of his purpose; yet if he expressly directs that no part of the money bequeathed is to be so applied, the bequest may be good: Thus, in the *Attorney-General* v. *Williams* (*z*), the testator directed the

(*v*) Glubb *v.* Atty. Gen., Ambl. 373. Harris *v.* Barnes, Ambl. 651. Brodie *v.* Chandos, 1 Bro. C. C. 444, note. Atty. Gen. *v.* Bishop of Chester, 1 Bro. C. C. 444. Foy *v.* Foy, 1 Cox, 165. Atty. Gen. *v.* Parsons, 8 Ves. 186. Atty. Gen. *v.* Munby, 1 Meriv. 327. Shaw *v.* Pickthall, Daniell's Rep. 92. Ingleby *v.* Dobson, 4 Russ. Ch. C. 342.

(*w*) Atty. Gen. *v.* Bowles, 2 Ves. Sen. 547.

(*x*) Atty. Gen. *v.* Hyde, Ambl. 751. Pelham *v.* Anderson, 2 Eden. 296. S. C. 1 Bro. C. C. 444, note. Atty. Gen. *v.* Nash, 3 Bro. C. C. 588. Foy *v.* Foy, 1 Cox, 163. S. C. cited 3 Bro. C. C. 593. Chapman *v.* Brown, 6 Ves. 404. Atty. Gen. *v.* Davies, 9 Ves. 544. Pritchard *v.* Arbouin, 3 Russ. Chanc. Cas. 456. Atty. Gen. *v.* Hodgson, 15 Sim. 146.

(*y*) 5 Sim. 651. Affirmed by Lord Brougham, 3 M. & K. 517.

(*z*) 2 Cox, 387. S. C. 4 Bro. C. C. 526.

dividends of certain sums in the public funds to be applied for or towards establishing a school; and he afterwards declared his meaning to be, that the schoolmaster should not have a less salary than 30*l.* per annum, and that the overplus of the dividends should be applied in buying books, fire, clothes, and other necessaries for the children, and placing them out as apprentices; *but no part to be applied for* victuals, drink, or *lodging:* It did not appear that there was any school already in existence: But Lord Loughborough thought this bequest was not void under the Statute of Mortmain. So in *Henshaw* v. *Atkinson* (*a*), the testator after reciting his wish and intention, that a Blue Coat School should be created at Oldham, and a Blind Asylum at Manchester, under the management and direction of trustees appointed by his Will, bequeathed 20,000*l.* in trust to the said trustees for each of the said charities, and directed that the said money should not be applied in the purchase of lands, or the erection of buildings, because it was his expectation that other persons would, at their expense, purchase lands and buildings for those purposes: And Sir J. Leach, V. C., held that the bequest was not void. And in *Dixon* v. *Butler* (*b*), where a testator bequeathed a sum of money to trustees in trust, in case the inhabitants of the parish of A. should, within seven years after her death, build a church within the said parish, to pay and apply the said sum as they should think fit, for and towards defraying the costs and expenses of building and erecting such church; Alderson, B., was of opinion that the bequest was valid. But in *Mather* v. *Scott* (*c*), where a testator gave the residue of his personal estate to his executors and other persons, with a request that they would be pleased to entreat the lord of the manor of Devonport to grant a spot of ground suitable for the erection of dwellings, to be appropriated to a charitable purpose, Lord Langdale, M. R., held, that the bequest was void; for

(*a*) 3 Madd. 306.
(*b*) 3 Y. & Coll. 677.
(*c*) 2 Keen, 172.

that it did not clearly exclude a purchase of the land: His Lordship appears to have been further of opinion, that a bequest of money to be laid out in building upon land, which the testator expected to be procured as a gift, could not be supported: And his Lordship observed, that he did not think that the case of *Henshaw* v. *Atkinson* was an authority in support of such a bequest; because the decision proceeded upon the codicils, from which it was to be collected that the expectation of the testator, as to the purchase of lands and buildings by other persons, had been disappointed, and that he contemplated making other provisions for the establishment of the charities.

In case of a devise by a freeman of London, of land within the city, the statute does not apply: for by the custom of London, freemen may devise in mortmain lands within the city (*d*).

what are charitable uses within the statute:

It remains to consider, what the law deems charitable uses, so as to be subject to the restriction of the statute. In the stat. 43 Eliz. c. 4, gifts for relief of aged, impotent, and poor people, for maintenance of sick and maimed soldiers and mariners, for ease of poor inhabitants concerning payment of taxes, for aid of young tradesmen, handicraftsmen, and persons decayed, for relief, stock, and maintenances of houses of correction, for marriages of poor maids, for education and preferment of orphans, for schools of learning, free schools, and scholars in universities, for relief or redemption of prisoners or captives, for repair of bridges, ports, havens, causeways, churches, sea-banks, and highways, are enumerated as charitable uses. Bequests to any of the purposes specified in the last mentioned statute, or to any purpose of a similar nature (*e*), are considered as bequests to charitable uses, within the Statute of Mortmain, 9 Geo. II. c. 36.—Thus, not only bequests for the education or relief of the

(*d*) Middleton *v.* Cater, 4 Bro. C. C. 409. Bac. Abr. Customs of London, (A.)

(*e*) See Turner *v.* Ogden, 1 Cox, 317.

poor, as by means of schools (*f*) or hospitals (*g*), or to the poor inhabitants, not receiving alms, of a particular parish (*h*), or to the widows and children of the seamen belonging to a particular place (*i*); but also all bequests for public purposes, whether local or general (*k*), as a bequest to the British Museum (*l*), or for the improvement of a particular city (*m*), or for the establishment of water-works for the use of the inhabitants of a particular town (*n*), or of a perpetual botanical garden for the public benefit (*o*); and, likewise bequests for the promotion of the Protestant religion, as for the advancement of the Christian religion among infidels (*p*), or for the establishment of a preacher in a particular chapel (*q*), or for the benefit of the poor dissenting ministers residing in any of the counties in England (*r*), or a bequest of an annual sum to the clerk of a parish to keep the chimes in repair, to play certain psalms (*s*), or to the vicar or curate of a particular place, for preaching an annual sermon on a certain day (*t*), or to build an organ gallery in a parish church (*u*), or to be paid

(*f*) Atty. Gen. *v.* Hyde, Ambl. 750. Atty. Gen. *v.* Nash, 3 Bro. C. C. 588.

(*g*) Masters *v.* Masters, 1 P. Wms. 420. Pelham *v.* Anderson, 2 Eden. 296. S. C. 1 Bro. C. C. 444, note. Foy *v.* Foy, 1 Cox, 163.

(*h*) Atty. Gen. *v.* Clarke, Ambl. 422.

(*i*) Powell *v.* Atty. Gen., 3 Meriv. 48. See also Atty. Gen. *v.* Comber, 2 Sim. & Stu. 93. As to the cases where bequests to poor relations are considered as bequests to charitable uses, see White *v.* White, 7 Ves. 423. Atty. Gen. *v.* Price, 17 Ves. 371. Crichton *v.* Grierson, 3 Bligh. N. S. 438.

(*k*) See Atty. Gen. *v.* Pearce, 2 Atk. 88. Atty. Gen. *v.* Corporation of Shrewsbury, 6 Beav. 220.

(*l*) British Museum *v.* White, 2 Sim. & Stu. 594.

(*m*) Howse *v.* Chapman, 4 Ves. 542. Mitford *v.* Reynolds, 1 Phill. Ch. C. 185.

(*n*) Jones *v.* Williams, Ambl. 651. Atty. Gen. *v.* Heelis, 2 Sim. & Stu. 67.

(*o*) Townley *v.* Bedwell, 6 Ves. 194.

(*p*) Atty. Gen. *v.* Virginia College, 1 Ves. Jun. 243.

(*q*) Grieves *v.* Case, 4 Bro. C. C. 67. S. C. 2 Cox, 301, 302. 1 Ves. Jun. 548: but see Doe *v.* Aldridge, 4 T. R. 264. Doe *v.* Copestake, 6 East, 328.

(*r*) Waller *v.* Childs, Ambl. 524. Atty. Gen. *v.* Fowler, 15 Ves. 85.

(*s*) Turner *v.* Ogden, 1 Cox, 316.

(*t*) Soresby *v.* Hollins, Highm. 174. S. C. 9 Mod. 221. Durour *v.* Motteux, 1 Ves. Sen. 320. Turner *v.* Ogden, 1 Cox, 316.

(*u*) Adnam *v.* Cole, 6 Beav. 353.

on a certain day to the singers sitting in the gallery of the church (*v*); are deemed bequests to charitable uses within the Statute of Mortmain.

So, before the statute 43 Geo. III. c. 107, bequests to the corporation of Queen Anne's bounty, for the augmentation of poor vicarages (*w*), or small livings (*x*), were holden to be charitable bequests within the statute (*y*); but now, by the provisions of the former statute, a devise of real estate as well as of any goods and chattels, for the benefit of Queen Anne's bounty, is rendered valid.

Again, bequests for building churches are regarded as charitable uses within the statute (*z*). But now by statute 43 Geo. III. c. 108, it is enacted, that all persons may, by Will executed three months at least before death, bequeath all their estate in real property, not exceeding five acres, or goods and chattels, not exceeding in value 500*l.* for the erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the Liturgy of the church of England shall be used, or any mansion-house for the residence of any minister of the church of England officiating in such church or chapel, or any out-buildings, churchyard, or glebe for the same respectively (*a*). The Act proceeds to provide that any gift, exceeding five acres, or 500*l.*, is to be reduced by order of the Chancellor on petition; And that no glebe containing upwards of fifty acres, shall be augmented by more than one acre.

A bequest of money, to be raised out of real estate for the purpose of erecting a monument to the testator's memory, is not a charitable use within the Statute of Mortmain (*b*). So

(*v*) Turner *v.* Ogden, 1 Cox, 316.

(*w*) Widmore *v.* Woodroffe, Ambl. 636.

(*x*) Middleton *v.* Clitherow, 3 Ves. 734.

(*y*) In these cases bequests of money were held void, on the ground that the corporation was bound by it's rules to lay it out in land.

(*z*) Pritchard *v.* Arbouin, 3 Russ. Chanc. C. 456. See Doe *v.* Hawthorn, 2 B. & A. 96.

(*a*) See Dixon *v.* Butler, 3 Y. & Coll. 677.

(*b*) Mellick *v.* The Asylum, 1 Jacob. 180. Adnam *v.* Cole, 6 Beav. 353. See Mitford *v.* Reynolds, 1 Phill. C. C. 185.

a trust to repair, and if need be, rebuild, a vault and tomb for the testator and his family, is not a charitable use within the statute (*c*).

Again, a gift to one of the chartered companies in the city of London, for an increase of their stock of corn for the service of the market in London, is a donation for the benefit of the company and its revenues, and not a charitable use (*d*).

the exceptions of the statute, as to the Universities:

It must be observed, that the statute contains two exceptions, the one in favour of the two Universities, and the colleges of Eton, Winchester, and Westminster, and the other respecting property in Scotland. With regard to the former of these, it has been holden, that the legislature meant to except such devises only as were really and *bonâ fide* for the benefit of the colleges, and not those in which the legal interest only passes to the college, in trust for other charitable purposes (*e*).

as to land in Scotland:

With regard to the exception of property in Scotland, legacies to be laid out in land in Scotland, or in heritable securities there, have been decided to be within this provision of the Act (*f*).

bequests of land, &c. in Ireland, or the Colonies:

And it has been further holden that, as the statute is local, it does not extend to prohibit dispositions of real estate, or personal property connected with real estate, in Ireland (*g*) or in the West Indies, or other colonies (*h*). But bequests of personal

(*c*) Doe *v*. Pitcher, 6 Taunt. 359. S. C. 2 Marsh. 61. 3 M. & S. 407. However, Lord Ellenborough expressed an opinion that, although it was not a charitable use, with respect to the party's own interment, it was so with respect to that of his family: 3 M. & S. 410.

(*d*) Atty. Gen. *v*. Haberdashers' Company, 1 Mylne & K. 420.

(*e*) Atty. Gen. *v*. Tancred, 1 Eden. 15. S. C. Ambl. 351. 1 W. Bl. 90. Atty. Gen. *v*. Munby, 1 Meriv. 327. See also Atty. Gen. *v*. Whorwood, 1 Ves. Sen. 534. It was said by Lord Northington, in the Atty. Gen. *v*. Tancred, that the exception extends only to colleges established in the university at the time of the statute: but this distinction was doubted by Lord Loughborough, in Atty. Gen. *v*. Bowyer, 3 Ves. 728.

(*f*) Oliphant *v*. Hendrie, 1 Bro. C. C. 570. Mackintosh *v*. Townsend, 16 Ves. 330.

(*g*) Campbell *v*. Lord Radnor, 1 Bro. C. C. 272, by Lord Loughborough.

(*h*) Atty. Gen. *v*. Stewart, 2 Meriv. 143. Nor to the East Indies: Mayor of Lyons *v*. E. I. Comp., 1 Moo. P. C. 175, 298. Mitford *v*. Reynolds, 1 Phill. C. C. 185, 192.

estate, connected with real estate in England, to be laid out in land in Scotland, Ireland, &c. for charitable uses, are within the Act, and void (*i*). And in a late case (*k*), where a Scotchman, by Will in the English form, made in England, gave the residue of his personal estate to trustees, of whom some, but not all, were resident in Scotland, upon trust, to lay out the same in the purchase of lands, or rents of inheritance in fee simple, for the intent expressed in an instrument of even date with his Will; and by that instrument he directed the trustees of his Will to pay the rents annually to certain other trustees, who at all times were to be persons residing within twenty miles of Montrose, to be by them applied to the relief of indigent ladies in Montrose, or within twenty miles of that town; it was holden by Lord Lyndhurst, and afterwards by the House of Lords, that the bequest was void under the statute.

bequest of proceeds of land, &c. to be laid out in Scotland:

It is necessary, in conclusion, to advert to two other classes of bequest on which the statute has been holden not to operate. The one class consists of cases, where there is a bequest to particular legatees, to which the statute does not apply, accompanied by a disposition void by the operation of the statute: In these cases the rule is, that if the two objects are not inseparably blended, the bequest in favour of the unobjectionable purpose will be supported, although the charitable disposition shall fail (*l*): but if the unobjectionable bequest be so mixed up with the purpose of the charity, as to be dependent on it, the bequest must be considered indivisible and void (*m*).

cases of bequests to legatees, accompanied by bequests to charity:

The other class of bequests, upon which the statute of

cases of bequests, with a

(*i*) Curtis *v.* Hutton, 14 Ves. 537.

(*k*) Atty. Gen. *v.* Mill, 3 Russ. Chanc. C. 328. 5 Bligh. N. C. 593. 2 Dow. & Cl. 393.

(*l*) Blandford *v.* Fackerell, 4 Bro. C. C. 394. Doe *v.* Aldridge, 4 T. R. 264. Atty. Gen. *v.* Stepney, 10 Ves. 22. Waite *v.* Webb, Madd. & Geld. 71. Doe *v.* Pitcher, 6 Taunt. 359. S. C. 2 Marsh. 61. Doe *v.* Wrighte, 2 B. & A. 710.

(*m*) Durour *v.* Motteux, 1 Ves. Sen. 323. Atty. Gen. *v.* Goulding, 2 Bro. C. C. 428. Atty. Gen. *v.* Whitchurch, 3 Ves. 141. Atty. Gen. *v.* Davies, 9 Ves. 535. Atty. Gen. *v.* Hinxman, 2 Jac. & Walk. 270. Limbrey *v.* Gurr, Madd. & Geld. 151. See also Morice *v.* Bp. of Durham, 10 Ves. 538. Mitford *v.* Reynolds, 1 Phill. Ch. C. 185, 196.

discretionary power to executors to lay out in lands or otherwise.

charitable uses does not operate, consists of cases where a personal fund is given to executors or trustees for charitable purposes, with a *discretionary* power to lay it out in lands or otherwise: And on this subject the rule is, that if the words of the Will are mandatory or directory, the bequests are void (*n*); but where the words of the Will leave sufficient room for the Court to say that there is a power in the trustees to lay out the money either in land or otherwise, the bequest will be good; upon the principle, that if the language of a Will is in the disjunctive, and leaves to the executors or trustees two methods to do a particular thing, the one lawful and the other prohibited, the lawful bequest shall be pursued and take effect (*o*). Accordingly, where the dividends of certain sums in the public funds were bequeathed to be applied in "paying the expenses of providing a proper school-house for instructing twenty poor girls in needle-work, reading, and writing," Sir J. Leach, V. C., held, that the bequest was not void, as a school-house might be provided by hire (*p*). But in a late case (*q*), a direction to executors to purchase so much freehold land as could be bought for 100*l.* for a charitable purpose, and in case land could not be conveniently purchased within twelve months after the testator's decease, to pay 20*s.* per quarter for such charitable purpose until such purchase could be made, was held, by Lord Langdale, M. R., not to give the executors such a discretion as to take the bequest out of the Mortmain Act (*r*).

And in another case (*s*), the same learned Judge held, that

(*n*) English *v.* Ord, Highm. 181. Grieves *v.* Case, 4 Bro. C. C. 67. S. C. 2 Cox, 301. 1 Ves. Jun. 548. Kirkbank *v.* Hudson, 7 Price, 212. In the last case the testator, after bequeathing the residue of his personal estate to the perpetual endowment of two schools "recommended" that his money should be collected within a convenient time, and laid out in the purchase of a freehold messuage or lands which were freehold, to be a perpetual endowment for the two schools. See also Doe *v.* Wrighte, 2 B. & A. 710.

(*o*) Soresby *v.* Hollins, Highm. 175. S. C. 9 Mod. 221. Grimmett *v.* Grimmett, Ambl. 212. Curtis *v.* Hutton, 14 Ves. 537. Atty. Gen. *v.* Goddard, 1 Turn. & R. 348.

(*p*) Johnston *v.* Swann, 3 Madd. 457. See also Kirkbank *v.* Hudson, 7 Price, 221.

(*q*) Mann *v.* Burlingham, 1 Keen, 235.

(*r*) See also Atty. Gen. *v.* Hodgson, 15 Sim. 146.

(*s*) Baker *v.* Sutton, 1 Keen, 224.

a bequest of money directed to be laid out on mortgage security, at the highest interest that could be legally and safely obtained for the same, was void under the Mortmain Act; because it must be considered that the testator intended an investment on real security exclusively.

On whom the bequests void by the statute devolve.

Bequests to charitable uses, made void by the statute of 8 Geo. II. c. 36, devolve on the testator's heir (*s*), or his next of kin (*t*), or the residuary legatee, according to the nature of the property bequeathed, and the language of the Will (*u*).

Indefinite bequests for liberal or benevolent purposes, or private charity, not charitable uses.

It must be observed in conclusion, that purposes of liberality and benevolence, or *private* charity, do not amount to "charitable uses," in the sense which that expression is used in the Courts of Law and Equity, with reference to the present subject: Thus, a bequest in trust for such objects of "benevolence and liberality," as the trustee in his own discretion shall most approve (*v*), is not a legacy to a charitable use. So it was held by the Court of King's Bench (*w*), that a devise to trustees of a reversion in land, to be applied by them and their successors, and the officiating ministers for the time being of a Methodist congregation, as they should think fit to apply the same, is not a devise to charitable uses within the stat. 9 Geo. II. c. 36. Again, a bequest for such "benevolent purposes," as the trustees in their integrity and discretion may agree on (*x*), or "to be given in private

(*s*) Arnold *v.* Chapman, 1 Ves. Sen. 108. Gibbs *v.* Rumsey, 2 V. & B. 294.

(*t*) House *v.* Chapman, 4 Ves. 542.

(*u*) See *ante*, p. 554, 555. Cooke *v.* Stationers' Company, 3 Myln. & K. 262. Henchman *v.* Atty. Gen., 3 M. & K. 485.

(*v*) Morice *v.* Bishop of Durham, 9 Ves. 399. 10 Ves. 522.

(*w*) Doe *v.* Copestake, 6 East, 328.

(*x*) James *v.* Allen, 3 Meriv. 17. As to cases where the disposition of a fund for charitable purposes is left to the discretion of legatees in trust, see Waldo *v.* Caley, 16 Ves. 206. Down *v.* Worrall, 1 M. & K. 561. Horde *v.* Lord Suffolk, 2 M. & K. 59. Ellis *v.* Selby, 1 Mylne & Cr. 286. Baker *v.* Sutton, 1 Keen, 224. Nightingale *v.* Goulburn, 5 Hare, 484. Townshend *v.* Carus, 3 Hare, 257. Kendall *v.* Granger, 5 Beav. 300.

charity" (*y*), is not to be considered a bequest to charitable uses.

This distinction is attended with important consequences; inasmuch as the rule is now completely established, that where a *charitable* purpose (in the technical sense) is expressed, however general, the bequest shall not fail on account of the uncertainty of the object; but the particular mode of application will be directed by the king's sign manual in some cases, in others by the Court of Chancery (*z*). But where a bequest is for a purpose of liberality or benevolence, or private charity, not amounting to a "charitable use," and is of a nature so general and undefined as to be incapable of being executed by the Court, it fails altogether, and the heir-at-law, or the next of kin, as the case may be, becomes entitled to the property (*a*), as in the case of bequests void by the statute.

(*y*) Ommanney *v.* Butcher, 1 Turn. & Russ. 260. See also Vezey *v.* Jamson, 1 Sim. & Stu. 71. Nash *v.* Morley, 5 Beav. 177.

(*z*) By Sir Wm. Grant, in Morice *v.* Bishop of Durham, 9 Ves. 405. Simon *v.* Barber, 5 Russ. 112. Hayter *v.* Trego, 5 Russ. 113. Bennett *v.* Hayter, 2 Beav. 81. The distinction seems to be that, where there is a general indefinite charitable purpose, not fixing itself on any particular object, the disposition is in the king by the sign manual; but where the gift is to trustees, with general or some objects pointed out, which fail, the Court will take upon itself the execution of the trust: Ommanney *v.* Butcher, 1 Turn. & Russ. 270. See also Moggridge *v.* Thackwell, 7 Ves. 36. Atty. Gen. *v.* Gladstone, 13 Sim. 7. Reeve *v.* Atty. Gen., 3 Hare, 191. As to cases where the Court can execute the intent *cy pres*, see further, Atty. Gen. *v.* Ironmongers' Company, 2 M. & K. 576. Cherry *v.* Mott, 1 Mylne & Cr. 123.

(*a*) Morice *v.* Bishop of Durham, 9 Ves. 399. 10 Ves. 522. James *v.* Allen, 3 Meriv. 17. Ommanney *v.* Butcher, 1 Turn. & Russ. 260. Vezey *v.* Jamson, 1 Sim. & Stu. 71. Fowler *v.* Garlike, 1 Russ. & M. 232. Ellis *v.* Selby, 1 M. & Cr. 286. Williams *v.* Kershaw, 5 Cl. & F. 111. Kendall *v.* Granger, 5 Beav. 300.

CHAPTER THE SECOND.

OF THE CONSTRUCTION OF WILLS OF PERSONALTY.

SECTION I.

Of the General Rules of Construction.

IT is obviously not within the scope of this Treatise to enter fully into the general doctrine of the construction of Wills. It may, however, be useful to state briefly some of the most important rules which have been established upon this subject.

1. Technical words not necessary.

1. Technical words are not necessary to give effect to any species of disposition (*a*). Therefore, where the testator used the words "all my *personal* estates," and it was clear beyond all doubts upon the face of the Will that the testator meant by these words, not what is technically understood by them, but the *real* property over which he had an absolute personal power of disposition, it was holden that the freehold passed by this description (*b*). So, on the other hand, if on the whole Will it clearly appears that the testator's intention was to bequeath leasehold property, in which he had a chattel interest only, under the description of his *real* estate, such intention shall be carried into effect (*c*).

(*a*) By Lord Kenyon, in Hay *v.* Coventry, 3 T. R. 86.

(*b*) Doe *v.* Tofield, 11 East, 246. See also Roe *v.* Pattison, 16 East, 221. Doe *v.* Haslewood, 6 A. & E. 167. Doe *v.* Pratt, *ibid.* 180. Davenport *v.* Coltman, 7 M. & W. 481.

(*c*) Hobson *v.* Blackburn, 1 Mylne & K. 571. Goodman *v.* Edwards, 2 Mylne & K. 759. See also Read *v.* Backhouse, 2 Russ. & M. 546. Doe *v.* Cranstoun, 7 M. & W. 1. But see Hall *v.* Fisher, 1 Coll. 47. Stone *v.* Greening, 13 Sim. 390.

2. Technical words to be taken in their legal sense.

2. Nevertheless, if technical words are used by the testator, he will be presumed to employ them in their legal sense, unless the context contain a clear indication to the contrary (*d*). "If words of art," said Lord Alvanley, in *Thelluson* v. *Woodford* (*e*), "are used, they are construed according to the technical sense, unless upon the whole Will it is plain that the testator did not so intend." Courts, therefore, have no right or power to say that the testator did not understand the meaning of the words he has used, or to put a construction upon them different from what has been long received, or what is affixed to them by the law (*f*). But where the intention of the testator is plain, it will be allowed to control the legal operation of words however technical (*g*).

The rule above stated has been carried so far, that, in some instances, the testator has been presumed to use words and forms of expression in the sense which they have acquired by decided cases, although such sense be different from their ordinary and natural meaning (*h*).

It may be useful, in this place, to advert to the well known principle, that where there is a general intent, and a particular one, the particular is to be sacrificed to the general intent (*i*): Which doctrine, perhaps, when rightly understood, amounts to no more that an example of the rule now under consideration, *viz.* that technical words, or words of known legal import, shall have their legal effect, unless, from subsequent inconsistent words, it is *very clear* that the

(*d*) Lane *v.* Lord Stanhope, 6 T. R. 352, by Lord Kenyon. Phillips *v.* Garth, 3 Bro. C. C. 68, by Buller, J. Buck *v.* Norton, 1 Bos. & Pull. 57, by Eyre, C. J. Jesson *v.* Wright, 2 Bligh. 1. Mounsey *v.* Blamire, 4 Russ. Ch. C. 386, 387.

(*e*) 4 Ves. 329.

(*f*) By Buller, J., in Hodgson *v.* Ambrose, Dougl. 341. See also Milnes *v.* Slater, 8 Ves. 306.

(*g*) Vauchamp *v.* Bell, Madd. & Geld. 343. 6 Cruise's Dig. 148, 3d edit.

(*h*) Baines *v.* Dixon, 1 Ves. Sen. 41. Wilmot *v.* Wilmot, 8 Ves. 10. But see Crowder *v.* Stone, 3 Russ. Chanc. Cas. 223.

(*i*) Robinson *v.* Robinson, 1 Burr. 38. S. C. 3 Bro. P. C. 180. Toml. edit. Doe *v.* Applin, 4 T. R. 82. Doe *v.* Smith, 7 T. R. 531. Doe *v.* Cooper, 1 East, 229. Pierson *v.* Vickers, 6 East, 548. Jesson *v.* Wright, 2 Bligh. 49. Doe *v.* Harvey, 4 B. & C. 620.

testator meant otherwise (*k*). For instance, if the testator bequeaths real property to a man and the *heirs of his body*, or to a man for life, with a subsequent limitation to the heirs of his body, this creates an estate tail according to the clearly established rules of law; and, therefore, the estate tail so created shall not be cut down into an estate for life, although the Will contains subsequent words expressive of an intention that the heirs of the body of the devisee shall take *as tenants in common* (*l*). It is true that heirs of the body cannot take as tenants in common; but it does not follow that the testator did not intend that the heirs of the body should take, because they cannot take in the mode prescribed: This only follows, that, having given to heirs of the body, he could not modify that gift in the two different ways which he desired (*m*). The particular intent, then, that the heirs of the body should take as tenants in common, must be sacrificed to the general intent that there should be an estate tail; and therefore the words "as tenants in common," may be rejected (*n*). Nevertheless the words "heirs of the body" will yield to a *clear* particular intent, that the estate should be only for life (*o*).

3. Construction must be on the whole Will:

3. The construction of the Will is to be made upon the entire instrument, and not merely upon disjointed parts of it; and consequently all it's parts are to be construed with reference to each other (*p*).

(*k*) By Lord Redesdale, in Jesson *v*. Wright, 2 Bligh, 56, 57. S. P. Doe *v*. Gallini, 5 B. & Adol. 621. Lees *v*. Mosley, 1 Y. & Coll. 589.

(*l*) Jesson *v*. Wright, 2 Bligh. 1, (reversing Doe *v*. Jesson, 5 M. & S. 95, and overruling Doe *v*. Goff, 11 East, 668.) Doe *v*. Featherstone, 1 B. & Adol. 944. See also Reece *v*. Steele, 2 Sim. 233. Mortimer *v*. West, 2 Sim. 274. Ward *v*. Bevil, 1 Younge & Jerv. 512. Jack *v*. Fetherston, 9 Bligh. 238. Dunk *v*. Fenner, 2 Russ. & M. 566. Douglas *v*. Congreve, 1 Beav. 59. Tate *v*. Clarke, 1 Beav. 100.

(*m*) By Lord Redesdale, in Jesson *v*. Wright, 2 Bligh. 57.

(*n*) See Doe *v*. Harvey, 4 B. & C. 610. S. C. 7 Dowl. & Ryl. 78.

(*o*) By Lord Eldon, in Jesson *v*. Wright, 2 Bligh. 53. North *v*. Martin, 6 Sim. 266. As to controlling the *primâ facie* meaning of the word "Issue," by the context, see the cases collected, *infra*, p. 953, note (*o*).

(*p*) Turpine *v*. Forreyner, 1 Bulst. 101. Mirril *v*. Nicholls, 2 Bulst. 178. Gittins *v*. Steele, 1 Swanst. 28. Hudson *v*. Bryant, 1 Coll. 681. A codicil is to be taken as a

Hence, general words in one part of a Will may be restrained, in cases where it can be collected from any other part of the Will, that the testator did not mean to use them in their general sense (*q*).

same words occurring more than once:

Hence, also, generally speaking, if the same words occur in different parts of the same Will, they must be taken to have been used everywhere in the same sense, unless there appears a clear intention to the contrary (*r*). But this rule does not preclude the Court from putting a different construction upon the same words, even though used only once in a Will, when applied to different subject-matters. Thus, in *Forth* v. *Chapman* (*s*), where the testator devised real and personal estate to A., and if he should die, and *leave no issue of his body*, then to B.; Lord Macclesfield said, that it might be reasonable enough to take the same words as to the different estates of realty and personalty, in different senses, and as if repeated by two several clauses; and that the words, "leave no issue," as applied to the *personal* estate, should be taken to mean, leave no issue *at the time of his death*, but as applied to the freehold, to mean an *indefinite failure of issue:* And this case has been considered as an authority, in many subsequent instances, for a different construction of the same words in a Will, as applied to different subjects (*t*).

when one bequest construed with reference to another.

It must be further observed, that where there is no connexion by grammatical construction, or direct words of reference, or by the declaration of some common purpose, between

component part of the Will; see *ante*, p. 8, 9.

(*q*) Strong *v.* Teatt, 2 Burr. 912. Doe *v.* Reade, 8 T. R. 122. Whitmore *v.* Trelawney, 6 Ves. 130. Crone *v.* Odell, 1 Ball & Beat. 466. S. C. 3 Dow. 61.

(*r*) Whitmore *v.* Craven, 2 Chanc. Cas. 169. Goodright *v.* Dunham, Dougl. 268. Dalzell *v.* Welsh, 2 Sim. 319. Ridgeway *v.* Munkittrick, 1 Dr. & W. 93, *per* Sugden, C. But see Winterton *v.* Crawfurd, 1 Russ. & M. 407.

(*s*) 1 P. Wms. 667.

(*t*) Sheffield *v.* Lord Orrery, 3 Atk. 288. Lord Stafford *v.* Buckley, 2 Ves. Sen. 180. Southby *v.* Stonehouse, 2 Ves. Sen. 616. Doe *v.* Smith, 5 M. & S. 131, 132. Doe *v.* Ewart, 7 A. & E. 636, 659. See also Carter *v.* Bentall, 2 Beav. 551. Byng *v.* Lord Strafford, 5 Beav. 558. Head *v.* Randall, 2 Y. & Coll. Ch. C. 231. Buckle *v.* Fawcett, 4 Hare, 536, 542.

distinct bequests in a Will, the rule now under consideration will not justify the drawing in aid the special terms of one bequest to the construction of another, although in its general terms and import similar, and applicable to persons standing in the same degree of relationship to the testator: and, although there is no apparent reason, other than the different wording of the clauses, to presume that the testator had a different purpose in view (*u*). Thus, in *Spirt* v. *Bence* (*v*), the testator had three sons, Thomas, Francis, and Henry: he first devised lands to Thomas and the heirs male of his body, remainder to Francis and his heirs; then other lands to Francis and the heirs male of his body, remainder to Henry and his heirs; then other lands to Henry and his heirs; after this he devised other premises to Henry, without words of limitation: and, again, other premises to Henry and his heirs, remainder for want of heirs of his body, to Francis for ever: And because the word "heirs" was not immediately connected with every part of the disposition to Henry, the Court thought that he took only an estate for life in those premises to which no words of limitation were added. So in *Doe* v. *Wright* (*w*), (which was also a case of a Will of realty, but decided on principles equally applicable to the construction of Wills of personalty), the testator, after these introductory words—"As touching such worldly and personal estate wherewith it has pleased God to bless me, I give and dispose of the same in manner following"—gave an estate for life to his wife in all his freehold, leasehold, and copyhold, and after her death he gave his grandson, James Wright, all his lands in Essex, and also all his *estate* in Huntingdonshire: to John Wright, another grandson, he gave all his *estate*, called the Coal-yard, in London, and also 500*l.*: to James Camper, his remaining grandson and heir-at-law, he gave the house he lived in, and his house and land called the Castle-yard in London, and also 500*l.*: It was argued on behalf of James Wright, that he

(*u*) Right *v.* Compton, 9 East, 267. Chambers *v.* Brailsford, 18 Ves. 368. But see Loveday *v.* Hopkins, Ambl. 273. Gittings *v.* McDermott, 2 M. & K. 69.

(*v*) Cro. Car. 368.

(*w*) 8 T. R. 64. S. C. in C. P. *nomine* Doe *v.* Child, 1 New R. 335.

took a fee, and not an estate for life only, in the lands in Essex, as well as those in Huntingdonshire, after the death of the wife; not only because the introductory clause denoted an intention in the testator not to die intestate as to any part of his property, but, because, since it was clear that by the word "estate" he took an estate in fee in the lands in Huntingdonshire, as likewise did the grandson, John Wright, in the premises called the Coal-yard, it could not be the intention of the testator to give James Wright a different estate in the lands in Essex, which were disposed of in the same general way without words of limitation; especially as he appeared to intend to make a general disposition of his fortune among his three grandsons: It was further urged, that the devise to the grandson who was heir-at-law, was made in the same words as that to James Wright, and the testator must have intended that his heir-at-law should have a fee, since it would have descended to him independent of the Will: However, it was holden, that James Wright took an estate for life only in the lands in Essex; for that the two clauses could not be connected. So in the case of *Doe* v. *Westley* (*x*), the testator, after giving several pecuniary legacies, the bequest of each commencing with the word "item," devised as follows: "Item, I give and bequeath unto Mary Westley, all that my messuage and tenement wherein I now dwell, with the garden and all the appurtenances thereto belonging; and I also give to the said Mary Westley, all my household goods and chattels, and implements of household, within doors and without, *all for her own disposing*, free will and pleasure, immediately after my decease:" And it was argued on behalf of Mary Westley, that the words *all for her own disposing*, which would carry the fee, were to be applied to the clause respecting the messuage, &c. and not merely to the household goods: But it was holden, that the two distinct sections of the Will made two distinct devises, and that, therefore, she took an estate for life only in the real property (*y*).

(*x*) 4 Barn. & Cress. 667. S. C. 7 Dow. & Ryl. 112.

(*y*) See further on this subject, Right *v.* Sidebotham, Dougl. 759. Goodright *v.* Barron, 11 East, 220. Paice *v.* Archbp. of Canterbury, 14

4. The Court is bound to give effect to every word of the Will, without change or rejection, provided an effect can be given to it, not inconsistent with the general intent of the whole Will taken together (*z*). Thus, if one devises land to A. B. in fee, and afterwards in the same Will devises the same land to C. D. for life, both parts of the Will shall stand; and in the construction of the law, the devise to C. D. shall be first (*a*). But where it is impossible to form one consistent whole, the separate parts being *absolutely* irreconcileable, the latter will prevail (*b*).

4. Effect must be given to every word.

It must not, however, be understood, that because the testator uses, in one part of his Will, words having a clear meaning in law, and in another part, words inconsistent with the former, that the first words are to be cancelled or overthrown (*c*). A contrary principle is now fully established in the doctrine already considered, that the general intent, although first expressed, shall overrule the particular (*d*).

5. The Will must be most favourably and benignly expounded to pursue, if possible, the intention of the testator (*e*).

5. Words may be transposed, supplied, or rejected, to advance the apparent intention:

To effectuate, therefore, the clear intention, as apparent upon the whole Will, words and limitations may be transposed (*f*), supplied (*g*), or rejected (*h*). But the rule is, that

Ves. 364. Fenny *v.* Ewestace, 4 M. & S. 58. Doe *v.* Pearse, 1 Price, 353. Crawford *v.* Trotter, 4 Madd. 361. Oldman *v.* Slater, 3 Sim. 84.

(*z*) Gray *v.* Minnethorpe, 3 Ves. 105. Constantine *v.* Constantine, 6 Ves. 102. Doe *v.* Rawding, 2 B. & A. 448.

(*a*) Anon. Cro. Eliz. 9. Doe *v.* Davies, 4 M. & W. 599.

(*b*) Constantine *v.* Constantine, 6 Ves. 100. Doe *v.* Biggs, 2 Taunt. 109. Sims *v.* Doughty, 5 Ves. 243. Wykham *v.* Wykham, 18 Ves. 421. Sherratt *v.* Bentley, 2 Mylne & K. 149. Morrall *v.* Sutton, 1 Phill. Ch. C. 533. See also 4 Beav. 478. 5 Beav. 100. Shipperdson *v.* Tower, 1 Y. & Coll. C. C. 441.

(*c*) By Lord Redesdale in Jesson *v.* Wright, 2 Bligh. 56.

(*d*) *Ante*, p. 926, 927.

(*e*) Touchst. 434. 2 Black. Com. 381.

(*f*) Green *v.* Hayman, 2 Chanc. Cas. 10. Spark *v.* Purnell, Hob. 75. East *v.* Cook, 2 Ves. Sen. 32. Duke of Marlborough *v.* Godolphin, 2 Ves. Sen. 74. Marshall *v.* Hopkins, 15 East, 309. Hudson *v.* Bryant, 1 Coll. 681.

(*g*) Doe *v.* Micklem, 6 East, 486, 493, 494. Kirkpatrick *v.* Kirkpatrick, 13 Ves. 476. Montagu *v.* Nucella, 1 Russ. Chanc. Cas. 171, 172.

(*h*) Boon *v.* Cornforth, 2 Ves.

words in a Will are not to be rejected, unless there cannot be any rational construction of the words as they stand (*i*).

"or" construed "and:"

"if" construed "when:"

So, in order to advance the apparent intention of the testator, "or" may be construed "and" (*k*), and *vice versâ* (*l*), in cases of legacies, as well as devises of real estate. So "if" may be construed "when" for the same purpose (*m*).

But a mistake in a Will cannot be corrected, or an omission supplied, unless it clearly appears by fair inference from the whole Will (*n*). Hence not only in cases of devises of real estate, but also of Wills of personal property, Courts of Construction cannot, in their interpretation of the intention of the testator, pay the least regard to any variance between the Will as it stands, and the instructions given for preparing it (*o*). If, in point of fact, there are any undue omissions or insertions in a Will of personalty, these may, under certain circumstances, be reformed by application to the Court of Probate (*p*).

Sen. 276. Sims *v.* Doughty, 5 Ves. 243. Doe *v.* Stenlake, 12 East, 515. Smith *v.* Pybus, 9 Ves. 566. Jesson *v.* Wright, 2 Bligh. 1. Sherratt *v.* Bentley, 2 Mylne & K. 149. Robinson *v.* Waddelow, 8 Sim. 134.

(*i*) By Lord Eldon, in Chambers *v.* Brailsford, 19 Ves. 654. S. C. 2 Meriv. 25.

(*k*) Richardson *v.* Spraag, 1 P. Wms. 434. Eccard *v.* Brooke, 2 Cox, 213. Read *v.* Snell, 1 Atk. 643. Weddell *v.* Mundy, 6 Ves. 341. Horridge *v.* Ferguson, 1 Jac. 583. Thackeray *v.* Hampson, 2 Sim. & Stu. 214. Monkhouse *v.* Monkhouse, 3 Sim. 126. Miles *v.* Dyer, 5 Sim. 435. 8 Sim. 330. Grimshawe *v.* Pickup, 9 Sim. 591. White *v.* Supple, 2 Dr. & W. 471. Parkin *v.* Knight, 15 Sim. 83. The construction of "and" for "or" was not allowed in Longmore *v.* Broom, 7 Ves. 124. Newman *v.* Nightingale, 1 Cox, 341. Gittings *v.* McDermott, 2 M. & K. 69.

(*l*) Maberley *v.* Strode, 3 Ves. 450. Bell *v.* Phyn, 7 Ves. 459. Stubbs v. Sargon, 2 Keen. 255. 3 M. & Cr. 507. White *v.* Supple, 2 Dr. & W. 471. Hetherington *v.* Oakman, 2 Y. & Coll. C. C. 299. This construction was refused in Doe *v.* Cooke, 7 East, 269. Doe *v.* Rawding, 2 B. & A. 441. Girdlestone *v.* Doe, 2 Sim. 225.

(*m*) Smart *v.* Clark, 3 Russ. Chanc. Cas. 365. But see Bartleman *v.* Murchison, 2 Russ. & M. 136.

(*n*) Philipps *v.* Chamberlaine, 4 Ves. 57. Dent *v.* Pepys, Madd. & Geld. 351. As to the application of parol evidence to rectify mistakes in the description of legatees, see *post*, § II. (D.): in the description of legacies, *post*, § IV.

(*o*) Murray *v.* Jones, 2 V. & B. 318. See further, on this point, as to Wills of realty, Newburgh *v.* Newburgh, 5 Madd. 364. Powell *v.* Mouchett, Madd. & Geld. 216.

(*p*) See *ante*, p. 299, *et seq.*

Again, an express bequest cannot be controlled by the reason assigned: The assigned reason may aid in the construction of doubtful words, but cannot warrant the rejection of words that are clear (*q*). Nor can any express disposition be varied by inference or argument from other parts of the Will (*r*): Much less shall the obvious construction of a Will be controlled by the inconvenient or unmeritorious nature of the bequest (*s*): On the contrary, the Court is bound to correct every inaccuracy and impropriety of terms in advancement of the *manifest* intention of the testator, however undeserving it may be of favour in a Court of Justice (*t*). Where, indeed, the literal force of expressions differs in a Will, it is a true rule to seek for the intention of the testator rather in a consistent and rational purpose, than in a purpose inconsistent and irrational (*u*).

6. Where words are capable of a two-fold construction, the rule is, even in the case of a deed, and much more in the case of a Will, to adopt such as tends to make it good (*v*).

6. Where words are capable of a twofold construction.

7. The intention of the testator is not to be set aside because it cannot take effect to the full extent, but it is to work as far as it can (*w*).

7. Where intention cannot take effect in part.

8. It is a settled rule, that, in the construction of a Will of personalty made by a testator domiciled in a foreign country, the *lex domicilii* must prevail, unless there is sufficient on the face of the Will to show a different intention (*x*).

8. Construction of Wills made by testators domiciled in a foreign country.

(*q*) Cole *v.* Wade, 16 Ves. 46.

(*r*) Collett *v.* Lawrence, 1 Ves. Jun. 269. Jones *v.* Colbeck, 8 Ves. 42.

(*s*) Thelluson *v.* Woodford, 4 Ves. 329. Smith *v.* Streatfield, 1 Meriv. 358. Defflis *v.* Goldschmidt, 1 Meriv. 419.

(*t*) Thelluson *v.* Woodford, 4 Ves. 311, by Lawrence, J.

(*u*) Jenkins *v.* Herries, 4 Madd. 67.

(*v*) By Lord Talbot, in Atkinson *v.* Hutchinson, 3 P. Wms. 260. By Lawrence, J., in Thelluson *v.* Woodford, 4 Ves. 312.

(*w*) Thelluson *v.* Woodford, 4 Ves. 326, by Buller, J.

(*x*) Story's Conflict of Laws, ss. 479 *a*, 479 *m*, 490, 491.

Sect. II.

Modes of Description of a Legatee.

The object of this section is to consider what persons are entitled to legacies under particular modes of description.

In general, no rule is better settled, than that legatees must answer the description and character given of them in the Will: but it will appear from the cases adduced in the course of the present section, that there are many important exceptions to it.

(A.) *Who are entitled under the description of* 1. "*Children:*" 2. "*Grandchildren:*" 3. "*Wife:*" 4. "*Nephews and Nieces:*" 5. "*Cousins.*"

1. "Children" in a class:

1. "Children." Generally speaking, every person who, *at the time of the testator's death*, falls within the described class of "children," will be entitled: But where it appears from express declaration, or clear inference, upon the Will, that the testator intended to confine his bequests to those only who answered the description *at the date of the instrument*, such intention must be carried into effect (*y*). A Court of Equity, however, is always anxious to include all children in existence at the time of the death of the testator (*z*): and particularly, when he stands in the relation of parent to the legatees, the Court, presuming that he intended to do his duty in providing for all his children at his death, will lay hold of any general expression to give effect to his presumed intention, and will not permit such general expression to be narrowed by the context (*a*).

when confined to those existing at the date of the Will:

The leading principle is, that where a bequest is immediate

(*y*) Sherer *v.* Bishop, 4 Bro. C. C. 55. See also Crossly *v.* Clare, Ambl. 397. Viner *v.* Francis, 2 Cox, 191, 192.

(*z*) Ringrose *v.* Bramham, 2 Cox, 384.

(*a*) Matchwick *v.* Cock, 3 Ves. 609. Freemantle *v.* Taylor, 15 Ves. 363.

to "children" in a class, children in existence at the death of the testator, and these alone, are entitled (*b*); (amongst which children *in ventre sa mere* are to be considered) (*c*): And it will make no difference that the bequest is to children "begotten or *to be* begotten" (*d*).

when confined to those existing at the death of the testator.

It must, however, be observed, that children born after the testator's death, may be entitled under a bequest to "children" in a class, in cases where the division of the fund among the legatees is deferred until a particular period which takes place after his decease. Thus where legacies are given to "the children" of A., when a child or children attain a particular age (*e*), or to be divided amongst them at the death of B. (*f*), any child who falls under the description *at the time when the fund is to be divided*, is entitled to a share, although not born till after the testator's death; and although born of a subsequent marriage (*g*). But no child born after the period of distribution has any claim (*h*): even where the legacy is given to children "born or *to be* born" (*i*). Cases, however,

(*b*) Roberts *v.* Higman, 1 Bro. C. C. 532, *in notis.* Viner *v.* Francis, 2 Bro. C. C. 658. S. C. 2 Cox, 190. Crone *v.* Odell, 1 Ball & Beat. 459. Davidson *v.* Dallas, 14 Ves. 576. Scott *v.* Harwood, 5 Madd. 332. De Witte *v.* De Witte, 11 Sim. 41.

(*c*) Doe *v.* Clarke, 2 H. Bl. 399. Rawlins *v.* Rawlins, 2 Cox, 425. Trower *v.* Butts, 1 Sim. & Stu. 181.

(*d*) Sprackling *v.* Ranier, 1 Dick. 344. Storrs *v.* Benbow, 2 M. & K. 46. Butler *v.* Lowe, 10 Sim. 317.

(*e*) Gilmore *v.* Severn, 1 Bro. C. C. 582, (recognised per M. R. in Ringrose *v.* Bramham, 2 Cox, 385.) Hoste *v.* Pratt, 3 Ves. 730. Hughes *v.* Hughes, 14 Ves. 256. S. C. 3 Bro. C. C. 352, 434. Curtis *v.* Curtis, 6 Madd. 14. Balm *v.* Balm, 3 Sim. 492. Titcomb *v.* Butler, 3 Sim. 417. Blease *v.* Burgh, 2 Beav. 221. Gardner *v.* James, 6 Beav. 170. Clarke *v.* Clarke, 8 Sim. 59.

(*f*) Ellison *v.* Airey, 1 Ves. Sen. 111. Atty. Gen. *v.* Crispin, 1 Bro. C. C. 386. Congreve *v.* Congreve, 1 Bro. C. C. 530. Devisme *v.* Mello, 1 Bro. C. C. 537. Crone *v.* Odell, 1 Ball & Beat. 459, 483. Morse *v.* Morse, 2 Sim. 485.

(*g*) Barrington *v.* Tristram, 6 Ves. 345. Critchett *v.* Taynton, 1 Russ. & M. 541.

(*h*) Andrews *v.* Partington, 3 Bro. C. C. 402. Prescott *v.* Long, 2 Ves. Jun. 690. Hoste *v.* Pratt, 3 Ves. 730. Godfrey *v.* Davis, 6 Ves. 43.

(*i*) Whitbread *v.* St. John, 10 Ves. 152. Gilbert *v.* Boorman, 11 Ves. 238. See further as to the admission or exclusion of afterborn children, Graves *v.* Boyle, 1 Atk 509. Haughton *v.* Harrison, 2

may occur, where the whole context of the Will displays a manifest intention of the testator to provide for *all* the children an individual may have, although their shares are appointed to be paid at a particular period: and then, although a difficulty may exist in making an appropriation to answer legacies given to an uncertain number of persons, *viz.* all the children an individual may ever have, yet the intention not to exclude any of them must be complied with (*j*).

It should be further observed, that in the case of an immediate gift to children, if there is no object *in esse* at the death of the testator, the gift will embrace *all* the children who may subsequently come into existence, by way of executory gift (*k*).

In *Harris* v. *Lloyd* (*l*), the testator bequeathed a legacy in trust for all and every the child and children of his son E. H.; if more than one to be equally divided between them, share and share alike, the shares of sons to be vested at twenty-one and to be paid or transferred at twenty-five, and the shares of the daughters to be paid or transferred at twenty-one or marriage, with benefit of survivorship as to the shares of children dying under twenty-one, and a direction that until the shares of the children should become payable, the dividends and interest of the trust fund should be applied in their maintenance and education: E. H. had no children at the death of

Atk. 329. Middleton *v.* Messenger, 5 Ves. 136. Pulsford *v.* Hunter, 3 Bro. C. C. 416. Ayton *v.* Ayton, 1 Cox, 327. Paul *v.* Compton, 8 Ves. 375. Walker *v.* Shore, 15 Ves. 122. Tebbs *v.* Carpenter, 1 Madd. 290. Clarke *v.* Clarke, 8 Sim. 59. Scott *v.* Lord Scarborough, 1 Beav. 154. Brandon *v.* Aston, 2 Y. & Coll. 30. 1 Roper, Leg. 51, 3rd edit., by Mr. White: to which excellent Treatise the writer is largely indebted, with respect to the whole subject of Legacies.

(*j*) Defflis *v.* Goldschmidt, 1 Meriv. 417. S. C. 19 Ves. 566. Hutcheson *v.* Jones, 2 Madd. 124. Evans *v.* Harris, 5 Beav. 45.

(*k*) 2 Jarman on Wills, 84, 85. So in the case of a gift preceded by an anterior interest, if there be no object at the time of the vesting in possession, all the children subsequently born will, it should seem, be let in, unless the terms of the gift restrict it to a narrower class of objects. *Ibid.* 96.

(*l*) 1 Turn. & Russ. 310.

the testator: But Lord Eldon, C., held that afterborn children would take: and that the interest, till the birth of a child, fell into the residue.

It may be material in this place to observe, that upon an ordinary limitation *by way of remainder* to children, &c. in a class, all who are *in esse* at the time of the death of the testator take vested, and, consequently, transmissible interests immediately upon the testator's death; and all who come *in esse* before the particular estates end, and the limitation takes effect in possession, are to be let in, and take a vested interest as soon as they come *in esse*, and they and their representatives will take as if they had been *in esse* at the testator's death (*m*).

Bequest to A. and his children.

Rule in *Wild's case*.

It is a doctrine, with respect to Wills of real estate, according to what is usually called "The rule in *Wild's case*" (*n*), that where lands are devised to a man *and his children*, he having none at the time of the devise, the word "children" must be taken as a word of limitation, and he shall take an estate tail; but if he has any children living at the time of the devise, the word "children" must be taken as a word of purchase (which it naturally is) and they will take a joint estate with him.

But it is by no means settled, whether this rule is or is not applicable to Wills of personal estate (*o*), as to which it is established, that an absolute interest will pass by terms which, if employed with respect to real property, would create an estate tail (*p*). The rule appears to have been applied, so as to give the parent an absolute interest, where there have been no children at the date of the Will or the death of the tes-

(*m*) Hatch *v.* Mills, 1 Eden, 342. Baldwin *v.* Karver, Cowp. 309. Atty. Gen. *v.* Crispin, 1 Bro. C. C. 386. Devisme *v.* Mello, 1 Bro. C. C. 537. Lincoln *v.* Pelham, 10 Ves. 166. Walker *v.* Shore, 10 Ves. 122. Roe *v.* Perryn, 3 T. R. 484. Doe *v.* Dorvell, 5 T. R. 518. Taylor *v.* Langford, 3 Ves. 119. Meredith *v.* Meredith, 10 East, 503. Halifax *v.* Wilson, 18 Ves. 168. Walker *v.* Main, 1 Jac. & Walk. 1. Right *v.* Creber, 5 B. & C. 866. Doe *v.* Prigg, 8 B. & C. 231, 235, 236.

(*n*) 6 Co. 16 *b*, 17 *b*.

(*o*) See Stokes *v.* Heron, 12 Cl. & Fin. 161. 2 Dr. & W. 89, 107.

(*p*) See *post*, p. 948, 949.

tator (*q*); though it seems sometimes to have been laid down, that, in such a case, the parent shall take only a life interest, with remainder to his children, if any should be subsequently born (*r*). And where there have been children living at the date of the Will, they have been held to take the whole interest jointly with their parents, and with any other children born before the testator's death (*s*); though in this case also, slight circumstances in the context appear to have been thought sufficient to justify the Court in holding that the parent shall take for life, with remainder to his children (*t*); (which would include all children, both those born before and those born after the testator's death) (*u*).

"Younger children."

when a younger child considered eldest and excluded.

It is established, ordinarily speaking, that where provisions are made for younger children to the exclusion of an eldest son, and a younger son becomes an eldest before the time of vesting, or, according to the language used in some of the authorities, before the time of distribution, such younger son is to be excluded (*v*). In a modern case (*w*) Sir T. Plumer, M. R., was of opinion, that even if the share, by the provisions of the Will, vested in the younger child at the age of twenty-one, and he attained that age, yet, never-

(*q*) Pyne *v.* Franklin, 5 Sim. 458. Read *v.* Willis, 1 Coll. 86. Scott *v.* Scott, 15 Sim. 47. Snowball *v.* Proctor, 2 Y. & Coll. Ch. C. 478.

(*r*) Paine *v.* Wagner, 12 Sim. 188, *per* Shadwell, V. C. 2 Dr. & W. 107, *per* Sugden, C. of Ireland. See also Bain *v.* Lescher, 11 Sim. 397. Robinson *v.* Hunt, 4 Beav. 450.

(*s*) De Witte v. De Witte, 11 Sim. 41. Pain *v.* Wagner, 12 Sim. 184. Beales *v.* Crisford, 13 Sim. 592. Crockett *v.* Crockett, 2 Phill. Ch. C. 555, *per* Lord Cottenham.

(*t*) Crawford *v.* Trotter, 4 Madd. 361. Jeffery *v* Honeywood, *Ibid.* 399. Morse *v.* Morse, 2 Sim. 485. Vaughan *v.* Lord Headfort, 10 Sim. 639. French *v.* French, 11 Sim. 257. Crockett *v.* Crockett, 2 Phill. Ch. C. 555, 556, *per* Lord Cottenham.

(*u*) Leake *v.* Robinson, 2 Meriv. 382. 11 Sim. 237. *Ante*, p. 937.

(*v*) Chadwick *v.* Doleman, 2 Vern. 528. Teynham *v.* Webb, 2 Ves. Sen. 198, 210. Hall *v.* Hewer, Ambl. 203. Loder *v.* Loder, 2 Ves. Sen. 526. Broadmead *v.* Wood, 1 Bro. C. C. 77. Lincoln *v.* Pelham, 10 Ves. 166. Bowles *v.* Bowles, 10 Ves. 177. Mathews *v.* Paul, 3 Swanst. 334. S. C. 2 Wils. C. C. 64. Savage *v.* Carroll, 1 Ball & Beat. 265.

(*w*) Mathews *v.* Paul, 3 Swanst. 340. See Livesey *v.* Livesey, 13 Sim. 33, 43.

'theless the vesting would be *sub modo* only, subject to be devested, and under the condition of not becoming an eldest son (*x*). In a subsequent case (*y*) it was holden by Lord Gifford, M. R., that a son who, when he attained twenty-one, was a younger child, but by the subsequent death of his elder brother, in the lifetime of his parents, had become an eldest son before the time fixed for the payment of the younger children's portions, was entitled to his share of portions, which were directed to vest in younger sons at twenty-one, though not payable till after the death of his parents, upon the ground that there was enough in the instrument by which the portions were provided to show that the character of the younger child was to be ascertained by reference to the time when the portions vested, and not to the time when they became payable (*z*).

In a Court of Equity, every child but the heir is considered as a younger child: and therefore an *eldest* daughter destitute of a provision, has been considered a younger child, to answer the general intention, though not falling literally within the description (*a*). So where the only issue of the marriage was a daughter, it was held that she was entitled to a portion provided for younger children, as otherwise she would have been left destitute, the real estate descending in another channel (*b*). But in *Heneage* v. *Hunloke* (*c*), Lord Hardwicke, although he acted upon the doctrine of the preceding cases as applied to equitable property, seemed to consider, that where the limitation is legal, it must receive the same construction in Equity as in a Court of Law: and at law, he

when an eldest considered a younger child, and included.

(*x*) See, however, with respect to the devesting of vested shares, Driver *v.* Frank, 3 M. & S. 25. (S. C. in error, 8 Taunt. 468. 6 Price, 41.) Graham *v.* Londonderry, cited 2 Ves. Sen. 199.

(*y*) Windham *v.* Graham, 1 Russ. Chanc. Cas. 331.

(*z*) See further on the question who is entitled to take as "first son" and "second son," Lomax *v.* Holmden, 1 Ves. Sen. 290, 294. Hawkins *v.* Hawkins, 9 Bingh. 765. King *v.* Bennett, 4 Mees. & W. 36. Adams *v.* Bush, 6 Bingh. N. C. 164. Langston *v.* Langston, 8 Bligh, N. S. 167.

(*a*) Beale *v.* Beale, 1 P. Wms. 244. Hall *v.* Luckup, 4 Sim. 5.

(*b*) Butler *v.* Duncomb, 1 P. Wms. 449.

(*c*) 2 Atk. 456.

doubted whether an eldest child would be permitted to recover under a limitation to a younger (*d*).

Upon the same principle which entitles an eldest daughter, an eldest son will be enabled to claim a portion as a younger child, when the family estate is given from him, or he is otherwise unprovided for (*e*).

But it was holden, in a case before Lord Hardwicke, that this latitude of construction is only allowable when the testator stands in the relation of parent, or *in loco parentis*, to the children (*f*).

In *Spencer* v. *Spencer* (*g*), by a marriage settlement, estates were limited in strict settlement, subject to a term for raising 15,000*l.* for the portions of all the children of the marriage, (except an eldest or only son), and to be vested and paid at such times as the husband should appoint, and in default of appointment, to vest at twenty-one, but not to be paid till after the husband's death; provided that if any son should become an eldest or only son before the time appointed for payment of his portion, then, and in default of any such appointment, his share should go to the other children: There was issue of the marriage two sons and three daughters: The eldest son attained twenty-one, and, together with his father, suffered a recovery of the estates to the use of the father for life, remainder to himself in fee: After all the younger children had attained twenty-one, the eldest son died intestate and without issue, whereupon the reversion in fee of the estates descended to the other son: Afterwards the father appointed the 15,000*l.* amongst that son and the three daughters, and directed that the shares should vest immediately, but should not be paid till after his death: The second son died before the father: Sir L. Shadwell, V. C.,

(*d*) See Pierson *v.* Garnet, 2 Bro. C. C. 38, 47. West *v.* The Lord Primate of Ireland, 3 Bro. C. C. 148.

(*e*) Emery *v.* England, 3 Ves. 232. Duke *v.* Doidge, 2 Ves. Sen. 203, in a note to Teynham *v.* Webb, 1 Roper, Leg. 57, 3rd edit.

(*f*) Hall *v.* Hewer, Ambl. 203. However, it is said in 2 Sugden on Powers, p. 293, 6th edit., that this distinction does not appear to be attended to at the present day.

(*g*) 8 Sim. 87.

held, that the share of the 15,000*l.* appointed to him, did not go over to his sisters, but belonged to his estate; the learned Judge being of opinion, that what the parties meant, was, that a child, who should take the estate by virtue of the limitations of the settlement, should not have a portion, but that all the other children should have portions. However, in *Peacocke* v. *Pares* (*h*), an estate was limited to A. for life, with remainder to his first and other sons in tail; and a term was created, for raising portions for younger children, to be interests vested in sons at twenty-one, but payable after the death of A.; and it was provided, that in case any of the younger sons should become an eldest or only son, his portion should accrue to the other children: A. had two sons, B. and C., and one daughter: B. attained twenty-one, and suffered a recovery, whereby he destroyed C.'s estate in remainder: B. died in 1807, leaving C., an infant, to whom he devised the estate for his life: A. died in 1833: And Lord Langdale, M. R., held, that C. was not entitled to participate in the portion: His Lordship thought that the event of the recovery being suffered, to bar the limitations of the settlement, could not reasonably be considered to have been in contemplation at the time when the settlement was made, so as to entitle the only son to the benefit of that which has been called the "prodigious latitude of construction," founded on the presumption that it was intended to provide for all the children of the marriage; and which presumption ought to be acted upon in all cases in which a loss of provision occurs by an event which can properly be supposed to have been in the contemplation of those by whom the settlement was made, and within their intention to provide for: But the learned Judge observed, that none of the cases go the length of deciding, that every disappointment of a child's provision, from whatever cause it may arise, is to be made good by construction upon that presumption.

Another instance, where a Court of Equity has considered

(*h*) 2 Keen, 689.

"posthumous child;" when child born in lifetime of father within this description.

a child within a description, which it does not in strictness answer, may be found in the case of a father bequeathing a portion to a child *in ventre sa mere:* for if a father gives a legacy to provide for such a child by the term of a "posthumous child," and he happen to survive its birth, it will still be considered a posthumous child within the meaning of the Will (*i*).

"Children:"

The word "children" does not, in its proper signification, extend further than the immediate descendants of the persons named; and consequently grandchildren, or issue generally, are not ordinarily included in that term (*j*).

grandchildren, &c. cannot take under this description.

Their inclusion, however, within the description of "children," has been permitted from necessity, when the Will would be inoperative, unless the sense of the word children were extended beyond its natural import: as where there is no child in existence at the date of the Will (*k*).

In *Lord Orford* v. *Churchill* (*l*), Sir William Grant said, he "never knew an instance where there were children, to answer the *proper* description, that grandchildren were permitted to share along with them" (*m*).

There are, however, some cases, which must be regarded as qualifying this doctrine: *viz.* those in which it has been held, that the testator, by using the words "children" and "issue" indiscriminately, has shewn his intention of using the former term in the sense of "issue," so as to entitle grandchildren to take under it (*n*).

(*i*) Jaggard *v.* Jaggard, Prec. Chanc. 177.

(*j*) Radcliffe *v.* Buckley, 10 Ves. 195. 4 Mylne & Cr. 60. Moor *v.* Raisbeck, 12 Sim. 123.

(*k*) *Ibid.* Lord Orford *v.* Churchill, 3 Ves. & Beam. 69. See also Crooke *v.* Brookeing, 2 Vern. 108. Gale *v.* Bennet, Ambl. 681.

(*l*) 3 Ves. & Bea. 59.

(*m*) See also, in support of this rule, the following cases: Crooke *v.* Brookeing, 2 Vern. 107. Reeves *v.* Brymer, 4 Ves. 692. Radcliffe *v.* Buckley, 10 Ves. 195.

(*n*) Wyth *v.* Blackman, 1 Ves. Sen. 196. S. C. *nomine* Wythe *v.* Thurlston, Ambl. 555, (and cited by Lord Alvanley, in Davenport *v.* Hanbury, 3 Ves. 259.) Gale *v.* Bennett, Ambl. 681. Royle *v.* Hamilton, 4 Ves. 437. Radcliffe *v.* Buckley, 10 Ves. 195. See also James *v.* Smith, 14 Sim. 214. But see Lord Orford *v.* Churchill, 3 Ves. & Beam. 59, for an instance, where

"Children:" when *natural* children are within this description.

Natural children, having acquired the reputation of being the children of a particular person, prior to the date of the Will, are capable of taking under the description of "children" (*o*).

But it appears to be an established rule, that wherever the general description of children in a Will will include legitimate children, it cannot also be extended to illegitimate children: in other words, where there are legitimate children to answer the description of "children," the rule of law is, that legitimate children only will take. Thus in *Bagley* v. *Mollard* (*p*), a testator devised a leasehold in trust for his "grandchild, Elizabeth, the only surviving child of his son William," and gave the residue of his property, after the death of his wife and daughter, to all the children of his sons James and William, and of his daughter Sarah, in equal shares: Elizabeth was illegitimate, and William had no other child: And it was held by Sir J. Leach, M. R., that Elizabeth did not take any share of the residue. So in *Fraser* v. *Pigott* (*q*), John Fraser bequeathed a sum of stock in certain events to his grandchildren, being children of his sons, William and John, whether born in wedlock or not: And, after certain specific bequests, he gave the residue of his personal estate to his sons William and John, as tenants in common; but if either of them should die in his (the testator's) lifetime, the moiety of such deceased son should go to his children; but if both of his sons should die in his lifetime, then he gave such residue to and among all their children as tenants in common: The testator's two sons died in his lifetime, one leaving legitimate and illegitimate children, the other illegitimate children only: And it was held by Lord Lyndhurst, C. B., that the legitimate children of the son having both descriptions of children, and the illegitimate children of the other son took

the word "issue" was held not to enlarge the words "children and grandchildren," so as to let in a great-grandchild.

(*o*) Wilkinson *v.* Adam, 1 Ves. & Beam. 422, 454.

(*p*) 1 Russ. & M. 581.

(*q*) 1 Younge, 354. Shadwell, V. C., dissented from this decision, in James *v.* Smith, 14 Sim. 210.

the residue, and that the illegitimate children of the first-mentioned son took no interest.

Two further rules were laid down by Lord Eldon, with respect to the proposition that natural children may take under the description of "children:" First, The Will itself must shew the testator's intention to include natural children in the term "children," either by express designation, or a necessary implication, collected from the instrument itself; (in the construction of which the term child, son, or issue, is to be considered *primâ facie* to mean *legitimate* child, son, or issue) (*r*): Secondly, The proof of the intention to include them in the description of "children," must be supplied by the Will only: extrinsic evidence (except to prove the fact of illegitimate children having, at the date of that instrument, acquired the reputation of being the children of the testator, or the person named in it), being inadmissible, and by no means to be received for the purpose of raising a construction by circumstances (*s*).

The principal cases in which, in conformity to the above rules, natural children have been held to be included in the description of "children" (*t*), and those in which the intention of the testator has been held *not* sufficiently manifested in their favour on the Will to admit them (*u*), will be found collected in the notes below.

In *Gill* v. *Shelley* (*v*), Sir John Leach, M. R., appears to

(*r*) Wilkinson *v.* Adam, 1 Ves. & Beam. 462.

(*s*) Wilkinson *v.* Adam, 1 Ves. & Beam. 422. Swaine *v.* Kennerley, 1 Ves. & Beam. 469.

(*t*) Wilkinson *v.* Adam, 1 Ves. & Beam. 422. S. C. confirmed in Dom. Proc. 12 Price, 470. Blundell *v.* Dunn, cited 1 Madd. 433. Beachcroft *v.* Beachcroft, 1 Madd. 430. Lord Woodhouselee *v.* Dalrymple, 2 Meriv. 419 See also Bayley *v.* Snelham, 1 Sim. & Stu. 78. Meredith *v.* Farr, 2 Y. & Coll. Ch. C. 525.

(*u*) Cartwright *v.* Vawdry, 5 Ves. 530. Osmond *v.* Tindall, 5 Ves. 534, *c.*, 2nd edit. Godfrey *v.* Davis, 6 Ves. 43. Swaine *v.* Kennerley, 1 Ves. & Beam. 469. Harris *v.* Lloyd, 1 Turn. & Russ. 310. Mortimer *v.* West, 3 Russ. Chanc. Cas. 370. Dover *v.* Alexander, 2 Hare, 275. Meredith *v.* Farr, 2 Y. & Coll. Ch. C. 525.

(*v*) 2 Russ. & M. 336.

have somewhat extended the rule with respect to the admission of extrinsic evidence on this subject. In that case the testatrix gave a share of her residuary estate to "the children," of the late Mary Gladman: At the time of making the Will there were living two children of Mary Gladman, *who was then dead:* One of them, Charlotte Shelley, was an illegitimate child: And his Honor held, that evidence was admissible to prove that she had acquired the reputation of being the child of Mary Gladman, *that the testatrix well knew that fact,* and that Mary Gladman left only those two children: The learned Judge was further of opinion, that this evidence, being admitted, demonstrated that the testatrix meant to include Charlotte Shelley under the expression of "the children of the late Mary Gladman."

"Natural child:" when unborn children can take under this description.

A natural child cannot take as the issue of a particular father, until it has acquired the reputation of being the child of that person, which cannot be before its birth (*w*). Hence, natural children, *unborn at the date of the Will,* and described as the children of the testator, or of another man, to be born of a particular woman, cannot take under that description (*x*).

So a legacy to a natural child *en ventre sa mere,* under the description of the child of the testator, or of another man, cannot be supported; because, since the identity of the father cannot be proved by reputation, it can only be ascertained by evidence, such as, being contrary to public decency, the law will not admit (*y*).

But if the bequest be to a natural child, of which a particular woman is enceinte, *without reference to any person as the father,* this difficulty does not exist, and the legacy will be supported (*z*). So where the testator expresses his *belief* that a natural child *en ventre sa mere* is his, and, proceeding

(*w*) Co. Lit. 3, *b.*

(*x*) Metham *v.* Duke of Devon, 1 P. Wms. 529. See Arnold *v.* Preston, 18 Ves. 288. Lomas *v.* Wright, 2 M. & K. 769.

(*y*) Earle *v.* Wilson, 17 Ves. 528, 532. And see 1 Ves. & B. 446. Wilkinson *v.* Wilkinson, 1 Y. & Coll. Ch. C. 657.

(*z*) Gordon *v.* Gordon, 1 Meriv. 141. Evans *v.* Massey, 8 Price, 22. Dawson *v.* Dawson, 6 Madd.

on such belief, provides for it, the bequest will be sustained; for in such case, as the testator chooses to *assume* the fact, and to act upon the foundation of his *belief*, there is no uncertainty in the object; since, whether it was or was not the child of the testator, he meant to provide for it, as the child of the mother described (*a*).

2. "Grandchildren:"

2. "Grandchildren:" Lord Northington seems to have been of opinion, in the case of *Hussey* v. *Berkley* (*b*), that the word "grandchildren" would, without further explanation, comprehend *great* grandchildren. But in the case of *Lord Orford* v. *Churchill* (*c*), is an authority to the contrary: And it seems but reasonable, that if the word "children" does not include grandchildren (as we have seen) the term "grandchildren" should not comprise children next to them in descent (*d*). The several distinctions which have been mentioned in regard to the enlargement of the word "children," seem applicable to a bequest to grandchildren: so that if it appear from the Will, that the word "grandchildren" was not used in its proper sense, but for the purpose of embracing all the descendants of the persons described, it will have this effect.

when *great* grandchildren included in this description.

A grandchild *by marriage* is not entitled under the description of "grandchildren" (*e*).

3. "Wife."

3. "Wife:" A bequest by a husband to his "beloved wife," not mentioning her by name, applies exclusively to the individual who answers the description at the date of the Will, and is not to be extended to an after taken wife (*f*).

The question whether a woman can take as a legatee by

292. And see the observation of Sir Wm. Grant, in Earle *v.* Wilson, 17 Ves. 532.

(*a*) Gordon *v.* Gordon, 1 Meriv. 141.

(*b*) 2 Eden, 196, S. C. Ambl. 603, *nomine* Hussey *v.* Dillon.

(*c*) 3 Ves. & Beam. 59.

(*d*) 1 Rop. Leg. 69, 3rd edit. See Acc., the judgment of Lord Cottenham, in Sanderson *v.* Bayley, 4 Mylne & Cr. 60: and Waring *v.* Lee, 8 Beav. 247.

(*e*) Hussey *v.* Berkley, *ubi supra.*

(*f*) Garratt *v.* Niblock, 1 Russ. & M. 629.

the name of the "wife" of such a one, when in truth she is not his lawful wife, will be considered hereafter (*g*).

4. "Nephews and Nieces:" The principles already stated with respect to the restriction and enlargement of the terms "children" and "grandchildren," apply to the words "nephews and nieces." Therefore *great* nephews and *great* nieces are not ordinarily to be considered as comprehended in that description (*h*): Nor will the expression "grand-nephews and nieces" include the children of grand-nephews and nieces (*i*). But in this case also, the more enlarged sense will be attributed to the expression, when the context indicates the intention of the testator so to use it (*j*).

4. "Nephews and nieces."

5. "Cousins:" It should seem, that the word "cousins," if used *simpliciter*, would include cousins of every description. But the Court is frequently obliged to put a restricted sense on the general expression. Thus in *Caldecott* v. *Harrison* (*k*), a testator, in his Will, gave several legacies, and mentioned several persons as his cousins, and every person there called a cousin, was, in fact, a first cousin: By a codicil, he gave his residuary estate to all such of his cousins both on his father's and mother's side, as should be living at his decease, and to all the children of such of his said cousins as might have theretofore died or might die in his lifetime: The testator left several first cousins and children of first and second cousins, and one first cousin once removed: And Sir L. Shadwell, V. C., held, that none of them were included in the residuary bequest, except the first cousins living at the testator's death, and the children of first cousins who died in his lifetime; his Honor being of opinion that, from the context, it appeared that by the word "cousins" the testator meant his first cousins, simply and strictly, without any qualification.

5. "Cousins."

Lord Kenyon, M. R. determined, in the case of *Mayott* v.

(*g*) *Post*, p. 991.

(*h*) Falkner v. Butler, Ambl. 514. Shelley v. Bryer, 1 Jacob. 207. 4 Mylne & Cr. 60.

(*i*) Waring v. Lee, 8 Beav. 247.

(*j*) James v. Smith, 14 Sim. 214.

(*k*) 9 Sim. 457.

Mayott (*l*), that under a bequest to all the testator's first and second cousins of the name of Mayott, first cousins of that name once removed, living at the testator's death, were entitled with a first cousin of the same name: And in two late cases, first cousins twice removed have been held entitled under bequests to first and second cousins, as being within the degree of second cousin (*m*).

But it was held by Lord Cottenham, in *Sanderson* v. *Bayley* (*n*), (reversing a decision of Sir L. Shadwell, V. C.), that a bequest to the testator's "first cousins or cousins german" does not include first cousins once removed.

In *Slade* v. *Fooks* (*o*), a testatrix bequeathed her residue to her second cousins of the name of Slade, and the issue of such of them as were dead: She had no second cousins, but she had three first cousins once removed, of that name, two of whom were living at her death, and had children, but the third was then dead, leaving children: And Sir L. Shadwell, V. C. held that the two surviving first cousins once removed, and the children of the one who was dead, were entitled to the residue, to the exclusion of the children of the former, although they were in the same degree of relationship to the testatrix as her second cousins would have been, had she had any.

(B.) *Who are entitled under the description of* 1. "*Heirs:*" 2. "*Issue:*" 3. "*Descendants:*" 4. "*Relations:*" 5. "*Next of Kin:*" 6. "*Family:*" 7. "*Executors and Administrators,*" or "*Legal Representatives,*" or "*Personal Representatives.*"

Terms which applied to realty give an estate tail, give the absolute interest if applied to personalty.

It may be observed, in the first place, that it is an established rule of construction, with respect to Wills of personalty, that where personal estate is given, in terms which, if applied to real estate, would create an estate tail, the property so bequeathed vests absolutely in the first taker, and, consequently,

(*l*) 2 Bro. C. C. 125.

(*m*) Silcox *v.* Bell, 1 Sim. & Stu. 301. Charge *v.* Goodyer, 3 Russ. Chanc. Cas. 140.

(*n*) 4 Mylne & Cr. 56.

(*o*) 9 Sim. 386.

devolves at his death on his executors and administrators, whether he has issue or not (*p*). Hence, generally speaking, where realty and personalty are included in one gift, if the legatee takes an estate tail in the former, he takes the latter absolutely (*q*).

1. "Heirs:"

legacy to A. and the heirs of his body:

to A. for life, and then to the heirs of his body:

Hence a legacy "to A. and to the heirs of his body," or "to A., to be secured to him and the heirs of his body," is an absolute bequest to A. (*r*); though a legacy "to A. and his heirs (say children)," is only a legacy to A. for life, remainder to his children (*s*). Again, there has already (*t*) been occasion to shew, that if a term of years be devised to one for life, and afterwards to the heirs of his body, the whole term will, generally speaking, vest absolutely in him (*u*). Again, a devise of freeholds and leaseholds to A. for life, and

(*p*) Lyon *v.* Mitchell, 1 Madd. 475. Ward *v.* Bevil, 1 Younge & Jerv. 525. Byng *v.* Lord Strafford, 5 Beav. 558. *Ante*, p. 566, 567. Accordingly, it was fully established, as a general rule, that if personalty be bequeathed to A., with a subsequent bequest over to B., in the event of the "failure of A.'s issue," or "the defect of his issue," or his "dying without issue," this amounts to a limitation *quasi* in tail to A., and gives him an absolute interest in the property (unless the context shews that the testator used the words importing a failure of issue in the restricted sense of issue *living at his death*): But if the limitation over is on the event of A.'s dying "without *leaving* issue," this means, as applied to *personal* estate, issue *living at his death*, and the gift over to B. is good: All the authorities on this subject are reviewed by Lord Brougham in his judgment in Campbell *v.* Harding, 2 Russ. & M. 390. S. C. in Dom. Proc. *nomine* Candy *v.* Campbell, 8 Bligh. 469. See also Mytton *v.* Boodle, 6 Sim. 457. Malcolm *v.* Taylor, 2 Russ. & M. 416. Dunk *v.* Fenner, *ibid.* 557. Lepine *v.* Ferard, 2 Russ. & M. 378. Radford *v.* Radford, 1 Keen, 486. Doe *v.* Ewart, 7 A. & E. 636. Atty. Gen. *v.* Bright, 2 Keen, 57. Garratt *v.* Cockerell, 1 Y. & Coll. C. C. 494. Leeming *v.* Sherratt, 2 Hare, 14. Daniel *v.* Warren, 2 Y. & Coll. C. C. 290. Turner *v.* Frampton, 2 Coll. 331.—But see now stat. 1 Vict. c. 26 (*Statute of Wills*), s. 29. *Ante*, Preface. *In re* O'Bierne, 1 Jones & Lat. 352. Harris *v.* Davis, 1 Coll. 416.

(*q*) Donn *v.* Penny, 19 Ves. 544. Dunk *v.* Fenner, 2 Russ. & M. 557. Simmons *v.* Simmons, 8 Sim. 22: But see Forth *v.* Chapman, *ante*, p. 928. 7 A. & E. 650, *et seq.*

(*r*) Crawford *v.* Trotter, 4 Madd. 361. *Ante*, p. 564, 565. Harris *v.* Davis, 1 Coll. 416.

(*s*) 4 Madd. 361. *Ante*, p. 938.

(*t*) *Ante*, p. 566.

(*u*) Theebridge *v.* Kilburne, 2 Ves. Sen. 233. Garth *v.* Baldwyn, 2 Ves. Sen. 646. Lord Verulam *v.* Bathurst, 13 Sim. 374.

after his decease to the heirs of his body, ***their heirs, executors, administrators, and assigns,*** gives A. an estate tail in the former, and an absolute interest in the latter (*v*).

It must be observed, that several cases occur in the books, where words creating an estate tail, according to the established rules of law, have been held to be narrowed by inconsistent limitations in other parts of the Will: Thus children have been held entitled, as purchasers, under the description of "heirs of the body," where the directions of the Will are inconsistent with construing the word in its usual acceptation as a word of limitation: as a legacy to A. for life, and then "to the heirs male of his body, *as tenants in common*" (*w*). But these cases, it is submitted, must be considered as much shaken, if not entirely overruled, by the decision of the House of Lords in *Jesson* v. *Wright* (*x*).

legacy to "the heirs of A.:" or "to my heirs:"

With respect to a legacy to "the heirs of A.:" When the word "heirs" is used to denote succession or substitution, it may be understood, as it is in the case of a legacy to A. and his heirs, to mean such person or persons as would legally succeed to the property according to its nature and quality: Thus, in *Vaux* v. *Henderson* (*y*), a legacy of personal property to A., "and failing him by decease before me, to his heirs," was decreed to belong to the next of kin of A. living at the time of the testator's death, A. having died before that event (*z*).

But where the word is used, not to denote succession or substitution, but to describe a legatee, and there is no context to explain it otherwise, it should seem that there is no reason to depart from the natural and ordinary sense of the word heir: Thus, in *Mounsey* v. *Blamire* (*a*), the testatrix devised, *inter alia*, a real estate to a person not her heir-at-law; and by a codicil she gave a pecuniary legacy "to my heir:" At her death three persons were co-heirs-at-law: And Sir J.

(*v*) Kinch *v*. Ward, 2 Sim. & Stu. 409. See also Dunk *v*. Fenner, 2 Russ. & M. 557.

(*w*) Jacobs *v*. Amyatt, 4 Bro. C. C. 542. But see North *v*. Martin, 6 Sim. 266.

(*x*) 2 Bligh. 1. See *ante*, p. 927. Dunk *v*. Fenner, 2 Russ. & M. 557.

(*y*) 1 Jac. & Walk. 388, note (*c*).

(*z*) See also Holloway *v*. Holloway, 5 Ves. 403. Gittings *v*. McDermott, 2 M. & K. 69. Price *v*. Lockley, 6 Beav. 180. Evans *v*. Salt, 6 Beav. 266.

(*a*) 4 Russ. Chanc. Cas. 384.

Leach, M. R., held that they, and not her next of kin, were entitled to the legacy. *A fortiori*, the heir, properly and technically speaking, may take personal property bequeathed to him by that description, where the intention of the testator in his favour appears upon the construction of the whole Will (*b*).

legacy to "my heirs *or* next of

In a case where the testator bequeathed, by an unattested Will, the residue of his estate of every kind to "my next of kin *or* heir-at-law, whom I appoint my executor," it was holden that the bequest was void, and that the property, which was entirely personal, must be distributed according to the Statute of Distributions (*c*). So in a late case, a testator, who had long resided in India, gave a legacy to "A. B., who resided at P. when I left England, *or to his heirs, executors, administrators or assigns*, for ever;" A. B. died in the testator's lifetime; and Sir L. Shadwell, V. C., held, that the bequest was void for uncertainty (*d*).

2. "Issue:"

legacy to "A. and his issue:"

A bequest to "A. and his issue," as it will clearly pass an estate tail in real property, so it will give to A. the absolute interest in a personal legacy (*e*). So a legacy to all the children of A. and their issue, share and share alike, and to be paid twelve months after the testator's decease, is an absolute gift to such children of A. as are living at the testator's death (*f*).

to several persons, and the issue of their respective bodies:

So a bequest to several persons share and share alike, as tenants in common, and to the issue of their respective bodies, but in case of the death of any or either of them without issue, then the share of him or them

(*b*) Gwynne *v.* Muddock, 14 Ves. 488.

(*c*) Lowndes *v.* Stone, 4 Ves. 649.

(*d*) Waite *v.* Templer, 2 Sim. 524, recognised by Lord Brougham, 2 M. & K. 78. See also Thomason *v.* Moses, 5 Beav. 77. Yearwood *v.* Yearwood, 9 Beav. 276. In Loveday *v.* Hopkins, Ambl. 273, a legacy "to my sister Loveday's heirs," was construed by Sir T. Clarke, M. R., to mean *children*, on the ground of there being a legacy immediately subsequent "to my sister Brady's children:" but see the cases mentioned, *supra*, p. 928, *et seq.*

(*e*) Donn *v.* Penny, 19 Ves. 547. Crawford *v.* Trotter, 4 Madd. 361. Martin *v.* Swannell, 2 Beav. 249. 2 Jarman on Wills, 493. See *ante*, p. 849, note (*p*).

(*f*) Butter *v.* Ommaney, 4 Russ. Chanc. Cas. 70.

so dying should go to the survivors or survivor equally, share and share alike, and to the issue of their respective bodies, gives the legatees an absolute interest with benefit of survivorship in case any of them died without issue at their death (*g*). Where a testator bequeathed all his personal property, not before disposed of by his Will, unto his trustees, in trust for his five sons, "and their respective issue, (if any,) such issue to take *per stirpes* and not *per capita*, to be divided amongst them in equal shares and proportions, the shares of such of them as shall have attained the age of twenty-one to be paid them respectively forthwith after my decease, and the shares of such of them as shall be under the age of twenty-one years to be paid to them when and as they shall respectively attain such age," it was held by the House of Lords that this bequest was an absolute gift to each of the testator's sons living at the time of his decease, of the fifth part of the property thus bequeathed; and the Lord Chancellor (Brougham) said, it was clear that the issue of any one of the sons would, at the death of the testator, take *by substitution*, if the son himself should at that time be dead (*h*). And it has been held, (as in the instance of a legacy to A. and the heirs of his body (*i*),) that the construction of a legacy to "A. and his issue," as an absolute gift to A., is not to be varied by superadded words *primâ facie* denoting distribution: as, for example, where the gift is to A. and his issue, male and female, to be divided equally between them (*j*). Again, it appears to be now established, that a legacy to A. for life, and after his death to his issue, gives him the absolute interest (*k*). It is true that in *Knight* v. *Ellis* (*l*), Lord Thurlow held that such bequest gave the legatee an estate for life only, and that the issue would take

to them and their respective issue, to take *per stirpes*:

to A. and his issue *as tenants common*

to A. for life, and after his death, to his issue:

(*g*) Lyon *v.* Mitchell, 1 Madd. 467.

(*h*) Pearson *v.* Stephen, 2 Dow. & Cl. 328. S. C. 5 Bligh. N. C. 203. See also Accord. Gibbs *v.* Tait, 8 Sim. 132. Turner *v.* Capel, 9 Sim. 158. Dick *v.* Lacy, 8 Beav. 214, *post*, p. 954.

(*i*) *Ante*, p. 927, 950.

(*j*) Tate *v.* Clarke, 1 Beav. 100.

(*k*) Atty. Gen. *v.* Bright, 2 Keen. 57.

(*l*) 2 Bro. C. C. 570.

as purchasers. However, in *Lyon* v. *Mitchell* (*m*), Sir T. Plumer seems to doubt the authority of this decision of Lord Thurlow: And it appears to have been overruled by Lord Langdale in *The Attorney General* v. *Bright* (*n*).——But it may be considered doubtful whether a legacy to A. for life, and after his death to his issue *as tenants in common*, (or to be enjoyed in some other course inconsistent with the devolution of an estate tail,) is a gift to him of the absolute interest, or only a gift to him for life, with remainder to his issue as purchasers (*o*). A legacy to A. and his issue *living at his decease*, amounts, it seems, to a gift of a life interest to A., with a contingent remainder to the issue living at his death as purchasers (*p*).

to A. for life, and after his death to his issue, *as tenants in common*:

to A. and his issue, *living at his death*:

When the description "issue" is employed in a Will as a word of purchase, it will, in its ordinary import, comprise all those who can claim as descendants from or through the person to whose issue the bequest is made, *i. e.*, grandchildren and great-grandchildren, as well as children: and in order to restrain this usual sense of the word, a clear intention must appear upon the Will (*q*).

when all descendants are entitled under the description of "issue" employed as a word of purchase:

(*m*) 1 Madd. 486.

(*n*) 2 Keen, 57. 2 Jarman on Wills, 496. See also Jordan *v.* Lowe, 6 Beav. 350.

(*o*) See 2 Jarman on Wills, 497. See also Evans *v.* Jones, 2 Coll. 516. Where there was a devise of *realty* to A. for life, and from and after his decease "unto all and every the issue of the body of the said A., share and share alike, as tenants in common, and *the heirs of such issue*;" it was held that A. took an estate for life only. Greenwood *v.* Rothwell, 5 Mann. & Gr. 628. 6 Beav. 492. But where A. devised *real estate* to all his children as tenants in common, during their respective lives, and afterwards to their issue, as tenants in common, it was held that A.'s children were devisees of an estate tail, as tenants in common, and that his grandchildren took nothing. Harrison *v.* Harrison, 7 M. & Gr. 938.

(*p*) See 2 Jarman on Wills, 330, note (*k*). See further on the subject of treating the word "issue" as a word of purchase, and not of limitation, Clay *v.* Pennington, 7 Sim. 370. Cursham *v.* Newland, 2 Bing. N. C. 58. S. C. 4 M. & W. 101. 2 Beav. 145. Ryan *v.* Cowley, Lloyd & Gould, 7. Slater *v.* Dangerfield, 15 M. & W. 263.

(*q*) Davenport *v.* Hanbury, 3 Ves. 257. Leigh *v.* Norbery, 13 Ves. 340. Bernard *v.* Mountague, 1 Meriv. 434. Dalzell *v.* Welch, 2 Sim. 319. Head *v.* Randall, 2 Y. & Coll. C. C. 231. Evans *v.* Jones, 2 Coll. 516.

when children only.

But, to use the words of Lord Eldon in *Sibley* v. *Perry* (*r*), if, upon fair reasoning, *deduced from the words of the Will*, all the contents, and design, and tenor of it, as manifested by it's contents, shew the word "issue" to be meant in a more restrained sense, that sense may be given to it; and his Lordship proceeded to decide that, in the Will before the Court, from it's being coupled with the word "parent," the correlative term "issue" must be taken in the sense of "children" (*s*).

3. "Descendants:"

3. "Descendants." Under this description is comprised every individual proceeding from the stock or family referred to by the testator (*t*). Thus, when the testator gave 4000*l*. to "the *descendants* of Francis Ince," it was held by Sir Thomas Clark, M. R., that great-grandchildren were entitled with grandchildren to shares of the fund, since they answered the description of descendants of Francis Ince; and that the distribution must be *per capita* (*u*). So where the testatrix directed her personal property to be divided equally between the *descendants* of Thomas Fairbank; and at her death there were three sons and eleven grandchildren of Thomas Fairbank, it was held by Lord Thurlow, that as well the grandchildren as children were entitled to the fund, and *per capita* (*v*).

Descendants *per stirpes.*

In *Dick* v. *Lacy* (*w*), there was a gift in a Will to Lady M. for life, with remainder to her nieces, the daughters of B., "and their descendants *per stirpes*, to hold to them, their heirs and assigns for ever:" The nieces had children at the

(*r*) 7 Ves. 531.

(*s*) See also Horsepool *v*. Watson, 3 Ves. 383. Hampson *v*. Brandwood, 1 Madd. 388. Orford *v*. Churchill, 3 V. & B. 67. Swift *v*. Swift, 8 Sim. 168. Peel *v*. Catlow, 9 Sim. 372. Ryan *v*. Cowley, Lloyd & Gould, 7. Carter *v*. Bentall, 2 Beav. 551. Ridgeway *v*. Munkethick, 1 Dr. & W. 84. Pruen *v*. Osborne, 11 Sim. 132. Goldie *v*. Greaves, 14 Sim. 348. Buckle *v*. Fawcett, 4 Hare, 536. Farrant *v*. Nichols, 9 Beav. 327.

(*t*) See the observations of Lord Eldon, in Wright *v*. Atkyns, 1 Turn. & Russ. 162.

(*u*) Crossly *v*. Clare, Ambl. 397. S. C. 3 Swanst. 320, note to Brandon *v*. Brandon.

(*v*) Butler *v*. Stratton, 3 Bro. C. C. 367.

(*w*) 8 Beav. 214.

death of the testator and of Lady M.: And it was held by Lord Langdale, M. R., that the nieces took absolute interests and in joint-tenancy: His Lordship was of opinion, that the word "descendants" was, in this instance, a word of purchase and not of limitation, but that they would only take by way of substitution (*x*): If one of the nieces had died leaving issue in the lifetime of Lady M., then there would have been persons exactly to answer the description, that is to say, nieces and the descendants of a niece, which descendants would take *per stirpes*.

"Eldest male lineal descendants."

It was held by Lord Eldon in *Oddie* v. *Woodford* (*y*), (and his decision was confirmed by the House of Lords,) that the designation of "eldest male lineal descendant" was inapplicable to a male person claiming in part through a female. Again in *Bernal* v. *Bernal* (*z*), it was decided by Lord Cottenham, in the construction of a Dutch Will, that "male children" meant "male descendants," and that male descendants meant, according to the English Law, (and, as it should seem, according to the Dutch Law also,) descendants claiming through males only.

"Male descendants."

"Relations by lineal descent:"

Where a testator gave all the residue of his real and personal estate unto and equally between and amongst all his relations who might claim and prove their relationship to him *by lineal descent*; and he had no wife or issue at the time of making his Will nor afterwards; and he died leaving several first cousins, his next of kin; it was held that they were entitled to the residuary estate both real and personal; for that the word "lineal descent" did not necessarily mean lineal descent *from the testator* (*a*).

Whether a gift to "A. *or* his issue," or to "A. *or* his children," or to "A. *or* his descendants," is concurrent or substitutional.

When a bequest is made to "A. *or* his children," or to "A. *or* his issue," or "A. *or* his descendants," a question may arise, whether the children, or issue, or descendants, are to take concurrently with A., or merely in substitution for him,

(*x*) See *ante*, p. 952, and note (*h*).

(*y*) 3 Mylne & Cr. 584.

(*z*) 3 Mylne & Cr. 559.

(*a*) Craik *v*. Lamb, 1 Coll. 489.

in case of his death before the testator (*b*). In *Newman* v. *Nightingale* (*c*), the testator gave 500*l.* "to the sole use of N. *or* of her children for ever:" And Lord Thurlow held, that N. took only an interest for life in the 500*l.*, and that the children were to take it among them after her death (*d*). But in *Crooke* v. *De Vandes* (*e*), Lord Eldon held, that a bequest to two persons, *or* their children, gave the children an interest by way of substitution only, and not a concurrent interest. So in *Montagu* v. *Nucella* (*f*), a testator bequeathed a sum of stock to each of five nephews and nieces, *or* to their respective child or children; should any die, without child, such share to revert to the residuary legatee: And Lord Gifford, M. R., held, that the true construction was, to vest the legacies absolutely in the nephews and nieces who survived the testator, and that the child or children of nephews or nieces took only as substitutes for their parent or parents dying in the testator's lifetime (*g*). In *Longmore* v. *Broom* (*h*), there was a bequest to executors, in trust that they should pay, &c., unto and amongst the testator's two brothers and his sister, *or* their children, in such shares, &c., and at such times, &c., as the trustees, or the major part, or the survivor, his executors, &c., should think proper: And Sir William Grant held, that all the children living at the death of the testator were entitled with the parents, *per capita;* his Honor being of opinion that a discretion was given to the executors to give the fund to the parents, or to the children; but as the Court had not that discretion, the distribution must be equal. But in *Jones* v. *Torin* (*i*), the testator bequeathed a sum of 6000*l.* in trust for his daughter for life, "and on her

(*b*) See *post*, Pt. III. Bk. III. Ch. II. § V. as to preventing the lapse of legacies by words of substitution.

(*c*) 1 Cox, 341.

(*d*) See also Richardson *v.* Spraag, 1 P. Wms. 433. Eccard *v.* Brooke, 2 Cox, 213.

(*e*) 9 Ves. 197.

(*f*) 1 Russ. Chanc. Cas. 165.

(*g*) See Pearson *v.* Stephen, *ante*, p. 952, note (*h*). Gibbs *v.* Tait, 8 Sim. 132. Turner *v.* Capel, 9 Sim. 158. Price *v.* Lockley, 6 Beav. 180. Dick *v.* Lacy, 8 Beav. 214, *ante*, p. 954, 955. Salisbury *v.* Petty, 3 Hare, 86, and *post*, Pt. III. Bk. III. Ch. II. § V.

(*h*) 7 Ves. 124.

(*i*) 6 Sim. 255.

decease, I give the said 6000*l.* to the children *or* descendants of T. F. in such proportions to each as my daughter may direct:" The daughter died without having made any appointment: And Sir L. Shadwell, held, that the children of T. F. were entitled to the fund, to the exclusion of their issue; the descendants being mentioned merely as substitutes for the children. Again, in *Parkin* v. *Knight* (*j*), the same learned Judge held that in a bequest "to A. *or* his issue," the word "or" might be construed "and," so as to give A. an estate tail in realty and an absolute interest in personalty.

4. "Relations." When a legacy is given by a testator "to my relations" generally, without enumerating any of them the Court will direct the money to be paid to such of his relations as would have been entitled under the Statute of Distributions, if he had died intestate (*k*). So where the testator bequeathed 50*l.* to each of his "relations by blood or marriage," Lord Rosslyn held, that the word "relations" must be confined to relatives entitled under the Statute of Distributions, and to persons who had married relatives entitled under that Act (*l*).

4. "Relations."

The same rule applies where the bequest is to "*near* relations" (*m*). So where the bequest is to "*poor* relations" (*n*), or "my most *necessitous*" or "*poorest*" relations (*o*), no persons are entitled except such as are within the statute; unless the legacy be given to establish a *charity* for poor relations (*p*).

So where a power is given to a person to dispose of a

(*j*) 15 Sim. 83. See also Harris *v.* Davis, 1 Coll. 416.

(*k*) Roach *v.* Hammond, Prec. Chanc. 401. Thomas *v.* Hole, Cas. temp. Talb. 251. Withorn *v.* Harris, 2 Ves. Sen. 527. Green *v.* Howard, 1 Bro. C. C. 31. Rayner *v.* Mowbray, 3 Bro. C. C. 234. Brandon *v.* Brandon, 3 Swanst. 319. Wright *v.* Atkyns, 1 Turn. & Russ. 161.

(*l*) Devisme *v.* Mellish, 5 Ves. 529.

(*m*) Whithorn *v.* Harris, 2 Ves. Sen. 527.

(*n*) Brunsden *v.* Woolridge, 1 Dick. 380. S. C. Ambl. 507.

(*o*) Widmore *v.* Woodroffe, Ambl. 636.

(*p*) White *v.* White, 7 Ves. 423. Atty. Gen. *v.* Price, 17 Ves. 371. A relation who was poor at the death of the testator, and has become rich before the period of distribution, is not entitled: Mahon *v.* Savage, 1 Scho. & Lefr. 111.

fund "among my relations, in such manner as he shall think proper," the appointment cannot be in favour of any relative who is not within the statute (*q*). But though a party to whom a power is thus delegated to fix the amount of the share that *each* relation shall take without entrusting him with the choice of the objects, is confined within the limits of the statute; it is otherwise when a power is committed to an individual to distribute the fund among *such* of the "relations" of the testator as he shall, in his discretion, select: for, in such a case, the individual is not restrained in the exercise of such discretion to relations within the Statute of Distributions (*r*). Where, indeed, the Court is called on to distribute, in failure of the person so empowered, it will confine itself according to the degrees and proportions mentioned in the statute, as well in the latter case as in the former (*s*): but with this difference, as it should seem, that where the donee of the power had authority to select the objects, the fund shall be distributed amongst the testator's next of kin, *in existence at the death of the donee of the power* (*t*): but where the donee of the power was entrusted with a discretion merely in apportioning the shares, the property shall be divided among the next of kin *living at the testator's death* (*u*).

No person can regularly answer the description of "relations," but those who are akin to the testator by *blood:* and, consequently, relations by marriage are not included in a bequest to "relations" generally: A wife, therefore, cannot regularly claim under a bequest to her husband's relations, nor a husband as a relation to his wife (*v*).

(*q*) Pope *v.* Whitcombe, 3 Meriv. 689.

(*r*) Mahon *v.* Savage, 1 Scho. & Lefr. 111. Spring *v.* Biles, 1 Term Rep. 435, in note. Forbes *v.* Ball, 3 Meriv. 437. Grant *v.* Lynam, 4 Russ. Chanc. Cas. 292.

(*s*) Grant *v.* Lynam, 4 Russ. Chanc. Cas. 292. See Ray *v.* Adams, 3 M. & K. 237.

(*t*) Harding *v.* Glyn, 1 Atk. 469. S. C. cited 5 Ves. 501. Cruwys *v.* Colman, 9 Ves. 325; but see Cole *v.* Wade, 16 Ves. 27.

(*u*) Pope *v.* Whitcombe, 3 Meriv. 689.

(*v*) Davies *v.* Baily, 1 Ves. Sen. 84. Worsley *v.* Johnson, 3 Atk. 758. 1 Rop. Leg. 108, 3rd edit. Harvey *v.* Harvey, 5 Beav. 134. See Craik *v.* Lamb, 1 Coll. 489, 494.

"*nearest* relations."

Where the description employed is "nearest relations," the Statute of Distributions shall not ascertain the persons entitled; but whosoever is the *nearest* will be entitled, to the exclusion of more remote relations who could have claimed under the statute in case of intestacy: As where a testator directed his residuary property to be "equally distributed amongst his *nearest* surviving relations," and died, leaving a brother, and sisters, and nephews and nieces, the children of a deceased brother; Sir William Grant held, that the brothers and sisters, as *nearest* of kin to the testator, were exclusively entitled (*w*). If the bequest be in the singular number, "my nearest relation," and there be several persons nearest of kin, in the same degree, the fund must be divided between them; and the word "relation," like "heir," must be taken in such case as *nomen collectivum* (*x*).

"Relations" of a particular name.

When the bequest is to relations of a particular *name*, as "my nearest relations of the name of Pyot," the word "name" has been considered equivalent to the expression "stock;" so that where a female relation was one of the nearest of kin, and entitled to the described name by *birth*, her claim was sustained to a share of the legacy, although she had lost the name of Pyot by her marriage (*y*).

Where the bequest was "to the first and nearest of my kindred, being *male, and of my name and blood*," it was held, that a person who was first and nearest of blood to the testator, and a male, but not originally of the testator's name, though he assumed it by the king's license, could not succeed in his claim (*z*).

5. "Next of kin:"

5. "Next of kin." A man's "kindred," in the proper signification of the word, means, such persons as are related to him *by blood*: and, accordingly, relations by *marriage*

(*w*) Smith *v.* Campbell, 19 Ves. 400. S. C. Coop. Chan. Ca. 275.

(*x*) Marsh *v.* Marsh, 1 Bro. C. C. 294. Pyot *v.* Pyot, 1 Ves. Sen. 337. 1 Rop. Leg. 104, 3d edit.

(*y*) Pyot *v.* Pyot, 1 Ves. Sen. 336. Carpenter *v.* Bott, June, 1847, *coram* Shadwell, V. C. Accord.

(*z*) Leigh *v.* Leigh, 15 Ves. 92. See also Barlow *v.* Bateman, 2 Bro. C. C. 272, Toml. edit.

are generally incapable of bringing themselves within the description of "next of kin" in a Will: and (as in the case just mentioned, of "relations") neither husband nor wife can be entitled under a bequest to the "next of kin" of either of them (*a*). But it was observed by Lord Eldon in *Garrick* v. *Lord Camden* (*b*), that it was competent to, and required from, the Court, to look through the whole Will, and to see whether, from the whole, an intention was manifested to include the wife among those who were to be taken more strictly as next of kin; a description *primâ facie* excluding her (*c*).

who are "kin:"

Persons related to the testator by the half-bood, are equally of "kin" to him with those of the whole-blood, and equally entitled with respect to the description of "nearest of kin" in a Will, to every preference over the more remote kindred of the testator (*d*).

to what kin the description "next of kin" extends.

It remains to consider to what kindred the description "next of kin" extends. Mr. Justice Buller, in *Phillips* v. *Garth* (*e*), decided, that under a bequest of a residue to the testator's executors "to be equally divided amongst his *next of kin*, share and share alike," all his next of kin were entitled who could have claimed under the statute in case of an intestacy. But this decision has been overruled (*f*), and it is now established, that if the words are "next of kin," and there is nothing to shew that the testator had reference

(*a*) Nichols v. Savage, cited in Bailey v. Wright, 18 Ves. 52. Garrick v. Lord Camden, 14 Ves. 372. Nor can a widow, as such, take under a limitation to the next of kin of her husband, *according to the Statute of Distributions*. Cholmondeley v. Lord Ashburton, 6 Beav. 86. *Secus*, under a bequest to such *persons* as would have been entitled under the Statute in case of intestacy. Jenkins v. Gower, 2 Coll. 537.

(*b*) 14 Ves. 382.

(*c*) See also M'Leroth v. Bacon, 5 Ves. 159, for an instance where a relation *by marriage* may be included in the word "family."

(*d*) Collingwood v. Pace, 1 Vent. 424. Brown v. Wood, Alleyn, 36. *Ante*, p. 348.

(*e*) 3 Bro. C. C. 64.

(*f*) Elmsley v. Young, 2 M. & K. 780, (in which the Lords Commissioners Shadwell and Bosanquet, overruled the decree of Sir John Leach, M.R, *ibid.* 82, and his decision in Hinckley v. Maclarens, 1 M. & K. 27.) Withy v. Mangles, 10 Cl. & F. 215.

to the Statute of Distributions, or to a division as in case of intestacy, the *nearest* of kin only are entitled (*g*). Hence, a surviving brother of the intestate will be entitled, in exclusion of the children of a deceased brother or sister (*h*). *A fortiori*, the nearest of kin will be alone entitled under a bequest to "next of kin in equal degree" (*i*).

Accordingly, where by the marriage settlement of Emily M., the ultimate limitation of a sum of 10,000*l*., which her father thereby covenanted to pay, was to "*such person or* "*persons as at the time of her death should be her next of* "*kin;*" and she died leaving her husband and a child of the marriage, and her own father and mother, surviving, it was held by the House of Lords in *Withy* v. *Mangles* (*j*), that her father mother and child were entitled, under the limitation, to the 10,000*l*., in joint tenancy: for that the words "next of kin," used *simpliciter*, must be construed in their natural meaning of nearest in proximity of blood; and, by the law of England, the child and the parent are equal in degree of proximity, *i. e.*, both are in the first degree, though the child (and the lineal descendants of the child), is preferred in the succession to property (*k*), and consequent grant of administration (*l*).

Again, in *Cooper* v. *Denison* (*m*), a testator bequeathed the residue of his effects to his wife for life, remainder to his daughter absolutely; but if his wife survived his daughter, then, at his wife's death, one-third of the capital was to go according to her Will, and the other two-thirds were to be paid "*to my other the next of kin of my paternal line:*" He died, possessed of personal estate only, leaving his wife and daughter, and three brothers, surviving: The daughter died, leaving children, before her mother: On the death of the mother, the question ultimately was, who were to take the two-thirds, as being at the death of the widow the testator's

(*g*) 19 Ves. 404.

(*h*) See Brandon *v*. Brandon, 3 Swanst. 312. S. C. 2 Wils. Chanc. Cas. 14. Elmsley *v*. Young, 2 M. & K. 780.

(*i*) Wimbles *v*. Pitcher, 12 Ves. 433. Anon. 1 Madd. 36.

(*j*) 10 Cl. & F. 215, affirming the decree of Lord Langdale, 4 Beav. 358.

(*k*) See *post*, Pt. III. Bk. IV. Ch. I. § III.

(*l*) *Ante*, p. 350.

(*m*) 13 Sim. 290.

"next of kin of his paternal line." It was contended for the grandchildren, that as being the sole next of kin, *ex parte paternâ, according to the Statute of Distributions*, they were exclusively entitled to the fund: On the part of the brothers, it was argued, that the computation of degrees of kindred in this case ought to be made in conformity with the Canon Law, according to which the brothers of the testator were nearer of blood than his grandchildren, and were, therefore, exclusively entitled as his next of kin: But Shadwell, V. C., decided against the exclusive claim on either side, being of opinion, that, as the question related to personal estate, the mode of computation ought to be in conformity to the civil law, according to which the grandchildren and brothers were in equal degree of kindred: And his Honor further held, that the brothers, as well as the grandchildren, were entitled; for that the Court must not look at the Statute of Distributions, but must inquire who were the next of kin, irrespective of that statute.

bequest to "next of kin" after a previous bequest for life.

Where there is a gift of a fund to a tenant for life, with a bequest over to the next of kin of the testator, and the tenant for life happens to be one of the next of kin; a question arises whether the next of kin, who are to take, are the next of kin of the testator, *living at his death*, or his next of kin, *living at the death of the tenant for life.* The rule is, that if there is nothing in the context of the Will, or the circumstances of the case, to control the natural meaning of the testator's words, his next of kin *living at his death* will be entitled; and, that if the tenant for life happens to be one of such next of kin, or to be solely such next of kin, he is not, on that account, to be excluded (*n*). But where the context demonstrates that the person or persons to take

(*n*) Holloway *v.* Holloway, 5 Ves. 399. Doe *v.* Lawson, 3 East, 278. Pearce *v.* Vincent, 1 Cr. & M. 598. 2 Bing. N. C. 328. 2 Keen, 230. Stert *v.* Platel, 5 Bing. N. C. 434. Elmsley *v.* Young, 2 M. & K. 780. Jennings *v.* Newman, 10 Sim. 219. Smith *v.* Smith, 12 Sim. 317. Urquhart *v.* Urquhart, 13 Sim. 613. Withy *v.* Mangles, 4 Beav. 358. 10 Cl. & F. 215. Nicholson *v.* Wilson, 14 Sim. 549. Jenkins *v.* Gower, 2 Coll. 537. Wilkinson *v.* Garrett, *ibid.* 643. Allen *v.* Thorp, 7 Beav. 72, 75. Lasbury *v.* Newport, 9 Beav. 376. Seifferth *v.* Badham, 9 Beav. 370. Say *v.* Creed, 5 Hare, 580, 587.

under the description of next of kin, is a person or persons to be ascertained at a future period, the expression must be necessarily understood as meaning the testator's next of kin, *living at the death of the tenant for life*, and the tenant for life will consequently be excluded. Thus, in *Briden* v. *Hewlett* (p), a testator gave his personal estate to trustees, upon trust to convert into money, and invest the same, and to pay the interest to his mother for her life; and after the decease of his mother, he gave all his estate and effects to such person or persons as she should by her Will direct and appoint; and in case his said mother should die without a Will, then to such person or persons as would be entitled to the same by virtue of the Statute of Distributions: The mother survived the testator, and died intestate: And Sir J. Leach, M. R., held, that the testator's next of kin at the death of the mother were entitled to the bequest. The ground of this decision appears to have been, that the term "*would* be entitled," used by the testator, being future, it was evident that it could not be intended that the mother should take under that description. Again, in *Butler* v. *Bushnell* (q), a testator bequeathed part of the residue of his property to trustees, in trust for his daughters during their lives, and after their respective deceases, for their children, and in case there should be no children of his daughters respectively, in trust for such person or persons as should happen to be his next of kin, according to the Statute of Distributions: And the same learned Judge held, that upon the death of a daughter, who survived the testator, without issue, her share went to the persons who were the testator's next of kin at her death; his Honor being of opinion, that the words "such persons as shall happen to be my next of kin," indicated an intention to confine the gift to such persons as should answer the description of his next of kin at the death of the tenant for life (r).—A similar construction must be adopted whenever the context, or the circumstances of the

(p) 2 M. & K. 90.

(q) 3 M. & K. 232.

(r) See Accord. Clapton v. Bulmer, 10 Sim. 426. 5 M. & Cr. 108. See also Booth v. Vicars, 1 Coll. 6.

case, indicate the testator's intention to exclude the tenant for life from the description of next of kin (*s*).

Direction that a fund shall be disposed of "in a due course of administration."

In *Scott* v. *Moore* (*t*), a fund was bequeathed to Elizabeth B. for life, and after her death for her children; and if she died without leaving a child, the testator directed that the fund should *be considered as part of his personal estate, and should be disposed of in a due course of administration;* and he gave her the residue of his effects, she paying thereout his debts and funeral and testamentary expenses; and he made her executrix: On her death without children, it was contended, on behalf of the testator's widow and next of kin, that the words "a due course of administration" meant that the fund should be distributed under the statute: But Sir L. Shadwell, V. C., held otherwise, being of opinion that the fund belonged to the personal representative of Elizabeth B., as the residuary legatee.

6. "Family."

6. "Family." The description "family" in a bequest of personalty, in its ordinary sense comprises the same persons as "kindred" or "relations" (*u*); and, consequently, the next of kin will be entitled, according to the rules which there has been already occasion to adduce with respect to the two latter descriptions. But this acceptation of the term "family" may be narrowed or enlarged by the context of the Will, so as in some instances to mean children (*v*), or in others, heir (*w*),

(*s*) Bird *v*. Wood, 2 Sim. & Stu. 400 (as explained in 2 M. & K. 89. 13 Sim. 627). Clapton *v*. Bulmer, 10 Sim. 426. 5 M. & Cr. 108. Minter *v*. Wraith, 13 Sim. 52. Cooper *v*. Denison, 13 Sim. 290. Say *v*. Creed, 5 Hare, 580; in which last case the bequest over was to the testator's next of kin on the part of the mother, and the tenant for life was his sole next of kin, *ex parte paternâ* as well as *ex parte maternâ*. It has been doubted whether Jones *v*. Colbeck, 8 Ves. 38, which was decided on this principle, was properly within it: See 13 Sim. 627. But see also Miller *v*. Eaton, Coop. 727, and 5 Hare, 588, 593, 594.

(*t*) 14 Sim. 35.

(*u*) Cruwys *v*. Colman, 9 Ves. 323.

(*v*) Barnes *v*. Patch, 8 Ves. 604. Wood *v*. Wood, 3 Hare, 65. Beales *v*. Crisford, 13 Sim. 592. See also Lord Alvanley's observation in M'Leroth *v*. Bacon, 5 Ves. 166.

(*w*) Chapman's case, Dy. 333, *b*. Counden *v*. Clerke, Hob. 33. Wright *v*. Atkins, Coop. Chanc. Cas. 122. 1 Roper, 123, 3d edit. Griffiths *v*. Evan, 5 Beav. 241. White *v*. Briggs, 15 Sim. 17.

"to A. for her and her family."

or it may even include relations by marriage (*x*). So where a testator directed his business to be carried on by his wife and son for the mutual benefit of the family, it was held, that the testator, in the words "my family" intended to comprise his wife (*y*). So where (*z*) a testator devised certain estates by name, together with his farming stock and furniture, to his beloved wife, to sell, to discharge all his creditors; and he constituted his wife and another person his executors, whom he appointed to sell and dispose of his estates and chattels, in such manner as they should jointly agree upon; or not to sell them, if it seemed most advisable to keep them, or in any way they should think proper, so that every creditor had his money, and if sold, "all overflush to my wife, towards her support and her family;" Lord Cottenham held, that the word "family" could not be confined to the heir, but that the other children of the testator must be considered as also objects of his bounty: And that if the contemplated event of a sale took place, a trust, as between the widow and children, would be created: And that they had such an interest in the devised estates, as enabled them to sustain a bill against the widow and her co-executor, impeaching a sale on the ground of fraud, and praying an account of the rents and profits. And in a recent case (*a*) the same Judge held that where a testator directed that "all my property shall be at the disposal of my wife for her and her children," she was either a trustee of the fund with a large discretion as to the application of it, or she had a power in favour of her children, subject to a life interest in herself (*b*).

In *Robinson* v. *Waddelow* (*c*), where a testator gave all

(*x*) M'Leroth *v.* Bacon, 5 Ves. 159. See White *v.* Briggs, 2 Phill. Ch. C. 583, as to the construction of the word "family" when applied to real and personal estate.

(*y*) Blackwell *v.* Bull, 1 Keen, 176.

(*z*) Woods *v.* Woods, 1 Mylne & Cr. 401.

(*a*) Crockett *v.* Crockett, 2 Phill. Ch. C. 553, overruling 5 Hare, 326.

(*b*) See further Wetherell *v.* Wilson, 1 Keen, 80. Taylor *v.* Bacon, 8 Sim. 100. Cape *v.* Cape, 2 Younge & C. 543. Jubber *v.* Jubber, 9 Sim. 503. Hadow *v.* Hadow, 9 Sim. 438. Gilbert *v.* Bennett, 10 Sim. 371. Raikes *v.* Ward, 1 Hare, 445. Thorp *v.* Owen, 2 Hare, 607. Longmore *v.* Elcum, 2 Y. & Coll. Ch. C. 362. Wilson *v.* Maddison, *ibid.* 372. Leach *v.* Leach, 13 Sim. 304.

(*c*) 8 Sim. 134.

the residue of his effects to be divided equally between his daughters, and their husbands and families; Sir L. Shadwell, V. C., rejected the words "husbands and families," and held that the two daughters took the residue equally and absolutely (*d*).

"Younger branches of a family."

In *Doe* v. *Flemming* (*e*), there was a devise of lands to the testator's daughter for life, remainder to her sons and daughters successively in tail, remainder to the testator's son for life, and his sons and daughters in tail; and for default of such issue, to the "younger branches of the family" of Brown Willis, and their heirs, to be equally divided amongst them, as tenants in common; and in default of such issue, to the "elder branches of the family of Brown Willis," (in the same terms:) At the time of the making of the Will, and of the testator's death, there were living two daughters of Brown Willis, four daughters of one of those daughters, an only son of Brown Willis's eldest son, and an only son of his third son: At the expiration of the estate tail, limited to the testator's grandchildren, there were living many descendants of one of Brown Willis's daughters, and of his third son: And it was held by the Court of Exchequer that the devise to the branches of Brown Willis's family was void for uncertainty.

7. "Executors and administrators," or "legal representatives," or "personal representatives:"

7. "Executors and administrators," or "legal representatives," or "personal representatives." If there be a bequest of personalty to A., "his executors and administrators," the law and the testator's intention concur in transferring to A. the absolute interest in the legacy (*f*); and if A. dies before the testator, the legacy will lapse, and cannot be claimed by his executors or administrators (*g*). And so it is, if the bequest be to A. and his "legal personal representative" (*h*), or to A. and his "legal representatives," which, in its ordinary sense, is synonymous with executors or administrators: Accordingly, in *Price* v. *Strange* (*i*), there was a devise of land to trustees, upon trust to pay the rent to the testator's

cases where they are to be considered as mere words of limitation:

(*d*) See also Cooper *v.* Thornton, 3 Bro. C. C. 186. Robinson *v.* Tickell, 8 Ves. 142.

(*e*) 2 Cr. Mees. & R. 638.

(*f*) Anderson *v.* Dawson, 15 Ves. 537. 1 Rop. Leg. 120, 3d edit.

(*g*) See *infra*, p. 1038.

(*h*) Taylor *v.* Beverley, 1 Coll. 108, 116.

(*i*) 6 Madd. 159.

wife during her life, if she should so long continue his widow, and after her death or second marriage, to sell the same; and in case the death or second marriage of his wife should not happen until the youngest of his children, being a son, should have attained the age of twenty-three, or being a daughter, should have attained that age, or married with consent, then on trust to pay and divide the proceeds of the sale amongst such of his children as should then be living, and the "*legal representative or representatives of him, her, or them, as shall then be dead:*" And in case the death or second marriage of the wife should happen during the minority of any of his children, then he directed the trustees to pay a share of such money unto such children as should at that time be entitled to receive their, his, or her share of his personal estate under his Will, (*viz.*, the sons who had attained the age of twenty-three, and the daughters who had attained that age, or married with consent,) in case he, or she, or they should then be living, "*and if dead, then to his, her, or their legal representative or representatives,*" and to place out the share or shares of such children as should not, by reason of their age, be so entitled, at interest, upon good security, for their benefit, and to pay the same to them, if sons, on attaining the age of twenty-three, and if daughters, on attaining that age, or marrying with consent: And Sir John Leach, V. C., was of opinion, that a son, who had attained the age of twenty-three in the lifetime of the wife, took an absolute vested interest in his share; since the ordinary sense of "legal representatives," (not controlled, as the learned Judge thought, by any different intention appearing on the whole of the present Will) was, executors and administrators; and reading the words in the first passage, which applied to the case of children who had attained twenty-three, in that sense, made it equivalent to a direction to pay the produce of the estate at the death of the widow to the children, their executors and administrators; or, in other words, gave a vested interest to the children, on their attaining the

age of twenty-three, or being daughters, on their marriage with consent.

So the words "personal representatives" are to be understood in the ordinary sense of executors or administrators, unless controlled by the context of the Will. Accordingly, in *Saberton* v. *Skeels* (*h*), the testator gave each of his daughters the sum of 1000*l*., and directed that each sum should be settled as follows, *viz*., that it should be invested in the funds or on real security, in the names of his trustees and the daughter entitled to the same, the interest to be paid to her, and not be subject to the debts or control of her husband, and that it should, at her death, pass according to any Will or disposition under hand and seal she might make, and, for want thereof, should *go to her personal representatives;* and if she should at any time choose to sink the same, or any part thereof, in the purchase of an annuity for her own life, payable to her own separate use, the trustees, together with her, were authorized to invest the same accordingly in government or good real security: And Sir John Leach held, that the words, "personal representatives," not being controlled here by the context of the Will, were to be considered as words of limitation, and synonymous with executors and administrators; and that the daughter, therefore, took an absolute interest in the fund: Consequently, on her death, she having made no appointment of it, his Honor held, that the interest thus vested in her belonged to her husband, as her administrator, to the exclusion of her children.

bequest to A. as tenant for life, or as one of several tenants for life, remainder as he shall appoint, and in default of appointment, to his executors, &c.

Again, where there is a bequest to A. for life, remainder to such persons as he shall appoint by Will, and in default of appointment, to his executors or administrators, it is held that he may assign the fund absolutely (*i*). So where there were bequests to females, some of whom were married, and some single, for their separate use for their respective lives,

(*h*) 1 Russ. & M. 587.

(*i*) Kirkpatrick *v*. Capel, MS. Sugd. Pow. vol. i. p. 79, 6th edit. See Acc. Cherry *v*. Boultbee, 2

and after their decease to such persons as they should respectively appoint, and in default of appointment to their respective executors, administrators, and assigns, it was held, that each of the legatees, whether a married or unmarried woman, was entitled, on petition, without executing any formal appointment, to an immediate transfer or payment to herself of the *corpus* of her share of the fund (*j*). So where the ultimate limitation of a fund is to the executors or administrators of one of several preceding tenants for life, it is held that the gift to the executors or administrators constitutes part of the estate of the tenant for life (*k*). Therefore, where the ultimate trust in a marriage settlement of a fund belonging to the wife is to her executors or administrators, her surviving husband will be entitled, to the exclusion of her next of kin (*l*). So where a gift, under a Will, subject to a life estate to the testator's widow, and to a life estate to his daughter and her husband and the survivor, with power of appointment to the daughter which was not executed, was in trust to pay the fund, " to and for the benefit of her executors or administrators;" and the daughter died first, and then the husband, and then the testator's widow; it was held, that the daughter's husband, on her death, became entitled to the reversionary interest in the fund as part of her estate (*m*). —— Again, if there be a limitation of a fund to

limitation to the executors of A. after the death of B.

Keen, 319. So a bequest to a wife for life, with remainder to her children, with remainder as she shall appoint, and in default thereof to her executors, administrators, and assigns, gives her an absolute interest, subject to the prior limitations and the power. Grafftey *v.* Humpage, 1 Beav. 52, per Lord Langdale. But where the trust was, to pay the income of a fund to a wife for her separate use for life, and that, after her death, the principal should remain on such trusts as she should appoint by will, and in default of appointment, in trust *for her next of kin according to the Statutes of Distribution*, it was held, that she was entitled merely to the income for life, and not to the principal absolutely. Hansen *v.* Miller, 14 Sim. 22.

(*j*) Holloway *v.* Clarkson, 2 Hare, 521.

(*k*) Daniel *v.* Dudley, 1 Phill. 1. Atty. Gen. *v.* Malkin, 2 Phill. Ch. C. 64, *post*, p. 973. See also Howell *v.* Gayler, 5 Beav. 157.

(*l*) Allen *v.* Thorp, 7 Beav. 72.

(*m*) Atty. Gen. *v.* Malkin, 2 Phil. Ch. C. 64. See also Howell *v.* Gayler, 5 Beav. 157.

the executors of A., after the death of B. and C., it does not fail by the death of B. and C. in the lifetime of A. (*n*): And the executors of A., at his death, are entitled to the fund as part of his residuary personal estate (*o*).

"legal representative" or "executors and administrators" controlled by context, so as to mean "next of kin."

But the ordinary sense of the words "legal representative" may be controlled by a different intention appearing upon the whole instrument. Thus in *Baines* v. *Ottey* (*p*), where a testatrix gave real and personal estate to trustees, in trust for Mary Knightly for life, with remainder as she should appoint; and in default of appointment, in trust to convey the real estate to such person or persons as would be the heir-at-law of Mary Knightly, and to transfer and assign the personal estate to or amongst such person or persons as would be the personal representative of Mary Knightly; and Mary Knightly appointed only a part of the personal estate; Sir J. Leach, M. R., held, that the next of kin, and not the executors, were entitled to the unappointed part of the personal estate: And his Honor observed, that the words "*to or amongst* such person or persons as would be the personal representatives of Mary Knightly," were not applicable to executors or administrators. So in *Robinson* v. *Smith* (*q*), where a testator bequeathed 700*l.* to his daughter's husband, his executors, &c. in trust to pay the interest to his daughter, for her separate use, for life, and after her death, to such persons as she should appoint by Will, and in default of appointment, to her "personal representatives;" and the daughter died without having made any appointment; Sir L. Shadwell, V. C., held, that her next of kin were entitled to the 700*l.* to the exclusion of her husband; because it was plain that the husband was made legatee of the fund, merely as trustee, to *pay* it over, if his wife died in his lifetime, and not to retain it. So in *Walter* v. *Makin* (*r*), a testator gave 450*l.* to trustees, their executors, &c. in trust

(*n*) Horseman *v.* Abbey, 1 Jac. & W. 381.

(*o*) Morris *v.* Howes, 4 Hare, 599, *post*, p. 972, 973. See also Howell *v.* Gayler, 5 Beav. 157.

(*p*) 1 M. & K. 465.

(*q*) 6 Sim. 47.

(*r*) 6 Sim. 148.

for his son for life, and after his son's decease, to pay thereout two legacies of 100*l.* each to two of his daughters, and to pay the residue to the "legal representatives" of his son; and he gave the residue of his personal estate to his son, his executors, &c.: And Sir L. Shadwell, held, that the words "legal representatives" meant next of kin; for it was clear on the face of the Will, that the testator meant to use those words in a different sense from "executors and administrators," which latter words occurred several times in the Will, and especially, in the gift of the residue to the son; and moreover the effect of putting that construction on the words would be to make the son partial residuary legatee, so far as 450*l.* was concerned, and also general residuary legatee of the personal estate (*s*). And in *Styth* v. *Monro* (*t*), where a bequest was made to the "representatives" of a person already deceased, it was held by Sir L. Shadwell, V. C., that this expression ought to be construed "descendants," the context of the Will requiring it.

The ordinary sense even of the express words "executors and administrators" has been held to be controllable by the plain intent collected from the whole instrument: Thus in *Bulmer* v. *Jay* (*u*), there was a trust in a marriage settlement to raise a sum of money out of the settled estate of the husband, at the end of twelve months from the decease of the survivor of the husband and wife, and to pay the same to the "executors or administrators" of the wife: The wife died in the husband's lifetime: And it was held by Sir L. Shadwell, V. C., and afterwards by Lord Brougham on appeal, that the next of kin of the wife were entitled to the money. Again, in *Smith* v. *Dudley* (*v*), in a marriage settlement, the ultimate trust of the wife's chattels was for the executors or administrators of the wife *of her own family*, and the ultimate trust of the husband's chattels, was for his executors or administrators *of his own family*: And Sir L. Shadwell, V. C., held,

(*s*) See also Cotton *v.* Cotton, 2 Beav. 67. *Post*, p. 975. Nicholson *v.* Wilson, 14 Sim. 549.

(*t*) 6 Sim. 49.

(*u*) 4 Sim. 48. 3 M. & K. 197.

(*v*) 9 Sim. 125.

that, though the same words were used, *mutatis mutandis*, in both limitations, yet the Court was justified in holding that, with respect to the wife's chattels, they meant her next of kin at her death, and, with respect to the husband's chattels, his executors or administrators simply. But in *Daniel* v. *Dudley* (*w*), where by a marriage settlement a sum of money, the property of the wife, was vested in trustees for the separate use of the wife during her life, and after her decease in trust for the husband during his life, and after the death of the survivor, upon certain trusts for the children, and in default of children, who, being sons, should attain twenty-one, or, being daughters, should attain twenty-one or marry, in trust for such person or persons as the wife should, notwithstanding her coverture, by deed or Will appoint, and in default of appointment, in trust to pay and transfer the same to the executors or administrators of the wife; Lord Cottenham expressed a strong opinion (contrary to the decision of Sir L. Shadwell in the same case (*x*)) that under the ultimate limitation to the executors or administrators of the wife the fund did not belong to the next of kin of the wife, in exclusion of the husband, but passed to the administrator of the wife as part of her general personal estate. "Legal or personal "representatives," said his Lordship, "may mean next of kin, "but executors or administrators cannot. Therefore, none of "the cases in which next of kin have been held to take, *ex vi* "*termini*, by the description of legal or personal represen- "tatives, have any application to the present. The limitation "in this case being to the executors or administrators, it seems "to me that it cannot signify whether these words are con- "strued as words of limitation or words of purchase; because, "on either supposition, the persons answering that description "take in their representative character, and then the fund is "to be applied and administered in the same manner as any "other assets that come to them in that character. That is "the doctrine of all the cases that have been cited, except

(*w*) 1 Phill. 1.

(*x*) 11 Sim. 163.

"that of *Bulmer* v. *Jay*, which stands alone." This opinion of Lord Cottenham was recognised by Lord Langdale as a governing authority in *Allen* v. *Thorp* (*y*). In the subsequent case of the *Attorney General* v. *Malkin* (*z*), Lord Cottenham said, that cases *might* exist, where the next of kin would be entitled under a gift to executors and administrators, upon evidence of an intention derived from peculiar terms and provisions of the instrument controlling the ordinary and legal sense of the words used; but that such evidence ought to be very strong to justify such a construction (*a*).

bequest to the testator's "executors," &c., or to his "representatives:"

A question somewhat different from that involved in the cases just mentioned arises, on occasions where the testator bequeaths a fund to his own executors or administrators, or to his own "representatives." —— If the ultimate limitation of a fund be to the testator's own executors or administrators, it will pass to them, not for their own benefit necessarily, but for the purposes, whatever they may be, for which they hold the general personal estate of the testator. And the same construction seems *primâ facie* to be applicable, if the limitation be to the testator's "representative or representatives," or "legal representative;" as it unquestionably is if the limitation be to his own "personal representative," or "legal personal representative" (*b*). But the context of a Will containing these words may be such as to render it necessary or proper to read them as importing consanguinity, or as referring to a distribution, though there is no intestacy, such as would have taken place had there been an intestacy (*c*).

(*y*) 7 Beav. 72. *Ante*, p. 969, See also Morris *v*. Howes, 4 Hare, 605, *per* Wigram, V. C., and Atty. Gen. *v*. Malkin, 2 Phill. 64. *Ante*, p. 969.

(*z*) 2 Phill. Ch. C. 64, 68. *Ante*, p. 969.

(*a*) In Grafftey *v*. Humpage, 1 Beav. 52, Lord Langdale said, that though cases had occurred in which, to support the plain intent, the words "personal representatives," or "executors and administrators," had been construed to mean next of kin, yet the words "executors, administrators, *and assigns*," did not appear to him to admit of this interpretation.

(*b*) Smith *v*. Barneby, 2 Coll. 728, 736; affirmed by Lord Chancellor, July, 1847.

(*c*) See Minter *v*. Wraith, 13 Sim. 52.

In *Jennings* v. *Gallimore* (*d*), the sum of 1000*l.* was settled in trust to be paid according to the appointment of Ambrose Gallimore, and in default thereof to his legal representatives, according to the course of administration: By his Will, reciting the settlement, and his power of appointment, he appointed the money to be paid to his "legal representatives according to the course of administration:" And he gave the residue of his property, real and personal, to his nephew, *whom he appointed his residuary legatee and one of his two executors:* The question as to this 1000*l.* was between the assignees of the nephew, a bankrupt, and the other next of kin, a sister and nieces: And Lord Alvanley held that the next of kin were entitled to share with the assignees of the nephew: His Lordship observed, that if it had rested on the settlement itself, he should have had great doubt of being able to get over the words "legal representatives;" but that he could not read the Will without implying an intention to consider it otherwise: That the testator never would have made such a Will, if he had thought that all the words he used came to nothing more than executing the power by giving the fund to his nephew: If he meant to give it to him, to whom he had given all the rest, why did he not say so? Again in *Long* v. *Blackall* (*e*), the testator bequeathed leasehold property held for a term of years to his widow, during her widowhood, remainder to his two living sons, and a child *in ventre*, if it proved a son, in succession, for life, remainder to their successive issue male; and if all his sons died without leaving issue male, remainder to such persons as should then be the "legal representatives" of him the testator; and he appointed his wife executrix: The sons all died without issue: And Lord Loughborough held, that the next of kin at the time of distribution were entitled to the property. The words in this case, as Lord Alvanley observed on another occasion (*f*), put it out of the power of the Court to put any other interpretation on the Will; for the word

(*d*) 3 Ves. 146.

(*e*) 3 Ves. 486.

(*f*) Holloway *v.* Holloway, 5 Ves. 401, 402.

"then" plainly proved that the personal representatives at the time of the death were not intended; and even if that word had not occurred, there was a great deal to shew that such could not be the intention; for the wife was made executrix, and it would have been a strange circuitous way of giving it to her.

Whether the expression "legal representatives," when it does not mean executors, means "nearest of kin," or next of kin according to the Statute of Distributions.

It was observed by Sir John Leach, M. R., in *Price* v. *Strange* (*g*), that he did not collect that Lord Alvanley, in *Bridge* v. *Abbott* (*h*), adverted to the case of a widow, and would have included her in his sense of legal representatives: Nor did the circumstances of the case of *Palin* v. *Hill* (*i*) require any decision with respect to this point. In *Horsepool* v. *Watson* (*j*), a testatrix devised lands to James Horsepool and Mary his wife for their lives, and the life of the survivor; and after the decease of the survivor, to trustees, to sell and apply the proceeds "unto and amongst all and every the issue child or children male or female of the body of the said James Horsepool by the said Mary his wife, and *their representatives* equally, share and share alike:" One of the children of James and Mary Horsepool survived the testatrix and Mary Horsepool, but died in the lifetime of James Horsepool, having married and left children, and her husband, who became her administrator: The question was, whether the children were entitled to her share, as her "representatives," or whether their father could claim, as her administrator: And Lord Loughborough decided in favour of the children; his Lordship being of opinion, that the use of the word "issue" qualified the word "representatives," and explained what the testatrix meant, by the general word; children and their representatives being issue (*k*). In *Cotton* v. *Cotton* (*l*) there was a bequest to A. or his legal representatives: A. was dead at the date of the testator's Will, having bequeathed his property on particular trusts: Several points

(*g*) 6 Madd. 162. *Ante*, p. 901.
(*h*) 3 Bro. C.C. 224, *post*, p. 979.
(*i*) 1 M. & K. 470, *post*, p. 983.
(*j*) 3 Ves. 383.
(*k*) See also Styth *v.* Monro, *ante*, p. 971.
(*l*) 2 Beav. 67.

were argued; first, whether the fund was subject to the trusts of A.'s Will; secondly, whether his executors took beneficially as his "legal representatives;" and thirdly, whether the fund was divisible among the nearest of kin of A. (thus excluding the widow) or amongst his next of kin, according to the Statute of Distributions: Lord Langdale, M. R., held that A.'s next of kin, according to the statute, were entitled; being of opinion that the words "legal representatives," meant those persons who would be entitled beneficially under the statute; for that when it is said that the expression "legal representatives" means next of kin, it is not that such is the force of the words themselves, but because the words are held to indicate the persons, who, upon the construction of the Will, are beneficially entitled in the place of the person to whom the gift was first made, and who, in that sense, legally represent such person. So in *Booth* v. *Vicars* (m), a testator directed that the residue of his personal estate, after the death of his widow, the tenant for life, should be paid by his trustees or the survivor of them, his executors or administrators, to A. and B., equally to be divided between them, share and share alike, if then living; but if dead, to go and be divided to and amongst the next legal representatives of A. and B., share and share alike: A. and B. died in the lifetime of the testator's widow: And it was held by Knight Bruce, V. C., that the next of kin of A. and B., *according to the Statute of Distributions*, living at the death of the testator's widow, were entitled to the fund; and further, that they were to take *per stirpes*, and not *per capita* (n).

bequests to "executors or administrators," or "representatives" as substitutes for a legatee dying before the testator;

Cases of some difficulty connected with this subject occur as to the construction of Wills, in which the words "executors or administrators" or "representatives" clearly mean *substitutes* in the event of a legatee dying in the lifetime of the testator; and the question is, who are the substitutes

(m) 1 Coll. 6.

(n) See also Martin v. Glover, 1 Coll. 269.

intended? The first inquiry which suggests itself on this head is, whether, if the legatee dies before the testator, and the bequest consequently passes, under the Will, to the executors and administrators of the legatee, they shall hold the property bequeathed for their own personal benefit, or as trustees. On the latter supposition a second inquiry becomes necessary; *viz.* for whose benefit they shall be considered to hold it.

whether in such case, or in any case, an executor or administrator can take, as such, beneficially:

In the case of *Ripley* v. *Waterworth* (o), Lord Eldon observed, that he doubted whether an executor or administrator ever takes anything, as such, which he will not be bound to apply as personal estate of the testator or intestate: And in *Milner* v. *Harewood* (p), his Lordship, recurring to his decision in *Ripley* v. *Waterworth*, said, "I have determined, and I see no reason to dissent from it, that where the executor is the special occupant of an estate *pur auter vie*, taken as executor, he must hold that as all other property taken by an executor, and therefore distributable in this Court."

The case, however, of *Evans* v. *Charles* (q), must be regarded as an express decision, that where executors or administrators are entitled under a bequest to "the personal representatives" of a third person, they take the property as *personæ designatæ*, beneficially, and not as part of the estate of the deceased (r): In that case Alice Heath, as executrix and residuary legatee of her brother John, became a creditor of Charles Floyer, who, after John's death, compounded with Alice and the other creditors for ten shillings in the pound in full of their demands: Alice died before receipt of the composition, having by Will bequeathed her residuary estate among some of her relations, and appointed two executors, who died before Floyer; and the plaintiff, Mrs. Evans, was the legal personal representative of the surviving executor, as also of Alice Heath: Floyer, being dead, his

(o) 7 Ves. 438.
(p) 18 Ves. 273.
(q) 1 Anstr. 128.
(r) See *ante*, 583, *et seq.* with respect to executors taking as purchasers.

widow, Blanch, after the death of Alice, charged her property by Will with the remaining ten shillings in the pound of her husband's debts which had been compounded for, directing the money to be paid to those creditors, "or their personal representatives:" Of the share of this bequest coming to Alice Heath, there were four sets of claimants: 1, the plaintiff, Evans, as her administratrix; 2, her residuary legatees; 3, her next of kin at her death, or their representatives; and, 4, her next of kin living at the death of Blanch Floyer: The Court disposed of these claims as follows: First, that the plaintiff, as administratrix of Alice, was legally and beneficially entitled, unless any other person could show a better right: Secondly, that Alice's residuary legatees failed in doing so, because the fund was neither Alice's at the date of her Will, nor at her death; so it never constituting part of her estate, could not have passed as such, if it had been expressly bequeathed to them, for want of interest in Alice; consequently, since her residuary legatees could not have taken the money by direct bequest, much less could they do so upon the basis of an implied trust affecting the conscience of the plaintiff: And thirdly and fourthly, that neither class of next of kin could make out a good title against the plaintiff, as that could only be effected by converting her into a trustee for them; a conversion impracticable in the present case; because the money formed no part of Alice's estate at her death; for in order to raise such a trust there must be property belonging to a testator at the time of his decease; but, in this instance, there was no such property belonging to Alice at her death upon which to found a constructive trust for her next of kin: It followed, therefore, and was determined, that the plaintiff, the legal representative of Alice, was the only person who could make a title to the legacy (*s*).

This case at one time seemed entitled to great weight, having been fully considered by the very eminent Judges who

(*s*) 1 Rop. Leg. 113, 114, 3d edit.

sat in the Court of Exchequer at the time of its decision (*t*). Moreover, it was approved by Lord Loughborough, in *Long* v. *Blackall* (*u*): And Lord Alvanley, in *Holloway* v. *Holloway* (*v*), appears to regard it as having been properly decided.

On the other hand, in the previous case of *Bridge* v. *Abbot* (*w*), a testatrix bequeathed the residue of her estate to several persons equally; but if any of them died before her, she directed that the share or shares of him, her, or them, so dying, should belong to his, her, or their "legal representatives:" The question was, who were entitled to the share of John Webb, one of the residuary legatees, who died before the testatrix: The claimants were the executors of John Webb, his residuary legatees, and his next of kin: and Lord Alvanley decided that those persons were entitled who would have been entitled as next of kin to John Webb at the death of the testatrix, in case he had at that time died intestate (*x*): And with reference to the claim of his executors, his Lordship observed, that the testatrix could not intend that any persons who should casually represent John Webb, as executors, who might be different persons, one representing him here, another abroad, one in the province of Canterbury, another in the province of York, should take; that she could not mean that the person who might be entitled to the probate of the Will should take beneficially (*y*). And in *Price* v. *Strange* (*z*), Sir John Leach, V. C., said, "It is difficult to yield assent to *Evans* v. *Charles*, that the personal representative took beneficially: It might have been better to have held that the personal representative was to take it upon trust, to administer as part of the personal estate: Perhaps the same conclusion would have been best also in *Bridge* v. *Abbott;* but that decision is less objectionable than *Evans* v. *Charles;* the next of kin, in a sense, legally represent a person as to his personal estate."

(*t*) Ch. B. Eyre, B. Hotham, B. Perryn, and B. Thomson.
(*u*) 3 Ves. 490.
(*v*) 5 Ves. 402.
(*w*) 3 Bro. C. C. 224.
(*x*) 5 Ves. 402.
(*y*) 3 Bro. C. C. 225.
(*z*) 6 Madd. 161.

Again, in *Wellman* v. *Bowring* (*a*), by a marriage settlement the ultimate trust declared of a copyhold estate, the property of the husband, was for his executors or administrators, and a similar trust was declared in respect to the executors and administrators of the wife, as to a copyhold estate which was her property: The wife survived the husband and took out administration to him: Sir John Leach, V. C., said, that there was no question but that the administratrix was a *persona designata*, with apt words of limitation according to the nature of the property, and was entitled to the copyhold as a purchaser; and that the real question in that cause was, whether it was intended that the administratrix should take beneficially or as a trustee: His Honor proceeded to declare his opinion, that the administratrix was not a trustee for the customary heir; but with respect to the question, whether there was a trust for the next of kin, the learned Judge declined to consider it, until all the persons, who were next of kin, were before the Court: The case afterwards came before Lord Eldon on an appeal (*b*), when his Lordship concurred in this opinion of the Vice Chancellor: And with respect to the trust for the next of kin, his Lordship observed (*c*), "Another question is, whether, the limitation being to the person by the description of an office, namely, to executors or administrators, the wife, taking the copyhold as administratrix of her husband, took it for her own use and benefit: May it not be held, by analogy to those cases in which the executor, taking leases *pur autre vie* as special occupant, has been deemed a trustee for the next of kin of his testator, that the meaning of the parties in the agreement made on their marriage was, that the executor or administrator was to take the copyhold estates for the purpose of making each copyhold so coming to him a personal interest of the husband and wife respectively?" It was ultimately decided by Sir L. Shadwell, V. C. (*d*), that the administratrix was not entitled to hold the estate for her own

(*a*) 1 Sim. & Stu. 24.
(*b*) 2 Russ. Chanc. Cas. 374.
(*c*) 2 Russ. Chanc. Chas. 380.
(*d*) 3 Sim. 328.

exclusive benefit, but for the benefit of herself and of her husband's next of kin, as the parties entitled under the Statute of Distributions.

Again, in *Collier* v. *Squire* (*e*), by a marriage settlement, stock, the property of the husband, was settled on trust for the separate use of the wife during her life, and, after her death, for the husband, if he survived her; but if he died in her lifetime, then for such persons as he should by deed or Will appoint: and in default of appointment, for his executors and administrators: The husband died in the wife's lifetime, having appointed an executrix, but without exercising his power: Sir John Leach, V. C., held, that the executrix was not entitled to the stock beneficially, but that it was to be administered by her as part of his general personal estate: and his Honor observed, that he could not intend that, by the limitation to the executors or administrators of the husband, a gift was meant to the uncertain person who might happen to obtain letters of administration of his property.

These cases, it should appear, tend considerably to shake the authority of *Evans* v. *Charles*. Indeed, on a late occasion (*f*), Lord Abinger, C. B., said, that this case was clearly not law. And it appears to have been regarded as overruled by Sir John Leach and Lord Brougham, in the case of ***Palin*** v. ***Hill*** (*g*).

It must, however, be observed, that unquestionably it is competent to a testator, if he thinks fit, to limit any interest to such persons as shall, at a particular time named by him, sustain a particular character (*h*): And therefore that the expressions of the Will may be such, as clearly to entitle the executors or administrators to a beneficial interest, even although the limitation to them should be preceded by a life estate in their testator or intestate: Thus, in *Sanders* v. *Frank* (*i*), it was determined by Sir Thomas Plumer, that a

(*e*) 3 Russ. Chanc. Cas. 467.

(*f*) Marshall *v.* Collett, 1 Younge & Coll. 239. *Infra*, p. 982.

(*g*) *Infra*, p. 983. See also Daniel *v.* Dudley, *ante*, p. 972. Atty. Gen. *v.* Malkin, 2 Phill. Ch. C. 64, *ante*, p. 973. Morris *v.* Howes, 4 Hare, 599, *ante*, p. 970. *Post*, p. 984.

(*h*) Holloway *v.* Holloway, 5 Ves. 401.

(*i*) 2 Madd. 147.

limitation of personal estate to a widow, by her husband's Will, for life, with a power of appointment, and in default of such disposition, "to her executors or administrators for their own use and benefit," did not vest the absolute interest in the property in the widow; but that she had an estate for life only, with a power to dispose of the fund; upon the principle, that the executors and administrators took as purchasers, in their own rights, and not by representation. So in *Wallis* v. *Taylor* (*j*), a testatrix gave stock in the three per cents. to her executors, in trust, as to one moiety thereof, for her daughter Hannah, and so to the other moiety, in trust to permit her daughter Sophia, then the wife of W. M., (but afterwards the wife of the plaintiff,) to receive the dividends for her life for her separate use, and from and after her decease, on trust to assign and transfer the last mentioned moiety "unto the executors or administrators of my said daughter Sophia, to and for his, her, or their use and benefit absolutely for ever:" And Sir L. Shadwell, V. C., held, that the plaintiff, as the administrator of Sophia, took under this limitation beneficially.

On the other hand, in *Marshall* v. *Collett* (*k*), by a marriage settlement, stock was assigned to trustees, upon trust to pay the interest and dividends to the husband for life, and in case he should survive the wife, upon trust to transfer the said stock to the husband, "his executors, administrators, or assigns, to and for *his or their* own use and benefit;" but in case the wife should survive the husband, upon trust during her life to pay the interest and dividends as she should appoint, and, after her decease, upon trust to transfer the stock "unto the executors or administrators of the said George Marshall (the husband) to and for their own use and benefit:" The wife survived the husband, and took out administration of his effects, and claimed an absolute interest in the whole *corpus* of the stock: But Lord Abinger, C. B., held, that she was not entitled: And his Lordship appeared to be of opinion that

(*j*) 8 Sim. 241.

(*k*) 1 Younge & Coll. 232.

a limitation in a settlement "to the executors and administrators of A. for their own use and benefit," unconnected with any other limitation shewing more specifically who are to take is void for uncertainty. Again, in *Stocks* v. *Dodsley* (*l*); a testator gave a legacy of 500*l.* to his wife, and after her decease to George Wragg; and if he should die in her lifetime, to such person or persons as he should by Will appoint; and in default of appointment, after the death of the wife, "to the executors and administrators of the said George Wragg, *absolutely*:" George Wragg died, having made a Will, by which he appointed an executor, but made no appointment of the legacy: And Lord Langdale, M. R., held, that the executor did not take a beneficial interest in the legacy. And in *Hames* v. *Hames* (*m*), it was held by the same learned Judge, upon the construction of a marriage settlement, that under a limitation to the executors, administrators, or assigns of the settlor, to and for his and their own use and benefit, his executors were not entitled beneficially (*n*).

For whose benefit an executor or administrator shall hold a bequest made to him as a substitute for a legatee dying before the testator, or in default of appointment.

Assuming that executors or administrators, who take a bequest as purchasers, are to be regarded merely as trustees, the question remains to be considered, for whose benefit such trust shall enure. The general rule appears to be, that the fund is to be applied and administered in the same manner as any other assets that come to them in their official character (*o*). However, in *Palin* v. *Hill* (*p*), John Milward, by his Will, after giving several legacies, among which was a legacy of 2000*l.* to Sarah Brown, directed, that in case of the death of any or either of the legatees in his lifetime, the legacy given to the legatee so dying in his lifetime "should go and be paid to his or her executors or administrators:" Sarah Brown died in the lifetime of the testator, having made a Will, by which she appointed Rebecca Sarah Palin her residuary legatee, and made two other persons her executors:

(*l*) 1 Keen, 325.

(*m*) 2 Keen, 646.

(*n*) See also Wood *v.* Cox, 2 M. & Cr. 684. Stubbs *v.* Sargon, 3 Mylne & Cr. 507. Meryon *v.* Collett, 8 Beav. 386.

(*o*) *Ante*, p. 972.

(*p*) 1 M. & K. 470.

The question was, first, whether the executors of Sarah Brown were entitled beneficially to the legacy of 2000*l.*; and secondly, whether, supposing them to hold it in their capacity of executors, they held in trust for the residuary legatee of Sarah Brown, or for her next of kin: Sir John Leach, M. R., being of opinion that the executors were clearly excluded from any beneficial interest in the legacy, decided that they held it in trust for the residuary legatee; his Honor considering it most consistent with the intention of the original testator to give a benefit to Sarah Brown, that the legacy should go to the ascertained object of Sarah Brown's bounty, namely, her residuary legatee: But this decision was reversed on appeal by Lord Brougham, C.; and his Lordship held, on the authority of the case of *Bridge* v. *Abbott* (which there has already been occasion to state) (*q*), that Sarah Brown's next of kin were entitled to the beneficial interest in the legacy: The principle of his Lordship's decision appears to be, that the property in the fund never vested, nor could by possibility vest, in Sarah Brown herself (*r*). A question somewhat similar has since arisen in *Morris* v. *Howes* (*s*). There a trust term had been created by a marriage settlement to raise 1000*l.* on the decease of the survivor of the husband and wife, in case there should be no issue of the marriage living at her death, and to pay it as the wife should appoint, and in default of such appointment, to the executors, administrators, and assigns of the wife's mother: There was no issue of the marriage, and the wife, having survived her husband, died without having exercised her power of appointment; Her mother afterwards bequeathed her residuary estate and died: And Wigram, V. C., held that the executors of the mother were entitled to take the 1000*l.* and interest as part of her residuary personal estate: And his Honor said, that it was clear they could not claim it beneficially but must take it in their character of executors, and if

(*q*) *Ante*, p. 979.

(*r*) See also Vaux *v.* Henderson, 1 Jac. & Walk. 388.

(*s*) 4 Hare, 599.

so, it was subject to her debts and she might have dealt with it as with her other property: His Honor, therefore, had no doubt that, as part of her estate, it would pass by the residuary clause in her Will: But it had been suggested that this would conflict with *Palin* v. *Hills:* That case, however, decided, not that property which belongs to a party, though not in possession, does not pass, but that property, the title to which commences after the death of the testator, does not pass by his Will: His Honor added, that although his decision did not conflict with *Palin* v. *Hills*, he might observe that that case had not been universally approved of (*t*).

(C.) *Who are entitled under the description of*—1. "*Servants*"—2. "*Inhabitants*"—3. "*Government.*"

"Servants:" what sort of servants entitled:

1. "Servants." Where the testator, after giving legacies to two of his servants, if in his service at his death, bequeathed to his "other servants" who should be living with him at that time, 50*l.* a-piece, and 10*l.* each for mourning; and by a codicil revoked the two latter legacies, and gave to all his other servants, in lieu thereof, 500*l.* each, and 20*l.* each for mourning; Sir W. Grant held, that a coachman, who was provided for the testator by a job-master, together with a carriage and horses, in the usual course of business, was not a servant within the intent and meaning of the Will (*u*). In another case (*v*) the testator bequeathed a year's wages to "such of his servants as should be living with him at his death;" And the Court declared that stewards of Courts, and such other servants as were not obliged to pass their whole time in their master's service, were not servants within the meaning of the bequest (*w*). So in *Booth* v. *Dean* (*x*), a

(*t*) Affirmed by the Lord Chancellor, M. T. 1846.

(*u*) Chilcot *v.* Bromley, 12 Ves. 114.

(*v*) Townshend *v.* Windham, 2 Vern. 546.

(*w*) The Court remarked at the same time, that it would not narrow the bequest to such servants only who lived at the testator's house, or had diet from him.

(*x*) 1 M. & K. 560.

testator bequeathed to each of his servants one year's wages, over and above what might be due to them at the time of his decease: Upon this bequest a question was made, whether a person who had worked in the testator's garden, under his gardener, for several years, at weekly wages, and a boy who had served the testator for some time as a cowboy, at weekly wages, and neither of whom resided with or formed part of the testator's family, were to be considered as entitled under the Will, to the year's wages: And Sir J. Leach, M. R., was of opinion that these persons were not servants in the sense in which the testator had used the expression: That in speaking of a year's wages, the testator plainly used that expression with reference to family servants, usually hired by the year. But in *Howard* v. *Wilson* (*y*), (which was a suit of subtraction of legacy, before Sir John Nicholl,) a coachman, a married man, originally hired by, and who had lived five years with the testatrix, residing over her stables in town, occasionally accompanying her into the country, where he lived in the house, though, like all her servants, on board wages; waiting sometimes at table, and remaining with her, though she changed her job-man, was held (although the several job-masters paid him his wages and board wages, except three shillings per week extra in the country, and found him his liveries,) entitled under a bequest "to each of my servants living with me at the time of my death, 10*l.*"

whether a continuance in the service is necessary to entitle.

Generally speaking, a servant must continue in the service of the testator till the time of his death, to come within the description of "servants." But in *Herbert* v. *Reid* (*z*), where a servant quitted the testator's house a few days before the death of the testator, she was allowed to shew, by proof of his declarations, that she was still considered by him to be in his service. And where a testator, by a codicil, bequeathed pecuniary legacies to certain persons by name, who were described as having lived many years in his family, and then added "to the other servants 500*l.* each," it was held, that

(*y*) 4 Hagg. 107.

(*z*) 16 Ves. 481.

a person who was in the testator's service at the date of the codicil, but who quitted it before his decease, was entitled to a legacy of 500*l.* (*a*)

2. "Inhabitants:"

2. "Inhabitants." Where a testator gave a legacy "to the poor inhabitants of St. Leonard's, Shoreditch, for ever," Sir Thomas Clarke, M. R., gave his opinion in favour of the charity, and said the Court had done so in many cases where the expressions were much more general and uncertain: But as it could not be intended that the poor inhabitants which were relieved by the parish should have benefit by this legacy, (which in effect would be giving to the rich and not to the poor,) his Honor declared that the distribution of the legacy was to be confined to the poor inhabitants of the parish, not receiving alms of the said parish; and ordered a scheme to be laid before the Master for such distribution (*b*). In a late case (*c*), a testatrix bequeathed all which might remain of her money, after her debts and legacies were paid, "to the Inhabitants of Tawleaven Row, in the parish of Lethney:" The Master found, that Tawleaven Row consisted of seven houses, which were entirely occupied by poor fishermen and labourers and their families, and that the inhabitants, at the time of the death of the testatrix, were the persons in his report enumerated, being thirty in number, of whom three were since dead, leaving no personal representatives: And Lord Langdale, M. R., held, that the persons so found by the Master to be inhabitants were entitled to the residue of the testatrix's general personal estate, after payment of her debts and legacies.

3. "Government:"

3. "Government." A legacy to government for the benefit of the public, is to be disposed of under the king's appointment by sign manual: The Crown is to direct its application to a proper use: Accordingly, in *Newland* v. *Attorney General* (*d*),

(*a*) Parker *v.* Marchant, 1 Y. & Coll. Ch. C. 290.

(*b*) Atty. Gen. *v.* Clarke, Ambl. 422.

(*c*) Rogers *v.* Thomas, 2 Keen, 8.

(*d*) 3 Meriv. 684. 1 Rop. Leg. 129, 3d edit.

Abraham Newland bequeathed stock "to his Majesty's Government in exoneration of the national debt;" and Lord Eldon directed the fund to be transferred to such person as the king should appoint under sign manual.

(D.) *Of Mistakes in the Names or Descriptions of Legatees.*

The general rule upon this subject is, that where the name or description of a legatee is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described, the mistake shall not disappoint the bequest. The error may be rectified, and the true intention of the testator ascertained, in two ways: 1. By the context of the Will; 2. To a certain extent, by parol evidence.

Mistake rectified by the context:

1. The mistake may be rectified by the context. Thus, an error in the *name* of the legatee may be obviated by the accuracy of his *description* (*e*): as where a legacy is given to "my namesake *Thomas*, the *second* son of my brother," and the testator's brother has no son named Thomas, but his second son is named William, there is sufficient certainty in the description to entitle the second son (*f*). So an error in the *description* may be obviated by the certainty of the *name;* as where a legacy was given to "Charles Millar Standen and Caroline Eliz. Standen, *legitimate* son and daughter of Charles Standen, now residing with a company of players," and it appeared that they were *illegitimate* children, their claim was, nevertheless, supported (*g*). So where there was a bequest to *John* Newbolt, *second* son of William *Strangways* Newbolt, vicar of Somerton; and the vicar of Somerton was William *Robert* Newbolt, and his *second* son was Henry

(*e*) Blundell *v.* Gladstone, 1 Phill. Ch. C. 279, 288. See also Queen's College *v.* Sutton, 12 Sim. 521.

(*f*) Stockdale *v.* Bushby, 19 Ves. 381. S. C. Coop. 229. See also Dowset *v.* Sweet, Ambl. 174. Smith *v.* Coney, 6 Ves. 42. Bradshaw *v.* Bradshaw, 2 Younge & C. 72. Bristow *v.* Bristow, 5 Beav. 289. Blundell *v.* Gladstone, 1 Phill. Ch. C. 279.

(*g*) Standen *v.* Standen, 2 Ves. jun. 589. S. C. 6 Bro. P. C. 193, Toml. edit.

Robert, and his *third* son was John Pryce; It was held, that John Pryce Newbolt was entitled to the legacy; for that the maxim applied, "*Veritas nominis tollit errorem descriptionis*" (*h*). So where the testator, being resident in India, bequeathed his residuary property to his "nearest relations in my native country Ireland," sisters living in America were held entitled (*i*).

Again, a mistaken omission of the name of the legatee may be supplied by the context: as when the testator gives his residuary estate to be divided among his *seven* children, and in enumerating them, mentions *six* names only: or where he makes a bequest to his six grandchildren by their Christian names, and mentions one twice over, omitting another altogether (*j*).

Mistake rectified by parol evidence.

2. The mistake may, to a certain extent, be rectified by parol evidence. It is obvious that the nature of this Treatise will not allow of a full consideration of this wide and difficult subject: It may be sufficient in this place to mention the general principles established with respect to it.

It may, perhaps, be safely stated as a general proposition, that a Court may inquire into every material fact relating to the person who claims to be interested under the Will, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the Court to identify the person intended by the testator (*k*).

Further, in certain special cases, extrinsic evidence of the intention of the testator, (*e. g.* proof of his *declarations*, at the time of making his Will), is admissible to make certain the person intended, where the description in the Will is insufficient for the purpose (*l*).

(*h*) Newbolt *v.* Price, 14 Sim. 354.

(*i*) Smith *v.* Campbell, 19 Ves. 400.

(*j*) Garth *v.* Meyrick, 1 Bro. C. C. 30.

(*k*) This subject is discussed with much learning and ability by Vice Chancellor Wigram, in his Treatise on "The Application of Extrinsic Evidence to Interpretation of Wills."

(*l*) Wigram, p. 78, *et seq.* 2nd edit.

In all cases in which a difficulty arises in applying the words of a Will to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence upon the same subject, calculated to explain who was the person really intended to take under the Will; according to the maxim, "*Ambiguitas verborum* latens, *verificatione suppletur.*"

There is, however, but one class of cases in which evidence of the testator's *declarations* can properly be admitted; and that is, of cases of *equivocation, viz.*, where an ambiguity arises, from the admission of extrinsic evidence, as to which of two or more things, or which of two or more persons, *each answering the description in the Will*, the testator meant to express (*m*).

Accordingly, where a complete blank is left for the devisee's name in a Will, no parol evidence, however strong, will be allowed to fill it up as intended by the testator (*n*). Where, however, a blank was left for the Christian name only, parol evidence was admitted to prove the individual intended (*o*). So in case of a devise "to Mrs. C.," Lord Lougborough referred it to the Master to receive evidence, to show the person intended (*p*). The two last cases, perhaps, are only reconcileable with the principles of law applicable to this subject, on the supposition that the evidence went to establish in the one case, that the claimant of the legacy was a person whom the testator was in the habit of calling "Mrs. C.;"—and in the other, that the claimant was a person whom the testator was in the habit of calling by the surname only (*q*).

(*m*) Miller *v.* Travers, 8 Bing. 244. Doe *v.* Hiscocks, 5 M. & W. 363. Bradshaw *v.* Bradshaw, 2 Y. & Coll. 72. Duke of Dorset *v.* Hawarden, 3 Curt. 80. Wilson *v.* Squire, 1 Y. & Coll. Ch. C. 654. Daubeny *v.* Coghlan, 12 Sim. 507. Doe *v.* Allen, 12 A. & E. 451.

(*n*) Baylis *v.* Atty. Gen. 2 Atk. 239. Hunt *v.* Hort, 3 Bro. C. C. 311. 8 Bing. 254. Clayton *v.* Lord Nugent, 13 M. & W. 200. See Doe *v.* Westlake, 4 B. & A. 57.

(*o*) Price *v.* Page, 4 Ves. 680.

(*p*) Abbot *v.* Massie, 3 Ves. 148.

(*q*) See the observations of Rolfe, B., 13 M. & W. 207. See also Lee *v.* Pain, 4 Hare, 251.

Where a testator has habitually called certain persons or things by peculiar names, and those names occur in his Will, evidence of such habit seems receivable to explain the meaning of the Will, in like manner as if his Will had been written in cypher, or in a foreign language (*r*).

In conclusion, it may be expedient to advert to cases of legacies given to persons in particular characters.

Legacy to one in a particular character.

In some cases, such legacies will fall within the rule above stated, that where there is no doubt as to the person intended, the mis-description of character shall not frustrate the bequest. Thus a woman may take a legacy by the name of the wife of such a one, although she be not a lawful wife, if she be reputed or known by that name (*s*). But it is otherwise where a bequest is made to a person in a certain character, which may reasonably be presumed to be the motive of the testator's bounty, and that character is subsequently ascertained to have been falsely assumed by the legatee, by a fraud practised on the testator (*t*). Thus, if a woman bequeaths a legacy to her supposed husband, who is in fact the husband of another woman, he shall take nothing by the bequest (*u*).

In ***Rishton*** v. ***Cobb*** (*v*), a testator gave a fund to trustees, on trust to empower Lady C., "*widow of Sir N. C.*," to receive the dividends so long as she should continue single and unmarried: At the date of the Will, and at the testator's death, Lady C. was married to one R.; but he had deserted her; and she always called herself Lady C., and represented herself to be a single woman and the widow of Sir N. C.;

(*r*) 5 M. & W. 368.

(*s*) 1 Powell Dev. 267. Edit. by Jarman. Giles *v.* Giles, 1 Keen, 685.

(*t*) 1 Powell Dev. 267, note (1).

(*u*) Kennell *v.* Abbott, 4 Ves. 802. See also *Ex parte* Wallop, 4 Bro. C C. 90, mentioned by Lord Alvanley in Kennell *v.* Abbott. That learned Judge, in the latter case, observed, that he would not have it understood, that if a testator, in consequence of the supposed affectionate conduct of his wife, gives her, being deceived by her, a legacy as his *chaste* wife, evidence of violation of her marriage vow could be given for the purpose of defeating the bequest; since that would open too wide a field: 4 Ves. 809.

(*v*) 9 Sim. 615.

and the testator and others always considered her so to be: Sir L. Shadwell, V. C., held that she, and her husband in her right, were entitled to claim the benefit of the bequest; for that no case of fraudulent misrepresentation had been established against her. And this decision was affirmed by Lord Cottenham on appeal (*w*).

In *Schloss* v. *Stiebel* (*x*), a testator domiciled in Jamaica, became during a temporary residence at Frankfort, engaged and betrothed to marry A. S.; and by a codicil to his Will, after mentioning her by name, and alluding to his intended marriage with her, he gave 3,000*l.*, "*to my wife:*" During the engagement, but before the marriage, the testator died: And Sir L. Shadwell, V. C., held that A. S. was entitled to the legacy; his Honor being of opinion that it was not given on condition of the testator marrying her, but that he had described her with reference to his intention of doing so.

Mistakes in the description of the number of a class of legatees.

Where there is a bequest to a class, and the intention of the testator is apparent to include all who constitute the class, though by mistake he has specified a wrong number, the Court will not allow such an error to have an excluding operation, but will strike out the specified number. Thus, in *Tomkins* v. *Tomkins* (*y*), where there was a bequest of 50*l.* a-piece to the *three* children of A., and A. had *four;* Lord Hardwicke was of opinion, that each of the four children were entitled to the 50*l.* So in *Garvey* v. *Hibbert* (*z*), the testator gave "to the *three* children of A. the sum of 600*l.* a-piece;" and Sir W. Grant held, that four children, all born before the date of the will, were entitled to 600*l.* each (*a*). Again, in *Harison* v. *Harison* (*b*), the testator bequeathed to the *two sons and the daughter* of Thomas Lovell 50*l.* each; At the date of the will and of the death of the testator, Thomas Lovell had *five* children living, namely,

(*w*) 5 M. & Cr. 145.

(*x*) 6 Sim. 1.

(*y*) Cited 3 Atk. 257. 2 Ves. sen. 564.

(*z*) 19 Ves. 124.

(*a*) See also Accord. Lee *v.* Pain, 4 Hare, 249. Morrison *v.* Martin, 5 Hare, 507.

(*b*) 1 Russ. & M. 72.

one son and four daughters, and not two sons and one daughter: And Sir J. Leach, M. R., held, that each of the five children was entitled to a legacy of *50l.* But in *Lord Selsey* v. *Lord Lake* (*c*), the testator gave a rent-charge to trustees, during the life of his niece and her *five daughters,* in trust, to pay it to his niece for life, and after her death, upon the like trust for her *said* daughters and the survivors and survivor, and while more than one should be living, to be divided between them in equal shares: It appeared, that at the date of the will, and at the death of the testator, his niece had *five sons and only one daughter:* And Lord Langdale, M. R., held, that the daughter alone was entitled to the annuity for life on the death of her mother.

Sect. III.

Of Specific Legacies.

Of legacies there are two kinds: a general legacy and a specific legacy. A legacy is general when it is so given as not to amount to a bequest of a particular thing or money of the testator, distinguished from all others of the same kind: A legacy is specific when it is a bequest of a *specified* part of the testator's personal estate which is so distinguished (*d*). Thus, for example, "I give a diamond ring," is a general legacy, which may be fulfilled by the delivery of any ring of that kind (*e*): while "I give the diamond ring presented to me by A." is a specific legacy, which can only be satisfied by the delivery of the identical subject (*f*). Again, if the testator, having many brooches or horses, bequeath "a brooch" or "a horse" to B.; in these cases, the legacy is general (*g*).

(*c*) 1 Beav. 146.

(*d*) 3 Beav. 349.

(*e*) 1 Rop. Leg. 170, 3d edit.

(*f*) Fonbl. Treat. Eq. B. 4, Pt. 1, Ch. 11, s. 5, note (*o*). Toller, 301. Lord Hardwicke, in Purse *v.* Snaplin, 1 Atk. 416, 417, considers both the above kinds of gifts as specific legacies, and that the latter may be more properly called an individual legacy.

(*g*) 1 Rop. Leg. 170, 3d edit.

But a bequest of "such part of my stock of horses which A. shall select, to be fairly appraised, to the value of 800*l.*" (*g*), or of "all the horses which I may have in my stable at the time of my death" (*h*), is specific.

The distinction between these two sorts of legacies is of the greatest importance: for, as it will hereafter more fully appear, if there be a deficiency of assets, a specific legacy will not be liable to abate with the general legacies; while, on the other hand, if the specific legacy fail by the ademption or inadequacy of its subject, the legatee will not be entitled to any recompense or satisfaction out of the general personal estate. So that though specific legacies have in some respect the advantage of those that are general, yet in other respects they are distinguished from them to their disadvantage (*i*).

Again, if there be a specific bequest of a thing described as already in existence, and no such thing ever did exist among the testator's effects, the legacy fails: Thus, although a gift of "my grey horse" will pass a black horse, which is not strictly grey, if it be found to have been the testator's intention that it should pass by that description; yet if the testator had no horse, the executor is not to buy a grey one (*k*): On the other hand, if the bequest is of "a horse," and no horse be found in the testator's possession at the time of his death, the executor is bound, provided the state of the assets will allow him, to procure a horse for the legatee (*l*).

It seems to have been once considered as the criterion of a specific legacy, that it is liable to ademption (*m*). But this has since been repeatedly denied (*n*). And it has even been held that a legacy may be specific, notwithstanding the tes-

(*g*) Richards *v.* Richards, 9 Price, 226.

(*h*) Fontaine *v.* Tyler, 9 Price, 98, by Richards, C. B. See also Stephenson *v.* Dowson, 3 Beav. 349, *per* Lord Langdale.

(*i*) Ashton *v.* Ashton, 3 P. Wms. 385, by Lord Talbot, C.

(*k*) Evans *v.* Tripp, 6 Madd. 92.

(*l*) See Bronsdon *v.* Winter, Ambl. 57.

(*m*) 1 Jac. & Walk. 601, *post*, p. 1001.

(*n*) See *post*, p. 1001.

tator expressly provides that it "shall not be deemed specific, so as to be capable of ademption" (*o*).

Bequests in the nature of specific legacies, or demonstrative legacies.

A legacy of quantity is ordinarily a general legacy: but there are legacies of quantity *in the nature* of specific legacies; as, of so much money, with reference to a particular fund for payment. This kind of legacy is called by the civilians *a demonstrative* legacy (*p*); and it is so far general, and differs so much in effect from one properly specific, that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets (*q*): yet the legacy is so far specific, that it will not be liable to abate with *general* legacies upon a deficiency of assets (*r*).

The Courts in general are averse from construing legacies to be specific: and the intention of the testator, with reference to the thing bequeathed, must be clear (*s*). Having thus premised, it may be advisable to consider some instances in which legacies have been held to be specific, with reference

(*o*) Jacques *v.* Chambers, 2 Coll. 435.

(*p*) "If the testator doe devise "tenne quarter of corne coming of "the corne which shall growe in "such a soyle, or two tunnes of "wine of his grapes in such a vine-"yard, or tenne lambs of such a "flocke, though so much corne, or "wine, or so many lambs doe not "arise of the thinges abovesaid, "yet the heire or executor is com-"pellable by law to make them "good *integraliter;* because he "may seeme to have mentioned "the soyle, the vineyard, and the "flocke, rather by way of *demon-"stration* than by way of condi-"tion." Fulbecke Parallele, p. 37. Edition, 1618.

(*q*) Touch. 433. Ellis *v.* Walker, Ambl. 310. Chaworth *v.* Beech, 4 Ves. 555. Gillaume *v.* Adderley, 15 Ves. 384. Smith *v.* Fitzgerald, 3 Ves. & Beam. 5. Mann *v.* Copeland, 2 Madd. 223. Fowler *v.* Willoughby, 2 Sim. & Stu. 358. Willox *v.* Rhodes, 2 Russ. Chanc. Cas. 445. Campbell *v.* Graham, 1 Russ. & M. 453. Creed *v.* Creed, 11 Cl. & F. 509, by Lord Cottenham.

(*r*) Coleman *v.* Coleman, 2 Ves. jun. 640, by Lord Loughborough. Roberts *v.* Pocock, 4 Ves. 160. Raymond *v.* Broadbelt, 5 Ves. 206. Lambert *v.* Lambert, 11 Ves. 607. Acton *v.* Acton, 1 Meriv. 178. 1 Rop. Leg. 169. Livesay *v.* Redfern, 2 Y. & Coll. 90. Creed *v.* Creed, 11 Cl. & F. 509, by Lord Cottenham.

(*s*) Ellis *v.* Walker, Ambl. 310. Kirby *v.* Potter, 4 Ves. 748. Innes *v.* Johnston, 4 Ves. 568. Webster *v.* Hale, 8 Ves. 413.

to—1. Money, securities for money, debts, &c.: 2. Bequests connected with the realty: 3. Bequests contained in a residuary clause.

1. Legacies of money, securities for money, debts, &c.:

1st. Legacies of money, securities for money, debts, &c. Under some circumstances, even pecuniary legacies are held to be specific: as of a certain sum of money in a certain bag or chest (*t*), or in the hands of A. (*u*): or of 200*l.*, the balance due to the testator from his partner on the last settlement between them, *if the testator did not draw such money out* of the trade before he died (*v*). But a legacy of "400*l.* to be paid to A. in cash," is a general legacy (*w*). So a legacy of money, to procure a specified object for the legatee; as of a sum to buy a ring (*x*), or to purchase lands (*y*), or government securities (*z*) for the legatee, is a general legacy. So a bequest of an annuity out of, or charged on the personal estate, is a general legacy (*a*).

money:

A *money* legacy will not be rendered specific, by its payment being postponed until a particular investment of a fund takes place: as where the bequest is to A. and B. of 1000*l.* each, "which legacies I direct to be *paid* so soon as my property in India shall be realised in England" (*b*): in which case the legatees are entitled to satisfaction, although all the property in India belonging to the testator should have been transmitted to England in his lifetime. So where sums of money are bequeathed by a testator, who has property in England and India, to persons resident in each place, with a direction that they shall be paid out of the assets in the

(*t*) Lawson *v.* Stitch, 1 Atk. 508.

(*u*) Hinton *v.* Pinke, 1 P. Wms. 540, by Lord Chancellor Parker. Crockat *v.* Crockat, 2 P. Wms. 164. Pulsford *v.* Hunter, 3 Bro. C. C. 416.

(*v*) Ellis *v.* Walker, Ambl. 310.

(*w*) Richards *v.* Richards, 9 Price, 226.

(*x*) Apreece *v.* Apreece, 1 Ves. & Beam. 364.

(*y*) Hinton *v.* Pinke, 1 P. Wms. 539.

(*z*) Lawson *v.* Stitch, 1 Atk. 507. Gibbons *v.* Hills, 1 Dick. 324.

(*a*) Alton *v.* Medlicot, cited in Lewin *v.* Lewin, 2 Ves. sen. 417. Hume *v.* Edwards, 3 Atk. 693. Creed *v.* Creed, 11 Cl. & F. 508, by Lord Cottenham.

(*b*) Sadler *v.* Turner, 8 Ves. 617. Raymond *v.* Brodbelt, 5 Ves. 199.

respective countries, such a direction will not constitute the legacies specific (*c*).

Stock, shares &c.

Stock, or government securities, or shares in public companies, may be specifically bequeathed, where, to use the expression often applied, there is a clear reference to the "*corpus*" of the fund (*d*). Thus, the word "my" preceding the word stock or annuities, has been several times adjudged sufficient to render the legacy specific: as where the bequest is of "*my* capital stock of 1000*l.* in the India Company's stock" (*e*): or a legacy is given "of *my* stock," or in "*my* stock," or "part of *my* stock" (*f*), or "*my* shares in the Grand Junction Canal Navigation Company" (*g*). So where the testator, being possessed of 5000*l.* stock, bequeathed "all the stock *which I have* in the three per cents. being about 5000*l.*," Lord Thurlow held the legacy specific (*h*). Again, in *Vincent* v. *Newcombe* (*i*), the testatrix by her Will bequeathed funded property sufficient to pay an annuity of 50*l.* to A. for life, and after A.'s death, she bequeathed the fund to other persons: And after giving various pecuniary legacies, she bequeathed to B. "the whole of the remainder of my dividends" during her life; and after B.'s decease, she bequeathed 1000*l.* stock to C., and other sums of stock to other persons: The testatrix died shortly after the date of her Will, entitled to 606*l.* Long Annuities, but to no other stock: And it was held, by Lord Lyndhurst, C. B., that the bequest to B., during her life, of the whole of the remainder of the dividends of the testatrix, was specific, and that C., and the other legatees in remainder after B.'s death, were not entitled to have the Long Annuities converted into Bank Annuities;

(*c*) Kirkpatrick *v.* Kirkpatrick, cited in Roberts *v.* Pocock, 4 Ves. 158.

(*d*) See Sibley *v.* Perry, 7 Ves. 529, 530.

(*e*) Ashburner *v.* M'Guire, 2 Bro. C. C. 108. Barton *v.* Cooke, 5 Ves. 461. Norris *v.* Harrison, 2 Madd. 279, 280.

(*f*) Kirby *v.* Potter, 4 Ves. 750, 751, by Lord Alvanley.

(*g*) Miller *v.* Little, 2 Beav. 259.

(*h*) Humphreys *v.* Humphreys, 2 Cox, 184.

(*i*) 1 Younge, 599.

though, being a decreasing fund, the legacies might altogether fail (*i*).

But in *Parrott* v. *Worsfold* (*k*), where a testator, reciting that he had 1500*l.* five per cents., gave it to A., and then gave to B. all other his stocks that he might be possessed of at the time of his death; Sir Thomas Plumer, M. R., held, that the latter bequest was not specific (*l*); and his Honor observed, that although the word "my" is evidence of the legacy being specific, where the particular stock is also referred to, yet it is not enough alone. So in *Dummer* v. *Pitcher* (*m*), a testator, before making his Will, transferred two sums of four per cents. and five per cents., which were then the whole of his funded property, into the joint names of himself and his wife: By his Will he bequeathed all his funded property or estate of what kind soever, to trustees, in trust for his wife for life, and after her decease, in trust (amongst other things) to pay certain legacies of four per cent. stock, amounting within 50*l.*, to the stock of that description, which he had so transferred; and he gave the residue of his estate to A. and B.: He afterwards purchased further sums of five per cents. in the names of himself and his wife, and died in her lifetime, having no stock except that before-mentioned, exclusive of which his property was not sufficient to pay his legacies: It was held by Sir L. Shadwell, V. C., and afterwards by Lord Brougham, on appeal, that the wife, on her husband's death, became absolutely entitled to the stock; and that the bequest of the testator's funded property was not sufficiently specific to make her elect between the stock, and the benefits which she took, under the Will, in certain parts of the testator's property (*n*). So in *Auther* v. *Auther* (*o*), a legacy of 10,000*l.* consols "now standing in my name," was held, from the context of the Will, not to be specific.

(*i*) See also Kampf *v.* Jones, 2 Keen, 756. Shuttleworth *v.* Greaves, 4 Mylne & Cr. 35.

(*k*) 1 Jac. & Walk. 594.

(*l*) But see *post*, p. 1001.

(*m*) 5 Sim. 35. 2 Mylne & K. 262.

(*n*) But see Shuttleworth *v.* Greaves, 4 Mylne & Cr. 35.

(*o*) 13 Sim. 422.

It must further be observed, that the mere possession by the testator, at the date of his Will, of stock, &c. of equal or larger amount than the legacy, will not make the bequest specific, when it is given *generally* of stocks or annuities (*p*), or of stocks of annuities *in* particular funds (*q*), without further explanation: for the testator might mean only to direct his executor to purchase with his general estate so much stock, &c. in the fund described; and therefore that clear intention, which (as it has before been observed) (*r*) is requisite for making a legacy specific, does not here exist (*s*). If, indeed, it clearly appears from the context, that the testator meant to bequeath the *identical* stock, &c. he was possessed of at the date of the Will, such manifest intention will render the legacy specific, although the testator has not *expressly* declared such intention, nor expressly referred to the stock: Thus, if a person having 1000*l.* three per cent. consols, bequeath 1000*l.* three per cent. consols to trustees, in trust to *sell* for the benefit of the legatee, the bequest will be specific; the intention being manifest, not conjectural, that, from the direction *to sell* three per cent. consols, the testator referred to the stock he *then* had (*t*).

In *Hayes* v. *Hayes* (*u*), a testator gave to his wife, Fanny Hayes, the interest of all his property in the public funds during her life, the principal being placed in the names of

(*p*) Partridge *v.* Partridge, Cas. temp. Talb. 226. Simmons *v.* Vallance, 4 Bro. C. C. 345. Webster *v.* Hale, 8 Ves. 410. Wilson *v.* Brownsmith, 9 Ves. 180. See also Johnson *v.* Johnson, 14 Sim. 313. But see Stafford *v.* Horton, 1 Bro. C. C. 482.

(*q*) Pursè *v.* Snaplin, 1 Atk. 415. Bronsdon *v.* Winter, Ambl. 57. Bishop of Peterborough *v.* Mortlock, 1 Bro. C. C. 565. Webster *v.* Hale, 8 Ves. 410. Sibley *v.* Perry, 7 Ves. 523, 529, 530. But see Avelyn *v.* Ward, 1 Ves. Sen. 424. Jeffreys *v.* Jeffreys, 3 Atk. 120.

(*r*) *Ante*, p. 995.

(*s*) See further illustrations of the same principle applied to India Bonds, in Sleech *v.* Thorington, 2 Ves. Sen. 562, 563. Gillaume *v.* Adderley, 15 Ves. 385, 389; and to canal shares, in Robinson *v.* Addison, 2 Beav. 515.

(*t*) Ashton *v.* Ashton, Cas. temp. Talb. 152. S. C. 3 P. Wms. 384. Simmons *v.* Vallance, 4 Bro. C. C. 348. 1 Rop. Leg. 181, 3rd edit. For a further instance, see Sleech *v.* Thorington, 2 Ves. Sen. 561, 564.

(*u*) 1 Keen, 97.

the undermentioned trustees for that purpose; and he also gave to his wife all his other property which he might be possessed of at his decease, after paying his funeral expenses and debts, part of his funded property being applied for that purpose, if necessary: On the death of his wife he gave to his daughter, Jane Hayes, 200*l.* stock three per cent. reduced annuities, and to two other persons, 50*l.* three per cent. reduced annuities respectively, and to his son the residue of his property, after paying those legacies: And he appointed two persons his executors and trustees: At the date of his Will the testator had 700*l.* three per cent. reduced annuities, but he afterwards sold out that stock, and invested part of the produce on mortgage: It was held by Lord Langdale, M. R., that the gift to Fanny Hayes of the interest of the testator's property in the funds was specific, and was consequently adeemed by the sale of the stock; but that the other legacies were general, and that Fanny Hayes took only a life interest in the testator's residuary estate.

Again, when a legacy is given *out* of a particular stock, of which the testator was possessed at the date of the Will, without anything expressive of the testator's intention, as where the bequest is of "1000*l.* *out of my* reduced Bank annuities three per cents.;" the legacy will not be specific (*v*), but a demonstrative legacy, as above described (*w*). Where, indeed, a clear intention appears, *upon other parts of the Will*, that the testator intended to bequeath so much of the *identical* stock or annuities which he had, the legacy will be considered specific (*x*).

So where a sum certain is given, and the stock, &c., in which it is invested at the time of making the bequest, is described in the Will, that circumstance alone will not make the legacy specific: As, where the bequest is "to B., the sum of 12,000*l.* of my *funded* property, to be transferred in

(*v*) Kirby *v.* Potter, 4 Ves. 748. Deane *v.* Test, 9 Ves. 146, 152.

(*w*) *Ante*, p. 995. 1 Rop. Leg. 192, 3d edit. Rogers *v.* Clarke, 1 Coop. 376.

(*x*) Drinkwater *v.* Falconer, 2 Ves. Sen. 623. Morley *v.* Bird, 3 Ves. 628, 631.

his name, or, as it shall appear most beneficial for his interest, by my executor" (*y*).

But there is, it seems, a distinction between a bequest of *money* out of stock, and a bequest of *stock* out of stock. Thus where a testatrix bequeathed the sum of 4000*l.* capital stock in the 3*l.* per cent. consols, or in whatever of the government funds the same shall be found invested, it was held by K. Bruce, V. C., that this was a specific legacy (*z*).

In *Parrot* v. *Worsfold* (*a*), Sir Thomas Plumer appeared to be of opinion, that a Will made now cannot contain a specific bequest of what may be bought hereafter; and he observed, that the ordinary criterion of a specific bequest is, that it is liable to ademption. But in a later case it was determined, that there may be a specific bequest of stock, of which a testator is not possessed, at the making of his Will, but of which he *may* be possessed *at his death* (*b*). So where a testator bequeathed the dividends, &c., of all stocks he should be entitled to, at the time of his decease, in the public funds; and he had 10,000*l.* consols at his death; it was held that this was a specific bequest of that sum (*c*).

admissibility of evidence as to whether bequests of stock are specific.

It has been decided, after much consideration, that evidence of the state of the funded property of the testator may be resorted to, in order to determine whether a bequest of stock is specific or pecuniary. In the *Attorney General* v. *Grote* (*d*), a legacy of "100*l.* Long Annuities stock," was held by Lord Eldon, (reversing the decision of Sir W. Grant) (*e*), to be pecuniary and not specific; his Lordship

(*y*) Lambert *v.* Lambert, 11 Ves. 607. See also for another instance, Raymond *v.* Broadbelt, 5 Ves. 199, and Gillaume *v.* Adderley, 15 Ves. 885: and see further, Danvers *v.* Manning, 2 Bro. C. C. 18. S. C. 1 Cox, 203. Roberts *v.* Pocock, 4 Ves. 159. Le Grice *v.* Finch, 3 Meriv. 50.

(*z*) Hosking *v.* Nicholls, 1 Y. & Coll. C. C. 478.

(*a*) 1 Jac. & Walk. 601. *Ante*, p. 998.

(*b*) Fontaine *v.* Tyler, 9 Price, 94. Queen's College *v.* Sutton, 12 Sim. 521. See also the judgment of Lord Cottenham, in Bethune *v.* Kennedy, *post*, p. 1010.

(*c*) Stephenson *v.* Dowson, 3 Beav. 342. See also *ante*, p. 994, 995.

(*d*) 2 Russ. & M. 699.

(*e*) 3 Meriv. 316.

coming to that conclusion upon the context of the Will and the terms of the gift, as compared with those of the other bequests, *and upon evidence of the state of the funded property.* Again, in *Boys* v. *Williams* (*f*), a testatrix, by a codicil, gave "to A. and M. 50*l.* each of Bank Long Annuities, now standing in my name:" At the date of the codicil, and at her death, she possessed Long Annuities sufficient to answer this bequest specifically, but not also to satisfy certain legacies charged by the other testamentary papers upon the same stock: Evidence as to the state and value of the testatrix's property in the funds at those respective times was admitted by Lord Brougham, (reversing the decision of Sir L. Shadwell, V. C.) (*g*): On the effect of that evidence, and the language of the testamentary papers taken together, the bequests to A. and M. were held by his Lordship not to be specific, but mere pecuniary legacies, intended to be charged on the stock in question (*h*).

Debts and securities.

A debt due to the testator may be specifically bequeathed: as where there is a bequest of "the money now owing to me from A." (*i*), or "the money due to me on the bond of A.," or "*my* mortgage" (*k*), or "the interest of 7000*l.* secured on mortgage of an estate at W., in the county of N., belonging to R. T." (*l*), or "*my* East India Bonds" (*m*), or "my note owing from A." (*n*): Or where the testator, *reciting that he is possessed* of about 7000*l.* Navy Bills, gives the same to his executor, to receive the interest, and lay out the same in the funds, to such uses as his daughter shall appoint (*o*). So

(*f*) 2 Russ. & M. 689.

(*g*) 3 Sim. 563.

(*h*) See also Collison *v.* Curling, 9 Cl. & F. 88. Warren *v.* Postlethwaite, 2 Coll. 116, 121.

(*i*) Ellis *v.* Walker, Ambl. 309.

(*k*) But where a sum of money is given, and the mortgage is merely mentioned as descriptive of the then situation of the money, the legacy is general: Le Grice *v.* Finch, 3 Meriv. 50.

(*l*) Gardner *v.* Hatton, 6 Sim. 93.

(*m*) Sleech *v.* Thorington, 2 Ves. Sen. 562, 563.

(*n*) Drinkwater *v.* Falconer, 2 Ves. Sen. 623. So where the legacy is of "all such sums of money as my executors may, after my death, receive on the interest note given to me by Messrs. C., bankrupts, &c." it is specific: Fryer *v.* Morris, 9 Ves. 360.

(*o*) Pitt *v.* Camelford, 3 Bro. C. C. 160.

where the testator bequeathed to his testator "the interest arising from her husband's bond to me, for principal 3500*l.* sterling, for life, to her separate use, amounting to 175*l.* sterling per annum," and on the decease of his sister, the principal of the said bond to his four daughters, to be equally divided amongst them; Lord Thurlow decided, that the bond was specifically given (*p*).

Again where the bequest was "to my granddaughter the sum of 40*l.*, *being part of a debt* due to me for rent from A., she allowing what charges shall be expended in getting the same: Item, I bequeath to my grandsons, C. and D., the rest and residue of what is due to me from the said A., which is about 40*l.* more, in equal shares, and they allowing charges as aforesaid;" these were held specific legacies (*q*). So a legacy of "1000*l.* being some part of monies received from my debtor, Mrs. A. G. deceased, but not remitted to me," was held specific (*r*). So a gift to A. B. of "the sum of 100*l.* which said sum is owing to me by bond from her father," was held to be a specific, and not a demonstrative legacy (*s*).

But where a legacy is bequeathed *out* of a debt, it will not, generally speaking, be a regular specific legacy, but a bequest, *in the nature of a specific legacy*, or a *demonstrative* legacy, according to the distinctions already stated, with regard to legacies *out* of a particular stock (*t*). Such legacies, therefore, are, in one sense only, specific, *viz.* that against all other general legatees they have a precedency of payment out of the debt or security: but in another sense they are general, since, if the debt be not in existence at the testator's death, or if it be insufficient to pay the legacies, the legatees

(*p*) Ashburner *v.* M'Guire, 2 Bro. C. C. 108. 1 Rop. Leg. 200, 3d edit. This case has been followed by Chaworth *v.* Beech, 4 Ves. 555. Innes *v.* Johnson, 4 Ves. 568. Stanley *v.* Potter, 2 Cox, 180. But see Coleman *v.* Coleman, 2 Ves. Jun. 639.

(*q*) Ford *v.* Fleming, 1 Eq. Cas. Abr. 302, pl. 3. S. C. 2 P. Wms. 469. 1 Rop. Leg. 204, 3d edit.

(*r*) Nelson *v.* Carter, 5 Sim. 530. See also Basan *v.* Brandon, 8 Sim. 171.

(*s*) Davies *v.* Morgan, 1 Beav. 405.

(*t*) *Ante*, p. 1000. Campbell *v.* Graham, 1 Russ. & M. 453.

will be entitled to satisfaction out of the general estate of the testator (*u*). This general rule is obviously, as in the case of a legacy *out* of stock, subject to be controlled by the manifest intention of the testator, to bequeath so much of the *identical* debt (*v*).

2. Bequests connected with the realty.

2. Bequests connected with the realty. Every devise of land is specific (*w*): and so a bequest of a lease for years of a farm (*x*), or of tithes (*y*), is a specific legacy.

So a bequest of a rent out of a term of years is specific: as where the testator bequeathed 40*l.* a-year to A. for life, out of his chattel estate at Kenn, and 10*l.* a-year to B. for life, out of the same estate, which he gave to C.: these several bequests were held specific (*z*). But if it be apparent that the testator's meaning is to give the legatee *an annuity at all events*, the legacy will be a general one, though it is directed to be paid *out of* an estate or the rents of it: consequently, though the fund out of which the legacy is directed to be paid, should fail, the legatee will be entitled to have his legacy made good out of the general personal estate (*a*).

So if, instead of an annuity, a gross sum be given *out of* a term or estate, it would seem that such bequest would operate as a charge only on the property and be considered as a demonstrative legacy, *i. e.* the gift of so much money, intended for the legatee at all events, with a fund (the estate) particularly referred to for its payment; so that if the estate be not the testator's property at his death, the legacy will not fail, but be payable out of his general assets (*b*). This

(*u*) 1 Rop. Leg. 210, 3d edit. For examples, see Roberts *v.* Pocock, 4 Ves. 150. Smith *v.* Fitzgerald, 3 Ves. & Beam. 5. Acton *v.* Acton, 1 Meriv. 178. *Ante*, p. 995, note (*q*).

(*v*) Badrick *v.* Stevens, 3 Bro. C. C. 431.

(*w*) Forrester *v.* Leigh, Ambl. 173.

(*x*) Long *v.* Short, 1 P. Wms. 403.

(*y*) Rudstone *v.* Anderson, 2 Ves. Sen. 418. Hone *v.* Medcraft, 1 Bro. C. C. 263.

(*z*) Long *v.* Short, 1 P. Wms. 403: and see the extract from Reg. Lib. in Cox's note. See also 11 Cl. & F. 508, by Lord Cottenham.

(*a*) Mann *v.* Copeland, 2 Madd. 223.

(*b*) 1 Rop. Leg. 174, 3d edit.

is another instance of a bequest in the nature of a specific legacy, or a *demonstrative* legacy.

Accordingly in the case of *Willox* v. *Rhodes* (*c*), a testator gave a number of legacies, adding, "I guarantee my estate at C. for the payment of the above legacies;" and in the subsequent part of his Will, he gave many other legacies: It was holden, that his first class of legacies were not specific, and, failing the estate at C., were to be borne by the general personal estate (*d*).

But, though general legacies do not become specific, because they are charged upon, or payable out of the proceeds of real estate, yet if the testator direct his freehold or leasehold estates to be sold, and dispose of the proceeds in such a form as to evince an intention to bequeath them specifically, the legacy will be properly specific (*e*). So if a testator simply charges his real estate with a sum of money, and then bequeaths the money so charged, the real estate alone is liable to the payment (*f*). Again, if annuities are given as specific interests in the real estate, they will not be affected by a general charge of legacies; and if the land be sold for the payment of the legacies, it must be sold subject to the annuities, or if sold discharged of them, the proceeds must be subject to the same liability; inasmuch as such annuities are, as to the real estates, entitled to priority over the legacies (*g*).

3. Bequests contained in a residuary clause: The question, whether such bequests are specific or general, may become important, where it is contended that the bequest is specific, so as to exonerate the personal estate, which is the subject of it,

3. Bequests contained in a residuary clause:

Savile *v.* Blacket, 1 P. Wms. 778. Fowler *v.* Willoughby, 2 Sim. & Stu. 354. Livesay *v.* Redfern, 2 Y. & Coll. 90.

(*c*) 2 Russ. Chanc. Cas. 452.

(*d*) See Accord. Creed *v.* Creed, 11 Cl. & F. 510, by Lord Cottenham.

(*e*) Page *v.* Leapingwell, 18 Ves. 463. 1 Rop. Leg. 175, 3d edit.

(*f*) Dickin *v.* Edwards, 4 Hare, 273, 276.

(*g*) Spong *v.* Spong, 3 Bligh, N. S. 84. S. C. 1 Dow. & Clark, 365. Creed *v.* Creed, 11 Cl. & F. 491, 507.

from debts and legacies, and charge the realty therewith (*h*); or where the personal estate, so bequeathed, comprises property, which is wearing out rapidly, (such as leaseholds or Long Annuities), and it is given to one for life, remainder to another.

bequest of general personal estate:

The bequest of all a man's personal estate generally is not specific: the very terms of such a disposition demonstrate its generality (*i*). And the circumstances of the bequest of the general personal estate being in the same sentence with that of the real, the devise of which is naturally specific, will not be sufficient to make it a specific legacy (*j*).

But if a man, having personal property at A. and elsewhere, bequeath all his personal estate *at A.* to a particular person, the legacy is specific; and if there is a deficiency of assets to pay other legacies, such a legatee shall not be obliged to abate with the other legatees (*k*). So where the testator bequeaths the residue of all his personal estate *in the island of Jamaica*, this is a specific legacy (*l*); and so is a bequest of all the testator's goods and chattels in a particular country (*m*).

residuary clause containing an enumeration of particular things:

A general residuary clause is not the less general because it contains an enumeration of some of the particulars of which it may consist (*n*).——In *Taylor* v. *Taylor* (*o*), the residuary clause in a Will was, "As to all my household furniture, implements of household, implements of my trade, stock in trade, cattle, sheep, implements in husbandry, and all the rest and residue of my monies, securities for money, and personal estate whatsoever and wheresoever, not hereinbefore

(*h*) See *post*, Pt. IV. Bk. I. Ch. II. § I.

(*i*) 1 Rop. Leg. 215, 3d edit.

(*j*) 7 Ves. 138.

(*k*) Treat. Eq. B. 4, Pt. 1, Ch. 2, s. 5. Sayer *v.* Sayer, 2 Vern. 688. S. C. Prec. Chanc. 392.

(*l*) Nisbett *v.* Murray, 5 Ves. 150.

(*m*) Moore *v.* Moore, 1 Bro. C. C. 127. So of all the goods in a particular room: Green *v.* Symonds, 1 Bro. C. C. 129, *in notis*: or of "all plate, linen, and furniture in my house at A., or which shall be therein at the time of my decease:" Gayre *v.* Gayre, 2 Vern. 538. Shaftsbury *v.* Shaftsbury, *ibid.* 747. Land *v.* Devaynes, 4 Bro. C. C. 537.

(*n*) 4 Hare, 628. 1 Coll. 502.

(*o*) 6 Sim. 246.

by me disposed of, I give and bequeath the same and every part thereof, unto my said wife and my said sons, Thomas Taylor and Abraham Taylor, in equal shares and proportions; and I direct that the share or shares of both or either of my said two sons, who may be under the age of twenty-one years, shall be employed, by my executors hereinafter named, for the benefit of such son or sons during his or their minority, in such manner as my said executors shall think proper:" And Sir L. Shadwell, V. C., held, that the articles particularly named were not specifically bequeathed, but that the testator merely meant to describe the residue of which the shares were given to his sons: And his Honor observed, that supposing the things mentioned to be specifically given, this would be a direction that the executors should employ the sons' shares of those things, that is to say, of the cattle, farming implements, &c., for the benefit of his sons, which the testator could not intend; but if the gift was residuary, then the executors would convert those articles into money, and the testator might with propriety direct his executors to employ the shares of his sons for their benefit (*p*).

Residuary bequest to one for life, remainder over.

Where a testator limits his residuary property to one for life, with remainder over, it is *primâ facie* to be intended that the testator means that the same property which is given

(*p*) In Clarke *v*. Butler, 1 Meriv. 304, the testator bequeathed as follows: "As to all that my leasehold house in L——, and all my household goods and furniture there and at S——, and as to all my plate, linen, china, pictures, live and dead stock, and all the residue of my goods, chattels, and personal estate, &c., I give and bequeath the same to A.:" By a codicil he revoked the bequest, "of the residue" to A., and gave "the residue of his said personal estate" to B.: And Sir W. Grant, M. R., held, that the gift of the general residue only, and not of the articles enumerated, was revoked by this codicil. This case was distinguished from that of Taylor *v*. Taylor, (*supra*, p. 1006,) by Sir L. Shadwell, in giving his judgment in the latter, inasmuch as, in the one Will the gift was divided into two distinct sentences, and the judgment as to all the things not connected with the leasehold house, though given in a weak form, was supported by the gift in the second codicil; whereas, in the other Will, there was no division of the sentence, and the things specifically named could not be separated from those given in general terms.

to the tenant for life, should go to those entitled in remainder; and if any part of the residue be of a wasting nature, as Long Annuities or leasehold estate, in order to effectuate this general purpose of the testator, such wasting property must be sold and converted into permanent property (*q*). Yet although this intention of the testator is *primâ facie* to be inferred, it may plainly appear, upon the whole context of the Will, that the testator had not that meaning, but that his intention was, that the tenant for life should derive the same income from the residuary estate, as he himself derived from the property up to the period of his death (*r*).

Thus in *Collins* v. *Collins* (*s*), a testator gave to his wife all and every part of his property, in every shape and without any reserve, for her life; and *at her death* the property so left to be divided, one-half among certain persons mentioned, the other half to be at the sole disposal of his wife: Part of the testator's property was leasehold: And Sir J. Leach, M. R., held, that the persons, to whom a moiety of the testator's property was given over, were not entitled to have the leaseholds sold; but that the widow was entitled to enjoy it for her life, inasmuch as there was a sufficient indication of intention that she should enjoy the property in specie (*t*).

So in *Alcock* v. *Sloper* (*u*), a testator gave the residue of his estate, real and personal, to his executors, upon trust to permit his wife to receive the rents, profits, and annual proceeds thereof to her sole use during her life, and after her decease, upon trust to sell his freehold house in Oxford Street, and also his leasehold houses, by auction; and the testator desired that E. A. should be employed as auctioneer, to convert the whole of his estate into money for the purposes

(*q*) Howe *v.* Lord Dartmouth, 7 Ves. 137. Alcock *v.* Sloper, 2 M. & K. 699. Lichfield *v.* Baker, 2 Beav. 481, 486. Sutherland *v.* Cooke, 1 Coll. 498. Hinves *v.* Hinves, 3 Hare, 609, 611. Pickup *v.* Atkinson, 4 Hare, 624, 628.

(*r*) 2 M. & K. 702.

(*s*) 2 M. & K. 703. 2 Beav. 486. 3 Hare, 611. 4 Hare, 628.

(*t*) This decision was fully recognised by Lord Cottenham, in Pickering *v.* Pickering, 4 Mylne & Cr. 300.

(*u*) 2 M. & K. 699.

therein mentioned: And it was held, by Sir J. Leach, M. R., that the widow was entitled to enjoy for her life the income of the testator's Long Annuities.

Again, in *Bethune* v. *Kennedy* (*v*), the Will of Charlotte Peyton was as follows, "I give and bequeath to my cousin, Henry Van Bodicoate, 100*l.* transfer stock in the Long Annuities; the like sum to my goddaughter, Cumberbatch Charlotte Forth; the residue of my property, all I do or may possess in the funds, copy or leasehold estates, to my dear sisters, Martha Peyton and Hester Kennedy, widow, during their lives; at the decease of both of them, to be equally divided, share and share alike, between my cousins, namely, Henry Van Bodicoate, Mary Anne Bethune, and Miss Catherine Peyton, or their heirs, share and share alike: I nominate and appoint my sister Hester Kennedy, executrix to this my last Will and Testament: The testatrix died in the year 1824: After payment of the two specific legacies of Long Annuities, her residuary estate consisted, among other things, of 150*l.* per annum Long Annuities: Martha Peyton survived the testatrix only a few days: The bill was filed by two of the legatees in remainder against Hester Kennedy, the surviving tenant for life, and against other parties interested in the fund; and the sole question which it raised was, whether Hester Kennedy was entitled to enjoy the interest and dividends of the Long Annuities as a specific legacy, or whether she took the Long Annuities only as a general residuary bequest, entitling the legatees to have them converted into a permanent fund, of which Hester Kennedy should have the annual income: And it was held, by Sir C. Pepys, M. R., that the Long Annuities were to be enjoyed by the tenant for life as a specific bequest: And his Honor, in giving his judgment observed, "The question is, whether this gift to the testatrix's sisters, although contained in what, for other purposes, and in point of form, is a mere residuary clause, does not amount to a specific gift of the fund for the benefit of the

(*v*) 1 Mylne & Cr. 114.

tenants for life. Against such a construction it was contended, that the bequest to the sisters was substantially a part of the residuary clause, the effect of which was not to be altered, merely because the testatrix had chosen to introduce into it an enumeration of the particular articles of which the residue consisted, and to parcel out the interest of the different persons who were to enjoy it in succession. This question is plainly one of intention, to be collected from a careful examination of the whole scope and context of the instrument; and so it has always been considered. After a specific bequest of a part of the stock which the testatrix had, there is here a gift of all she did or might possess in the funds, copy or leasehold estates, to her dear sisters. Now as to the copyhold or leasehold estates, it is not disputed that the gift is specific. If so, why should it also not be specific with respect to the funds? The intention, it is reasonable and natural to presume, must have been the same with respect to both descriptions of property: and there can be no doubt that a bequest of all that a testator may possess in the funds, would be a specific bequest of all his funded property, the rule being that the legacy is not the less specific for being general. The true test by which to try whether a bequest is or is not specific, is to inquire what would be the result if there had been pecuniary legacies with a deficient fund, or a necessity for a sale for payment of debts,—to inquire whether or not, in such a case, the bequest would have been protected in a competition with the claims of pecuniary legatees. A party claiming under a gift of all the property that a testator possessed of a specified kind, would not, I apprehend, be bound to contribute: and there is nothing in the particular expressions employed in the Will under consideration to make a difference in that respect. Upon the terms used in this Will, therefore, which it may be observed, are plainly distinguishable from those which occurred in *Alcock* v. *Sloper* (w), I am of opinion that this is a specific bequest of

(w) *Ante*, p. 1008.

a sum invested in the Long Annuities, and to be enjoyed by the tenant for life in the state in which the testatrix left it. There is another reason for coming to that conclusion; not so strong, indeed, as existed in the case of *Alcock* v. *Sloper*, in which it formed the sole ground of Sir J. Leach's judgment, but certainly assisting and confirming the view I have already taken. In *Alcock* v. *Sloper* there was nothing in the words themselves which gave a specific character to the legacy; but his Honor considered that the gift was in a sense specific, because there was to be a specific ownership of the income of the general estate, and that the peculiar nature of the direction respecting the conversion furnished a sufficient indication ot intention that the property should continue to be enjoyed by the tenant for life as it then existed. The same inference of intention, may, I think, be drawn, though not so conclusively, from the general nature of the provisions contained in this Will."

In the subsequent case of *Pickering* v. *Pickering* (*x*), Lord Cottenham made the following observations with reference to the present subject: "All that *Howe* v. *Lord Dartmouth* (*y*) decided, and that was not the first decision to the same effect, is, that where the residue or bulk of the property is left *en masse*, and it is given to several persons in succession as tenants for life and remainder-men, it is the duty of the Court to carry into effect the apparent intention of the testator. How is the apparent intention to be ascertained if the testator has given no particular directions? If, although he has given no directions at all, yet he has carved out parts of the property to be enjoyed in strict settlement by certain persons, it is evident that the property must be put in such a state as will allow of it's being so enjoyed. That cannot be, unless it is taken out of a temporary fund and put into a permanent fund. But that is merely an inference from the mode in which the property is to be enjoyed, if no direction is given as to how the property is to be managed. It is equally clear, that if a person gives certain property specifically to one person for

(*x*) 4 Mylne & Cr. 298, 299. (*y*) 7 Ves. 137. *Ante*, p. 1007, 1008.

life, with remainder over afterwards, then, although there is a danger that one object of his bounty will be defeated by the tenancy for life lasting as long as the property endures, yet there is a manifestation of intention which the Court cannot overlook. If a testator gives leasehold property to one for life, with remainder afterwards, he is the best judge whether the remainder-man is to enjoy. The intention is the other way, so far as it is declared, and the terms of the gift, as a declaration of intention, preclude the Court from considering that he might have meant that it should be converted. Those two kind of cases are free from difficulty, but other cases of very great difficulty may occur in which it may be very doubtful whether the testator has left property specifically, but in which there are expressions which raise the question whether the property is not to be enjoyed specifically; for, as the Master of the Rolls appears to have observed in the present case, the word 'specific,' when used in speaking of cases of this sort, is not to be taken as used in its strictest sense, but as implying a question whether, upon the whole, the testator intended that the property should be enjoyed in specie. Those are questions of difficulty, because the Court has to find out what was the intention of the testator as to the mode of management, and as to the mode of enjoyment" (z). His Lordship further observed, in the course of his judgment, that great injustice would be done, if where there is nothing in the Will but a tenancy for life and a remainder, it was always to be held, that the property is to be at once converted: That the principle uniformly adopted in acting upon *Howe* v. *Lord Dartmouth* was, to take that as a case applicable to circumstances such as existed in that case, where they are found to exist, and not controlling cases where a contrary intention is to be found in the Will: And his Lordship considered it quite as well settled as *Howe* v. *Lord Dartmouth* itself is, that when you find an indication of intention that

(z) See Daniel *v.* Warren, 2 Y. & Coll. Ch. C. 290, 293, per Knight Bruce, V. C. Accord.

the property is to be enjoyed in its existing state, it shall be so enjoyed.——Further instances, in which the Will has been held to express sufficiently an intention that the property as it existed at the death of the testator, shall be enjoyed *in specie* in succession, so as to control the general rule, will be found collected in the note below (*a*).

On the other hand, in *Mills* v. *Mills* (*b*), the testator gave all his freehold and leasehold messuages, lands, and hereditaments, ready money, securities for money, stock in the public funds, goods, chattels, and effects, and all other his real and personal estate and effects, to trustees, in trust to pay the rents of his freehold and leasehold estates, and the dividends, interest, and proceeds of his money in the funds and other his said personal estate to his daughter for life, and after her death, to stand possessed of his said freehold and leasehold estates, money in the fnnds, and all other his said real and personal estate, for the children of his daughter, and in default of such children, in trust to pay the rents of his said freehold and leasehold estates, and the dividends, interest, and proceeds of his said stock in the funds, and other his said personal estate, to his nephews, for their lives, and after their deaths, in trust to stand possessed of his said freehold and leasehold estates, money in the funds, and other his said personal estate for their children; and, in default of such children, he gave his said freehold and leasehold estates, stock in the public funds, and all other his said real and personal estate to the corporation of S., in trust, as soon as conveniently might be after they should come into possession thereof, to sell his said freehold and leasehold estates, and also to sell, call in, and convert into money his said stocks in

(*a*) Goodenough *v.* Tremamondo, 2 Beav. 512. Vaughan *v.* Buck, 1 Phill. Ch. C. 75. Harvey *v.* Harvey, 5 Beav. 134. Daniel *v.* Warren, 2 Y. & Coll. Ch. C. 290. Oakes *v.* Strachey, 13 Sim. 414. Cockran *v.* Cockran, 14 Sim. 248. Hinves *v.* Hinves, 3 Hare, 609; in which last case Wigram, V. C., observed, that the Court, in applying the rule, has leant against conversion as strongly as is consistent with the supposition that the rule itself is well founded. 3 Hare, 611, 612.

(*b*) 7 Sim. 501.

the public funds, and all other his said personal estate, and to lend the same to certain persons upon the terms therein mentioned: The testator, at the date of his Will, and at his death, was possessed of leasehold estates, turnpike securities, Bank stock, and other personal estate: And Sir L. Shadwell, V. C., held, that the bequest to the trustees was a general residuary bequest, and that the leaseholds and Bank stock ought to be sold, and the proceeds invested in the three per cents.; and an inquiry was directed, whether the turnpike securities were real and permanent securities.

So in *Lichfield* v. *Baker* (*c*), a testator, possessing Long Annuities and money in different funds, bequeathed the residue of his estate to A. for life, and, after her death, he gave certain stock legacies, and whatever there might remain, to B.: And it was held by Lord Langdale, M. R., that the Long Annuities ought to be converted for the benefit of the parties in remainder.

Further instances, in which the context of the Will has been held not to contain a sufficient indication of intention to control the general rule, will be found collected in the note below (*d*).

Sect. IV.

Of the Description of Legacies.

The object of this Section is to inquire, to what property legatees are entitled under particular modes of description of the thing bequeathed.

"Goods:"

"Goods," "chattels." The word "goods" is *nomen generalissimum:* and, when construed in the abstract, will comprehend all the personal estate of the testator, as Stock, bonds, notes, money, plate, furniture, &c. (*e*) And a bequest of all

(*c*) 2 Beav. 481.

(*d*) Benn *v.* Dixon, 10 Sim. 636. Sutherland *v.* Cooke, 1 Coll. 498. Pickup *v.* Atkinson, 4 Hare, 624.

(*e*) Ryall *v.* Rolle, 1 Atk. 180, 182. Crichton *v.* Symes, 3 Atk. 62. Anon. 1 P. Wms. 267. Moore *v.* Moore, 1 Bro. C. C. 128. Kendall *v.* Kendall, 4 Russ. Chanc. Cas. 370.

the testator's "chattels" will have the same effect as a bequest of all his "goods and chattels" (*f*). So the word "effects," standing alone, will pass the whole of the testator's residuary estate (*g*).

"chattels:" "effects:"

But where the bequest is of "all my goods" (or "of all my chattels") *at a particular place*, the legacy is restricted to such things only as *savour of locality*, as furniture not attached to the freehold, plate, linen, Bank-notes, and ready money (*h*). And under such a bequest, bonds, and other *choses in action* do not pass (*i*). Nor will they pass by a bequest of "all things" in a particular house (*k*). It has been suggested, indeed, that exchequer notes, promissory notes payable to the bearer, exchequer bills, and bills of exchange indorsed in blank, being, according to modern decisions in the Courts of Law, considered rather as money in possession than *choses in action*, might pass under such a bequest as well as Bank-notes (*l*). However, in *Stuart* v. *Bute* (*m*), Lord Eldon said, "I have seen Lady Aylesbury's case, which is also mentioned by Lord Mansfield in *Miller* v. *Race* (*n*), but has never been cited accurately: It was a bequest of 'my house, and all that shall

(*f*) Co. Lit. 118, *b*. Swinb. Pt. 7, s. 10, pl. 8. Kendall *v*. Kendall, 4 Russ. Chanc. Cas. 370.

(*g*) Campbell *v*. Prescott, 15 Ves. 507. Hogan *v*. Jackson, Cowp. 304. Michell *v*. Michell, 5 Madd. 71, 72. Hearne *v*. Wigginton, 6 Madd. 119. Parker *v*. Marchant, 1 Y. & Coll. Ch. C. 290. See Ponton *v*. Dunn, 1 Russ. & M. 402, as to the testator's interest in a partnership concern.

(*h*) Countess of Aylesbury's case, cited by Lord Hardwicke, in Chapman *v*. Hart, 1 Ves. Sen. 273. S. C. Ambl. 68. Green *v*. Symonds, 1 Bro. C. C. 129, *in notis*.

(*i*) *Ibid.* Moore *v*. Moore, 1 Bro. C. C. 127. Jones *v*. Sefton, 4 Ves. 166. Hertford (Lord) *v*. Lowther (Lord), 7 Beav. 1.

(*k*) Popham *v*. Lady Aylesbury, Ambl. 68. So in Fleming *v*. Brook, 1 Scho. & Lefr. 318, where the bequest was of all testator's property in A.'s house, *except a particular bond*, Lord Redesdale held that, in spite of the inference to be drawn from the exception, *choses in action* generally did not pass: This decision has been doubted: See 1 Rop. Leg. 231, 3d edit. Hotham *v*. Sutton, 15 Ves. 319: *Infra*, p. 1019. But it appears to be recognised by Lord Cottenham, in Arnold *v*. Arnold, 2 Mylne & K. 374.

(*l*) 1 Rop. Leg. 224, 225, 3d edit. citing Collins *v*. Martin, 1 Bos. & Pull. 648. Wookey *v*. Pole, 4 B. & A. 1. See *ante*, p. 656.

(*m*) 11 Ves. 662. S. C. in Dom. Proc. 1 Dow. 73.

(*n*) 1 Burr. 457.

be in it at my death:' Lord Hardwicke held that cash passed, and Bank-notes, which Lord Hardwicke there, I do not know why, considered as cash, but not promissory notes and securities, as they were the evidence of title to things out of the house, and not things in it: Bank-notes I think just in the same situation." In *Brooke* v. *Turner* (o), a testatrix bequeathed to her niece, her pictures and her collection of coins (except those of the two last and present kings) in and about her dwelling-house; and all the residue of her estate, both real and personal, (except as otherwise disposed of) she gave to her grandchildren; and she directed that, from and after the day of her interment, all the property over which she had any disposing power, in and about her dwelling-house (except what she had otherwise given) should belong to her niece, and not be subject to diminution except by her personal act and authority: After the testatrix's death, guineas, sovereigns, Bank of England, country bank, and promissory notes and a mortgage, to a large amount, in the whole, were found in her house: And Sir L. Shadwell, V. C., held, that the niece (notwithstanding an annuity and a sum in gross were given to her by the Will) was entitled to the guineas and sovereigns, and also to the Bank of England notes, but not to the country bank or promissory notes, or the mortgage: His Honor observed, that Lord Hardwicke held that Bank of England notes passed under the bequest in *Lady Aylesbury's Case*, and that Lord Eldon, though he expressed a doubt as to the principle of that decision, did not expressly overrule it (p). Again, in *Lord Hertford* v. *Lord Lowther* (q), it was held by Lord Langdale, M. R., that a bequest of "all the goods and chattels, plate, linen, "money at the bankers, or stock in the Monte de Milano, "linen, horses, carriages, &c., I may die possessed of at "Milan," did not pass Polish certificates and Neapolitan bordereaux (being government obligations) there situate,

(o) 7 Sim. 671.

(p) See also Lord Redesdale's judgment in Fleming v. Brook, 1 Scho. & Lefr. 319, and Lord Langdale's in Lord Hertford v. Lord Lowther, 7 Beav. 9.

(q) 7 Beav. 1.

entitling the bearer to receive the interest and capital at a future time; inasmuch as the authorities determine, that, in such cases, *choses in action*, except Bank-notes, are not to be considered as having the locality of the places where the securities are. It was further held, that such securities could not be considered as money or cash: And that, not having their locality at Milan, they did not pass under the words "&c. at Milan." This decision was affirmed on appeal to the Lord Chancellor (*r*).

In *Read* v. *Stewart* (*s*), Sir John Leach, M. R., held, that a bequest of a cabinet, "with whatever it contains, except money," would not pass a promissory note payable to the testatrix of a date anterior to the Will, and which, at her death, was found in the cabinet, it not appearing whether the note was in the cabinet at the date of the Will.

"household goods:"

By the term "household goods," everything of a permanent nature, *i. e.* articles of household which are not consumed in their enjoyment, that were used in, or purchased, or otherwise acquired by a testator, for his house, will pass to the legatee (*t*). But goods in his house, which are also goods in the way of his trade or business, will not pass: as where the testator, under a contract with government, was possessed of seven hundred beds, which he employed in entertaining sick and wounded seamen of the royal navy (*u*).

Plate will pass by this term (*v*): and it should seem that it is not of any consequence whether the plate was in common use or not, provided it were suitable to the situation and quality of the testator (*w*).

(*r*) See 7 Beav. Addenda et Corrigenda.

(*s*) 4 Russ. Chanc. Cas. 69.

(*t*) 1 Rop. Leg. 225, 3d edit.

(*u*) Pratt *v.* Jackson, 2 P. Wms. 302. S. C. in error, 1 Bro. P. C. 222, Toml. edit.

(*v*) Lillcott *v.* Compton, 2 Vern. 638. Flay *v.* Flay, 2 Freem. 64. S. C. 2 Eq. Cas. Abr. 318. Masters *v.* Masters, 1 P. Wms. 425. Nicholls *v.* Osborn, 2 P. Wms. 421. Budgen *v.* Ellison, 1 P. Wms. 425, *in margine.* Snelson *v.* Corbett, 3 Atk. 370.

(*w*) Kelly *v.* Powlet, Ambl. 605. S. C. 1 Dick. 359, approved by Lord Alvanley in Porter *v.* Tournay, 3 Ves. 313. But the judgments in all the older cases rely on the plate being commonly used by the family.

But articles found in the house whose use is in their consumption, as malt, hops, or victuals, will not pass (*x*). Nor will guns and pistols pass, if used in riding and shooting of game, though they may in some sense be for defence of the house: but a clock in the house, if not fixed thereto, will be included in the words "household goods" (*y*).

"Goods and chattels, &c. *in and about the house*:"

Where the testator directed that all his plate, furniture, household goods, &c. &c. and other "*goods and chattels*," &c. &c. which should be *in and about his dwelling-house and outhouses* at A. at his death, should be enjoyed by such person as should be entitled to his estate under his son's marriage settlement; Lord Henley held that running horses were within the words (*z*).

In another case, the testator bequeathed to Lady S. all the residue of his *personal estate and effects*, except such part as should be *in and about his house* at C., which part he gave to his son, and directed the household furniture to go as heir-looms: In an iron chest at C., in which the steward kept the cash, was found a bond for arrears of rent, and the sum of 379*l.* 2*s.* 9*d.* in cash: Lord Loughborough decided that the bond and cash did not pass to the son (*a*).

"Goods" and other general words restricted by the context.

The words "goods," "chattels," and other general terms, if coupled with other words of a limited signification, will be restrained to things *ejusdem generis*. Thus, where the testator bequeathed to his niece all his *goods*, *chattels*, household stuff, furniture, and *other things*, which should be in his house at A., it was decreed that cash found there at the testator's house did not pass; for by the word "other things" should be intended things of like nature and species with those before specified (*b*).

(*x*) Slanning *v.* Style, 3 P. Wms. 334.

(*y*) *Ibid.* See also Cole *v.* Fitzgerald, *infra*, p. 1022.

(*z*) Gower *v.* Gower, Ambl. 61. S. C. 2 Eden, 201.

(*a*) Jones *v.* Lord Sefton, 4 Ves. 166.

(*b*) Trafford *v.* Berrige, 1 Eq. Cas. Abr. 201, pl. 14. See for other instances, Cook *v.* Oakley, 1 P. Wms. 302. Boon *v.* Cornforth, 2 Ves. Sen. 279. Woolcomb *v.* Woolcomb, 3 P. Wms. 112. Timewell *v.* Perkins, 2 Atk. 103. Crichton *v.* Symes, 3 Atk. 61. Cavendish *v.*

But where the bequest was of all the testatrix's plate, linen, household goods, and *other effects, money excepted,* Lord Eldon held, that although it was now settled that the words "other effects" mean, in general, effects *ejusdem generis,* yet in this case all the residuary estate, (including leaseholds, stock, a promissory note, jewels, wearing apparel, a carriage, wines, &c.) except money should pass: for the disposition, by reason of the express exception, must be taken to comprehend all that *she had not excluded,* which was money only (*c*).

Several other authorities may be found, which shew that this rule is not of universal application (*d*).

In *Kendall* v. *Kendall* (*e*), it was holden by Lord Lyndhurst that a bequest of "all monies, *goods, chattels, clothing, &c.,* my property, which may remain after paying my funeral expenses and debts," would pass the testator's interest in stock and money, inasmuch as the words "monies, goods, and chattels," would pass the whole personal estate including stock, and the introduction of the words "clothing, &c." was not for the purpose of qualifying the former terms, but resulted from the anxiety of the testator to enumerate every species of property which occurred to him.

So in *Arnold* v. *Arnold* (*f*), the testator by a Will executed in India, where he and his family then resided, bequeathed, among other legacies, "to my dear wife 1000*l.* sterling; also my wines and property in England:" The Master found, by a special report, that the testator's property in England at the time of his decease, consisted of the following particulars; *viz.* a sum of 734*l.* 17*s.* 6*d.*, being cash and

Cavendish, 1 Bro. C. C. 467. S. C. 1 Cox, 77. Rawlings *v.* Jennings, 13 Ves. 39, 46. Sutton *v.* Sharp, 1 Russ. Chanc. Cas. 146. Collier *v.* Squire, 3 Russ. Chanc. Cas. 467. Lamphier *v.* Despard, 2 Dr. & Warr. 59. See also the judgment of Knight Bruce, V. C., in Parker *v.* Marchant, 1 Y. & Coll. Ch. C. 301—304.

(*c*) Hotham *v.* Sutton, 15 Ves. 319. See Brooke *v.* Turner, *ante,* p. 1016.

(*d*) Parker *v.* Marchant, 1 Y. & Coll. Ch. C. 290, 301, 302.

(*e*) 4 Russ. Chanc. Cas. 360. See also Fleming *v.* Burrows, 1 Russ. Chanc. Cas. 276.

(*f*) 2 M. & K. 365.

bills in the hands of his bankers; certain wines which the executors had subsequently given up to the testator's widow; a box containing wearing apparel; the sum of 800*l.* 10*s.* 1*d.*, new four per cent. annuities standing in the names of trustees; the sum of 36*l.* 18*s.* 6*d.* the arrears of a pension payable out of the Exchequer; the sum of 50*l.* due on the balance of an account; and a reversionary interest in the dividends to accrue on the sum of 1715*l.* 12*s.* in the three per cents. during the life of another person: On the one side it was contended that the widow, under this bequest of the testator's wines and property in England, took nothing but the box of wearing apparel, on the ground of there being nothing else among the several articles and property in England *ejusdem generis* with the wines: On the other side it was insisted that the terms were general, and applied to every description of property to be found existing in England at the time of the testator's decease; and it was argued, on the part of the widow, that the bequest of the testator's wines could not be considered as limited to wines in England, but that it included all his wines, wherever existing: Lord Cottenham held, that the wines, as well as the property subsequently spoken of, were limited to the locality of England; but that the widow took all the several descriptions of the testator's property which the Master had reported to have been in England at the time of his death: And his Lordship observed, that the mere enumeration of particular articles, followed by a general bequest, obviously did not of necessity restrict the general bequest; because a testator often throws in such specific words, and then winds up the catalogue with some comprehensive expression, for the very purpose of preventing the bequest from being so restricted: The learned Judge added, that he had been unable to discover any instance in which the word "property" had been confined to articles of the description before enumerated, unless where other expressions occurred from which it was clear that the word was not there used in its ordinary sense.

Again, the word "effects," when inserted in a *residuary*

disposition, will not be confined to articles *ejusdem generis* with those preceding it: Thus where the bequest was of all the testator's sugar-house, &c. stock, with jewels, plate, household goods, furniture, and *all effects whatsoever*, the general residue passed (*g*).

An instance of the restraint of general words by the context may be adduced in the doctrine, that, where the legatee has a *money legacy*, this circumstance is to be considered as clearly manifesting an intention to confine the import of the word "goods" or the like, so as to prevent it passing ready money (*h*).

"Household furniture:"

"Household Furniture:" By this expression, all personal chattels will pass that may contribute to the use or convenience of the householder, or the ornament of the house (*i*), as plate, linen, china, both useful and ornamental, and pictures (*k*): But goods or plate in the possession of the testator in the way of his trade, will not pass (*l*): nor books (*m*): nor wines (*n*).

In *Paton* v. *Sheppard* (*o*), it was held by Shadwell, V. C., that a bequest of household furniture would pass *fixtures* belonging to the testator, in a leasehold house (*p*).

In *Cremorne* v. *Antrobus* (*q*), a testator by his Will bequeathed his leasehold dwelling-house, together with all his

(*g*) Campbell *v.* Prescott, 15 Ves. 500. Mitchell *v.* Mitchell, 5 Madd. 69. 1 Rop. Leg. 250, 251, 3d edit. See also Parker *v.* Marchant, 1 Y. & Coll. Ch. C. 290. Midland Counties Railway *v.* Oswin, 1 Coll. 74.

(*h*) Roberts *v.* Kuffin, 2 Atk. 113. See Brooke *v.* Turner, *ante*, p. 1016.

(*i*) By Sir T. Clarke, M. R., in Kelly *v.* Powlet, Ambl. 610. See also Cole *v.* Fitzgerald, 1 Sim. & Stu. 189. S. C. 3 Russ. Chanc. Cas. 301.

(*k*) Ambl. 611. See *ante*, p. 1017, as to plate. Whether a bust will pass under the words "household goods, furniture, fixtures," *quære*; See Willis *v.* Curtois, 1 Beav. 189.

(*l*) Le Farrant *v.* Spencer, 1 Ves. Sen. 97.

(*m*) Bridgman *v.* Dove, 3 Atk. 202. Kelly *v.* Powlet, Ambl. 611. Porter *v.* Tournay, 3 Ves. 311.

(*n*) Porter *v.* Tournay, 3 Ves. 311.

(*o*) 10 Sim. 186.

(*p*) In Slanning *v.* Style, 3 P. Wms. 336, Lord Talbot held, that the clock of the house, *if not fixed to it*, was included in a bequest of household goods. See *ante*, p. 1018.

(*q*) 5 Russ. 312.

pictures, prints, drawings, or paintings in miniature or enamel, with all his gold and silver coins, medals, watches, and trinkets, of every kind whatsoever; as also his coaches, carriages, harness, and furniture to the same belonging; and also, all and singular the fixtures appurtenant to his said leasehold messuage, together with the household furniture, plate, linen, wines, liquors, and other his estate and effects whatsoever, in and about the same, and that should be in his possession at the time of his decease, or in and about his said dwelling-house, or the outhouses and offices appurtenant thereto, and by him held, used, occupied, and enjoyed therewith: By a codicil he made a different disposition of the house, "with all its furniture and appurtenances thereunto belonging:" It was held by Lord Lyndhurst, that pictures placed in the house as ornamental furniture, and the plate and linen, passed by the codicil; but that the codicil had no operation on the disposition made by the Will of the books, the gold and silver coins, trinkets, and things of that nature.

"Fixed furniture:"

In *Birch* v. *Dawson* (*r*), A. bequeathed his leasehold messuage, with the grates, stoves, coppers, locks, bolts, keys, bells, and other fixtures, and fixed furniture, to V. for life; and the household goods, furniture, plate, linen, china, books, wines, and liquors, and other properties in the messuage, not being comprehended under the preceding terms, *fixtures and fixed furniture*, to V. absolutely: There were in the messuage, looking-glasses, standing on chimney pieces, and nailed to the wall; and a book-case standing on (but not fastened to) brackets, and screwed to the wall: And the Court of King's Bench held, that V. took only a life interest in these, because they came within the term "fixed furniture."

"Household effects:"

In *Cole* v. *Fitzgerald* (*s*), it was held by Sir John Leach, V. C., that the words "household furniture and other household effects, of or belonging to the testator's dwelling-house and premises at his decease," comprised all property in the house or on the premises intended for use or consumption

(*r*) 2 Adol. & Ell. 37. (*s*) 1 Sim. & Stu. 189.

therein, or for ornament thereof; and that it included pistols, apparatus for turning, models, pictures, an organ, a parrot, books (*t*), wine, and liquors; but not a pony, cow, or fowling-pieces, unless it was proved they were kept for defence of the house; If a hay-stack was only for use, it would pass; if for sale, it would not: And this decision was afterwards affirmed by Lord Lyndhurst (*u*).

In *Fitzgerald* v. *Field* (*v*), the testator directed that his household furniture, &c., and utensils in and about his mansion-house at H. should go with the mansion-house, and that for that purpose, his trustees should make an inventory of the furniture, &c., and utensils, which should be found in and about his mansion-house and premises at the time of his decease: It was holden that those words did not pass farming utensils on lands at H. occupied by the testator along with the mansion-house.

"Stock on farm:"

"Stock on farm:" By this term, not only all *moveable* property upon or belonging to the farm will pass; but also, as it should seem, growing crops (*w*); and in one case, from the context, it was held to include stock in the malt trade (*x*).

In *Steward* v. *Cotton* (*y*), a testator devised a farm to his wife for life, remainder to A. in fee, with all the stock which should be on it at the time of his decease, which it was his will should be kept up by his wife during her life, and go along with the farm; and he bequeathed the residue of his estate and effects, real and personal, to his wife absolutely:

(*t*) So books will pass under a bequest of "other articles of domestic use and enjoyment." Cornwall *v*. Cornwall, 12 Sim. 303.

(*u*) 3 Russ. Chanc. Cas. 301. According to the latter reporter, the Vice Chancellor declared that the parrot did not pass.

(*v*) 1 Russ. Chanc. Cas. 427.

(*w*) Cox *v*. Godsalve, 6 East, 604, note. West *v*. Moore, 8 East, 399. But see Vaisey *v*. Reynolds, 5 Russ. 12. *Ante*, p. 601, note (*l*).

(*x*) Brooksbank *v*. Wentworth, 3 Atk. 64. As to what will pass by "Live and dead stock," see Porter *v*. Tournay, 3 Ves. 313. Randall *v*. Russell, 3 Meriv. 190. 1 Rop. Leg. 245, 3d edit. As to what passes by a bequest of "Stock in Trade," see Elliott *v*. Elliott, 9 M. & W. 23.

(*y*) 5 Russ. 17, *in notis, coram* Willis, Justice, and Masters Holford, Browning, and Orde.

The testator died in July: The wife, having severed the growing crops and stacked them on the farm, died in the following September, when the remainder-man entered and took possession both of the farm and of the crops which had been so severed: And it was held, that the personal representative of the wife was entitled to those crops.

"Utensils:"

"Utensils." Under this term plate or jewels will not pass, according to the opinion of the Judges, in *Dame Latimer's Case* (z).

"Money:"

"Monies." Where a testator gives to one person "all his monies in hand," and to another "all his monies out on securities," the balance at his banker's will pass as money in hand (a). Under a bequest of all the testator's "money" in his house at A., bank notes and ready money will alone pass, although he may leave in it mortgages, bonds, or receipts for government annuities (b). However, where the testator bequeathed all his *money* in the Bank of England, and never had any cash in the Bank, but was entitled to some three per cents. and five per cents. Bank annuities, Sir Wm. Grant, M. R., held, that the stock passed (c).

But though, upon the whole context of the Will, stock may pass by the term "money" (d), yet *money* does not, by the force of the word, include *stock* (e).

(z) Dyer, 59, pl. 15.

(a) Vaisey *v.* Reynolds, 5 Russ. 12. See also Accord. Parker *v.* Marchant, 1 Y. & Coll. Ch. C. 290, affirmed 1 Phill. Ch. C. 356. But the expression "*cash or* monies *so called*," was held not to include a promissory note payable to the testator or order, or Long Annuities, or Colombian Bonds. Beales *v.* Crisford, 13 Sim. 592. So also Fryer *v.* Ranken, 11 Sim. 55. Smith *v.* Butler, 1 Jones & Lat. 692.

(b) 1 Rop. Leg. 252, 3d edit. Downing *v.* Townsend, Ambl. 280. *Ante*, p. 1015.

(c) Gallini *v.* Noble, 3 Meriv. 691. See Benson *v.* Whittam, 2 Sim. 493, as to a bequest of "money in the hands of any banker." See also Howell *v.* Gayler, 5 Beav. 157.

(d) See Legge *v.* Asgill, (1 Turn. & Russ. 265, note,) as cited by Sir J. Leach, M. R., in Kendall *v.* Kendall, 4 Russ. Chanc. Cas. 369.

(e) Ommanney *v.* Butcher, 1 Turn. & Russ. 272, by Lord Eldon. Gosden *v.* Dotterill, 1 M. & K. 56. Willis *v.* Plaskett, 4 Beav. 208. So it was held by Lord Langdale, M. R., in Douglas *v.* Congreve, 1 Keen, 410, that a legacy of a sum of stock did not fall within the description of "pecuniary legacies."

In *Hastings* v. *Hane* (*f*), a testator, after giving specific and pecuniary legacies, willed that A. and B. should divide, equally, any *monies* which might remain to his account after payment of his debts and pecuniary legacies: The testator, at the date of his Will and at his death, had money accounts subsisting between him and his bankers, and other persons: And Sir L. Shadwell, V. C., held, that the bequest did not pass his residuary estate, but only the balances due on those accounts, subject to the debts and legacies.

The result of the cases seems to be, that, although a simple bequest of "money" will not of itself pass stock, yet the word "money," may be so used in a Will, as from the whole context to shew that the testator meant it to pass stock and other personal estate; and when the intention can be clearly collected, the Court will act upon it. Thus in *Dowson* v. *Gaskoin* (*g*), a testatrix, whose personal property consisted chiefly of stock, after bequeathing a number of pecuniary and specific legacies, and giving certain directions as to her funeral, gave 200*l.* to each of her executors for their trouble, and bequeathed whatever remained of *money* to the five children of E. D.: And Lord Langdale, M. R., held, that by the words, "whatever remains of money," the testatrix referred to her general residuary personal estate. Again, in *Rogers* v. *Thomas* (*h*), a testatrix, whose property consisted chiefly of stock in the public funds, after giving various legacies of sums of money, gave and bequeathed to the inhabitants of Tawleaven Row, all which might remain of her *money* after her lawful debts and legacies were paid: And the same learned Judge held, that the persons found to be inhabitants of Tawleaven Row were entitled to the residue of the testatrix's general personal estate. So in *Glendening* v. *Glendening* (*i*), where a testator bequeathed to his wife the interest of his *money* and the use of his goods for life; and at her death he gave certain legacies and the remainder of his property to his brothers and sisters; and at his death the

(*f*) 6 Sim. 67.
(*g*) 2 Keen, 14.
(*h*) 2 Keen, 8.
(*i*) 9 Beav. 324.

principal part of his property consisted of money in the funds; it was held by the same Judge, that the widow was entitled to the residue for life.

"Money in the funds:"

"Money in the Funds." In a case where a testator directed all his property, *except ready money, or money in the funds*, to be converted into money, and the clear monies arising from such conversion to be invested in the names of the executors in 3*l.* per cent. consols, or "other government securities" in England; it was held by Knight Bruce, V. C., that Greek bonds, though guaranteed by this country, were not comprehended in the word "funds;" and that they were a proper subject of conversion under the terms of the Will (*k*).

"Securities for money:"

"Securities for Money." If there be nothing in the Will to control the force of this expression, stock in the funds will pass by it (*l*): but it seems doubtful whether it will include Bank stock, that being property wherein the owner is interested as a partner in a public trading company (*m*).

It has been held that an I. O. U. given to the testator for goods sold by him was not a "security for money," within the meaning of a bequest of "all my money and securities for money" (*n*).

In *Galliers* v. *Moss* (*o*), the testator bequeathed to his executors, by a residuary clause, all his stock in trade, ready money, *securities for money*, personal estate, and effects of what nature and kind whatever, in trust that they or the survivor, or the heirs, executors, administrators, &c. of such survivor, should sell the same, and invest the produce in the purchase of freehold estate: The Court of K. B. was of opinion, that the legal estate in lands, of which the testator was seised as mortgagee, did not pass to the executors by the words "securities for money." But in the previons case of

(*k*) Burnie *v.* Getting, 2 Coll. 324. See Montresor *v.* Montresor, 1 Coll. 693.

(*l*) Bescoby *v.* Pack, 1 Sim. & Stu. 500.

(*m*) *Ibid.* See Dicks *v.* Lambert, 4 Ves. 725.

(*n*) Barry *v.* Harding, 1 Jones & Lat. 475. In this case, Sugden, C., of Ireland, said that a bill of exchange or promissory note is a security for money, in the legal and proper sense of the words.

(*o*) 9 B. & C. 267.

Renvoise v. *Cooper* (*p*), Sir J. Leach, V. C., held, that a residuary clause of personalty, including the words "mortgages and *other securities for money*," passed the legal fee. And on a subsequent occasion, in *Ex parte Barber* (*q*), it was held by Sir L. Shadwell, V. C., that a devise of all the testator's freehold estates, and all his farming stock, ready money, bills, bonds, notes and other *securities for money*, and all the residue of his personal estate, to trustees, *their heirs*, executors, &c., in trust to sell his real estates, and to sell, get in, and convert into money all his personal estate, would pass a mortgage in fee. Again in *Mather* v. *Thomas* (*r*), it was held by the same learned Judge, in conformity with a certificate by the Judges of the C. P. on a case sent by his Honor for their opinion, that a devise of all messuages, buildings, chattels real, ready money, *securities for money*, debts owing, and personal estate, save what were before otherwise disposed of, to trustees and *their heirs*, in trust to pay the rents and profits to C. for life, and after his decease to divide such residue among the children of J. C., would pass lands vested in the devisor as mortgagee in fee.

"Interest" or "dividends" of a particular fund.

Where the "Interest" or "produce" of a fund is bequeathed to a legatee, or in trust for him, *without any limitation as to continuance*, the principal will be regarded as bequeathed also (*s*): Thus an indefinite gift of the dividends gives the absolute property of the stock (*t*).

"Annuity:"

But there is a marked distinction between the gift of the produce of a fund without limit as to time, and a simple gift of an annuity. An annuity may be perpetual, or for life, or for any period of years; but, in the ordinary acceptation of the term

(*p*) 6 Madd. 371.

(*q*) 5 Sim. 451.

(*r*) 6 Sim. 115. 10 Bing. 44. 3 M. & Sc. 687.

(*s*) Elton *v.* Sheppard, 1 Bro. C. C. 532. Philipps *v.* Chamberlaine, 4 Ves. 51. Rawlings *v.* Jennings, 13 Ves. 39. Adamson *v.* Armitage, 19 Ves. 418. S. C. Cooper, 283, 284. Stretch *v.* Watkins, 1 Madd. 253. Clough *v.* Wynne, 2 Madd. 188. Haig *v.* Swiney, 1 Sim. & Stu. 490. Hawkins *v.* Hawkins, 7 Sim. 178. Clarke *v.* Gould, *ibid.* 197. See also, *ante*, p. 697, note (*b*). But see Cooke *v.* Bowler, 2 Keen, 54. M'Donald *v.* Bryce, *ibid.* 517.

(*t*) Page *v.* Leapingwell, 18 Ves. 463. Haig *v.* Swiney, 1 Sim. & Stu. 487, 490.

used, if it should be said that a testator had left another an annuity of 100*l.* per annum, no doubt would occur of the gift being an annuity for the life of the donee (*u*). Accordingly it is held, that a simple gift of an annuity to A. does not give an annuity beyond the life of A. (*v*). So it was decided by Knight Bruce, V. C., in *Wilson* v. *Maddison* (*w*), that a bequest of 30*l.* a year "from the interest of my funded money in the Bank of England," did not amount to a bequest of so much stock as would produce that annual sum, but constituted an annual charge of 30*l.* upon the funded property for the life of the legatee; His Honor observing that what the testator gave was an annuity of 30*l.* a year charged on the stock; not an annuity of 30*l.* a year, part of the stock.

Still where, in effect, the bequest is a gift of property which will produce the amount of the annuity, or, in other words, where the Will dedicates the *corpus* of a fund to the purchase of the annuity, it is a gift in perpetuity (*x*). So where the Will deals with the annuity as being in existence and operative beyond the period of the life of him who is first to enjoy it, and no other period can be fixed for such further duration short of making it perpetual (*y*), the annuity must be considered as given in perpetuity; that is to say, it is a bequest of so much property as will produce the income which the testator prescribes as the amount of the gift he intends for the legatee.

Bequest to purchase annuity for life of legatee.

It may be here mentioned, that it is established by several cases (*z*), that where money is bequeathed to be invested in the purchase of an annuity for the life of the legatee, and the legatee dies before it is laid out, or even before the fund is available, as during the life of the person after whose death

(*u*) 1 Cr. & Ph. 280.

(*v*) Blewitt *v.* Roberts, 1 Cr. & Ph. 274, overruling the decree of the V. C., 10 Sim. 491, and also *semble*, Tweedale *v.* Tweedale, 10 Sim. 453.

(*w*) 2 Y. & Coll. Ch. C. 372.

(*x*) Stokes *v.* Heron, 12 Cl. & F. 161. 2 Dr. & Warr. 89.

(*y*) 12 Cl. & F. 194. Robinson *v.* Hunt, 4 Beav. 451.

(*z*) Yates *v.* Compton, 2 P. Wms. 309. Barnes *v.* Rowley, 3 Ves. 482. Palmer *v.* Craufurd, 3 Swanst. 305.

the investment is to be made (*a*), yet still it is a vested legacy, from the death of the testator, and the sum will belong to the personal representatives of the legatee: And it is further established, that the legatee for whose benefit it was intended, having survived the testator, may elect either to take the sum, or to have it laid out in an annuity (*b*).

"Debts:"

"Debts." Under a bequest of "whatever debts may be due to me at the time of my death," it has been held, that a bill of exchange, drawn in the testator's favour, and delivered by him to his banker, and a cash balance in his banker's hands, passed to the legatee (*c*).

But, where a testator bequeathed all his ships and money due to him at the time of his decease, to A. B., it was held that freight earned by a ship under a charter-party executed after the date of the Will, and in respect of a voyage not completed until after the testator's death, did not pass to A. B. either as "money due," or as incident to the ship (*d*).

Where the testator bequeathed all his ready money and *debts* due and owing to him *at his death*, to A., and all his government stock and funds, and personal estate, to B.; and after making his Will, sold out a certain sum of stock, and lent it upon bond, conditioned for replacing the stock on a day specified, *which day he survived:* Sir Wm. Grant held, that this bond passed to A., under the bequest of the testator's *debts*, the question depending on what was the actual description of the property at the time of his death, and the circumstance that the debtor might still transfer the stock, not being allowed to alter or affect the rights of parties (*e*).

In the case of *Stenhouse* v. *Mitchell* (*f*), Lord Eldon was

(*a*) Bayley *v.* Bishop, 9 Ves. 6.

(*b*) Palmer *v.* Craufurd, 3 Swanst. 417, 488. Dawson *v.* Hearn, 1 Russ. & M. 606. As to whether, in the construction of the word "legacies" in a Will, annuities bequeathed are to be included, see Cornfield *v.* Wyndham, 2 Coll. 184.

(*c*) Carr *v.* Carr, 1 Meriv. 541, note to Devaynes *v.* Noble. See also 1 Phill. Ch. C. 361, *per* Lord Lyndhurst. Accord.

(*d*) Stephenson *v.* Dowson, 3 Beav. 342.

(*e*) Essington *v.* Vashon, 3 Meriv. 434.

(*f*) 11 Ves. 356.

of opinion, that the words "debts due at my death from A., whether by bonds or mortgages, or open accounts," would have passed only debts *ejusdem generis* with the securities specified, and would, therefore, not have included a judgment debt, had not the context of the Will disclosed a larger intention (*g*).

The bequest of a debt due on a particular security, will pass the capital only, and not arrears of interest due at the testator's death (*h*); and *e converso*, the bequest of *arrears* of a debt will not pass the principal (*i*).

In *Collins* v. *Doyle* (*k*), a testatrix who was entitled to a distributive share of the assets of an intestate, to whom, at her death, no administration had been taken out, bequeathed "all such sums of money as should be owing to me at the time of my decease from G. B.:" And it was holden by Lord Gifford, that these words would not pass her beneficial interest in a sum of money which was then due from G. B. to the estate of the intestate.

But in *Bainbridge* v. *Bainbridge* (*l*), where a testatrix being entitled to her son's residuary estate, (the amount of which was unascertained at her death), bequeathed as follows, "If any debts due to me at my decease, I request my executors will collect and pay into the hands of my children;" Sir L. Shadwell, V. C., held, that the son's residue passed by the bequest.

"Jewels."
"Pearls."
"Necklaces."

"Jewels." In the *Atty. Gen.* v. *Harley* (*m*), a testatrix directed all her jewels to be sold to pay her debts, except a particular ring set with diamonds, which she gave to a friend, and she then bequeathed the remainder of her rings, her necklaces, of every description, pearls, garnets, cornelians, and watches, to B.; by a subsequent testamentary disposition

(*g*) But see Bridges *v.* Bridges, Vin. Abr. tit. Devise (O. b.) pl. 13. Chalmers *v.* Storil, 2 Ves. & Bea. 222. 1 Rop. Leg. 253, 3d edit.

(*h*) Roberts *v.* Kuffin, 2 Atk. 112. Harvey *v.* Cooke, 4 Russ. Chanc. Cas. 34. But see Harcourt *v.* Morgan, 2 Keen, 274.

(*i*) Hamilton *v.* Lloyd, 2 Ves. Jun. 416. 1 Rop. Leg. 256, 3d edit.

(*k*) 1 Russ. Chanc. Cas. 135.

(*l*) 9 Sim. 16.

(*m*) 5 Russ. 173.

she gave all her trinkets of every denomination, her jewels excepted, to C.; and, in another part of the same instrument, directed her jewels to be sold; afterwards, by a third testamentary instrument, she bequeathed to C. all her trinkets and pearls, with various specific articles, among which were some rings set with diamonds: The testatrix was possessed of a very valuable necklace and cross, and of a pearl necklace, besides other necklaces, and of various diamond rings, besides those which were specifically bequeathed: And it was held by Lord Lyndhurst that the diamond necklace and cross, and the diamond rings, not specifically mentioned, were to be sold, and did not pass to B.: His Lordship further held, that the pearl necklaces passed to B., under the gift of necklaces of every description, and did not pass to C. under the gift of pearls.

"Books." In *Willis* v. *Curtois* (*n*), a question arose under the Will of the celebrated Dr. Willis, whether a collection of books bound into volumes, which contained manuscript notes of his attendance upon King George the Third, would pass by a bequest to his nephew, a gentleman engaged in the like branch of the medical profession as the testator, of "all and every the books in and about my house in Tenterden Street:" Lord Langdale, M. R., held in the affirmative.

"Books."

"Personal ornaments." In the construction of the same Will, his Lordship held, that a pocket book and a case of instruments, usually carried about the person of the testator, did not pass under a bequest of "personal ornaments." But the learned Judge inclined to be of opinion that a gold pencil case, toothpick case, lip-salve box, and eye-glass, similarly circumstanced, would pass.

"Personal ornaments."

"Linen." Under this term, without qualification, table and bed linen, and every article to which that general word can be applied, will pass: But where there is a bequest of "all linen and *clothes* of all kinds," it has been held, that only body linen will pass (*o*).

"Linen and clothes."

(*n*) 1 Beav. 189.

(*o*) Hunt *v.* Hort, 3 Bro. C. C. 311.

"Medals."

"Medals." By this word, curious pieces of current coin, which have been kept by the testator with his medals, have been held to pass (*p*).

"Portraits."

"Portraits." Where a testator bequeathed the *portraits* of himself, of his grandfather and grandmother, and of his mother, and of the Duke of Schomberg, to A. B.; and the testator had one portrait of himself, one of his grandfather and grandmother, and one of his mother, and a three quarter portrait and a portrait in crayons of the Duke of Schomberg, and also a picture in which the duke is represented on horseback, with a battle in the distance; it was held that that picture was a portrait of the duke, and that it passed, together with all the other portraits, by the bequest (*q*).

"Plantation" in the West Indies.

It should seem, that by a devise of a West Indian plantation, the stock, implements, utensils, &c. upon it will pass (*r*).

Mistakes in the description of a legacy.

Mistakes in the description of legacies, like those in the description of legatees, may be rectified by reference to the terms of the gift, and evidence of extrinsic circumstance, taken together (*s*).

The error of the testator, says Swinburne (*t*), in the proper name of the thing bequeathed, doth not hurt the validity of the legacy, so that the body or substance of the thing bequeathed is certain: As for instance, the testator bequeathed his horse Criple, when the name of the horse was Tulip; this mistake shall not make the legacy void; for the legatary may have the horse by the last denomination; for the testator's meaning was certain, that he should have the horse; if therefore he hath the thing devised, it is not material if he hath it by the right or the wrong name.

Accordingly, in *Door* v. *Geary* (*u*), where a husband be-

(*p*) Bridgman *v.* Dove, 3 Atk. 202.

(*q*) Duke of Leeds *v.* Amherst, 13 Sim. 459, affirmed by Lord Lyndhurst, C.

(*r*) Lushington *v.* Sewell, 1 Sim. 435 See Wood *v.* Gaynon, 1 Ambl. 395. *Ante*, p. 624.

(*s*) *Ante*, p. 988, *et seq.* Boys *v.* Williams, *ante*, p. 1002.

(*t*) Pt. 7, s. 5, pl. 7. See also Godolph. Pt. 3, c. 25, s. 10.

(*u*) 1 Ves. Sen. 255.

queathed to his wife 700*l.* East India stock, having none; but there was 700*l.* Bank stock, to the surplus of which the wife was entitled as an executrix, after payment of her testator's debts, and which the husband afterwards transferred in his own name; Lord Hardwicke held, that the 700*l.* Bank stock should go to the wife; the learned Judge being of opinion, that, as it was a case merely of error of description, the words "East India" should be rejected: And his Lordship said it was no greater mistake than the devise of a black horse, the testator having only a white horse, where the word "black" shall be rejected (*v*).

Again, where the intention of the testator is plain, a mistake in his calculation shall not defeat that intention. Thus, in *Milner* v. *Milner* (*w*), Sir W. Milner bequeathed a legacy in this manner: "I give my daughter Mary 3,500*l.*, which with 6,000*l.* she is entitled to by my marriage settlement, and 500*l.* from her father-in-law, make up 10,000*l.*, which I design for her fortune:" In fact she was entitled only to 5,000*l.* by the settlement: And Lord Hardwicke held, that she was entitled to have 4,500*l.* under the Will.

So in *Trevor* v. *Trevor* (*x*), a testator gave his wife an annuity of 100*l.* and the sum of 1004*l.*, which he considered would, with the property she was entitled to after his death, make up to her an income of 2,500*l.* a-year: In fact those gifts made up her income only to 1,800*l.* a-year: And Sir John Leach, M. R., held, that she was entitled to have the deficiency supplied out of the testator's residuary estate.

So it has been held, that where a testator has given a certain sum, as a debt due to the person to whom he gives it, the circumstance that he does not owe to that person so much as he has given, shall not invalidate the bequest;

(*v*) See also Swinb. Pt. 7, s. 5, pl. 16. Selwood *v.* Mildmay, 3 Ves. 306, 310, and the remarks on this case of Tindal, C. J., in Miller *v.* Travers, 8 Bingh. 252, and of Langdale, 9 Beav. 362, 363, 365. Gallini *v.* Noble, 3 Meriv. 691. Hewson *v.* Reed, 5 Madd. 451. King *v.* Wright, 14 Sim. 400. Howard *v.* Conway, 1 Coll. 87. Lindgren *v.* Lindgren, 9 Beav. 358.

(*w*) 1 Ves. Sen. 106.

(*x*) 5 Russ. 24.

agreeably to the maxim of the civil law, *falsâ demonstratione legatum non perimi.* Thus in *Whitfield* v. *Clemment* (*y*), a testatrix bequeathed all her personal estate to trustees, in trust to sell, and out of the produce to pay all debts; "and in the next place to pay to A. 300*l.* due on bond:" The testatrix owed only 120*l.* to A. upon bond: But Sir W. Grant decreed payment of the whole 300*l.*

Admissibility of evidence to ascertain the thing bequeathed.

The rules, which there already has been occasion to state (*z*) as to the admissibility of evidence of extrinsic facts, and of extrinsic evidence of intention, in order to enable the Court to identify the *person* intended by the testator to be the object of his bounty, are equally applicable, *mutatis mutandis*, as to the admissibility of such evidence for the purpose of making certain the *thing* intended to be bequeathed by him (*a*).

Property contracted for by testator will pass by a description of it as testator's actual property.

It may here be observed that what a party is entitled to under a contract he may well be taken to consider as his own. Thus lands contracted for will pass by a general devise of all the testator's lands and of all the lands purchased by him, although he had other lands purchased and actually conveyed (*b*). And so if a testator contract for the purchase and transfer of a particular description of stock, and then bequeaths all he possesses or has of such stock, it will pass (*c*). So if a testator having contracted for the purchase of a large quantity of wool, should make his Will, bequeathing to one person all his personal estate except his wool, and to another all his wool, this would be a good bequest of the wool, although the party contracting to sell it had it not himself, but had to procure it to enable him to fulfil his contract (*d*).

(*y*) 1 Meriv. 402.

(*z*) *Ante*, p. 989, *et seq.*

(*a*) See further, on this subject, Lindgren *v.* Lindgren, 9 Beav. 358.

(*b*) Atcherley *v.* Vernon, 10 Mod. 518, 526. 4 M. & Cr. 75.

(*c*) Collison *v.* Girling, 4 M. & Cr. 63, 75.

(*d*) 4 M. & Cr. 74, 75.

Sect. V.

Of Legacies Vested or Contingent.

There has already been occasion to shew (*e*), that contingent and executory interests, though they do not vest in possession, may vest in right, so as to be transmissible to the executors or administrators of the party dying before the contingency on which they depend takes effect: But where that contingency is the endurance of life of the party till a particular period, the interest will obviously be altogether extinguished by his death before that period.

The object of the present section is to ascertain the circumstances under which a legacy is to be regarded as a vested interest, or as contingent on the event of the endurance of the life of the legatee: or, in other words, in what cases the interest in a legacy will be so fixed as to be transmissible to the executor or administrator of the legatee, though he die before the time arrives for the payment of the money; and on the other hand, in what cases the legacy will lapse by the death of the legatee.

The general principle, as to the lapse of legacies by the death of the legatee, may be stated to be, that if the legatee die before the testator's decease, or before any other condition precedent to the vesting of the legacy is performed, the legacy lapses, and is not payable to the executors or administrators of the legatee. It is proposed, in pursuing this subject, to treat, 1st. Of legacies lapsed by the death of the legatee before the death of the testator: 2ndly. Of legacies lapsed by the death of the legatee after the death of the testator: 3rdly. Of the lapse of legacies charged on a real fund: 4th. Of the lapse of legacies charged on a mixed fund of realty and personalty.

(*e*) *Ante*, p. 759.

1. *Of Legacies lapsed by the death of the Legatee before the Testator.*

General rule that unless the legatee survive the testator, the legacy lapses:

It has been established from the earliest periods, both in the Ecclesiastical Courts and in Equity, that unless the legatee survive the testator, the legacy is extinguished: neither can the executors or administrators of the legatee demand the same (*e*). And Swinburne puts the case of the testator and legatee being drowned in the same ship, or both being struck to death by the fall of a house, in which case he lays it down, that as they both died at the same time, the legacy is not due, and consequently not transmissible to the executors or administrators of the legatee. In a modern case in the Prerogative Court (*f*), a husband had appointed his wife executrix and residuary legatee, and he and his wife were drowned in the same ship: the contest was, whether administration to the husband *cum testamento annexo* should be granted to the next of kin of the testator, or the next of kin of the wife, as residuary legatee: By the practice of that Court, if the wife had lived to be entitled as a residuary legatee, her next of kin would have had a right to the administration in preference to the next of kin of the husband (*g*): But Sir John Nicholl held that the next of kin of the husband had a *primâ facie* right, and therefore that the *onus* of proof lay on the party who claimed derivatively from the residuary legatee, to shew that she survived, so as to prevent the lapse of the legacy: and, as no satisfactory evidence was adduced for that purpose, the Court decreed the administration to the next of kin of the husband, as being clearly entitled on the assumption that he and the wife perished at the same moment (*h*).

(*e*) Swinb. Pt. 7, s. 23, pl. 1. Godolph. Pt. 3, c. 25, s. 25. Wentw. Off. Ex. 436, 14th edit.

(*f*) Taylor *v.* Diplock, 2 Phillim. 261.

(*g*) See *ante*, p. 381—383.

(*h*) See also, on this point, Wright *v.* Sarmuda, reported in the notes to 2 Phillim. 266, and in Evans's edit. of 2 Salk. 593. (*nomine* Wright *v.* Netherwood.) General Stanwix's case, reported as R. *v.* Dr. Hay, 1 W. Bl. 640. Broughton *v.* Randall, Cro. Eliz. 503. Colvin *v.* Pro-

Not only in cases of bequests of money, or of other chattels in possession, but also of a debt due from the legatee to the testator, the legacy will lapse by his death before the testator, and the executor of the legatee must pay the money: Thus, in *Maitland* v. *Adair* (*i*), the words in the Will were, "I devise to my brother 2000*l.*; I also return him his bond for 400*l.*, with interest thereon, which he owes me;" The brother died in the lifetime of the testator: the bond was a joint bond in the Scotch form, by the testator's brother and son: The question was, whether the disposition of the bond by the Will amounted to a release, or was only a legacy, and therefore lapsed: Lord Loughborough, C., held very clearly, that it was a legacy to the brother which had lapsed (*k*).

Where, however, a testator by his Will declared that one-fifth of the residue of his personal estate should be divided amongst certain of his creditors named in a schedule to his Will, and the schedule contained both the names of the creditors and the debts due to them respectively, the remedy for the recovery of which was barred by the Statute of Limitations; it was held by Lord Lyndhurst, C. B., and afterwards by Alderson, B., that the parties so named in the schedule were not to be considered as legatees, but as creditors, and consequently that the representatives of such as died in the testator's lifetime were entitled to the benefit of the Will (*l*).

curator-General, 1 Hagg. 92. *Ante*, p. 383, 726, 727. In Sillick *v.* Booth, 1 Y. & Coll. Ch. C. 117, 126, where two brothers had perished by shipwreck, under circumstances of which there was no evidence, Knight Bruce, V. C. said, it was not necessary to be taken that they died at the same instant; for that by the law of England, evidence of health, strength, age, or other circumstances, may be given in evidence in cases of this nature, tending to the judicial presumption that one party survived the other. But as to the rule in the Ecclesiastical Court on this subject, see *ante*, p. 727.

(*i*) 3 Ves. 231.

(*k*) See further on this subject, Elliott *v.* Davenport, 1 P. Wms. 83. Toplis *v.* Baker, 2 Cox, 118. Sibthorp *v.* Moxom, 3 Atk. 580. Izon *v.* Butler, 2 Price, 34. Atty. Gen. *v.* Holbrook, 3 Y. & J. 114. S. C. 12 Price, 407. South *v.* Williams, 12 Sim. 566.

(*l*) Williamson *v.* Naylor, 3 Y. & Coll. 208. See also Accord. Philips *v.* Philips, 3 Hare, 281.

even where the legacy is given to the legatee and his *executors*, &c.;

Even in a case where a legacy is given to a man *and his executors, administrators, and assigns*, or to a man *and his representatives*, if the legatee dies before the testator, though the executors are named, yet the legacy is lost: for the words "executors, administrators, and assigns, &c." are considered as only descriptive of the interest bequeathed; and those who take by representation only cannot be entitled to anything to which the person they represent never had any title (*m*).

So where a legacy is given to A. for life, and after the death of A. *to* B. *or his proper representatives, in case of his dying before* A., if B. dies in the lifetime of the testator, the legacy lapses (*n*). Again, if a legacy be given to a man, and directed to be paid *to him or his executors*, or administrators, or personal representatives, or to his heirs, *at the end of a year after the testator's death*, and the legatee die before the testator, the legacy intended for him will lapse (*o*).

In *Baker* v. *Hanbury* (*p*), a legacy was given to the separate use of a married woman, during the joint lives of her and her husband, and in case she should survive him, to her absolutely; but if she did not survive him, to such persons as she should by will appoint, and in default of appointment, to her next of kin: She died in the lifetime of her husband and the testator: And Lord Lyndhurst, C., held that the legacy had lapsed, being of opinion that it was intended to be an absolute bequest to the wife, but that it was qualified on account of her being a married woman. But this decision was overruled in *Edwards* v. *Saloway* (*q*), by Lord Cottenham, C., who held that, in such a case, the next of kin of the legatee were entitled to the legacy.

(*m*) Elliott *v.* Davenport, 1 P. Wms. 83. Corbyn *v.* French, 4 Ves. 435. Hutcheson *v.* Hammond, 3 Bro. C. C. 128, 142, 143. Shuttleworth *v.* Greaves, 4 Mylne & Cr. 35. See also Taylor *v.* Beverley, 1 Coll. 108, 116. *Ante*, p. 966.

(*n*) Corbyn *v.* French, 4 Ves. 418, 435. It will be observed, that the substitution of the executors in this case did not refer to the legatee's dying before the testator, but to his dying before the time of the payment of the legacy: See Acc. Bone *v.* Cook, M'Clel. 169. S. C. 13 Price, 332.

(*o*) Tidwell *v.* Ariel, 3 Madd. 403.

(*p*) 3 Russ. Chanc. Cas. 340.

(*q*) 2 Phill. Ch. C. 625.

this rule controlled by the manifest intention of testator, a substitute being declared for the legatee:

But this general rule may be controlled by the manifest intention of the testator, appearing on the face of the Will, that the legacy shall not lapse, and by his distinctly providing a substitute for the legatee dying in his lifetime. Thus, in *Sibley* v. *Cook* (*q*), the testatrix bequeathed as follows: "I give the several legacies and sums following, which I Will shall be paid to the several persons hereinafter named, and that if any of those persons should die before the same become due and payable, *I Will that they or any of them shall not be deemed lapsed legacies:*" The testatrix then particularized the several legatees, and proceeded thus: "to Ann, the wife of R. Wensley, *and to her executors or administrators,* I give the sum of 50*l.*: Ann died in the lifetime of the testatrix, and her husband administered to her: The question was, whether the legacy lapsed in consequence of that accident: And Lord Hardwicke determined in the negative; and said, that the testatrix expressly provided against a lapse if Ann died before her; "for she says, 'if any of these persons die before their legacies become due and payable, I Will that they or any of them shall not be deemed lapsed legacies;' and subsequently to this, devises to Ann, and to her executors and administrators, 50*l.*; so that, in case of her death before the testatrix, other persons are named to take." His Lordship, however, appears to have been of opinion that the expression of intention of the testator, however plain, that the legacy should not lapse, would not have prevented the operation of the general rule, unless coupled with the nomination of the executors and administrators in substitution. "If a man," said the learned Judge, "devises real estate to J. S. and his heirs, and signifies or indicates his intention, that if J. S. died before him, it should not be a lapsed legacy, yet unless he had nominated another legatee, the heir-at-law is not excluded, notwithstanding the testator's declaration: So in the devise of a personal legacy to A., although the testator should show an intention that

(*q*) 3 Atk. 572. But it is not allowable to prove this intention by evidence *dehors* the Will: Maybank v. Brooks, 1 Bro. C. C. 84.

the legacy should not lapse in case A. die before him, yet this is not sufficient to exclude the next of kin."

In accordance with this judgment of Lord Hardwicke, is that of the Lord C. Baron, in *Toplis* v. *Baker* (*r*): "Put the case," observed his Lordship, "of a testator saying, 'I give to A., and if A. shall die before me, yet I do not mean the legacy shall lapse;' I should not know how to prevent this legacy lapsing: But if the testator had said, 'If A. shall die, I mean his executors shall take it,' then I understand the effect very clearly; the executors being specially mentioned, and substituted for the legatee."

These cases were followed by *Bridge* v. *Abbott* (*s*): There the testatrix bequeathed the residue of her personal estate to several persons in equal shares, but in case of the death of any of them before her, she directed that the shares of those dying, should go to, be had, and received by his or her legal representatives: One of the legatees died before the testatrix: And Lord Alvanley, M. R., after observing that nothing was more clear than that a testator might prevent a legacy from lapsing, and the necessity, according to *Sibley* v. *Cook*, not only that he should declare the legacy should not lapse, but also who should take in the place of the legatee, decreed that the present bequest did not lapse, but belonged to such persons as would have been entitled as the next of kin to the deceased legatee at the death of the testatrix in case he had at that time died intestate (*t*).

These authorities (*u*) appear to have settled that a testator may, if he thinks fit, prevent a legacy from lapsing; though, in order to effect this object, he must declare either expressly, or in terms from which his intention can be with sufficient clearness collected, what persons or perons he intends to substitute for the legatee dying in his lifetime.

(*r*) 2 Cox, 121.

(*s*) 3 Bro. C. C. 224, *ante*, p. 979.

(*t*) See *ante*, p. 976, *et seq*.

(*u*) See also Vaux *v.* Henderson, *ante*, p. 950. Palin *v.* Hill, *ante*, p. 983. Bone *v.* Cook, M'Clel. 169. S. C. 13 Price, 332. Collins *v.* Johnson, 8 Sim. 356, note (*e*). *Post*, p. 1042, note (*z*).

substitution implied by a bequest to "A. *or* his personal representatives," or to "A. *or* his heirs:"

Further, it seems to be now established, that where there is a bequest "to A. *or* his personal representatives," or "to A. *or* his heirs," the word "or," generally speaking, implies a substitution, so as to prevent a lapse. In *Gittings* v. *McDermott* (*v*), the Will of Charles Stone contained the following bequest: "I give and bequeath to the children of my sister, the late Elizabeth Wall, *or to their heirs*, the following sums, vested in the Navy four per cent. public funds; that is to say, to Lavendar Wall 100*l.*, Edward Wall 200*l.*, William Wall 200*l.*, Sarah Thornby, her eldest daughter, 200*l.*, Charlotte Brown, her youngest daughter, 200*l.*, Edward Wall, her grandson, 100*l.*, amounting in the whole to 1000*l.* stock:" The testator, after giving various other specific and pecuniary legacies, disposed of the residue of his property as follows: "All the remainder of my property of whatever description in the public funds, arrears of pay, half-pay and allowances, and whatsoever effects I may die possessed of, after payment of all bequests and debts, I give and bequeath in equal shares to each of my dear sisters, *viz.* to my very dear sister, Mary Stewart, one-half, and to my sister Sarah Gittings, the other half of the said property, *and upon their deaths respectively to their heirs:*" Mary Stewart and Sarah Gittings, the testator's sisters, and three of the legatees of the 1000*l.* stock, died in the lifetime of the testator: The bill was filed by Charles Gittings, who was the heir-at-law and one of the next of kin of Sarah Gittings, and also one of the next of kin of the testator, against the several other parties claiming interests under the Will: On the bequest to the children of Elizabeth Wall, a question was raised, whether the legacies given to such of them as had died in the lifetime of the deceased children were, in the event which had happened, entitled by substitution: And it was held by Sir John Leach, V. C., and afterwards by Lord Brougham on appeal, that the word "or" implied a substitution in contemplation of a lapse by the predecease of the children: and that the word

(*v*) 2 M. & K. 69.

"heirs," (which, in respect of personal property, must be taken to mean the "next of kin") (*v*), provided with sufficient distinctness a substitute for the legatee predeceasing (*w*).

by a bequest "in equal shares to A. and B. *and* upon their deaths respectively to their heirs," construed with reference to the context.

It was further held, by both the learned Judges, in this case, with respect to the residuary clause, that the gift did not lapse by the death of the sisters in the lifetime of the testator; but that the next of kin, living at his death, were entitled by substitution: Lord Brougham, however, observed, that it must be admitted that the words "to A. and B. *and* upon their death to their heirs," seems rather to point at succession than at substitution (*x*): And his Lordship expressed his opinion, that if the bequest of the residue had stood alone, the true construction of that bequest would have been, that the gift was to the legatees for life, and after their decease to their heirs; that is, it would have carried the whole interest to the legatees, and have made a lapse on their predecease (*y*): But the learned Judge added, that his opinion rested not upon the words, taken by themselves, but on the whole context, and the preceding parts of the Will; and that as the construction of the foregoing gifts to the Walls precluded a lapse as to those legacies, there arose from thence an inference not to be avoided or resisted, that the words employed touching the residue must be taken in the like sense (*z*).

whether children can take in lieu of their parent in cases where their parent would have had no title.

(*v*) See *ante*, p. 950.

(*w*) See also Price *v.* Lockley, 6 Beav. 180. *Ante*, p. 955—957.

(*x*) See *ante*, p. 950, 1038.

(*y*) *Ante*, p. 1038.

(*z*) See also Lord Brougham's *dictum* in Pearson *v.* Stephen, *ante*, p. 952. A question may arise, in the case of a bequest to children, &c., in a class, and the representatives of such as are dead, whether the representatives are to take by way of original substantive limitation, or by way of substitution only: If by the latter, none are entitled but such as represent parties, who could have taken as original legatees. In Christopherson *v.* Naylor, 1 Meriv. 320, there was a bequest to "each and every the child and children of my brother and sisters, which shall be living at the time of my death; but, if any child or children of my said brother and sisters shall happen to die in my lifetime, and leave issue, then the legacy or legacies hereby intended for such child or children so dying, shall be for his, her, or their issue:" And Sir W. Grant, M. R., held, that the issue took only by substitution; and that, therefore, only the issue of such children as *were living at the date*

The general rule of equity relating to lapses, is equally applicable, whether the legacy be given under a Will, made by virtue of donorship flowing originally from the testator, or

Lapse of legacy given under a power by death of legatee before appointor.

of the Will, were entitled, in the event of the death of their respective parents during the testator's lifetime. So in Butter *v.* Ommaney, 4 Russ. 73, a testator bequeathed the residue of his estate, after the death of two persons, to such children of B. as should be then living; and as to such of them as should be then dead, leaving children, he directed that the children should stand in the place of their parents: And Sir L. Shadwell, V. C., held that the children of the children of B. who had died in the testator's lifetime, *before the date of the Will,* took no share of the residue. So in Waugh *v.* Waugh, 2 M. & K. 41, a testator gave a sum of 5,000*l.*, in the event of the death of his nephew, J. W., without leaving issue, to be equally divided among all the brothers and sisters of J. W. who should be living at the time of his death, and the children then living of any of his brothers and sisters who should have previously departed this life, but so that the children of such deceased brother and sister should take only the share which their parent would have taken if living: And Sir John Leach, M. R., held, that a child of a brother of J. W., *which brother was dead at the making of the Will,* took no share of the 5,000*l.* Again, in Peel *v.* Catlow, 9 Sim. 372, a testator bequeathed one-sixth part of his residuary estate among the children of his late sister, Jane Taylor, and directed that their share should be paid to them at twenty-one, and that in case any of them should die under that age leaving issue, their shares should be paid to their issue, as soon as such issue could give a legal discharge for the same; but if any of the children should die without leaving issue, their shares should be paid to the surviving children and the issue of such of them as should be then dead, such issue taking no greater share than their deceased parents would have been entitled to, if living: And Sir L. Shadwell, V. C. held, that under this clause, no grandchild of Jane Taylor could take except by way of substitution for it's parent; and therefore, that a grandchild, *whose parent had died before the date of the Will,* was not entitled. So in Gray *v.* Garman, 2 Hare, 268, a testator gave his real and personal estate to his wife for her life, and the residue to be divided between her brothers and sisters, and in case any *of them* should be dead at the time of her decease, leaving issue, such issue to stand in their parents' place: And it was held by Wigram, V. C., that as no brother or sister, *who died before the date of the Will,* was capable of taking under the bequest, the issue of any such brother or sister could not take by substitution. See also Bennett *v.* Merriman, 6 Beav. 360. But if there is an original substantive gift to two classes of legatees, *viz.* first, to the children of a legatee for life, living at the time of his decease, and secondly, to the issue of such of them as shall then be dead, leaving issue, the issue of *a child who was dead at the date of the Will,* may be entitled to a share:

whether it be given under a power created for the purpose; for, in the latter case, although the legatee will take under the authority of the power, yet he will not be considered as

Tytherleigh *v.* Harbin, 6 Sim. 329. So in Giles *v.* Giles, 8 Sim. 360, a testator bequeathed his residue to trustees, in trust for all his children living at the decease of his wife, as tenants in common; and if any such children should die before his wife, and should leave issue, then the children of *such* his son or daughter should be entitled to the portion of such his son or daughter who might be deceased before the decease of his wife; provided that until the portions thereby provided for any of the *said* children of his said sons or daughters who might have died before their mother, should become vested, it should be lawful for his trustees to apply the interest of the portion to which any such child might be entitled in expectancy, for the maintenance of such child: The testator, at the date of his Will, had four sons and one daughter, *and he had had another daughter who was then dead* leaving children who survived the testator: And Sir L. Shadwell, V. C. held, that those children were entitled to a share of the residue; His Honor being of opinion that, looking at the Will altogether, the true construction of it was, that the testator adverted as much to the children of the daughter who had died, as he did to the children who had survived but might die. (See also Bebb *v.* Beckwith, 2 Beav. 308. Gaskell *v.* Holmes, 3 Hare, 438. Rust *v.* Baker, 8 Sim. 443. Jarvis *v.* Pond, 9 Sim. 549.) Again in Smith *v.* Smith, 8 Sim. 353, a testator gave his residuary estate to trustees, in trust for his wife for life, and after her death, to divide it amongst all his children who might be then living; the shares of such of them as should then have attained twenty-one to be paid to them within three months after his wife's death, and the shares of the others, on their attaining twenty-one, or to the survivors of them in case of the death of any of them in his wife's lifetime and without leaving issue: Provided that if any of his children who should die in his wife's lifetime, should have left issue, such issue should have their parents' share: The testator's wife survived him: *One of his children who was living at the date of his Will died in his lifetime* leaving issue: And Sir L. Shadwell, V. C. held (overruling Thornhill *v.* Thornhill, 4 Madd. 377,) that the issue were entitled to a share of the residue: His Honor being of opinion that the testator meant that if a child died and left issue, the issue should take although the child could not. (See also Bone *v.* Cook, M'Clel. 169. S. C. 13 Price, 332. Collins *v.* Johnson, 8 Sim. 356, note (*e*). Cort *v.* Winder, 1 Coll. 320.) Again in Le Jeune *v.* Le Jeune, 2 Keen, 701, there was a bequest of copyhold and leasehold property to the testator's widow for life; and at her death, the whole to be sold and divided into five parts, one of which was to be paid to each of the testator's four sons living at her decease; and in case of either of their deaths, his share to be paid to his issue; and in case either should die without issue, his

taking from the time of it's creation, so as to prevent a lapse, occasioned by the death of the legatee before the appointor, when the power is executed by Will; and for the following reasons: The legatee does not take under the power solely and exclusively, but under it and the Will jointly: The Will so made is to be construed and considered like all others: It is, therefore, ambulatory, revocable, and incomplete, till the death of the testator; consequently, no person can take under it, who does not survive him. If, then, an appointee by Will made under a general power, die before the testator, his legacy will not be transmissible to his executors or administrators (*a*).

As to legacies given to joint tenants:

It is requisite further to consider the general rule above stated, as applied to legacies given in joint-tenancy, or in tenancy in common. If a legacy be given to two persons *jointly*, although one of them happen to die before the testator, such interest will not be considered lapsed or undisposed of, but will survive to the other legatee (*b*).

to tenants in common

But where legacies are given to legatees, as tenants in common, as where an aggregate fund is to be divided among them, *nominatim*, in equal shares, if any of them die before the testator, what was intended for those legatees will lapse into the residue (*c*).

share to be divided among the surviving children: And Lord Langdale, M. R. held that the daughter *of a son who died in the testator's lifetime* was entitled to such share as her parent, if he had survived the widow, would have been entitled to; His Lordship being of opinion, that the words "in case of either of their deaths" were not necessarily referable to the time between the deaths of the testator and of the tenant for life, but might be referred to any time prior to the death of the tenant for life, even though the time should be in the lifetime of the testator himself. See also Gaskell *v.* Holmes, 3 Hare, 438.

(*a*) 1 Rop. Leg. 426, 3d edit. 2 Sugd. Pow. 16, 6th edit. Oke *v.* Heath, 1 Ves. Sen. 135, 141. Duke of Marlborough *v.* Godolphin, 2 Ves. Sen. 73. Vanderzee *v.* Aclom, 4 Ves. 771. Burges *v.* Mawbey, 10 Ves. 319, 326. Easum *v.* Appleford, 5 M. & Cr. 56. Master *v.* Laprimaudaye, 2 Coll. 443. Woodcock *v.* Renneck, 1 Phill. Ch. C. 72.

(*b*) Buffar *v.* Bradford, 2 Atk. 220. Dowset *v.* Sweet, Ambl. 175. Morley *v.* Bird, 3 Ves. 628. 1 Rop. Leg. 417, 3d edit.

(*c*) Man *v.* Man, 2 Stra. 905. Bagwell *v.* Dry, 1 P. Wms. 700. Page *v.* Page, 2 P. Wms. 489.

The law is the same, as to survivorship in cases of joint-tenants (*d*), and lapse in cases of tenants in common (*e*), when the testator revokes the interest originally given to one of them.

to tenants in common in a class:

But it must be observed, that where a legacy is given *to a class* of persons in general terms as tenants in common, as to the children of A., the death of one of them before the testator will not occasion a lapse of any part of the fund; but those of the described class, who survive the testator, will take the whole (*f*).

to tenants in common with a clause of survivorship:

A further exception, as to the doctrine of lapse in cases of legacies given to tenants in common, occurs in instances where the Will contains a limitation over of the legacy to the survivors (*g*). Thus in *Mackinnon* v. *Peach* (*h*), the testator bequeathed to his two daughters his plate and plated ware, together with the pearls, &c. in his possession, share and share alike, and upon the demise of either of them without lawful issue, then the share of her so dying to go to her sister: One of the daughters died unmarried in the testator's lifetime: And Lord Langdale, M. R., held, that the surviving daughter was entitled to the whole of the articles bequeathed; for that the circumstance of the deceased daughter, who would have taken as tenant in common if both had survived the testator, having died in his lifetime, did not prevent the gift over to her sister from taking effect (*i*).

Owen *v.* Owen, 1 Atk. 494. Peat *v.* Chapman, 1 Ves. Sen. 512. Ackroyd *v.* Smithson, 1 Bro. C. C. 503.

(*d*) Humphrey *v.* Tayleur, Ambl. 136. S. C. 1 Dick. 161.

(*e*) Creswell *v.* Cheslyn, 2 Eden. 123. S. C. 3 Bro. P. C. 246. Toml. edit. Shaw *v.* M'Mahon, 4 Dr. & W. 431. But see *contrà*, Harris *v.* Davis, 1 Coll. 416.

(*f*) Viner *v.* Francis, 2 Cox, 190. S. C. 2 Bro. C. C. 658. 1 Rop. Leg. 421, 3d edit. Shuttleworth *v.* Greaves, 4 Mylne & Cr. 38. Cort *v.* Winder, 1 Coll. 320. Lee *v.* Pain, 4 Hare, 250. Shaw *v.* M'Mahon, 4 Dr. & W. 431, 438. *Secus*, where it appears that the testator did not intend to give to a class incapable of being ascertained at the time, but to individuals who are, or who are capable of being, enumerated. Bain *v.* Lescher, 11 Sim. 397. Havergal *v.* Harrison, 7 Beav. 49.

(*g*) See Smith *v.* Pybus, 9 Ves. 566, and the cases collected, *post*, p. 1048, note (*p*).

(*h*) 2 Keen, 555.

(*i*) But see *post*, p. 1048, note (*p*)

In such cases, if more than one of the legatees happen to die before the testator, a question arises, whether the original shares only, or the accrued as well as the original, pass to the survivors. The general rule is, that where distinct legacies are given with survivorship, the clause of survivorship, unless extended by particular words, attaches only to the original shares, and does not affect the accruing shares (*k*): But an exception to this rule has been admitted, where the disposition is, not of separate legacies, but of one aggregate fund, which the testator meant should remain an aggregate fund, and should not be broken into fragments, if some of the persons, to whom interests in it were given, happened to die (*l*).

questions whether the accrued as well as original pass to the survivors:

In *Knight* v. *Gould* (*m*) a testatrix bequeathed the residue of her property "to my executors hereinafter named, to enable them to pay my debts, legacies, funeral, and testamentary charges, and also to recompense them for their trouble, equally between them:" She then proceeded to nominate three persons to be her executors: One of them died in the lifetime of the testatrix: And it was held by Sir John Leach, M. R., and afterwards by Lord Brougham, on appeal, that the whole residue vested in the two survivors: His Lordship, in giving his judgment, observed, that it was not necessary to decide whether these legatees took as joint-tenants, or as tenants in common; because it was clear, on the construction of the Will, that the testatrix meant to give the residue to her executors as a class of persons in their official character: The learned Judge added, it did not follow

to executors in a class.

(*k*) See Perkins v. Micklethwaite, 1 P. Wms. 275. Rudge v. Barker, Cas. temp. Talb. 124. *Ex parte* West, 1 Bro. C. C. 575. Vandergucht v. Blake, 2 Ves. Jun. 534. Barker v. Lea, 1 Turn. & Russ. 415. Crowder v. Stone, 3 Russ. Chanc. Cas. 217. Bright v. Rowe, 3 Mylne & K. 316. Rickett v. Guillemard, 12 Sim. 88. Macgregor v. Macgregor, 2 Coll. 192.

(*l*) See Pain v. Benson, 3 Atk. 78. Worlidge v. Churchill, 3 Bro. C. C. 465. Barker v. Lea, 1 Turn. & Russ. 413, 415. Eyre v. Marsden, 2 Keen, 564. 4 Mylne & Cr. 231. Sillick v. Booth, 1 Y. & Coll. Ch. C. 121. Leeming v. Sherratt, 2 Hare, 14.

(*m*) 2 M. & K. 295.

that a bequest of a residue to executors equally, must, in all cases, be a gift to them in their representative capacity, and so survive to those who live to take the office (*n*).

In what cases a legacy in remainder, or with a limitation over, will lapse by the death of the prior legatee in the lifetime of the testator.

It is necessary in this place to consider what effect the death of a prior legatee, in the lifetime of the testator, will produce on the interest of another legatee in remainder.

In the case of a legacy to a legatee for life, with remainder to another legatee, if the tenant for life dies before the testator, the remainder over takes effect upon the death of the testator (*o*). So, if a legacy be given to a person, with a limitation over, if he should die under twenty-one, or before the happening of any other event, and he dies, in the lifetime of the testator, under the prescribed age, or before such other event happens, the legacy over does not lapse (*p*).

But the rule is different, where a legatee, to whom the legacy is given absolutely, with an executory limitation over, dies in the lifetime of the testator, *but after the event has happened, on the non-occurrence of which the limitation over depends:* for in such case every part of the bequest lapses.

Thus, in *Calthorpe* v. *Gough* (*q*), a legacy was given to trustees, in trust for Lady Gough for life, and in case she

(*n*) See Barber *v.* Barber, 3 Myl. & Cr. 688. *Post*, Pt. III. Bk. III. Ch. v. § I.

(*o*) Hardwick *v.* Thurston, 4 Russ. Ch. Cas. 383. Lee *v.* Pain, 4 Hare, 225: And it will make no difference that a power of appointment is given to the legatee for life: Chatteris *v.* Young, 6 Madd. 30.

(*p*) Miller *v.* Warren, 2 Vern. 207. Ledsome *v.* Hickman, 2 Vern. 611. Willing *v.* Baine, 3 P. Wms. 113. Walker *v.* Main, 1 Jac. & Walk. 1. Humberstone *v.* Stanton, 1 Ves. & Beam. 388. Humphreys *v.* Howes, 1 Russ. & M. 639. Mackinnon *v.* Peach, 2 Keen, 555. Le Jeune *v.* Le Jeune, 2 Keen, 701. Rickett *v.* Guillemard, 12 Sim. 88. But if a testator possessed of a specific chattel, or a chattel real, bequeath it to A. and the heirs of his body, and in default of such issue, to B., the death of A. in the testator's lifetime, without issue, does not enable B., though surviving the testator, to take under his Will, but causes a lapse; for such a bequest to A. is, in truth, a gift to him absolutely (see *ante*, p. 948, 949), and the gift over to B. a mere nullity. Harris *v.* Davis, 1 Coll. 416, 424, 425. See also Andrew *v.* Andrew, *ibid.* 690.

(*q*) 3 Bro. C. C. 394, note to Doo *v.* Brabant. S. C. 4 T. R. 707, note (*b*).

should die in the lifetime of her husband, as she should appoint, and in default of appointment, to her children, but if she should survive her husband, then to her absolutely: She *survived her husband*, and died in the lifetime of the testator: And Lord Alvanley held, that the legacy lapsed, and the children were not entitled. Again, in *Williams* v. *Jones*(r), a testator, after bequeathing a sum of Long Annuities to his wife for life, gave the capital, after her death, to A., if he should be living at her decease, and if not, to A.'s son: *A. outlived the wife*, but died in the testator's lifetime: And it was holden that the legacy to A. lapsed, and that the gift to his son did not take effect (s). So in *Doo* v. *Brabant* (t), a legacy was given in trust for Sarah Counsell, until she attained the age of twenty-one, and then to pay the same to her; if she should die under twenty-one, leaving a child or children, then in trust for such child or children; but in case she should die under twenty-one, without having any child or children, then over to other persons: Sarah Counsell *attained twenty-one*, and married; but she died in the lifetime of the testator, leaving two children: And it was holden that the legacy lapsed, and the children were not entitled. So in *Humberstone* v. *Stanton* (u), there was a bequest to the son of the testator on his accomplishing his apprenticeship, with the dividends in the meantime for maintenance; and in case he should die before he accomplished his apprenticeship, then and in such case to the other children: The legatee *lived to accomplish his apprenticeship*, but afterwards died in testator's lifetime: And it was holden that the legacy lapsed, and the bequest over could not take place: for the event which was to bar the claim of the brothers and sisters had happened (v).

(r) 1 Russ. Ch. C. 517.

(s) But see Gaskell v. Holmes, 3 Hare, 438.

(t) 3 Bro. C. C. 393. S. C. 4 T. R. 706.

(u) 1 Ves. & Beam. 384.

(v) See also other examples in Miller v. Faure, 1 Ves. Sen. 85. Williams v. Chitty, 3 Ves. 545. Dicken v. Clarke, 2 Younge & C 572. As to cases where somewhat similar limitations over have been held to take effect, see *post*, Pt. III. Bk. III. Ch. II. § VI. p. 1090, *et seq.*

1 Vict. c. 26: gifts to children or other issue who leave issue living at the testator's death shall not lapse.

By stat. 1 Vict. c. 26, s. 33, (which does not extend to any Will made before Jan. 1, 1838), "where any person being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect, as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the Will."

This section does not substitute the issue for the deceased legatee, but gives the legacy to him absolutely, as though he had survived the testator; and it is therefore disposable by the Will of the legatee (*w*).

It has been decided (*x*) that this section of the Act does not apply to a testamentary appointment.

There has already been occasion to consider under what circumstances a Will, made before the new Act, will be brought within this section by a republication after the Act came into operation (*y*). And it will be observed, that the authorities then cited demonstrate that if the bequest be made after the Act came into operation, the Act will apply to a case where a child died before the Will was made, but after the Act came into operation (*z*).

Legatee in trust.

In conclusion of this portion of the subject of lapse, it may be mentioned, that where a bequest is made to a man as trustee for another person, the legacy will not lapse by the death of the trustee in the testator's lifetime (*a*).

Johnson *v.* Johnson, 3 Hare, 157.

Griffiths *v.* Gale, 12 Sim. 354.

Ante, vol. 1, p. 183, 184. Skinner *v.* Ogle, 1 Robert. 363. S. C. 4 Notes of Cas. 74. Winter *v.* Winter, 5 Hare, 306. Wild *v.* Reynolds, 5 Notes of Cas. 1.

(*z*) 5 Hare, 306.

(*a*) Eales *v.* England, Prec. Chan. 200. S. C. 2 Vern. 468. Oke *v.* Heath, 1 Ves. Sen. 140. Inchiquin *v.* French, 1 Cox, 1. See also South *v.* Williams, 12 Sim. 566.

II. *Of Legacies lapsed by the death of the Legatee after the death of the Testator.*

If a legacy be given generally, without specifying the time when it is to be paid, it is due on the day of the death of the testator (*b*), though not payable till the end of a year next after the testator's death. This delay is merely an allowance of time for the convenience of the executor, and does not prevent the interest vesting immediately on the testator's death (*c*): Hence, if the legatee happen to die within the year, his personal representative will be entitled to the legacy (*d*).

Where no period for payment is specified.

But when a future time for the payment of the legacy is defined by the Will, the legacy will be vested or contingent, according as, upon construing the Will, it appears whether the testator meant to annex the time to the payment of the legacy, or to the gift of it.

Where a future time for payment is appointed:

In ascertaining the intention of the testator in this respect, the Courts of Equity have established two positive rules of construction: 1st, That a bequest to a person *payable* or *to be paid* at or when he shall attain twenty-one years of age, or at the end of any other certain determinate term, confers on him a vested interest immediately on the testator's death, as *debitum in præsenti solvendum in futuro*, and transmissible to his executors or administrators: for the words "payable"

(*b*) Swinb. Pt. 7, s. 23, pl. 1.

(*c*) Garthshore *v.* Chalie, 10 Ves. 13. See Collins *v.* Macpherson, 2 Sim. 87.

(*d*) So where a testatrix bequeathed several legacies, and amongst others, one to a servant, if he should be residing with her at the time of her decease but not otherwise; and she directed the said legacies to be paid *within* six months after her decease; and declared that the legacies should not be vested until payable; and the legatee died before the expiration of the six months; it was held, that his representatives were entitled to the legacy. Lucas *v.* Carline, 2 Beav. 367. See also Packham *v.* Gregory, 4 Hare, 396, 397. Nevertheless the intention of the testator, that his gift should not vest in the legatee until it should be actually remitted to him, will prevail, when clearly expressed, provided the remittance be not delayed by negligence or accident: Law *v.* Thompson, 4 Russ. Chanc. Cas. 92.

or "to be paid," are supposed to disannex the time the gift of the legacy, so as to leave the gift immediate, in the same manner, in respect of it's vesting, as if the bequest stood singly, and contained no mention of time (*e*). 2d, That if the words "payable" or "to be paid" are omitted, and the legacies are given *at* twenty-one, or *if*, *when*, *in case*, or *provided* the legatees attain twenty-one or any other future definite period, these expressions annex the time to the substance of the legacy, and make the legatee's right to it depend on his being alive at the time fixed for its payment: Consequently, if the legatee happens to die before that period arrives, his personal representative will not be entitled to the legacy (*f*).

The Courts of Equity have adopted these rules from the established practice of the Ecclesiastical Courts (which in these matters have concurrent jurisdiction); more in compliance with such practice than from any conviction of the soundness of the rules themselves.

Rule 1: where the bequest is immediate, and payment postponed, the legacy is vested:

As to the first rule, *viz.*, that where the bequest is in terms immediate, and the payment alone postponed, the legacy is vested; it may be desirable, first, to give some cases illustrative of it, and then to point out certain exceptions to it's application.

In *Jackson* v. *Jackson* (*g*), the testator bequeathed to his son 400*l.*, *to be paid to him* at the end of one year next after his (the testator's) death, and the further sum of 100*l.* at the death of his mother: The son died before his mother: The question was, whether he took a vested interest in the 100*l.*: And Lord Hardwicke determined in the affirmative, observing, that the legacy of that sum was plainly vested, and the time of payment only postponed; for the former words "to be paid," were to be carried on, as they would clearly be, if turned into any other language.

(*e*) Swinb. Pt. 7, s. 23, pl. 9. Godolph. Pt. 3, c. 24, s. 25. Stapleton *v.* Cheales, Prec. Chanc. 317.

(*f*) See Hanson *v.* Graham, 6 Ves. 245.

(*g*) 1 Ves. Sen. 217.

In *Sydney* v. *Vaughan* (*h*), a legacy of 100*l.*, was bequeathed to an apprentice, *to be paid to him* within six months after he should have fully served out his apprenticeship: The legatee, instead of serving his time, ran away from his master and died intestate after the period of his apprenticeship expired: The Court of Great Sessions, on the Brecon circuit, decreed the legacy to his administrator, with interest from the end of six months after the expiration of the apprenticeship: And the House of Lords confirmed this decree.

In *Bolger* v. *Mackell* (*i*), the testatrix gave her residuary estate to Catherine, the daughter of James Winter, and to the lawful children of her (the testatrix's) brothers, John and James Snowden, in equal shares, the shares of the sons with the interest or accumulations *to be paid* at their ages of twenty-one, and of the daughters at twenty-one or marriage, after a deduction of what might be laid out for their maintenance and preferment in the world: John Snowden died without issue, but James died leaving two sons, neither of whom attained twenty-one: The question was, whether, notwithstanding that circumstance, two-thirds of the residue vested in them, so as to be transmissible to their legal personal representatives: And Lord Rosslyn was of opinion, that the two sons took vested interests, remarking, that the present was a mere bequest of the residue of personal estate, payable at twenty-one, so that the rule as to vesting must take place: which was not prevented by the addition of a direction that maintenance should be deducted (*k*).

It may here be observed, that a gift in terms which import a present vested interest, with a postponed time of payment, is not made contingent by a direction to accumulate till the time of payment arrives (*l*).

(*h*) 2 Bro. Parl. Ca. 254.

(*i*) 5 Ves. 509.

(*k*) The rule is the same, where a gift to children, &c., in a class is immediate, and the time of *division* only is postponed until they attain a certain age respectively: Farmer *v.* Francis, 2 Sim. & Stu. 505. Kevern *v.* Williams, 5 Sim. 171.

(*l*) Blease *v.* Burgh, 2 Beav. 226.

The following exceptions to this rule may be remarked:

Rule controlled by the intention of testator, apparent from the context:

1st. The rule itself is always subservient to the intention of the testator: and, therefore, if upon construing the whole Will, it *clearly* appears that the testator meant the time of payment to be the time when the legacy should vest, no interest will be transmissible to the executors or administrators, if the legatee dies before the period of payment; although the words "to be paid" or "payable at" or other terms of immediate gift be employed in the Will (*m*).

This exception may be found in operation in cases where the testator has shown a clear intention that the legacies shall not vest till his debts are satisfied (*n*), or till his property has been sold or realized, and got in by his executors, or been laid out in a purchase: For if the testator thinks proper to say distinctly that his legatees, general or residuary, shall not be entitled to the property unless they live to receive it, there is no law against such intention, if clearly expressed (*o*).

But in these cases the intention of the testator, that the legacies shall not vest, must be expressed *with certainty* to prevent the operation of the general rule: for although the payment of the legacies be expressly postponed till the testator's debts be discharged, or till the sale of an estate be effected, or till after the residue of personal estate shall be laid out in the purchase of lands, yet the general rule that the gift is immediate, and the payment alone postponed, will operate; and the legacy will be transmissible, though the legatee die before the discharge of debts, or other event until which the payment is expressly postponed (*p*).

In the instances where this exception, by reason of the manifest intention of the testator, prevents the operation of

(*m*) Mackell *v.* Winter, 3 Ves. 536. Howes *v.* Herring, 1 M'Clel. & Y. 295. Hunter *v.* Judd, 4 Sim. 455.

(*n*) Bernard *v.* Mountague, 1 Meriv. 422.

(*o*) 1 Rop. Leg. 485, 3d edit. Law *v.* Thompson, 4 Russ. Chanc. Cas. 92.

(*p*) Gaskell *v.* Harman, 6 Ves. 159. 11 Ves. 489. Stuart *v.* Bruere, 6 Ves. 529, *in notis.* Entwistle *v.* Markland, 6 Ves. 528, *in notis.* Sitwell *v.* Bernard, 6 Ves. 520. 1 Rop. Leg. 480, 3d edit.

the rule, it must be observed, that the legacies will, at all events, be considered vested at the period when the debts of the testator *might* have been paid, or the sale or purchase *might* have been effected, upon a due administration of the affairs of the testator: And a Court of Equity will inquire into what that period might have been; for that Court will not suffer the rights of legatees to be prejudiced by the fraudulent or unnecessary delay of executors or trustees (*q*).

dies incertus conditionem facit:

Another exception to the rule may be stated to be; that if the event, upon which the legacy is directed to be paid, be uncertain as to it's taking place, then the legacy becomes a conditional legacy, and will not devolve on the executors or administrators of the legatee, unless the condition be performed by the happening of the event (*r*).

Thus in *Atkins* v. *Hiscocks* (*s*), the bequest was of 200*l.* to Eliz. Hiscocks, to be paid at the time of her marriage, or within three months afterwards, provided she married with the approbation of, &c.: The testator also gave to Elizabeth an annuity until that event took place: She died without ever having been married, after having attained the age of twenty-one: The question was, whether Elizabeth took such a vested interest in the legacy, as was transmissible to her administrator: And Lord Hardwicke determined in the negative: Upon which occasion he remarked, that in the common cases of legacies to be paid at the age of twenty-one, there was a certain time fixed, not to the thing itself, but to the execution of it; and the time so fixed must necessarily arrive: But that when the time annexed to the payment was merely eventual, and might or might not come, and the person died before the contingency happened, his Lordship could find no instance where it had been decided that the legacy should be paid at all events.

But this exception will not apply when it is apparent from

(*q*) 1 Meriv. 422. Elwin *v.* Elwin, 8 Ves. 547. 1 Rop. Leg. 484, 3d edit.

(*r*) Swinb. Pt. 7, s. 23, pl. 10. Godolph. Pt. 3, c. 25, s. 25.

(*s*) 1 Atk. 500. 1 Rop. Leg. 486, 3d edit.

the whole of the Will, that it was not the intention of the testator to make the legacy conditional: Thus in *Booth* v. *Booth* (*t*), the testator, having two great nieces, both of age, named Phœbe and Anne, devised the residue of his estate to trustees, in trust, to place it out at interest, and pay the annual produce to Phœbe and Anne, until their respective marriages, and immediately after their respective marriages, *to assign to them* respectively their several shares: Phœbe, after surviving the testator, died without ever being married: And the question was, whether, notwithstanding Phœbe never married, she took a vested interest in her moiety, which was transmissible at her death to her personal representatives, one of whom was her sister Ann: Lord Alvanley held, on the ground of the bequest being a residue (*u*), and given to persons of maturity, as also upon the words of the devise, that the case was one where the maxim *dies incertus conditionem facit* could not be applied; and that Phœbe took a vested interest in her share, to which Ann, as her residuary legatee, was immediately entitled, although Ann could not claim her own original share previous to her own marriage. Again, in *Vize* v. *Stoney* (*v*), Benjamin White gave to his daughter Rebecca 1500*l.*, to his daughter Susannah 1000*l.*, and to his daughter Catherine 1200*l.*, "the said respective sums to be paid to my said daughters respectively on their respective days of marriage, with the lawful interest thereof, to be computed from the day of my decease until the same shall be respectively fully paid:" And it was held by Sugden, C. of Ireland, that the legacies, being to be paid with interest, were

(*t*) 4 Ves. 399.

(*u*) See also Jones *v.* Mackilwain, 1 Russ. Chanc. Cas. 223. There has always been a strong disposition in the Court to construe a residuary clause so as to prevent an intestacy with respect to any part of the testator's property: By Sir W. Grant, in Leake *v.* Robinson, 2 Meriv. 386. "If there is any case which decides, as an abstract proposition, that a gift of a residue to a testator's children, upon an event which afterwards happens, does not confer on those children an interest transmissible to their representatives merely because they die before the event happens, I am satisfied that case must be at variance with other authorities." By Wigram, V. C., 2 Hare, 23.

(*v*) 1 Dr. & Warr. 337.

vested, and only founded in contingency, and that the personal representatives of Rebecca and Catherine, who had both survived the testator and died unmarried, were entitled to their respective legacies (*w*).

2d. Rule: a legacy given "at," "if," "when," "in case," "provided," the legatee attains twenty-one, &c. is contingent:

It remains to consider the other positive rule on this subject: *viz.*, that if the words "payable" or "to be paid," are omitted, and the legacy is given *at* twenty-one, or *if*, *when*, *in case*, or *provided*, the legatee attains twenty-one, or any other future definite period, this confers on him a contingent interest, which depends for its vesting, and its transmissibility to his executors or administrators, on his being alive at the period specified.

In *Onslow* v. *South* (*x*), the testator being possessed of considerable personal estate in Jamaica and in England, bequeathed as follows: "I give to J. S. now under the custody of R. D. 2000*l.* *at* the age of twenty-one years, to be paid by my executors in England:" J. S. died under the age of twenty-one, but, having attained the age of eighteen, he bequeathed this legacy to the defendant South; the validity of which disposition depended upon the question, whether J. S. took a vested interest in the money before the age of twenty-one: And the Lord Chancellor determined that the legacy did not pass to the defendant; since J. S.'s interest in it was not vested, but contingent; and his Lordship remarked, that the word "now" was merely descriptive of the condition of the legatee; and that the word "paid" was only applicable to the persons by whom the money was to be satisfied.

So in *Cruse* v. *Barley* (*y*), the testator gave to his son 200*l.* *at* his age of twenty-one: The son died under twenty-one: And it was determined that the legacy never vested in him; as the age was annexed to the gift and not to the payment; and consequently, his personal representative could not be entitled to the money.

(*w*) See also Lang *v.* Pugh, 1 Y. & Coll. Ch. C. 718.

(*x*) 1 Eq. Cas. Abr. 295, pl. 6.

(*y*) 3 P. Wms. 20.

In *Smell* v. *Dee* (*y*), the bequest was of "100*l.* a-piece to the two children of J. S. *at* the end of ten years next after my decease:" The legatees died before the expiration of the ten years: And Lord Cowper held the legacies to be extinct; and said, "that wherever the time is annexed to the legacy, and not to the payment of it (as in the present case), if the legatee die before the day of payment, the legacy is lapsed" (*z*).

"if," "when:" In *Stapleton* v. *Cheales* (*a*), it was clearly held, that the expressions "at twenty-one," or "*if*," or "*when* he shall attain twenty-one," were all one and the same, and in each of those cases, if the legatee died before that age, the legacy lapsed. This is fully confirmed by Sir W. Grant in *Hanson* v. *Graham* (*b*), who observed, that in the civil law the words "*cum*" and "*si*," as referred to this subject, are precisely equivalent; and from that law we borrow all, or at least the greatest part of our rules upon legacies (*c*).

"Provided:" In *Atkinson* v. *Turner* (*d*), the testator gave two-thirds of three-eighths of his joint-stock and trade to his grandson, *provided* he should attain the full age of twenty-one, with remainder over if he did not live to that period: The grandson died under twenty-one; and the question was, whether his administrator was entitled to the profits which accrued from the death of the testator to the infant's decease; which depended upon the circumstance whether he took a vested interest in the legacy during minority: And the Master of the Rolls determined in the negative; considering, that by

(*y*) 2 Salk. 415.

(*z*) See also Accord. Bruce *v.* Charlton, 13 Sim. 65, 68.

(*a*) Prec. Chanc. 317. See also Butcher *v.* Leach, 5 Beav. 391.

(*b*) 6 Ves. 243, 245.

(*c*) In the case of May *v.* Wood, 3 Bro. C. C. 473, 474, Lord Alvanley broadly laid down a different doctrine. But Sir W. Grant, in Hanson *v.* Graham, 6 Ves. 243, demonstrates that the principle on which his Lordship proceeded was an erroneous one. See also Lane *v.* Goudge, 9 Ves. 230; and the observations of Lord Brougham, in Phipps *v.* Ackers, 3 Cl. & Fin. 715.

(*d*) 2 Atk. 41. See also Watson *v.* Hayes, 5 M. & Cr. 125, 132, 133. Young *v.* Macintosh, 13 Sim. 445.

the words of the Will, nothing vested in the legatee, since he did not attain the age of twenty-one.

"In case:"

In *Elton* v. *Elton* (*e*), where a testator gave to his granddaughter 1500*l.* to be at her disposal, *in case* she married with consent, &c., Lord Hardwicke held, that marriage was a condition precedent to the vesting of the legacy; observing, that whether the testator said, "in case she marry, I give," or, "I give, in case she marry," made no difference; for in both instances marriage is annexed to the substance of the devise (*f*).

Direction to transfer "from and after," or "to pay at," a future period, without any previous gift:

Where there is no gift but by a direction to pay, or divide and pay, at a future time, or on a given event, or to transfer "from and after" a given event, the vesting will be postponed till after that time has arrived, or that event has happened, unless from particular circumstances a contrary intention is to be collected (*g*).

This doctrine, in fact, only assimilates the gift of a legacy, under the form of a direction to pay or divide at a future time, or on a given event, to the instance already considered of a simple and direct bequest of a legacy *at* a like future time, or on a like event (*h*).

Exceptions to 2d Rule:

gift of interim interest:

It may now be proper to ascertain the exceptions prevalent with respect to this latter rule. 1st, Where a testator bequeaths a legacy to a person at a future time, and either gives him the intermediate interest, or directs it to be applied for his benefit, the Court there considers the disposition of the interest to be an indication of the testator's intention that the legatee should at all events have the principal, and on this ground holds such legacies to be vested (*i*).

(*e*) 3 Atk. 504.

(*f*) See also Knight *v.* Cameron, 14 Ves. 389.

(*g*) Leake *v.* Robinson, 2 Meriv. 387. Booth *v.* Booth, 4 Ves. 399. Ford *v.* Rawlins, 1 Sim. & Stu. 328. Jones *v.* Mackilwain, 1 Russ. Chanc. Cas. 223. Vawdry *v.* Geddes, 1 Russ. & M. 203. Murray *v.* Tancred, 10 Sim. 465. Watson *v.* Hayes, 5 M. & Cr. 125, 133. Davies *v.* Fisher, 5 Beav. 201, 209, *per* Lord Langdale. Beck *v.* Burn, 7 Beav. 492. Chevaux *v.* Aislabie, 13 Sim. 71. But see Leeming *v.* Sherratt, 2 Hare, 14, 17, 21. Packham *v.* Gregory, 4 Hare, 396, 397, 398, and *post*, p. 1061.

(*h*) 2 Hare, 18.

(*i*) Fearne, Cont. Rem. 553, note

Thus in *Fonereau* v. *Fonereau* (*k*), the bequest was of 1000*l.* to Claudius Fonereau, *when* he should have attained the age of twenty-five: The testator empowered his executors and trustees to place the money at interest, which he directed to be applied at their discretion for the education of Claudius, as also part of the principal to put him apprentice, and the remainder to be paid to him when he should have attained the age of twenty-five, and not before: Claudius having died under that age, the question was, whether his personal representative was entitled to the legacy; which depended upon this, whether he took a vested interest: And Lord Hardwicke decided in the affirmative.

In *Hoath* v. *Hoath* (*l*), the testator gave 100*l.* to Thomas Hoath *at* his age of twenty-one, and directed the intermediate interest to be paid to his mother for his maintenance: Thomas having died under twenty-one, the question was, whether this was a vested legacy: And Lord Thurlow determined in the affirmative, in consequence of the interest having been given for the benefit of Thomas, before his legacy became payable.

In *Hansom* v. *Graham* (*m*), the testator bequeathed to his three grandchildren 500*l.* a-piece, four per cent. consols, *when* they should respectively attain the age of twenty-one, or be married, provided the marriages were had with the consent of his executors and trustees; and he directed the interest of the annuities to be laid out at the discretion of his executors and trustees as they should think proper, for the benefit of the legatees, until they attained twenty-one or married, and for no other use, intent, or purpose: The

by Mr. Butler. Where interim interest is given, it is presumed that the testator meant an immediate gift, because, for the purpose of interest, the particular legacy is to be immediately separated from the bulk of the property: By Sir J. Leach, in Vawdry *v.* Geddes, 1 Russ. & M. 208. See also Saunders *v.* Vantier, 1 Cr. & Ph. 248, by Lord Cottenham. Accord.

(*k*) 3 Atk. 645. S. C. 1 Ves. Sen. 118. 1 Rop. Leg. 495, 3d edit.

(*l*) 2 Bro. C. C. 4. 1 Rop. Leg. 495, 3d edit.

(*m*) 6 Ves. 239. 1 Rop. Leg. 498, 3d edit.

testator then gave his residuary personal estate to his son Isaac Graham, whom he appointed executor: One of the grandchildren died intestate at the age of nine years, after surviving the testator; and the question was, whether the plaintiffs, it's next of kin, or the residuary legatee of the testator, were entitled to the legacy; which depended upon this circumstance, whether the deceased grandchild took a vested interest in it: And Sir W. Grant determined in favour of the plaintiffs, the next of kin, upon the principle, that the gift of the whole interest for the benefit of the legatees, which gave them the absolute property in it, as it became due, also gave them immediate vested interests in the legacies, and consequently, that the next of kin of the deceased grandchild were entitled to the 500*l.* bequeathed to it (*n*).

Accordingly, it is an established doctrine, that directions to pay or divide, &c. at a future time, or on a given event, which, as it has already been shewn (*o*), of themselves import a postponement of the vesting, may be so controlled by a direction to apply the interest for the benefit of the legatee (*p*), or by other expressions and circumstances, as to postpone payment or possession only, and not the vesting (*q*).

In *Davies* v. *Fisher* (*r*), a gift of personalty to trustees for A. for life, and after his death, in trust for the children of A., "*as they severally attained twenty-five years,*" the income to be applied *during their respective minorities* by their guardian for their maintenance, &c., with a gift over in case no child should live to attain twenty-five, was held by Lord Langdale

(*n*) See further on the subject of this exception, Branstrom *v.* Wilkinson, 7 Ves. 421. Lane *v.* Goudge, 9 Ves. 229. Jones *v.* Mackilwain, 1 Russ. Chanc. Cas. 220. Murray *v.* Addenbrook, 4 Russ. 407. Murkin *v.* Phillipson, 3 M. & K. 257. Stephens *v.* Frost, 2 Younge & C. 302. Vivian *v.* Mills, 1 Beav. 315. Cromek *v.* Lumb, 3 Younge & C. 565. Vize *v.* Stoney, 1 Dr. & Warr. 337. *Ante*, p. 1056. Parker *v.* Golding, 13 Sim. 418. Lister *v.* Bradley, 1 Hare, 10, 13.

(*o*) *Ante*, p. 1059.

(*p*) Parker *v.* Golding, 13 Sim. 418. Milroy *v.* Milroy, 14 Sim. 48. Hammond *v.* Maule, 1 Coll. 281.

(*q*) 5 Beav. 209. Leeming *v.* Sherratt, 2 Hare, 14. Packham *v.* Gregory, 4 Hare, 396.

(*r*) 5 Beav. 201.

to be vested, notwithstanding the interval between the twenty-first and twenty-fifth year of each child, during which there was no direction as to the application of the interest (*s*).

But, generally speaking, if the gift of maintenance be not co-extensive with the whole amount of the interest (*t*), or if it be made out of another fund (*u*), in neither case will the legacies vest, prior to the arrival of the periods at which they are made payable: for such provisions afford no presumption that the testators intended the legacies to vest before they became due.

Again, in the cases above cited, the *corpus* of the property was given with a postponement of the payment, and the interest or fund directed to be applied or managed for the benefit of the legatee: But the exception will not apply where the interest or dividends alone are the subject of bequest until a particular time, and the principal is not sooner taken out of the residue, but directed for the first time to be taken out of it, and paid or transferred to the legatee *at the end of that period:* because the gift and payment of it are one and the same, and it was the intention of the testator to make the gifts of the interest and the capital separate and distinct, so as to constitute the time appointed for payment of the principal the very essence of the gift of it (*v*).

Thus in *Batsford* v. *Kebbell* (*w*), the testatrix gave to Robert Endly the dividends which should become due after her death upon 500*l.* three per cent. Bank Annuities, until he should arrive at the full age of thirty-two years, at which time she directed her executors to transfer to him the prin-

(*s*) See also Accord. Marquis of Bute *v.* Harman, 9 Beav. 320. Milroy *v.* Milroy, 14 Sim. 48; in which last case Shadwell, V. C., held, that the word "minority" meant the time that would elapse before the youngest child attained twenty-five.

(*t*) Pulsford *v.* Hunter, 3 Bro. C. C. 416. Hanson *v.* Graham, 6 Ves. 249. Leake *v.* Robinson, 2 Meriv. 386, 387. Vawdry *v.* Geddes, 1 Russ. & M. 203.

(*u*) 1 Rop. Leg. 497, 3d edit.

(*v*) 1 Rop. Leg. 500, 3d edit. This statement by Mr. Roper of the principle of the cases was approved of and acted upon by Alderson, B., in Cromek *v.* Lumb, 3 Younge & C. 576.

(*w*) 3 Ves. 363. 1 Rop. Leg. 500, 3d edit.

cipal sum for his own use: Robert died under that age; and the question was, whether his personal representatives or the residuary legatee of the testatrix were entitled to the legacy; which depended upon the circumstance, whether Robert took a vested interest in it previous to the age of thirty-two: It was insisted for the residuary legatee, that there was no gift of the principal to Robert but in the direction to transfer at a time which never arrived; and that the difference was between a gift of the *corpus*, taking it out of the residue, and a gift of the dividends only, the capital being to be taken out at a future period: And Lord Rosslyn concurred in this statement, and decreed in favour of the residuary legatee; remarking that he had looked into the cases, from which it appeared that dividends were always a distinct subject of legacy; that, in this instance, there was no gift but in the direction for payment, a direction that only attached upon a person of the age of thirty-two, which necessarily excluded Robert, as he never attained that age: And his Lordship said, that in all the other cases of vesting, the thing was given, and the profit of the thing was given (*x*).

In *Watson* v. *Hayes* (*y*), a testator directed all his property to be sold by his executors, and the proceeds to be invested in government or real securities, to be disposed of as after-mentioned: He then desired his executors to pay 25*l.* yearly, for the maintenance and education of his natural daughter, until she attained the age of twenty-one or married, when he required them to pay her the sum of 500*l.*: The daughter died under age, and unmarried: Sir L. Shadwell, V. C., held that, nevertheless, the 500*l.* vested in her; his

(*x*) See also Sansbury *v.* Read, 12 Ves. 75. Ford *v.* Rawlins, 1 Sim. & Stu. 328. Vawdry *v.* Geddes, 1 Russ. & M. 203. Taylor *v.* Bacon, 8 Sim. 100. The presumption of an immediate gift from the circumstance of the interim interest being given, fails entirely, when the testator has expressly declared, that the legacy is to go over in case of the death of the legatee before a particular period: By Sir J. Leach, in Vawdry *v.* Geddes, 1 Russ. & M. 208. But see *contra*, 1 Jarman on Wills, 774, and also Davies *v.* Fisher, 5 Beav. 201, 213. *Post*, p. 1070, 1071. *Ante*, p. 1061.

(*y*) 9 Sim. 500.

Honor being of opinion that the 25*l.* directed to be applied for the maintenance and education of the legatee, might be fairly regarded as intended to be the interest of the 500*l.* which was directed to be paid to her on her attaining twenty-one, or being married. But this decision was reversed by Lord Cottenham on appeal, on the ground that the gift of the maintenance was a distinct gift (*z*).

It must further be remarked, with respect to this exception, that a contingent gift of the interest will not vest the principal: Thus a legacy to A., as soon as she attains twenty-one, *with interest*, is contingent (*a*). But a bequest by a testator of one-third of his personal estate to his daughter, and in case of his decease, to have the interest therein and principal when she attained the age of twenty-five, was held to give a vested interest to the daughter, though she died under that age (*b*).

And it should be here observed that there is an important distinction between a case where the legacy is to be severed *instanter* from the general estate, for the use and benefit of the legatee, and a case where a legacy is to be severed from the estate only upon the happening of a particular event. Thus in *Saunders* v. *Vautier* (*c*), a testator bequeathed to his executors or trustees all the East India stock which should be standing in his name at his death, upon trust to accumulate the dividends until D. W. V. should attain twenty-five, and then to transfer the principal, together with such accumulations, to D. W. V. his executors, administrators, or assigns, absolutely: The Will also contained a residuary bequest: The testator had 2000*l.* India stock standing in his name at his death: And it was held by Lord Cottenham, that D. W. V. took an immediate vested interest in that legacy, although he was a minor at the testator's death; and accordingly the Court ordered the stock, with its accumulations, to be transferred to him on his attaining twenty-one: And his Lordship observed,

(*z*) 5 M. & Cr. 124.

(*a*) Knight *v.* Knight, 2 Sim. & Stu. 490.

(*b*) Breedon *v.* Tugman, 3 M. & K. 289.

(*c*) 1 Cr. & Ph. 240.

that there was not only a gift of the intermediate interest, but a positive direction to separate the legacy from the estate and to hold it in trust for the legatee when he should attain twenty-five (*d*).

where a previous estate is given to another.

A second exception to the latter rule is, that where a person bequeaths a sum of money or other personal estate to one for life, and after his decease to another, the interest of the second legatee is vested: and his personal representatives will be entitled to the property, though he dies in the lifetime of the person to whom the property is bequeathed for life (*e*).

Thus, in *Monkhouse* v. *Holme* (*f*), the testator gave 800*l.* to trustees, to pay to his wife the interest for life, and from and after her death he disposed of the said sum of 800*l.* in manner following, &c.: Then the testator, after several intermediate devises and bequests, gave the legacy, upon which the question arose; "I also give to Jonathan Monkhouse, son of my brother George, the sum of 100*l.*:" Jonathan, having survived the testator, died before the widow; and the question was, whether he took a vested interest in the legacy, so as to transmit it to his personal representatives: And Lord Rosslyn decided in the affirmative; His Lordship remarking that the 800*l.* was given to the trustees to pay the interest to the wife for life, and then in parts and shares; which showed that the testator intended to give vested interests to the several legatees.

So in *Blamire* v. *Geldart* (*g*), the testator gave to George Pringle 200*l.* three per cent. Consols, at his wife's decease, and appointed her, Pringle, and another person, executors,

(*d*) See also Accord. Greet *v.* Greet, 5 Beav. 123. Lister *v.* Bradey, 1 Hare, 10. See also Curtis *v.* Lukin, 5 Beav. 147, 155, 156. Rocke *v.* Rocke, 9 Beav. 66. But the mere necessity of making such a severance in some events only (as in the case of the residue becoming payable before the legacy itself is payable, or other cause unconnected with the legacy itself) is not sufficient to vest the legacy. Festing *v.* Allen, 5 Hare, 575, 578.

(*e*) Fearne, Cont. Rem. 554, note.

(*f*) 1 Bro. C. C. 298. 1 Rop. Leg. 503, 3d edit.

(*g*) 16 Ves. 314. 1 Rop. Leg. 505, 3d edit.

to manage the property and fulfil the intentions of his Will: Pringle, the legatee, died before the wife; and the question was, whether he took a vested interest in the Consols, which entitled his personal representative to a transfer of them, the testator's widow being dead: And Sir W. Grant, M. R., determined in the affirmative, and thus expressed himself: "If the testator had given the stock to his wife for life, and at her death to Pringle, it would have been clear that he would have had a vested interest in the nature of a remainder: In a Will, it is not material in what order the clauses are arranged: The question is, what is the effect upon the whole? This testator begins by giving to Pringle the stock at the death of his wife, and then gives to his wife the whole of his property: Consequently, she has a life interest in that stock so given to Pringle at her death; for it is part of the testator's property not antecedently disposed of: Thus the Will, no matter in what order, divides the fund between these two persons; giving to one the interest for her life, and to the other the capital at her decease: In effect and substance Pringle took a remainder, which became vested immediately upon the testator's death, and was not defeated by his own death in the lifetime of the wife" (*h*).

Within the principle of this exception may be considered the cases, where the fund, which is the subject of the legacy, is given, not as in cases within the first exception, for the benefit of the legatee himself, but to another person beneficially, till the legatee arrive at a particular age, as till he attains twenty-one; or for a certain purpose, as till a certain

(*i*) See further on the subject of this exception, Atty. Gen. *v.* Crispin, 1 Bro. C. C. 386. Exel *v.* Wallace, 2 Ves. Sen. 119. Benyon *v.* Maddison, 2 Bro. C. C. 75. Scurfield *v.* Howes, 3 Bro. C. C. 90. Taylor *v.* Langford, 3 Ves. 119. Wadley *v.* North, 3 Ves. 364. Hallifax *v.* Wilson, 16 Ves. 168. Walker *v.* Main, 1 Jac. & Walk. 1. Cousins *v.* Schroder, 4 Sim. 23. Watson *v.* Watson, 11 Sim. 73. Peters *v.* Dipple, 12 Sim. 101. Kimberley *v.* Tew, 4 Dr. & Warr. 139. Locker *v.* Bradley, 5 Beav. 593. Hammond *v.* Maule, 1 Coll. 281, 283, 284. Bree *v.* Perfect, 1 Coll. 128. Butterworth *v.* Harvey, 9 Beav. 130. Roberts *v.* Burder, 2 Coll. 130. Packham *v.* Gregory, 4 Hare, 396.

quantity of debt be paid: These bequests mean to give all to a particular person, but to carve out a certain interest to endure a certain time, merely by way of exception out of the whole property meant to vest in the legatee (*i*).

In these instances the person to whom the absolute property is limited, will take an immediate vested interest in the subject; since such bequests are in the nature of remainders; the rule as to which is, that the interests of the first and subsequent takers vest together (*k*).

But this exception will not apply in cases where the principal itself is not bequeathed, but the *interest only* or income is given to a person for life, or some other period, and at the decease of the first taker, or the end of the period, the *capital* is bequeathed to another, and *where it appears from the context of the Will*, that *no interest in the capital was intended to pass till the determination of the life estate*, or other particular period: for in such cases the gift of the income and the gift of the capital are considered as distinct gifts; and when the legatee of the principal dies during the preceding period, the legacy is not transmissible to the executors or administrators (*l*).

Thus, in *Billingsley* v. *Wills* (*m*), the testator gave to his brother, Capel Billingsley, the *interest* of 1500*l.*, for life, and from and after his decease, he gave the *said sum* of 1500*l.* to all the younger sons, and to all the daughters of Capel, equally, to be paid to them at their ages of twenty-one; declaring, that no elder son, if there should be more than one son, nor any elder daughter, if there were only daughters of Capel, living at his decease, should have any share or interest in the 1500*l.*: But if all the children of Capel, except one, died before twenty-one, then he gave 1000*l.*, part of the 1500*l.*, to such surviving only child, to be paid at twenty-one:

(*i*) Boraston's case, 3 Co. 21. Phipps *v.* Ackers, 9 Cl. & F. 583, 591. 4 M. & Gr. 1107. Lane *v.* Goudge, 9 Ves. 230, by Sir Wm. Grant. Parkin *v.* Knight, 15 Sim. 83.

(*k*) See Balmain *v.* Shore, 9 Ves. 507.

(*l*) Fearne, Cont. Rem. 554, note. 1 Rop. Leg. 506, 3d edit.

(*m*) 3 Atk. 219.

Capel had three children when the Will was made, and another child after the testator's death: Letitia, one of the three children, married and attained twenty-one, but died before her father: The question was, whether she, having attained twenty-one, but dying during the life of her father, was, notwithstanding, entitled to a vested interest in a share of the 1500*l.*, so as to transmit it to her husband, the defendant, her personal representative: Lord Hardwicke determined, that Letitia took no vested interest, but that the shares in remainder were contingent during the life of Capel Billingsley; since there was no gift of the capital previously to his death, the objects to take it being uncertain, till that event happened, and consequently, the time of payment being annexed to the substance of the gift of the legacy (which was at the death of Capel), as Letitia was not then living, she took no interest in it which she could transmit to her personal representative (*n*).

Where gift is postponed for the convenience of the fund, it is vested:

It must be confessed that the cases which have been above cited, and the various distinctions created thereby, have left the law in a state of some confusion as well with respect to the doctrine of controlling a gift *at* a future time, or a direction to pay and divide at a future time or on a given event, (or other expressions denoting a postponement of the vesting of a legacy,) by reason of it's being a bequest in the nature of a remainder; as also with respect to the doctrine previously discussed of controlling such expressions by a gift of the intermediate interest of the fund to the legatee. A general proposition has been laid down on the subject by an eminent writer (*o*), which appears to have met with the approval of Wigram, V. C., in *Packham* v. *Gregory* (*p*), *viz.*, that though

(*n*) In Packham *v.* Gregory, 4 Hare, 399, it was said by Wigram, V. C., that after very great pains, Lord Hardwicke put this case upon the particular circumstances. See further on this subject, Thicknesse *v.* Liege, 3 Bro. P. C. 365, Toml. edit. Reeves *v.* Brymer, 4 Ves. 692. Hoghton *v.* Whitgreave, 1 Jac. & Walk. 146. Ford *v.* Rawlins, 1 Sim. & Stu. 328. Taylor *v.* Bacon, 8 Sim. 100. Lang *v.* Pugh, 1 Y. & Coll. Ch. C. 718, 726.

(*o*) 1 Jarman on Wills, 763.

(*p*) 4 Hare, 398.

there be no other gift than in the direction to pay or distribute *in futuro*, yet if such payment or distribution appear to be postponed for the convenience of the fund or property, (as where the future gift is only postponed to let in some other interest), the vesting will not be deferred till the period in question.

secus, where the attaining of a certain age is made part of the description of the legatee.

This general proposition, however, must not be understood as applicable to cases where the attainment of a particular age is introduced into and made a constituent part of the description or character of the objects of the gift; as where the bequest is to *the* children *who* shall attain, or to *such* children *as* shall attain the age of twenty-one years; there being in such cases no gift except to the persons who answer the qualification which the testator has annexed to the enjoyment of his bounty (*q*).

In what way the vesting of a legacy is affected by a limitation over on a contingency.

Difficult questions, connected with this subject, have arisen on the construction of Wills, by which legacies are limited over on a contingency, by way of executory bequest.

The general rule appears to be, that a devise over on a contingency does not, of itself, and without more, prevent any of the shares of the legatees from vesting in the meantime, provided the words of bequest be, in other respects, sufficient to pass a present interest (*r*); though such a devise over of the entirety may be called in aid of other circumstances to shew that no present interest was intended to pass (*s*).

Accordingly, in *Skey* v. *Barnes* (*t*), a testator gave his personal estate to trustees, upon trust to pay the interest to his daughter E. S. for her life, and after her decease, to pay

(*q*) 1 Jarman on Wills. 771. Newman *v.* Newman, 10 Sim. 51. Bull *v.* Pritchard, 1 Russ. 213. 5 Hare, 567. Festing *v.* Allen, 12 M. & W. 279. 5 Hare, 575. See also 4 Hare, 397, 398, 399, where Wigram, V. C., expressed an opinion that the decisions of Batsford *v.* Kebbell (*ante*, p. 1062) and Vawdry *v.* Geddes (*ante*, p. 1062, 1063) are referrible to this principle.

(*r*) 3 Meriv. 340. 5 Beav. 214.

(*s*) *Ibid.* Indeed the devise over has been sometimes considered as affording an argument *in favor* of an immediate vesting. See *post*, p. 1071, note (*x*).

(*t*) 3 Meriv. 335, 340.

and divide the principal among the children of his said daughter, and the issue of a deceased child, as she should appoint, and in default of appointment, to go and be equally divided among them; and if but one, then to such only child; the portions of sons to be paid at their respective ages of twenty-one and of daughters at their respective ages of twenty-one or marriage: If no issue, or all died before their respective portions became payable, then over: One of the children of E. S., having survived her, died under twenty-one and unmarried: It was contended, that the evident intention was that the shares should not vest till twenty-one, but that in the event of the death of any under that age, the others should take by survivorship: But Sir W. Grant held, that the shares were so given as to vest immediately in the children, though liable to be divested by all dying under twenty-one, without issue; and that, therefore, the share of a child dying under twenty-one passed to its representative. So in *Templeman* v. *Warrington* (*u*), a testatrix bequeathed the residue of her funded property in trust for her niece for life, and after her death, to be equally divided amongst all her children, whether sons or daughters, share and share alike; and in case it should happen there was but one child at the niece's death, then to go to that only child; and in failure of issue, to go as the niece should appoint by her Will: The niece had eleven children, three of whom, having survived the testatrix, died in the lifetime of the niece: And it was held by Shadwell, V. C., that all the children took vested interests; and as more than one survived their mother, there was no divesting of interest; and his Honor said that *Skey* v. *Baines* was clearly in point (*v*).

In *Bland* v. *Williams* (*w*), there was a bequest to trustees of the testator's residuary estate, with a direction to apply so much of the interest, dividends, and profits as might be neces-

(*u*) 13 Sim. 267.

(*v*) See Accord. Davies *v.* Fisher, 5 Beav. 201, 214. Locker *v.* Bradley, *ibid.* 593. Kimberley *v.* Tew, 4 Dr. & Warr. 139. See also Davidson *v.* Dallas, 14 Ves. 577.

(*w*) 3 M. & K. 411.

sary for the maintenance and education of the children of the testator's daughter until they should respectively attain the age of twenty-four, and then to divide the principal equally between them, with a gift over in case any of them should die under twenty-four, without leaving issue: And it was held by Sir J. Leach, M. R., that the bequest was not void as too remote; but gave a present vested interest, with an executory bequest over in case of death under twenty-four without leaving issue: And his Honor observed, that "whether in a gift of this nature the time of vesting is postponed, or only the time of payment, depends altogether upon the whole context of the Will. If the gift over is simply upon the death under twenty-four, then the gift could not vest before that age (*x*). In this case, the gift over is not

(*x*) "Why not?" is asked in 1 Jarman on Wills, 775, note (*x*), commenting on this passage. And that learned author expresses an opinion that a bequest in the terms supposed may admit of the application of the principle of the cases of Edwards *v.* Hammond, 3 Lev. 132. Doe *v.* Moore, 14 East, 601. Doe *v.* Nowell, 1 M. & S. 327. Bromfield *v.* Crowder, 1 New Rep. 313, and Doe *v.* Ward, 9 A. & E. 582, which are cited in another part of the same work (vol. 1, p. 738), as establishing the proposition, with respect to devises of *real* estate, that though a devise to a person, if he should live to attain a particular age, standing alone, would be contingent, yet if it be followed by a limitation over, in case he die under such age, the devise over is considered as explanatory of the sense in which the testator intended the devisee's interest in the property to depend on his attaining the specified age, namely, that at that age it should become absolute and indefeasible; the interest in question, therefore, must be construed to vest *instanter*. This class of cases has been since fully discussed in the House of Lords, in Phipps *v.* Ackers, 9 Cl. & F. 583 (on appeal from the decision of Shadwell, V. C., in Phipps *v.* Williams, 5 Sim. 44), where the judges delivered their opinion (which was adopted by the House), that if a testator devises real estate to C. D., when and so soon as he shall attain his age of twenty-one years, but in case C. D. shall die under the age of twenty-one, without leaving issue, then that the said estate shall sink into and form part of the testator's residuary real estate, and he gives all the residue of real estates to J. C., (subject to various limitations affecting the same); the devisee C. D., on the death of the testator, takes an estate in fee simple, subject to be devested in the event of his dying under twenty-one and without issue. And Tindal, C. J., in delivering the opinion of the Judges, said that the class of cases in ques-

simply upon the death under twenty-four, but upon the death under twenty-four, without leaving issue. If upon a death under twenty-four, at whatever age, issue was left, then the gift over is not to take place. It is in effect, therefore, a vested interest with an executory devise over, in case of death under twenty-four, without leaving issue. All the cases upon the subject (*y*), except *Bull* v. *Pritchard* (*z*), before Lord Gifford, are reconcileable with this distinction." (*a*).

presumption in favour of bequests, by way of portions to

In construing a settlement or Will, which makes a provision for children subject to a prior life-interest, the Court leans

tion went on the principle that the subsequent gift over, in the event of the devisee dying under twenty-one, sufficiently shews the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which of course gives him the immediate interest, subject only to the chance of its being devested on a future contingency: And that whether the doctrine on which this class of cases has rested was originally altogether satisfactory or not, it was sufficient to say that it clearly had been established and recognised, not only in the Court below but in the House of Lords itself; and that it governed the present case. In the subsequent case of Festing *v.* Allen, 12 M. & W. 301, the Barons of the Exchequer said that they should not feel inclined to extend the doctrine of Doe *v.* Moore and Phipps *v.* Ackers to cases not precisely similar.

(*y*) Leake *v.* Robinson, 2 Meriv. 363. Farmer *v.* Francis, 2 Sim. & Stu. 505. Vawdry *v.* Geddes, 1 Russ. & M 203. Judd *v.* Judd, 3 Sim. 525. Hunter *v.* Judd, 4 Sim. 455.

(*z*) 1 Russ. Chanc. Cas. 213. In that case a testator bequeathed personal property to his trustees and executors upon trust, to pay the dividends to his daughter during her life, to her separate use, and after her decease, to pay the principal unto all and every her children who should live to attain twenty-three years of age, share and share alike, with benefit of survivorship, in case any of them died under that age; with limitations over, in case there should be no such child or children, or, being such, all of them should die under twenty-three, without lawful issue: The daughter had a child, who died under age in the daughter's lifetime: And Lord Gifford, M. R., held, that the attainment of the age of twenty-three was necessary to vest an interest in any of the children; and, consequently, that the bequests to them, and the subsequent limitations, were too remote. See 5 Hare, 567. Doe *v.* Ward, 9 A. & E. 582, 605.

(*a*) See also Bree *v.* Perfect, 1 Coll. 129.

strongly in favour of that construction by which the children will take a vested interest at twenty-one or marriage, whether they survive the tenant for life or not; and if the instrument is incorrectly or *ambiguously* expressed, or if it contains *conflicting* and contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which the shares are to vest, the rational presumption is, that the child acquires a vested and transmissible interest at the period when it is most needed, *viz.* at twenty-one, if a son, or on marriage or at that age, if a daughter (*b*).

children, vesting at twenty-one or marriage.

Accordingly, in *Clutterbuck* v. *Edwards* (*c*), a testator appointed a fund, after the death of his wife, to his son, to be paid to him at her decease, if he should then have attained twenty-one; and in case his son died under twenty-one, and after the wife, he gave the fund to his brother; and in case the wife should outlive both the son and the brother, he gave it to the brother's daughters, then living: The son attained twenty-one, and died in the lifetime of the wife, who survived both the son and the brother: There were daughters of the brother then living: And it was held, by Sir John Leach, M. R., and by Lord Brougham, on appeal, that the representatives of the son, and not the daughters of the brother, were entitled to the fund.

But when the testator has unequivocally expressed an intention, that a provision to be made for his children shall depend on their surviving both or either of their parents, the Court must give effect to that intention, and can only lean to the presumption in favour of children, where the intention of the testator is ambiguously expressed (*d*).

(*b*) Howgrave *v.* Cartier, 3 V. & B. 79, 85, 86. Perfect *v.* Lord Curzon, 5 Madd. 442. Torres *v.* Franco, 1 Russ. & M. 649. Mocatta *v.* Lindo, 9 Sim. 56. Whiting *v.* Force, 2 Beav. 571. Jones *v.* Jones, 13 Sim. 561. Mostyn *v.* Mostyn, 1 Coll. 161. Butterworth *v.* Harvey, 9 Beav. 130.

(*c*) 2 Russ. & M. 577.

(*d*) 3 V. & B. 85. Hotckin *v.* Humfrey, 2 Madd. 65. Fitzgerald *v.* Field, 1 Russ. 430. Tucker *v.* Harris, 5 Sim. 538. Tawney *v.* Ward, 1 Beav. 563. *Ex parte* Hunter, 3 Younge & C. 610. Bright *v.* Rowe, 3 M. & K. 316. Evans *v.* Scott, 1 Cl. & F., N. S. 43.

An illustration of these doctrines may be found in the late decision of *Whatford* v. *Moore* (*e*); in the arguments of which case almost all the previous authorities on this subject were cited: And Lord Cottenham, in giving his judgment, made the following observations. "In a case of doubtful construction upon the whole instrument, the Court leans to that which will include children so dying (*i. e.* attaining their age in the lifetime of their parents and dying before them), as most convenient, and most likely to have been the intention of the parties. It may be thought that Courts have gone the full length that is justifiable in order to attain this object; but no case has gone so far as to do violence to the words, if no other part of the instrument be found inconsistent with them." His Lordship further observed, that "the cases upon this subject turn upon such nice distinctions, and are so little reconcileable, that the only reasonable course is to adopt the rule which has been generally recognised, of leaning in favour of a construction which includes all the children, if the instrument affords fair grounds for doing so; but if not, to give effect to the plain meaning of the words used." And his Lordship added that the cases "have proceeded upon grounds so peculiar, and have departed so widely from the rule of construing instruments, according to the obvious and natural meaning of the words used, that it is not possible to come to any very satisfactory conclusion upon any case which varies at all from former decisions."

A bequest to a class which is void for remoteness as to any member of that class, fails altogether.

It must be observed, however, that a gift to a class which is void as to any member of that class, by reason of being too remote, must fail altogether: Therefore if a bequest is made to a class of persons, in such a manner, that, with respect to some of the members of it, it is too remote, by reason of the interest not vesting within the legal limits during which a bequest may take effect, the whole gift fails, notwithstanding, with respect to others of the class, it may not be too remote;

(*e*) 7 Sim. 574. 3 Mylne & Cr. 270.

for what the Court has to determine is, ***whether the class can take;*** if not, the Court cannot split into portions the general bequest to the class, and say, that because the rule of law forbids the testator's intention from operating in favour of the whole class, his bequests shall be made, what he never intended them to be, *viz.*, a series of particular legacies to particular individuals, or distinct bequests, in each instance, to two different classes; for this, in effect, would be to make a new Will for the testator (*f*). Nor will this rule be varied, even in favour of a person who is *named* by the testator, and with respect to whom, individually, the bequest is not too remote, if he is mentioned as a member of the class, with respect to whom, as a class, the gift is too remote (*g*).

Vested legacies subject to executory bequests over.

Another question, closely connected with these points, has frequently arisen, *viz.*, whether the terms of a legacy give to the legatee an absolute and indefeasible interest in the thing bequeathed, or an interest, which, though vested in him, is subject to an executory bequest over, on the happening of a particular event. But this inquiry will, perhaps, be more appropriately introduced hereafter (*h*), in conjunction with the doctrine of conditional legacies.

III. *Of the Lapse of Legacies payable out of the Real Estate.*

As to legacies payable out of real estates only, the first rule above stated, as adopted with respect to legacies payable out of personal estate, *viz.* that when the gift and the time of payment are distinct, the legacy vests immediately, does not hold, generally speaking.

The reason of this distinction is, that in the civil law a bequest to a person to be paid at a future time, was held to

(*f*) Leake *v.* Robinson, 2 Meriv. 363, 390. Bull *v.* Pritchard, 1 Russ. 213. Vawdry *v.* Geddes, 1 Russ. & M. 203. Cromek *v.* Lumb, 3 Younge & C. 565. Comport *v.* Austen, 12 Sim. 218. Ker *v.* Lord Dungannon, 1 Dr. & Warr. 509.

(*g*) Porter *v.* Fox, 6 Sim. 485.

(*h*) *Post*, p. 1081, *et seq.*

confer on him a present right to the legacy, notwithstanding the time of payment was future; so that, immediately on the testator's decease it became, in the eye of the civil law, a present debt, payable at a future time. Now, anciently, legatory matters arising on personal estate were solely under the jurisdiction of the Ecclesiastical Courts, and the decisions of those Courts were regulated by the civil law: By degrees Courts of Equity took cognizance of them, and with a view to uniformity of decision, adopted the rule in question, in respect to such legacies: But legacies payable out of real estate never fell within the cognizance of the Ecclesiastical Courts; there was not, therefore, the same reason for applying this rule to that description of legacies; and, as it appeared contrary to the favour which the law shews to the owner of the inheritance, Courts of Equity rejected it as a general rule in respect to all such legacies (*i*).

The leading case generally referred to, as establishing this distinction, is *Poulet* v. *Poulet*, or *Pawlett* v. *Pawlett* (*k*): There Lord Pawlett settled by deed real property in trustees for a term of years in remainder after his death, upon trust, after payment of his debts, to pay such sums of money and maintenance for younger children, as his Lordship should appoint by Will; and, in default of appointment, to raise 4000*l.* a-piece for each such child, payable at twenty-one or marriage, with maintenance in the intermediate time: Lord Pawlett appointed by Will to his two daughters, and only younger children, Susanna and Vere, 4000*l.* each to be raised and paid in manner, and at the times, and with the maintenance prescribed by the deed: Both daughters survived him: But Vere died under age, and unmarried, before any part of her portion could be raised; and her mother was her administratrix, who claimed her portion: The question was, whether such claim could be supported, as Vere died under twenty-one, and unmarried: And the Lord Keeper determined in the negative; observing, that "the

(*i*) Fearne, Cont. Rem. 555, note by Mr. Butler.

(*k*) 2 Ventr. 366. 1 Vern. 204, 321. 1 Rop. Leg. 554, 3d edit.

portion was to come wholly out of the lands, and the personal estate no way subjected or made liable to the payment of it by the Will."

The rule of law laid down in the case of *Pawlett* v. *Pawlett* has been adopted in a numerous series of cases (*l*): and in conformity with the principle of it, it has been further decided, that a gift of interest until the legacy becomes due will not vest the principal, when the legacy is charged on land; but if the legatee dies before time of payment, the legacy is lost (*m*).

But a difference observable in the apparent motives for the postponement of legacies, has given rise to an extensive exception from this general rule respecting the vesting of legacies charged on land. When a legacy is bequeathed to a child on his attaining twenty-one or marrying, or on any other event personal to him, the legacy is evidently postponed to the time specified, from its being considered that the legatee will then want the benefit of the legacy. But when the estate is devised to a person for life, and after his decease is charged with a legacy, the legacy is evidently postponed till the decease of the devisee for life, from its being incompatible with his life estate, that it should be raised in his lifetime: The payment of the legacy is therefore considered to be postponed, in the first case, from regard to circumstances personal to the legatee; and, in the second, from regard to the circumstances of the estate; and it has been inferred, that in cases of the first description, the testator does not intend the legatee shall receive the legacy, unless the circumstance happens on which the testator made it payable; and that in cases of the second description, the testator intends the legatee shall receive it at all events: In the former cases, therefore, it has been held, that if the

(*l*) Smith *v.* Smith, 2 Vern. 92. Yates *v.* Phettiplace, 2 Vern. 416. S. C. Prec. Chanc. 140. Reynish *v.* Martin, 3 Atk. 335. Jennings *v.* Looks, 2 P. Wms. 276. Duke of Chandos *v.* Talbot, 2 P. Wms. 610. Prowse *v.* Abingdon, 1 Atk. 485. Harrison *v.* Naylor, 3 Bro. C. C. 108.

(*m*) Gawler *v.* Standerwicke, 1 Bro. C. C. 106, in a note to Green *v.* Pigot. S. C. 2 Cox, 15.

legatee dies while the time of payment is in suspense, the legacy sinks into the land for the benefit of the inheritance; and in the latter cases it has been held, that if the legatee dies during the continuance of the preceding estate or interest, his personal representatives will be entitled, on its determination, to have the legacy raised for their benefit (*n*).

The case of *King* v. *Withers*, which there has already been occasion to state (*o*), is the leading case by which this exception has been established, as to the vesting of legacies, payable out of the real estate at a future time: and the principle of that decision has been adopted in a multitude of subsequent cases (*p*).

So the rule in question is always liable to the operation of the more general and powerful rule, namely, that the intention of the testator, to be gathered from the words of the Will, must prevail (*q*).

It must be further observed, with respect to this general rule, that it may clearly be controlled by a direction in the Will that the legacy should vest on the testator's death: Thus in a modern case (*r*), the testator gave legacies charged on his real estate to his two daughters, "*the same to vest in them immediately on my death*, but to be paid on their attaining their ages of twenty-one years, and the interest

(*n*) Fearne, Cont. Rem. 557, note by Mr. Butler.

(*o*) *Ante*, p. 757.

(*p*) Godwin *v.* Munday, 1 Bro. Chanc. Cas. 191, and the cases in the notes thereto. Hutchins *v.* Foy, Com. Rep. 716, 723. Lowther *v.* Condon, 2 Atk. 128. Emes *v.* Hancock, 2 Atk. 507. Sherman *v.* Collins, 3 Atk. 319. Hodgson *v.* Rawson, 1 Ves. Sen. 44. Tunstall *v.* Brachen, Ambl. 167. S. C. 1 Bro. C. C. 124, note to Dawson *v.* Killett. Embrey *v.* Martin, Ambl. 230. Manning *v.* Herbert, Ambl. 575. Jeale *v.* Titckener, Ambl. 703. S. C. 1 Bro. C. C. 120, in a note. Clark *v.* Ross, 2 Dick. 529. S. C. 1 Bro. C. C. 120, note. Dawson *v.* Killet, 1 Bro. C. C. 119, and the cases in the notes. Walker *v.* Main, 1 Jac. & Walk. 17. Watkins *v.* Cheek, 2 Sim. & Stu. 199. Poole *v.* Terry, 4 Sim. 294. Murkin *v.* Phillipson, 3 M. & K. 257. Goulbourn *v.* Brooks, 2 Younge & C. 539. Salisbury *v.* Petty, 3 Hare, 86, 90, 91. Evans *v.* Scott, 1 Cl. & F., N. S. 43, 57.

(*q*) Brown *v.* Wooler, 2 Y. & Coll. C. C. 134, 138.

(*r*) Watkins *v.* Cheek, 2 Sim. & Stu. 199.

thereof in the meantime to be applied in their maintenance and education:" The daughters both died infants; and it was contended, that the legacies, as against the real estate, must sink for the benefit of the devisee: But Sir John Leach, V. C., held, that this was prevented by the express direction that the legacies should vest on the death of the testator; and, therefore, that the personal representatives of the daughters were entitled to the legacies.

IV. *Of the lapse of Legacies charged on a mixed fund of Realty and Personalty.*

It sometimes happens that legacies are charged on a mixed fund, that is, both on real and personal estate: In that case, the personal estate is considered to be the primary fund, and the real estate to be the auxiliary fund for the payment of the legacies (*s*). So far as the personal fund will extend to pay them, the case is governed by the same rules as if the legacies were payable out of personal estate only; and so far as the real estate must be resorted to for the payment of the legacies, the case is governed by the same rules as if they were charged on the real estate only (*t*).

Thus in *The Duke of Chandos* v. *Talbot* (*u*), Sir T. Doleman bequeathed to his nephew Thomas 500*l*., payable at the age of twenty-five: He also devised his real estates to trustees, charged with the payment of debts and legacies: Thomas, having survived the testator, died at the age of sixteen: From the state of the real and personal assets, it became necessary for the Court to determine whether all or what proportion of the 500*l*. was to be paid, regard being had to the circumstance of the legatee not having lived to the age of twenty-five: And the Court decided, that so much of the legacy as was to affect the real estate, failed by the death of Thomas under twenty-five; and that such part of it as the personal estate was sufficient to answer, vested in the legatee,

(*s*) See *post*, Pt. IV. Bk. I. Ch. II. § I.

(*t*) Fearne, Cont. Rem. 557, note by Butler.

(*u*) 2 P. Wms. 601. 1 Rop. Leg. 557, 3d edit.

and was transmissible to his personal representatives: Lord King observed, upon this occasion, that there was no difference where the real as well as the personal estate was charged; for in such case, so far as the executor or administrator of the legatee claimed out of the latter fund, he should succeed, according to the rule of the Ecclesiastical Court, in which those things were determinable, even although the infant legatee died before the time of payment; but that so far as the legacy was charged upon the land, so far should it, upon the legatee dying before the money became payable, sink; and this being the rule which had of late universally prevailed, whether the legatee were a child or a stranger, it would be of the most dangerous consequence, and disturb a great deal of property, to break into it (*v*).

So in *Prowse* v. *Abingdon* (*w*), Mr. Compton, after directing his trustees and executors to sell part of his real estate, towards satisfaction of debts, and to stand seised of the rest upon trust, by the means mentioned in his Will, to pay all his debts and legacies, remainder to the use of Mrs. Abingdon for life, &c., gave to his nephew Thomas Prowse a legacy of 500*l.* to be paid at twenty-one or marriage: Thomas never married, and died under twenty-one; and it became necessary to resort to the real fund, charged with debts and legacies, for payment of the legacy of 500*l.*, if the administrator of Thomas were entitled to receive it, notwithstanding the death of the latter during infancy: But Lord Hardwicke was of opinion against the claim, upon the principle that, as Thomas died under twenty-one, he did not take a vested interest in the money, so far as concerned the real estate (*x*).

(*v*) See also *In re* Hudsons, 1 Dru. 6, *coram* Sugden, C. of Ireland.

(*w*) 1 Atk. 482.

(*x*) See 1 Rop. Leg. 558, 3d edit.

SECT. VI.

Of Legacies on Condition.

In the preceding section one sort of conditional legacy has been considered: *viz.* where the condition is that the legatee shall be alive at a particular period: It is now proposed to treat of this species of legacy generally.

A conditional legacy is defined to be a bequest whose existence depends upon the happening, or not happening, of some uncertain event, by which it is either to take place or to be defeated (*y*).

No precise form of words is necessary in order to create conditions in Wills: but whenever it clearly appears that it was the testator's intent to make a condition, that intent shall be carried into effect (*z*).

In the case of *Tattersall* v. *Howell* (*a*), a legacy was given provided the legatee changed his course of life and gave up all low company and frequenting public houses: And Sir W. Grant held, that this was a condition such as the Court would carry into effect, and directed the Master to inquire, whether the legatee had discontinued to frequent public houses, keeping low company, &c.

Of conditions precedent or subsequent:

Conditions are subject to the well known division into conditions precedent, and conditions subsequent. When a condition is of the former sort, the legatee has no vested interest till the condition is performed: when it is of the latter, the interest of the legatee vests in the first instance, subject to be devested by the non-performance or breach of the condition (*b*).

(*y*) 1 Rop. Leg. 645, 3d edit.

(*z*) *Ibid.* Godolph. Pt. 3, c. 4, s. 4.

(*a*) 2 Meriv. 26.

(*b*) See the authorities cited by Manning, Serjt., *arguendo*, in Wynne *v.* Wynne, 2 M. & Gr. 14, *et seq.* Every condition by the civil law suspends the legacy; so that a condition subsequent by the civil law is of the nature of a condition precedent at common law: Harvy *v.* Aston, Com. Rep. 738.

precedent: For example, in the instances already adduced of contingent legacies, the endurance of the life of the legatee till the period specified, was a condition precedent to the legacy vesting in him; and since, by reason of his death, he failed to perform the condition, he never acquired any vested interest.

subsequent: For an example of a condition subsequent may be mentioned the case of *Nicholls* v. *Osborn* (*c*), where the testator bequeathed the surplus of his personal estate to his niece, about the age of seventeen, to be paid to her at the age of twenty-one; and if she should die before twenty-one or marriage, then over: And it was held, that the surplus vested in the niece, and that the bequest over was on a condition subsequent.

So in *Gray* v. *Garman* (*d*), there was a gift by a testator of his real and personal estate to his wife for her life, and the residue to be divided equally among her brothers and sisters; *and in case any of them should be dead, at the time of her decease, leaving issue*, such issue to stand in their parents' place: And it was held, that each of the brothers and sisters, who survived the testator, took vested interests in their shares, subject to be devested in the event of his or her death, *leaving issue*, in the lifetime of the widow: Consequently, that the brothers and sisters who died, *without issue*, in her lifetime were entitled to share in the residue; inasmuch as the event had not happened on which their vested interest was liable to be devested (*e*).

bequest to one, and "in case of his death" to another. It is fully established, as a general rule, that a bequest to any person, "and in case of his death" to another, is an absolute gift to the first legatee, if he survives the testator; and this, whatever be the form of expression, as "if he die," "should he happen to die," "in case death should happen

(*c*) 2 P. Wms. 419.

(*d*) 2 Hare, 268.

(*e*) See also Accord. Salisbury *v.* Petty, 3 Hare, 86; and for further instances of vested legacies subject to be devested on a subsequent event, see Heron *v.* Stokes, 2 Dr. & W. 190. Kimberley *v.* Tew, 4 Dr. & W. 89, 115. *Post*, p. 1092, 1093.

to him," and so forth: The event here contemplated being so inevitable, that it cannot be deemed a contingency, the Courts have held, that something else must be intended than merely to provide for the case of the legatee dying at some time or other; and have said, that they will rather suppose the testator to have contemplated and provided for the case of the legatee dying in his own lifetime; and so have read those words as if they had been "in case of his death during the testator's lifetime;" in which event alone they have allowed the bequest over to take effect (*f*).

Again, if there is a bequest to one for life, and after his decease to A., and "in case of A.'s death," to his child or children, or to B., the contingency is held referable to the lifetime of the first legatee; and the bequest over only takes effect in case A. dies during the continuance of the life estate; he takes absolutely, if he survives the tenant for life (*g*).

Further, a bequest to A., when and if he attains the age of twenty-one, and "in case of his death," to B., is a gift absolute to A., unless he dies under age (*h*). Accordingly, in *Home* v. *Pillans* (*i*), a testator bequeathed as follows: "I give and bequeath to my nieces Catherine and Mary, the sisters of the said David and John Home, the sum of 2000*l.* sterling each, when and if they should attain their ages of twenty-one years, and which said legacies to my said two nieces I give to them for their and each of their own sole

(*f*) Hinckley *v.* Simmons, 4 Ves. 160. King *v.* Taylor, 5 Ves. 806. Turner *v.* Moor, 6 Ves. 557. Cambridge *v.* Rous, 8 Ves. 12. Webster *v.* Hale, 8 Ves. 410. Ommaney *v.* Bevan, 18 Ves. 291. Slade *v.* Milner, 4 Madd. 129. Home *v.* Pillans, 2 M. & K. 20, 21. Crigan *v.* Baines, 7 Sim. 40. Clarke *v.* Lubbock, 1 Y. & Coll. Ch. C. 492. Salisbury *v.* Petty, 3 Hare, 86, 93.

(*g*) Hervey *v.* McLaughlin, 1 Price, 264. Galland *v.* Leonard, 1 Swanst. 161. Clarke *v.* Gould, 7 Sim. 197. Whitton *v.* Field, 9 Beav. 368. Salisbury *v.* Petty, 3 Hare, 86, 93. The rule seems to be the same, even where the gift over is in case of death, *in connexion with a collateral event*, (*e. g.* leaving children.) Galland *v.* Leonard, 1 Swanst. 161. Da Costa *v.* Keir, 3 Russ. 360. 2 Jarman on Wills, 693. Davenport *v.* Bishopp, 2 Y. & Coll. Ch. C. 463. Barker *v.* Cocks, 6 Beav. 82. *Post*, p. 1084, note (*k*).

(*h*) 2 M. & K. 24.

(*i*) 2 M. & K. 15.

and separate use, free from the debts or control of their or either of their husbands; and in case of the death of my said nieces or either of them leaving children or a child, I give and bequeath the share or shares of such of my said nieces or niece so dying, unto their or her respective children or child:" Sir John Leach, M. R., held, that the interest taken by each of the testator's nieces in the 2000*l.* legacy did not become absolute on their respectively attaining the age of twenty-one, but continued to be subject to an executory bequest over, in the event of their leaving children living at their death: But this decision was reversed by Lord Brougham on appeal: And his Lordship held, (pronouncing a very elaborate judgment, in which he cited and commented on all the preceding authorities,) that the nieces of the testator took an absolute interest in their legacies of 2000*l.*, upon attaining the age of twenty-one respectively (*k*).

It is, however, plain that these general rules cease to be applicable, where it appears, from the whole of the Will, that their application would frustrate the intention of the testator. Thus, in *Child* v. *Giblett* (*l*), a testator bequeathed the residue of his estate to his daughters Selina and Elizabeth, in equal proportions; and " in case of the death of either,"

(*k*) It is observed by Mr. Jarman (in his Treatise on Wills, vol. 2, p. 696), that Lord Brougham, in his judgment in this case, in his remarks on Hervey *v.* McLaughlin (1 Pri. 264, *ante*, p. 1083, note (*g*)), and that class of cases, but very faintly adverts to the fact, that, in them, the gift over was in case of death *simpliciter*, and in the Will before him, it was in case of death *in connexion with a collateral event* (*i. e.* leaving children), which forms a most material distinction, and excludes from the latter case much of the reasoning adopted by him from the cited authorities. The distinction to which the learned writer refers is this; *viz.* that where the words referring to the event of death are coupled with a contingency, the event contemplated may or may not happen, and is not inevitable, as in the instance of a gift over in case of death *simpliciter*; and therefore the reasoning on which the Courts have proceeded (see *ante*, p. 1083) with respect to a gift of the latter kind, is not applicable. See Allen *v.* Farthing, MSS. 12th Nov. 1816, *coram* Sir J. Leach, V. C., stated in 2 Jarm. 688. See also Child *v.* Giblett, stated in the text above.

(*l*) 3 M. & K. 71.

the whole to the survivor of them; and in the event of their marrying and having children, then to the child or children of them, or the survivor of them, if they should attain the age of twenty-one years; but if not, then among the children of Paul Giblett: The daughters both survived the testator: Elizabeth died without having been married, and bequeathed the whole of her property to Selina: The question was, whether Selina was entitled to an absolute interest in the residuary property of her father: And Sir John Leach, M. R., held, that she was not so entitled, but that the bequest to her continued subject to the executory bequest over, in favour of Paul Giblett's children: And his Honor observed, that the testator could not possibly have intended that the children of Paul Giblett should take in the event of a marriage of his daughters and their death without issue in his lifetime, and that they should not take in the event of a marriage of his daughters and their dying without children after his decease (*m*).

Impossible conditions *precedent*:

With respect to conditions precedent, which are impossible, a different rule is applicable to bequests of personal property from that which is prevalent respecting devises of realty. By the common law of England, if a condition precedent is impossible, as to drink up all the water in the sea, the devise will be void (*n*). But by the civil law, which on this subject has been adopted by the Courts of Equity (*o*), when a condition precedent to the vesting of a legacy is impossible, the bequest is single, *i. e.* discharged of the condition; and the legatee will be entitled as if the legacy were unconditional (*p*).

If indeed the impossibility of the condition were unknown to the testator, as where a legacy is given on condition the legatee marries the testator's daughter, who happens to be

(*m*) See also Billings *v.* Sandom, 1 Bro. C. C. 393. Nowlan *v.* Nelligan, 1 Bro. C. C. 489. Douglas *v.* Chalmer, 2 Ves. Jun. 501. *Ex parte* Hunter, 3 Younge & C. 610.

(*n*) Co. Lit. 206, *b.* Roundel *v.* Currer, 2 Bro. C. C. 73.

(*o*) Lowther *v.* Cavendish, 1 Eden, 116, 117.

(*p*) Swinb. Pt. 4, s. 6, pl. 2, 3. Harvy *v.* Aston, Com. Rep. 738.

then dead; or where the impossibility arises from a subsequent act of God, as if she be living at the date of the Will, but dies before the marriage can be solemnized; the impracticability of the performance will be a bar to the claim of the legatee (*q*); in cases, at least, such as those mentioned, where the performance of the condition appears to be the motive of the bequest.

Impossible conditions *subsequent.*

Where a condition subsequent is impossible, it is the doctrine as well as of the common law as of the civil, that the condition is void, and the legacy single and absolute (*r*).

Illegal conditions *precedent:*

With regard to conditions precedent which are illegal, if performance requires an act which is *malum in se,* as to kill A., burn his house, or the like, then both by the common and civil law, not only the condition but the bequest itself is void (*s*). But where the illegality consists merely in the performance of the condition being against a rule or the policy of the law, there, (although by the common law the devise as well as the condition is equally void as if there existed *malum in se*) by the civil law, the condition only is void, and the bequest single and good (*t*). Thus, where the testator bequeathed to his niece 2*l.* a month if she lived with her husband, and 5*l.* a month *if she lived from him,* Lord Northington was of opinion that she was entitled to the 5*l.* a month payment; for the condition being *contra bonos mores,* the bequest was single (*u*).

(*q*) Swinb. Pt. 4, s. 6, pl. 8, 14. Lowther *v.* Cavendish, 1 Eden, 116, 117.

(*r*) Co. Lit. 206, *a. b.* Lowther *v.* Cavendish, Ambl. 358. S. C. 1 Eden, 99. Thomas *v.* Howell, 1 Salk. 170. Harvy *v.* Aston, Com. Rep. 738. Aislabie *v.* Rice, 3 Madd. 256. Burchett *v.* Woolward, Turn. & Russ. 442.

(*s*) Swinb. Pt. 4, s. 6, pl. 16, and the note in Powell's edit. 1 Rop. Leg. 653, 3d edit.

(*t*) Swinb. Pt. 4, s. 6, pl. 16. Harvy *v.* Aston, Com. Rep. 738.

(*u*) Brown *v.* Peck, 1 Eden, 140. 1 Rop. Leg. 654, 3d edit. See also Tenant *v.* Bray, cited Toth. 141, in which case there was a devise to a daughter to pay her a sum of money if she would be divorced from her husband, and the gift was made good, though the condition was void. See further, as to the legality of the separation of husband and wife, Jones *v.* Waite, 1 Bingh. N. C. 656. S. C. in error, 5 Bingh. 341. In Dom. Proc. 4 M. & Gr. 1104. 9 Cl. & F. 101. Cocksedge *v.* Cocksedge, 14 Sim. 244.

Illegal conditions *subsequent.*

Where the performance of a condition subsequent is illegal, then, as well at the common law, as by the civil law adopted in the Courts of Equity, the condition is void, and bequest freed from it, as though it has been given unconditionally (*v*).

On the same principle, an original vested gift shall not be qualified by a subsequent gift engrafted on it, which the law will not allow to take effect; as by a gift over which is void by reason of being too remote (*w*). And the rule in general, that an absolute interest is not to be taken away by a gift over, unless that gift over may itself take effect (*x*).

Repugnant conditions.

Among illegal conditions subsequent, may be classed such as are repugnant. " I find it laid down as a rule long ago established," said Lord Alvanley, in *Bradley* v. *Peixoto* (*y*), " that where there is a gift with a condition inconsistent with and repugnant to such gift, the condition is wholly void:" In that case, the testator had given his son the dividends of 1620*l.* Bank stock for his support during life, and at his death the principal and interest were given to his heirs, executors, administrators, and assigns; but *if he attempted to dispose of all or any part of the stock,* such attempt should exclude him from any benefit under the Will, and be a forfeiture, and the fund should go to the testator's other children: The learned Judge was of opinion, that the legatee was entitled to the legacy discharged of the condition (*z*).

But though a condition, restraining the legatee from spending or disposing of the legacy *generally,* is repugnant and void; yet it may be good if the restraint is confined to the disposal of it *to a particular person* (*a*), or before a *par-*

(*v*) Co. Lit. 206, *a. b.* Poor *v.* Mial, 6 Madd. 32. Ridgway *v.* Woodhouse, 7 Beav. 437.

(*w*) Blease *v.* Burgh, 2 Beav. 221, 226. Ring *v.* Hardwick, *ibid.* 352.

(*x*) Green *v.* Harvey, 1 Hare, 428, 431. Winckworth *v.* Winckworth, 8 Beav. 576. Eaton *v.* Barker, 2 Coll. 124.

(*y*) 3 Ves. 325.

(*z*) See also Cuthbert *v.* Purrier, Jacob. 415. Ware *v.* Cann, 10 B. & C. 433. Billing *v.* Billing, 5 Sim. 232. Rishton *v.* Cobb, 9 Sim. 615. 5 M. & Cr. 145, *post*, p. 1096, note (*n*). Byng *v.* Lord Strafford, 5 Beav. 558, 567.

(*a*) Litt. Sec. 361. Swinb. Pt. 4, s. 13, pl. 6.

ticular time (*b*). So the condition may be carried into effect, if it is so expressed *as to amount to a limitation* (*c*). "If property," said Lord Eldon, in *Brandon* v. *Robinson* (*d*), "is given to a man for his life, the donor cannot take away the incidents to a life estate; and, as I have observed, a disposition to a man, until he shall become bankrupt, and, after his bankruptcy, over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien it: If that condition is so expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited" (*e*).

Another instance of a repugnant, and therefore void, condition may be found in the doctrine that if there be an absolute bequest of property, with a proviso that if the legatee dies without having disposed of it by Will, or otherwise, his interest in it shall cease, and it shall go over to another; the gift over is void and the legacy absolute (*f*).

Performance of conditions *precedent.*

It is now proposed to consider the performance of conditions: And first, of conditions precedent: Although the general rule is, that they must be strictly performed, yet by the civil law, which has been, it should seem, in this respect also adopted by Courts of Equity, if the condition is per-

(*b*) Large's case, 2 Leon. 82.

(*c*) Wilkinson *v.* Wilkinson, 2 Wils. C. C. 47. S. C. 3 Swanst. 515.

(*d*) 18 Ves. 433.

(*e*) See further, as to the effect of the bankruptcy of the legatee, or his discharge under an Insolvent Act, on conditions and limitations of this nature, Dommett *v.* Bedford, 6 T. R. 684. Shee *v.* Hale, 13 Ves. 405. Brandon *v.* Robinson, 18 Ves. 429. Cooper *v.* Wyatt, 5 Madd. 482. Yarnold *v.* Moorhouse, 1 Russ. & M. 364. Green *v.* Spicer, *ibid.* 395. Lear *v.* Leggatt, *ibid.* 690. Lewes *v.* Lewes, 6 Sim. 304. Whitfield *v.* Prickett, 2 Keen, 608. Brandon *v.* Aston, 2 Y. & Coll. Ch. C. 24. Churchill *v.* Marks, 1 Coll. 447. Twopenny *v.* Peyton, 10 Sim. 487. Godden *v.* Crowhurst, *ibid.* 642. Lord *v.* Bunn, 2 Y. & Coll. Ch. C. 98. Kearsley *v.* Woodcock, 3 Hare, 185. Younghusband *v.* Gisborne, 1 Coll. 400. Martin *v.* Margham, 14 Sim. 230.

(*f*) Ross *v.* Ross, 1 Jac. & W. 154. Green *v.* Harvey, 1 Hare, 428.

formed *cy pres*, as it is termed, that is, so as *substantially* to fulfil the testator's intention, it will be sufficient (*g*).

As an example of the doctrine of the civil law may be mentioned a case put by Swinburne (*h*): If A. bequeath a legacy to B. in case he erect a monument to A. *within three days* after A.'s death; although B. should not literally comply with the condition, he would be entitled to the legacy upon building the monument within a reasonable time; since the erection would be considered as a motive and essence of the bequest, and the time appointed for the building but a mean to expedite the business. So, in Courts of Equity, where the condition requires a legatee to execute a release within a certain time, it has been held that if the release is in fact executed within a reasonable, though not within the specified time, the legatee will be entitled; on the principle that the period for executing the release was merely ancillary to the accomplishing of that object, and the procurement of that instrument was the end and substance of the condition (*i*).

But the observance of the time mentioned in the condition may be material to the due performance of it: as where the condition is that the legatee shall return to England within a time specified by the testator, and personally apply for his legacy (*k*). In *Hawkes* v. *Baldwin* (*l*), a testatrix gave legacies to A., B., and C., and declared that if any of them should be dead at her decease, or should not then be heard of to be then living, or should not respectively claim their respective legacies within twelve months after her death, then the legacies given to such of them as should be dead at her decease, or as should *neglect* to claim the same within

(*g*) Swinb. Pt. 4, s. 7, pl. 4. 1 Rop. Leg. 663, 3d edit.

(*h*) Pt. 4, s. 6, pl. 11.

(*i*) Taylor *v.* Popham, 1 Bro. C. C. 168. Simpson *v.* Vickers, 14 Ves. 341, 348. 1 Rop. Leg. 664, 3d edit. Paine *v.* Hyde, 4 Beav. 468. Wilkins *v.* Knipe, 5 Beav. 273.

(*k*) Tulk *v.* Houlditch, 1 Ves. & Beam. 248. Burgess *v.* Robinson, 1 Madd. 172. S. C. 3 Meriv. 7. 1 Rop. Leg. 665, 3d edit. See Tollner *v.* Marriott, 4 Sim. 19. As to what is a performance of such a condition, see Tanner *v.* Tebbutt, 2 Y. & Coll. Ch. C. 225.

(*l*) 9 Sim. 355.

the time aforesaid, should sink into her residuary estate: Three years after the testatrix's death, C., who had not been heard of for upwards of twenty years, claimed her legacy: And Sir L. Shadwell, V. C., held that she was not entitled to it, although she had been ignorant, until a short time before, that her sister was dead. And it should seem that in all cases where there is *a limitation over* of the legacy, upon the legatee not performing a condition within the time prescribed for that purpose; if the terms be not literally complied with, the condition will be held not to be performed within the intent and meaning of the testator (*m*).

in what cases apparent conditions precedent shall be regarded as conditional limitations, and construed according to their substantial effect.

Moreover, instances have frequently occurred in which the Court has concluded, from the context of the Will, that the intention of the testator is effectually fulfilled by regarding a clause of apparent condition, as a clause of *conditional limitation,* so as not to require, as in the case of a gift on a condition, that the very event, on which the gift is made contingent, must be fulfilled with strict exactness, but paying regard, in the construction, to the substantial effect of the contingency specified, and so to the real intent of the testator. Thus, where a testator devised to the child, of which his wife was pregnant, *and if any such child died under twenty-one,* then over; the devise over was held good, though the wife proved not to have been *enciente* (*n*). So, where there was a devise, on condition that the devisee should give a release within three months after the testator's decease, *and if he should neglect to give such release,* then over; and the devisee died in the testator's lifetime; it was held, that this was a conditional limitation, and not a case of condition, and that the devise over took effect (*o*). Again, where the gift was to the testator's children surviving him,

(*m*) Simpson *v.* Vickers, 14 Ves. 341. 1 Rop. Leg. 668, 3d edit.

(*n*) Jones *v.* Westcomb, 1 Eq. Cas. Abr. 245. S. C. Prec. Chanc. 316. See also Statham *v.* Bell, Cowp. 40. Gulliver *v.* Wickett, 1 Wils. 105. Foster *v.* Cook, 3 Bro. C. C. 347.

(*o*) Avelyn *v.* Ward, 1 Ves. Sen. 420. See also Doe *v.* Scott, 3 M. & S. 300.

and if they all died under twenty-one, then over; and the testator died without leaving, or ever having had, any children, the bequest over was held good (*p*). Again, a bequest, "*in case I shall have but one child living at the time of my decease*, or all but one die under twenty-one and unmarried," was established, in the event of the testator's death never having had any child (*q*).

Accordingly, in the late case of *Mackinnon* v. *Sewell* (*r*), a testatrix bequeathed the residue of her estate, in trust for her daughter Caroline for life, and after her death, for her daughter Caroline's daughter, if she should survive her mother and attain twenty-one, but in case she should not survive her mother and attain twenty-one, then in trust for such other child or children of the testatrix's said daughter, as should be living at their mother's death, to be paid to them after her death as they attained twenty-one; and *if all such other children* of the testatrix's said daughter *should die before attaining twenty-one*, then in trust for Louisa Mackinnon: The grand-daughter attained twenty-one, but did not survive her mother: Another child of the testatrix's daughter attained twenty-one, but did not survive his mother: Afterwards the daughter died: And Sir L. Shadwell, V. C., and subsequently Lord Brougham, on appeal, held that the bequest over to Louisa Mackinnon took effect: His Lordship, in giving his elaborate judgment, stated, that, in order to support the decree, the Court must be satisfied and had satisfied itself, First, that the words, "all such other children" of the testatrix's daughter, described one class of her children, *viz.* those who survived her; Secondly, that the clause so construed might be taken, upon the authorities, as only apparently a condition but really a limitation: The learned Judge further stated, in the course of his judgment, that all or almost all the cases, upon which this doctrine is founded, are referable to one consideration, which it was very

(*p*) Meadows *v.* Parry, 1 V. & B. 124.

(*q*) Murray *v.* Jones, 2 V. & B. 313. See also Quicke *v.* Leach, 13 M. & W. 218.

(*r*) 5 Sim. 78. 2 M. & K. 202.

material to keep in view; *viz.* the construction which they authorise is never inconsistent with, far less contrary to the plain intention of the clause itself, but only aids or furthers that intention, by supplying a manifest omission; in other words, no real difference is made in the result; for the event contemplated has not happened, but something equivalent has taken place: His Lordship added, that almost all the cases are those of double contingencies, the second being of a negative nature, so that the first not happening amounts to the same thing as if both had happened: Thus a bequest over to A., *in case* the first takers, *the unborn children of* B., *die before they reach twenty-one,* read as a condition, is a bequest to A., if B. has children and they do not live to twenty-one; and the first or affirmative contingency not happening, it follows, of necessity, that the second or negative must: If it is read as to it's substance and import, and not resolved into it's parts, the bequest is, *in case no child of* B. *reaches majority:* and of course none can, if he have none (*s*). But wherever the words plainly import a condition as in the testator's contemplation, and where that condition cannot be understood to have been substantially complied with by the event which has actually happened, the gift over fails (*t*).

performance of conditions *subsequent.*

With respect to the performance of conditions subsequent, the general rule is, that they are to be construed with great strictness, as they go to devest estates already vested: Therefore the very event must happen, or the act with all it's details must be done, in order to deprive the legatee of his legacy (*u*). Thus, if legacies be given to two persons, and *if either die during the life of* A., *then* to the survivor *living at the death of* A.; and both the legatees die before

(*s*) This case was acted on, and applied to the case of a pecuniary legacy, by Lord Langdale, in Wilson *v.* Mount, 2 Beav. 397. See also Aiton *v.* Brooks, 7 Sim. 204.

(*t*) See Doe *v.* Shipphard, 1 Dougl. 75. Doo *v.* Brabant, 4 T. R. 706, and the other cases collected, *ante*, p. 1048, 1049. Toldervy *v.* Colt, 1 Mees. & Wels. 250. S. C. 1 Y. & Coll. 240. Dicken *v.* Clarke, 2 Younge & Coll. 572. Lenox *v.* Lenox, 10 Sim. 400.

(*u*) 1 Rop. Leg. 676, 3d edit.

A.; the personal representatives of both will be entitled: for the legatees took vested interests at the death of the testator, subject to be devested in favour of the survivor who might be living at the decease of A.; but as there was no such survivor *at that period*, the devesting contingency never happened (*v*). So where there was a bequest to A. of the interest and dividends of personal property for life, and then to be divided equally amongst her three children, *or such of them as should be living at her death;* and the children *all* died in the lifetime of the tenant for life; it was held, that they took vested interests, transmissible to their representatives; for the vested interests first given by the Will were, by the form of the expression, only defeated in case there should be some or one, and not all of the children living at the mother's death; but that event did not happen, for there was not one child then living (*w*).

condition subsequent of death of legatee before his legacy becomes "*payable.*"

And here it may be mentioned, that if a legacy is given to A. for life, and after his death, to his children at majority or marriage, with a gift over in the event of any one of them dying before his or her share becomes "*payable*," the Court will lean strongly (particularly in the case of a Will making a provision for children) in favour of construing the word "payable" to refer to the majority or marriage of the legatees and not to the period of distribution; so that if any one of the children should happen to die, after having attained majority or married, in the lifetime of the tenant for life, the legacy shall not go over, but shall be considered as having vested absolutely at the majority or marriage (*x*).

(*v*) Harrison *v.* Foreman, 5 Ves. 207.

(*w*) Sturgess *v.* Pearson, 4 Madd. 411. See also Wagstaff *v.* Crosby, 2 Coll. 746. For further instances, see Smither *v.* Willock, 9 Ves. 233. Wall *v.* Tomlinson, 16 Ves. 413. Hervey *v.* McLaughlin, 1 Price, 264. Laffer *v.* Edwards, 3 Madd. 210. Browne *v.* Lord Kenyon, 3 Madd. 410. Whittell *v.* Dudin, 2 Jac. & Walk. 279. Jones *v.* Bromley, 6 Madd. 137. Shnell *v.* Tyrrell, 7 Sim. 86. Mayer *v.* Townsend, 3 Beav. 443. Belk *v.* Slack, 1 Keen, 238. Locker *v.* Bradley, 5 Beav. 593. Campbell *v.* Brownrigg, 1 Phill. Ch. C. 301. Templeman *v.* Warrington, 13 Sim. 267. Kimberley *v.* Tew, 4 Dr. & W. 139.

(*x*) Hallifax *v.* Wilson, 16 Ves.

Condition not to dispute the Will.

A condition that the legatee shall not dispute the Will, is valid in law (*y*), though it has been, in general, considered as *in terrorem* merely, and will not operate a forfeiture by reason of the legatee's having disputed the validity (*z*) or effect (*a*) of the Will.

But where the legacy is given over to another person, in case of a breach of such condition, then if the legatee controvert the Will, his interest will cease and vest in the other legatee (*b*). If indeed the legacy, instead of being given to a stranger, is limited over to the executors in the event of the condition being broken, such condition is still merely regarded as *in terrorem*, and not obligatory (*c*). Yet if the testator direct the legacy to fall into *the residue* upon a breach of the condition, and dispose of that fund, the residuary legatee will be a particular legatee of the individual legacy; and, as such, will be entitled to it, if the condition is broken (*d*).

Conditions in restraint of marriage:

As conditions in restraint of marriage are of no infrequent occurrence, and form a subject on which numerous decided cases may be found, it may be expedient to apply to them, separately, some of the rules of law already mentioned with respect to conditional legacies generally.

when valid:

First, with regard to the legality of such conditions. By the doctrine of the civil law, which seems at one time to have

168. Jones *v.* Jones, 13 Sim. 561. Butterworth *v.* Harvey, 9 Beav. 130. But see Bright *v.* Rowe, 3 M. & K. 316. A similar construction has prevailed as to marriage settlements. See Emperor *v.* Rolfe, 1 Ves. Sen. 208. Woodcock *v.* Duke of Dorset, 3 Bro. C. C. 569. Hope *v.* Lord Clifden, 6 Ves. 499. Schenck *v.* Legh, 9 Ves. 300. Powis *v.* Burdett, *ibid.* 428. Howgrave *v.* Cartier, 3 V. & B. 79. Perfect *v.* Lord Curzon, 5 Madd. 442. 2 Jarman on Wills, 696. Evans *v.* Scott, 1 Cl. & F., N. S. 43. *Ante*, p. 1072, *et seq.*

(*y*) Cooke *v.* Turner, 15 M. & W. 727. S. C. 14 Sim. 493.

(*z*) Powell *v.* Morgan, 2 Vern. 90. Loyd *v.* Spillett, 3 P. Wms. 344.

(*a*) Morris *v.* Burroughs, 1 Atk. 404.

(*b*) Cleaver *v.* Sperling, 2 P. Wms. 528. Cooke *v.* Turner, 14 Sim. 493. S. C. 15 M. & W. 727.

(*c*) Cage *v.* Russel, 2 Ventr. 352.

(*d*) See Lloyd *v.* Branton, 3 Meriv. 118. 1 Rop. Leg. 686, 3d edit.

been adopted by the Ecclesiastical Courts of this kingdom, and in a great measure by the Courts of Equity, all conditions in restraint of marriage were regarded as illegal, and legacies were discharged of such conditions, whether precedent or subsequent (*e*). But the ancient rule has been greatly relaxed in modern times; and it is now settled, that conditions which do not directly or indirectly import an *absolute injunction to celibacy*, are valid (*f*). Thus conditions restraining marriage under twenty-one, or other reasonable age, without consent of executors, guardians, &c. (*g*) or requiring or prohibiting marriage with particular persons (*h*), and the like, are valid and legal conditions (*i*).

Still the law will not allow *conditions* in absolute restraint of marriage: And accordingly it has been lately held, in the instance of a condition subsequent, that it was altogether void, and that the legatee should retain the interest given to him, discharged of the condition (*k*), notwithstanding a gift over.

It is not, however, to be understood, that where property is limited to a person until that person marries, and when such marriage happens, then over, such *limitation* may not be valid (*l*). On the late occasion (*m*), Wigram, V. C. said, that he was satisfied, from an examination of the authorities, that a gift until marriage, and when the party marries, then over, is a valid limitation: And his Honor said, that in the

(*e*) See the judgment of Lord Thurlow, in Scott *v.* Tyler, 2 Dick. 720.

(*f*) Scott *v.* Tyler, 2 Dick, 721, by Lord Thurlow.

(*g*) Hemmings *v.* Munckley, 1 Bro. C. C. 303. Scott *v.* Tyler, 2 Bro. C. C. 431. S. C. 2 Dick. 712. Stackpole *v.* Beaumont, 3 Ves. 89. Clifford *v.* Beaumont, 4 Russ. Chanc. Cas. 325; which must be considered as overruling Underwood *v.* Morris, 2 Atk. 184.

(*h*) Scott *v.* Tyler, 2 Dick. 721, by Lord Thurlow. Perrin *v.* Lyon, 9 East, 170, (in which case the restraint was from marrying a Scotchman). See also Randal *v.* Payne, 1 Bro. C. C. 55.

(*i*) See 1 Rop. Leg. 660.

(*k*) Morley *v.* Rennoldson, 2 Hare, 570.

(*l*) King Edward the 6th granted to his sister, the Lady Mary, the manor of D., so long as she should continue unmarried: This was admitted to be a good limitation, but no condition. Fulbecke's Parallele, 47, edit. 1618.

(*m*) 2 Hare, 580.

case of a widow there was no question of the validity of such a limitation (*n*).

It may here be observed that a gift to an "unmarried" person cannot be construed to mean a gift to that person so long as he shall remain unmarried: And therefore if a testator bequeaths a fund to his "unmarried children," if once a child is entitled to participate by filling the character of an unmarried child, he or she will not lose that right by his or her subsequent marriage (*o*).

With respect, moreover, to conditions in restraint of marriage *without consent*, not under the age of twenty-one, or other reasonable age, but *generally*, such conditions, like those just mentioned in restraint of litigating the Will, are regarded as a declaration of the testator *in terrorem* merely, if there is no disposition over; and whether precedent (*p*) or subsequent (*q*), are inoperative for the vesting or devesting of the legacy. But if there be a direction that the legacy, in the event of a breach or non-performance of such a condition, shall go over to another legatee, the condition is obligatory; for the Court is bound to protect the interest of the party in whose favour the ulterior limitation is made (*q*). A mere gift of the residue to a particular person will not be

(*n*) See further as to limitations *duranteviduitate*, Luxford *v.* Cheeke, 3 Lev. 125. Gordon *v.* Adolphus, 3 Bro. P. C. 306, Toml. edition. Richards *v.* Baker, 3 Atk. 321. Jordan *v.* Holkham, Ambl. 209. Rishton *v.* Cobb, 9 Sim. 615. 5 M. & Cr. 145. But in Marples *v.* Bainbridge, 1 Madd. 590, Sir T. Plumer rejected the distinction between a condition and limitation. See 5 M. & Cr. 152.

(*o*) Jubber *v.* Jubber, 9 Sim. 503.

(*p*) Harvy *v.* Aston, Com. Rep. 728, by Comyns, C. B. Reynish *v.* Martin, 3 Atk. 331, by Lord Hardwicke. Malcolm *v.* O'Callaghan, 2 Madd. 353, by Sir T. Plumer. But it has been doubted whether a condition *precedent* requiring the consent of the executors, &c. to the marriage of the legatee, generally, be not operative, whether the legacy be limited over or not: See 1 Rop. Leg. 716, 3d edit., and the observations of Lord Eldon in Clarke *v.* Parker, 19 Ves. 15; and those of Sir Wm. Grant, in Lloyd *v.* Branton, 3 Meriv. 116.

(*q*) Stratton *v.* Grimes, 2 Vern. 357. Wheeler *v.* Bingham, 3 Atk. 367, by Lord Hardwicke. Malcolm *v.* O'Callaghan, 2 Madd. 353, by Sir T. Plumer.

considered such a limitation (*u*), unless the testator also directs the legacy to fall into the residue in case of breach of the condition (*v*).

When rejected as inapplicable.

Provisions of this kind may be sometimes entirely rejected, as being inapplicable. Thus in *Crommelin* v. *Crommelin* (*w*), provisions in a father's Will respecting his daughter's marriage were held not to apply to a daughter who, having married in her father's lifetime, after his death married a second time. Again, in *Bird* v. *Hundson* (*x*), a direction to pay interest to a legatee so long as she remained single, with a gift over on her death, was held to give to the legatee the interest for life, notwithstanding her marriage (*y*).

Performance of conditions in restraint of marriage: when consent to be obtained: of whom: consequence of death of one of several whose consent is required;

Next, concerning the performance of conditions in restraint of marriage. In the instances of conditions requiring marriage with consent of executors or trustees, it has been decided that such consent must be obtained before or at the marriage; for a subsequent approbation by the executors, &c. will not be a performance of the condition (*z*). Again, the consent of all the executors or trustees must be obtained (*a*); though where one of them is dead, if the condition is precedent, it should seem that the consent of all the survivors is sufficient (*b*): But if the condition is subsequent, and consequently marriage without the consent of several persons is to devest the legacy, the death of all (*c*) or one of them (*d*) will discharge the condition altogether.

(*u*) Wheeler *v.* Bingham, 3 Atk. 364.

(*v*) 3 Atk. 368. Lloyd *v.* Branton, 3 Meriv. 118. *Ante*, p. 1094.

(*w*) 3 Ves. 227. See also Clarke *v.* Berkeley, 2 Vern. 720. Parnell *v.* Lyon, 1 Ves. & B. 479. *Post*, p. 1098, note (*g*). Rishton *v.* Cobb, 5 M. & Cr. 145. 9 Sim. 615.

(*x*) 2 Swanst. 342.

(*y*) 5 M. & Cr. 153.

(*z*) Reynish *v.* Martin, 3 Atk. 331. Clarke *v.* Parker, 19 Ves. 21. Long *v.* Ricketts, 2 Sim. & Stu. 179. Although the word "*approbation*," be also used, it should seem that the same rule must prevail: Malcolm *v.* O'Callaghan, 2 Madd. 353. Clarke *v.* Parker, 19 Ves. 21. But see Burleton *v.* Humfrey, Ambl. 256, *contrà*.

(*a*) Clarke *v.* Parker, 19 Ves. 17.

(*b*) 1 Rop. Leg. 691, 3d edit. See also Worthington *v.* Evans, 1 Sim. & Stu. 172.

(*c*) Graydon *v.* Hicks, 2 Atk. 18. Aislabie *v.* Rice, 3 Madd. 256. Grant *v.* Dyer, 2 Dow. Parl. C. 73.

(*d*) Peyton *v.* Bury, 2 P. Wms. 626.

what consent sufficient:

The next consideration is, what will be a sufficient consent: It has been decided, that a general consent, given to the legatee after attaining majority, will be sufficient (*b*): and further, that an unconditional consent, once given, cannot be retracted (*c*); unless for good reasons, moral or pecuniary, afterwards discovered (*d*). But the consent may be conditional: and then it will be sufficient or not, according as it's condition is or is not performed (*e*). Again, it has been held that consent may be implied, as from the circumstance that the executor or trustee witnesses the reception of addresses of marriage, and intimates no disapprobation; for then the maxim *qui tacet, satis loquitur*, applies (*f*). Lastly, if the legatee married in the lifetime of the testator with his consent, or subsequent approbation, that is equivalent to a marriage after his death with the consent of his executors, &c. (*g*).

second marriage without consent after a first with consent:

A first marriage with consent is a sufficient performance of the condition: and therefore a second marriage without consent, though in the lifetime of the executor or other individual whose assent is required in the condition, will incur no forfeiture (*h*).

legacy at twenty-one *or* on marriage with consent:

If a bequest is made to a legatee at twenty-one, or upon marriage with consent, with a clause of forfeiture upon marriage without consent, if the legatee attains twenty-one, the condition is extinct, and a subsequent marriage without consent is no forfeiture (*i*). Again, where a bequest was

(*b*) Mercer *v*. Hall, 4 Bro. C. C. 328. Pollock *v*. Croft, 1 Meriv. 181.

(*c*) Strange *v*. Smith, Ambl. 263. Merry *v*. Ryves, 1 Eden, 1. Dashwood *v*. Bulkeley, 10 Ves. 242. Le Jeune *v*. Budd, 6 Sim. 441.

(*d*) 10 Ves. 242, 243.

(*e*) Dashwood *v*. Bulkeley, 10 Ves. 230. D'Aguilar *v*. Drinkwater, 2 Ves. & Beam. 225. 1 Rop. Leg. 701, 3d edit.

(*f*) Campbell *v*. Lord Netterville, cited in 2 Ves. Sen. 530, and in 10 Ves. 243.

(*g*) Clarke *v*. Berkeley, 2 Vern. 720. Parnell *v*. Lyon, 1 Ves. & Beam. 479. Wheeler *v*. Warner, 1 Sim. & Stu. 304. Smith *v*. Cowdery, 2 Sim. & Stu. 358.

(*h*) Hutcheson *v*. Hammond, 3 Bro. C. C. 128. Crommelin *v*. Crommelin, 3 Ves. 227.

(*i*) Desbody *v*. Boyville, 2 P. Wms. 547. Knapp *v*. Noyes, Ambl. 662. On the same principle, where the testator gave his daughter 400*l*. to be paid in twelve months after

made in trust for A. *when and so soon as he attained twenty-one, or married before that age with consent of guardians;* but if he should not attain twenty-one, or marry before that age with such consent, then over; Sir William Grant held, that on attaining twenty-one, A. was absolutely entitled, although he had *previously* married without consent (*k*). Where the bequest was to A. *to be paid at twenty-one or marriage*, but if A. died under twenty-one, or married without the consent of B., then over, Lord Hardwicke held that marriage during minority, without consent, was a forfeitute (*l*). The distinction between these two cases may, perhaps, be discovered by considering, that in the former case the legacy is given on a condition *precedent*, upon the happening of one of two events, *viz.*, marriage with consent *or* the attainment of twenty-one, and the legacy vests, if either contingency happens; whereas in the latter, the condition is *subsequent*, and the vested interest to be determined, if either of two events happens, *viz.* his death before twenty-one, or marriage without consent (*m*).

marriage without consent *before* attaining twenty-one, and subsequent attainment of that age:

Before leaving this subject, it must be observed, that if an executor or trustee, whose consent is required by the Will to the marriage of a legatee, refuse to execute his power by consenting, the Court of Chancery will direct one of it's Masters to inquire into the proposed marriage, and determine on its propriety; and further, if the marriage should be found suitable, to receive proposals for a settlement on the legatee and issue of the marriage (*n*).

unreasonable refusal of consent by executor, &c. controlled by a Court of Equity.

his death, but if she married John Osborne, then he revoked the legacy and gave her a shilling in lieu; and she married fourteen months after his death; Lord Rosslyn ordered her to be paid the legacy of 400*l.* with interest: Osborn *v.* Brown, 5 Ves. 527.

(*k*) Austen *v.* Halsey, 13 Ves. 125. See also Knight *v.* Cameron, 14 Ves. 389.

(*l*) Chauncey *v.* Graydon, 2 Atk. 616.

(*m*) See 1 Rop. Leg. 715, 3d edit. If a legacy should be given payable upon marriage with consent of trustees under twenty-one; and the legatee marry without consent under twenty-one, and then marry a second time, having attained majority; it may be questioned, whether, on such second marriage, the legatee would become entitled to the legacy: Clifford *v.* Beaumont, 4 Russ. Chanc. Cas. 325.

(*n*) Clarke *v.* Parker, 19 Ves. 18

Legacies to executors:

In conclusion of the subject of conditional legacies, it will be proper to advert to the rules established with respect to legacies given to executors.

given in that character are on condition of accepting the office:

Where legacies are given to persons, in the character of executors, and not as marks of personal regard only, such bequests are considered to be given upon an implied condition, *viz.*: that the parties clothe themselves with the character in respect of which the benefits were intended for them (*o*). "Nothing is so clear," said Lord Alvanley, in *Harrison* v. *Rowley* (*p*), "as that if a legacy is given to a man, as executor, whether expressed to be for care and pains or not, he must, in order to entitle himself to the legacy, clothe himself with the character of executor" (*q*).

It has, however, been held on two occasions (*r*), by Shadwell, V. C., that this rule does not extend to the case of a residue; and his Honor said there was no case which decided that an executor should be deprived of his right to a residue, or a share of a residue, given to him, because he did not prove the Will.

In order to make a proper application of this rule, two inquiries are necessary: First, When shall a legacy be regarded as given to a man *in the character of executor:* Secondly, What shall be a sufficient assumption of the character of executor to entitle the legatee, when a legacy is so given.

where a legacy is to be regarded as given to an executor in that character:

First, When a legacy shall be regarded as given to a legatee in the character of executor: The presumption is, that a legacy to a person appointed executor is given to him in that character, and it is on him to shew something in the nature of the legacy, or other circumstances arising on the Will, to repel

19. Goldsmid *v.* Goldsmid, 19 Ves. 368. S. C. Coop. 225. 1 Rop. Leg. 697, 3d edit.

(*o*) 1 Rop. Leg. 672, 3d edit. Abbot *v.* Massie, 3 Ves. 148. Freeman *v.* Fairlie, 3 Meriv. 31.

(*p*) 4 Ves. 216.

(*q*) It will make no difference that the executor is aged and incapable by bodily and mental infirmities of proving the Will. Hanbury *v.* Spooner, 5 Beav. 630. But he may prove it at any time, even after the hearing: Reed *v.* Devaynes, 2 Cox, 285.

(*r*) Griffiths *v.* Pruen, 11 Sim. 202. Christian *v.* Devereux, 12 Sim. 264. See also 2 Coll. 202.

that presumption (*s*). Thus, in *Reed* v. *Devaynes* (*t*), the testator gave legacies to certain persons by the description of "my very good friends," and in the further part of the Will, desired them to act as executors: One of those persons, who had not proved the Will, or acted as executor, claimed his legacy: But Lord Alvanley said, that an executor so appointed, could not claim his legacy without acting, or at least proving the Will. So in *Stackpoole* v. *Howel* (*u*), the testator devised his real and personal estates to the plaintiff, and the defendants, Howell and Maberly, upon various trusts, and appointed them executors: He afterwards made two codicils, by which he gave to those three persons legacies, not expressly as trustees or executors, but by their names and descriptions; and the legacies by the first codicil were classed together, and of equal amounts, as were those in the second: The plaintiff renounced probate, and he nevertheless claimed the legacies: But Sir Wm. Grant held, that he was not entitled. Again, in *Piggott* v. *Green* (*v*), a testatrix gave legacies of 100*l.* each to A., B., and C., and in a subsequent part of her Will, she appointed them her executors: In the preceding clauses, she made devises and bequests "to her executors thereinafter named," and "to her executors and trustees:" A. neither proved nor acted: And Sir L. Shadwell, V. C., held, that he was not entitled to the legacy (*w*).

But this presumption will be rebutted, if it should appear, either from the language of the bequest, or from the fair construction of the whole Will, that the bequest to a person, who is named executor, is given to him independently of that character; And then the legatee will be entitled to receive the legacy, whether he accepts the office or not. Thus, in *Humberston* v. *Humberston* (*x*), the testator, as an encouragement to his executors (who were four) to accept the trust

(*s*) Stackpole *v.* Howell, 13 Ves. 239. Dix *v.* Reed, 1 Sim. & Stu. 239. Calvert *v.* Sebbon, 4 Beav. 222.

(*t*) 3 Bro. C. C. 95. S. C. 2 Cox, 285. See *post*, p. 1103, note (*c*).

(*u*) 13 Ves. 417.

(*v*) 6 Sim. 72.

(*w*) See also Barber *v.* Barber, 3 Mylne & Cr. 688. *Post,* Pt. III. Bk. III. Ch. V. § I.

(*x*) 1 P. Wms. 333.

and executorship, gave to each of them 100*l.* and 12*l.* for mourning, and to each a ring, and 10*l.* a-year for their trouble: And Lord Chancellor Cowper held, that, notwithstanding the condition of the acceptance might seem to run to all the legacies, yet the executors, though they did not act, should have their rings and mourning, these being intended for them immediately, and not to wait their time of acceptance; but that they should not have their 100*l.* and the annuity of 10*l.* each. So in *Dix* v. *Reed* (*y*), the testator bequeathed thus: "I give to William Reed and John Baugley 50*l.* each, whom I nominate and appoint executors in trust to this my Will; the said bequests to be upon condition of their taking upon them the trusts hereinafter mentioned:" In a subsequent part of the Will, the testator added, "I give unto my cousin, Thomas King, the sum of 50*l.*, whom I appoint as joint executor in trust in this my Will:" Reed and Baugley proved the Will; but King declined proving it, and did not interfere in the trusts: It was insisted that he was not entitled to the legacy of 50*l.*: The Master reported the legacy to be due, but an exception was taken to the report: And Sir John Leach, V. C., overruled the exception, observing, that he considered the gift rather intended in respect of the legatee's relationship than of his office.

So in *Burgess* v. *Burgess* (*z*), a legacy given to the testator's trustees and executors, *as a mark of his respect for them*, was held by Knight Bruce, V. C. not to be revoked by a codicil appointing other trustees and executors in their room, and giving a legacy of equal amount to the newly appointed trustees and executors, in similar language (*a*).

Again, in *Cockerell* v. *Barber* (*b*), a testator, after giving a legacy to his friend and partner, Mr. Palmer, appointed him one of his executors, and made other devises and bequests in

(*y*) 1 Sim. & Stu. 237.

(*z*) 1 Coll. 367.

(*a*) See also Compton *v.* Bloxham, 2 Coll. 201, 202, where the same Judge said, that the Courts had struggled against the effect of a general rule, the propriety of which had been doubted.

(*b*) 2 Russ. Chanc. Cas. 585.

his favour, so that Mr. Palmer was entitled under the Will to much greater benefits than any of the other executors: By a codicil, in which Mr. Palmer was described as one of the executors, a further legacy was bequeathed to him: And Lord Eldon, C., held, that these legacies were not given to him in his character of executor: But his Lordship took occasion to lament the infringement of the old simple rule, that if a man was named executor, and had a legacy given to him, he should not have the legacy, if he did not take the office (*c*).

what is a sufficient assumption of the office to satisfy the condition.

Secondly, What shall be a sufficient assumption of the character of executor, to entitle the legatee, when a legacy is given to him in that character? If the legatee prove the Will with an intention to act under it, that will be a sufficient performance of the condition: or if he unequivocally manifest an intention to act in the executorship, as by giving directions about the funeral of the testator, and be prevented by death from further entering upon his office, that will also be a performance of the condition (*d*). Thus in *Harrison* v. *Rowley* (*e*), the testatrix bequeathed to her executors 100*l.* each for their care and loss of time: One of the executors survived the testatrix so short a time, that he was prevented from joining with his co-executors in proving her Will, but he concurred with them in giving directions respecting her funeral, and in paying certain sums for burial fees, making the coffin, and opening the vault, in consequence of those directions: And Lord Alvanley decided that his executors were entitled to

(*c*) Lord Alvanley, in Reed *v.* Devaynes, 2 Cox, 285, said that he thought a child, who had a portion left him by a Will, in which he was appointed executor, could not take the portion unless he acted as executor: But this may be considered inconsistent with the more recent authorities: And the same remark, perhaps, applies to the principal decision of the same learned Judge in Reed *v.* Devaynes, (stated *ante*, p. 1101,) inasmuch as it appears from the report in Cox, that the legacy was given to the executors, "as a mark of my gratitude for the friendship they have shewn me;" which words, it should seem, would rebut the presumption that the bequest was given to them in their character of executors.

(*d*) 1 Rop. Leg. 673, 3d edit.

(*e*) 4 Ves. 212.

the legacy. In this case his Lordship declined determining whether, if the executor had died without knowing that he was appointed executor, or manifesting any intention to take upon him the trust, (as if he had died at a distance, before the information reached him) he would have been entitled (*f*).

In *Hollingsworth* v. *Grasett* (*g*), a testator bequeathed his residuary estate to A., the executor and trustee of his Will; with a gift over in case of the death of A., *so that he might not be enabled* to perform the duties thereby required of him: A. proved the Will, but died before he had fully performed the trusts of it: And it was held by Sir L. Shadwell, V. C., that A., by merely proving the Will, entitled himself to the residue absolutely.

But the conduct of an executor, after proving the Will, may be such as to demonstrate, that instead of a *bonâ fide* intention to execute the trusts, he procured probate as a means of enabling him to violate, in the grossest manner, the confidence reposed in him by the testator: In such a case, the mere act of proving the Will cannot entitle him to the legacy meant for him (*h*). Thus in *Harford* v. *Browning* (*i*), Mr. Morris (one of four executors) had a legacy of 1500*l.* and an annuity of 100*l.* given to him by the testator, upon proving the Will, and taking upon himself the execution of it: Morris concurred in the probate, and shortly afterwards eloped with, and married abroad, the infant daughter of the testator, who was beneficially interested under the Will: With the exception of probate, Morris never acted as executor, and, in consequence of his misconduct, he was restrained by the Court of Chancery from interfering in the trust of the Will: And Lord Thurlow determined, that Morris's concurrence in the probate, under these circumstances, did not entitle him either to the legacy or the annuity.

(*f*) 4 Ves. 215. In Brydges *v.* Wotton, 1 Ves. & Beam. 134, a trustee dying nineteen months after the testatrix, without having acted, was held entitled to the legacy given as a token of regard, and a recompence for his trouble; no refusal or neglect to act, where necessary, appearing.

(*g*) 15 Sim. 52.

(*h*) 1 Rop. Leg. 673, 3d edit.

(*i*) 1 Cox, 302.

In *Baker* v. *Martin* (*k*), a testator directed that 100*l.* should be annually paid to one of his executors, for his trouble in superintending his concerns, until a final settlement of his affairs should take place: The executor proved and acted: Some time after the testator's death, a suit was instituted for the administration of his estate, but no receiver was appointed, and some of the assets were still outstanding: Sir L. Shadwell, V. C., held that the annuity did not cease on account of the institution of the suit.

where an annuity given to an executor "for his trouble" shall cease.

A request by a testator, that a handsome gratuity should be given to each of his executors, is void for uncertainty (*l*).

bequest of a "handsome gratuity" to executors.

In conclusion, it may be mentioned, that where personal property is bequeathed to executors as trustees, the probate of the Will is an acceptance of the trusts (*m*).

Liability of executor legatee accepting the office.

In the case of *Messenger* v. *Andrews* (*n*), a testator gave a specific bequest to A., and directed that, in consideration of the bequest, A. should pay his debts; and made A. his residuary legatee and executor: And Lord Lyndhurst, C., held, that the payment of the debts was a condition annexed to the specific bequest, and that if A. accepted the bequest, he was bound to pay the debts, though they should far exceed the amount of the property bequeathed to him.

In *Henvell* v. *Whitaker* (*o*), the testator directed his just debts and funeral expenses to be fully paid and satisfied by his executor thereinafter named: And Sir John Leach, M. R., held, that this was a condition imposed upon the executor to satisfy the testator's debts and funeral expenses, as far as all the property, which he derived under the testamentary disposition, would extend, whether real or personal.

(*k*) 8 Sim. 25.

(*l*) Jubber *v.* Jubber, 9 Sim. 503.

(*m*) Mucklow *v.* Fuller, Jacob. 198.

(*n*) 4 Russ. Chanc. Cas. 478.

(*o*) 3 Russ. Chanc. Cas. 343. See also Dover *v.* Gregory, 10 Sim. 393, 399.

Sect. VII.

Of Cumulative Legacies.

Legacies are said to be cumulative, as contradistinguished from such as are merely repeated. Where the testator has twice bequeathed a legacy to the same person, it becomes a question, whether the legatee be entitled to both, or one only: *i. e.* whether the second legacy shall be regarded as merely a *repetition* of the prior bequest; or whether it shall be construed as an additional bounty and *cumulative* to the former benefit. On this point, the intention of the testator is the rule of construction (*p*).

The cases in which this question arises, may be classed under two heads: 1st, Where there is no evidence of the testator's intention apparent for the face of Will; 2nd, Where there is such internal evidence.

1st. Where there is no internal evidence of intention.

1st. Where there is no internal evidence of intention, the following positions of law appear established:

I. If the *same specific thing* is bequeathed *twice* to the same legatee in the same Will, or in the Will, and again in a codicil, in that case he can claim the benefit only of one legacy, because it could be given no more than once (*q*).

II. Where two legacies of quantity of *equal amount* are bequeathed to the same legatee in one and *the same instrument*, there also the second bequest is considered a mere repetition, and he shall be entitled to one legacy only (*r*).

III. Where two legacies of quantity of *unequal amount* are given to the same person in the *same instrument*, the one is

(*p*) Ridges *v.* Morrison, 1 Bro. C. C. 389. Coote *v.* Boyd, 2 Bro. C. C. 527. Toller, 334.

(*q*) Toller, 335. 2 Hare, 432.

(*r*) Swinb. Pt. 7, s. 21, pl. 13. Godolph. Pt. 3, c. 26, s. 46. Greenwood *v.* Greenwood, 1 Bro. C. C. 30, *in notis.* Garth *v.* Meyrick, 1 Bro. C. C. 30. Holford *v.* Wood, 4 Ves. 75. Manning *v.* Thesiger, 3 M. & K. 29.

not merged in the other, but the latter shall be regarded as cumulative, and the legatee is entitled to both (*s*).

IV. Lastly, where two legacies are given *simpliciter* to the same legatee by *different instruments,* in that case also the latter shall be cumulative, whether its amount be equal (*t*) or unequal (*u*) to the former (*v*).

It may be observed here, that if the Ecclesiastical Court has granted probate, *as of a Will and codicil,* this is conclusive of the fact of their being distinct instruments, though written on the same paper (*w*). So if two instruments have been admitted to probate in the Ecclesiastical Court as one testament, a Court of Construction is bound to consider them as such (*x*). Where a testamentary instrument, incomplete as a Will, appears on the face of it to be intended as a substitution for a former complete Will, and the Ecclesiastical

(*s*) Swinb. Pt. 7, s. 21, pl. 13. Curry *v.* Pile, 2 Bro. C. C. 225. Windham *v.* Windham, Finch, R., 267. Yockney *v.* Hansard, 3 Hare, 620, 622.

(*t*) Swinb. Pt. 7, s. 21, pl. 13. Godolph. Pt. 3, c. 26, s. 46. Wallop *v.* Hewett, 2 Chanc. Rep. 70. Newport *v.* Kynaston, Finch, R., 294. Baillie *v.* Butterfield, 1 Cox, 392. James *v.* Semmens, 2 H. Blackst. 219. Benyon *v.* Benyon, 17 Ves. 34. Forbes *v.* Lawrence, 1 Coll. 495. Lee *v.* Pain, 4 Hare, 216.

(*u*) Pit *v.* Pidgeon, 1 Chanc. Cas. 301. Masters *v.* Masters, 1 P. Wms. 423. Hooley *v.* Hatton, 2 Dick. 461. S. C. 1 Bro. C. C. 389, note. Hodges *v.* Peacock, 3 Ves. 735. Wray *v.* Field, 6 Madd. 300. S. C. 2 Russ. Chanc. Cas. 257. Mackenzie *v.* Mackenzie, 2 Russ. Chanc. Cas. 272, 273. Watson *v.* Reed, 5 Sim. 431. Guy *v.* Sharp, 1 M. & K. 589. Gordon *v.* Hoffman, 7 Sim. 29: In the last case, the testator, by his Will, gave to his son a legacy of *three* thousand pounds, and, by a codicil, a legacy of 4000*l.* in addition to the legacy of *two* thousand pounds *given by his Will:* And Sir L. Shadwell, V. C., held, that the son was entitled to the legacy of 3000*l.* in addition to the legacy of 4000*l.* See also Atty. Gen. *v.* George, 8 Sim. 138. Spire *v.* Smith, 1 Beav. 419. Robley *v.* Robley, 2 Beav. 95. Tweedale *v.* Tweedale, 10 Sim. 453. Lord Hertford *v.* Lord Lowther, 7 Beav. 107. Lyon *v.* Colville, 1 Coll. 449.

(*v*) By Sir J. Leach, V. C., in Hurst *v.* Beach, 5 Madd. 358.

(*w*) Baillie *v.* Butterfield, 1 Cox, 392. See also Campbell *v.* Radnor, 1 Bro. C. C. 272, by Lord Loughborough. Martin *v.* Drinkwater, 2 Beav. 215. Russell *v.* Dickson, 2 Dr. & Warr. 133, 137.

(*x*) Heming *v.* Clutterbuck, 1 Bligh, N. S. 491, 492. Brine *v.* Ferrier, 7 Sim. 549. But see also Walsh *v.* Gladstone, 1 Phill. Ch. C. 294. *Ante*, p. 458.

Court has admitted both instruments to probate, the Court of Chancery will give effect to the new disposition as far as it goes, in substitution for the former; but will treat the former as operative so far as no substituted disposition is provided in it's place (*y*).

2ndly, Where there is internal evidence of intention.

2. Where there is internal evidence of the intention of the testator. In many cases, the Will or codicil affords intrinsic evidence that the second gift was intended by the testator as a mere substitution for the first; and consequently that one legacy alone was intended (*z*): For example, where a latter codicil appears to be a mere copy of the former, with the addition of a single legacy (*a*), or when it is manifest that the latter instrument was made for the purpose of explaining or better ascertaining the legacies bequeathed by the former (*b*).

(*y*) Jackson *v.* Jackson, 2 Cox, 35. Kidd *v.* North, 14 Sim. 463. 2 Phill. Ch. C. 91. *Ante*, p. 138.

(*z*) See Martin *v.* Drinkwater, 2 Beav. 215. Yockney *v.* Hansard, 3 Hare, 620. Russell *v.* Dickson, 2 Dr. & Warr. 133. Where a testator, having given a general legacy, by a subsequent instrument makes it specific, the ademption of the specific legacy, without more, will not set up the general legacy. Lord Hertford *v.* Lord Lowther, 7 Beav. 107.

(*a*) Coote *v.* Boyd, 2 Bro. C. C. 521. Moggridge *v.* Thackwell, 1 Ves. Jun. 472. S. C. 3 Bro. C. C. 517.

(*b*) See upon this subject, Mayor of London *v.* Russell, Finch, R., 290. Duke of St. Albans *v.* Beauclerk, 2 Atk. 636. Campbell *v.* Lord Radnor, 1 Bro. C. C. 271. Jackson *v.* Jackson, 2 Cox, 35. James *v.* Semmens, 2 H. Black. 213. Allen *v.* Callow, 3 Ves. 289. Barclay *v.* Wainwright, 3 Ves. 462. Osborne *v.* Duke of Leeds, 5 Ves. 369. Currie *v.* Pye, 17 Ves. 462. Atty. Gen. *v.* Harley, 4 Madd. 263. Wray *v.* Field, 6 Madd. 300. S. C. 2 Russ. Chanc. Cas. 257. Gillespie *v.* Alexander, 2 Sim. & Stu. 145. Hemming *v.* Gurrey, 2 Sim. & Stu. 311. S. C. in Dom. Proc. 1 Bligh, N. S. 479. 1 Dow. N. S. 35. Fraser *v.* Byng, 1 Russ. & M. 90. Watson *v.* Reed, 5 Sim. 431. Strong *v.* Ingram, 6 Sim. 197. Martin *v.* Drinkwater, 2 Beav. 215. Adnam *v.* Cole, 6 Beav. 353. Lord Hertford *v.* Lord Lowther, 7 Beav. 107. Lee *v.* Pain, 4 Hare, 240. If a testator expressly declares one gift to be in addition to another, and in another instance makes a gift without any such declaration, this is *a circumstance* to shew that the latter was intended not to be additional but in substitution. Russell *v.* Dickson, 2 Dr. & Warr. 139, *per* Sugden, C. of Ireland. See the remarks of Wigram, V. C., on this point, in Lee *v.* Pain, 4 Hare, 219—221, 233.

So if in two instruments the legacies are not given *simpliciter*, but the motive of the gift is expressed, and in both the instruments the *same* motive is expressed and the *same* sum is given, the Court considers the two coincidences as raising a presumption that the testator did not, by the second instrument, mean a second gift, but meant only a repetition of the former gift (*c*). But the Court raises this presumption only where the double coincidence occurs of the same motive and the same sum in both instruments (*d*). It will not raise it if the same motive be expressed in both instruments, and the sums be different: Consequently, the legatee is in such case entitled to both sums (*e*).

On the other hand, the ordinary inference that legacies are cumulative, arising from the fact of their being of unequal amount, or of their being given by different instruments, may be strengthened by internal evidence: as, where one is given generally, and the other for an express purpose; or where one reason is assigned for the former and another for the latter (*f*); or where the legacies are not *ejusdem generis*, as where an annuity and a sum of money are given (*g*), or two annuities of the same amount by different instruments, the one payable quarterly, the other half-yearly (*h*); or where one legacy is vested and another contingent (*i*).

Parol evidence of testator's intention.

Before leaving this subject, it is necessary to take some notice of the question as to the admissibility of parol evidence,

(*c*) Benyon *v.* Benyon, 17 Ves. 34. Hurst *v.* Beach, 5 Madd. 358, by Sir John Leach, V. C.

(*d*) Mackinnon *v.* Peach, 2 Keen, 555.

(*e*) Hurst *v.* Beach, 5 Madd. 359. Lord *v.* Sutcliffe, 2 Sim. 273.

(*f*) Ridges *v.* Morrison, 1 Bro. C. C. 388.

(*g*) Masters *v.* Masters, 1 P. Wms. 423, 424. See also Atty. Gen. *v.* George, 8 Sim. 138.

(*h*) Currie *v.* Pye, 17 Ves. 462.

(*i*) Hodges *v.* Peacock, 3 Ves. 735: or where one is payable immediately on the testator's death, and the other at a future period: Wray *v.* Field, 2 Russ. Chanc. Cas. 261, 262. See also Wright *v.* Cadogan, 2 Eden, 239. Guy *v.* Sharp, 1 M. & K. 589. Strong *v.* Ingram, 6 Sim. 197. Atty. Gen. *v.* George, 8 Sim. 138. Spire *v.* Smith, 1 Beav. 419. Robley *v.* Robley, 2 Beav. 95. Suisse *v.* Lord Lowther, 2 Hare, 424. Lee *v.* Pain, 4 Hare, 223.

to shew that the testator did or did not intend a double benefit. In the case of *Hurst* v. *Beach* (*k*), Sir John Leach, V. C., had occasion to consider the point: One of the questions before his Honor in that case was, whether parol evidence was admissible to prove that the testatrix meant a legacy of 500*l.*, given by a codicil, as a substitution merely of a legacy of 300*l.*, given by her Will: Upon which his Honor gave the following judgment (*l*): "Upon the question whether evidence is admissible to prove that the testatrix did not mean that the defendant should take both sums, there are no decisions in Courts of Equity: There are *obiter dicta* for the admission of such testimony (*m*): but in *The Duke of Leeds* v. *Osborne*, the point was fully argued, and Lord Alvanley appears to have inclined against receiving it. It did not, however, become necessary there to decide the question. It is to be collected from the Digest, that it was admitted by the civil law. This Court has no original jurisdiction in testamentary matters; it acts with respect to them only upon the ground of administering a trust; and is bound to adopt, in questions of legacy, the principles and rules of the Ecclesiastical Court. I found it necessary, therefore, to direct inquiry to be made in that Court upon this point, and the answer that I have received is, that no decision has taken place there upon this question, and that no settled opinion is formed upon it (*n*): It remains, then to be considered upon the principles of evidence which are received in

(*k*) 5 Madd. 351.

(*l*) 5 Madd. 359.

(*m*) See Coote *v.* Boyd, 2 Bro. C. C. 528, by Lord Thurlow; and see also Hooley *v.* Hatton, 1 Bro. C. C. 390, note. S. C. 2 Dick. 461. James *v.* Semmens, 2 H. Black. 213.

(*n*) But although no decisions may be found as to the admissibility of evidence with respect to the *construction* of a Will and codicil giving legacies to the same legatee, yet there are several authorities for the admissibility, in the Ecclesiastical Court, of parol evidence, with respect to the *factum* of the instrument, to investigate *quo animo* the act was done by the testator; as whether a subsequent codicil was intended as a substitute for, and consequently, revocatory of a former one, or not: See *ante*, p. 136: See also the observations of Lord Loughborough in Campbell *v.* Radnor, 1 Bro. C. C. 272; and of Sir H. Jenner Fust, in Thorne *v.* Rooke, 2 Curt. 825—827.

our own law. Our primary principle is, that evidence is not admissible to contradict a written instrument. *In some cases, Courts of Equity raise a presumption against the apparent intention of a testamentary instrument, and there they will receive evidence to repel that presumption;* for the effect of such testimony is not to show that the testator did not mean what he has said, but, on the contrary, to prove that he did mean what he has expressed. Thus, where the Court raises the presumption against the intention of a double gift, by reason that the sums and the motive are the same in both instruments, it will receive evidence that the testator actually intended the double gift he has expressed. In like manner, evidence is received to repel the presumption raised against an executor's title to the residue, from the circumstance of a legacy given to him; and to repel the presumption that a portion is satisfied by a legacy. *In all these cases, the evidence is received in support of the apparent effect of the instrument, and not against it.* Here the evidence tendered is not in support of the apparent effect of the instrument, but directly against it. This codicil leaves unrevoked the former legacy of 300*l.* to the defendant, and makes to him a further substantive gift of 500*l.* The evidence tendered is, that the testatrix did not mean this as a further gift of 500*l.*, but meant to substitute the 500*l.* in the place of the former 300*l.* I am of opinion, therefore, that such evidence cannot be received without breaking in upon the primary rule, that parol evidence is not admissible against the expressed effect of a written instrument" (*o*).

In *Guy* v. *Sharp* (*p*), Lord Brougham decided, that evidence of a testator's *declarations* of his meaning and intention were inadmissible, upon the question whether a legacy was cumulative or substitutional: His Lordship, however, admitted depositions, relating to the amount of the testator's property, and the circumstances of his family, to be read *de bene esse.* It became unnecessary to decide the point as to their admis-

(*o*) See Accord. Hall *v.* Hill, 1 Dr. & Warr. 94, 116. Lee *v.* Pain, 4 Hare, 216. *Post*, p. 1118.

(*p*) 1 M. & K. 589.

sibility, the learned Judge being of opinion, that, even if admitted, the evidence would not alter the conclusion to be arrived at upon a due regard to the construction of the instruments themselves: But his Lordship adverted to the manifest difference between the declarations, whether verbal or written, of a testator, and the proof of facts and circumstances, by the knowledge of which the Court, when called upon to construe, may be placed in the same situation with the party who made the instrument, and may thereby be the better able to understand his meaning (*q*).

Substituted legacies subject to the incidents of the original gift.

It may be here mentioned, as a general rule, that where one legacy is given as a mere *substitution* for another, the substituted gift is subject to the incidents of the original one, although it is not so expressed in the testamentary instrument (*r*).

Sect. VIII.

Of the Satisfaction of Debts and Portions by Legacies.

Of the satisfaction of debts by legacies.

It is a rule established in the Courts of Equity, that where a debtor bequeaths to his creditor a legacy equal to, or exceeding the amount of his debt, it shall be presumed, in the absence of any intimation of a contrary intention, that the legacy was meant by the testator as a satisfaction of the debt (*s*).

(*q*) See Accord. Martin *v.* Drinkwater, 2 Beav. 215. See also Boys *v.* Williams, *ante*, p. 1002.

(*r*) Shaftesbury *v.* Marlborough, 7 Sim. 237. Day *v.* Croft, 4 Beav. 561. Bristow *v.* Bristow, 5 Beav. 289. *Post*, Pt. III. Bk. V. Ch. III. *Secùs*, where the latter legacy is a distinct substantive bequest. Chatteris *v.* Young, 2 Russ. Ch. C. 183. Alexander *v.* Alexander, 5 Beav. 518.

(*s*) Brown *v.* Dawson, Prec. Chanc. 240. Fowler *v.* Fowler, 3 P. Wms. 353. Richardson *v.* Greese, 3 Atk. 68. Gaynon *v.* Wood, 1 Dick. 331. So a legacy may operate as a satisfaction of a covenant: Wathen *v.* Smith, 4 Madd. 325. But where the legacy is of *less* amount than the debt, it shall not be deemed a part payment or satisfaction: Cranmer's case, 2 Salk. 508. Graham *v.* Graham, 1 Ves. Sen. 263.

This rule, however, though it has long prevailed, has met with the censure of several eminent Judges; and the Courts have inclined to lay hold of any minute circumstances whereupon to ground an exception to it (*s*).

Thus the presumption of satisfaction shall not be made, where the debt was not contracted till after the making of the Will; for the testator could not have intended by the legacy to have satisfied a debt which did not then exist (*t*): Nor where the debt is due upon a current account; for the state of the account, and on whose side the balance lay, might be unknown to the testator (*u*): Nor where the debt was upon a bill of exchange, or other negotiable security; for the debt might have been transferred to a stranger by the legatee passing away the instrument (*v*).

Again, where the legacy is at all contingent or uncertain, it shall not be deemed a satisfaction of a debt (*w*): As where the legacy is given upon the contingency of the legatee surviving a particular person or period (*x*): or where the legacy is of the whole or part of a residue; for it may possibly turn out, after all the claims on the testator's estate are satisfied, that such legacy is not of equal amount with the debt (*y*). So a provision by Will that the legatee shall have the interest of a particular fund, or other proceeds, *for life*, shall not be deemed a satisfaction of a sum of money which the legatee is entitled to claim *absolutely* from the testator (*z*).

Another exception to the rule exists in cases where the legacy is not payable immediately after the death of the testator; for the debt is due at the death of the testator, and

(*s*) See the remarks of Sir T. Clarke, M. R., in Mathews *v.* Mathews, 2 Ves. Sen. 636, and of Lord Alvanley in Hinchcliffe *v.* Hinchcliffe, 3 Ves. 529. See also Hales *v.* Darell, 3 Beav. 324, 332. Smith *v.* Lyne, 2 Y. & Coll. Ch. C. 345.

(*t*) Cranmer's case, 2 Salk. 508. Jeffs *v.* Wood, 2 P. Wms. 132. Thomas *v.* Bennet, 2 P. Wms. 343.

(*u*) Rawlins *v.* Powel, 1 P. Wms. 299.

(*v*) Carr *v.* Eastabrooke, 3 Ves. 561.

(*w*) Nicholls *v.* Judson, 2 Atk. 300.

(*x*) Compton *v.* Sale, 2 P. Wms. 553.

(*y*) Devese *v.* Pontet, 1 Cox, 188.

(*z*) Alleyn *v.* Alleyn, 2 Ves. Sen. 37. Forsight *v.* Grant, 1 Ves. Jun. 298.

therefore the legacy must be so too (*a*). Thus, in *Mathews* v. *Mathews* (*b*), Sir Thomas Clarke, M. R., said, that he remembered a case before the Lord Chancellor (Lord Hardwicke) where an old lady, indebted to a servant for wages, by Will gave ten times as much as she owed or was likely to owe; yet because the legacy was made payable in a month after her own death, the Court laid hold of that circumstance to take it out of the general rule (*c*).

A further exception may be found in cases where the legacy and debt are of a different nature (*d*): as where the testator is indebted by bond, and bequeaths an interest in land to his creditor (*e*). So in *Bartlett* v. *Gillard* (*f*), a leasehold estate of the testator's was subject to an annuity of 12*l.* to Mrs. Bartlett, for her sole use, to be paid to her half-yearly, on the 27th of January and the 27th of July: He devised all his lands, in which the leasehold was included, to Richard Gillard, paying to Mrs. Bartlett 12*l.* per annum, by half-yearly payments, to be made of the 27th of January and the 27th of July: The Lord Chancellor held, that although the amounts of the two annuities and the days of payments were precisely the same, yet as the second was charged on the freehold as well as the leasehold property and was payable to Mrs. Bartlett generally, and not to her separate use, this was sufficient to repel the presumption that the second annuity was intended as a satisfaction of the first, and that consequently both were payable. In *Fourdrin* v. *Gowdey* (*g*),

(*a*) By Lord Hardwicke, in Clark *v.* Sewell, 3 Atk. 96. See also Atkinson *v.* Webb, Prec. Chanc. 236. Nicholls *v.* Judson, 2 Atk. 300. Mathews *v.* Mathews, 2 Ves. Sen. 635. Haynes *v.* Mico, 1 Bro. C. C. 129. Jeacock *v.* Falkener, 1 Bro. C. C. 295. Adams *v.* Lavender, 1 M'Clel. & Y. 41.

(*b*) 2 Ves. Sen. 636.

(*c*) In Richardson *v.* Greese, 3 Atk. 69, Lord Hardwicke said, that legacies to servants had never been held to be in satisfaction of debts. But this case mentioned by Sir T. Clarke, and also Chancey's case, 1 P. Wms. 408, seem to decide that they are to be so considered, unless there are circumstances to take the case out of the general rule.

(*d*) See the observations of Lord Hardwicke in Bellasis *v.* Uthwatt, 1 Atk. 428.

(*e*) Eastwood *v.* Vinke, 2 P. Wms. 614. Richardson *v.* Elphinstone, 2 Ves. Jun. 463.

(*f*) 3 Russ. Chanc. Cas. 149.

(*g*) 3 M. & K. 409.

a testator, under his wife's appointment, was entitled to her residuary estate, charged with her pecuniary legacies, including one of 100*l.* to Anna Jewitt, and another of 100*l.* to Mary Ann Myers, who was a married woman, to her separate use, independent of her husband; and it was left to his discretion, either to pay the charges in his lifetime, or to direct them to be paid by his executors: He did not pay them in his lifetime; but amongst other legacies, which by his Will he directed his executors to pay, was a sum of 500*l.* to Anna Jewitt, and a sum of 100*l.* to Mary Ann Myers, not limited to her separate use: Sir J. Leach, M. R., held that the sum of 100*l.*, given to Anna Jewitt by the appointment of the wife, was satisfied by the 500*l.* bequeathed by the testator; and that the sum of 100*l.* bequeathed to Mary Ann Myers was in addition to, and not a satisfaction of the 100*l.* given to her separate use by the wife.

Again, a legacy of a specific chattel, however great its value, will not be a satisfaction of a debt; unless the testator bequeaths it with such condition expressed, and the legatee accepts it by way of satisfaction (*h*).

It must also be observed, that the presumption of satisfaction may be counteracted by other parts of the Will: As where the legacy appears to be given *diverso intuitu*, some particular purpose being expressed as the ground of the bequest (*i*); or where there is an express direction in the Will for the payment of *all debts and legacies* (*k*).

A legacy given by a parent to a child, is regarded, with respect to the rule in question, in the same light as a legacy to a stranger (*l*): Nor is a legacy given by a husband to his wife considered upon any different footing (*m*).

(*h*) Byde *v.* Byde, 1 Cox, 49.

(*i*) Mathews *v.* Mathews, 2 Ves. Sen. 635, *post*, p. 1116.

(*k*) Chancey's case, 1 P. Wms. 410, 411. Richardson *v.* Greese, 3 Atk. 68. Field *v.* Mostin, 2 Dick. 543. Hales *v.* Darell, 3 Beav. 324. But see Wathen *v.* Smith, 4 Madd. 331.

(*l*) Tolson *v.* Collins, 4 Ves. 483, *post*, p. 1117.

(*m*) Fowler *v.* Fowler, 3 P. Wms. 353.

It is said that a legacy shall in all cases be construed as a satisfaction, in case there be a deficiency of assets (*n*).

Of the satisfaction of portions by legacies.

With respect to the satisfaction of portions by legacies, the rule has been established, with much fewer exceptions than that with regard to the satisfaction of debts, that where a parent is under obligation, by articles or settlement, to provide portions for his children, and he afterwards makes a provision by Will for them, such testamentary provision shall, *primâ facie*, be presumed to be a satisfaction or performance of the obligation (*o*). The strong inclination of the Courts against double portions has caused this rule to be applied without much relaxation (*p*).

If, therefore, the bequests be less in amount than the portions, or payable at different periods, such legacies will, notwithstanding, be considered satisfactions, either in full or in part according to circumstances (*q*).

But this presumption may be repelled or fortified by intrinsic evidence derived from the nature of the two provisions. Where the two provisions are of the same nature, or there are but slight differences (*r*), the two instruments

(*n*) Toller, 337.

(*o*) Bruen *v.* Bruen, 2 Vern. 439. Copley *v.* Copley, 1 P. Wms. 147. Moulson *v.* Moulson, 1 Bro. C. C. 82. Ackworth *v.* Ackworth, 1 Bro. C. C. 307, note. Weall *v.* Rice, 2 Russ. & M. 251. Papillon *v.* Papillon, 11 Sim. 642.

(*p*) See 2 Rop. Leg. 68, 3d edit. See also *infra*, Pt. III. Bk. III. Ch. III. § II. p. 1142, *et seq.* as to the ademption of legacies given as portions.

(*q*) Jesson *v.* Jesson, 2 Vern. 255. Byde *v.* Byde, 1 Cox, 44. S. C. 1 Bro. C. C. 309, note. Warren *v.* Warren, 1 Bro. C. C. 305. Finch *v.* Finch, 1 Ves. Jun. 534. 2 Rop. Leg. 68, 3d edit. See Fazakerley *v.* Gillibrand, 6 Sim. 591.

(*r*) It is not possible to define what are to be considered as slight differences between two provisions: Slight differences are such as, in the opinion of the Judge, leave the two provisions substantially of the same nature; and every Judge must decide that question for himself: By Sir J. Leach, M. R., 2 Russ. & M. 268. Where the legacy is contingent, it shall not be considered a satisfaction of the portion: Bellasis *v.* Uthwatt, 1 Atk. 426, 428. Hanbury *v.* Hanbury, 2 Bro. C. C. 352: So where the legacy is given *diverso intuitu:* See Foster *v.* Evans, 6 Sim. 15.

afford intrinsic evidence against a double provision: Where the two provisions are of a different nature, the two instruments afford intrinsic evidence in favour of a double provision (*s*).

It must be further observed, that a legacy by a father to a child is not a satisfaction of a *debt* due to the child, or of monies owing to the child *in the nature of a debt*, in any other way than a debt due from a stranger would be satisfied by such legacy: and therefore circumstances of difference, such as there has already been occasion to point out (*t*), will be laid hold of by the Court to prevent the application of the rule of satisfaction (*u*). And in *Hall* v. *Hill* (*v*), where a father, upon the marriage of his daughter, executed to the intended husband his bond, (with a warrant of attorney for confessing judgment thereon) conditioned for the money of 800*l.* by instalments, part thereof to be paid during his life, and the residue upon his decease, and the intended husband gave a bond in the same amount to the trustees of the marriage settlement, which was settled upon the intended wife and issue; and then the father bequeathed to his daughter a legacy of 800*l.*; it was held by Sugden, C. of Ireland, that this legacy could not be considered as a satisfaction of the debt due to the husband, notwithstanding such debt was, in substance, a portion.

Admissibility of parol evidence.

With respect to rebutting the presumption of satisfaction of a debt by parol evidence, it was holden by Lord Talbot, in *Fowler* v. *Fowler* (*w*), that such evidence was not admissible: But Lord Eldon, in *Wallace* v. *Pomfret* (*x*), upon the authority of the cases as to satisfaction of portions (*y*), held, that parol declarations by the testator are admissible in evidence, to repel the presumption of a satisfaction of a debt by the bequest of a greater amount, even where such declarations

(*s*) 2 Russ. & M. 267, 268. See *post*, Pt. III. Bk. III. Ch. III. § II. p. 1144, *et seq*.

(*t*) *Ante*, p. 1113—1115.

(*u*) Tolson *v.* Collins, 4 Ves. 483. Stoken *v.* Stocken, 4 Sim. 152. See Plume *v.* Plume, 7 Ves. 258.

(*v*) 1 Dr. & Warr. 94.

(*w*) 3 P. Wms. 354.

(*x*) 11 Ves. 547, 548.

(*y*) See *infra*, Pt. III. Bk. III. Ch. III. § II. p. 1145.

were not contemporaneous with, but subsequent to the making of the Will; ***and although the expressions in the Will may afford an inference in favour of the presumption.*** And it was laid down by Sir J. Leach, in *Weall* v. *Rice* (z), that *whether the two instruments afford intrinsic evidence in favour of or against a double provision*, extrinsic evidence is admissible of the real intention of the testator. And this proposition seems to have been approved of by Lord Langdale in *Lord Glengall* v. *Barnard* (a).

But it has been doubted, on strong grounds, whether these doctrines are warranted, to their full extent, either by principle or authority: And the sound rule appears to be, in accordance with the reasoning of Sir John Leach himself in *Hurst* v. *Beach* (b), that in no instance can parol evidence be admitted *against construction* upon the words of the Will: But that where the presumption is raised by the Court against the apparent intention of the testamentary instrument, *that* presumption may be rebutted by parol evidence; for then the effect of such testimony is not to shew that the testator did not mean what he has said, but to prove that he did mean what he expressed (c).

Sect. IX.

Of the Release of Debts by Legacies: and herewith of the effect of appointing a Debtor or a Creditor to be Executor.

1. *Of a Legacy by a Creditor to his Debtor.*

Where a creditor bequeaths a legacy to his debtor, and either does not notice the debt, or mentions it in such a manner as to leave his intention doubtful, and after his death the securities for the debt, if any exist, are found uncancelled among the testator's property, the Courts of Equity do not

(z) 2 Russ. & M. 267, 268.

(a) 1 Keen, 769, 793, 794.

(b) 5 Madd. 351. *Ante*, p. 1111.

(c) Hall *v.* Hill, 1 Dr. & Warr. 94, 113, 114. Lee *v.* Pain, 4 Hare, 201, 216.

consider the legacy to the debtor as necessarily, or even *primâ facie*, a release or extinguishment of the debt, but require evidence clearly expressive of the intention to release (*d*): And if such intention does not appear clearly expressed or implied on the face of the Will, evidence from other sources will be admitted (*e*).

Where a testator recites that a legatee is indebted in a certain sum, that recital binds the legatee, except in case of a clear mistake of figures (*f*).

It must be observed, that if the testator expressly bequeaths the debt to his debtor, this, being no more than a release by Will, operates only as a legacy; and is assets, therefore, subject to the payment of the testator's debts (*g*).

Retainer and set-off of a legacy, in respect of a debt due from the legatee, or party claiming through the legatee:

Where a legatee is indebted to the testator, the executor may retain the legacy, either in part or full satisfaction of the debt, by way of set-off (*h*). And it has been held, that in a suit by a legatee to obtain payment of the legacy *out of the assets of the testator*, in a due course of administration, the executor may retain so much of the legacy as is sufficient to satisfy a debt due from the legatee to the testator, although the remedy for such debt was, at the time of the death of the testator, barred by the Statute of Limitations (*i*).

In *Campbell* v. *Graham* (*k*), a testator bequeathed to John Campbell the sum of 2000*l*., and to Henrietta Campbell and Margaret Campbell, the sum of 500*l*. each: At his death in the year 1790, John Campbell was indebted to the testator in

(*d*) 2 Rop. Leg. 61, 3rd edit. Wilmot *v.* Woodhouse, 4 Bro. C. C. 226. See also Jeffs *v.* Wood, 2 P. Wms. 132.

(*e*) 2 Rop. Leg. 61, 3rd edit. Eden *v.* Smyth, 5 Ves. 341.

(*f*) Robinson *v.* Bransby, 6 Madd. 348.

(*g*) Rider *v.* Wager, 2 P. Wms. 331, 332. Toller, 338. *Ante*, p. 1037.

(*h*) Jeffs *v.* Woods, 2 P. Wms. 130. So a retainer will be allowed to one executor, out of a legacy to his co-executor, in respect of a *devastavit* by the latter: Sims *v.* Doughty, 5 Ves. 243.

(*i*) Courtenay *v.* Williams, 3 Hare, 539.

(*k*) 1 Russ. & M. 453.

two several bonds with penalties of 5,272*l.* and 1,400*l.* to secure the repayment of 2,632*l.* and 700*l.* with interest: Soon after the testator's death, his personal representative in Jamaica, where both the testator and John Campbell were domiciled, commenced actions on the bonds in the Supreme Court there, and in the year 1794 recovered judgments for the full penalties and costs, amounting together to the sum of 6703*l.* 5*s.*; but no attempt was made to levy execution on these judgments, and they remained unsatisfied: In 1818, Henrietta and Margaret assigned their respective legacies to the plaintiff who was the personal representative of John Campbell; and he, in the year 1821, when administration was for the first time taken out to the testator's estate in England, filed the bill for the purpose of enforcing payment: And it was held by Sir J. Leach, M. R., that John Campbell must be considered as having been paid his legacy by retaining the amount out of the bond debt, and that that amount was to be deducted, first, from the interest, and then *pro tanto*, from the principal due from him upon the bonds, *as at the end of the year after the death of the testator, when the legacy became payable;* and that interest was then to be calculated on the balance till the amount equalled the sum for which the judgments were recovered, and no further: And also, that such retainer and set-off could not be allowed in respect of the legacies which the plaintiff claimed only as assignee (*l*).

In *Davis* v. *Elmes* (*m*), a testator bequeathed to his daughter and her husband 300*l.* for their own use and benefit, and directed that if the husband should be indebted to him at the time of his death, the debt should be deducted out of his legacy: The husband died in the lifetime of the testator, indebted to him in 250*l.*, and the testator afterwards died:

(*l*) It was afterwards held by Lord Brougham, on appeal, that the assigned legacies, under the circumstances, ought to be presumed to be satisfied: (See *infra*, Pt. v. Bk. II. Ch. II.) But his Lordship confirmed the judgment of the Master of the Rolls, on the other point.

(*m*) 1 Beav. 131.

And Lord Langdale, M. R., held that the debt was not to be deducted from the daughter's legacy; for that in the event that had happened, the husband never had any interest in the legacy; and the testator could not be taken to have intended that when the husband had no interest, his personal debt was to be deducted from the wife's interest.

It may be observed, that the term "set-off" is somewhat inaccurately used in cases of this kind. The proper use of that expression seems applicable only to the mutual demand of debtor and creditor. A right of this nature is rather a right to pay out of the fund in hand, than a right to set-off. And such right of payment can only arise where there is a right to receive the debt so to be paid, and the legacy or fund so to be applied in payment of the debt must be payable by the person entitled to receive the debt (*n*). Accordingly, in *Cherry* v. *Boultbee* (*o*), Thomas Boultbee was indebted to Catherine Boultbee, his sister, in the sum of 1878*l.*: He became bankrupt, and shortly after his bankruptcy, Catherine made her Will, whereby she gave legacies of 500*l.* and 2000*l.* to her executors, in trust to pay the interest thereof, (as to the 500*l.*, after the decease of her mother,) to Thomas Boultbee for his life, without power of anticipation, and free from his debts; and after his decease to pay the principal to such persons as he should appoint, and in default of appointment to his executors and administrators, for his and their own use and benefit: The testatrix did not prove her debt under her brother's commission: He died without having obtained his certificate, and without having attempted to make any appointment: Lord Langdale, M. R. held, (overruling the case of *Ex parte Man* (*p*), before Sir J. Leach,) that the executors of the testatrix had no right to set-off the debt due from Thomas Boultbee to the testatrix against the legacies, but that the assignee of Thomas Boultbee was entitled to so much of the legacies as the assets were sufficient to pay: And this

(*n*) See McMahon *v.* Burchell, 2 Phill. Ch. C. 127. 5 Hare, 325.

(*o*) 2 Keen, 319.

(*p*) Mont. & M'Arth. 210.

decision was confirmed by Lord Cottenham on appeal (*q*). In this case the bankruptcy of the debtor having taken place in the lifetime of the testatrix, her executors never were entitled to receive from the assignees more than the dividends of the debt; and as the bankrupt never obtained his certificate, he was never entitled to receive the legacy; consequently there never was a time at which the same person was entitled to receive the legacy and liable to pay the entire debt. But it should seem that the assignees would have been bound to allow the amount of any dividends on the debt, if it had been proved.

in a case of a legacy to a *feme covert* whose husband is indebted to the testator's estate.

It is necessary here to consider, how far the right of set-off by the executor extends, in case of a legacy to a married woman, with respect to debts due from her husband to the testator. At law a legacy to the wife is a legacy to the husband: But in equity, where a legacy is given to a married woman, or she becomes entitled to a share of personal estate as one of the next of kin of an intestate, the property is subject to the claim of the wife, for a provision out of it for herself and children (*r*). Thus in *Elibank* v. *Montolieu* (*s*), a married woman entitled as next of kin of an intestate, filed a bill against the administrator and her husband: The administrator claimed to retain towards satisfaction of a debt by bond from the husband to him: But the Court declared that he was not entitled to retain, as the wife's share was subject to a provision in favour of her and her children: And it was referred to the Master, to see a proper settlement made on them. So in *Carr* v. *Taylor* (*t*), where the bill was filed by a married woman, as next of kin of an intestate, for a share of the residue of his personal estate, it was holden that the administrator could not set off a debt due from the husband to the intestate's estate. In *Ex parte O'Ferrall* (*u*), executors were allowed to set off a moiety of a legacy, given by their testator to the wife of the bankrupt, against a debt due from

(*q*) 4 M. & Cr. 442.

(*r*) See *infra*, Pt. III. Bk. III. Ch. IV. § V.

(*s*) 5 Ves. 737.

(*t*) 10 Ves. 574.

(*u*) 1 Glyn. & Jam. 347.

the bankrupt to their testator: and the other moiety was ordered to be settled on the wife for life, with remainder to the issue of the marriage.

But where the legacy is discharged of the wife's equity, as by her death without any such settlement having been made, or by any other means (*v*), the legacy becomes the absolute property of the husband, and the executors have a right to satisfy it by writing off so much of a debt due from him to the estate of the testator (*w*): Accordingly, in *Ranking* v. *Barnard* (*x*), a legacy was given to a wife, whose husband was largely indebted to the testatrix: He became bankrupt, and the wife afterwards died, without having asserted any claim in respect of the legacy: The assignees of the husband claimed the legacy: But it was holden by Sir J. Leach, V. C., that the executors of the testatrix were entitled to retain the legacy in part discharge of the debt due to her.

And the result of the authorities appears to be, that where a debt to the estate of a testator may be set off by the executors against a legacy bequeathed by the testator to his debtor, such debt may also be set off against a legacy bequeathed by the testator to the wife of the debtor, subject to her equity (if any) in the legacy (*y*).

2. *The effect of appointing a Debtor to be Executor.*

It will be convenient to consider this subject, first, as to the effect in law, of the testator's appointing his debtor to be his executor; and then as to the effect in equity.

At law.

In point of law such a nomination, even by a testator of the age of seventeen years (*z*), will operate as a release or extinguishment of the debt: The principle is, that a debt is merely a right to recover the amount by way of action, and as an executor cannot maintain an action against himself, his appointment by the creditor to that office suspends the action

(*v*) See McMahon *v.* Burchell, 5 Hare, 325.

(*w*) 5 Madd. 34.

(*x*) 5 Madd. 32.

(*y*) McMahon *v.* Burchell, 5 Hare, 325. 3 Hare, 99.

(*z*) Co. Lit. 264, *b.* But see now stat. 1 Vict. c. 26, s. 7, *ante*, p. 14.

for the debt: And where a personal action is once suspended by the voluntary act of the party entitled to it, it is for ever gone and discharged (*a*). Thus, if the obligee of a bond makes the obligor his executor, this amounts at law to a release of the debt (*b*).

The law is the same, where a creditor appoints one of several joint, or even one of joint *and several* debtors his executor: Thus, if several obligors be bound jointly, and the obligee constitute one of them his executor, it is an extinguishment of the debt at law, and a release to them all (*c*). So if an obligee in a joint and several bond makes one of two obligors his executor, the action is discharged as to both obligors (*d*): For a release to one of several obligors, whether they are bound jointly, or jointly and severally, discharges the others, and may be pleaded in bar by all (*e*).

But if the creditor makes the executor of the debtor his executor, this is no extinguishment of the debt (*f*): Therefore, if the obligee of a joint and several bond makes the executor of one of the obligors his executor, who has no assets, this does not release the other obligor (*g*).

The rule is not confined to cases, where the creditor appoints his debtor his sole executor: The debt is equally released where one only of several executors is indebted to the testator: for they cannot sue without making him who is a debtor also a plaintiff, which he cannot be against himself (*h*):

(*a*) Wentw. Off. Ex. ch. 2, p. 73, 14th edit. Nedham's case, 8 Co. 136, *a*. Fryer *v*. Gildridge, Hob. 10. Dorchester *v*. Webb, Cro. Car. 373. Wankford *v*. Wankford, 1 Salk. 299. Com. Dig. Admon. (B. 5.) Bac. Ab. Release, B. Errington *v*. Evans, 2 Dick. 457.

(*b*) Nedham's case, 8 Co. 136, *a*.

(*c*) Wentw. Off. Ex. ch. 2, p. 74, 14th edit. Com. Dig. Admon. (B. 5.)

(*d*) Bro. Exor. pl. 118. Fryer *v*. Gildridge, Hob. 10. Cheetham *v*. Ward, 1 Bos. & Pull. 630. See also S. P. Wankford *v*. Wankford, 1 Salk. 300, by Gould, J.

(*e*) 2 Roll. Abr. 412, tit. Release, (G.) pl. 4, 5. Kynaston *v*. Clayton, 2 Salk. 574. 2 Saund. 47, *gg*. 48, note to Fowell *v*. Forest.

(*f*) Bac. Abr. tit. Exors. (A.) 10.

(*g*) Dorchester *v*. Webb, Cro. Car. 372. S. C. W. Jones, 345. S. P. by Holt, C. J., 1 Salk. 305. See also Alston *v*. Andrew, Hutt. 128.

(*h*) Bro. Exors. pl. 114. Wentw. Off. Ex. c. 2, p. 74, 75, 14th edit.

And after the death of the debtor executor, the surviving executors cannot sue his executor or administrator: for the debt was at law utterly extinct by the making him executor, as if the testator had released to him (*i*).

Nor is the case varied by the executor dying after having administered, without having proved the Will (*k*), or without having either proved the Will or administered (*l*); for in such case also the debt is extinguished, and the administrator *cum testamento annexo* can bring no action for it. If, indeed, a *sole* executor does not administer, and refuses in the Ecclesiastical Court to be executor, then the making him executor will not act as a release: for a man can no more be forced to accept a release against his Will, than a deed of grant (*m*). But if the obligee make the obligor and others his executors, and the obligor refuses, but the others administer, and the obligor dies first, yet the debt is released; because the refusal was void, and the obligor might have come in and administered notwithstanding; for the probate by the other executors was for his benefit (*n*).

It is clear, from the principle upon which these doctrines

Com. Dig. Admon. (B. 5.) 1 Salk. 302, by Powell, J., Cheetham *v.* Ward, 1 Bos. & Pull. 630.

(*i*) Wentw. Off. Ex. c. 2, p. 75, 14th edit. Com. Dig. Admon (B. 5.) *Contrà, per cur.* in Crossman *v.* Reade, 1 Leon. 320, pl. 441.

(*k*) Wankford *v.* Wankford, 1 Salk. 299.

(*l*) Wentw. Off. Ex. c. 2, p. 75, 14th edit. Com. Dig. Admon. (B. 5.)

(*m*) Wankford *v.* Wankford, 1 Salk. 307, by Holt, C. J. The same opinion was expressed in the same case by Gould, J., 1 Salk. 301; and by Powys, J., 1 Salk. 302; but Powell, J., declined giving any opinion on the point: 1 Salk. 304: There is a *dictum* to the contrary by Twisden, J., (which was mentioned by the judges in the above case,) in Abram *v.* Cunningham, 1 Ventr. 303: And see also Butler's note to Co. Lit. 264, *b.*, where it is said that the debt is discharged, whether the executor accepts or refuses the executorship: Therefore the point must, perhaps, be considered doubtful.

(*n*) 1 Salk. 308, by Holt, C. J., Bac. Abr. tit. Executor, (A.) 10. It seems clear, also, that the debt is in such case released, inasmuch as the co-executor, who has refused before the Ordinary, must still be made a co-plaintiff in all actions by the other executors: Hensloe's case, 9 Co. 37, *a.* Wankford *v.* Wankford, 1 Salk. 307, by Lord Holt. 1 Saund. 291, *k. l.* note to Cabell *v.* Vaughan.

have been established, that the nomination of the debtor to the office of executor does not merely extinguish the legal remedy for the debt, but that the debt itself is absolutely discharged at law: Accordingly, in the case of *Freakley* v. *Fox* (o), where the payee of a promissory note appointed the maker his executor, the Court of King's Bench held that the debt was gone, and that, consequently, no action could be maintained on the note, even by a person to whom the executor had indorsed it.

It must, however, be observed, that, as between the debtor executor, and the creditors of the testator, this doctrine is applicable only in cases where there are assets sufficient to satisfy the testator's debts (p): For it would be unfair to defraud the creditors of their just debts by a release which is absolutely voluntary (q): And therefore the debt due from the executor shall be considered, on their behalf, as assets in his hands (r): Accordingly it was said by Lord Holt (s), that when the obligee makes the obligor his executor, the debt is assets, and the making him executor does not amount to a legacy, but to payment and release: And that if H. be bound to J. S. in a bond of 100*l.*, and then J. S. makes H. his executor, H. has actually received so much money, and is answerable for it; and if he does not administer so much, it is a *devastavit.*

It must further be remarked, that, where the debtor is appointed executor, the suspension of the remedy is the *voluntary act of the creditor,* and therefore the action is for ever gone: But the effect is different, where the remedy is sus-

(o) 9 B. & C. 130. S. C. 4 Mann. & R. 18.

(p) Bac. Abr. Exors. (A.) 10.

(q) 2 Black. Com. 512: If the testator, says Lord Talbot, in Brown *v.* Selwyn, Cas. temp. Talb. 241, 242, had expressly given it away, even that could not have screened it from debts.

(r) Holliday *v.* Boas, 1 Roll. Abr. 920, 921. Exors (G.) pl. 13. Woodward *v.* Lord Darcy, Plowd. 186. Dorchester *v.* Webb, Cro. Car. 373. Touchst. 497, 498. Wankford *v.* Wankford, 1 Salk. 305, by Holt, C. J. The author of "The Office of an Executor," seems to be of opinion that the debt will be assets in equity only: ch. 2, p. 73, 74, 14th edit.

(s) 1 Salk. 306.

pended *by the act of law* (*t*): Thus, if administration of the effects of a creditor be committed to the debtor, this being by act of law, is only a temporary privation of the remedy (*u*): Therefore, if the obligor of a bond takes out administration to the obligee, and dies, the administrator *de bonis non* of the obligee may maintain an action for such debt against the executor of the obligor (*v*). Again, if the executrix of the obligee marry the obligor, such marriage is no release of the debt; for the testator has done no act to discharge it (*w*): Consequently, the remedy is merely suspended by the legal effect of the coverture; and, on her death, the administrator *de bonis non* will be equally entitled to that debt, as to any others outstanding (*x*): But if the obligee makes the wife of the obligor his executrix, this will operate as a release (*y*).

It was decided in *Caweth* v. *Philips* (*z*), that making a debtor executor *durante minore ætate* of another person does not discharge the debt; on the ground that the debtor is only executor in trust for the other during his minority.

It may also be proper in this case to mention the case of *Stapleton* v. *Truelock* (*a*): There the testator made B. and C. his executors, and added, "I Will that C. shall pay to my other executor all such debts as he oweth me, before he shall meddle with anything of this my Will, or take any advantage of this my Will for the discharge of the same debts, for that I have made him one of my executors:" And it was held that C. could not administer, or be executor, before he paid the debts.

(*t*) Wankford *v*. Wankford, 1 Salk. 303, by Powell, J.

(*u*) Wentw. Off. Ex. c. 2, p. 76, 14th edit. Nedham's case, 8 Co. 136, *a*. Wankford *v*. Wankford, 1 Salk. 306, by Holt, C. J.

(*v*) Lockier *v*. Smith, 1 Sid. 79. S. C. 1 Keb. 313, pl. 33. Hudson *v*. Hudson, 1 Atk. 461.

(*w*) Nedham's case, 8 Co. 136, *a*. Co. Lit. 264, *b*. Wankford *v*. Wankford, 1 Salk. 306, by Holt, C. J.

(*x*) Crosman's case, 1 Leon. 320. S. C. Moore, 236. Wankford *v*. Wankford, 1 Salk. 306, by Holt, C. J. Toller, 349.

(*y*) Fryer *v*. Gildridge, Hob. 10. S. C. 1 Roll. Abr. 935, (B.) pl. 6, 940, (M.) pl. 4.

(*z*) 1 Lord Raym. 605.

(*a*) 3 Leon. 2, pl. 6. S. C. Moore, 11.

In equity.

It remains to investigate the effect in equity of the appointment of a debtor to the office of executor.

It is considered, as there has already been occasion to state, that the debt due from the debtor executor has been paid to him by himself; and upon this supposition it is an established rule in equity that the executor shall be accountable for the amount of his debt as assets (*b*): And it should seem to be now clearly settled, that the debt is general assets, not only for the payment of the testator's debts, but also of his legacies (*c*).

There are, indeed, some authorities for considering the appointment in the light of a specific legacy to the debtor for the purpose of discharging the debt, and that, therefore, although like all other legacies, it shall not be paid or retained till the debts are satisfied, yet the executor has a right to it exclusive of the other legatees (*d*): And Lord Talbot, in *Brown* v. *Selwyn* (*e*), speaks of the question as being at that time unsettled, whether such a debt was assets to pay legacies in general, though he inclines to be of opinion in the affirmative. However, Lord Thurlow, in *Carey* v. *Goodinge* (*f*), and Sir William Grant, in *Berry* v. *Usher* (*g*), treat the point as perfectly settled, that the appointment of a debtor to be executor is no more than a parting with the action, and that it shall not operate as a release as against legatees. So in *Simmons* v. *Guttridge* (*h*), Lord Erskine held, that the exa-

(*b*) See the judgment of Lord Tenterden, in Freakley *v.* Fox, 9 B. & C. 134.

(*c*) Flud *v.* Rumcey, Yelv. 160. Phillips *v.* Phillips, 2 Freem. 11. S. C. 1 Chanc. Cas. 292. Anon. 2 Freem. 52. Errington *v.* Evans, 2 Dick. 456. Carey *v.* Goodinge, 3 Bro. C. C. 111. Berry *v.* Usher, 11 Ves. 90. Simmons *v.* Gutteridge, 13 Ves. 264. Bac. Abr. Exors. (A.) 10.

(*d*) Co. Lit. 264, *b.* note (1), by Butler. 2 Black. Com. 512. Toller, 349: But Lord Holt, in Wankford *v.* Wankford, 1 Salk. 306, denies that the making a debtor executor amounts to a legacy: And even if it did, it should seem that he would have no right of retainer against other specific legatees: See *infra*, Pt. III. Bk. III. Ch. IV. § II.

(*e*) Cas. temp. Talb. 242.

(*f*) 3 Bro. C. C. 111.

(*g*) 11 Ves. 90.

(*h*) 13 Ves. 262.

mination of an executor under the usual decree, upon a bill by legatees for an account, ought to contain an interrogatory whether he is indebted to the testator; the debt from himself being assets (*i*).

A trust is accordingly raised in equity, not only for a residuary legatee (*k*), but even for a next of kin (*l*).

Under this head of making debtors executors, it may be proper to observe, that if a debtor is in execution, and the plaintiff dies intestate, and the right of administration comes to the debtor, in this case he cannot be discharged upon a *habeas corpus*, because *non constat de personâ;* neither can he give a warrant of attorney to acknowledge satisfaction; and therefore it seems most advisable to renounce the administration, and get it granted to another, and then he may be discharged by a letter of attorney from such administrator (*m*).

Debtor in execution becoming entitled to administer to the creditor.

3. *Of the effect of appointing a Creditor to be Executor.*

There has already been occasion to consider the privilege enjoyed by a creditor, who is appointed to the office of executor, of retaining for his own debt out of the assets, in priority to all other creditors of equal degree (*n*): But it remains further to investigate how far that appointment and the consequent privilege operate as an extinguishment of the claim of the executor.

If a debtor makes his creditor, or the executor of his creditor, his executor, this alone is no extinguishment of the debt, though there be the same hand to receive and pay: Yet *if the executor has assets of the debtor*, it is an extinguishment; because then it is within the rule that the person who is to receive the money, is the person who ought to pay

Where creditor is sole executor:

(*i*) See also Tomlin *v.* Tomlin, 1 Hare, 247, *per* Wigram, V. C.

(*k*) Brown *v.* Selwyn, Cas. temp. Talb. 240. S. C. 3 Bro. P. C. 607, Toml. edit.

(*l*) Carey *v.* Goodinge, 3 Bro. C. C. 110.

(*m*) Bailey's case, 2 Mod. 315. Bac. Abr. tit. Exors. (A.) 10.

(*n*) See *ante*, p. 894, *et seq.*

it: But if he has no assets, then he is not the person who ought to pay, though he is the person that is to receive it (*o*): The debt, in other words, is not extinct, unless upon a supposition that the executor has assets, which he may retain to pay himself (*p*).

Therefore, if the obligor makes the obligee his executor, and he has no assets, he may sue the heir, if the heir be bound (*q*): But it is said, that if he pay himself any part of his debt by retaining out of the assets, he cannot sue the heir for the residue; for he cannot apportion his debt, but he ought to retain goods for the whole, or have an action for the whole against the heir (*r*).

where one of several debtors makes the creditor executor:

The law is the same, if one of several joint and several debtors makes their common creditor his executor: Therefore if such an executor has assets, the debt is extinct, and he cannot sue the other debtor; for the having assets amounts to payment (*s*). Thus, in the case of *Locke* v. *Crosse* (*t*), the obligee was made executor to one of two joint and several obligors, and in an action by him against the other, where the matter was pleaded, the plea was held to be bad, because it did not show to what value the assets were that the plaintiff administered; but if the defendant had shown that the plaintiff had administered goods to the value of the debt in demand, it had been a good plea.

where a creditor is one of several executors.

Again, the same doctrine prevails where the debtor appoints his creditor to be one of several executors, *if the creditor administers* (*u*): But if the creditor neither proves

(*o*) Woodward *v.* Lord Darcy, Plowd. 185. Fryer *v.* Gildridge, Hob. 10. Cock *v.* Cross, 2 Lev. 73. S. C. 3 Keb. 116. 1 Freem. 49, pl. 59. Wankford *v.* Wankford, 1 Salk. 305, by Holt, C. J.

(*p*) By Powell, J., in Wankford *v.* Wankford, 1 Salk. 304.

(*q*) 1 Roll. Abr. 940, (M.) pl. 5. Pidgeon *v.* Pitts, 2 Show. 401, pl. 273. Wankford *v.* Wankford, 1 Salk. 304, by Powell, J. Co. Lit. 264, *b.* note by Butler.

(*r*) Woodward *v.* Lord Darcy, Plowd. 185, 186. Wentw. Off. Ex. 78, 14th edit.

(*s*) Wankford *v.* Wankford, 1 Salk. 305, by Holt, C. J.

(*t*) Cited by Holt, C. J., 1 Salk. 305. S. C. *nomine* Cock *v.* Cross, 2 Lev. 72. 3 Keb. 116. S. C. *semble*, 1 Freem. 49, pl. 59.

(*u*) Woodward *v.* Lord Darcy, Plowd. 184. Dorchester *v.* Webb, Cro. Car. 372.

the Will, nor acts as executor, he may bring an action against the other executor (*v*); nor is it necessary, to enable him so to do, that he should renounce before the Ordinary (*w*). So if the debtor makes the creditor and another his executors, and the creditor does not administer, but dies, his executor shall have an action against the surviving executor (*x*).

Action by creditor administrator for his own debt against executor *de son tort.*

It may be proper, in this place, to mention the case of *Ashley* v. *Childers* (*y*): There a man died intestate, and a stranger possessed himself of the intestate's goods: Afterwards, letters of administration were granted to a creditor of the intestate, who brought an action for the debt due to him by the intestate, against the stranger, as executor of his own wrong: The question was, whether the creditor, by taking the letters of administration, had not suspended his action for the time he continued to be administrator: And Twisden, J., held that he had: But the rest of the Court held, that, as there was an averment by the plaintiff that he had no assets to satisfy his debt, the action was not suspended, but was sustainable; for the reason why the creditor's taking out administration is said to suspend or extinguish the action, is on supposition of assets.

(*v*) Dorchester *v.* Webb, W. Jones, 345.

(*w*) Rawlinson *v.* Shaw, 3 T. R. 557.

(*x*) Woodward *v.* Lord Darcy, Plowd. 184.

(*y*) 1 Roll. Abr. 940, Extinguishment, (M.) pl. 5. S. C. Style, 384.

CHAPTER THE THIRD.

OF THE ADEMPTION OF LEGACIES.*

Sect. I.

Of the Ademption of Specific Legacies.

THE general rule is, that in order to complete the title of a specific legatee to his legacy, the thing bequeathed must, at the testator's death, remain *in specie* as described in the Will: otherwise the legacy is considered as revoked by ademption. For instance, if the legacy be of a specified chattel in possession, as of a gold chain, or a bale of wool, or a piece of cloth, the legacy is adeemed, not only by the testator's selling or otherwise disposing of the subject in his lifetime, but also if he should change it's form so as to alter the specification of it; as if he should convert the gold chain into a cup, or the wool into cloth, or make the piece of cloth into a garment, the legacy shall be adeemed (*a*).

Demonstrative legacies:

It must here be observed that the rule of ademption does not apply to *demonstrative* legacies: *i. e.* to legacies of so much money with reference to a particular fund for payment: as for instance, legacies given *out* of a particular stock (*b*), or debt (*c*), or term (*d*): for although the particular fund be not in existence at the testator's death, the legatees will be entitled to satisfaction out of the general estate (*e*).

It is now proposed further to consider the rule above laid

(*a*) Ashburner *v.* M'Guire, 2 Bro. C. C. 110.

(*b*) *Ante*, p. 1000.

(*c*) *Ante*, p. 1003.

(*d*) *Ante*, p. 1004.

(*e*) *Ante*, p. 995.

down, and certain qualifications of it, by applying it to some of the examples of specific legacies heretofore adduced (*f*).

Ademption of specific legacy of a debt:

As to the ademption of specific legacies of debts and securities for money: If a debt specifically bequeathed be received by the testator, the legacy is adeemed: because the subject is extinguished, and nothing remains to which the words of the Will can apply (*g*). Thus in *Rider* v. *Wager* (*h*), the testator specifically bequeathed to A. part of a debt due to him from B., and the remainder to C.: The testator called in the money: And Lord King determined that the legacy was extinguished; and further held in the same case, the testator having bequeathed to D. a debt which D. owed him, that this legacy was adeemed by payment of the money in his lifetime (*i*). So in *Barker* v. *Rayner* (*j*), the testator effected two policies of insurance on the life of his wife, the one for 600*l.*, and the other for 1500*l.*, payable to himself, his executors, &c., within six months of his wife's death: By his Will, he gave all his right, title, and interest in the policies, the policies themselves, and all the benefit and advantage thereof, to his executors and trustees, to pay the yearly premium during his wife's life; and, after her death, he directed certain payments to be made out of the money to be received, and the remainder to be placed out upon securities at interest, and disposed of the principal and interest by the Will: He survived his wife, and himself received the amount of the policies, and, after applying part of the money to particular purposes, placed the remainder out at interest upon securities, which were left in the hands of the executors: Sir John Leach held, that the specific testamentary disposition of the policies was adeemed: And this decision was confirmed on appeal, by Lord Eldon (*k*). Again, in *Gardner* v. *Hatton* (*l*), a testator bequeathed the interest of 7000*l.*, secured on mort-

(*f*) *Ante*, p. 996, *et seq.*

(*g*) Badrick *v.* Stevens, 3 Bro. C. C. 431.

(*h*) 2 P. Wms. 329, 330.

(*i*) 2 P. Wms. 331.

(*j*) 5 Madd. 208.

(*k*) 2 Russ. Chanc. Cas. 122. See for further examples, Birch *v.* Baker, Mosely, 375. Stanley *v.* Potter, 2 Cox, 180.

(*l*) 6 Sim. 93.

gage of an estate at Worstead, in the county of Norfolk, belonging to Mr. Robert Tuck: The 7000*l.* and interest were received after the date of the Will by the testator's agent, on his account, and, immediately afterwards, 6000*l.*, part of it, was invested on another mortgage, and the remainder was paid into a bank in which the testator had no other monies, but was afterwards drawn out by a person to whom the testator had given a cheque for the amount: And Sir L. Shadwell, V. C., held, that the legacy was specific, and, notwithstanding the 6000*l.* remained due on the second mortgage at the testator's death, that the legacy was wholly adeemed.

So a partial receipt by the testator of the debt specifically bequeathed, will operate as an ademption *pro tanto*. Thus, in *Ashburner* v. *M'Guire* (*m*), where a bond debt was bequeathed, the obligor became bankrupt, and the testator received a dividend under the commission in respect of the debt: Lord Thurlow held, that this receipt was an ademption *pro tanto*. So in *Fryer* v. *Morris* (*n*), where the specific legacy was of money due on a note for 400*l.*, and the testatrix received 385*l.* 18*s.* of the debt, Sir William Grant determined that the receipt of that sum was an ademption, on the ground of all the preceding decisions, *viz.* that the thing given and described no longer existed.

Such being the principle by which the ademption of specific legacies is governed, the fallacy is obvious of a distinction formerly taken with respect to a specific legacy of a debt, *viz.* between a compulsory, and a voluntary payment of it to the testator: in other words, between a case where the testator himself calls in a debt which he has bequeathed, and a case where the debtor unprovoked, and without solicitation, thinks fit to pay it: in the former instance, it was said, it is the act of the testator, and consequently, an ademption: in the latter, he is merely passive, and therefore cannot be presumed to have changed his mind (*o*). More recent decisions

(*m*) 2 Bro. C. C. 108.

(*n*) 9 Ves. 360.

(*o*) Orme *v.* Smith, 1 Eq. Cas. Abr. 302. S. C. 2 Vern. 681. Part-

must be regarded as having repudiated this doctrine (*p*): and it may now be considered established, according to the words of Lord Thurlow, in *Humphries* v. *Humphries* (*q*), that " the only rule to be adhered to is to see whether the subject of the specific bequest remained *in specie* at the time of the testator's death; for if it did not, then there must be an end of the bequest; and the idea of discussing what were the particular motives and intention of the testator in each case, in destroying the subject of the bequest, would be productive of endless uncertainty and confusion" (*r*).

When stock is specifically bequeathed, and it does not wholly, or does only in part exist at the testator's death, the legacy will either be totally or partially adeemed, as the case may be (*s*). Thus, in *Ashburner* v. *M'Guire* (*t*), the testator made the following bequest: " To A., now at school, &c. my capital stock of 1000*l.* in the India Company's stock, with the dividends, &c.:" The fund was afterwards sold by the testator: And Lord Thurlow decided, that the legacy was adeemed (*u*).

ademption of a specific legacy of stock:

And it is said, that the legacy is irretrievably adeemed by the sale of the stock; and will not be revived by a new purchase of similar stock by the testator (*v*). In *Pattison* v.

ridge *v.* Partridge, Cas. temp. Talb. 223. Crockat *v.* Crockat, 2 P. Wms. 165. Rider *v.* Wager, 2 P. Wms. 330. Ellis *v.* Walker, Ambl. 311. See also Thomond *v.* Suffolk, 1 P. Wms. 464. Drinkwater *v.* Falconer, 2 Ves. Sen. 624. Ford *v.* Fleming, 2 P. Wms. 469. Ashton *v.* Ashton, 3 P. Wms. 385. S. C. Cas. temp. Talb. 152. Hambling *v.* Lister, Ambl. 402.

(*p*) See Ashburner *v.* M'Guire, 2 Bro. C. C. 110. Badrick *v.* Stevens, 3 Bro. C. C. 431. Stanley *v.* Potter, 2 Cox, 180. Innes *v.* Johnson, 4 Ves. 574. Fryer *v.* Morris, 9 Ves. 363. Barker *v.* Rayner, 5 Madd. 208, 217. S. C. 2 Russ. Chanc. Cas. 122.

(*q*) 2 Cox, 185.

(*r*) For an instance of a receipt which does not amount to an ademption, see Graves *v.* Hughes, 4 Madd. 381.

(*s*) 1 Rop. Leg. 287, 3d edit.

(*t*) 2 Bro. C. C. 108.

(*u*) See also Sleech *v.* Thorington, 2 Ves. Sen. 560. Drinkwater *v.* Falconer, 2 Ves. Sen. 623. Humphreys *v.* Humphreys, 2 Cox, 184. Birch *v.* Baker, Mosely, 373.

(*v*) 1 Rop. Leg. 288, 3d edit.: But see the *dicta* of Lord Talbot in Partridge *v.* Partridge, Cas. temp. Talb. 227; of Lord Hardwicke in Avelyn *v.* Ward, 1 Ves. Sen. 426; and of Sir Thomas Clarke, in Drinkwater *v.* Falconer, 2 Ves. Sen. 625.

Pattison (*w*), a testator gave to Margaret Forbes, whom he afterwards married, among other bequests the sum of 50*l.* Long Annuities, which he described as purchased with 1000*l.* left him by the Will of James Tillard: After his marriage, he made a codicil, by which he confirmed to his wife the benefits given to her by his Will, in addition to the provision made for her by her marriage settlement: He afterwards sold his Long Annuities, and with the produce purchased new Annuities, which differed only from the Long Annuities by being terminable a quarter of a year sooner: Subsequently to this transaction, he made another codicil, by which he confirmed his Will and former codicil: And Sir John Leach, M. R., held, that the legacy of 50*l.* Long Annuities was adeemed; his Honor observing that the law was settled, that a legacy is adeemed if the specific thing do not exist at the testator's death.

But no ademption will take place when the stock specifically bequeathed is exchanged by act of law; as when a fund is converted into one of a different description by act of Parliament (*x*); nor where the stock has been transferred into another fund by a trustee without the knowledge or authority of the testator (*y*); nor where the stock is merely transferred with the testator's consent, from the name of his trustee into his own (*z*), or, as it should seem, from the names of old to those of new trustees, or from the specified fund to a fresh security, under a power so to do (*a*): Nor, perhaps, will the legacy be adeemed, when the testator lends the stock specifically bequeathed, on condition of it's being replaced (*b*).

In *Basan* v. *Brandon* (*c*), a testator, resident in Jamaica, bequeathed to A. B. 2000*l.*, part of a sum of 7000*l.* in the hands of his agents in England and received by them from

(*w*) 1 M. & K. 12.

(*x*) Partridge *v.* Partridge, Cas. temp. Talb. 226. Bronsdon *v.* Winter, Ambl. 59. 1 Rop. Leg. 289, 3d edit.

(*y*) Shaftsbury *v.* Shaftsbury, 2 Vern. 747. 1 Rop. Leg. 290, 3d edit.

(*z*) Dingwell *v.* Askew, 1 Cox, 427.

(*a*) 1 Rop. Leg. 291, 3d edit.

(*b*) *Ibid.* 292.

(*c*) 8 Sim. 171.

the Transport Board on his account: The testator afterwards went to Philadelphia, where he died: Seven days before his death, he wrote to his agent in Jamaica, desiring him to order his agents in England to invest all his monies in their hands received from the Transport Board, in any stock most beneficial to his estate: The agent wrote accordingly; but, some time before his letter arrived in England, the agents there, had, of their own accord, invested the whole of the testator's monies in their hands in the four per cents.: And Sir L. Shadwell, V. C., held, that the legacy was not adeemed: His Honor being of opinion, that the unauthorized act of the agents could not alter the Will; and that a mere unexecuted intention to change the state of a fund, which the testator might have revoked, and which, in fact, was never carried into execution, cannot, in any sense, be considered as an ademption.

ademption of specific legacy of partnership share:

If a partner, under articles providing for the renewal of the partnership, specifically bequeaths his share of the profits (naming the amount) and upon the expiration of the old, new articles are entered into, by which his share of the profits is altered, the legacy will not be revoked by ademption (*d*).

ademption of specific legacy of goods:

As to ademption of specific legacies of goods, it must be observed, that where the disposition of the subject is not absolute, the legacy will not be adeemed: As where a testator pawns or pledges an article specifically bequeathed, a right of redemption is left in him, and passes to the legatee at his death; so as to enable him to call on the executor to redeem, and deliver it to him (*e*).

not by pawning:

when by removal:

The ademption of a specific legacy of goods will sometimes be effected by the mere removal of them: Thus where the testator bequeathed all his books at his chambers in the Temple; and afterwards removed his books into the country,

(*d*) Blackwell *v.* Child, Ambl. 260. 1 Rop. Leg. 304, 3d edit.

(*e*) Ashburner *v.* M'Guire, 2 Bro. C. C. 113, by Lord Thurlow.

this was held to extinguish the legacy (*f*). So where the bequest was of all the testator's household goods, plate, linen, china, &c. &c. which should be in or about his dwelling-house at B. at the time of his death; and he afterwards took another house, into which he removed the greater part of the furniture from the house at B.; this removal was held an ademption (*g*). Again, where the testator bequeathed to his wife the lease of his house in Baker Street, and the household furniture, plate, pictures and certain other articles therein, and the lease having expired in his lifetime, part of the furniture was sold, and the remainder, together with the plate, pictures, and other articles, was removed to a house which the testator took in Edward Street, it was held, that the legacy was adeemed; because it was clear that the testator made the bequest of the furniture, &c., with reference to giving the lease, and that he had in contemplation an enjoyment of the house with the furniture, &c.; and, consequently, that the bequest had totally failed by the change of circumstances (*h*).

But no ademption by removal, it should seem, will take place, where the goods are removed for their preservation, as to save them from fire (*i*); or where they are removed by fraud, or without the testator's knowledge or authority (*k*); or where, by the nature of the place described, it is clear that their locality was not referred to, as essential to the bequest, as in the case of a specific legacy of goods in a ship (*l*); or where the testator has two houses, in which he lives alternately, and being possessed of one set of furniture only, which he removes with himself to each house, bequeaths, while residing in one of them, all his furniture in that house (*m*).

(*f*) Green *v.* Symonds, 1 Bro. C. C. 129, in note. But see Cunningham *v.* Ross, *post*, p. 1139.

(*g*) Heseltine *v.* Heseltine, 3 Madd. 276.

(*h*) Colleton *v.* Garth, 6 Sim. 19.

(*i*) Chapman *v.* Hart, 1 Ves. Sen. 273.

(*k*) Shaftsbury *v.* Shaftsbury, 2 Vern. 747.

(*l*) Chapman *v.* Hart, 1 Ves. Sen. 273.

(*m*) Land *v.* Devaynes, 4 Bro. C. C. 537.

In *Cunningham* v. *Ross* (*n*), a testator bequeathed all his bills, bonds, &c., belonging to him, lying in the lodgings he possessed in the house belonging to Mr. Smith: At his death, the testator had no effects in the house of Mr. Smith: It was contended that the legacy failed, on the authority of the case of *Shaftsbury* v. *Shaftsbury* (*o*), in which case the testator devised to his wife all his goods that should be in his house, and before his death, he removed all the goods from the said house, and the devise was held void: But Sir George Lee was of opinion, that the present case differed from that; for there the testator devised all his goods *that should be in his house*, which implied, that should be there at his death; but, in the present case, the words were only descriptive of what the testator meant to bequeath; and therefore it was immaterial whether they remained at Smith's house at the time of his death or not.

Again, in *Norris* v. *Norris* (*p*), a testator bequeathed to his wife as follows:—"All my interest in my house at Lavender Hill, the furniture, books, pictures, wines, &c. &c.:" After the date of his Will, the testator removed from Lavender Hill to Spencer Lodge, taking with him furniture, books, pictures, wine, and plate: He afterwards purchased more of these articles, and died at Spencer Lodge: And it was held by Knight Bruce, V. C., that the testator's wife was entitled to the furniture, books, pictures, wines, and plate, which he had at the time of his death.

ademption of legacies of terms for years:

As to the ademption of specific legacies of terms for years: Generally speaking, when the testator expresses himself in the present tense, and all the words directly refer to a lease of which he was *then* possessed, a specific legacy of such lease will be adeemed by a surrender; and a new term, acquired by the testator upon a renewal of the surrendered lease, will not pass to the specific legatee: Thus in *Abney* v.

(*n*) 2 Cas. temp. Lee, 272.
(*o*) 2 Vern. 747.
(*p*) 2 Coll. 719.

Miller (q), Mr. Burton, in the year 1732, bequeathed all his college leases which he then held of Magdalen College, to his mother, to be sold immediately after his death, with directions to divide the proceeds amongst several persons, including his mother, whom he appointed executrix and residuary legatee: He afterwards surrendered his college leases, and accepted two new ones, the one in December, 1736, and the other in August, 1740, and paid large sums of money for fines, but the last lease was not sealed with the college seal till after his death: The question was, whether the specific devise of the old leases was adeemed by their surrender and the acceptance of the new: And Lord Hardwicke determined that the surrender of the old, and acceptance of the new lease in 1736, was an ademption, because the words of devise being in the present tense, and therefore only applicable to the lease then in existence, could not possibly comprehend the renewed lease: But as to the new lease of 1740, his Lordship decided, that as it was void for want of the college seal, the devise of the old one was not adeemed by the mere attempt of the testator to renew (r).

But such an ademption will, it appears, be effected only when the testator has the *legal* estate in the term specifically bequeathed: for where the testator is merely a *cestui que trust*, and the equitable interest only is bequeathed, the Court will not permit a mere surrender of the old lease by the testator and his trustee to defeat the specific legacy, but will consider the intention of the testator appearing upon the Will (s).

And no such ademption will take place, when the expressions of the bequest have a prospective or future operation, as where they are of "all the estate which *I have or shall*

(q) 2 Atk. 593, 597. 1 Rop. Leg. 306, 3d edit.

(r) See also Rudstone v. Anderson, 2 Ves. Sen. 418. Hone v Medcraft, 1 Bro. C. C. 261. James v. Dean, 11 Ves. 390. 15 Ves. 238. Slatter v. Noton, 16 Ves. 197. Colegrave v. Manby, 6 Madd. 83, 84, 85.

(s) Carte v. Carte, 3 Atk. 174. S. C. Ambl. 28. Slatter v. Noton, 16 Ves. 201. 1 Rop. Leg. 309, 310.

have to come in the land held by me under a lease from A." (*t*); or where, the old lease containing a covenant on the part of the lessor to renew, the lessee bequeaths "all my right and interest under or *by virtue* of the lease (*u*). Lastly, a surrender of a lease will not operate an ademption, where the bequest is not specific; as where the testator devises "all and singular my leasehold estate, goods, chattels, and personal estate whatsoever" (*v*).

In *Woodhouse* v. *Okill* (*w*), A. having the legal estate in leaseholds and being beneficially entitled to one-third part of them, in right of his late wife, and being entitled, under the Will of B. (whose executor he was) to another third for his life, with remainder to his children as he should appoint, with remainder to them absolutely; by his Will, gave one-third to one of his daughters for life, with remainder to her children, and the other third, to another daughter for life, with remainder to her children: A. afterwards joined, with the other tenant in common, in a deed of partition, by which they assigned the leaseholds, in trust, as to one portion, for A., his executors, &c. as administrator of his late wife; as to another portion, in trust for A., his executors, &c. as executor of B., and, as to the remainder, in trust for the other tenant in common: And Sir L. Shadwell, V. C., held that the deed was not a revocation of the Will in equity.

1 Vict. c. 26.

And now, by stat. 1 Vict. c. 26, s. 23, it is enacted, "that no conveyance or other act made or done subsequently to the execution of a Will of or relating to any real or personal estate therein comprised, except an act by which such Will shall be revoked as aforesaid, shall prevent the operation of the Will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by Will at the time of his death" (*x*). And by section 24,

(*t*) James *v.* Dean, 11 Ves. 383, 389. 15 Ves. 236. Abney *v.* Miller, 2 Atk. 599. Slatter *v.* Noton, 16 Ves. 199. Colegrave *v.* Manby, 6 Madd. 84.

(*u*) 1 Rop. Leg. 311, 312, 3d edit.

(*v*) Stirling *v.* Lydiard, 3 Atk. 199. Digby *v.* Legard, 2 Dick. 500: but see James *v.* Dean, 11 Ves. 390.

(*w*) 8 Sim. 115.

(*x*) Notwithstanding this enact-

"every Will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will."

This Act, however, does not extend to any Will made before Jan. 1, 1838.

Revival of adeemed legacy by the republication of the Will or by codicil.

A mere republication of the Will does not revive a legacy which has been extinguished by the ademption of its subject (*y*). So though a codicil, republishing a Will, makes the Will speak as from the date of the codicil for the purpose of passing after purchased lands; yet it does not for the purpose of reviving a legacy revoked, adeemed, or satisfied (*z*). But if, between the ademption and the republication, the testator has acquired property, which will answer the description of the adeemed legacy, the legatee will, it should seem, be entitled to the new subject; because, by the republishing, the Will is made to speak from the date of the republication (*a*).

Sect. II.

Of the Ademption of Legacies given as Portions.

Ademption of legacy given by father as a portion.

As to the ademption of legacies given as portions to children by their father: On this subject an artificial doctrine prevails in Courts of Equity, the establishment of which has excited

ment if a testator devises real estate and afterwards sells it, and the purchase is not completed till after his death, the purchase-money belongs to his personal representatives and not to his devisee. Farrer *v.* Winterton, 5 Beav. 1. *Ante*, p. 553. See also Moor *v.* Raisbeck, 12 Sim. 123.

(*y*) Drinkwater *v.* Falconer, 2 Ves. Sen. 626. Monck *v.* Monck, 1 Ball & Beat. 306.

(*z*) Powys *v.* Mansfield, 3 Myl. & Cr. 359.

(*a*) *Ante*, p. 181. Alford *v.* Earle, 2 Vern. 209: S. C. cited 3 P. Wms. 168. Coppin *v.* Fernyhough, 2 Bro. C. C. 292: but this is contrary to the opinion of Lord Hardwicke in Abney *v.* Miller, 2 Atk. 599. See stat. 1 Vict. c. 26, s. 24, *supra*, p. 1141, 1142, s. 34, Preface.

the regret and censure of more than one eminent modern Judge, though it has also met with approbation from other high authorities. The rule is, that where a father gives a legacy to a child, it must be understood *as a portion,* although not so described in the Will, because it is a provision by a parent for his child (*b*): and if the father afterwards advances a portion for that child, as upon marriage, it will be a complete ademption of the legacy, not only in cases where the advancements are larger than, or equal to, the testamentary portions (*c*), but also, it has been said, in cases where the sums advanced are *less* than the sums bequeathed (*d*). But it was decided by Lord Cottenham, in *Pym* v. *Lockyer* (*e*), after a careful investigation of all the authorities, that where the portion is less than the legacy, it shall operate only as an ademption *pro tanto.* The legacy will not be set up by a codicil, made after the settlement, ratifying and confirming the Will, and all the devises and bequests therein contained (*f*).

This presumption against double portions will not be repelled, although there may be a difference between the nature of the provision made by the Will and of the provision under the subsequent settlement (*g*). And therefore the application of the principle of ademption will not be pre-

(*b*) By Lord Eldon, in *Ex parte* Pye, 18 Ves. 153. See also the judgment of Wigram, V. C., in Suisse *v.* Lowther, 2 Hare, 434, *et seq.*

(*c*) Elkenhead's case, cited 2 Vern. 257. Ward *v.* Lant, Prec. Chanc. 182. Jenkins *v.* Powell, 2 Vern. 115. Upton *v.* Prince, Cas. temp. Talb. 71. Scotton *v.* Scotton, 1 Stra. 236. Tapper *v.* Chalcroft, cited 2 Atk. 492. Watson *v.* Lord Lincoln, Ambl. 325. Grave *v.* Salisbury, 1 Bro. C. C. 427. Carver *v.* Bowles, 2 Russ. & M. 301.

(*d*) Hartop *v.* Whitmore, 1 P. Wms. 681. Clarke *v.* Burgoine, 1 Dick. 353. *Ex parte* Pye, 18 Ves. 153.

(*e*) 5 M. & Cr. 29. See Accord. Kirk *v.* Eddowes, 3 Hare, 515.

(*f*) Booker *v.* Allen, 2 Russ. & M. 270. Powys *v.* Mansfield, 3 Mylne & Cr. 359.

(*g*) Trimmer *v.* Bayne, 7 Ves. 508. *Ex parte* Pye, 18 Ves. 153. Hartopp *v.* Hartopp, 17 Ves. 184. Monck *v.* Monck, 1 Ball & Beat. 298. Sheffield *v.* Coventry, 2 Russ. & M. 317. Platt *v.* Platt, 3 Sim. 503. Davys *v.* Boucher, 3 Younge & C. 411. Powys *v.* Mansfield, 3 Mylne & Cr. 359.

vented by the circumstance that the limitations of the portion under the Will are widely different from the limitations of the portion under the settlement. This doctrine was settled by the decision of the House of Lords in *Lord Durham* v. *Wharton*(*h*), overruling the judgment of Lord Brougham, C., and Sir L. Shadwell, V. C. (*i*). In this respect there is a distinction between the principle of the ademption of legacies given as portions, and that of the satisfaction of debts by legacies (*k*).

The presumption, however, will not prevail, where the testamentary portion and subsequent advancement are not *ejusdem generis* (*l*); or where the subsequent advancement depends upon a contingency, and the testamentary portion is certain (*m*); or where a legacy or advancement is not merely given as a portion, but is expressed to be made in lieu of, or compensation for, an interest to which the child was entitled (*n*); or where the bequest to the child is of a residue or part of a residue; in which case the legacy cannot be

(*h*) 10 Bligh, 526.

(*i*) Wharton *v.* Lord Durham, 5 Sim. 297. 3 M. & K. 472.

(*k*) 1 Ball & Beat. 298. 10 Bligh, 545. Accordingly, if a parent, having made a Will bequeathing a certain sum to a child, takes upon himself to make a settlement of it, the variance between the provisions of the Will and those of the settlement affords no argument against the portion being a satisfaction of the legacy. Where, therefore, a father makes an absolute gift by his Will to his child, and afterwards, on the marriage of that child, settles a like sum on the husband and wife and their children, the provision of the settlement is a satisfaction of the legacy. Barry *v.* Harding, 1 J. & Lat. 475. Again, where a legacy is given to M., with a contingent limitation over to N., in the event of M. dying without children, and the legacy to M. is adeemed by a subsequent gift to M. in the lifetime of the testatrix, to which no limitation in favour of N. is attached; the legacy is not merely adeemed as to M., but extinguished as to N. Twining *v.* Powell, 2 Coll. 262.

(*l*) Holmes *v.* Holmes, 1 Bro. C. C. 555. 1 Rop. Leg. 325, 3d edit. Davys *v.* Boucher, 3 Y. & Coll. 411.

(*m*) Spinks *v.* Robins, 2 Atk. 491. See further Crompton *v.* Sale, 2 P. Wms. 553. 1 Rop. Leg. 325, 3d edit. But see also the observations of Lord Cottenham, 3 Mylne & Cr. 374, 375.

(*n*) Baugh *v.* Read, 1 Ves. Jun. 257. 1 Rop. Leg. 325. But see the observations of Lord Lyndhurst, in Durham *v.* Wharton, 10 Bligh, 546.

considered as a portion (*o*): In such cases the presumptive ademption by advancement will not take place. It should seem also, that the principle does not extend to devises of real estate (*p*).

Admissibility of parol evidence.

Likewise, this presumption may be rebutted or confirmed by the application of parol evidence of a different intention by the testator (*q*): And where evidence is admissible for that purpose, counter-evidence is also admissible: And it was held by Sir John Leach, M. R., in *Booker* v. *Allen* (*r*), that if it be proved by parol evidence that the testator intended the provision made by the settlement to be in lieu of the legacy left by the Will, the settlement will be held a satisfaction of the legacy, though the two provisions differ so much from each other, that they cannot be considered substantially the same (*s*). The true rule appears to be that parol evidence is only properly admissible in such cases for the purpose of shewing what the testator meant *by the act subsequent to the Will* (*t*). The law on this subject has been lately fully considered, on an examination of all the previous authorities, by Wigram, V. C., in *Kirk* v. *Eddowes* (*u*). In that case, a testator bequeathed the sum of 3000*l.* to his daughter for her separate use, for life, with remainder to her children as she should appoint; and, in default of appointment, to her children equally, with provisions for survivorship, advancement, and for the substitution of their issue; and subject to an annuity, and to his debts, he devised and bequeathed all the residue of his real and personal estate

(*o*) Farnham *v.* Phillips, 2 Atk. 215. Freemantle *v.* Banks, 5 Ves. 85. 1 Rop. Leg. 326, 3d edit. Hall *v.* Hill, 1 Dr. & W. 119, *per* Sugden, C. of Ireland: for the legacy of a portion means a legacy of a definite sum: Davys *v.* Boucher, 3 Younge & C. 410, 411.

(*p*) Davys *v.* Boucher, 3 Younge & C. 397.

(*q*) Biggleston *v.* Grubb, 2 Atk. 48. Rosewell *v.* Bennett, 3 Atk. 77. Trimmer *v.* Bayne, 7 Ves. 508. Robinson *v.* Whitley, 9 Ves. 577. Thelluson *v.* Woodford, 4 Madd. 420. Lloyd *v.* Harvey, 2 Russ. & M. 310. Powys *v.* Mansfield, 6 Sim. 528. 3 Mylne & Cr. 359. Davys *v.* Boucher, 3 Younge & C. 397. Kirk *v.* Eddowes, 3 Hare, 509, 517.

(*r*) 2 Russ. & M. 270.

(*s*) See also Lloyd *v.* Harvey, 2 Russ. & M. 310.

(*t*) Hall *v.* Hill, 1 Dr. & W. 94, 116—119, 131, 132.

(*u*) 3 Hare, 509.

(naming securities for money) unto his son absolutely: After the date of the Will, the testator gave to his daughter and her husband a promissory note for 500*l.* then due to the testator: In a suit by the children of the daughter against the son, claiming to have the legacy of 3000*l.* invested and secured for their benefit, the defendant tendered parol evidence that, after the date of the Will, the testator was requested by his daughter to confer some benefit on her husband, and that, thereupon, the testator gave her the promissory note, declaring that it was to be in part satisfaction of the legacy of 3000*l.*; and that the testator was advised by his solicitor, that it was not necessary to alter his Will to give it that effect: And the learned Judge held, that this evidence was admissible, as constituting an essential part of a transaction subsequent to, and independent of, the Will, of which subsequent transaction there was no evidence in writing; and that the parol evidence was not receivable as evidence of revocation or alteration of any part of the Will, but as evidence of a transaction, whereby the legatee had received part of her legacy by anticipation (*u*); and that the advance to the daughter and her husband was an ademption *pro tanto* of the legacy bequeathed by the Will for the benefit of the daughter and her children, which was in the nature of a portion: though it might have been otherwise, if the children had been all living at the date of the Will, and been named therein individually, and not merely described as a class.

Ademption of legacy given by a testator *in loco parentis.*

Where the testator is *in loco parentis* to the legatee, the legacy will be considered as a portion, and will be adeemed by a subsequent advancement, in all cases where it would be so, if made by the actual parent (*v*). But where the testator stands neither in the natural nor assumed relation of

(*u*) His Honor disclaimed holding that declarations of the testator made at any other time than cotemporaneously with the advance would be admissible.

(*v*) 1 Rop. Leg. 333, 3d edit. Monck *v.* Monck, 1 Ball & Beat. 298. Trimmer *v.* Bayne, 7 Ves. 515. Booker *v.* Allen, 2 Russ. & M. 270. Powys *v.* Mansfield, 3 Mylne & Cr. 359. Twining *v.* Powell, 2 Coll. 262.

parent to the legatee, the legacy will be considered as a bounty, and will not be adeemed by a subsequent advancement (*w*); unless the legacy is given for a *particular* purpose, and the testator advances money for the *same* purpose (*x*); or unless the intention otherwise legally appear, that the advancement was made with a view to ademption (*y*). The question, who is to be considered as standing *in loco parentis*, with reference to this rule, is one of considerable difficulty (*z*), which must in a great degree depend upon the individual circumstances of each particular case.

The proper definition of a person *in loco parentis* to a child is, a person who *means* to put himself in the situation of the lawful father of the child, with reference to the father's office and duty of making a provision for the child (*a*). And it necessarily flows from the rule of presumption that parol evidence is admissible to prove that the testator was in this predicament: For if the acts of a party standing *in loco parentis* raise, in equity, a presumption which could not arise from the same acts of another person not standing in that situation, evidence must be admissible to prove or disprove the facts upon which the presumption is to depend; *viz.*, whether he had meant to put himself *in loco parentis*; and as the fact to be tried is the intention of the party, his declarations, as well as his acts, must be admissible for that purpose (*b*). Great-uncles (*c*), uncles (*d*), grandfathers (*e*),

(*w*) Wetherby *v.* Dixon, 19 Ves. 407. S. C. Coop. Chanc. Cas. 279.

(*x*) Debeze *v.* Mann, 2 Bro. C. C. 166. Monck *v.* Monck, 1 Ball & Beat. 303. See also the observations of Lord Cottenham, 3 Mylne & Cr. 377. In the following cases the legacy was held *not* to be adeemed by reason of the non-correspondence of the purposes of the legacy and the advancement: Roome *v.* Roome, 3 Atk. 181. Spinks *v.* Robins, 2 Atk. 491.

(*y*) 1 Rop. Leg. 330, 331, 3d edit.

(*z*) See the remarks of Lord Eldon in *Ex parte* Pye, 18 Ves. 150.

(*a*) Powys *v.* Mansfield, 3 Mylne & Cr. 359. See Rogers *v.* Soutten, 2 Keen, 598.

(*b*) 3 Mylne & Cr. 370.

(*c*) Shudall *v.* Jekyll, 2 Atk. 516, 518.

(*d*) See Powel *v.* Cleaver, 2 Bro. C. C. 517, 518.

(*e*) Roome *v.* Roome, 3 Atk. 183. Perry *v.* Whitehead, 6 Ves. 547.

or putative fathers (*f*), are not to be considered *in loco parentum*, unless they have intended to assume the office and duty of a parent. But a person may stand *in loco parentis* to a child, though the child resides with, and is maintained by his father (*g*). And when the testator's assumption of the office of a parent is established, his legacy will be considered a portion, and accordingly *primâ facie* adeemed by a subsequent advancement, not only in cases where he is collaterally related to, or the putative father of the legatee, but also where no relationship of any kind subsists between them (*h*).

(*f*) Grave *v.* Lord Salisbury, 1 Bro. C. C. 425, cited 6 Ves. 547.

(*g*) Powys *v.* Mansfield, 3 Mylne & Cr. 359, overruling the decision of the Vice Chancellor, 6 Sim. 528.

(*h*) The reader is referred to 1 Roper on Legacies, 333, 3d edit., for an able examination of the question, as to what circumstances are sufficient to invest the testator with the assumed relation of parent to the legatee, and whether parol evidence is admissible to shew that the legacy by a testator, who is not actually a parent, was *intended* for a portion. Where parol testimony is given in order to rebut the presumption of ademption, (in a case where the evidence establishes the fact that the testator did mean to place himself in *loco parentis*,) it is plain that the presumption may be supported by evidence of the same kind: 3 Mylne & Cr. 370: And the declarations of the party are admissible in evdence for this purpose: 3 Mylne & Cr. 374.

CHAPTER THE FOURTH.

OF THE PAYMENT OF LEGACIES.

Sect. I.

All Debts must be paid before any Legacies are satisfied.

It is obvious, that, as the whole personal estate is liable in the hands of the executor to the payment of the debts of the testator, the executor must take care to discharge them, before he satisfies any description of legacy.

There is no distinction, in this respect, in favour of specific legacies: Hence if an executor, although acting *bonâ fide*, and under a conviction that the assets are amply sufficient for the payment of the testator's debts, permits specific legatees to retain or possess themselves of the articles bequeathed to them, he will be answerable for the value of those articles, with interest at 4*l.* per cent., if there should ultimately be a deficiency of assets, although the deficiency should be occasioned by subsequent events, which he had no reason to anticipate: and the Court will direct an account to be taken of the value of the property so possessed by the legatees, and interest to be computed, unless it is certain that the assets will ultimately be sufficient to pay all the creditors (*a*).

Voluntary debts.

There has already been occasion to point out, that even *voluntary* bonds and other debts by specialty, must be paid in preference to legacies (*b*).

(*a*) Spode *v.* Smith, 3 Russ. Chanc. Cas. 511.

(*b*) *Ante*, p. 871, 872.

Contingent debts:

With respect to *contingent* debts, a question of great importance arises; namely, whether an executor can safely make payment of legacies, or deliver over a residue, where there is an outstanding covenant of his testator, (or bond with a condition, or the like) which has never yet been broken, and which may or may not be broken hereafter.

This point arose as early as the reign of Queen Elizabeth, in the case of *Nector* v. *Gennet* (*c*), and on that occasion the Court of King's Bench appears to have been of opinion, that the payment of a legacy before a bond, which was not forfeited, was compellable: The case was, that a legatee sued in the Ecclesiastical Court for his legacy: The executors pleaded that the testator, who was keeper of a prison, was bound in an obligation to the sheriff (to an amount exceeding the entire value of his property) for the safe keeping of the prisoners committed to his charge, which obligation had become forfeited, in consequence of a judgment against the sheriff, on an action for an escape; and that they had nothing in their hands, *ultra, &c.*, to answer the demand: This plea was disallowed: whereupon a prohibition was sued, which being demurred to, the defendant prayed a consultation: Upon this the principal question was, whether the escape was such that the sheriff was suable in respect of it; for if not, the bond was not forfeited, and if the bond was not forfeited, then it was said to be plain that the legacy should be first paid; and to this purpose, it was argued, that by the civil law, the legatary must enter into a bond to make restitution, if the obligation should be afterwards recovered; so there was no inconvenience to any: To which the whole Court (except Fenner) agreed, and determined that it was no plea, unless the obligation were forfeited: And Coke said, " The difference is, when the obligation is for the payment of a lesser sum at a day to come, it shall be a good plea against the legatee before the day; for it is a duty maintenant, which is in the condition: But otherwise it

(*c*) Cro. Eliz. 466. S. C. *nomine* Norton *v.* Gennet, Owen, 72. S. C. *nomine* Necton *v.* Gennet, Gouldsb. 141. Moor. 413.

is, where a statute or obligation is for the performance of covenants, or to do a collateral thing; there, until it be forfeited, it is not any plea against a legatee; for peradventure it shall never be forfeited, and may lie in *perpetuum*, and so no will should be performed:" And the majority of the Judges being of opinion that there was no forfeiture, a consultation was awarded: the effect of which, as far as it regards the present question, was to leave the Spiritual Court to proceed according to their own established course, namely, to compel the legatee to give security to refund the legacy, in case of the executor's becoming afterwards liable to be sued upon the bond (*d*).

The question was afterwards very much discussed in the case of *Eeles* v. *Lambert* (*e*), 23 Car. I.; but the Court gave judgment upon a defect in the pleadings, and declined giving their opinion upon this point (*f*): In the course of the argument, Rolle, C. J., alluded to the above case of *Nector* v. *Gennet*, as having decided that legacies ought to be paid conditionally, *viz.*, to be restored if the covenant should be broken. The point does not appear to have arisen again till the year 1752, when, in the case of *Hawkins* v. *Day* (*g*), Lord Hardwicke expressed a clear opinion, that even an unbroken covenant renders it unjustifiable for an executor to pay a legacy: And his Lordship accordingly held, that although payment by an executor of a simple contract debt, before any breach of the condition of a specialty, ought to be allowed as a good administration against the specialty (*h*), yet that payment of a legacy, after notice of the specialty, and before a breach, was not a good payment.

(*d*) In a late case in the Prerogative Court of Canterbury, Sir J. Nicholl stated that an executor was bound to pay a legacy, upon condition that the legatee gave security to refund in case the amount of his legacy should be required in discharge of alleged debts, the existence of which was contested: Higgins *v.* Higgins, 4 Hagg. 244.

(*e*) Style, 37, 54, 73. S. C. Aleyn. 38.

(*f*) Aleyn. 41.

(*g*) Ambl. 160. S. C. 1 Dick. 155. See also a fuller report from the Harg. MSS. Num. 471, p. 218, in Mr. Blunt's edition of Ambler, p. 803, and the extract from Reg. Lib. 3 Meriv. 555.

(*h*) See *ante*, p. 877, *et seq.*

In *Pearson* v. *Archdeaken* (*k*), an action of covenant was brought in the Court of King's Bench in Ireland, by the assignee of a reversion, against an administrator *de bonis non* with the Will annexed, for breaches of covenants contained in a lease made to the testator: The breaches assigned were for non-payment of rent, and for not keeping the premises in repair: The testator had died more than twenty years before the action was brought, but the breaches had occurred within the last four years: The defendant pleaded *plene administravit*, and issue was taken thereon: At the trial, in the year 1831, the plaintiff proved that assets to the amount of 1000*l.* had been received by the defendant between the years 1822 and 1824: The defendant proved that he had paid those assets over to a legatee: It also appeared in evidence, that the testator had sold his interest in the lease twenty-four years ago to a person who till within the last four years had paid rent to the plaintiff: Bushe, C. J., was of opinion that the payment of legacies was no answer to the plaintiff's demand, and directed the jury to find a verdict for the plaintiff: A rule to shew cause why this verdict should not be set aside was subsequently obtained: But after argument and full consideration, the Court of King's Bench in Ireland discharged the rule: And Bushe, C. J., in delivering judgment, observed, that "The plaintiff's right to recover is established as a legal right, and no case has been cited to shew that such a defence is available to a personal representative in a Court of Law: On the contrary, notwithstanding some *dicta*, it appears from many cases in equity, that such a defence would not be available in equity, against the plaintiff's demand; payment of legacies being considered there as no answer to the claims of creditors. If then the defendant would have no equity in the Court of Chancery against this demand, upon what principle can it be supposed that the defence can be available in this Court? All cases of this kind are cases of hardship, and this is very particularly so;

(*k*) 1 Alcock & Nap. 23.

but that hardship is out of the reach of a Court of Law, and the law must take it's course."

when a legatee must give security against contingent debts.

Such being the state of authorities, it should seem that a Court of Equity ought not to compel the executor to part with the assets, either to a particular or residuary legatee, without a sufficient indemnity: for otherwise, if the contingent covenants, &c. should afterwards be broken, the executor would be liable, according to the above decisions, to answer the damages *de bonis propriis*, without any fault in him (*l*). Upon this principle, Sir William Grant acted in *Simmonds* v. *Bolland* (*m*): In that case, an executor claimed to retain out of the residue certain parts of the property, to protect himself against a future contingent demand in respect of covenants entered into by the testator, for payment of rent and repairs of an estate held by him under lease from a corporation, though there was no existing breach of covenant, nor arrears of rent, in respect of which he was liable: On a bill by the residuary legatee for the property so retained, Sir William Grant ordered, that the funds in question should be made over to the plaintiff, on his giving a sufficient indemnity to the executor, the terms of such indemnity to be settled before the Master (*n*).

The subject was again considered, without any decision on the express point, by the highest authority: In *Vernon* v. *Egmont* (*o*), John James, Earl of Egmont, being tenant

(*l*) Fletcher *v*. Stevenson, 3 Hare, 360, 370. See also Cochrane *v*. Robinson, 11 Sim. 378. No decree that a Court of Equity could make, would bind the obligees, &c., or protect the executor against their demands, if the bond should be afterwards forfeited: By Sir W. Grant, 3 Meriv. 554. See 3 Hare, 370.

(*m*) 3 Meriv. 547.

(*n*) In Thomas *v*. Montgomery, (the case of the Queensberry leases,) cited 1 Bligh, N. S. 568, 571. 3 Meriv. 551, 552, it was directed by Lord Eldon, C., that a large amount of assets should be retained in Court to answer the contingent demands of the lessees of leases made by the testator under a power. But in that case the leases had actually been attacked in the Court of Session in Scotland; and the Lord Chancellor, the money being in Court, thought right to retain the fund, while the numerous difficult points of Scotch law relating to the leases were under investigation: 1 Bligh, N. S. 571. See Thomas *v*. Montgomery, 1 Russ. & M. 729.

(*o*) 1 Bligh, N. S. 554.

for life under a deed of settlement, with a power to lease under certain restrictions, granted leases not in conformity with the power, and died, leaving by Will the residue of his personal estate to his eldest son, the next remainderman under the settlement: The son called upon his father's executor to pay the residue: The executor required an indemnity, against the contingent claims of the lessees in case of eviction: But the son refused to give such indemnity, and filed a bill against the executor for an account, and the payment of the residue: And Lord Gifford, M. R., decreed payment without any indemnity: But on appeal to the House of Lords, this decree was reversed: Lord Lyndhurst, C., said (*p*), that if it were necessary to decide the general principle, although he was inclined to think that the appellant had a title, he should take much time for consideration; but that the case was special, as the respondent had the power to confirm or to disturb the leases, and that he ought not to take the fund out of the hands of the executor, without giving indemnity against any action which might be brought by the tenants, in case of eviction; on which special ground, he should advise the House to reverse the decree: And Lord Eldon observed, that the residue of the personal estate was demanded by the respondent, who had the power to rescind the leases granted by the testator; and if he should do so, the appellant, as executor of the lessor, would be liable in damages to the extent of the assets received by him: Under which circumstances, his Lordship was of opinion, that the judgment of the House of Lords ought to be, that the appellant should pay over the residue, upon having indemnity from the respondent against the disturbance of the leases: And accordingly the Lords declared, that before the residue of the testator's personal estate should be paid to the respondent or his assigns, the respondent ought either to confirm, or in case he was unable to confirm by his own act, to procure to be confirmed, the leases granted by the testator, not in conformity

(*p*) 1 Bligh, N. S. 571.

with his powers, or otherwise give a satisfactory indemnity to the appellant against any claims which might be made against him in respect of the leases, and all costs, charges, damages, and expenses, which the appellant might incur, or be subjected to in respect thereof (*p*).

But it has been held that an executor, who has assented unconditionally to a specific bequest of the testator's leasehold estates, is not entitled to an indemnity out of the testator's general estate in respect of his covenants contained in the leases (*q*).

It may here be mentioned, that the old practice of the Court of Chancery was, that the legatee should in all cases give the executor security to refund, if debts should afterwards appear (*r*): But the Court has now ceased to require such security (*s*); and therefore, in modern cases, creditors have been allowed, in Courts of Equity, to follow assets in the hands of legatees, as well as of the executor (*t*).

Payment of legacies before debts of which an executor has no notice.

Another question arises, of great importance, and closely connected with the preceding inquiry, *viz.*, whether, under any circumstances, an executor or administrator can be allowed payments made to legatees, or parties entitled in distribution, as against creditors of whose claims he had no notice.

In the case of *The Governors of the Chelsea Water Works* v. *Cowper* (*u*), N. P. Sittings after Hilary Term, 1795, an action of debt on bond was brought against the defendant as executor of Sir G. Littleton: Pleas, 1st, *Non est factum:* 2nd, *Plene administravit:* It appeared in evidence, that, in the year 1768, Sir G. Littleton having procured for a servant of his the place of collector under the Chelsea Water Works Company, had joined in the present bond, as a surety for his

(*p*) See also Fletcher *v.* Stevenson, 3 Hare, 360.

(*q*) Shadbolt *v.* Woodfall, 2 Coll. 30.

(*r*) Chamberlain *v.* Chamberlain, 1 Chanc. Cas. 257.

(*s*) Anon. 1 Atk. 491.

(*t*) By Lord Hardwicke in Hawkins *v.* Day, Harg. MSS. Ambl. 804, Blunt's edit. March *v.* Russell, 3 Mylne & Cr. 42. *Post,* Pt. III. Bk. III. Ch. IV. § X.

(*u*) 1 Esp. N. P. C. 275.

faithful accounting, &c. Upon the issue of *plene administravit,* the defendant's counsel admitted, that the defendant had assets from Sir George Littleton sufficient to satisfy the debt; but stated that, twenty-two years ago, he had paid over the whole of Sir George Littleton's property, which he had then in his hands, to the Duke of Bridgewater, as residuary legatee; and that he had now nothing remaining in his hands, nor had he, till the bringing of the present action, any notice that there was such a claim as that now made, subsisting against the estate: Lord Kenyon said, that he was of opinion, that where an executor or administrator has satisfied the debts and legacies affecting the testator's or intestate's estate, and paid over the remainder to the residuary legatee, and has had no notice of any other subsisting demand, provided he had not done it too precipitately, it was a good answer to an action, such as the present; that the statute having directed that no legacies should be claimed before the end of one year from the intestate's death, seemed to have meant to give that time for creditors to the estate to make their claims, or at least to give notice to the executor or administrator, that there were such claims subsisting; and that as in the present case, the debt was of such long standing, and unclaimed for such a number of years, and the remainder of the estate paid over to the residuary legatee, he was of opinion that it was complete evidence of *plene administravit,* in favour of the executor; his Lordship, however, added, that he would reserve that point.

But in *Norman* v. *Baldry* (*v*), on the marriage of William Baldry with Ann Freston, he together with Simon Baldry, executed a joint and several bond, dated the 7th of October, 1802, to W. Lewis, conditioned for the payment by the heirs, executors or administrators of William Baldry, within three months after his decease, of 490*l.* to Ann Freston, in case she should survive him; but, in case she should die in his lifetime, then for the payment by him of 200*l.* within six

(*v*) 6 Sim. 621.

months after the death of Ann Freston, to the persons therein named: Simon Baldry died in March, 1820: Ann Baldry died in April, 1831, leaving her husband her surviving: William Baldry having become insolvent, the persons entitled to the 200*l.* under the bond, filed, in 1832, a creditor's bill against the executors of Simon Baldry: The executors, in their answer, said that they had applied the whole of Simon Baldry's personal estate in payment of his debts and legacies; and that they never heard of the bond until October, 1831: And it was argued on their behalf, on the authority of *The Governors of the Chelsea Water Works* v. *Cowper* (*w*), that as the plaintiffs had suffered nine years to elapse, without giving the executors any notice of the bond, they were not entitled to sue the executors: But Sir L. Shadwell, V. C., said, that he had always understood the law to be, that an executor who had paid simple contract creditors of his testator, a bond being in existence, but not payable, ought to be allowed those payments (*x*); but that an executor was liable, if he had paid the legatees, notwithstanding he had no notice of the bond; and that he was not disposed to agree to what was attributed to Lord Kenyon in the case cited.

In the late case of *Smith* v. *Day and another* (*y*), an action was brought against executors on a bond, which had been given by their testator to indemnify the obligee against any claim that might be made for the rent of some premises of which he had taken an assignment: The defendants pleaded *plene administravit:* And the question, upon this plea, was as to certain parts of the residue of the testator's estate, which the executors had invested in the funds, and on a mortgage, (having changed the security once or twice,) for the benefit of the residuary legatees, without notice of the claim of the plaintiff: Two points arose with respect to this question; 1st, Whether the executors could give in evidence any payment of legacies under the plea of *plene administravit:* 2nd, Whether, in this particular case, the money still remain-

(*w*) *Ante*, p. 1155.

(*x*) See *ante*, p. 876, note (*e*).

(*y*) 2 Mees. & W. 684.

ing, as it was asserted, in their hands, they could sustain by evidence such a plea: Lord Abinger, in giving the judgment of the Barons of Exchequer, said that there was no occasion for the Court to pronounce any opinion upon the first point; that there might be difficulty in supporting this plea; but that there was no necessity for saying anything about that, the Court being of opinion that the assets in question still remained in the hands of the defendants as executors, and that they were not considered to have been so apportioned in satisfaction of the legacies as to bar the claim of a creditor.

In *Knatchbull* v. *Fearnhead* (z), Lord Cottenham held that the executors of a deceased trustee, having admitted the receipt of assets which would have been sufficient to answer a particular breach of trust committed by their testator, besides his other debts, were chargeable with the loss occasioned by such breach of trust, although they had paid all his debts of which they had any knowledge out of the assets, and had distributed the whole surplus among his residuary legatees many years before, and at a time when they had no notice of the breach of trust, or of any claim in respect of it (a).

In *Hill* v. *Gomme* (b), the executors, whose testator died in 1827, advertised for persons having claims or demands on the estate of their testator, and having provided for all that appeared, they, in 1829, distributed the estate amongst the legatees and took from them an indemnity: A demand previously unknown both to the claimant and the executors was made against the estate in 1836, and a bill filed to enforce it: And Lord Langdale, M. R., held that, if the claim were valid, the executors were still personally liable to the plaintiff.

These authorities appear to demonstrate that the mere circumstance of want of notice of a debt or claim against the estate of the deceased, will not excuse an executor or administrator from the payment or satisfaction of it, if the assets were originally sufficient for the purpose, notwithstanding

(z) 3 Mylne & Cr. 122.

(a) See also March v. Russell, 3 Mylne & Cr. 30.

(b) 1 Beav. 540.

that, in ignorance of the existence of the debt or claim, he has *bonâ fide* handed over the assets to legatees or parties entitled in distribution. But it seems to have been considered, in some cases, that lapse of time may operate as a waiver of the right of the creditor or claimant, by way of *laches* on his part, so as to preclude him from complaining of the insufficiency of the assets.

Thus in *Davis* v. *Blackwell* (c), an action of covenant was brought against an executor, and the breach assigned was the non-repair of a house demised to the testator by a lease which expired in December, 1831: The testator died in March, 1829: Probate was taken out in May, 1830; and this action was commenced in November, 1830: The defendant pleaded *plene administravit; plene administravit* before notice of the covenant; *plene administravit* before notice of breach of covenant: on which pleas issue was joined: At the trial, it appeared that the defendant, after discharging some debts, made over the residue of the assets to the residuary legatee *within six months after the date of the probate:* No notice had been given to him of the state of the house in question, which had never been occupied by the testator: A verdict having been found for the plaintiff, a rule was afterwards obtained for a new trial, on the ground that the defendant was discharged by having paid over all the assets to the legatee before notice of the plaintiff's claim: But, after argument, the Court of Common Pleas discharged the rule: And Tindal, C. J., in giving judgment, said, "It is not clear that payment of legacies would in any case be an answer to a demand of a debt; for all the text books lay it down, that, after the payment of debts, it is the duty of the executor to pay legacies, and if he pays legacies first, he does it at his own hazard. I am not, however, prepared to say, that after such a length of time as elapsed in the case of the *Chelsea Water Works Co.* v. *Cowper* (d), the laches of the creditor might not be deemed a waiver of his right

(c) 9 Bingh. 5. S. C. 2 Moore & Sc. 8.

(d) *Ante*, p. 1155.

against the executor: it is not necessary here to decide that point: it is certain, however, that in the case of administrators, the statute 22 & 23 Car. II. c. 10, leads us to infer that no payment of legacies would be a discharge against a claim of debt. By sect. 8, of that statute, it is enacted, 'That no such distribution of the goods of any person dying intestate be made till one year be fully expired after the intestate's death; and that such and every one to whom any distribution and share shall be allotted, shall give bond, with sufficient sureties in the said Courts, that if any debt or debts truly owing by the intestate, shall be afterwards sued for and recovered, or otherwise duly made to appear, then and in every such case, he or she shall respectively refund and pay back to the administrator, his or her rateable part of that debt or debts, and of the costs of suit and charges of the administrator by reason of such debt, out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the said debt or debts so discovered after the distribution made as aforesaid.' That section leads to the inference that payment of legacies would not be a bar in an action against an administrator for a debt, due from the intestate; if it would not in an action against an administrator, there is no reason why it should in an action against an executor; for, though an executor should not provide himself with a bond of indemnity, as an administrator is enjoined to do, the Spiritual Court would decree that the legacy should be refunded, if debts were afterwards discovered. I will not say that such a defence might not be made if the debt were claimed after a great lapse of time; but six months does not appear to me to be a reasonable time for ascertaining the existence of debts; and the legacies having therefore been paid prematurely, this rule must be discharged."

Again, in *Richards* v. *Browne* (*e*), the executor of an executor was sued, in the year 1836, on a promissory note given

(*e*) 3 Bingh. N. S. 493

by the original testator in the year 1816: The defendant pleaded that he had no assets of the original testator, nor of the first executor: The plaintiff replied, that the defendant had assets of the original testator: It appeared, at the trial of the issue joined hereon, that the testator had paid interest regularly on the note till his death in the year 1825, and that the first executor continued to pay it up to the year 1831: The first executor died in the year 1832: The original testator had bequeathed his household furniture to the first executor for life, and after his death to Sarah Chapple: In July, 1831, the plaintiff's then attorney wrote to the defendant (who was then attorney for the first executor,) on the subject of the note, stating, that his client did not claim from the first executor payment of the money as executor of the original testator, but that it was claimed from him individually, he having become liable to the debt from payment of interest from time to time to the defendant: On the death of the original testator, the first executor took possession of the furniture bequeathed to him for life; and on his death, Sarah Chappel, *with the consent of the defendant,* took possession of the same furniture, which continued in her hands, until the time of action brought, and was worth more than the amount claimed on the note: On these facts it was contended that the plaintiff could not recover, first, because he had, by his own laches and the letter of his attorney, misled the defendant in his distribution of assets; in consequence of which he had been led to administer the assets in a way he would not otherwise have done, by assenting to the legacy in remainder to Sarah Chapple; and secondly, that the *devastavit,* if any, was committed by the first executor, inasmuch as the taking possession of the furniture bequeathed to him for life was an assent by him to the residuary bequest to Sarah Chapple; and so the defendant, having no assets, was not liable: But the Court of Common Pleas, on a special case, gave judgment for the plaintiff: As to the first point, the Judges were of opinion that the letter in question, although on the particular occasion it made claim on the first executor because he had

recognised the debt by payment of interest, did not renounce the right to claim against the assets of the original testator, and contained nothing incompatible with an intention to resort to that right, if the claim against the first executor, in his personal capacity, should be unavailing; and as to the supposed laches, an answer was afforded by the demand and receipt of interest on the debt during the whole period of the first executor's life: It was admitted, however, by Tindal, C. J., that if, in the distribution of assets, a creditor does mislead an executor, either by laches or express authority, so as thereby to induce the executor to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of an insufficiency of assets (*f*); but on the facts of the present case, his Lordship thought the defendant was not within the reach of that principle: As to the second point, the Court was of opinion that it did not appear that the first executor had been guilty of any *devastavit;* inasmuch as his taking possession of the furniture was, under the circumstances, no assent to the bequest over to Sarah Chapple (*g*).

How far a creditor's priority over legatees may be barred in a suit for the administration of assets.

In conclusion of this subject, it may be proper to consider how far the laches of the creditor may affect his priority over legatees, where there is a suit for the administration of testator's assets. Although the language of the decree, where an account of debts is directed, is, that those who do not come in shall be excluded from the benefit of that decree; yet the course is, to permit a creditor, he paying the costs of the proceedings, to prove his debt, as long as there happens to be a residuary fund in Court, or in the hands of the executor, and to pay him out of that residue (*h*): If a creditor does not

(*f*) See Accord. Stroud *v.* Stroud, 7 M. & Gr. 417, 421.

(*g*) See *post,* Pt. III. Bk. III. Ch. IV. § III. p. 1188, 1189.

(*h*) By Lord Eldon in Gillespie *v.* Alexander, 3 Russ. Chanc. Cas. 136. March *v.* Russell, 3 Mylne & Cr. 41. See the observation of Lord Lyndhurst, in Vernon *v.* Egmont, 1 Bligh, N. S. 570. It should seem that, after report settled, though not signed, in a creditor's suit, a creditor cannot be let in to prove his debt without a special application to the Court; and he must submit to be visited with costs and

come in till after the executor has paid away the residue, he is not without remedy, though he is barred from the benefit of that decree: If he chooses to sue the legatees and bring back the fund, he may do so (*i*): but he cannot affect the legatees, except by suit; and he cannot affect the executor at all (*j*).

A point of considerable difficulty arises, if a creditor does not come in until some individual legatees have received their legacies in full under the sanction of the Court, and there are left in Court certain funds which have been directed to be appropriated to other individual legatees, who have not been paid: The question then is, whether a creditor, so coming in, is to be paid his whole debt by the unpaid legatees; or whether the rule is not, that he should take from them such a proportion only of his debt as would have been borne by them if he had applied before the other legacies were paid, and that he should be left to recover the residue of it against the paid legatees: In the case of *Gillespie* v. *Alexander* (*k*), (which was a suit for the administration of a testator's assets,) after a decree on further directions had sanctioned payments made by the executor in discharge of legacies, and had directed the fund in Court to be apportioned among the other legatees, a creditor obtained permission to prove his debt: The Master subsequently reported a debt to be due to him; but in the mean time, the fund had been apportioned, and part of it had been paid over, while the remainder had been carried to the account of particular legatees, who were infants: And Lord Eldon held, that the creditor was entitled to receive out of the funds of the legatees so remaining in

pay the usual penalty for default: Parker *v.* Moorley, 3 Younge & C. 720.

(*i*) See *post*, Pt. III. Bk. III. Ch. IV. § X. David *v.* Frowd, 1 M. & K. 209, 210. Sawyer *v.* Birchmore, 1 Keen, 401. 2 M. & Cr. 611. March *v.* Russell, 3 Mylne & Cr. 31. Underwood *v.* Hatton, 5 Beav. 36.

(*j*) 3 Russ. Chanc. Cas. 136, 137. 1 M. & K. 209, 210. 1 Keen, 401. 2 M. & Cr. 611. 5 Beav. 36. The creditor has, it should seem, under such circumstances, lost his legal title by the administration of the Court of Equity, and his only remedy is in that Court: 1 M. & K. 210.

(*k*) 3 Russ. Chanc. Cas. 130.

Court, not the whole of the debt, but only part of it, bearing the same proportion to the whole as the legacies given to those legatees bore to the whole amount of the legacies given by the Will; and that he must seek the payment of the rest of his debt, in proper proportions, amongst those legatees who had been actually paid (*l*).

Accordingly, in *Greig* v. *Somerville* (*m*), in a suit instituted in 1814, to administer the personal estate of an intestate who died in 1807, the Master reported that no debts had been proved; and by the decree on further directions, in 1817, the whole of the residue was apportioned and distributed; but as the plaintiff was then an infant, his share, amounting to four-ninths of the fund, was retained, and carried to his separate account: In 1825, a foreign prince, claiming to be a creditor of the intestate, petitioned for leave to prove his debt against the sum remaining in Court; and the plaintiff coming of age soon after, applied to have that sum paid out: And Lord Lyndhurst held, that the creditor was not precluded by the previous proceedings, or the lapse of time, from tendering such proof before the Master; but that every defence should be allowed there, which would have been competent upon a new bill; that the debt, if established, must be restricted, as against the fund in Court, to that proportion which the plaintiff's share bore to the whole amount distributed; and therefore, that after reserving a sum equal to four-ninths of the claim, the residue of the fund ought to be paid out to the plaintiff (*n*).

(*l*) See David *v.* Frowd, 1 M. & K. 210, Accord. by Sir J. Leach, M. R.

(*m*) 1 Russ. & M. 338.

(*n*) See also Cattell *v.* Simons, 8 Beav. 243.

Sect. II.

Of the Abatement of Legacies.

1. As to the abatement of general legacies. In case the assets be sufficient to answer the debts and specific legacies, but not the general legacies, the latter are subject to abatement.

In case of deficiency of assets, general legatees must abate before specific:

This abatement must take place among all the general legatees in equal proportions (*o*): And the executor has no power to give himself a preference in regard to his own legacy, as he has in the instance of his own debt (*p*).

Generally speaking, nothing shall, in such cases, be abated from the specific legacies (*q*). But if the testator bequeaths specific legacies, and also general pecuniary legacies, and directs by his Will that such pecuniary legacies shall come out of all his personal estate, or words tantamount; then, if there be no other personal estate than the specific legacies, they must be intended to be subject to those which are pecuniary; otherwise, the words of the bequest to the pecuniary legatees would be nugatory (*r*).

but a residuary legatee cannot call on them to abate.

It must here be observed, that a *residuary* legatee has no right to call upon particular general legatees to abate: The whole personal estate not specifically bequeathed must be exhausted, before those legatees can be obliged to contribute anything out of their bequests

(*o*) Treat. Eq. B. 4, Pt. 1, ch. 2, s. 5. With regard to general legacies of stock, the abatement will be regulated by the value of stock at the end of one year next after the testator's death: Blackshaw *v.* Rogers, cited *per curiam,* in Simmons *v.* Vallance, 4 Bro. C. C. 349. Auther *v.* Auther, 13 Sim. 440, *per* Shadwell, V. C.

(*p*) Toller, 347.

(*q*) Treat. Eq. B. 4, Pt. 1, ch. 2, s. 5. Clifton *v.* Burt, 1 P. Wms. 679. 2 Black. Com. 513. Toller, 339.

(*r*) Sayer *v.* Sayer, Prec. Chanc. 393. Treat. Eq. B. 4, Pt. 1, ch. 2, s. 5.

(*s*) Purse *v.* Snaplin, 1 Atk. 418. Fonnereau *v.* Poyntz, 1 Bro. C. C. 478. 1 Rop. Leg. 355, 3d edit.

In *Farmer* v. *Mills* (*t*), a testator, by his Will, bequeathed certain annuities, and directed that sums set apart to secure them, should, as the annuitants died, sink into the residue of his personal estate: By a codicil to his Will, he stated, that in case his property would not provide an income equal to the annuities, they should be rateably reduced: His estate was deficient, and the annuities were rateably reduced: And it was held, by Sir John Leach, M. R., that upon the death of any annuitant, the sum, set apart to secure the reduced annuity, would belong to the residuary legatees, and was not to be applied to increase the reduced annuities to the amount given by the Will: His Honor, however, observed, that if the case had rested upon the Will, the residuary legatees could have taken no benefit, until the annuities were fully provided for (*u*).

In *Arnold* v. *Arnold* (*v*), a testator desired that A., B., and C. might each enjoy, during life, the interest of 800*l.* sterling, the prineipal to devolve eventually to his residuary legatees: He directed the residue of his property to be divided into three equal parts, one part to each of his brothers and his sister; and if his brothers and sister should not survive him, or have legal issue living at the testator's death, then their shares to devolve in equal proportions to the survivors, as well as the shares that might have been devised to their issue: The testator's estate was not sufficient to pay the legacies in full: And Sir C. Pepys, M. R., held, that upon the death of one of the tenants for life, an apportionment of the legacy of 800*l.*, set apart to answer her life-interest, fell

(*t*) 4 Russ. 86.

(*u*) In Scott *v.* Salmond, 1 M. & K. 363, a testator gave several life annuities charged upon a particular fund, the income of which he considered to be equal to them in value; and he gave the fund itself over to another person for life, upon the respective deaths of the annuitants: The fund having proved deficient, and the annuitants having suffered a proportional abatement, it was held, by Sir J. Leach, M. R., and afterwards by Lord Brougham, on appeal, that on the death of one of them, the income from the fund released by the falling in of her annuity went over to the tenant for life, and was not applicable to make good the deficiency of the continuing annuities.

(*v*) 2 M. & K. 374.

into the residue, and was not given over to the residuary legatees in their individual character; and that the surviving tenants for life were entitled to have the deficiencies in their annuities satisfied out of the released fund: And his Honor observed, on *Farmer* v. *Mills* (*w*) being cited, that in that case the testator's codicil expressly provided that the annuities should be rateably reduced; and that but for that codicil, the residuary legatees could have taken no benefit until the annuities were fully paid.

A point of considerable difficulty arises in cases where there are pecuniary legatees and a residuary legatee, and *by reason of the devastavit of the executor* the estate becomes insufficient to pay all the pecuniary legacies: The question then is, whether, there being at the testator's death a residue of a certain sum, the residuary legatee is not entitled to rank as a legatee of that sum.

In *Dyose* v. *Dyose* (*x*), Lord Cowper, in the instance of deficiency by a *devastavit*, held, that he was bound to consider the residuary legatee as entitled to something, if the state of the assets at the death of the testator left a residue; and that the wreck of the estate, which could be recovered after the *devastavit*, was divisible, not among the pecuniary legatees alone, but among all the legatees according to the proportion of their legacies, and allowing the residuary legatee to claim as a legatee of the amount of the residue as it stood at the death of the testator.

But this decision came under the consideration of Lord Thurlow, in the cases of *Fonnereau* v. *Poyntz* (*y*), and *Humphreys* v. *Humphreys* (*z*); on both which occasions his Lordship condemned the doctrine of it: And this condemnation was approved by Sir William Grant in *Page* v. *Leapingwell* (*a*).

On the other hand, in *Ex parte Chadwin* (*b*), Lord Eldon, after reviewing all the preceding authorities, seems to con-

(*w*) *Ante*, p. 1160.
(*x*) 1 P. Wms. 305.
(*y*) 1 Bro. C. C. 478.
(*z*) 2 Cox, 186.
(*a*) 18 Ves. 466.
(*b*) 3 Swanst. 387.

sider the question as unsettled: and his decree in that case may, perhaps, be considered as in some measure confirmatory of *Dyose* v. *Dyose*, though certainly on a totally different principle.

The case alluded to, *Ex parte Chadwin* (*c*), is an authority to shew that a legatee, entitled to a priority, may have so dealt, in respect to his legacy, with an executor guilty of a *devastavit*, as to lose all priority, and to render it just, that the estate should be divided as if no *devastavit* had taken place: There the testator directed his trustees and executors, after sale of his estates, to stand possessed of the money arising from the sales, upon trust, in the first place, to invest 400*l.* in trust for his wife for life in bar of dower, and after her death for W. C., and upon further trust, out of the residue of the money, to invest 400*l.* in trust for J. R. for life, and after his death for his children; and upon further trust, to pay other sums to persons named; and he bequeathed the residue of his estate to W. C.: The only acting executor made no investment on the trust of the Will, but paid interest on the two sums of 400*l.* to the respective legatees, and applied the assets to his own use, and afterwards became bankrupt: Lord Eldon was of opinion, that, by so dealing with the executor, these two legatees had made him their debtor for their legacies respectively: And upon that ground his Lordship decreed, that the dividends payable upon the whole sum proved under the commission against the executor, in respect of the testator's estate, should be divided among the pecuniary and the residuary legatees, in the proportion of the amount of their legacies, and of the residue, as it was computed at the death of the intestate, with interest on each.

In the late case of *Willmott* v. *Jenkins* (*d*), an executor, who was also trustee, divided the assets: He paid to the adult legatees their shares, and invested the shares of the infants in his own name, but he executed no declaration

(*c*) 3 Swanst. 380. (*d*) 1 Beav. 401.

of trust thereof: He afterwards applied these sums to his own use: Further assets having unexpectedly fallen in, Lord Langdale, M. R., held, that they ought, in the first place, to be applied in making good the infant's legacies: And the learned Judge said, that if an executor makes payments to a legatee in person, or to a trustee for a legatee, or makes such appropriation as is equivalent to payment, the other persons entitled under the Will are not to be called on to contribute for any loss which may afterwards happen to the funds so paid or appropriated (*e*); but that if there be no payment, and no appropriation equivalent to payment, his Lordship did not see why, if anything afterwards comes to the hands of the executors, it should not be applied in discharge of the legacies of the unpaid legatees.

Priority, among general legatees, of purchasers over volunteers:

The general rule is, that, among legacies in their nature general, (according to the distinctions attempted to be pointed out in a previous chapter) there is no preference of payment: they shall all abate together, and proportionally, in case of a deficiency of assets to satisfy them all. But this must be understood only as among legatees, who are all volunteers; for if there be any valuable consideration for the testamentary gift, as where a general legacy is given in consideration of a debt owing to the legatee, or of the relinquishment of any right or interest, as of her dower by a widow (*f*), such legacy will be entitled to a preference of payment over the other general legacies, which are mere bounties (*g*); and it should seem that the preference will be allowed, though the bequest should exceed the value of the right or interest relinquished by the legatee (*h*): But it is requisite that the right or interest should be subsisting at the testator's death (*i*).

(*e*) See Morris *v.* Livie, 1 Y. & Coll. Ch. C. 380. *Post*, p. 1205.

(*f*) Burridge *v.* Bradyl, 1 P. Wms. 127. Blower *v.* Morret, 2 Ves. Sen. 420. Davenhill *v.* Fletcher, Ambl. 244. Norcott *v.* Gordon, 14 Sim. 258. But such a legacy has no priority, where the testator leaves no real estate out of which the widow is dowable: Acey *v.* Simpson, 5 Beav. 35.

(*g*) Treat. Eq. B. 4, Pt. 1, ch. 2, s. 5.

(*h*) Ambl. 244.

(*i*) 2 Ves. Sen. 422.

In *Heath* v. *Dendy* (*j*), the testator, having by a post-nuptial settlement made certain provisions for his wife, which were expressed to be in bar of dower, bequeathed to her specific legacies, and also a general legacy, adding, that what he had so given her, together with the provision made for her by the settlement, should be in lieu of any dower which she might claim: The assets proved insufficient for the payment of the legacies in full: And Lord Gifford, M. R., held, that the wife was entitled to priority over the other legatees, and that the legacy given to her ought not to abate proportionally with the other legacies: His Lordship, in giving judgment, observed, that if, at the death of the testator, his widow had not been entitled to dower, then, according to the principle of the previous authorities, she could not have claimed any priority: But, at his death, her right to dower was in full force; and she was to release her dower, not merely for the provision which the settlement made, but for that provision taken in conjunction with the legacy: It was not material whether the sum bequeathed was or was not the whole of the consideration for the release of the dower: If it was only part of the consideration, she was nevertheless a purchaser of the sum, and was entitled to priority over the other legatees (*k*).

In *Davies* v. *Bush* (*l*), a testator had bequeathed a legacy to a person, between whom and himself accounts had subsisted for some time, on condition of his executing to the testator's executors a general release of all claims and demands which the legatee had on the testator: The legatee executed the release: The assets were insufficient for the payment of all the legacies; and the question was, whether this particular legatee was, by the execution of the release, a

(*j*) 1 Russ. Chanc. Cas. 543.

(*k*) It is enacted by stat. 3 & 4 W. IV. c. 105, (Act for the Amendment of the Law relating to Dower) s. 12, that nothing in this Act contained shall interfere with any rule of equity, or of any Ecclesiastical Court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies.

(*l*) 1 Younge, 341.

purchaser of his legacy, and entitled to be paid in preference to the other legatees; or whether he was bound to abate rateably with them: It did not appear whether the legatee had any legal claim or demand on the testator: Lord Lyndhurst, C. B., was of opinion, that if there was not a debt actually due to the legatee, he could not be considered as a purchaser of the legacy, so as to avoid an abatement with the other legatees: If no debt were due, and the release was required merely for the sake of peace, then, unquestionably, the legatee could not be treated as a purchaser.

General legacies bequeathed to creditors, whose debts have been previously liquidated by composition at less than their real amounts, are merely voluntary, and therefore not exempt from abatement together with other general legacies upon a deficiency of assets (*m*). So where the testator bequeaths money to pay the debts of a relation or friend, such legacies must be considered as bounties, and in no better condition than other general legacies (*n*).

Instances where priority among general legatees is not allowable:

It must here be observed, that a legacy, which is, in it's nature, general, and given to a volunteer, will not be entitled to any exemption from abatement, on the ground of it's being applied to any particular object or purpose: Thus legacies of a certain sum each to executors for their care and trouble (*o*), or of sums of money for mourning rings (*p*), or to servants (*q*), or to charities (*r*), are not to be preferred to other general legacies. And although the bequest is made in favour of a wife or child of the testator, it can claim no preference, but must abate with the rest of the general legacies (*s*).

(*m*) Coppin *v.* Coppin, 2 P. Wms. 296.

(*n*) Shirt *v.* Westby, 16 Ves. 396. 1 Rop. Leg. 361, 3d edit.

(*o*) Fretwell *v.* Stacy, 2 Vern. 434. Atty. Gen. *v.* Robins, 2 P. Wms. 25. Heron *v.* Heron, 2 Atk. 171.

(*p*) Apreece *v.* Apreece, 1 Ves. & Beam. 364. In Masters *v.* Masters, 1 P. Wms. 423, Lord Parker exempted a legacy of a certain sum for building a monument to the memory of a relation from abating with the general legacies; but this decision has been doubted on strong grounds: See 1 Rop. Leg. 364, 3d edit., and Blackshaw *v.* Rogers, cited 4 Bro. C. C. 349.

(*q*) 2 P. Wms. 25.

(*r*) 2 P. Wms. 25. Tate *v.* Austin, 1 P. Wms. 265. Masters *v.* Masters, 1 P. Wms. 423. Atty. Gen. *v.* Hudson, 1 P. Wms. 675. Bishop of Peterborough *v.* Mortlock, 1 Bro. C. C. 566.

(*s*) Blower *v.* Morret, 2 Ves. Sen. 420. 1 Rop. Leg. 365, 3d edit.

Again, an annuity charged on the personal estate is a general legacy (*t*): And therefore, as between annuitants and legatees, there is no priority where there is a deficient estate, but both must abate proportionably. And whether an annuity is to commence immediately on the death of the testator or at a future period, this principle will equally apply (*u*). And if annuities abate with reference to other legacies, they must, of course, abate between themselves. Accordingly, in *Innes* v. *Mitchell* (*v*), a testator had bequeathed an annuity of 300*l.* to his three daughters, and the survivors and survivor, with a gift over to the last survivor of the sum set apart to answer the annuity: After the death of one of the daughters, the fund set apart was lost by the misconduct of the trustee, and the annuity remained unpaid for the rest of the lives of the other two; but after their deaths a sum of money, forming part of the residue, but of less amount than the original fund, became available: And it was held, that the annuity must be supposed to have continued until it was put an end to by the principal money falling in; and that such money must be apportioned rateably between the arrears which would, on that supposition, be due to the daughters respectively, and the sum originally set apart which belonged to the last survivor.

in what cases such priority is allowable.

But if by the express words or fair construction of the Will, the intent of the testator is clearly manifest to give one general legatee a priority to the others, that intention must be carried into effect (*w*): as where the testator gave legacies to his two sons and his daughter, with a proviso, that if

(*t*) Hume *v.* Edwards, 3 Atk. 693. Alton *v.* Medlicott, cited in Lewin *v.* Lewin, 2 Ves. Sen. 417. Innes *v.* Mitchell, 1 Phill. Ch. C. 716, *per* Lord Lyndhurst. 11 Cl. & F. 508, *per* Lord Cottenham. But if annuities are given as specific gifts of interest in the real estate, they shall not abate with legacies charged generally on the real estate. Creed *v.* Creed, 11 Cl. & F. 491 (overruling the decision of Sugden, C. of Ireland, 1 Dr. & W. 416).

(*u*) 1 Phill. Ch. C. 716.

(*v*) 2 Phill. Ch. C. 346, reversing the decision 1 Phill. Ch. C. 710.

(*w*) Lewin *v.* Lewin, 2 Ves. Sen. 415.

the assets should fall short for the satisfaction of those legacies, his daughter notwithstanding should be paid her full legacy, and the abatement be borne proportionally by the legacies of the sons only (*x*). So where the testator, after giving various legacies, expressed at the end of his Will his apprehension that there would be a considerable surplus of his personal estate, beyond what he had before given away in legacies, for which reason he gave several further legacies; and afterwards, by a codicil, he gave several other legacies; it was decreed, that the subsequent legacies given by the Will, having been given on a presumption that there would be a surplus, and there happening to be no surplus, the former legacies should have a preference, and the legacies at the end of the Will should be lost; and also, that the same apprehension of a surplus must be intended to have continued in the testator at the time of making his codicil: and therefore, unless the inference could be repelled, the legacies given by the codicil must be lost also (*y*). Again, where a testator gave 1000*l.* to trustees, upon trust to pay the interest to his wife, during her life, and after her decease he declared his Will to be, that the 1000*l.* should become part of his personal estate, and applicable to the trusts or payment of the legacies given by his Will; and he gave a legacy of 500*l.*, in trust for N. M. and his wife, in nearly the same words; it was held, that a priority was given to those two legacies (*z*).

But where the expressions are ambiguous, and do not mark with certainty the testator's intention, no priority can be allowed: Therefore it is not sufficient that the testator gives a direction as to a general legacy to his wife, that it

(*x*) Marsh *v.* Evans, 1 P. Wms. 668.

(*y*) Atty. Gen. *v.* Robins, 2 P. Wms. 23. See also Accord. Stammers *v.* Halliley, 12 Sim. 42.

(*z*) Brown *v.* Brown, 1 Keen, 275. See, for further examples of preference of general legatees in payment, in consequence of the intention of the testator, not expressed in terms, but sufficiently apparent from the whole contents of the Will, Lewin *v.* Lewin, 2 Ves. Sen. 415. Beeston *v.* Booth, 4 Madd. 161, 170. Pepper *v.* Bloomfield, 3 Dr. & W. 499.

shall be paid *immediately* after his death, out of the *first* monies that shall be received by the executors (*a*). So if the words are "*Imprimis*," or "in the first place, I give 1000*l.* to A." this will not give a priority to other general legatees (*b*). In a modern case (*c*), the testator gave his personal estate to executors, in the first place, to pay debts, funeral and testamentary expenses; and in the next place, three legacies to B., C., and D., with legal interest from three months after his death; and afterwards to raise and set apart three sums of money to be applied as therein mentioned: Upon a question of abatement, the Court declared, upon the principle before stated, that none of the legacies were entitled to a priority of payment, and therefore, that all of them must abate proportionally, according to the general rule (*d*).

Legacies in the nature of specific legacies.

It is necessary here to refer to the class of legacies alluded to in a previous section (*e*), as being in the nature of specific legacies, and sometimes called demonstrative legacies, *viz.* bequests of money with reference to a particular fund for their payment, and not simply a gift of the specific fund itself: Those legatees have such a lien upon the specific fund referred to, that they will not be obliged to abate with general legatees: And in this, as in the preceding cases, the testator's intention is the principle; for it is inferred, that he, in referring to specific parts of his estate for payment of particular legacies, intended those legacies a preference to others which he had not so secured (*f*).

Of the abatement of specific legacies.

It has appeared, that as long as any of the assets, not specifically bequeathed, remain, such as are specifically

(*a*) Blower *v.* Morret, 2 Ves. Sen. 420. See also 4 Madd. 168.

(*b*) Brown *v.* Allen, 1 Vern. 31. Blower *v.* Morret, 2 Ves. Sen. 421. Treat. Eq. B. 4, Pt. 1, ch. 2, s. 5. 4 Madd. 168, 169.

(*c*) Beeston *v.* Booth, 4 Madd. 161. 1 Rop. Leg. 369, 3d edit.

(*d*) See also Thwaites *v.* Foreman, 1 Coll. 409. Creed *v.* Creed, 1 Dr. & W. 416. 11 Cl. & F. 491.

(*e*) *Ante*, p. 995.

(*f*) Roberts *v.* Pocock, 4 Ves. 150. Lambert *v.* Lambert, 11 Ves. 607. Acton *v.* Acton, 1 Meriv. 178. 1 Rop. Leg. 316, 3d edit. Creed *v.* Creed, 11 Cl. & F. 509, *per* Lord Cottenham.

bequeathed are not to be applied in payment of debts (*g*); although to the complete disappointment of the general legacies: But when the assets, not specifically bequeathed, are insufficient to pay all the debts, then the specific legatees must abate, in proportion to the value of their individual legacies (*h*). So a legatee entitled to a legacy of the sort just mentioned, in the nature of a specific legacy, must abate with the specific legatees (*i*).

An important inquiry connected with this subject, sometimes occurs; *viz.* under what circumstances the specific legatees of chattels can compel the devisees of the real estate of the testator to contribute to the satisfaction of his debts, in case the general personal estate proves insufficient for that purpose. But it will be more convenient to consider this question hereafter, together with the subject of the exoneration of real estate (*k*) and the doctrine of marshalling assets (*l*).

SECT. III.

Of the Executor's Assent to a Legacy.

Necessity of executor's assent to complete the title of legatee.

The whole personal property of the testator, as it has appeared in a former part of this Work, devolves upon his executor (*m*). It is his duty to apply it, in the first place, to the payment of the debts of the deceased: and he is responsible to the creditors for the satisfaction of their demands, to the extent of the whole estate, without regard to the testator's having by the Will directed that a portion of

(*g*) Or of costs, when a suit has been instituted: Barton *v.* Cooke, 5 Ves. 464.

(*h*) Sleech *v.* Thorington, 2 Ves. Sen. 561, 564. Clifton *v.* Burt, 1 P. Wms. 680. Duke of Devon *v.* Atkins, 2 P. Wms. 382, 383. 1 Rop. Leg. 313, 3d edit. 2 Fonbl. Treat. Eq. B. 4, Pt. 1, ch. 2, s. 5, note (*q*).

(*i*) Roberts *v.* Pocock, 4 Ves. 160. 1 Rop. Leg. 316, 3d edit.

(*k*) *Post*, Pt. IV. Ch. II. § I.

(*l*) *Ibid.* § II.

(*m*) *Ante*, p. 546.

it shall be applied to other purposes (*n*). Hence, as a protection to the executor, the law imposes the necessity that every legatee, whether general or specific, and whether of chattels real or personal, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect (*o*).

Hence, also, the legatee has no authority to take possession of his legacy without such assent, although the testator, by his Will, expressly direct that he shall do so: for if this were permitted, a testator might appoint all his effects to be thus taken, in fraud of his creditors (*p*).

Before such assent, however, the legatee has an inchoate right to the legacy, such as is transmissible to his own personal representatives, in case of his death before it be paid or delivered (*q*), and such as to be subject to forfeiture, as in case of the outlawry of the legatee (*r*).

Again, if the testator by Will forgive a debt due to him from a particular person, it is the better opinion, that the assent of the executor is necessary to give effect to the testator's intention; for although, on the one hand, it may be alleged that the party, to whom the debt is bequeathed, must necessarily have it by way of retainer, and that such a clause operates rather as an extinguishment than as a donation, and therefore that it needs no such assent as where there is to be a transfer of the property; yet, on the other hand, a debt so forgiven is regarded, with great reason, in the light of a legacy, and, like other legacies, not to be sanctioned by the executor, in case the estate be insufficient for the payment of

(*n*) See *ante*, p. 1149.

(*o*) Swinb. Pt. 1, s. 6, pl. 5, s. 7, pl. 1. 1 Roll. Abr. 618, tit. Devise, (A.) pl. 1, 2. Co. Lit. 111, *a*. Perk. s. 488, 570. Wentw. Off. Ex. 69, 14th edit. Bolles *v*. Nyseham, Dyer, 254, *b*. Northey *v*. Northey, 2 Atk. 77. 1 Saund. 280, *e*. note (5) to Duppa *v*. Mayo. Where an executor has not assented to a specific bequest, the persons beneficially entitled are not necessary parties to a suit relating to the property specifically bequeathed: Const *v*. Harris, 1 Turn. & R. 514.

(*p*) Wentw. Off. Ex. 409, 14th edit.

(*q*) Wentw. Off. Ex. 69, 14th edit.

(*r*) Toller, 308: This is put doubtingly in Wentw. Off. Ex. 70, 14th edit.

debts: But as soon as the executor assents, and not before, it shall be effectually discharged (*s*).

Until very lately, it appears to have been the practice of the Bank of England, with respect to government stock or annuities, grounded upon the statute 5 W. & M. c. 20, by which the Bank was instituted, and upon the other Acts of Parliament which regulate the devise of property transferable at the Bank, (by which the probates of Wills are directed to be there deposited, for the purpose of having the trusts extracted,) in cases where stock, &c. has been specifically bequeathed, without the intervention of trustees, to permit the transfer to be made to the legatees, and not to the executor; and when trustees have been appointed, then to the trustees, with a restriction not to allow of a transfer to any other persons, except those named in the Will: It seems, however, to be now clear, that this practice is erroneous, and that the executor, having the legal right to the specific as well as to the general assets, to pay debts, &c., has the sole right to call upon the Bank to transfer the stock into his name; as no interest in it vests in the legatees prior to his assent (*t*). It also appears to be immaterial whether such property be given specifically in the strict sense of the word, or as a residue; such property being to be considered in no other view than the other general assets as to this purpose, and therefore subject to all the incidents of a testamentary disposition of personal estate (*u*). And now by stat. 8 & 9 Vict. c. 91, s. 1, it is expressly enacted, that all stock, standing in the name of any deceased person, shall and may be assigned and transferred by the executors or administrators of the deceased, notwithstanding any specific bequest thereof (*v*).

It follows from the rule respecting the necessity of the

(*s*) Wentw. Off. Ex. 72, 14th edit. Rider *v.* Wager, 2 P. Wms. 332. Sibthorp *v.* Moxon, 3 Atk. 581. S. C. 1 Ves. Sen. 50. Elliott *v.* Davenport, 1 P. Wms. 83. Izon *v.* Butler, 2 Price, 41. Atty. Gen. *v.* Holbrook, 3 Younge & Jerv. 114. S. C. 12 Price, 407.

(*t*) See *ante*, p. 688. 1 Rop. Leg. 732, 3rd edit. Humberstone *v.* Chase, 2 Younge & C. 209.

(*u*) 1 Rop. Leg. 732, 3d edit.

(*v*) See *ante*, p. 689.

executor's assent, that if, without it, the legatee takes possession of the thing bequeathed, the executor may maintain an action of trespass or trover against him: So, although a chattel, real or personal, specifically bequeathed, be in the custody or possession of the legatee, and the assets be fully adequate to the payment of debts, he has no right to retain it in opposition to the executor: by whom, in such case, an action will lie to recover it (*w*).

If an executor refuse his assent without cause, he may be compelled to give it, by a Court of Equity (*x*).

What shall constitute an assent.

With respect to what shall constitute such assent on the part of the executor, the law has for this purpose prescribed no specific form: and it may be either express or implied (*y*): The executor may not only in direct terms authorize the legatee to take possession of his legacy, but his concurrence may be inferred either from indirect expressions or particular acts; and such constructive permission shall be equally available (*z*). Thus, for instance, if a horse is bequeathed, and the executor requests the legatee to dispose of it; or if a third person proposes to purchase the horse of the executor, and he directs him to buy it of the legatee; or if the executor himself purchases the horse of the legatee, or merely offers him money for it; this amounts to an assent by implication to the legacy (*a*). So where the legatee of a term of years grants it to the executor, his acceptance of the grant either for himself, or as trustee, is an implied permission that the term shall be the legatee's to grant (*b*). So

(*w*) Mead *v.* Lord Orrery, 3 Atk. 239. Wentw. Off. Ex. 409, 14th edit. Com. Dig. Admon. (C. 5.) Bac. Abr. Exors. (L.) 3.

(*x*) Com. Dig. Admon. (C. 8.)

(*y*) Whether there has been an assent or not may involve matters of law, but it is generally a question of fact. Elliott *v.* Elliott, 9 M. & W. 27, *per* Lord Abinger. Mason *v.* Farnell, 12 M. & W. 674.

(*z*) Com. Dig. Admon. (C. 6.) Toller, 308, 309.

(*a*) Wentw. Off. Ex. 414, 14th edit. Com. Dig. Admon. (C. 6.) Toller, 309.

(*b*) Wentw. Off. Ex. 414, 14th edit. Com. Dig. Admon. (C. 6.) So where a term of years, subject to a quit rent, was devised, and after the testator's death, his administrator with the Will annexed paid the quit rent for six years, and

in a case where the rents or interest of a bequest are directed to be applied for the maintenance of the legatee during minority, if the executor commences so to apply them, his consent to the principal will be presumed (*c*); or if the legacy be subject to a charge, which is paid by the executor; for assent to the charge is assent to the disposition of the fund out of which it is to be satisfied (*d*).

Again, when the executor informs a legatee that he intends him to have the legacy according to the devise (*e*), or that the legacy is ready for him whenever he will call for it (*f*); such declarations clearly amount to a good assent to the bequest.

On the other hand, since the assent to a legacy by an executor may, in its consequences, be of great prejudice to him, it is but reasonable that the act or expressions deemed sufficient to impart that assent should be unambiguous (*g*). Hence a proposition stated in a book of authority (*h*) may be doubted: *viz.*, that if the executor say to a legatee, "God send you joy of your legacy," those expressions will amount to an assent: For if such words were uttered before the executor had had an opportunity of examining the testator's affairs, it would surely be unjust to construe words of congratulation into terms of assent to a legacy, so as to involve the executor in the consequences of a *devastavit;* although it may be otherwise, if those expressions were uttered after the executor had had sufficient time to acquaint himself with the state of the assets (*i*).

If a term of years or other chattel be bequeathed to A. for life, with remainder to B., and the executor assents to the

in an account rendered to the devisee, debited him with the payments so made; Tindal, C. J., held, that this was sufficient to shew the assent of the administrator to the bequest: Doe *v.* Mabberley, 6 C. & P. 126.

(*c*) Paramour *v.* Yardley, Plowd. 539. 1 Rop. Leg. 737, 3d edit.

(*d*) Young *v.* Holmes, 1 Stra. 70.

(*e*) Touchst. 456. Barnard *v.* Pumfrett, 5 M. & Cr. 70, *per* Lord Cottenham.

(*f*) Hawkes *v.* Saunders, Cowp. 293. 5 M. & Cr. 70.

(*g*) 1 Rop. Leg. 736, 3d edit.

(*h*) Shep. Touchst. 456.

(*i*) 1 Rop. Leg. 736, 3d edit.

interest of A., such assent will enure to vest that of B.; and *e converso:* for the particular estate and the remainder constitute but one estate (*k*). So an assent to a bequest of a lease for years is an assent to a condition or contingency annexed to it (*l*): As if there be a devise of a term to the testator's widow so long as she continues unmarried; and if she marry, then of a rent payable out of the land; the executor's assent to the devise of the term is an assent to that of the rent in case of the devisee's marriage (*m*). So an assent to a devise of a chattel lease is an assent to a devise of rent out of it (*n*). But if a lessee for years bequeaths a rent to A., and the land to B., it has been doubted whether the executor's assent that A. shall have the rent is an assent that B. shall have the land (*o*): However, it is said to be now established, that in this case also, an assent to the bequest to one shall enure to the benefit of the other; on the ground that as the assent of the executor is required as well for the benefit of creditors as for his own, an inference arises, from his assent to one of the legatees of the specific property, that he had no occasion for the term or rent to pay debts; for if he had, then his assent to either of the legatees would be improper, as both ought to abate *pro ratâ* (*p*).

Presumed assent.

In certain cases, the assent of the executor may be presumed; upon the principle, that, in the absence of evidence, the executors shall be taken to have acted in conformity with their duty; as when executors die after the debts are paid,

(*k*) Welcden *v.* Elkinton, Plowd. 521. Lampet's case, 10 Co. 47, *b.* Adams *v.* Pierce, 3 P. Wms. 12. Wentw. Off. Ex. 426, 14th edit. Com. Dig. Admon. (C. 6.) But where there is a bequest of a number of articles, as stock in trade, or plate, the executor may properly withhold his assent as to part. Elliott *v.* Elliott, 9 M. & W. 23.

(*l*) Com. Dig. Admon. (C. 6.)

(*m*) Goffe *v.* Haywood, 1 Roll. Abr. 620, tit. Devise, (E.) pl. 2. S. C. 1 Roll. Rep. 247, 368. S. C. *nomine* Gough *v.* Howarde, 3 Bulst. 121. S. C. *nomine* Gouge *v.* Hayward, Bridgm. 52. Godolph. 244, Pt. 2, c. 30, s. 8.

(*n*) Com. Dig. Admon. (C. 6.) 1 Roll. Abr. 620, tit. Devise, (E.) pl. 3.

(*o*) 3 Bulst. 122. 1 Roll. Rep. 248. Bridgm. 55. Plowd. 521, *b.*

(*p*) 1 Rop. Leg. 738, 3d edit.

but before the legacies are satisfied (*q*). So, as it should seem, the assent of an executor may be concluded from the legatee's possessing himself of the subject bequeathed, and retaining it for some considerable time without complaint by the executor (*r*).

Conditional assent.

The assent of the executor may also be upon a condition precedent, as if he should tell the legatee that he will pay the legacy, provided the assets are sufficient to answer all demands; or, in the case of a devise of a term for years, provided the devisee will pay the rent in arrear at the testator's death; and in that case, if the condition be not performed, there is no assent (*s*). But it should seem that if the condition is such as the executor had no authority to impose, for example, if he should declare his assent, provided the legatee went to York, and there did a thing for the executor's personal benefit, the assent would be considered absolute (*t*). So if the assent be on a condition subsequent, as, provided the legatee will pay the executor a certain sum annually, such condition is void, and a failure in performing it shall not devest the legatee of his legacy (*u*).

By whom the assent can be given:

It must now be inquired by whom the assent to a legacy may be given. It has appeared in an earlier part of this Work, that a person appointed executor may assent to a legacy before he proves the Will (*v*), and that even if he should die without taking probate, his assent would be effectual (*w*). Again, there has already been occasion to observe, that if several executors be appointed, the assent of any one of them is sufficient (*x*); and therefore if there be a legacy

(*q*) See Cray *v*. Willis, 2 P. Wms. 531, 532. 1 Rop. Leg. 742, 3d edit.

(*r*) Mathews on Presumptions, 267. 3 Preston Abstr. 145, 2nd edit. This appears to be a question for the jury: Richardson *v*. Gifford, 1 Adol. & Ell. 52. S. C. 3 Nev. & M. 325.

(*s*) Wentw. Off. Ex. 429, 14th edit.

(*t*) 1 Rop. Leg. 743, 3d edit. See also Westwick *v*. Wyer, 4 Co. 28, *b*. Com. Dig. Admon. (C. 8.) Elliott *v*. Elliott, 9 M. & W. 28, *per* Parke, B.

(*u*) Wentw. Off. Ex. 429, 14th edit.

(*v*) *Ante*, p. 240.

(*w*) *Ante*, p. 241.

(*x*) *Ante*, p. 812.

to one of several executors, he may take it of his own assent, without the others (*y*). Further, the efficacy of an assent by an administrator *durante minore ætate*, in case of an infant being constituted executor (*z*), and the invalidity of the assent of an executrix who is a married woman, without the concurrence of her husband (*a*), have been elsewhere previously considered in this Treatise.

Effect of assent:

At law, after an assent by the executor to a specific legacy, the interest in the chattel bequeathed vests in the legatee (*b*), so that he may bring ejectment (*c*), or trover (*d*), to recover it, even against the executor himself. And there has already been occasion to shew (*e*), that an executor who has assented unconditionally to a specific bequest of the testator's leaseholds is not entitled, in a Court of Equity, to require an indemnity out of the testator's general estate in respect of his covenants contained in the leases.

in what cases the assent may be retracted.

It is likewise true, as a general proposition, that if an executor once assent to a legacy, he can never afterwards retract (*f*): and notwithstanding a subsequent dissent, a specific legatee has a right to take the legacy, and has a lien on the assets for that specific part, and may follow them (*g*). But if the assent has not been completed by payment, in the case of a general legacy, or possession, in that of a specific one, and it's recall is not attended with injury to a third person, as to a *bonâ fide* purchaser from the legatee on the faith of such assent, it seems only reasonable, that the exe-

(*y*) 1 Roll. Abr. 618. Devise, (B.) pl. 2. Perk. s. 572. Com. Dig. Admon. (C. 8.) Townson *v.* Tickell, 3 B. & A. 40.

(*z*) *Ante*, p. 403.

(*a*) *Ante*, p. 825.

(*b*) Paramour *v.* Yardley, Plowd. 539. Westwick *v.* Wyer, 4 Co. 28, *b.* Bastard *v.* Stukely, 2 Lev. 209. Barton's case, 1 Freem. 289. Young *v.* Holmes, 1 Stra. 70 Doe *v.* Guy, 3 East, 120.

(*c*) 3 East, 120.

(*d*) Williams *v.* Lee, 3 Atk. 223.

(*e*) *Ante*, p. 1155. Shadbolt *v.* Woodfall, 2 Coll. 30.

(*f*) Wentw. Off. Ex. 415, 14th edit. Com. Dig. Admon. (C. 8.) The author of the Office of an Executor expresses his opinion that an assent cannot be *after a disassent*, but thinks the question doubtful: p. 415, *et seq.* 14th edit.

(*g*) Mead *v.* Lord Orrery, 3 Atk. 238. Toller, 311.

cutor, under particular circumstances, should have the power of retracting it; as where he assents upon a reasonable ground for considering that the assets are sufficient to answer all demands, but unknown debts are unexpectedly claimed, which occasions a deficiency (*h*). Moreover, if the assent has been completed by payment or possession, *and afterwards debts appear*, of which the executor had no previous notice, he may, by bill in equity, compel the legatee to refund (*i*).

Relation of assent to death of testator.

The assent of an executor shall have relation to the time of the testator's death: Hence, in the case of a devise of a term of years in tithes, in an advowson, or in a house or land, if after the testator's death, and before the executor's assent, tithes are set out, the church becomes void, or rent from the undertenant becomes payable, the assent by relation shall perfect the legatee's title to these several interests (*k*). So such assent shall by relation confirm an intermediate grant by the legatee of his legacy (*l*).

Executor's assent to his own legacy:

In a case of a legacy bequeathed to the executor, the union of the two characters of executor and legatee in one person makes no difference; for his assent is as necessary to a legacy's vesting in him in the capacity of legatee, as to a legacy's vesting in any other person (*m*): and that on the same principle, *viz.* that until he has examined the state of the assets, he is incompetent to decide whether they will admit of his taking the thing bequeathed as a legacy, and whether it must not of necessity be applied in satisfaction of debts (*n*).

His assent to his own legacy, may, as well as his assent to

(*h*) See 1 Rop. Leg. 743, 3d edit.

(*i*) See *post*, Pt. III. Bk. III. Ch. IV. § X. 3 East, 123. *Ante*, p. 797, note (*f*).

(*k*) Wentw. Off. Ex. 445, 446, 14th edit. Saunders's case, 5 Co. 12, *b*. *Infra*, p. 1221.

(*l*) Toller, 311. This is put doubtingly in Wentw. Off. Ex. 69, 445, 14th edit.; and see the remark of Gibbs, C. J., at the conclusion of his judgment, in Doe *v*. Sturges, 7 Taunt. 223. 2 Marsh. 516.

(*m*) Toller, 345.

(*n*) Wentw. Off. Ex. 67, 68, 14th edit. Toller, 345.

that of another legatee, be either express or implied: He may not only, in positive terms, announce his election to take it as a bequest, but such election may also be implied from his language or his conduct (*o*). The rule as to the latter, as laid down by Gibbs, C. J., in *Doe* v. *Sturges* (*p*), is that "if an executor, in his manner of administering the property, does any act which shews he has assented to the legacy, that shall be taken as evidence of his assent; but if his acts are referable to his character of executor, they are not evidence of assent to the legacy."

Therefore, if the executor say that he will have the legacy according to the Will (*q*); or if by deed reciting that he has a term for years by devise, he grant it over (*r*); this will amount to an assent to take it as legatee: So if he take the profits of a term to his own use (*s*), or repair the tenements bequeathed, at his own expense (*t*), or if he exclude a co-executor from a joint-occupancy of a term with him (*u*), all these acts indicate an assent to the bequest. So if a term of years be devised to the executor for life, and afterwards to A. B., if the executor say that A. B. will have it after him, that implies an election to take it as legatee (*v*). In like manner, if he perform a condition or trust annexed to the devise; as if a lessee for years devise his term to his executor, on condition of his paying 10*l.* a-year to J. S., which he pays accordingly; this payment amounts to an election on his part to take the lease as a legacy, and it is in law an execution of the legacy for ever: for he who performs the charge of a thing, claims the benefit which is annexed to it (*w*). Again, an assent to take part as a residuary legatee, is an assent also to take the whole residue in the same character (*x*). On

(*o*) Toller, 345.

(*p*) 7 Taunt. 223.

(*q*) Com. Dig. Admon. (C. 6.) Garrett *v.* Lister, 1 Lev. 25.

(*r*) Com. Dig. Admon. (C. 6.)

(*s*) Com. Dig. Admon. (C. 6.)

(*t*) Com. Dig. Admon. (C. 6.) Cheyney *v.* Smith, 1 Leon. 216.

(*u*) Anon. Dyer, 277, *b.* Com. Dig. Admon. (C. 6.)

(*v*) Garrett *v.* Lister, 1 Lev. 25. Com. Dig. (C. 6.)

(*w*) Paramour *v.* Yardley, Plowd. 544. Com. Dig. Admon. (C. 6.)

(*x*) Hinson *v.* Button, 2 Roll. Rep. 158.

the other hand, if the executor merely say, that the testator "left all to him" (*y*), this will not amount to an election to take as legatee. Further if the executor demise a term bequeathed to him by the description of executor, this cannot be construed into an assent, because the act is consistent with his power and character as executor (*z*): And even a lease by him in his own name, if the lease be in its terms inconsistent with his title as legatee, will not amount to an assent to take as legatee (*a*): It is a rule, that it is not sufficient, to constitute an implied assent, to show that the act is equally applicable to the title of legatee as to the character of executor (*b*).

Until the executor has made his election, either express or implied, he shall take the legacy as executor, though all the debts have been paid independently of such bequest (*c*).

Effect of executor's entry into possession of a term bequeathed to him.

With regard to the effect of *entry* by the executor into possession of a term of years bequeathed to him, the following distinction exists: Where the *entire* term is given to the executor, an entry will amount to an election to take as legatee: But where a sole executor, or one of several executors, takes an interest in a leasehold estate for life, or any *partial* interest, he must do something more than enter, in order to give assent to his legacy (*d*). There is a substantial reason for this distinction; for if his general entry on his life estate were an election to enter as legatee, it would necessarily confirm the remainder devised over (*e*); and that might happen in cases wherein he might want the estate in remainder for sale, in order to pay the testator's debts: Such an assent would be a *devastavit* in the executor, which

(*y*) 1 Roll. Abr. 620. Devise, (D.) pl. 6. Com. Dig. Admon. (C. 7.)

(*z*) Cheyney *v.* Smith, 1 Leon. 216. Com. Dig. Admon. (C. 7.)

(*a*) Doe *v.* Sturges, 7 Taunt. 222.

(*b*) 7 Taunt. 217. S. C. 2 Marsh. 505. See also 1 Coll. 360, *per* K. Bruce, V. C. Accord.

(*c*) Com. Dig. Admon. (C. 5.)

(*d*) Pannel *v.* Fenn, Cro. Eliz. 348. Lampet's case, 10 Co. 47, *b.* Cray *v.* Willis, 2 P. Wms. 531. Doe *v.* Sturges, 7 Taunt. 221. 2 Marsh. 514. S. P. *per* Parke, J., 3 B. & Adol. 680. See Touchs. 457, *contrà.*

(*e*) See *ante*, p. 1179, 1180.

might be a grievous hardship to him: But if the devise to him be absolute, the same reason does not exist; for he has the value of the whole term, as an equivalent, to indemnify himself against the consequences of the *devastavit* (*f*).

In *Doe* v. *Sturges* (*g*), the law on this subject was fully considered by the Court of Common Pleas: In that case the testator bequeathed a term of years to his nephew Samuel Hayes for life, with remainder over, appointing Samuel and two other persons trustees and executors, with power for Samuel during life, and afterwards for the surviving executors and trustees, to demise the lands for twenty-one years: Samuel alone entered upon the property at the testator's death, and demised it for fourteen and forty-two years, reserving the rent to himself, his executors, &c.: He also made the contract for this lease in his own name, and disposed of the estate by his Will, one of his co-executors being alive: The estate was claimed by the plaintiff, deriving title under the Will of the first testator, in opposition to the interest of the defendant, a purchaser from the lessee: The lease could not be supported under the power, and, as a demise by a mere tenant for life, it determined upon his death; but as a lease by one of several executors, it might be supported, unless the executor Samuel had previously assented to the devise to himself: In that event, the legal interest in the term in remainder after his death vested in the devisees over, which entitled them to recover; since the demise by the executor in the character of legatee, could only continue during his life: But the Court decided, that neither his entering into the land, nor his sole lease reserving rent to himself and his executors, (which was alike inconsistent with his interest as tenant for life, and his duty as executor,) should be deemed an assent to the legacy; and that the lease should therefore take effect for the whole forty-two years, out of the lessor's legal interest as executor.

In the case of the *Atty. Gen.* v. *Potter* (*h*), a testator bequeathed a leasehold house, and his residuary estate, to

(*f*) Doe *v.* Sturges, 7 Taunt. 221, by Gibbs, C. J. 2 Marsh. 514.

(*g*) 7 Taunt. 217. 2 Marsh. 505.

(*h*) 5 Beav. 164.

his wife, and John Lane and James Potter, whom he appointed his executrix and executors, on trust to permit his said wife to receive the rents, interest, and profits for life, and afterwards to pay certain legacies, and the residue was given to Ann, the wife of the said James Potter, and three others, or such of them as should be living at his death: The widow, with the permission of her co-executors, retained possession of the house during her life, and Ann Potter, together with the three others, executed a deed, whereby they agreed to take as tenants in common; and it was also executed by James Potter, the executor, and husband of Ann: And it was held by Lord Langdale, M. R., that no assent to the legacy of the house in remainder had been constituted by these facts.

However an entry by an executor, to whom a partial interest only in a term of years has been bequeathed, may, accompanied by other circumstances, amount to an election to take as legatee: As where an executor, devisee for life of a term of years, enters upon the lands, explaining the act by a declaration that he claims the estate as devisee for life (*i*). So where a lease is devised to an executor, during the minority of the testator's eldest son, to the intent that with the profits he should educate all the children, and the residue of the term, after the son attains twenty-one, is given to him; the entry of the executor generally, coupled with an application by him of the rent in educating the children, will amount to an assent, not only to the devise to himself, but of the residue of the term to the eldest son (*k*). In *Doe* v. *Tatchell* (*l*), a testator bequeathed a term in premises to R. Sharp, his executors, &c., in trust to sell and dispose of the same, as might seem most advantageous, and apply the proceeds to the maintenance of the testator's son during his life: He bequeathed the remainder after the son's decease to such uses as the son should by his Will appoint; and he appointed Sharp his

(*i*) Welcden *v.* Elkington, Dyer, 358, *b*. 359. S. C. Plowd. 520.

(*k*) Paramour *v.* Yardley, Plowd. 539. See also Young *v.* Holmes, 1 Stra. 710.

(*l*) 3 B. & Adol. 675.

executor: When the testator died, his journeyman was managing his business on the premises, as he had done for some years, and the testator's son also resided there: At the funeral, Sharp said, in presence of the journeyman and other persons, "The house is young Batten's," (meaning the son's) "Tatchell" (the journeyman) "must stay in the house and go on with the business, but young Batten must have a biding place:" Tatchell accordingly continued on the premises, carrying on the business, paying no rent, but maintaining the testator's son who was weak in intellect and unable to provide for himself: Sharp lived twenty years afterwards, and did not interfere further with the property: And the Court of King's Bench held, that that was a sufficient evidence of a disposal of the property by Sharp according to the trusts in the Will, and that he had assented to take under the Will as legatee in trust, and not as executor (*m*).

This decision, it may be observed, demonstrates that it is not essential for the efficacy or validity of an assent to a bequest that it should confer a legal interest, or affect the mere legal title to the subject of the bequest: And accordingly, where a testator bequeathed all his personal estate to his wife, with the exception of two leasehold houses, the rents of which he gave her for life, and after her death he directed that they should be sold and the produce divided among his four children, and he appointed his wife and another person his executrix and executor; and upon his death his wife entered into possession of his personal property, including the leasehold houses, and paid all his debts; it was held by Knight Bruce, V. C., that, under the circumstances of the case, she had assented to the legacy to the children (*n*).

Executor taking possession of chattels bequeathed to him for life.

In *Richards* v. *Browne* (*o*), a testator bequeathed to a Miss Wade, whom he appointed executrix, his household furniture for her life, and after her death to Sarah Chapple: The

(*m*) See also Trail *v.* Bull, 1 Coll. 352.

(*n*) Trail *v.* Bull, 1 Coll. 352.

(*o*) 3 Bingh. N. S. 493. *Ante,* p. 1160, *et seq.*

testator, at the time of his decease, which took place in the year 1825, was indebted in 100*l.* on a promissory note, which he had made in the year 1816, and on which he had regularly paid interest during his life: On his death, Miss Wade took possession of the furniture, and continued to pay interest on the note up to the year 1831: On her death in the year 1832, Sarah Chapple took possession of the furniture: And it was contended, that Miss Wade, by so taking possession under the bequest to her for life, had assented to the residuary bequest to S. Chapple: But the Court of Common Pleas held, that this did not, under the circumstances, amount to such an assent: And Tindal, C. J., said, that though an assent to a particular estate in a property bequeathed is an assent to the estate in remainder also, yet, as Miss Wade might have taken the furniture either as executrix or as legatee, and as there was no reason for presuming she took it on the bad title of a legatee while debts remained unpaid, when she might have taken it on a good one as executrix, it must be intended that she held it as executrix.

Executor's assent to his own legacy after renouncing.

If an executor legatee renounce probate, his assent to his own legacy will be ineffectual: and if he take the thing bequeathed without the permission of the administrator *cum testamento annexo*, he will incur the same liabilities as any other legatee so acting (*p*).

Assent of one of several executors to his own legacy.

If one of several executors be a legatee, his single assent to his own legacy will vest the complete title in him (*q*): And if the subject be entire and given to all the executors, the assent of any one of them to his own proportion will be sufficient (*r*).

(*p*) Broker *v.* Charter, Cro. Eliz. 92. But *quære*, where the legatee, being one of several executors, renounces, and the others prove the Will: See *ante*, p. 1125, note (*n*).

(*q*) 1 Roll. Abr. 618, Devise, (B.) pl. 2, 3. Townson *v.* Tickell, 3 B. & A. 40. *Ante*, p. 812, 1181.

(*r*) *Ibid.*

Sect. IV.

At what time Legacies are to be paid: and herewith of Bequests for Life, with remainder over.

Legacies generally payable at the end of a year from testator's death.

On the same principle that the assent of an executor to a legacy is necessary, he cannot, before a competent time has elapsed, be compelled to pay it. The period fixed by the civil law for that purpose, which our Courts have also prescribed, and which is analogous to the Statute of Distributions, (as will hereafter be seen,) is a year from the testator's death, during which it is presumed that the executor may fully inform himself of the state of the property (*s*). But within that period he cannot be compelled to pay a legacy, even in a case where the testator directs it to be discharged within six months after his death (*t*).

This allowance, however, to executors is merely for convenience, in order that the debts of the testator may be ascertained, and the executors made acquainted with the amount of assets, so as to be able to make a proper distribution of them (*u*): Therefore, if the state of the testator's circumstances be such as to enable the executors to discharge legacies at an earlier period, they have authority to do so (*v*).

(*s*) Wood *v.* Penoyre, 13 Ves. 333, 334. Pearson *v.* Pearson, 1 Scho. & Lefr. 11. Toller, 312.

(*t*) See Benson *v.* Maude, 6 Madd. 15. In Brooke *v.* Lewis, 6 Madd. 358, the testator gave certain legacies, which he directed to be paid within six months after his decease; and he directed the residue to be divided among certain persons named, or such of them as should be living *at the time the same should be distributed:* And it was holden, that the residue was to be divided among the legatees named, who were living at the end of one year after the death of the testator.

(*u*) Garthshore *v.* Chalie, 10 Ves. 13.

(*v*) Pearson *v.* Pearson, 1 Scho. & Lefr. 12, by Lord Redesdale, "I know of no case," said Lord Eldon, in Angerstein *v.* Martin, 1 Turn. & R. 241, "which prevents executors, if they choose, from paying legacies, or handing over the residue, within the year: and if it is clear, *currente anno,* that the fund for the payment of debts and lega-

Again where a legacy was given to A. to be paid at twenty-one, and if he should die before attaining that age, then to B., and A. died before twenty-one, several years after the testator; it was holden that B. was entitled to receive the legacy immediately upon the death of A.: for although it was objected, that this being a new substantive legacy to B., the executor ought to have a year's time for the payment of it, yet the Court held, that the year's time must be intended to be from the death of the testator; whereas in this case the testator had been dead much longer (*w*).

Practice in an administration suit.

According to the ordinary practice in a suit to administer the assets of a deceased testator, the Court in the first place, waits until all the claims on the estate are settled, and until the clear fund is ascertained; and then the particular legatees are paid (*x*): They are paid their principal, and if entitled to interest, they are paid interest at the rate of four per cent. up to that time (*y*).

But if it clearly appears, that a surplus will remain, after discharging all the testator's debts and liabilities, although the exact amount of the surplus cannot be ascertained for a considerable time, the Court will, by anticipation, direct proportional payments to be made to pecuniary legatees, as far as that can be done with safety to the creditors (*z*).

In a late case (*a*) where it appeared, upon affidavits, that the estate was large, with but few debts or charges thereon, the Court ordered the jointure of the widow of the testator, and annuities given by his Will, to be paid out of the income

cies is sufficient, there can be no inconvenience in so doing." His Lordship also observed, on another occasion, that if a case was produced in which it was quite clear that there were no debts, the Court would give the fund to the party, notwithstanding there had not been a lapse of twelve months: Garthshore *v.* Chalie, 10 Ves. 13.

(*w*) Laundy *v.* Williams, 2 P. Wms. 478.

(*x*) Thomas *v.* Montgomery, 1 Russ. & M. 737.

(*y*) See *post*, Pt. III. Bk. III. Ch. IV. § VI., as to claiming interest.

(*z*) 1 Russ. & M. 729. But the legatees are not entitled to have the fund appropriated, subject to the eventual demands established: See *post*, p. 1205.

(*a*) Digby *v.* Boycatt, 4 Hare, 444.

of the estate, *before decree*, but refused to direct the payment of the pecuniary legacies.

Legacy subject to a devesting contingency.

Where a legacy is given generally, subject to a limitation over upon a subsequent event, the devesting contingency will not prevent the legatee from receiving his legacy, at the end of the year from the testator's death; and he is not bound to give security for repayment of the money, in case the event should happen: Thus where a legacy was given on condition to be void in case the legatee should succeed to an estate in the event of the death of A. without issue of her body, payment was decreed in the lifetime of A., and without security for refunding (*b*). But in a modern case (*c*), a legacy was given to a father, on condition that he did not interfere with the education of his daughter: And on a bill by the father for his legacy, the Court required from him security to that effect, to be approved by the Master, and directed the costs of the proceedings to be paid out of the legacy.

Annuity.

If an annuity be given by Will, it shall commence immediately from the testator's death, and consequently the first payment shall be made at the expiration of a year next after that event (*d*). Where an annuity is expressly directed to commence within the year, as at the first quarter-day after the testator's death (*e*), or where an annuity is given with a

(*b*) Fawkes *v.* Gray, 18 Ves. 131. See also Griffiths *v.* Smith, 1 Ves. Jun. 97. 1 Rop. Leg. 752, 3d edit.

(*c*) Colston *v.* Morris, 6 Madd. 89.

(*d*) By Lord Eldon, in Gibson *v.* Bott, 7 Ves. 96, 97, and in Fearns *v.* Young, 9 Ves. 553. Stamper *v.* Pickering, 9 Sim. 176. See also Houghton *v.* Franklin, 1 Sim. & Stu. 392, where Sir J. Leach observes, that as a Will speaks at the death of a testator, it must be intended that the payment of an annual sum given by it is to commence from that period, unless there be some circumstances or expressions in the Will to control that intention. But in Storer *v.* Prestage, 3 Madd. 168, his Honor said, that "when annuities *are given out of a residue*, and there is no time of payment mentioned in the Will, it may be questioned whether the principle must not be the same as if there were one tenant for life of the residue, and the annuities be payable only from the end of one year after the testator's death." See, however, *post*, p. 1193, *et seq.*

(*e*) Storer *v.* Prestage, 3 Madd. 167.

direction that it shall be paid monthly (*f*), the money will be due at the first quarter-day in the former case, and at the end of the first month after the testator's death, in the latter, although not payable by the executor till the end of the year (*g*). Where a testator gives an annuity to A. for life, and directs the first payment to be made within one month from his, the testator's, death, the annuity commences from the death of the testator; and though the first year's payment is due at the appointed time, the payment for the second year does not become due till the end of the year (*h*). Where a testator gives an annuity to A. for life, payable quarterly, the first payment to be made within eighteen months after his death; the annuity does not commence till fifteen months from the death of the testator (*i*).

Bequests for life, remainder over:

A distinction was taken by Lord Eldon, in *Gibson* v. *Bott* (*k*), between an annuity and a legacy for life: "If an annuity," said his Lordship, "is given, the first payment is paid at the end of the year from the death; but if a legacy is given for life, with remainder over, no interest is due till the end of two years. It is only interest of the legacy; and till the legacy is payable, there is no fund to produce interest" (*l*).

However, a different doctrine prevails with respect to a bequest of the *residue* of personal estate for life, with remainder over: For the later decisions seem to have established that the person taking the residue for life is entitled to the income, in some shape or other, from the death of the testator (*m*).

(*f*) Houghton v. Franklin, 1 Sim. & Stu. 390.

(*g*) See *ante*, p. 1190.

(*h*) Irvin v. Ironmonger, 2 Russ. & M. 531.

(*i*) 2 Russ. & M. 531.

(*k*) 7 Ves. 96.

(*l*) It is a doubtful point whether a sum of money, directed to be placed out to produce an annuity, is to be considered as a legacy payable at the end of a year, or as an annuity, payable from the death: 7 Ves. 97.

(*m*) Angerstein v. Martin, 1 Turn. & R. 232. Hewitt v. Morris, 1 Turn. & Russ. 241. La Terriere v. Bulmer, 2 Sim. 18. Dimes v. Scott, 4 Russ. 195. Douglas v. Congreve, 1 Keen, 410. Taylor v. Clarke, 1 Hare, 161. But see *contrà*, Taylor v. Hibbert, 1 Jac. & Walk. 308. Stott v. Hollingworth, 3 Madd. 161. Griffith v. Morrison, 1 Jac. & Walk. 311, note, and Amphlett v. Parke, 1 Sim. 275.

But some difficulty exists in applying this doctrine in instances where the testator has directed the residue to be invested in specified securities: And the rule in cases of such a nature appears not to be yet exactly settled.

In *La Terriere* v. *Bulmer* (n), Sir Anthony Hart, V. C., held, that the tenant for life of a residue, which was directed to be laid out in certain securities, was entitled to the income accrued in the first year after the testator's decease, on such parts of the testator's estate as were invested at his death in the proper securities, and on such parts as were afterwards so invested within the same year; but that the income before such investment formed part of the capital of the residue. In *Dimes* v. *Scott* (o), a testator directed the residue of his personal estate to be converted into money, and invested in government or real securities, in trust for A. for life, and after his death for B.: Part of the estate consisted of a share which the testator had in an Indian loan bearing interest at ten per cent.: After it had been determined that a conversion ought to have been made into three per cent. stock at the end of a year after the testator's death (p), a question arose, whether the tenant for life was entitled to the interest actually made during the year; and it was held by Lord Lyndhurst, that the tenant for life should be allowed during that period, in lieu of the actual income, the dividends on so much three per cent. stock as the proceeds of the property, if converted at the end of that year, would have purchased. In *Douglas* v. *Congreve* (q), a testator bequeathed the residue of his estate and effects real and personal to trustees, upon trust to convert the same into government securities in their own names, and to pay the interest and dividends thereof to M. S. for her life, and after her decease to pay and transfer such residue in equal moieties to the persons therein mentioned: And Lord Langdale, M. R., said, that in a case where there is no direction to accumulate, and therefore no direction to add interest to capital, it appeared to him more likely to have

(n) 2 Sim. 18.

(o) 4 Russ. 195.

(p) See *post*, p. 1196.

(q) 1 Keen, 410.

been the intention of the testator that, until the lapse of such convenient time as may be allowed to the executor to make the conversion directed by the Will, the tenant for life should enjoy the interest actually accrued; and if it should be held, as in *Dimes* v. *Scott*, that the conversion ought to be made in a year, his Lordship thought that no inconvenience could follow from allowing the tenant for life the interest of the residue, making interest as it stood at the time of the testator's death, until the end of one year, or so much of that year as should elapse before the conversion of the residue according to the direction of the Will: And the learned Judge held accordingly. In *Taylor* v. *Clark* (*r*), Wigram, V. C. considered that *Douglas* v. *Congreve* and *Dimes* v. *Scott* could not stand together, and his Honor said, that he felt bound to follow the authority of the latter case, and did accordingly act upon it, although he expressed his own unfettered opinion to be, that *La Terriere* v. *Bulmer* was altogether right, and that so far as that case is impugned by the decision of *Dimes* v. *Scott*, the latter decision was to be regretted (*s*).

(*r*) 1 Hare, 161.

(*s*) It is, however, obvious, that the language of a Will may be such as to entitle the tenant for life to receive the actual income of the testator's property *in specie*, as it stood at his death, and nothing more or less, until the property shall be actually converted, or at all events, until it might have been so, but for improper delay. See Wrey *v.* Smith, 14 Sim. 202. Mackie *v.* Mackie, 5 Hare, 70. Sparling *v.* Parker, 9 Beav. 524. Again, the claim of the tenant for life to any income at all during the year may, of course, be controlled by an opposite disposition of the income before investment. Thus, where a residue is directed to be laid out in land, to be settled on a person for life, with remainder over, and *the interest to accumulate* until the money is so laid out, the accumulation shall cease at the end of the year from the testator's death, and from that period the legatee for life will be entitled to the interest: Sitwell *v.* Bernard, 6 Ves. 520. Stair *v.* Macgill, 1 Bligh, N. S. 662. S. C. 1 Dow. N. S. 24. Vigor *v.* Harwood, 12 Sim. 172. Tucker *v.* Boswell, 5 Beav. 607. See also Parry *v.* Warrington, 6 Madd. 155. Where the testator directed a sale of his real estate with all convenient speed after his death, and that the produce, together with his residuary personal estate, should be invested, and the dividends be paid to one for life, and further directed that the trustees should stand possessed of the trust monies and rents and profits until sale and investment; and the land remained unsold; Sir J. Leach, M.R., said that the

With respect to cases where the testator simply bequeaths all the residue of his personal estate for life with remainder over, without any direction to invest it in any particular manner, it must be observed, that, as between the tenant for life and the remainder-man, where the residue consists in part, or wholly, of property in it's nature perishable, and daily wearing out, such as leaseholds, (not specifically given) the tenant for life will not be entitled to the annual produce which the property so wearing out is actually making, but to interest from the death on the estimated value (*t*). And it is a general rule, that where personal property is bequeathed for life, with remainder over, and not specifically, it is to be converted into the three per cents., subject, in the case of a real security, to an inquiry, whether it will be for the benefit of all parties; and the tenant for life is entitled only upon that principle (*u*). And it appears to be now established, with respect to the application of this rule, that the tenant for life is to be allowed, *as from the death of the testator*, the income of such parts of the personal estate as were at his death, and have remained, in a state of investment which ought to be recognised and allowed to be continued by a Court of Equity: But that with regard to those parts of the personal estate which neither were at the testator's death, nor

tenant for life, by the clear language of the Will, was not entitled to the rents and profits of the residuary real estate until it had been sold and the produce invested: That it was consistent with principle and authority, that twelve months should be considered as the time within which the sale might reasonably have been made: And that from that time the tenant for life was entitled to the rents: Vickers *v.* Scott, 3 M. & K. 500.

(*t*) Gibson *v.* Bott, 7 Ves. 89. Fearns *v.* Young, 9 Ves. 552. 2 Rop. Leg. 298, 3d edit.

(*u*) Howe *v.* Lord Dartmouth, 7 Ves. 137, *a.* Dimes *v.* Scott, 4 Russ. 195. Alcock *v.* Sloper, 2 M. & K. 699. Crawley *v.* Crawley, 7 Sim. 427. Mills *v.* Mills, *ibid.* 501. *Ante*, p. 1012, 1013. Mousley *v.* Carr, 4 Beav. 49. Mackie *v.* Mackie, 5 Hare, 70, 75, 76. Preston *v.* Melville, 15 Sim. 35. Chambers *v.* Chambers, 15 Sim. 183. But this general rule does not attach upon property of a testator who makes his Will and dies in India, leaving property and a family there, unless the parties come to this country; and then the person in remainder is entitled to have the fund brought here and invested: Holland *v.* Hughes, 16 Ves. 111. S. C. 3 Meriv. 685.

have since been, in such a state of investment as ought to be recognised and allowed to be continued by the Court, they must be valued as at a period of one year after his death; and interest from his death, on the value so taken, not exceeding four per cent., must be paid to the tenant for life (*v*).——But though for the purpose of determining the amount of income to which the tenant for life is entitled, the property must be thus feigned to be in a proper state of investment at that period, it does not follow that he can demand payment of an income to that amount, until the property in respect of which it is payable shall be gotten in (*w*).

It must here be observed, that where the bequest to the tenant for life is *specific*, the legatee in remainder is not entitled to have the property so converted, notwithstanding by reason of it's being a decreasing fund, the legacies over may altogether fail (*x*). So where the bequest is not "*specific*," in the strict sense of the expression, yet if the Court find in the Will an indication of intention that the property is to be enjoyed in it's existing state, that intention must be carried into effect, and the property shall be so enjoyed (*y*). But a direction by the testator for the conversion and investment of his personal property from time to time as trustees may think fit, will not, *per se*, prevent the operation of the general rule above mentioned, (*viz.* that where personal property is bequeathed in a series of limitations, it shall be invested in such securities as are approved by a Court of Equity for the benefit of all persons interested in it;) for such a direction expresses no more than the law would direct without it (*z*).

(*v*) Caldecott *v.* Caldecott, 1 Y. & Coll. Ch. C. 312, 737. See also Turner *v.* Newport, 2 Phill. Ch. C. 14. 14 Sim. 32. The usual course seems to have been to allow 3*l.* per cent. only: But it has been held that it is competent to the Court to allow 4*l.* per cent. Sutherland *v.* Cook, 1 Coll. 504, 505.

(*w*) 1 Hare, 170.

(*x*) Vincent *v.* Newcombe, 1 Younge, 599. *Ante*, p. 997. Collins *v.* Collins, 2 M. & K. 703. Alcock *v.* Sloper, 2 M. & K. 699. Bethune *v.* Kennedy, 1 Mylne & Cr. 114. *Ante*, p. 1008, *et seq.*

(*y*) *Ante*, p. 1008, *et seq.* Pickering *v.* Pickering, 2 Beav. 31. 4 Myln. & Cr. 289. But see also Chambers *v.* Chambers, 15 Sim. 183.

(*z*) Caldecott *v.* Caldecott, 1 Y. & Coll. Ch. C. 312.

Inventory by legatee for life:

If personal chattels are bequeathed to A. for life, remainder to B., A. will be entitled to the possession of the goods, upon signing and delivering to the executor an inventory of them admitting their receipt, expressing that he is entitled to them for life, and that afterwards they belong to the person in remainder (*a*). The old practice of the Court of Chancery was to require the tenant for life to give security for the protection of the remainder-man: But such security is not now required, unless a case of danger is shewn (*b*).

Gift for life of things *quæ ipso usu consumuntur.*

It may here be observed, that a gift for life of things *quæ ipso usu consumuntur*, as corn and wine, *if specific*, is an absolute gift of the property; but if *residuary*, the things must be sold and the interest of the produce paid to the legatee for life (*c*).

Legacy to an infant:

Where the legatee is an infant, the executor cannot safely pay him, or any other person on his account, until he attains twenty-one, unless under the provisions of the statute 36 Geo. III. c. 52, s. 32. In certain cases, indeed, he may apply the *interest* of the legacy to the maintenance of the infant: This subject will be pursued hereafter, together with the inquiry as to the proper person to whom legacies are to be paid (*d*).

payment when legatee dies under age.

If a legacy be given to A. to be paid at twenty-one, and the intermediate interest is not given, and A. dies before that period, his representative must wait for the money until A., if living, would have attained twenty-one (*e*): But where interest is given during the minority, and the legatee dies

(*a*) Slanning *v.* Style, 3 P. Wms. 336. Leeke *v.* Bennett, 1 Atk. 471. Bill *v.* Kinaston, 2 Atk. 82.

(*b*) Foley *v.* Burnell, 1 Bro. C. C. 279. Conduitt *v.* Soane, 1 Coll. 285.

(*c*) Randall *v.* Russell, 3 Meriv. 194. Andrew *v.* Andrew, 1 Coll. 690. See Porter *v.* Tournay, 3 Ves. 314. According to the old rule of the common law, a bequest of a term of years, or of a personal chattel, passed the whole property, and no remainder could be limited after it. But the objection was removed by changing the name from *remainders* to *executory bequests*. Manning's case, 8 Co. 94, *b.*, 95, *a.* 2 Saund. 338, *k.*

(*d*) *Infra*, p. 1206—1213.

(*e*) Anon. 2 Vern. 199. Chester *v.* Painter, 2 P. Wms. 336. Roden *v.* Smith, Ambl. 588. Crickett *v.* Dolby, 3 Ves. 13.

under age, his executors or administrators will be entitled immediately on his death (*f*).

Again, in case a legacy be left to A. at twenty-one, and if he die before that period, then to B., and A. dies before he attains his age, B. shall be entitled immediately; for he does not claim under A., but the devise is a distinct substantive bequest, to take effect on the contingency of A.'s dying during his minority (*g*).

A legacy of a defined fund vested absolutely is payable at twenty-one, notwithstanding payment is further postponed by the Will.

It should here be remarked, that where a testator gives a legatee an absolute vested interest in a defined fund, so that, according to the ordinary rule, he would be entitled to receive it on attaining twenty-one, but by the terms of the Will payment is postponed to a subsequent period, *e. g.* till the legatee attains the age of twenty-five, the Court will, nevertheless, order payment on his attaining twenty-one; for at that age he has the power of charging or selling, or assigning it, and the Court will not subject him to the disadvantage of raising money by these means, when the thing is absolutely his own (*h*). So, notwithstanding a legacy is directed to accumulate for a certain period, *e. g.* until the legatee attains the age of thirty, yet if he has an absolute indefeasible interest in the legacy, he may require payment the moment he is competent, by reason of having attained twenty-one, to give a valid discharge (*i*).

(*f*) Cloberry *v.* Lampen, 2 Freem. 25. Crickett *v.* Dolby, 3 Ves. 13. But if a legacy be payable out of *land* at a future day, although given with interest in the meantime, if the legatee die before the day of payment, the Court will not direct the legacy to be raised until the time for payment arrives: Gawler *v.* Standerwick, 2 Cox, 15.

(*g*) Papworth *v.* Moore, 2 Vern. 283. Laundy *v.* Williams, 2 P. Wms. 478. But where legacies were given to A., B., and C., the three co-heiresses of the testator, to be paid at their respective marriages, and if either of them should die, her legacy to go to the survivors; and one of them died unmarried; it was held, that the survivors should not receive the legacy of the deceased before their respective marriages: for the condition, though not repeated, was annexed to the whole, whether it accrued by survivorship, or by the original devise: Moore *v.* Godfrey, 2 Vern. 620. See also, as to a legacy charged on land, Feltham *v.* Feltham, 2 P. Wms. 271.

(*h*) Curtis *v.* Lukin, 5 Beav. 147, 155, 156. Rocke *v.* Rocke, 9 Beav. 66.

(*i*) Josselyn *v.* Josselyn, 9 Sim.

Laches by neglect to invest legacies directed to be laid out in stock.

Where, in the administration of an estate, a Court of Equity decrees the payment of legacies which by the Will are directed to be invested in stock, it never enters into consideration whether the executor might or might not have been able, with reasonable diligence, to have provided for the legacies at an earlier period, in order to fix him with such amount of stock as at the earlier period might have been purchased with the legacy: And the reason, probably, is, because the difficulty and expense which would attend such an inquiry in the case of an executor, makes it more convenient in practice that the legacy should be provided for in money at the time of the administration by the Court, without reference to the price of stocks: But where a legacy is given by a Will to a trustee, who is not an executor, and he is directed to invest it immediately upon receiving it in the purchase of stock, and he receives it from the executor, and in the place of such investment he keeps it in his own hands, his conduct is a plain breach of trust, and he is clearly answerable to his *cestui que trust* for any loss by a subsequent rise in the price of stock: There is in such a case no difficulty or inconvenience in ascertaining the extent of the loss: And, accordingly, when an executor, who happens also to be named a trustee of a legacy to be laid out in stock, has fully administered the estate, and assented to the legacy, and retains the legacy in his hands, not as assets of the testator, but as trustee of the legacy, then the principles which would apply to another trustee must apply to him: He is no longer clothed with the character of executor, but is, as to the legacy, a mere trustee (*k*).

Appropriation of legacies payable *in futuro.*

It is necessary, in conclusion, to advert to the subject of the payment of legacies which, by the Will, are given payable *in futuro*. Although legatees are not entitled in any case to receive their legacies before the day of payment arrives,

63. Saunders *v.* Vautier, 4 Beav. 115. 1 Cr. & Ph. 240. Greet *v.* Greet, 5 Beav. 123.

(*k*) Byrchall *v.* Bradford, 6 Madd. 13. S. C. *ibid.* 235, 240.

yet they are entitled to go into the Court of Chancery, and pray that a sufficient sum be set apart to answer the legacy when it shall become due (*l*).

Thus, in *Ferrand* v. *Prentice* (*m*), a bill was filed by a legatee for the security of a legacy of 200*l.*, which the executor, the defendant, was directed by the Will to pay at the end of ten years after the death of the testator: The bill prayed that the defendant might admit assets and give security, or pay the money into the Bank: And, although no particular reasons were assigned, as wasting assets, or insolvency, in the defendant, yet Sir Thomas Clark, M. R., decreed that the defendant should pay the money into the Bank, and that he should have the interest in the mean time; and that, at the end of the ten years, the principal should be paid to the plaintiff. So in *Walker* v. *Cook* (*n*), a legacy was left to one to be paid at the age of twenty-four: The legatee being only twelve years old, his father filed a bill that the legacy might be invested in the funds: And it was so decreed, though it was declared that the legatee was not entitled to the money before attaining the age of twenty-four. So in *Johnson* v. *Mills* (*o*) the sum of 2000*l.* was left to the testator's daughter at twenty-one; and in default, to her child, and if no child, to one Mills: A bill was filed to secure the fund; which was opposed by the executrix, on the ground there was no danger or insolvency in the case: But Lord Hardwicke said, "I thought nothing was better settled than what is now endeavoured to be made a question; that wherever a demand was made out of assets certainly due, but payable at a future time, the person entitled thereto might come against the executor, to have it secured for his benefit, and set apart in the meantime, that he might not be obliged to pursue

(*l*) By Lord Hardwicke, in Phipps *v.* Annessley, 2 Atk. 58. It is otherwise where the legacy is to be raised out of real estate: Gawler *v.* Standerwick, 2 Cox, 15.

(*m*) Ambl. 273. S. C. 2 Dick. 568. S. C. cited by Lord Thurlow, 1 Bro. C. C. 105.

(*n*) Cited by Lord Thurlow, in Green *v.* Pigot, 1 Bro. C. C. 105.

(*o*) 1 Ves. Sen. 282. S. C. cited by Lord Thurlow, *nomine* Johnson *v.* De la Creuze, 1 Bro. C. C. 105.

these assets through several hands: Nor is there any more useful part of the jurisdiction of this Court in the administration of assets: therefore it is admitted to be done in the case of a legacy always, although contingent and payable at a future day, so that it might fall into the bulk of the estate: and this is done to secure the interest of every party, of course, as a common equity, without expecting any suggestion of insolvency of the executor, or of wasting the assets."

Again, in *Green* v. *Pigot* (*p*), a legacy of 5000*l.* was given to a female infant, to be paid at twenty-one or marriage, with interest at four per cent.; but if she died before, it was directed by the Will that the legacy should sink into the residue: And Lord Thurlow ordered the sum of 5000*l.* (with interest at four per cent. from the end of a year after the testator's death) forthwith to be laid out in three per cents. in the name of the Accountant General, upon the trust and subject to the contingencies in the testator's Will: And his Lordship said that he did not see any distinction as to the legacy being contingent or merely future (*q*). So in *Carey* v. *Askew* (*r*), the testator gave 15,000*l.* to his daughter, to be paid to her at twenty-one or marriage, with interest in the mean time; but if she died before, to sink: And Lord Kenyon, M. R., held, that the money must be immediately raised and appropriated, although the child might not live to attain her age, or day of marriage.

However, it should appear from the modern case of *Webber* v. *Webber* (*s*), that where a legacy of a certain sum of money is given, on a contingency, the Court will not direct a sum of stock belonging to the estate to be appropriated to pay the legacy when the contingency happens; but will direct the whole residue to be paid over to the residuary legatee, on his giving *real security:* The principle is, that the legatee being

(*p*) 1 Bro. C. C. 103.

(*q*) See Pullen *v.* Smith, 5 Ves. 21, for an instance of an appropriation on the application of a contingent legatee. See also the observation of Buller, J., in Hutcheson *v.* Hammond, 3 Bro. C. C. 144, 145.

(*r*) 2 Bro. C. C. 58.

(*s*) 1 Sim. & Stu. 311.

entitled to receive a certain sum in money when the contingent event happens, the legacy is not capable of being secured by the present appropriation of any sum of stock (*t*).

When the appropriation is made under the direction of the Court, it should seem, according to the opinion of Lord Thurlow, in *Green* v. *Pigot* (*u*), that the legatee must bear any losses and enjoy any additions which the fluctuation of the price of stock may cause: But in *Sitwell* v. *Bernard* (*v*), Lord Eldon said, that there had been other cases since *Green* v. *Pigot*, in which it had been held not to be the legitimate effect of appropriation to give a larger interest than if there had been no appropriation: However, in the subsequent case of *Burgess* v. *Robinson* (*w*), where there had been an investment of 500*l.* in stock, in pursuance of an order made on the application of a trustee, without the consent of the plaintiff, who was entitled thereto, Sir William Grant held that the investment of the money was an appropriation by which all parties were bound, and therefore that the plaintiff was entitled to the stock, and all the benefit accrued from the rise thereof (*x*).

Appropriation to secure bequest of an annuity.

In *Slanning* v. *Style* (*y*), a testator had charged the residue of his estate with an annuity of 40*l.* payable quarterly: And Lord Talbot, C., ordered, the estate appearing to consist of some bonds or securities, that such part thereof should be brought before the Master, as might be sufficient to preserve the annuity (*z*).

When a fund has been appropriated for the payment of an annuity given by Will, a question may arise whether the legatee is to suffer the loss consequent on the partial failure of the fund. In cases where the annuity is a charge upon the whole personal estate, it seems clear that the executor

(*t*) By Sir John Leach, V. C., 1 Sim. & Stu. 312, 313.

(*u*) 1 Bro. C. C. 105, 106.

(*v*) 6 Ves. 543.

(*w*) 3 Meriv. 9, 10.

(*x*) See also Rock *v.* Hardman, 4 Madd. 254, by Sir John Leach, V. C. Kimberly *v.* Tew, 4 Dr. & W. 139, 149.

(*y*) 3 P. Wms. 336.

(*z*) See Fryer *v.* Buttar, 8 Sim. 442.

cannot affect the legatee's right to the entire annuity by any appropriation (*a*). Thus in *May* v. *Bennett* (*b*), a testator having directed his executors to lay out, in what government security they pleased, as much money as would produce a certain annual interest, and having given that annual interest to his wife during her life, in case she did not marry again, the executors invested in the five per cents. a sum which yielded dividends exactly equal to the specified income: Those dividends were afterwards diminished by the conversion of the five per cents. into four per cents.: And Lord Gifford, M. R., held, that the widow was entitled to have the deficiency made good, either by the sale from time to time of portions of the appropriated stock, or out of any other part of the residue which could be made available. Again in *Davies* v. *Wattier* (*c*), a testator having directed an annuity to be paid out of his personal estate, a sum of five per cent. stock was, in the course of the cause, ordered to be set apart to answer the annuity: This fund having become insufficient for the purpose, by the conversion of the five per cents. into four per cents., the deficiency was directed by Sir John Leach, V. C., to be supplied out of another fund, to which other persons interested in the residue had been declared to be entitled (*d*). But it may be otherwise where the appropriation is made in certain stock by the executor in conformity with the direction of the testator, so that the bequest may be regarded as a gift of the interest of the particular stock. Thus in *Kendall* v. *Russell* (*e*), a testator gave the yearly sum of 2000*l*. sterling, to his wife for her life, and after her decease, to his trustees, upon the same trusts as after declared concerning the yearly sum of 3000*l*.: He then gave to his trustees the yearly sum of 3000*l*. sterling to issue out of a sufficient sum of stock in the five per cents., to be invested in the names of his trustees for that purpose, in

(*a*) Gordon *v*. Bowden, 6 Madd. 342.

(*b*) 1 Russ. Chan. Cas. 370.

(*c*) 1 Sim. & Stu. 463.

(*d*) See also Boyd *v*. Buckle, 10 Sim. 595.

(*e*) 3 Sim. 424.

trust for his daughter for her life, and, after her decease, for her children: The trustees invested 100,000*l.* five per cents., to answer the two yearly sums: The stock was afterwards converted into four per cents., whereby the dividends became insufficient to pay the yearly sums: And Sir L. Shadwell, V. C., held that the legatees were not entitled to have the deficiency supplied out of the testator's residuary estate (*f*). Again, where, although the requisite amount of stock has been appropriated in the name of the executor, he afterwards sells it out and wrongfully applies the proceeds to his own use, he and all those who may stand in his place, including a claimant by assignment from him for valuable consideration, even when made before the *devastavit*, of his share in the testator's residuary estate, are precluded from contending that due provision was made for the annuity; and consequently the deficiency caused by the executor's *devastavit* must be supplied out of his share of the residue (*g*).

Appropriation where the amount of the testator's is contingent.

Where the existence and amount of a testator's debts are contingent, and depend upon the result of legal proceedings, before a foreign tribunal, which are not likely to be speedily settled, the Court of Chancery, in administering his assets, will not be induced by that circumstance to direct an appropriation of the fund in Court to answer pecuniary legacies, subject to such demands as creditors may eventually establish (*h*).

(*f*) If the legatee of the annuity assents to the appropriation of some particular fund for the payment of it, the failure thereof, whether partial or total, would probably be at his risk: Lumley on Annuities, p. 298. But such assent must be clearly established: See Arundell *v.* Arundell, 1 M. & K. 316.

(*g*) Morris *v.* Livie, 1 Y. & C. Ch. C. 380.

(*h*) Thomas *v.* Montgomery, 1 Russ. & M. 729. *Ante*, p. 1191.

SECT. V.

To whom Legacies are to be paid.

This inquiry is one of great importance to an executor, who must be careful to pay legacies into the hands of those who have authority to receive them.

Legacy to A. and his family.

If a legacy be given to A., to be divided between himself and his family, and the executor pays the legacy to A., it is well paid to discharge the executor (*a*). So if one was to give a legacy to the Senior Six Clerk, to be divided among himself and the other Six Clerks, it would be well paid to the Senior (*b*).

Infant legatee.

It is a general rule, that, where a legatee is an infant, and would be entitled to receive the legacy, if he were of age, the executor is not justified in paying it either to the infant, or to the father, or any other relation of the infant, on his account, without the sanction of a Court of Equity (*c*): And even in the case of a child who has attained majority, payment to the father is not good, unless it be made by the consent of the child, or confirmed by his subsequent ratification (*d*).

It may happen that an executor has, with the most honest intentions, paid the legacy to the father of the infant; nevertheless he will be held liable to pay it over again to the legatee

(*a*) Cooper *v.* Thornton, 3 Bro. C. C. 96, 186. Robinson *v.* Tickell, 8 Ves. 142. Robinson *v.* Waddilove, 8 Sim. 134. See Woods *v.* Woods, 1 Mylne & Cr. 401, *ante*, p. 965, and the other cases cited, p. 965, note (*a*).

(*b*) 3 Bro. C. C. 99, by Lord Alvanley.

(*c*) Dagley *v.* Tolferry, 1 P. Wms. 285. S. C. *nomine* Doyley *v.* Tollferry, 1 Eq. Cas. Abr. 300, pl. 2. S. C. *nomine* Dawley *v.* Ballfrey, Gilb. Eq. Rep. 103. A contrary doctrine was acted upon in the early case of Holloway *v.* Collins, 1 Chan. Cas. 245. S. C. 1 Eq. Cas. Abr. 300, pl. 1.

(*d*) Cooper *v.* Thornton, 3 Bro. C. C. 97, by Lord Alvanley. If a suit be instituted in the Spiritual Court for an infant's legacy by the father, to have it paid into his hands, an injunction or prohibition will be granted: Rotherham *v.* Fanshaw, 3 Atk. 629.

on his coming of age: And although such cases have been attended with many circumstances of hardship on the executor, yet he has been held responsible, on the policy of obviating a practice so dangerous to the interests of infants, and so naturally productive of domestic discord (*e*). Thus in the case of *Dagley* v. *Tolferry* (*f*), legacies of one hundred pounds a-piece were bequeathed to four infants: the executor paid the legacies to the father, and took his receipt for them: when one of the legatees came of age, who was about ten years old at the time of payment, the father told him that he had such a legacy of his in his hands, but could not pay it immediately, and requested him not to apply to the executor, at the same time promising that he would himself pay it: The son acquiesced for fourteen or fifteen years, during which period his father and he carried on a joint trade, and then became bankrupt: On a commission taken out against the son, this legacy, among other things, was assigned for the benefit of his creditors; and the assignee filed a bill against the executor, for an account and payment of the legacy; which was decreed accordingly by the Master of the Rolls, but without interest; and the decree was affirmed by the Lord Chancellor on an appeal: His Lordship, however, on the hardship of the case, ordered the deposit to be divided. So in *Phillips* v. *Paget* (*g*), the testatrix left a legacy of one hundred pounds each to the three children of B., and appointed C. her executor, leaving him the bulk of her estate, provided he paid those three legacies within a year after her death: The defendant within that period paid into the children's own hands their several legacies, the eldest of whom was then sixteen years, the second fourteen, and the youngest only nine: On their coming of age they filed their bill against the executor to be paid their respective legacies; suggesting that their father had embezzled the money, and was insolvent, and that the payment was a fraud:

(*e*) Toller, 314.

(*f*) 1 P. Wms. 285. S. C. *nomine* Doyley *v.* Tollfery, 1 Eq. Cas. Abr. 303, pl. 2. S. C. *nomine* Dawley *v.* Ballfrey, Gilb. Eq. Rep. 103.

(*g*) 2 Atk. 80, 81.

The defendant in his answer denied all knowledge of the money's ever having come to the father's hands: The Lord Chancellor held, at first, that as the executor paid those legacies to save a forfeiture of what he himself took under the Will, he ought not to pay them over again; but, on farther consideration, conceiving the point to be very doubtful, his Lordship recommended a compromise; and the defendant agreeing to pay fifty pounds, to be divided between the three plaintiffs, without costs on either side, they were ordered to release their legacies.

But when the direction to the executor is not to pay the legacy to the child, but the bequest is made to a *trustee* for him, the executor will be justified in paying the money to the person so appointed (*h*). Hence, if the testator order the sum to be paid to the father, he will be a trustee for his child, and entitled to receive the money; and his receipt will be a good discharge to the executors (*i*).

It would appear, on principle, that the direction for payment to the trustee must appear upon the face of the Will, and cannot be proved by parol evidence. However it appears from the Register's book, that in the case of *Dagley* v. *Tolferry* (*k*), evidence was read that the testator on his death-bed gave direction that the executor should pay the legacies to the father of the infants, that he might improve the money for their benefit (*l*): But Lord Alvanley, in *Cooper* v. *Thornton* (*m*), questioned the propriety of admitting this proof, and observed that it would be dangerous to admit evidence that a legacy, given to one person, was ordered to be paid to another.

But the executor may discharge himself from all responsibility, with respect to the payment of legacies due to infants, by virtue of the statute 36 Geo. III. c. 52, s. 32, by which it is enacted, that " where by reason of the infancy, or absence

(*h*) 1 Rop. Leg. 771, 3d edit.

(*i*) Cooper *v.* Thornton, 3 Bro. C. C. 96. Robinson *v.* Tickell, 8 Ves. 142. *Ante*, p. 1206.

(*k*) *Ubi supra.*

(*l*) See Cooper *v.* Thornton, 3 Bro. C. C. 97.

(*m*) 3 Bro. C. C. 97.

beyond the seas, of any person entitled to any legacy, or to the residue of any personal estate, or any part thereof, chargeable with duty by virtue of this Act, the person or persons having or taking the burthen of any Will or testamentary instrument, or the administration of such personal estate, cannot pay such legacy or some part thereof, although he, she, or they may have effects for that purpose, or cannot pay such residue, or some part thereof, although he, she, or they may have the same, or some part thereof, in his, her, or their hands, it shall be lawful for such person or persons to pay such legacy, or residue, or any parts or part thereof respectively, or any sum or sums of money on account thereof, after deducting the duty chargeable thereon, into the Bank of England with the privity of the Accountant General of the Court of Chancery, to be placed to the account of the person or persons for whose benefit the same shall be so paid: for payment of which money the said Accountant General shall give his certificate as usual in such cases, on production of the certificate of the Commissioners of Stamps, that the duty thereon has been duly paid; and such payment into the Bank shall be a sufficient discharge for the money so paid in, provided the duty be also paid thereon as aforesaid; and such money when paid in, shall be laid out by the said Accountant General, without any formal request for that purpose, in the purchase of three pounds per centum Consolidated Annuities, which, with the dividends thereon, shall be transferred and paid to a person or persons entitled thereto, or otherwise applied for his or their benefit, on application to the Court of Chancery, by petition or motion, in a summary way."

Before the passing of this Act, if a suit was commenced to secure a legacy to an infant, the costs were allowed out of the testator's general assets: But after the statute was passed, Lord Alvanley took occasion to say (*n*), that in future he should not give the costs in such a case; for since the statute,

(*n*) Whopham *v.* Wingfield, 4 Ves. 630.

the executor has nothing to do but under that Act to pay the legacy into Court; and then he has done: and the infant, when of age, may petition for it.

The executor is not bound to pay the legacy into the Bank, under the statute, till the expiration of a year from the testator's death (*o*).

when the executor may allow maintenance out of a legacy:

It must also be observed that an executor cannot, without risk, pay any *part* of a legacy bequeathed to an infant, either to the infant or any person for his use: Therefore the executor is not justified in applying any part of the *capital* of the legacy for the maintenance or advancement of the child, or any other purpose than mere necessaries, without the sanction of the Court (*p*): But with respect to the *interest* of the sum bequeathed, it should seem, that the executor may apply a requisite part of it for the support of the infant legatee, without the authority of the testator, if he does no more than the Court would have directed, if it had been resorted to in the first instance (*q*): For the principle is established, that if an executor do, without application, what the Court would have approved, he shall not be called upon to account, and forced to undo that, merely because it was done without application (*r*).

confirmation by legatee after attaining majority of previous application of legacy:

Again, if a Court of Equity can discover a clear act of the legatee, when of age, confirmatory of the application of his legacy by the executor during his minority, it will hold him estopped from claiming a repayment (*s*). Accordingly Lord Alvanley observed (*t*), with reference to the above-mentioned case of *Dagley* v. *Tolferry* (*u*), "Although the son acquiesced a great length of time, still it was competent to him, or his representatives, to demand it; because a contrary determination would encourage such payment, and because the son must acquiesce, or pursue his father; or, which is the same

(*o*) Toller, 319.

(*p*) Davies *v.* Austen, 3 Bro. C. C. 178. S. C. 1 Ves. Jun. 247. Lee *v.* Brown, 4 Ves. 362. Walker *v.* Wetherell, 6 Ves. 473.

(*q*) 1 Rop. Leg. 768, 3d edit.

(*r*) Lee *v.* Brown, 4 Ves. 369, by Lord Alvanley.

(*s*) 1 Rop. Leg. 771, 3d edit.

(*t*) 3 Bro. C. C. 97.

(*u*) *Ante*, p. 1207.

thing, by bringing his suit against the executor, occasion his pursuing the father: and that I take to be the ground on which Sir John Trevor and Lord Cowper went: *and if the legatee did not stand in that relation to the person to whom the legacy was paid*, the bill would be dismissed." But the intention, on the part of the legatee, to confirm such application must be unequivocal (*v*).

when the Court will order maintenance out of a legacy.

Where the testator is the parent, or in *loco parentis*, of an infant legatee, whether the legacy be contingent, or vested, interest on the legacy shall be allowed as a maintenance from the time of the death of the testator. This subject will be pursued hereafter, together with the subject of interest generally (*w*).

But this may be the proper place to advert to the principles on which the Court will act, when one, not a parent, gives a legacy to an infant. The general rule is, that where a bequest is vested and immediate, so that the legatee, if he were of age, would be entitled to receive his legacy at the end of the year from the testator's death, the Court will order maintenance out of the interest of the legacy, although no express provision be made for maintenance, and even though the income be expressly directed to accumulate (*x*); provided the parents of the infant legatee are unable to maintain him (*y*). But no such allowance will be made by the Court,

(*v*) See Lee *v.* Brown, 4 Ves. 362.

(*w*) See *infra*, p. 1226—1228.

(*x*) Greenwell *v.* Greenwell, 5 Ves. 194. Collis *v.* Blackburn, 9 Ves. 470. Stretch *v.* Watkins, 1 Madd. 253. Where a testator gave his residuary estate to an infant and directed 60*l.* a-year to be allowed for his maintenance, and the residue was of large amount, the Court, from time to time, considerably increased the maintenance: Josselyn *v.* Josselyn, 9 Sim. 63.

(*y*) And an increased allowance for maintenance has been made, for the purpose of supporting parents in great indigence: Allen *v.* Coster, 1 Beav. 1013. But the Court will not direct an inquiry as to the propriety of an allowance to the father for the *past* maintenance of the infant, unless a special case be made: *Ex parte* Bond, 2 M. & K. 439. But see Reeves *v.* Beymer, 6 Ves. 425. Sherwood *v.* Smith, 6 Ves. 455. Collis *v.* Blackburn, 9 Ves. 470. Maberly *v.* Turton, 14 Ves. 499. Stopford *v.* Lord Canterbury, 11 Sim. 82. Stephens *v.* Lawry, 2 Y. & C. Ch. C. 87. An executor (not a father) may be allowed maintenance for the time past: Sisson *v.* Shaw, 9 Ves. 285. Greenwell *v.* Greenwell, 5 Ves. 194.

if the parents be of ability (z). And it is clear that no maintenance will be ordered out of the interest where the legacy is contingent (a), unless, perhaps, by consent of the legatees over, in instances where they are competent to give it (b): "But the cases," said Lord Eldon, in *Ex parte Kebble* (c), "after great struggle, go this length: that where there are equal legacies to a class of children, even with a direction for accumulation, the principal with the accumulation to be paid at twenty-one, with survivorship, in case of the death of any under that age, to the others, the chance of all taking or the survivor being equal, the Court takes the fund, which belongs to all, and must go to all or some of them, and maintains them all out of the interest (d): But the principle cannot be applied, where the legacy is not given absolutely to

This allowance, even in the case of a mother, must be limited to what has been actually expended upon such maintenance, though such expenditure may have been less than what the amount of the child's fortune would have justified. Bruin v. Knott, 1 Phill. Ch. C. 572.

(z) Ability may, perhaps, be understood in the sense of ability to maintain and educate according to the fortune and expectations of the infant. See *Ex parte* Williams, 2 Coll. 740. Even where there is an express provision for the maintenance of an infant legatee, it has been laid down, that the Court will not permit such provision to be applied, if the parent be of ability to maintain the infant legatee: Andrews v. Partington, 3 Bro. C. C. 60. S. C. 2 Cox, 223. But though a father is undoubtedly bound to maintain and educate his children, yet it is competent for him to contract that certain property shall be applied to those purposes: Accordingly in Meacher v. Young, 2 Mylne & K. 490, Sir John Leach, M. R. held, that if, under a marriage contract, a fund has been settled upon trust for the children of the marriage, at twenty-one, with a proviso, that till their shares become payable, the interest shall be applied towards their maintenance; the father is entitled to receive such interest for that purpose, without reference to his own ability to maintain them. See also Stocken v. Stocken, 4 Sim. 152. 4 Mylne & Cr. 95. Hawkins v. Watts, 7 Sim. 199. Thompson v. Griffin, 1 Cr. & Ph. 317. And for a further relaxation of the rule, see Hoste v. Pratt, 3 Ves. 733. Sisson v. Shaw, 9 Ves. 285. Maberly v. Turton, 14 Ves. 499.

(a) Lomax v. Lomax, 11 Ves. 48. Errington v. Chapman, 12 Ves. 20.

(b) Cavendish v. Mercer, 5 Ves. 195, note. Fendall v. Nash, *ibid.* 197, note. Evans v. Massey, 1 Younge & Jerv. 196.

(c) 11 Ves. 606.

(d) See also to the same effect, the subsequent cases of Marshall v. Holloway, 2 Swanst. 436; and Haley v. Bannister, 4 Madd. 275.

the children and the survivor, but in case of the death of a child under twenty-one, there is a limitation to the issue; who for that purpose are as strangers: In this case, as in that, the property may never belong to any of these children" (*e*).

It was said by Sir W. Grant (*f*), that it had very rarely occurred that the Court had broken in upon the capital of a legacy for the mere purpose of maintenance, though frequently, for the purpose of putting out the child for life. However, in *Ex parte Green* (*g*), the petition prayed, that the principal of a sum of 298*l.* belonging to two infants, might from time to time be applied to their maintenance: They had no other property, except some copyhold premises yielding about 6*l.* per annum: Sir Thomas Plumer said, that as the sum was so small, he would venture to make the order; and the order was made without a reference (*h*).

In case of a *feme covert* legatee.

If a legacy be given to a married woman, it must be paid to the husband. So where a legacy was given to a married woman, living separate from her husband, with no maintenance, and the executor paid it to the wife, and took her receipt for it, yet on a suit instituted by the husband against the executor, he was decreed to pay it over again with interest (*i*). It has also been adjudged, that if the husband

(*e*) See *acc.* Errat *v.* Barlow, 14 Ves. 202. Marshall *v.* Holloway, 2 Swanst. 436. *Ex parte* Whitehead, 2 Younge & Jerv. 249. Turner *v.* Turner, 4 Sim. 430. Cannings *v.* Flower, 7 Sim. 523.

(*f*) Walker *v.* Wetherell, 6 Ves. 474.

(*g*) 1 Jac. & Walk. 253.

(*h*) See also Barlow *v.* Grant, 1 Vern. 254. Harvey *v.* Harvey, 2 P. Wms. 23. Payne *v.* Low, 1 Russ. & M. 223. *In re* England, *ibid.* 499. *Ex parte* Swift, *ibid.* 575. *Ex parte* Chambers, *ibid.* 577. Bridge *v.* Brown, 2 Y. & C. Ch. C. 181.

(*i*) Palmer *v.* Trevor, 1 Vern. 261. Toller, 320. Where a sum of stock was bequeathed to a married woman, whose husband was of unsound mind, though no commission of lunacy had issued against him, Sir John Leach, M. R., on a bill filed by the husband and wife for payment of the legacy, transferred the fund into Court to the joint account of the plaintiffs, and afterwards, in consideration of the poverty of the parties, made an order on the petition of the wife, that the dividends should be paid to her for her life: Steed *v.* Calley, 2 M. & K. 52.

and wife are divorced *à mensâ et thoro*, and a legacy be left to her, the husband alone may release it (*k*), and, consequently, to him alone it is payable (*l*).

But if the husband has not made any provision for his wife, the executor may decline to pay the legacy, if it exceeds 200*l.*, until the husband consents to make a suitable settlement upon her: as the Court of Chancery, upon the bill of the husband for the money, would refuse to order payment to him, unless he consented to a reasonable settlement out of it upon the legatee (*m*). Nor does the Court confine it's interposition in favour of the wife, and compel a provision for her, against those persons only, who are seeking to obtain her property by the assistance of the Court; but in extension of the principle of those cases in which equity restrains the husband from proceeding in the Ecclesiastical Court, because that jurisdiction cannot enforce a settlement for the wife, will entertain a bill by a married woman against an executor or administrator and the husband, praying for a provision out of a legacy bequeathed to her, or out of a share of an intestate's estate, to whom she is next of kin (*n*).

But if the wife be an adulteress living apart from her husband, a Court of Equity will not interfere upon her application for a settlement out of a legacy given to her: neither will it order the legacy to be paid to her husband; not to the former, because she is unworthy of the Court's

(*k*) Stephens *v.* Totty, Cro. Eliz. 908. S. C. Moore, 665. Noy, 45. Motam *v.* Motam, 1 Roll. Rep. 426. S. C. 3 Bulst. 264. Chamberlain *v.* Hewson, 1 Salk. 115, by Holt, C. J. S. P. S. C. 1 Ld. Raym. 74.

(*l*) See Green *v.* Otte, 1 Sim. & Stu. 250.

(*m*) Browne *v.* Elton, 3 P. Wms. 202. Lady Elibank *v.* Montolieu, 5 Ves. 742, in note. But the husband is entitled to the *interest* of his wife's property, though he refuses to make a settlement on her: Sleech *v.* Thorington, 2 Ves. Sen. 562, by Sir Thomas Clarke, M. R. See also Vaughan *v.* Buck, 13 Sim. 404. As to how much of the sum bequeathed should be settled on the wife, see Coster *v.* Coster, 9 Sim. 597. The Court, it should seem, has a discretion: But it may be stated, as a general proposition, that the Court never settles the whole on her: *Ibid.*

(*n*) Lady Elibank *v.* Montolieu, 5 Ves. 737. Toller, 321. See Coster *v.* Coster, 1 Keen, 199.

notice or interference; nor to the latter, because he does not maintain her, in respect of which duty the law only gives to him her fortune (*o*). It may, however, be inferred from the case of *Ball* v. *Montgomery* (*p*), that though the Court may not make a settlement on the wife when living in adultery, yet that it will secure her trust property for the benefit of the survivor, or of the children.

Again, where no criminality attaches to the wife, but while she is living apart from her husband, under a deed of separation, a legacy is given to her, as the Court will interpose in her behalf for a provision, and the husband is entitled to the money upon making it, the executor may insist upon a settlement on the wife, as a condition preceding his paying the legacy to the husband (*q*). Accordingly in a late case (*r*), a married woman who had left her husband and was living separate from him, but not in a state of adultery, was held to be entitled to a settlement out of a sum of stock to which her husband had become entitled in her right.

However, whether the husband shall make any provision, before he receives the legacy, depends solely upon the wife, who may waive her right by appearing in Court and consenting to his receiving it (*s*); even though the clear amount payable has not been ascertained (*t*). Hence, although in making a provision for the wife, the Court always includes the children of the marriage (*u*), yet the wife's title to a settlement is, according to the most approved opinions, *personal*

(*o*) Carr *v.* Eastabroke, 4 Ves. 146. 1 Rop. Husb. & Wife, 375, 2d edit.

(*p*) 2 Ves. Jun. 191. S. C. 4 Bro. C. C. 339. 1 Rop. Husb. & Wife, 276, 2d edit.

(*q*) March *v.* Head, 3 Atk. 720. 1 Rop. Leg. 773, 3d edit.

(*r*) Eedes *v.* Eedes, 11 Sim. 569.

(*s*) Willats *v.* Cay, 2 Atk. 67. Milner *v.* Colmer, 2 P. Wms. 641. Parsons *v.* Dunne, 2 Ves. sen. 60. But in cases where the wife consents that her husband shall have her property, the Court requires a proper affidavit by the husband and wife, that no previous settlement has been made of it: Minet *v.* Hyde, 2 Bro. C. C. 663. Binford *v.* Bawden, 2 Ves. jun. 38: And if a woman, who is, or has been married, is entitled to a legacy, the Courts expects a similar affidavit, before it will direct payment to her; Hough *v.* Ryley, 2 Cox, 157.

(*t*) Packer *v.* Packer, 1 Coll. 92.

(*u*) See Groves *v.* Clarke, 1 Keen, 140.

to her, and does not extend to her children (*v*): so that if she be entitled to a legacy, and die, leaving a husband and children, the latter, although unprovided for by settlement, can claim no provision out of the legacy (*w*); and if he files a bill to recover such legacy, his children cannot oblige him to make a provision for them out of it (*x*). Where indeed there is a decree for a settlement on the wife, the children are entitled to the benefit of it, although the wife may have died before any proposal for a settlement was carried into the Master's office (*y*). Nevertheless, if the wife, after the institution of the suit, to which she is a party defendant, for administering the estate out of which the legacy is to be paid, appears in Court, and consents that her husband shall have the fund wholly and absolutely, it will be so ordered, and the children will be deprived of any provision out of it (*z*). Hence it appears to follow, that the wife's equity does not attach, for the benefit of her children, upon the mere filing of the bill (*a*). But in *Lloyd* v. *Mason* (*b*), where the wife appeared by her counsel at the hearing of the cause and claimed her equity, and the legacy was directed to be carried

(*v*) Winch *v.* Brutton, 14 Sim. 379.

(*w*) See Ranking *v.* Barnard, 5 Madd. 33.

(*x*) Scriven *v.* Tapley, Ambl. 509. Murray *v.* Lord Elibank, 10 Ves. 84. 1 Rop. Husb. & Wife, 264, 2d edit.

(*y*) Rowe *v.* Jackson, 2 Dick. 604. Fenner *v.* Taylor, 1 Sim. 171. Groves *v.* Perkins, 6 Sim. 584. De la Garde *v.* Lempirere, 6 Beav. 344, 345, *per* Lord Langdale. And it will make no difference, that, by the form of the decree, made without discussion, the settlement to be made is a settlement on the wife alone, and not on the wife and her children: Groves *v.* Clarke, 1 Keen, 132.

(*z*) Murray *v.* Lord Elibank, 10 Ves 88, 90. S. C. 13 Ves. 6. Lloyd *v.* Williams, 1 Madd. 466. Fenner *v.* Taylor, 1 Sim. 171: *Secùs*, where there is an *agreement* by the husband for a settlement: 1 Sim. 169: or where the interest is reversionary, in part vested and in part contingent: Wade *v.* Saunders, 1 Turn. & R. 306. See *ante*, p. 728, note (*d*). Where a wife established her right to a settlement, as against her husband's assignees, to the extent of one-half of the fund, Lord Langdale, M. R. held, that she could not afterwards waive the making of the settlement so as to defeat the rights of her children: Whittem *v.* Sawyer, 1 Beav. 593.

(*a*) De la Garde *v.* Lempriere, 6 Beav. 344, overruling Steinmetz *v.* Halthin, 1 Gl. & J. 64.

(*b*) 5 Hare, 149.

to the separate account of the husband and wife; and, the husband being a bankrupt, and his assignee having sold his interest in the legacy, the solicitors for the purchaser and for the wife agreed to refer the claim of the wife to their counsel, who determined that she was entitled to a settlement, subject to the costs; but before any further steps were taken she died, leaving children; it was held by Sir J. Wigran, V. C., that the husband and those claiming through him were, after steps which had been taken, bound to allow a settlement of part of the fund on the wife and children, and that on her death the children were entitled to the portion which would have been settled: And his Honor observed, that the question whether the children could, after the death of their mother, insist on her equity, depended, not on the question whether she was bound, but whether her husband was: That there might be a case in which she was not absolutely bound, but in which, as against the husband, the children were entitled; and that if he was bound, the children were certainly entitled.

The equity of the wife to oblige her husband to make a suitable provision for herself and children, in consideration of her fortune, in instances where he cannot obtain the whole or part of it without the assistance of a Court of Equity, is obligatory upon all persons claiming generally from or under him, as executors, assignees in Bankruptcy or Insolvency, or assignees by deed in trust to pay debts: So that if the husband becomes a bankrupt, or takes advantage of the Insolvent Acts, or assigns his property to trustees for the benefit of his creditors, including the interest of his wife, the assignees will be obliged to make provision for her and children, before they are permitted to receive it, whether the legacy be absolute or for life only (*c*).

(*c*) Carr *v.* Taylor, 10 Ves. 574. Beresford *v.* Hobson, 1 Madd. 362. Green *v.* Otte, 1 Sim. & Stu. 250. *Ex parte* O'Ferrall, 1 Gl. & Jam. 347. 1 Rop. Leg. 774, 3d edit. In Elliott *v.* Cordell, 5 Madd. 149, Sir J. Leach, V. C., held, that a *purchaser* from the husband was not compellable to make a provision for the wife. But it should seem that the equity which the Court administers in securing a

It must here be remarked, that an executor *may* pay a wife's legacy to her husband, which will defeat her right to a settlement; but if there be a suit pending, the executor cannot make the payment, because his office is suspended (*d*).

When the wife is the subject of a foreign state, by the law of which her husband would be entitled to receive the whole of her property, without making any provision for her, the Court will dispense with her consent, and order the fund to be paid to her husband, without requiring any settlement (*e*).

Where the bequest is to the separate use of the wife.

It may be observed, in conclusion, that when a bequest is made to the *separate use* of a married woman, as where it is given "for her own use and at her own disposal" (*f*), she alone can give a good discharge for it: Her husband has no interest in the fund: And she may sue for it by her next friend (*g*).

Where the legatee is abroad.

A difficulty may occur with respect to the payment of legacies, in cases where a legacy is given to a legatee who has been abroad, and not heard of for a long time.

In one case, a legatee having been abroad twenty-eight years, and not heard of for twenty-seven, the Court presumed him to be dead (*h*). And the same was done in a subsequent case (*i*), after an absence, without any tidings, of sixteen years.

provision and maintenance for the wife is founded on the rule of compelling a party who seeks equity to do equity: And therefore, if the fund cannot be reached otherwise than by the interposition of a Court of Equity, the Court will withhold it's assistance, in all cases, till it has secured to the wife the means of subsistence: Sturgis *v.* Champneys, 5 M. & Cr. 97, 105. Hanson *v.* Keating, 4 Hare, 1.

(*d*) Murray *v.* Elibank, 10 Ves. 90. Doswell *v.* Earle, 12 Ves. 473. See also Macaulay *v.* Phillips, 4 Ves. 18.

(*e*) Sawer *v.* Shute, 1 Anst. 63. Campbell *v.* French, 3 Ves. 323. 1 Rop. Husb. & Wife, 265, 2d edit.

(*f*) See *ante*, p. 633.

(*g*) See Prichard *v.* Ames, 1 Turn. & Russ. 222.

(*h*) Dixon *v.* Dixon, 3 Bro. C. C. 510. See also, In the goods of Hutton, 1 Curt. 595.

(*i*) Mainwaring *v.* Baxter, 5 Ves. 458.

But in some cases the Court has required that the parties entitled to the legacies in the event of the death of the legatees, should give security to refund, in case the legatee should return (*k*).

However the executor may avoid all responsibility, by pursuing the provisions of the stat. 36 Geo. III. c. 52, s. 32 (*l*), which authorizes the executor or administrator to pay legacies, given to persons abroad, into the Bank, with the privity of the Accountant General, as in cases of legacies given to infants.

Where the legatee is a bankrupt.

There has already (*m*) been occasion to consider the question, whether, in case a legatee be a bankrupt, the legacy ought or ought not to be paid to his assignees.

Where the legatee is a convict felon.

Where a man is convicted of felony, and sentenced to transportation, not only the personal property which belonged to him at the time of conviction, but also that which accrues due to him afterwards, during the term of transportation, such as a legacy bequeathed to him, or a share of a residue devolving on him during that period, is forfeited to the Crown (*n*). But where the legacy is contingent and does not vest till after the expiration of that period, the convict himself will be entitled to it (*o*).

Illusory appointments;

It frequently happens that a power is given to trustees or executors, to appoint a certain sum of money, for example 10,000*l.*, to several objects, in such manner that none of the objects can be excluded by the donee of the power from a share of such property; as "to all and every the child or children" of the testator, or of any other person: In such a

(*k*) Norris *v.* Norris, Finch, R. 419. Bailey *v.* Hammond, 7 Ves. 590. Dowley *v.* Winfield, 14 Sim. 277. Cuthbert *v.* Purrier, 2 Phill. Ch. C. 199.

(*l*) See *ante*, p. 1208, 1209.

(*m*) *Ante*, p. 906, and note (*e*), p. 1088, and note (*e*).

(*n*) Roberts *v.* Walker, 1 Russ. & M. 752.

(*o*) Stokes *v.* Holden, 1 Keen, 145.

case, it will be good *legal* execution of the power, if the greater part of the fund be given to one of the children, and the residue, however small, for example, five shillings, be distributed among the rest: But Courts of Equity at a very early period assumed, in such cases, the power of controlling appointments, which were merely *illusory:* And the difficulty of ascertaining what proportion shall, in every particular case, be considered illusory, has given rise to much litigation, and a great variety of decisions: So that eminent Judges have taken occasion to lament that equity had not followed the rule of law (*p*).

11 G. IV. and 1 W. IV. c. 46. valid in equity as well as at law.

But now, by the statute 11 Geo. IV., and 1 Wm. IV. c. 46, it is enacted, "that no appointment, which from and after the passing of this Act, shall be made in exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid or impeached in equity, on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed to or left unappointed to devolve upon any one or more of the objects of such power; but that every such appointment shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder, or in default of such appointment, take more than an unsubstantial, illusory, or nominal share of the property subjected to such power."

Effect of a gift to some of a class according to appointment, where no appointment is made.

When there appears to be a general intention in favour of a class, and a particular intention in favour of individuals of the class to be selected by another person, and the particular intention fails from the selection not being made, the Court will carry into effect the general intention in favour of the class (*q*). Accordingly a gift to the testator's three sisters, *or* their children, as his mother should, by deed or Will, appoint, was held to be a gift, in default of appointment, to the whole class of the daughters *and* the children equally (*r*).

(*p*) Kemp *v.* Kemp, 5 Ves. 862.

(*q*) Burrough *v.* Philcox, 5 M. & Cr. 92, *per* Lord Cottenham.

(*r*) Penny *v.* Turner, 2 Phill. Ch. C. 493.

SECT. VI.

Of Interest upon Legacies.

Interest on specific legacies:

Specific legacies are considered as separated from the general estate, and appropriated at the time of the testator's death; and, consequently, from that period, whatever produce accrues upon them, and nothing more or less, belongs to the legatee (*q*): Therefore, where there is a specific legacy of stock, the dividends belong to the legatee from the death of the testator (*r*): And it is immaterial whether the enjoyment of the principal is postponed by the testator or not (*s*).

Accordingly, it should seem, that the specific legatees of cows, mares, or ewes, are entitled to the brood fallen between the death of the testator and the assent of the executor to the legacy: So also as to the wool of sheep shorn, &c. (*t*).

on general legacies:

General legacies in their nature carry interest (*u*): and, as in the case of all other claims with that incident, the interest is to be computed from the time at which the principal is actually due and payable.

If a legacy be brought into Court, and the legatee has notice of it, so that it is his fault not to pray to have the money, or that the money should be put out, the legatee, in such case, shall lose the interest from the time the money was brought into Court: But if the money was put out, the legatee

(*q*) Sleech *v.* Thorington, 2 Ves. Sen. 563.

(*r*) Barrington *v.* Tristram, 6 Ves. 345. Bristow *v.* Bristow, 5 Beav. 289.

(*s*) 2. Rop. Leg. 227, 3d edit. Where a legacy is charged upon real property, and no day of payment is mentioned in the Will, interest will be given from the testator's death: Maxwell *v.* Wettenhall, 2 P. Wms. 26. Stonehouse *v.* Evelyn, 3 P. Wms. 254. Spurway *v.* Glynn, 9 Ves. 483.

(*t*) Wentw. Off. Ex. 445, 14th edit.

(*u*) A legacy of 50*l.* for a ring, is not specific (see *ante*, p. 996): and therefore carries interest with other pecuniary legacies: Apreece *v.* Apreece, 1 V. & B. 364.

shall have the interest which the money put out by the Court yielded (*v*).

In the further consideration of the doctrine of allowing interest on general legacies, the subject may be regarded, First,—in cases where the testator has not fixed any time of payment: Secondly, in cases where the time of payment is named by him.

1st, where the testator has fixed no time for payment:

1st. When no time of payment is fixed: The executor is by law allowed one year from the testator's death to ascertain and settle his affairs; at the end of which time the Court, for the sake of general convenience, presumes the personal estate to have been reduced into possession: Upon that ground, interest is payable from that time unless some other period is fixed by the Will (*w*): Nor will interest be payable from an earlier date, although there is a direction in the Will to pay the legacy "as soon as possible" (*x*). If, indeed, the legacy is decreed to be a satisfaction of a debt, the Court always allows interest from the death of the testator (*y*). A further exception to the rule exists in the case of a legacy given to a child by a parent, or one *in loco parentis* (*z*), whether by way of portion or not; in which instance the Court will give interest *from the death*, to create a provision for it's maintenance (*a*): So where a testator bequeaths a sum of money to an infant, and directs that his maintenance shall be paid out of the interest of that sum, the payment of interest will be allowed from the death, and not be postponed till the end of one year after (*b*). In *Lowndes* v. *Lowndes* (*c*), the Court

(*v*) Maxwell *v.* Wettenhall, 2 P. Wms. 27.

(*w*) Wood *v.* Penoyre, 13 Ves. 333, 334. See also Gibson *v.* Bott, 7 Ves. 96.

(*x*) Webster *v.* Hale, 8 Ves. 410, 413. Benson *v.* Maude, 6 Madd. 15.

(*y*) Clarke *v.* Sewell, 3 Atk. 99: So where the testator charged his real estate by Will with the simple contract debts of another person, he was considered as having adopted those debts as his own, and the creditors, as legatees, were held entitled to interest from his death: Shirt *v.* Westby, 16 Ves. 393.

(*z*) Wilson *v.* Maddison, 2 Y. & Coll. Ch. C. 372.

(*a*) Beckford *v.* Tobin, 1 Ves. Sen. 310. Crickett *v.* Dolby, 3 Ves. 13. See *post*, p. 1226.

(*b*) 1 Ves. Sen. 308.

(*c*) 15 Ves. 301.

of Exchequer decided that illegitimate children are not within the general exception of a legacy given by a parent to a child (*d*). But in *Newman* v. *Bateson* (*e*), where a legacy was given to a natural daughter of the testator, with directions that so much of the interest should be applied in her maintenance as his executors should think proper, the Court held, that although the daughter was a natural child, yet the testator having given maintenance expressly to her, it came within the common rule of a legacy given to a child; and directed interest from the time of the testator's death (*f*). This exception, however, is confined to legacies in favour of infants, and has never been extended to a legacy given to an adult (*g*). Nor does it apply to the case of a wife (*h*).

After the expiration of the year from the death of the testator, the legacy will carry interest, although payment be, from the condition of the estate, impracticable (*i*), and although the assets have been unproductive (*k*): The general rule was stated by Lord Redesdale, in *Pearson* v. *Pearson* (*l*): "Whether the fund bears interest or not, is totally immaterial in the case of pecuniary legacies: I remember a case of *Greening* v. *Barker*, where the fund did not come to be dis-

(*d*) See also 1 Ves. Sen. 310.

(*e*) 3 Swanst. 689.

(*f*) See also Dowling *v.* Tyrell, 2 Russ. & M. 343. Acc.

(*g*) Raven *v.* Waite, 1 Swanst. 553.

(*h*) Stent *v.* Robinson, 12 Ves. 461.

(*i*) Wood *v.* Penoyre, 13 Ves. 334. A testator gave a legacy to his daughter, and all his real and personal estate to his wife, and after her death, he gave his real estate, subject to the legacy, to his son in fee: The wife survived the testator, and afterwards died: And Sir J. Shadwell, V. C., held that the legacy, with interest from the end of a year after the testator's death, was raiseable out of the real estate, in case the personal estate was deficient: Freeman *v.* Simpson, 6 Sim. 75. See also Acc. Milltown *v.* Trench, 4 Cl. & Fin. 276. S. C. 10 Bligh, N. S. 1.

(*k*) So it has been held that if a legacy be given to A., subject to the payment of a minor sum to B., interest on such minor sum is payable by A. to B. from the end of a year after the testator's death, notwithstanding that, in consequence of litigation between A. and the residuary legatees, A. did not, for several years, obtain possession of his own legacy, which did not, in the mean while, make interest. Lord Hertford *v.* Lord Lowther, 9 Beav. 266.

(*l*) 1 Scho. & Lefr. 10.

posable for the payment of legacies till near forty years after the death of the testator, and yet the legacies were held to bear interest from the year after the testator's death; and the Court there was of opinion, that it was a general settled and fixed rule, that pecuniary legacies bear interest from the expiration of twelve months, if there should at any time be a fund for the payment of them, and that in case the fund was productive within the twelve months, all the intermediate profits belonged to the residuary legatee: The executor may pay the legacy within the twelve months, but is not compelled to do so: he is not to pay interest for any time within the twelve months, although during that time he may have received interest: But if he has assets, he is to pay interest from the end of the twelve months, whether the assets have been productive or not."

Where a legacy was given to A., to be paid at twenty-one, and if he should die before attaining that age, then to B., and A. died before twenty-one, several years after the testator, it was holden that B. was entitled to interest on the legacy from the death of A.; for although it was objected that, this being a new substantive legacy to B., the executor ought to have a year's time for the payment of it, yet the Court held, that the year's time must be intended to be from the death of the testator (*m*).

In *Pickwick* v. *Gibbes* (*n*) a testator directed his trustees, as soon as convenient after the decease of his wife, to raise 10,000*l*., for his nephew, an infant, and to invest it and apply the income towards his maintenance: The testator had previously given his wife an annuity of 1000*l*. a-year, payable quarterly: The wife predeceased the testator: And Lord Langdale, M. R., held, that the infant was entitled to interest on his legacy, from the testator's decease.

Interest on annuities

An annuity bestowed by Will, without mentioning any time of payment, is considered as commencing from the death of

(*m*) Laundy *v.* Williams, 2 P. Wms. 481.

(*n*) 1 Beav. 271.

the testator, and the first payment as due at the expiration of one year (*o*): from which latter period interest may be claimed in cases where it is allowed at all: But, generally speaking, the Court of Chancery has refused applications for interest upon the arrears of annuities given by Will (*p*): unless in cases where the person charged with the payment of the annuity has at law incurred a forfeiture by non-payment, against which he is obliged to seek relief in equity: there no assistance will be given him by the Court, except upon terms of doing equity, *viz.*: by consenting to pay the grantee of the annuity the arrears due, with interest (*q*).

Interest on bequests for life:

The question, whether a legatee for life is entitled to interest from the death of the testator, or from the end of the year after his death, has been considered in a previous section (*r*).

2dly, When the time of is fixed:

2. With respect to interest on general legacies, where the time of payment is fixed by the testator: The general rule is, that the legacies will not carry interest before the arrival of the appointed period; as for instance, when the legatee shall attain twenty-one (*s*): Nor will it make any difference that the legacy is vested (*t*).

(*o*) See *ante*, p. 1192.

(*p*) Batten *v.* Earnley, 2 P. Wms. 163. Anderson *v.* Dwyer, 1 Scho. & Lefr. 301. Martyn *v.* Blake, 3 Dr. & W. 125. The practice is the same with respect to annuities secured by deed: Anon. 2 Ves. Sen. 661, 662. Robinson *v.* Cumming, 2 Atk. 411. Newman *v.* Auling, 3 Atk. 579. Tew *v.* Winterton, 3 Bro. C. C. 489. S. C. 1 Ves. Jun. 451.

(*q*) Ferrers *v.* Ferrers, Cas. temp. Talb. 2. 2 Rop. Leg. 309, 3d edit.

(*r*) *Ante*, p. 1193, *et seq.*

(*s*) Heath *v.* Perry, 3 Atk. 101. Tyrrell *v.* Tyrrell, 4 Ves. 1. But if the appointed period (*e. g.* the legatee's attaining twenty-one or marrying with consent) arrived in the lifetime of the testator, the legacy will carry interest from his death. Coventry *v.* Higgins, 14 Sim. 30.

(*t*) Heath *v.* Perry, 3 Atk. 102, by Lord Hardwicke: Crickett *v.* Dolby, 3 Ves. 10. Festing *v.* Allen, 5 Hare, 575, 577. Where a testatrix gave several legacies, and directed her husband, whom she appointed her executor, to pay the legacies as soon after her death as might be convenient, or within three years, if it should suit his

legacies to children of testator:

But this rule is subject to an exception in case of the testator being the parent (or *in loco parentis* (u)), of the legatee: For there, whether the legacy be vested or contingent, if the legatee be not an adult (v), interest on the legacy shall be allowed, as a maintenance, from the time of the death of the testator (w), *if there is no other provision for that purpose* (x). The Court will determine the *quantum* of allowance, either the whole of the usual interest allowed by the Court, or less, according to circumstances (y).

Where the legatee is the child of the testator, and a specific sum is given by the Will for maintenance, no greater allowance can be claimed for that purpose, although it be less than the usual rate of interest upon the legacy (z): But the Court has in some cases increased the allowance, where it was insufficient for a reasonable maintenance, and where the legacy was vested (a).

This exception is not extended in favour of nephews and nieces (b), nor of grandchildren (c), unless the testator were *in loco parentis.*

convenience, Alderson, B., held, that the legatees were not entitled to interest on their legacies before the expiration of the three years: Thomas *v.* Atty. Gen., 2 Younge & C. 525.

(u) Acherley *v.* Vernon, 1 P. Wms. 783. Hill *v.* Hill, 3 V. & B. 183. Mills *v.* Robarts, 1 Russ. & M. 555. Leslie *v.* Leslie, Cas. temp. Sugd. 4. Rogers *v.* Soutten, 2 Keen, 598. Wilson *v.* Maddison, 2 Y. & C. Ch. C. 372. Russell *v.* Dickson, 2 Dr. & W. 133.

(v) Raven *v.* Waite, 1 Swanst. 553.

(w) Harvey *v.* Harvey, 2 P. Wms. 21. Incledon *v.* Northcote, 3 Atk. 438. Chambers *v.* Godwin, 11 Ves. 2. Brown *v.* Temperley, 3 Russ. Chanc. Cas. 263: Even though the Will should contain an express direction that the interest shall accumulate: Mole *v.* Mole, 1 Dick. 310. M'Dermott *v.* Kealy, 3 Russ. Chanc. Cas. 264, note. In the case of a child *in ventre sa mere*, interest must be computed from the time of its birth: Rawlins *v.* Rawlins, 2 Cox, 425.

(x) Wynch *v.* Wynch, 1 Cox, 433. Donovan *v.* Needham, 9 Beav. 164.

(y) 2 Rop. Leg. 234, 3d edit.

(z) Harle *v.* Greenbank, 3 Atk. 716. Long *v.* Long, 3 Ves. 286, note.

(a) Aynsworth *v.* Pratchett, 13 Ves. 321. 2 Rop. Leg. 238, 3d edit. See Turner *v.* Turner, 4 Sim. 430. *Ante*, p. 1210, 1211.

(b) Crickett *v.* Dolby, 3 Ves. 10.

(c) Haughton *v.* Harrison, 2 Atk. 330. Butler *v.* Freeman, 3 Atk. 58.

Again, in some instances, legacies payable at a future period will carry interest, although not given by a parent, or a person *in loco parentis*, where there appears an intention on the part of the testator that the legatees shall be maintained out of the property bequeathed to them (*d*). In *Boddy* v. *Dawes* (*e*), a testator gave legacies out of a sum of stock to the grandchildren named in his Will on their attaining the age of twenty-one, and if any of them should die under twenty-one, their portion to be equally divided among such of them as should attain twenty-one; but if the whole of his said grandchildren should die under that age, then he gave the interest of the sum of stock to the father of the said grandchildren for his life, and after his decease the principal as therein mentioned: And Lord Langdale, M. R., held, that the grandchildren were entitled to the interest during their minority.

apparent intent that the legatees shall be maintained out of the bequest:

Where the payment of a legacy is postponed by the testator to a future period, as until the legatee attains twenty-one, and the Will directs, that when that period arrives, the payment shall be made *with interest*, the legacy will bear interest only from the end of the year after the testator's death (*f*).

legacy given "with interest.":

Where a vested legacy, either particular or residuary, is given to an infant, without appointing any time for payment, and it is subject to a limitation over upon a devesting contingency, which takes effect; as where the legacy is given upon condition to devest it upon the death of the legatee under twenty-one, and he dies under that age; yet as the legacy was payable at the end of the year after the testator's death, his executor or administrator, and not the legatee over, will

Interest of legacy during lifetime of infant legatee whose death under age devests the legacy.

Descrambes *v.* Tomkins, 4 Bro. C. C. 149, note. S. C. 1 Cox, 133. Festing *v.* Allen, 5 Hare, 579.

(*d*) Leslie *v.* Leslie, Cas. temp. Sugd. 1.

(*e*) 1 Keen, 362.

(*f*) Knight *v.* Knight, 2 Sim. & Stu. 492.

be entitled to the interest which accrued on the legacy during the infant legatee's life (*g*).

The same doctrine prevails with respect to a gift of a *residue*, where the bequest is such as to *vest* immediately, but not *payable* until the legatee shall attain twenty-one, with a bequest over, devesting the legacy in case he dies under that age: In that case also, although the legatee dies under twenty-one, his personal representative will be entitled to the interest which became due during the legatee's life (*h*).

The rule is otherwise with respect to contingent bequests (*i*). So where a *particular* legacy, though vested, is not payable till twenty-one, and nothing is said in the Will that shows the testator's intention to give interest in the mean time, in such case, if the legacy be devested by the death of the legatee before attaining twenty-one, his personal representatives cannot claim the interest accruing till his death (*k*).

But where a particular legacy is given, even contingent upon the event of the legatee attaining twenty-one, *with interest in the mean time*, and the legatee dies before that age; the arrears of interest up to the time of his death will, it seems, belong to his personal representative (*l*).

Rate of interest.

It remains to consider the rate of interest allowed on legacies: The rule at present established is, to allow four per

(*g*) Taylor *v.* Johnson, 2 P. Wms. 504. Shepherd *v.* Ingram, Ambl. 448. Montgomerie *v.* Woodley, 5 Ves. 522. 3 Atk. 102, note by Sanders to Heath *v.* Perry. Branstrom *v.* Wilkinson, 7 Ves. 420. Mills *v.* Robarts, 1 Russ. & M. 555. M'Donald *v.* Bryce, 2 Keen, 284. Barber *v.* Barber, 3 Mylne & Cr. 688. See also Webb *v.* Kelly, 9 Sim. 469.

(*h*) Nicholls *v.* Osborn, 2 P. Wms. 419. Chaworth *v.* Hooper, 1 Bro. C. C. 81. Hawkins *v.* Combe, 1 Bro. C. C. 335. And see Skey *v.* Barnes, 3 Meriv. 345, 346, *per* Sir W. Grant.

(*i*) See Cox's note to Taylor *v.* Johnson, 2 P. Wms. 506. See also Descrambes *v.* Tomkins, 1 Cox, 133. S. C. 4 Bro. C. C. 149, *in notis*. Glanvill *v.* Glanvill, 2 Meriv. 38.

(*k*) See Mr. Sanders's note to Heath *v.* Perry, 3 Atk. 102, and that of Mr. Cox, to Taylor *v.* Johnson, 2 P. Wms. 506.

(*l*) Harris *v.* Finch, M'Clel. 141: but see Errington *v.* Chapman, 12 Ves. 20.

cent., whether the legacy be charged upon land, or payable out of personal estate only (*m*). Nor will the rule be varied, it should seem, in the Courts here, by reference to the higher rate of interest allowed in the country where the testator resided, or where the fund was invested at the time of making the Will. Therefore, a legacy by a testator residing in Antigua will not, in an English Court, be allowed to bear Antigua interest (*n*): So if a legacy is given in the currency of Jamaica, where the testator resided, and there are assets and executors in both countries, the legatee shall be allowed interest at four per cent. only, and not Jamaica interest, in a suit in an English Court against the English executor (*o*). The principle is, that the fund is supposed in the course of a year after the testator's death to come into the hands of the executor, and that the executor can make four per cent. of it here. If it were proved that the fund was abroad, and greater interest made, it might be otherwise (*p*).

But interest has been directed to be computed, as against the executor, at five per cent., when the property has been employed by him in trade (*q*). And in a case where an executor was directed to lay out the testator's personalty in the funds, and he unnecessarily sold out stock, keeping large balances in his hands, and resisting payment of debts by a false pretence of outstanding demands, he was charged with five per cent. interest and costs (*r*).

The interest on legacies is to be computed upon the prin-

(*m*) Wood *v*. Bryant, 2 Atk. 523. Treves *v*. Townshend, 1 Bro. C. C. 386. Sitwell *v*. Bernard, 6 Ves. 543.

(*n*) Malcolm *v*. Martin, 3 Bro. C. C. 50. See also Stapleton *v*. Conway, 1 Ves. Sen. 427. The case of Raymond *v*. Brodbelt, 5 Ves. 199, was decided on it's particular circumstances: By Sir W. Grant, 10 Ves. 334.

(*o*) Bourke *v*. Ricketts, 10 Ves. 330.

(*p*) 3 Bro. C. C. 54, by Lord Alvanley.

(*q*) Heathcote *v*. Hulme, 1 Jac. & Walk. 122. *Infra*, Pt. IV. Bk. II. Ch. II. § II. See also Burnell *v*. Brown, 1 Jac. & Walk. 175, as to the interest where the property is wrongfully withheld.

(*r*) Crackelt *v*. Bethune, 1 Jac. & Walk. 586. See also Mosley *v*. Ward, 11 Ves. 581. *Infra*, Pt. IV. Bk. II. Ch. II. § II.

cipal only, and not upon the principal and interest (*s*). But under particular circumstances, the Court will allow the legatee compound interest: As where there is an express direction in the Will that the executor should lay out the fund to accumulate, and he neglects to do so (*t*).

In a case where the testator gave to each of certain infant nephews and nieces by name, a sum of money "with compound interest at five per cent. per annum, from the day of their birth, to be settled on their marrying or attaining twenty-one years, which ever may first happen;" it was held by Sir C. Pepys, M. R., that compound interest at five per cent. was to run on each of the legacies from the birthdays of the several legatees till their marriage or majority respectively, and not merely to the day of the testator's death (*u*).

Sect. VII.

In what Currency Legacies are to be paid.

Upon this subject the intention of the testator, as apparent upon the construction of the Will, is to furnish the rule of decision (*v*): But where legacies are given generally, it will be presumed that the testator intended that they should be paid in the money of the country in which he was domiciled and the Will was made; without regard to the currency of the place where the legatees reside: Consequently, if a testator, domiciled in Jamaica or Ireland, makes his Will there, and gives legacies generally, they must be paid in Jamaica or Irish money (*w*).

(*s*) Perkyns *v.* Baynton, 1 Bro. C. C. 574. Crackelt *v.* Bethune, 1 Jac. & Walk. 586.

(*t*) Raphael *v.* Boehm, 11 Ves. 92. S. C. 13 Ves. 590. Dornford *v.* Dornford, 12 Ves. 127. See *infra*, Pt. IV. Bk. II. Ch. II. § II.

(*u*) Arnold *v.* Arnold, 2 M. & K. 365.

(*v*) Lansdowne *v.* Lansdowne, 2 Bligh, 91.

(*w*) Saunders *v.* Drake, 2 Atk. 466. Pierson *v.* Garnet, 2 Bro. C. C. 38. Malcolm *v.* Martin, 3 Bro. C. C. 50. Lansdowne *v.* Lansdowne, 2 Bligh, 92. Even before

So if a testator, domiciled in England, charges his lands in Ireland or the West Indies with legacies generally, without mentioning whether they are to be paid in sterling money or in currency, they will be payable in sterling money of England (*x*).

Where a legacy is given in a foreign country and coin, as in Sicca rupees, by a Will of a testator domiciled in India, the payment, if made by remittance to this country, must be according to the current value of the rupee in India, without regard to the exchange or the expense of remittance: So as to other countries (*y*).

In *Campbell* v. *Graham* (*z*), a testator, domiciled in Jamaica, gave legacies in Jamaica currency, which ultimately came to be paid out of assets in England: And Sir J. Leach, M. R., held, that as there could be no expense of remittance, their value was to be computed according to the standard par of exchange between Jamaica and British currency, and not according to the actual rate at the time of payment.

In *Holmes* v. *Holmes* (*a*), a testator, being then domiciled in Ireland, by his Will made there prior to the stat. 6 Geo. IV. c. 79 (equalizing the currency of the United Kingdom), bequeathed an annuity: He afterwards transferred his residence to England and died domiciled there, after the passing of that statute: And it was held by Sir John Leach, M. R., that the bequest of the annuity, though not perfected till the

the stat. 6 Geo. IV. c. 79, (for assimilating the currencies of England and Ireland) there was no such thing as Irish *money*, though there was Irish *currency*. Therefore, where a settlement created a rent-charge of 1000*l*. a-year *sterling lawful money of Ireland*, it was held that this must be taken to mean 1000*l*. a-year sterling, and the words "*of Ireland*" must be rejected. Cope *v*. Cope, 15 Sim.

(*x*) Phipps *v*. Lord Anglesea, 5 Vin. Abr. 209, pl. 8. S. C. 1 P. Wms. 696. Wallis *v*. Brightwell, 2 P. Wms. 88, 89. Lansdowne *v*. Lansdowne, 2 Bligh, 91, by Lord Eldon. See also Noel *v*. Rochfort, 10 Bligh, 483. S. C. 4 Cl. & Fin. 158.

(*y*) Cockerell *v*. Barber, 16 Ves. 461. See Scott *v*. Bevan, 2 Barn. & Adol. 78.

(*z*) 1 Russ. & M. 453.

(*a*) 1 Russ. & M. 660.

death of the testator, was a gift made at the time of making the Will; and, the gift being prior to the statute, that the annuity was to be computed in Irish currency.

In *Banks* v. *Sladen* (*b*), a testator gave a legacy of 12,500*l.* four per cent. annuities: At the making of his Will there was a stock called New four per cents., in which he had a small sum, and a stock called four per cents. consolidated, of which he was a holder to a very large amount: Before the death of the testator, the latter stock was reduced to three and a half per cent.; and another four per cent. stock was created: And Sir J. Leach, M. R., held, that the investment of the legacy was to be made in an existing four per cent. stock, and not in the stock which had been reduced to three and a half per cent.

In *Sheffield* v. *Lord Coventry* (*c*), a testator gave to a son a legacy of 20,000*l.* in "the joint stock of the four per cent. Bank Annuities, transferable at the Bank of England, commonly called four per cent. Bank Annuities:" The only four per cent. Bank Annuities existing at the date of his Will, were reduced to three and a half per cent.; and afterwards, and before his death, a new stock of four per cent. Bank Annuities was created: And the same learned Judge held, that the Will spoke at the testator's death, and the son was entitled to a sum of 20,000*l.* in the then existing four per cent. Bank Annuities.

Sect. VIII.

Of the Payment or Delivery of Specific Legacies.

With respect to the payment, or delivery, of specific legacies, a question may arise, whether the legatee is entitled to any increase, which may have happened to the subject, between the date of the Will and the death of the testator:

(*b*) 1 Russ. & M. 216. (*c*) 2 Russ. & M. 317.

or, in other words, whether the legacy shall have relation to the one period or the other.

As to Wills made, or re-executed, or re-published on or after the 1st day of January, 1838, it is enacted by stat. 1 Vict. c. 26, s. 24, that "every Will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will."

The general rule, which was established, as to Wills of personal estate, before the passing of this statute, may, perhaps, be stated to be, that in order to confine the bequest to the date of the Will, the expressions must refer unequivocally to the property which the testator then had; otherwise they will not be allowed to have that effect (*d*): Thus if the bequest be general, as of all the testator's goods *in* a particular house or place, whatever personal chattels are found there at the time of his death will pass, though not there at the date of the Will (*e*).

However, if the testator shews a clear intention to dispose of such goods as belonged to him in a particular place at the date of his Will, property afterwards brought there will not pass: as where the bequest is "of all such part of my personal property as is now in my house at ——" (*f*). But in *All Souls' College* v. *Coddrington* (*g*), the bequest was, "I devise my library of books, now in the custody of C., to All

(*d*) See Parker *v.* Marchant, 1 Y. & Coll. Ch. C. 290.

(*e*) Sayer *v.* Sayer, 2 Vern. 688. 1 Rop. Leg. 220, 3d edit. But none will pass by such a bequest, which are not *actually* in the house or place at the testator's death, however clear the intention of the testator may be to have placed them there: Thus if one bequeaths to his son the furniture of his house at D., and orders goods to be carried thither from London, and agrees with the carrier for that purpose, but dies before the goods are removed to D.; they cannot pass by the bequest: Beaufort *v.* Dundonald, 2 Vern. 739.

(*f*) 1 Rop. Leg. 220, 3d edit. Dormer *v.* Burnet, cited in Downing *v.* Townsend, Ambl. 281. Atty. Gen. *v.* Bury, 8 Vin. Abr. 328, pl. 2. 1 Eq. Cas. Abr. 201. See also Smallman *v.* Goolden, 1 Cox, 329.

(*g*) 1 P. Wms. 597.

Souls' College in Oxford;" and the testator gave to the same college 4000*l.* more to augment their library: he afterwards bought several valuable books, which were placed in his library: And the question was, whether those books passed to the college: Sir Joseph Jeykyll, M. R., determined in the affirmative, upon the construction of the word "now:" his Honor being of opinion, that "now" did not relate to the books which were in the library at the date of the Will; but that it denoted where the library was; and might have been intended to distinguish that particular library from any other belonging to the testator: And his Honor observed, "if I devise all my flock of sheep now on such a hill, or in such a pasture; in that case, because sheep are in their nature fluctuating, some must die, some be killed, and some lambs be produced which will afterwards breed, and it being the case of a collective body, the sheep produced afterwards shall pass; and this is within the reason of a devise of a personal estate, which, because always fluctuating, shall therefore relate to the time of the testator's death; besides the Will as to personals, does not speak till after the testator's death."

In *Harcourt* v. *Morgan* (*h*), a testator gave to W. H. and M. H. the amount of the bond he held for 1000*l.*; when they got the principal money paid to them, they then to give their uncle, J. B., the sum of 50*l.*, and also their father and mother the sum of 50*l.* each, arising from the bond: And Lord Langdale, M. R. held, that W. H. and M. H. were entitled to the interest accrued due upon the bond in the lifetime of the testator, as well as to the principal (*i*).

If the testator bequeaths to a specific legatee, a certain quantity of Bank stock, for example, 5000*l.* standing in his name, and a bonus be given by the Bank, under the statute 56 Geo. III. c. 96, s. 3, in the interval between the date of the Will and the testator's death, the additional capital will not pass to the legatee (*k*). But in *Matthews* v. *Maude* (*l*), a

(*h*) 2 Keen, 274.

(*i*) See *ante*, p. 1030.

(*k*) Norris *v.* Harrison, 2 Madd. 268. But see Courtney *v.* Ferrers, 1 Sim. 145.

(*l*) 1 Russ. & M. 397.

testatrix had power to dispose by Will of property, which she enjoyed under the residuary gift of her brother; a part of this property consisted of 7000*l.* Bank stock, which after the brother's death, was increased by a bonus to 8750*l.*: The testatrix in her Will, made shortly after the bonus was declared, described the Bank stock as consisting of 7000*l.*: And Sir Leach, M. R., decreed that the 8750*l.* passed by force of general expressions which plainly manifested an intention to bequeath all that the testatrix derived from her brother (*m*).

Specific legacies not to be sold without necessity:

It may be observed, in conclusion, that it is the duty of executors, as far as possible, to preserve articles specifically bequeathed, according to the testator's wish; and unless compelled, they ought not to apply them to the payment of debts (*n*). And it may be further remarked, that it is also the duty of the executors to get in all the testator's estate, whether specifically bequeathed or otherwise; and that the expenses incurred in doing so must be paid out of the general estate, as part of the expenses of the administration (*o*).

must be got in by the executor at the expense of the general estate:

right of selection in a legatee of a certain number of a stock of articles.

It may be added, that if a testator, dying solvent, bequeaths to A. a given number of articles forming part of a stock of articles of the same description, as for instance, if he has twenty horses in his stable and bequeaths six of them, the legatee, and not the executor, has the right of selection (*p*).

Specific legacy of an unopened packet.

There has already been occasion to point out, that if a testator should happen to direct his executor to deliver a specified packet, part of the property of the deceased, to a particular legatee, unopened, the executor cannot, consistently with his duty, comply with this direction (*q*).

(*m*) See also Carver *v.* Bowles, 2 Russ. & M. 304.

(*n*) Clarke *v.* Ormonde, Jacob, 108.

(*o*) Perry *v.* Meddowcroft, 4 Beav. 204.

(*p*) Jacques *v.* Chambers, 2 Coll. 435.

(*q*) See *ante*, p. 323.

Sect. IX.

Of Election.

Although the limit of this Treatise will not admit of a full discussion of the doctrine of Election, it is necessary to state briefly the nature of the subject, and some of the leading principles established with respect to it.

Doctrine of election:

It is a principle of equity, that a person, who accepts a benefit under an instrument, must adopt the whole, giving full effect to its provisions, and renouncing every right inconsistent with it: If therefore a testator assumes to dispose of property belonging to A., and devises to A. other lands, or bequeaths to him a legacy, by the same Will, A. will not be permitted to keep his own estate, and enjoy at the same time the fruits of the devise or bequest made in his favour, but must *elect*, whether he will part with his own estate, and accept the provisions of the Will, or continue in the enjoyment of his own property, and reject that bequeathed (*r*).

It is not requisite, for the operation of this principle, that the testator should be aware that the property, of which he so undertakes to dispose, is not his own: The obligation of making an election will be equally imposed on the legatee, although the testator proceeded on an erroneous supposition that both the subjects of bequests were absolutely at his own disposal (*s*).

It is necessary, however, that the intention of the testator, to dispose of the property which is not his own, should be

(*r*) See Mr. Swanston's excellent notes to the case of Dillon *v.* Parker, 1 Swanst. 396, *et seq.*: and the cases collected in 2 Rop. Leg. 482, *et seq.* 3d edit. 1 Pow. Dev. 430, *et seq.* Jarman's edition.

(*s*) Whistler *v.* Webster, 2 Ves. Jun. 370. Thelluson *v.* Woodford, 13 Ves. 221. Welby *v.* Welby, 2 Ves. & Beam. 199. Nayler *v.* Wetherell, 4 Sim. 114. When it appears that the testator meant only to dispose of the property, provided he had power to do so, no case of election arises: Church *v.* Kemble, 5 Sim. 525.

clear: the intention must appear by demonstration plain, by necessary implication (*t*). And it must appear, as it should seem, upon the face of the Will: for it seems now to be established that parol evidence is inadmissible for the purpose of shewing it (*u*).

to what cases applicable: The doctrine of election is applicable to interests immediate, remote, contingent, of value, or not of value (*v*).

It must, however, be observed, that the doctrine does not preclude a party claiming by the Will from enjoying a derivative interest, to which he is entitled at law, under a legal estate taken in opposition to the Will: Thus a man may be tenant by curtesy of an estate tail, held by his wife in opposition to a Will under which he accepts a legacy (*w*).

Nor is that doctrine applicable as against creditors taking the benefit of a devise for payment of debts, and also enforcing their legal claim upon other funds disposed of by the Will (*x*).

heir-at law: Again, the doctrine of election is not applicable, where real property is assumed to be devised by a Will not executed

(*t*) Rancliffe *v.* Parkins, 6 Dow. 179, by Lord Eldon. Johnson *v.* Telford, 1 Russ. & M. 244. Crabb *v.* Crabb, 1 M. & K. 511. Dillon *v.* Parker, in Dom. Proc. 7 Bligh, N. S. 325. S. C. 1 Clark & F. 303. See the cases collected in 2 Rop. Leg. 498, *et seq.*, 3d edit.

(*u*) Stratton *v.* Best, 1 Ves. Jun. 285. Doe *v.* Chichester, 4 Dow. 65, 76, 78, 89. 1 Rop. Husb. & Wife, 590, Jacob's edit. Clementson *v.* Gandy, 1 Keen, 309. See the cases, *contrà*, collected in the notes to Dillon *v.* Parker, 1 Swanst. 402, 403.

(*v*) Wilson *v.* Townshend, 2 Ves. Jun. 697, by Lord Loughborough. Webb *v.* Lord Shaftsbury, 7 Ves. 481. In Forrester *v.* Cotton, Ambl. 388. S. C. 1 Eden, 532, Lord Northington said that the rule of election must be confined to plain and simple devises of the inheritance, and cannot be extended to limitations: And Lord Hardwicke appears, in Bor *v.* Bor, 3 Bro. P. C. 178, note, Toml. edit., to have thought that it did not extend to interests in remainder after an estate tail: (See also *acc.* Stewart *v.* Henry, Vern. & Scriv. 49:) But these opinions have not been sanctioned by subsequent authorities: See Mr. Swanston's note to Dillon *v.* Parker, 1 Swanst. 407, 408: and Graves *v.* Forman, cited 3 Ves. 67.

(*w*) Cavan *v.* Pulteney, 2 Ves. Jun. 544. S. C. 3 Ves. 384. 1 Swanst. 408, note. See also Brodie *v.* Barry, 2 Ves. & Beam. 127; and Mr. Jacob's note to his edition of Roper, Husb. & Wife, vol. i. p. 30.

(*x*) Kidney *v.* Coussmaker, 12 Ves. 136. 1 Swanst. 408, note. 1 Pow. Dev. 437, Jarman's edit.

so as to pass it, and by the same Will a legacy is given to the heir: In such a case the heir may take the legacy, without making good the devise (*y*); unless the imperfectly executed Will contains an express condition to that effect annexed to the legacy (*z*). So where a Scotchman domiciled in England devised all the residue of his real, personal, and mixed estates and effects, whatsoever and wheresoever, which he might be seised of, possessed, or entitled to at the time of his death, upon trust for his children in certain shares; and one of them, being heir-at-law, became entitled, according to the Scotch law, to a heritable bond, it was held that he was not bound to elect between this bond and the benefits to which he was entitled under the Will (*a*).

The law is the same where the devise of the land is invalid, on account of want of capacity to devise, by reason of infancy or coverture (*b*).

But a devise of "all my estate and effects which I shall die possessed of" extends to lands purchased by the testator after the date of the Will, and therefore, in a case to which the new Statute of Wills does not apply, the heir taking benefits under the Will must elect (*c*).

widow entitled to dower:

It is further necessary to consider the subject as applied to the case of a widow entitled to dower.

By stat. 3 & 4 Wm. IV. c. 105, s. 9, it is enacted, that "where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to

(*y*) Cary *v.* Askew, 1 Cox, 241. Sheddon *v.* Goodrich, 8 Ves. 481. Brodie *v.* Barry, 2 Ves. & Beam. 127. Gardiner *v.* Fell, 1 Jac. & Walk. 22. 1 Swanst. 406, note to Dillon *v.* Parker.

(*z*) 1 Cox, 244. 8 Ves. 497. 2 Ves. & Beam. 130. Boughton *v.* Boughton, 2 Ves. Sen. 12. 1 Swanst. 406, note. Dundas *v.* Dundas, 2 Dow. & Clarke, 349, 374.

(*a*) Allen *v.* Anderson, 5 Hare, 163.

(*b*) Hearle *v.* Greenbank, 3 Atk. 695, 715. S. C. 1 Ves. Sen. 298. Rich *v.* Cockell, 9 Ves. 369. 1 Swanst. 406, note.

(*c*) Churchman *v.* Ireland, 4 Sim. 520. 1 Russ. & M. 250. But see Johnson *v.* Telford, 1 Russ. & M. 244.

dower out of or in any land of her said husband, unless a contrary intention be declared by his Will:" And by sect. 10, "No gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his Will."

But by sect. 14, it is enacted, that this Act shall not extend to the dower of any widow who shall have been or shall be married on or before January 1, 1834, and shall not give to any Will, &c. executed before that day the effect of defeating or prejudicing any right to dower. It is, therefore, requisite, with respect to cases to which the Act does not apply, to refer briefly to the authorities as established before the passing of the statute.

To exclude a widow from her legal right, either there must be an express declaration to that effect, or it must appear *clearly* from the whole frame of the Will, that it was the testator's intention to give her some interest *wholly inconsistent* with her enjoyment in that legal right (*d*). "It is to be collected from all the cases," said Lord Redesdale, in *Birmingham* v. *Kirwan* (*e*), "that as the right to dower is in itself a clear legal right, an intent to exclude that right by voluntary gift must be demonstrated either by express words, or by clear and manifest implication. If there be anything ambiguous or doubtful, if the Court cannot say that it was clearly the intention to exclude, then the averment that the gift was made in lieu of dower, cannot be supported; and to make a case of election, that is necessary; for a gift is to be taken as pure, until a condition appear: This I take to be the ground of all the decisions."

Accordingly, in *Lawrence* v. *Lawrence* (*f*), it was decided

(*d*) 1 Russ. Chanc. Cas. 133. See the authorities establishing this principle collected in 1 Rop. Husb. & Wife, 577, *et seq*. Jacob's edition. 2 Rop. Leg. 530, *et seq*. 3d edit.

(*e*) 2 Scho. & Lefr. 452.

(*f*) 2 Vern. 365. S. C. 2 Freem. 234. 3 Bro. P. C. 483. Toml. edit.

by the House of Lords, that where a testator gave certain legacies to his widow, and also part of his real estate during her widowhood, and devised the residue to other persons, she was not precluded from taking dower in the whole: the sole possession of part of the lands not being deemed inconsistent with the assertion of a legal right to a third of the whole (*g*). And the law appears to be clearly settled at this day, that a devise of lands, *eo nomine*, upon trust for sale, or a devise of lands, *eo nomine*, to a devisee beneficially, does not, *per se*, express an intention to devise the land otherwise than subject to its legal incidents, that of dower included (*h*).

But where the provisions of the Will are absolutely inconsistent with her claims of dower, the widow must make her election. The difficulty of applying this principle, in the ascertaining whether the inconsistency does or does not exist, has given rise to numerous and somewhat conflicting decisions (*i*). It may, perhaps, be useful, in this place, to mention those which are most recent. In *Miall* v. *Brain* (*k*), Sir J. Leach, V. C., held, that the widow was put to her election, where there was a general devise to trustees, of the real estate, and a house, which formed part of it, was given upon trust to permit and suffer the testator's daughter *to use, occupy and enjoy* it for her life; his Honor thinking that the testator contemplated for his daughter the *personal* use, occupation, and enjoyment of the house, so as to be inconsistent with the widow's right to dower out of it: There being, therefore, one part of the property, with respect to which it was clear the testator did not intend it should be subject to dower, it followed, since the whole of the property was given by one general devise, that he did not intend that any portion of it should be subject to dower (*l*). Again, In *Butcher* v. *Kemp* (*m*),

(*g*) See also Holdich *v.* Holdich, 2 Y. & Coll. Ch. C. 22, *per* Knight Bruce, V. C. Accord.

(*h*) Ellis *v.* Lewis, 3 Hare, 310, 313.

(*i*) See the cases collected in 2 Rop. Leg. 540, *et seq.* 3d edit. See also Hall *v.* Hill, 1 Dr. & W. 94.

(*k*) 4 Madd. 119, 125.

(*l*) See also the observations of Lord Lyndhurst in 3 Russ. Chanc. Cas. 204, 205.

(*m*) 5 Madd. 61.

his Honor decided, that where the testator directed his trustees to continue his farming business on his farm of one hundred and thirty-six acres, during the minority of his daughter, and for her benefit, the widow, a devisee, was put to her election in respect of her dower out of this farm; because the testator's intention was that the trustees should be possessed of the entire farm, and her title to dower would disappoint that intention. So in *Roadley* v. *Dixon* (*n*), the testator, after bequeathing to his wife an annuity, charged on his estate at S., with power of entry and distress, if it should be in arrear for thirty days, and giving other legacies and annuities, which he charged on his lands at S. in aid of his personal estate, gave and devised all his real and personal property to trustees, upon certain trusts; and he directed them to occupy and manage, during the minority of his son, a farm constituting the greater part of his estate at S., and to let and manage the residue of his real estates, and to receive the rents of the whole of his real estates: And Lord Lyndhurst held, that the widow must be put to elect between her dower and the benefits given her by the Will (*o*). Again, in *O'Hara* v. *Chaine* (*p*), where a testator, having contracted to sell part of his fee simple estates, devised all his real and personal estates to trustees, and directed them to complete his contract with the purchaser, and to sell and convert into money all his real and personal estates, and out of the interest of the monies to arise from the sales to pay an annuity to his wife for her life; and he empowered his trustees to lease such parts of his real estates as should not be sold; it was held by Sir E. Sugden, C. of Ireland, that the widow was bound to elect between benefits given by the Will and her dower.

In *Reynolds* v. *Torin* (*q*), the testator bequeathed to his wife during her life four-sevenths of the income of his general

(*n*) 3 Russ. Chanc. Cas. 192.

(*o*) See also Lowes *v.* Lowes, 5 Hare, 501. Reynard *v.* Spence, 4 Beav. 103. Taylor *v.* Taylor, 1 Y. & Coll. Ch. C. 727.

(*p*) 1 Jones & Lat. 662.

(*q*) 1 Russ. Chanc. Cas. 129.

residuary estate, in which he intended to include a Scotch heritable bond; but the infant heir, having elected, under the order of the Court, to claim against the Will, took that bond by his legal title, subject to the widow's right of terce: And Lord Gifford held, that the widow must elect; and that, although disappointed of the four-sevenths of the interest of the bond debt, which the testator meant her to enjoy, she must, if she claimed what he had effectually bequeathed to her, bring in her terce to increase the general residuary estate.

Whether a mere charge of an annuity upon the land subject to dower, with a clause of entry and distress, will be sufficient to put the widow to her election, is a question which has given occasion for much contrariety of decision, and is still unsettled (*r*).

Case of two bequests, one onerous and the other beneficial.

Where a testator makes two bequests to the same person, one of which happens to be onerous and the other beneficial, the legatee will not be allowed to reject the one and retain the other. Thus, in *Talbot* v. *Lord Radnor* (*s*), a testator bequeathed a leasehold house to his sister, and he also bequeathed to her an annuity for her life: The rent reserved by the lease was higher than the house would let for at the time of the decease of the testator: The question was, whether, if the legatee disclaimed the lease, she could retain the annuity: And Sir John Leach, M. R., was of opinion that, as it was the plain intention of the testator that his estate should no longer be subject to the rent of the leasehold house, the legatee could not, in that respect, disappoint his intention, and retain the benefit given by his Will; but must take the benefit *cum onere*.

The inquiry, as to what acts or acquiescence constitute an

(*r*) See the cases cited in the arguments of the case of Roadley *v.* Dixon, 3 Russ. Chanc. Cas. 192, and the observations of Lord Lyndhurst on the point, in 3 Russ. Chanc. Cas. 201, 202. It has lately been treated as an established point, that a mere gift of an annuity to her, though charged on all the testator's property, is not sufficient to put her to her election: Holdich *v.* Holdich, 2 Y. & Coll. Ch. C. 18, 21.

(*s*) 3 M. & K. 254.

implied election, must be decided rather by the circumstances of each case than by any general principle: The questions are, whether the parties acting or acquiescing were aware of their rights: whether they intended election: whether they can restore the individuals affected by their claim to the same situation as if the acts had never been performed: or whether these inquiries are precluded by lapse of time (*t*).

What constitutes an election.

A party bound to elect is entitled first to ascertain the value of the funds; and for that purpose may sustain a bill to have all necessary accounts taken (*u*). An election, under a misconception of the extent of claims on the fund elected, is not conclusive (*v*).

Effect of election.

Another subject of much doubt, with respect to the doctrine of election, has been, whether the election to take against the Will induces the necessity of relinquishing the benefit given by it *in toto*, or only imposes an obligation to indemnify the claimants whom it disappoints; that is, as it is sometimes expressed, whether the principle, on which the doctrine of election proceeds, is forfeiture or compensation (*w*). The more recent authorities are said to establish, that compensation only is to be made (*x*).

(*t*) See Mr. Swanston's note to Dillon *v.* Parker, 1 Swanst. 332, and the cases there collected. See also Morgan *v.* Edwards, 1 Bligh, N. S. 401. S. C. 1 Dow. N. S. 104. Dillon *v.* Parker, Dom. Proc. 7 Bligh, N. S. 325. S. C. 1 Clark & F. 303. Reynard *v.* Spence, 4 Beav. 103. Briscoe *v.* Briscoe, 1 Jones & Lat. 334.

(*u*) 1 Swanst. 332, note. Pigott *v.* Bagley, M'Cl. & Y. 576, *per* Alexander, C. B.

(*v*) 1 Swanst. 332, note.

(*w*) See the cases collected and discussed in the valuable note of Mr. Swanston to Gretton *v.* Haward, 1 Swanst. 433; and that of Mr. Jacob to his edition of Rop. Husb. & Wife, vol. i. p. 566.

(*x*) 1 Swanst. 442, note: but see Mr. Jacob's note, *ubi supra*.

SECT. X.

Of the Refunding of Legacies.

Under certain circumstances, legatees are bound to refund their legacies, or a rateable part of them. It will, perhaps, be most convenient to consider, 1st, In what cases the executor can compel a legatee to refund; 2ndly, In what cases a creditor has that right; 3rdly, In what cases one legatee can make another refund: It will be observed, however, that the two latter of these inquiries are not properly within the scope of this Treatise.

1st, When the executor can make a legatee refund.

1st. In what case the executor can compel a legatee to refund. The general rule on this subject was laid down by Sir John Strange, M. R., in *Orr* v. *Kaines* (*y*): "Whenever an executor pays a legacy, the presumption is, that he has sufficient to pay all legacies, and the Court will oblige him, if solvent, to pay the rest; and not permit him to bring a bill to compel the legatee, whom he *voluntarily* paid, to refund" (*z*).

But where the payment of the legacy by the executor is under the *compulsion of a suit*, he is entitled to compel the legatee to refund, in case of a deficiency of assets (*a*).

Again, if the executor pays away the assets in legacies, and *afterwards debts appear*, of which he had no previous notice, and which he is obliged to discharge, he may by a bill compel the legatees to refund (*b*).

It seems that, formerly, legatees used to give security to the executor for refunding, if the assets should prove insufficient (*c*).

(*y*) 2 Ves. Sen. 194.

(*z*) See also Coppin *v.* Coppin, 2 P. Wms. 296.

(*a*) Newman *v.* Barton, 2 Vern. 205. Noel *v.* Robinson, 2 Ventr. 368. S. C. 1 Vern. 94.

(*b*) Nelthorp *v.* Biscoe, 1 Chanc. Cas. 136. Davis *v.* Davis, 8 Vin. Abr. 423, tit. Devise, (Q. d.) pl. 35. 1 Rop. Leg. 398, 3d edit. 3 East, 123, *per* Lord Ellenborough.

(*c*) Chamberlain *v.* Chamberlain, 1 Chanc. Cas. 257. Anon. 1 Atk. 491. *Ante*, p. 1155.

In *Livesey* v. *Livesey* (*d*), an annuity was bequeathed to a legatee, but he was not entitled to it until he attained twenty-one: The executrix, by *mistake*, made payments to the legatee in respect of his annuity for two years before he attained that age: And it was holden that the executrix was entitled to retain them out of the future payments of the annuity (*e*).

2d. When a creditor can make a legatee refund.

2. In what case a creditor of the testator can call on a legatee to refund. Where the testator's funds at the time of his death are not sufficient to pay both debts and legacies, it is clear that an unsatisfied creditor can compel a satisfied legatee to refund, whether the legacy was paid to him voluntarily or by compulsion (*f*): and he has the same right, although the testator's funds at the time of his death were sufficient to pay both debts and legacies (*g*): And although the assets were handed over to the legatee by the personal representative in ignorance of the creditor's demand (*h*).

3. When one legatee can make another refund.

3. In what cases one legatee can oblige another to refund. If the assets were originally sufficient to satisfy all the legacies, and afterwards, by the wasting of the executor, there is a deficiency, an unsatisfied legatee cannot oblige a satisfied one to refund, whether the legacy were paid him with or without suit: But if the assets were not originally sufficient to pay all the legacies, and one legatee receives his legacy in full, in that case the unsatisfied legatees may compel the one so paid to refund (*i*).

(*d*) 3 Russ. Chanc. Cas. 287.

(*e*) See also Cooper *v.* Pitcher, 4 Hare, 485.

(*f*) Hodges *v.* Waddington, 2 Ventr. 360. Noel *v.* Robinson, 1 Vern. 94. S. C. 2 Ventr. 358. Anon. 1 Vern. 162. Newman *v.* Barton, 2 Vern. 205. Gillespie *v.* Alexander, 3 Russ. Chanc. Cas. 136, 137, by Lord Eldon. March *v.* Russell, 3 Mylne & Cr. 31. Underwood *v.* Hutton, 5 Beav. 36. *Ante*, p. 1163, 1164.

(*g*) Hodges *v.* Waddington, 2 Ventr. 360. Anon. 1 Vern. 162.

(*h*) March *v.* Russell, 3 Mylne & Cr. 31.

(*i*) By Sir Joseph Jekyll, in 1 P. Wms. 495. Walcott *v.* Hall, 1 P. Wms. 495, note (1), by Mr. Cox. S. C. 2 Bro. C. C. 305. See also the observation of the Master of the Rolls in Gillespie *v.* Alexander, 3 Russ. Chanc. Cas. 133, and David *v.* Frowd, 1 M. & K. 200.

But it should seem, that in no case, where the executor is solvent, can an unsatisfied legatee maintain a suit against another who has been satisfied: because the remedy is in the first place against the executor, who, by paying the one legacy, has admitted assets to pay all (*k*).

Legatee refunding not charged with interest.

It remains to be considered, in what cases legatees, who are compelled to refund, shall do so with interest. On this point, Lord Eldon has stated (*l*) the rule to be, "If a legacy has been erroneously paid to a legatee, who has no farther property in the estate, in recalling that payment, I apprehend that the rule of the Court is not to charge interest: but if the legatee is entitled to another fund making interest in the hands of the Court, justice must be done out of his share."

(*k*) Orr *v.* Kaimes, 2 Ves. Sen. 194. 1 Rop. Leg. 399, 3d edit.

(*l*) Gittins *v.* Steele, 1 Swanst. 200.

CHAPTER THE FIFTH.

OF PAYMENT OF THE RESIDUE.

SECT. I.

Of the Residuary Legatee.

WHEN the executor has paid all the debts, and all the legacies heretofore mentioned, he must, in the last place, pay over the surplus or residue of the personal estate to the residuary legatee, if any such be nominated: And although the residuary legatee dies before the payment of debts, and before the amount of the surplus is ascertained, yet it shall devolve on his personal representative (*a*).

What terms of bequest are sufficient to constitute a residuary legatee.

No particular mode of expression is necessary to constitute a residuary legatee: It is sufficient, if the intention of the testator be plainly expressed in the Will, that the surplus of his estate, after payment of debts and legacies, shall be taken by a person there designated (*b*). Thus, in *Leighton* v. *Bailie*(*c*), a testatrix, whose Will consisted of a great number of testamentary papers, made the following indorsement on one of them which had no date; "I think there will be something left, after all funeral expenses, &c. being paid, to give W. B., now at school, towards equipping him to any profession he may hereafter be appointed to:" By another testamentary paper, which was also without date, she bequeathed to W. B. a legacy of 500*l.*: There was no express residuary gift in any

(*a*) Brown *v.* Farndell, Carth. 52. Toller, 341.

(*b*) Bland *v.* Lamb, 2 Jac. & W. 399. Hearne *v.* Wigginton, 6 Madd. 120. Fleming *v.* Burrows, 1 Russ. 276.

(*c*) 3 M. & K. 267.

of the testamentary papers: And Sir J. Leach, M. R., held, that, under the first mentioned paper, W. B. was to be regarded as the testatrix's residuary legatee.

In *Legge* v. *Asgill* (c), a testatrix by her Will disposed of certain Long Annuities, and of a sum in cash, and then used the following words; "I believe there will be sufficient money left to pay my funeral expenses:" By a codicil to her Will the testatrix expressed herself thus; "If there is money left unemployed, I desire it may be given in charity:" And it was held by Sir J. Leach, V. C., and afterwards by Lord Eldon on appeal, that the general residue of the testatrix's personal estate, including a sum of 2500*l.* trust monies, in which she had a vested reversionary interest, at the time of her death, subject to be divested by the appointment of her mother, passed under the words "money left unemployed," and was well given to charity. Again in *Boys* v. *Morgan* (d), it was held by Sir L. Shadwell, V. C., and by Lord Cottenham on appeal, that the following passage at the end of a Will, "I guess there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire E. M. to do, and keep the residue for her own use and pleasure," amounted, under the circumstances, and upon the whole context of the Will, to a gift of the general residuary personal estate to E. M. So in *Rogers* v. *Thomas* (e), a testatrix whose property consisted chiefly of stock in the public funds, after giving various legacies of sums of money, gave and bequeathed to the inhabitants of Tawleaven Row all which might remain of her money after her lawful debts and legacies were paid: And Lord Langdale, M. R., held, that the persons found to be inhabitants of Tawleaven Row were entitled to the residue of the testatrix's general personal estate. Again, in *Dowson* v. *Gaskoin* (f), a testatrix, whose personal property consisted chiefly of stock, after bequeathing a number of pecuniary and specific legacies, and giving

(c) 1 Turn. & Russ. 265, note (a).
(d) 9 Sim. 289. 3 Mylne & Cr. 661.
(e) 2 Keen, 8.
(f) 2 Keen, 14.

certain directions as to her funeral, gave 200*l.* to each of her executors for their trouble, and bequeathed whatever remains of money to the five children of E. D.: And the same learned Judge, held, that by the words, "whatever remains of money," the testatrix referred to her general residuary personal estate (*g*).

But in *Ommanney* v. *Butcher* (*h*), a testator, after bequeathing to A. and B. legacies of stock unequal in amount, and giving several legacies to public charities, requested the said A. and B. to be his executors, and gave to them as such one hundred guineas each: He then ordered his books, jewels, plate, and household furniture to be sold, and after desiring mourning to be provided for his servants, and five guineas each to be given to several persons named in the Will, and to his two executors for a ring as a token of remembrance, concluded his Will in the following manner, "In case there is any money remaining I should wish it to be given in private charity:" And Sir T. Plumer, M. R., held, that the general residue of the testator's personal estate, consisting of a leasehold estate, money in the funds, and a balance in cash, was not comprehended in the residuary clause, which was confined to the residue of the produce of the articles which the testator directed to be sold. So in *Wrench* v. *Jutting* (*i*), a testator bequeathed to A. his household furniture and other like things, "and all other goods of whatever kind;" and then he distinguished a particular sum, part of his property, and directed it to be divided, after all his debts should be paid, between certain legatees, and proceeded, "three or four thousand pounds, or whatever remaining sum or sums, to A.:" And it was held by Lord Langdale, that A. did not take the general residue; the learned Judge observing, that the testator would not have enumerated the particular sums at all, unless he had intended them alone to be subject to the disposition of this clause; his Lordship being also of opinion,

(*g*) See also Glendening *v.* Glendening, 9 Beav. 324.

(*h*) 1 Turn. & R. 260.

(*i*) 3 Beav. 521.

that the generality of the words, "goods of whatever kind," in the earlier part of the Will, was controlled by the context. Again, in *Hastings* v. *Hane* (*k*), a testator, after giving specific and pecuniary legacies, willed that A. and B. should divide equally any monies which might remain *to his account* after payment of his debts and pecuniary legacies: The testator, at the date of his Will and at his death, had money-accounts subsisting between him and his bankers, and other persons: And Sir L. Shadwell, V. C., held that the bequest did not pass his residuary estate, but only the balances due on those accounts, subject to the debts and legacies (*l*).

Rights of residuary legatee generally:

Where the residuary legatee is nominated generally, he is entitled, in that character, to whatever may fall into the residue after the making of the Will, by lapse, invalid disposition, or other accident (*m*); or by acquirement subsequent to the date of the Will (*n*). "It has been long settled," said Sir William Grant, in *Cambridge* v. *Rouse* (*o*), "that a residuary bequest of personal estate (for it is otherwise as to real) car-

(*k*) 6 Sim. 67.

(*l*) For other cases connected with this subject, see *ante*, p. 1018, *et seq*. Kendall *v*. Kendall, 4 Russ. 360. In the goods of Davis, 3 Curt. 748, 749. *Ante*, p. 1247, note (*b*).

(*m*) Jackson *v*. Kelly, 2 Ves. Sen. 285. Kennell *v*. Abbott, 4 Ves. 803. Cambridge *v*. Rous, 8 Ves. 12. Bird *v*. Le Fevre, 15 Ves. 589. Roberts *v*. Cooke, 16 Ves. 451. Smith *v*. Fitzgerald, 3 V. & B. 3. Leake *v*. Robinson, 2 Meriv. 392. Legge *v*. Asgill, 1 Turn. 265, *in notis*. Andree *v*. Ward, 1 Russ. Chanc. Cas. 260.

(*n*) Bland *v*. Lamb, 5 Madd. 412. S. C. confirmed on appeal, 2 Jac. & Walk. 399, Hearne *v*. Wigginton, 6 Madd. 119. The nomination of a residuary legatee will not prevent his taking a lapsed bequest by substitution, *i. e.* in the place of the deceased legatee, when the testator shows his intention that the residuary legatee should so take it; and there is no inconsistency between the characters of a residuary and a particular or substituted legatee to prevent it: In fact, the latter title may be more beneficial than the former, upon a deficiency of assets to pay all the debts and legacies; for as residuary legatee, he can claim nothing until all debts and legacies are fully paid; but as a particular or substituted legatee, his right to an equality of payment with the rest is preserved; so that, after rateably abating with them, he is entitled to receive the remainder of the legacy: 1 Rop. Leg. 429, 3d edit. Rose *v*. Rose, 17 Ves. 347, 352.

(*o*) 8 Ves. 25.

ries, not only every thing not disposed of, but every thing that, in the event, turns out not to be disposed of." So it was observed by Sir John Leach, V. C., in *Jones* v. *Mitchell* (*p*): "The Will, as to personal estate, speaks at the time of the death of the testator, and the residuary legatee takes, not only what is undisposed of by the expressions of the Will, but that which becomes undisposed of at the death, by disappointment of the intentions of the Will: It is otherwise as to the residuary devisee of real estate, or of the price of real estate: As to him, the Will speaks only at the time of making it (*q*), and he can take nothing but what is at that time intended for him."

Accordingly, where a testator bequeathed all his personal estate, *except* the money laid out in stock, mortgages, and bonds, to A.; and as to his money in stock, and on mortgages and bonds, he gave the same to B.; and the gift to B. failed by an event analogous to a lapse; it was held that the property which was intended to be given to B. passed under the residuary bequest to A. (*r*).

The foundation of this general rule in respect of lapsed legacies is, that the residuary clause is understood to be intended to embrace every thing not otherwise effectually given; because the testator is supposed to take the particular legacy away from the residuary legatee only for the sake of the particular legatee; so that upon the failure of the particular intent, the Court gives effect to the general intent (*s*).

When, therefore, from the construction of the Will, the presumption in favour of such general intent is negatived, the rule does not apply, and the lapsed legacy is undisposed of (*t*). Such is the case of a residuary bequest to several as tenants in common (*u*): The share of one, dying in the testator's lifetime, does not pass; because, the testator having

(*p*) 1 Sim. & Stu. 294.

(*q*) But see the Statute of Wills, (1 Vict. c. 26, s. 24,) Preface: and *ante*, p. 1233.

(*r*) Evans *v.* Jones, 2 Coll. 516.

(*s*) 5 M. & Cr. 61, 62.

(*t*) Easum *v.* Appleford, 5 M. & Cr. 56, 62. Upjohn *v.* Upjohn, 7 Beav. 59.

(*u*) See *infra*, p. 1254.

given to each a certain proportion of his property, according to their number, it would not be consistent with such declared intention to give to the survivor a larger proportion (*v*). So where a testator gave one-third of the residue to A., and another one-third to B., and as to the other one-third thereof, gave 500*l.* to C., and the remainder thereof to D.; and C. died in the lifetime of the testator; it was held that the 500*l.* belonged to the next of kin, as undisposed of (*w*).

Again, the testator may, by the terms of the bequest, narrow the title of the residuary legatee, so as to exclude him from lapsed legacies: As where it appears to be the intention of the testator that the residuary legatee should have only what remained *after the payment of legacies* (*x*).

of residuary legatee partially.

Again, the testator may, by the terms of the Will, so circumscribe and confine the residue, as that the residuary legatee, instead of being a general legatee, shall be a specific legatee, and then he shall not be entitled to any benefit accruing from lapses, unless what shall have lapsed constitute a part of the particular residue (*y*): Thus, in *Cook* v. *Oakley* (*z*), A., on board a ship, made his Will, and gave to his mother, if alive, his gold rings, buttons, and chests of clothes, and to his executor, who was on board with him, his red box, arrack, and all things not before bequeathed; and at the time of making his Will he was entitled to a considerable leasehold estate by the death of his father, of his right to which he was ignorant: It was holden, that A.'s executor was legatee of a particular residue, namely, of what the testator had on board the ship; and such legacy excluded him from the general residue: But that as A.'s mother died

(*v*) 5 M. & Cr. 62.

(*w*) Lloyd *v.* Lloyd, 4 Beav. 231. See also Accord. Skrymsher *v.* Northcote, 1 Swanst. 566. Harris *v.* Davis, 1 Coll. 416. See also Master *v.* Laprimaudaye, 2 Coll. 443. Clowes *v.* Clowes, 9 Sim. 403.

(*x*) Davers *v.* Dewes, 3 P. Wms. 40. Atty. Gen. *v.* Johnstone, Ambl. 577. See also Nisbett *v.* Murray, 5 Ves. 149. Baker *v.* Hall, 12 Ves. 497. 2 Rop. Leg. 587, 3d edit. It was said by Lord Eldon, in Bland *v.* Lamb, 2 Jac. & Walk. 406, that very special words are required to take a bequest of the residue out of the general rule.

(*y*) Toller, 343.

(*z*) 1 P. Wms. 302.

in his lifetime, his rings, buttons, and chests of clothes lapsed into such particular residue, and devolved on his executor, not as executor, but as legatee of such particular residue (*a*). And even though the word "residue" be employed by the testator, yet if it appears, on the construction of the whole Will, that he meant to use it in a more restricted sense, than that of its large and general sense comprehending whatever of his personal estates in the events which happen turns out to be undisposed of, the Court is bound to construe it in such restricted sense (*b*).

Survivorship as to residue:

Where the residuary estate is bequeathed to several persons in *joint tenancy*, if one or more of them happen to die in the lifetime of the testator, or after his death, but before the severance of the joint tenancy in the residue, their shares will survive to the others (*c*). But if the residue be given to several as *tenants in common*, the shares of the deceased shall not go to the survivors, but shall devolve on the testator's next of kin, according to the Statute of Distributions, as so much of the personal estate remaining undisposed of by the Will, in case the death happened in the lifetime of the testator; or shall go to the personal representatives of the deceased legatee, in case his death took place after that of the testator (*d*).

in cases of several residuary legatees:

joint-tenants:

In *Perkyns* v. *Baynton* (*e*), indeed, Lord Thurlow doubted whether there could be a joint tenancy of a money legacy, and said that there was no case of a residue given to persons, not executors, where they have been considered as joint tenants. But in *Crooke* v. *De Vandes* (*f*), Lord Eldon stated, that, upon the doubt thus expressed by Lord Thurlow, he, at the time, looked at some of the original Wills in Doctors' Commons,

(*a*) See also 2 Rop. Leg. 589, 3d edit.

(*b*) Green *v.* Pertwee, 5 Hare, 249.

(*c*) Webster *v.* Webster, 2 P. Wms. 347. *Ante*, p. 1045.

(*d*) Bagwell *v.* Dry, 1 P. Wms. 700. Page *v.* Page, 2 P. Wms. 488. Painter *v.* Salisbury, cited in Bennet *v.* Batchelor, 1 Ves. Jun. 67. Peat *v.* Chapman, 1 Ves. Sen. 542. *Ante*, p. 1045, 1252.

(*e*) 1 Bro. C. C. 118.

(*f*) 9 Ves. 204.

where a construction had been put on them, and he made up his mind upon the point, upon which he had never had any doubt since, that a simple bequest of a legacy or a residue of personal property to A. and B., without more, is a joint tenancy; and it is upon the other side to shew from some part of the context applying to that bequest, that the words are not to have their legal operation. Again, in *Jackson* v. *Jackson* (*g*), the same learned Judge observed, that it is clear that where a residue of a personal estate, consisting of a great variety of particulars, is left to two persons, their executors, administrators, and assigns, the effect is a joint tenancy (*h*).

tenants in common

But where a money legacy or a residue is given to more persons than one, by any mode of expression *which denotes a severance*, the legatees will be tenants in common: As where the gift is to A. and B., "share and share alike" (*i*), or "equally to be divided between them" (*k*), or "respectively" (*l*) or "between them" (*m*). Again, where there is a bequest to A. for life, and after her decease, to her children, when they arrive at the age of twenty-one years, the children who attain twenty-one will necessarily take as tenants in common, though there are no words of severance used in the bequest; because it is contrary to the rule of law that persons, who are to take at different times, can take as joint tenants (*n*)

(*g*) 9 Ves. 595.

(*h*) See also Swaine *v.* Burton, 15 Ves. 370, 371. Godkin *v.* Murphy, 2 Y. & Coll. Ch. C. 351. Jenkins *v.* Gower, 2 Coll. 537.

(*i*) Heathe *v.* Heathe, 2 Atk. 122. Norman *v.* Fraser, 3 Hare, 84.

(*k*) Thrustout *v.* Peak, Vin. Abr. Devise, (X. a.) pl. 11. Where a testator gave one-fourth of his residuary estate to trustees, in trust for his wife for life, and, after her decease, in trust for and to be equally divided amongst all his children who should be then living, and the issue of such of them as should be then dead, such issue taking only the part or share which his, her, or their deceased parent or parents would have been entitled to, if living; and two children, and two grandchildren the issue of a deceased child of the testator, were living at the death of the widow; it was held that the two grandchildren took, *as between themselves*, as joint-tenants and not as tenants in common. Bridge *v.* Yates, 12 Sim. 645. See also Amies *v.* Skillern, 14 Sim. 428.

(*l*) 2 Atk. 122.

(*m*) Lashbrook *v.* Cock, 2 Meriv. 70. Richardson *v.* Richardson, 14 Sim. 526.

(*n*) Woodgate *v.* Unwin, 4 Sim. 129. But see 2 Jarm. on Wills, 160.

Where, however, words which, according to the ordinary rule, constitute a tenancy in common, are combined with, or followed, by others which would make a tenancy in common inconsistent with the manifest design or the subsequent bequest of the testator, they may be taken to indicate, not the nature, but the proportion of the interest each party is to take: As where there is a bequest to two persons "respectively in equal shares" of the interest and dividends only of the residue of the testator's estate, and the *corpus* of the residue is not to be divided or possessed until after the decease of the two, and then it is to be divided amongst such of their children only as shall be living at the death of the survivor, *per capita* and not *per stripes* (*o*).

Words of survivorship: to what period they refer.

A considerable difficulty arises where words of severance are used in the bequest, sufficient to constitute a case of tenancy of common, accompanied by words of survivorship, inconsistent with such a tenancy; as if a residue be bequeathed to two or more, equally to be divided between them, *and the survivors or survivor of them.* In *Cripps* v. *Wolcott* (*p*), Sir J. Leach, V. C., said, that he considered it now settled, that in the case of such a bequest, if there be no special intent to be found in the Will, the survivorship is to be referred to the period of division: And that if no previous interest be given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy: But if a previous life estate be given, then the period of division is the death of tenant for life, and the survivors at such death will take the whole legacy (*q*).

(*o*) Pearce *v.* Edmeades, 3 Younge & C. 246. See also Currie *v.* Gould, 4 Beav. 117. McDermott *v.* Wallace, 5 Beav. 142. Vanderplank *v.* King, 3 Hare, 1.

(*p*) 4 Madd. 15.

(*q*) This rule, though certainly opposed to several previous cases, and regarded by very high authority (see the judgments of Lord Cottenham, in Pearson *v.* Casamajor, 1 Maclean & Rob. App. Cases, 714, and in Wordsworth *v.* Wood, 4 M. & Cr. 645, and of Lord Campbell, S. C. in Dom. Proc. 1 Cl. & F., N. S. 156) as not settled, appears to have been frequently recognised and acted upon. See the judgment of Lord Brougham in Wordsworth *v.* Wood, 1 Cl. & F., N. S. 152, 153. See also Pope *v.* Whitcombe, 3 Russ. 124.

Survivor construed "other."

It may be here mentioned, that the word "surviving" has been construed "other," to give effect to the apparent intention (*r*). Thus where a fund is given between a class or number of persons as tenants in common for life, with interests in the nature of remainders to their children respectively, and a valid provision is made that in the event of the death and failure of issue of any of the original takers, the share of the original taker or takers so circumstanced shall go to the survivors or survivor of them, the word "survivors or survivor" may, in general, well be considered as an expression of contrast, used for the purpose of distinguishing the takers not so circumstanced, and therefore as meaning "others or other:" And so in analogous instances (*s*): But the word "survivor" must receive its natural construction, and not be read as meaning "other," unless the nature of the disposition itself, or the context of the Will, renders a departure necessary to effectuate the apparent intention of the testator (*t*).

Survivorship in case of a gift as to a class:

In *Barber* v. *Barber* (*u*), a testator by his Will directed, that in the event of the death of his son and daughter under twenty-one, the property bequeathed to them should devolve to and become the property of four persons, *each particularly named and described*, to be divided betwixt them in equal

Gibbs *v.* Tait, 8 Sim. 132. Taylor *v.* Beverley, 1 Coll. 108. Watson *v.* England, 15 Sim. 1. Turing *v.* Turing, 15 Sim. 139. See further Belt *v.* Slack, 1 Keen, 238. Eaton *v.* Barker, 2 Coll. 124. Wagstaff *v.* Crosby, 2 Coll. 746. The rule has been otherwise as to real estate; it being considered that indefinite words of survivorship should be referred to the death of the testator: Doe *v.* Prigg, 8 B. & C. 231. But the current of authorities appears to have been turned of late, as well as to real as to personal estate: See Buckle *v.* Fawcett, 4 Hare, 536. Williams *v.* Tartt, 2 Coll. 85. 1 Coll. 117. As to the period to which the word "then" is to be referred, in a bequest to a class of persons "then living," see Archer *v.* Jegon, 8 Sim. 446. Gaskell *v.* Holmes, 3 Hare, 438. 1 Jarm. 768, note (*k*).

(*r*) Wilmot *v.* Wilmot, 8 Ves. 10. Eyre *v.* Marsden, 4 Mylne & Cr. 240.

(*s*) Slade *v.* Parr, 1 Y. & Coll. Ch. C. 565. Harris *v.* Davis, 1 Coll. 416. Cole *v.* Sewell, 4 Dr. & W. 1. 1 Coll. 113.

(*t*) Crowder *v.* Stone, 3 Russ. 217. Cromek *v.* Lumb, 3 Y. & Coll. 565. Leeming *v.* Sherratt, 2 Hare, 14. Taylor *v.* Beverley, 1 Coll. 114. Cooper *v.* Palmer, 1 Coll. 665.

(*u*) 3 Mylne & Cr. 688.

proportions, and to their heirs for ever; which last mentioned four persons he appointed executors, and he afterwards appointed two other executors: One of the four persons, and also both of the after appointed executors, renounced probate, and declined to act; It was not disputed that the bequest made to these four persons was made to them *as executors;* that is, on condition that they took upon themselves that office, and consequently, that the one who had renounced could not claim his share (*v*): But, on the one hand, it was insisted that his share was a lapsed legacy, and went to the next of kin of the testator; while, on the other hand, the three other persons named as residuary legatees with him who had renounced, contended that they were entitled to the residue in thirds, including, therefore, the share destined for him: Lord Cottenham decided that they were not so entitled, but that the share had become undisposed of, and belonged to the next of kin: And his Lordship, in giving judgment, made the following observations:

" The question to be decided is, who are the legatees? It is quite clear that, if the legatees had not been appointed executors, the gift to them would have created a tenancy in common, and therefore, that, upon the failure of the gift to any one, his share would have been undisposed of, and that the three others could not have claimed. And it is equally clear that, if any other condition had been imposed upon these four tenants in common, upon which their title to the legacy was to depend, and one had refused to perform the condition, his share would have been undisposed of, and that the other three could not have claimed it. The ground upon which the title of the executors who proved is rested, leaves these propositions untouched; for it stands upon this ground, that the gift is to a class, and that the three executors who proved constitute the class: and it was contended that there was no distinction between a gift to executors as tenants in common, and a gift to certain persons as tenants in common who are afterwards appointed executors.

(*v*) See *ante*, p. 1100, *et seq.*

"This, as all other questions of construction, must depend upon the intention. A gift to a class implies an intention to benefit those who constitute the class, and to exclude all others; but a gift to individuals described by their several names and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named. In a gift to a class you look to the description, and inquire what individuals answer to it; and those who do answer to it are the legatees described. But if the parties to whom the legacy is given be not described as a class, but by their individual names and additions, though together constituting a class, those who may constitute the class at any particular time may not, in any respect, correspond with the description of the individuals named as legatees. If a testator give a legacy to be divided amongst the children of A. at a particular time, those who constitute the class at the time will take; but if the legacy be given to B., C., and D., children of A., as tenants in common, and one die before the testator, the survivors will not take the share of the deceased child. The question must be, was the intention to bequeath to those who might, at the time, constitute the class, or to certain individuals who, it was supposed, would constitute it? Such would appear to be the question to be asked, and the point to be ascertained; but the more important inquiry is, whether the authorities justify and support this view of the case.

"In *Page* v. *Page* (*w*), decided by Lord King in 1728, and approved by Lord Talbot in 1734, there was the gift of a residue to six persons, to each one-sixth; and they were appointed executors. It was held that the one-sixth of one who died in the lifetime of the testator lapsed for the next of kin. In this case there is a gift to four equally, to be divided betwixt them, *i. e.* to each one-fourth. In *Owen* v. *Owen* (*x*), the testator gave the residue of his estate to his two nieces, to be equally divided between them, and appointed them executrixes. One died in the testator's lifetime: and Lord Hard-

(*w*) 2 P. Wms. 489. *Ante*, p. 1045, 1253.

(*x*) 1 Atk. 494. *Ante*, p. 1046,

wicke said that he had followed *Page* v. *Page* in *Holderness* v. *Reyner;* and that the reasoning of Sir J. Jekyll, in *Hunt* v. *Berkley* (y), could not be supported; and held that the share intended for the deceased niece lapsed for the benefit of the next of kin, and did not go to the surviving niece.

"In *Knight* v. *Gould* (z), the gift was of the residue 'to my executors hereinafter named, to pay my debts, legacies, &c., and also to recompense them for their trouble, equally between them;' and three persons were then named executors, one of whom died in the testator's lifetime; and Sir John Leach first, and Lord Brougham, upon appeal, held, that the two survivors were entitled to the whole. The latter relied upon two grounds principally; first, that the persons to take were those who were to perform the duties, and the survivors were such persons; secondly, that the gift was to the executors as a class in terms; for the words "hereinafter named" were mere surplusage, inasmuch as the result would have been the same if they had been omitted, it being absolutely necessary to name them in order to appoint them. In that case the gift was to executors described as such; in this, it is to individuals particularly named and described. In that, the fund given was what should remain after part had been administered. Those who were to take and those who were to administer were considered as identical.

"The result, therefore, of the authorities, supposing them strictly to apply, is in favour of the claim of the next of kin. There is the case of *Page* v. *Page*, decided by Lord King and approved by Lord Talbot, and in two cases approved and acted upon by Lord Hardwicke; whereas, in support of the claim of the acting executors, there is only the case of *Hunt* v. *Berkley*, decided, indeed, by a high authority, Sir Joseph Jekyll, but disapproved by Lord Hardwicke, and overruled by every subsequent case in which the point has arisen. It is also to be observed that the case of *Hunt* v. *Berkley* would not, if it were clearly a right decision, necessarily

(y) Mosely, 47. S. C. 1 Eq. Cas. Abr. 243.

(z) 2 Mylne & Keen, 295. See *ante*, p. 1047.

govern the present case; because, in that case, the residuary legatees and the executors were the same, and the decision must have proceeded upon this, that the testator did, in fact, intend to give the residue to whomsoever of the parties named might be his executors. But it is clear that, if *Page* v. *Page*, *Holderness* v. *Reyner*, and *Owen* v. *Owen*, be right, they necessarily include the present case; the claims of the next of kin being much stronger in this case than in any of those; inasmuch as, in all those cases, those named residuary legatees and executors were the same; so that the question might arise, whether the intention was to give the residue to the individuals, or to the class which they composed: whereas, in the present case, the residuary legatees do not constitute any class to which a name can be given, without including the description of residuary legatees. If the three surviving executors to whom the share of the residue was given are entitled, they must be so entitled as constituting the class intended to be benefited; but what is the class which they so constitute? Not the executors; because there were two other executors named besides the persons intended to be so benefited; and although the two others also declined to prove, so that the three, in fact, are the only acting executors, yet the class of executors, as contemplated by the testator, consisted of six; and there was clearly no intention to give the benefit to such of the six as might act as executors, for that might have given the benefit to the two. This case, therefore, has nothing in common with *Knight* v. *Gould*, or any other case in which the gift has been construed to be in favour of such as might act as executors. If, then, the class intended to take be not such as might, at the time, be the executors, it must be such of the executors named as might, at the time, be also of the number of the residuary legatees named; but that is only another mode of describing the residuary legatees; and, if their situation as residuary legatees be considered, they are only tenants in common of the residue, between whom there can be no survivorship.

"There seems also to be some confusion in terms in con-

sidering legatees as constituting, as such, a class for the purpose in question. They have no existence as a class, except under the description in the Will. To such persons a testator may undoubtedly give a right of survivorship *inter se*, by expressly directing it, or by creating a joint-tenancy. The first the testator in this case has not done, and the second he has, in terms, excluded, by creating a tenancy in common; and he could not have intended that those who proved should take the whole in the event of some not proving, and not in the event of their dying before him. To effectuate a gift to those of the class he has himself constituted, who may be in a condition to take at a particular time, he must have used expressions from which that intention may be fairly deduced. Such an intention cannot be deduced from a gift to four persons by name, between whom the share of the residue is to be divided."

In case of several executors entitled as such to the residue.

It must here be observed, that where co-executors take a residue in that character, they take as joint-tenants: Therefore if one of them dies after the death of the testator, but before the severance of the joint-tenancy in the residue, his share will survive to his co-executors, and his own executors or administrators will be excluded, as well as the next of kin of the testator (*a*). Thus, in *Baldwyn* v. *Johnson* (*b*), where two executors divided a part of the testator's property, but lodged a sum in the funds for securing the payment of an annuity; it was holden, that as to this they were joint-tenants, and that it should survive upon the death of one to the other (*c*). So in *Griffiths* v. *Hamilton* (*d*), all the executors died except two, Hoare and Griffiths: Hoare alone proved,

(*a*) Frewen *v*. Relfe, 2 Bro. C. C. 220. Baldwyn *v*. Johnson, 3 Bro. C. C. 455. Griffiths *v*. Hamilton, 12 Ves. 298. White *v*. Williams, 3 V. & B. 72. S. C. Cooper, 58. See also the judgment of Lord Brougham, in Knight *v*. Gould, 2 M. & K. 299—303.

(*b*) 3 Bro. C. C. 455.

(*c*) But in Partridge *v*. Pawlet, 1 Atk. 467, Lord Hardwicke laid it down as a rule, that if two tenants in common put out money as joint executors, it shall not survive, but shall go respectively to those persons who are the proper representatives of each.

(*d*) 12 Ves. 298.

and died: After his death, Griffiths proved: And he was declared entitled, as surviving executor, to all the testator's personal estate, not reduced into possession and divided before the death of Hoare.

The question as to what shall amount to a severance of the joint-tenancy, was much considered in the late case of *Gould* v. *Kemp* (*e*). There a testatrix bequeathed the residue of her property "to my executors, hereinafter named, to enable them to pay my debts, legacies, funeral, and testamentary charges, and also to recompense them for their trouble, equally between them. I do nominate, constitute, and appoint my said trustees, James Kemp, James Kemp the younger, and John Prior Ward, to be executors of this my Will:" James Kemp the elder died in the lifetime of the testatrix; and it was held, that as the gift was to the three, as a class, in their official character, the whole residue vested in the two survivors (*f*): James Kemp the younger and Ward proved the Will, and took on them the office of executors: Some years afterwards, but before any severance of the residuary property had been made, a letter was written and delivered by Kemp to Ward, who at the time was confined to his bed by sickness, engaging to secure to his family, in any way he might desire by his Will, a moiety of the property bequeathed to them by the Will of their testatrix: And it was held by Sir John Leach, M. R., and afterwards by Lord Brougham, on appeal, that this letter amounted to a severance of the joint-tenancy.

(*e*) 2 M. & K. 304.

(*f*) See *ante*, p. 1047, 1259.

Sect. II.

Of the Right of the Executor to the Residue, in case there is no Residuary Legatee.

If the testator neither makes any disposition of the residue, nor appoints an executor, the residue belongs clearly to the next of kin: But if the testator, appointing an executor, makes no disposition of the residue, a question arises whether it shall belong to such executor or to the next of kin: And this is an inquiry which has given rise to much litigation and difficult discussion: In future, however, it is to be hoped that the late Act of Parliament (hereinafter stated at large) will free this subject from the great variety of distinctions which have been established with respect to it.

At law, it has been the rule, from the earliest period, that the whole personal estate devolves on the executor: and if, after payment of the funeral expenses, testamentary charges, debts, and legacies, there shall be any surplus, it shall vest in him beneficially (*g*).

In equity, *primâ facie*, the rule has been the same as at law: The numerous cases upon the subject must be considered as having established the general rule, that the executor, by the mere force of the appointment, should take all the undisposed of residue of the personal estate, as well beneficial as legal (*h*). But this general rule has been controlled in equity, in all cases where a necessary implication or strong presumption has appeared, that the testator meant to give only the *office* of executor, and not the beneficial interest in the residue: In all such cases, the executor has been considered a trustee for the next of kin of the testator;

(*g*) Atty. Gen. *v.* Hooker, 2 P. Wms. 340. Southcot *v.* Watson, 3 Atk. 228. Urquhart *v.* King, 7 Ves. 228.

(*h*) See Lowndes on Legacies, 249, 250.

or in cases where no next of kin can be found, a trustee for the Crown (*i*).

But though the general rule has been thus clearly established, great and inevitable difficulty has existed in applying it to particular cases. It was observed by Sir W. Grant (*k*), that "so long as the doctrine of the Court with regard to the right of executors to the residue of personal estate, not expressly disposed of, shall stand upon its present footing, it is impossible to lay down any rules to prevent the frequent recurrence of this question: for as it is always open to the next of kin to shew intention from the particular wording of the Will, adverse to the effect of the legal appointment of the executor, the circumstances, from which it may be endeavoured to deduce that intention, may be infinitely varied."

11 Geo. IV. & 1 W. IV. c. 40.

Such being the state of the jurisdiction of the Courts of Equity in cutting down the right of the executor, the Act of 11 Geo. IV. & 1 Wm. IV. chap. 40, was passed, which after reciting that "testators by their Wills frequently appoint executors, without making any express disposition of the residue of their personal estate; and whereas executors so appointed become by law entitled to the whole residue of such personal estate; and Courts of Equity have so far followed the law, as to hold such executors to be entitled to retain such residue for their own use, unless it appears to have been their testator's intention to exclude them from the beneficial interest therein, in which case they are held to be trustees for the person or persons (if any) who would be entitled to such estate under the Statute of Distributions, if the testator has died intestate; and whereas it is desirable that the law should be extended in that respect," proceeds to enact, "that when any person shall die, after the first day of September next after the passing of this Act, having by his or her Will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors,

After 1st Sept. 1830, executors to be deemed to be trustees for

(*i*) Middleton *v.* Spicer, 1 Bro. C. C. 201. Taylor *v.* Haygarth, 14 Sim. 8, 12. Russell *v.* Clowes, 2 Coll. 648.

(*k*) Pratt *v.* Sladden, 14 Ves. 197.

such executor or executors shall be deemed by Courts of Equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the Will or any codicil thereto, that the person or persons, so appointed executor or executors, was or were intended to take such residue beneficially" (*l*).

persons entitled to any residue under the Statute of Distributions, unless otherwise directed by Will:

And by the second section it is further provided and enacted, "That nothing herein contained shall affect or prejudice any right to which any executor, if this Act had not been passed, would have been entitled, in cases where there is not any person who would be entitled to the testator's estate under the Statute of Distributions, in respect of any residue not expressly disposed of (*m*)."

not to affect rights of executors where there is not any person entitled to the residue.

It is necessary, however, with relation to questions which may yet arise respecting Wills of persons who have died previously to September 1st, 1830, to review briefly the grounds on which the Courts of Equity had proceeded, until the time of the passing the above Act, in deciding either that the executor was entitled to the residue beneficially, or that he was merely a trustee for the next of kin.

(*l*) It has been contended that this Act provides only for the case in which the property is vested in the executor *by virtue of his appointment*, and that it does not apply to a case where he takes it by virtue of an express gift: But in Love *v.* Gaze, 8 Beav. 472, a testator appointed A. and B. his executors and he gave them all his personal estate, "that is to say, for you to pay all as follows:" He then gave several legacies, and afterwards said, "I wish all this to be paid in six months after my death:" And it was held by Lord Langdale, under this statute, that the executors did not take the unexhausted residue beneficially, but in trust for the next of kin; as the intention that they should take beneficially did not appear by the Will. See also Andrew *v.* Andrew, 1 Coll. 686.

(*m*) The statute, it should seem, has made no alteration in the law except in cases where the deceased has left next of kin. Taylor *v.* Haygarth, 14 Sim. 8. Russell *v.* Clowes, 2 Coll. 648. If, therefore, there are no next of kin, and no intention is disclosed on the face of the Will that the executors shall be excluded from taking beneficially, they will be entitled as against the Crown. 2 Coll. 648.

What is sufficient in cases not within the Act, to raise a presumption against the executor's title:

For this purpose it is necessary to consider, what circumstances have been held sufficient to raise that presumption, which according to the rule above laid down, must exist, in cases not within the Statute, in order to preclude the executor from taking the residue beneficially.

the words "in trust:"

In the first place, where the executor is expressly appointed *in trust* (*n*), or the residue is bequeathed to him *in trust* (*o*), though no trusts are declared (*p*), or though the trusts declared do not exhaust the whole property (*q*), he shall be a trustee for the next of kin: But it may be otherwise, where he is made trustee of some particular fund, and not the whole residue (*r*).

character of trustee plainly affixed:

The rule is the same, where the character of trustee is plainly affixed to him, though not by express words: As where there is a direction to the executor to "keep a proper account" (*s*); or where the testator appoints him, entreating him to take the office (*t*); or directs that the executor shall be saved harmless from all expenses attending the execution of the Will (*u*); or declares that the whole of the property

(*n*) Pring *v.* Pring, 2 Vern. 99. Bagwell *v.* Dry, 1 P. Wms. 700. Read *v.* Snell, 2 Atk. 643. Androvin *v.* Poilblanc, 3 Atk. 300. Pratt *v.* Sladden, 14 Ves. 198. Dawson *v.* Clark, 18 Ves. 254. Vezey *v.* Jamson, 1 Sim. & Stu. 69.

(*o*) Graydon *v.* Hicks, 2 Atk. 18. Pratt *v.* Sladden, 14 Ves. 198.

(*p*) Wheeler *v.* Sheers, Mosely, 288, 301. Milnes *v.* Slater, 8 Ves. 295, 308. Dawson *v.* Clark, 15 Ves. 414, by Sir W. Grant. 18 Ves. 254, by Lord Eldon. Vezey *v.* Jamson, 1 Sim. & Stu. 69. Taylor *v.* Haygarth, 14 Sim. 8, 12.

(*q*) Robinson *v.* Taylor, 2 Bro. C. C. 589. Dawson *v.* Clark, 18 Ves. 257, *per* Lord Eldon. King *v.* Denison, 1 V. & B. 260. Southouse *v.* Bate, 2 V. & B. 396. Woollett *v.* Harris, 5 Madd. 452. Mullen *v.* Bowman, 1 Coll. 197. But see Dawson *v.* Clark, 15 Ves. 409, 416. 2 V. & B. 399, *per* Sir Wm. Grant. Russell *v.* Clowes, 2 Coll. 660, *per* Knight Bruce, V. C. See also Andrew *v.* Andrew, 1 Coll. 686.

(*r*) Batteley *v.* Windle, 2 Bro. C. C. 31. Griffiths *v.* Hamilton, 12 Ves. 298. Pratt *v.* Sladden, 14 Ves. 198. Russell *v.* Clowes, 2 Coll. 648.

(*s*) Gladding *v.* Yapp, 5 Madd. 56.

(*t*) Lord North *v.* Purdon, 2 Ves. Sen. 495. Seley *v.* Wood, 10 Ves. 71. Langham *v.* Sanford, 17 Ves. 451. Giraud *v.* Hanbury, 3 Meriv. 150.

(*u*) Dean *v.* Dalton, 2 Bro. C. C. 634.

shall pass by the Will "according to law (*v*);" or appoints the executor "to see my Will put in force" (*w*).

So a presumption against the executor may arise from the condition of the party appointed, as where the testator names a mercantile firm to be his executors (*x*); or the person who shall for the time being fill a certain office, as that of ambassador from a particular country (*y*).

If the character of the trustee is affixed by the Will to one of several executors, they are all trustees; for there is no instance of making one a trustee, and the others not (*z*).

legacy given to a sole executor:

Again, it has been long settled that an express legacy, however small, to a sole executor, will raise the necessary presumption against him (*a*); notwithstanding legacies are also given to the next of kin (*b*); and so will a legacy which is given to him as one of a class, as a legacy to the children of A., of which the executor is one (*c*); and notwithstanding the legacy is specific (*d*). Nor will it make any difference that the appointment to the office and the gift of the legacy are in different parts of the Will; though it may be questionable whether the presumption arises, when a legacy is given by the Will, and the executor appointed by a codicil (*e*).

The presumption, however, will not be raised against the executor by a particular legacy to him for life, *with remainder over* (*f*), or by an exceptive bequest to him out of a subject

(*v*) Cranley *v.* Hale, 14 Ves. 307.

(*w*) Braddon *v.* Farrand, 4 Russ. Chanc. Cas. 87.

(*x*) De Mazar *v.* Pybus, 4 Ves. 644.

(*y*) Urquhart *v.* King, 7 Ves. 225. Griffiths *v.* Hamilton, 12 Ves. 309.

(*z*) White *v.* Evans, 4 Ves. 21. Milnes *v.* Slater, 8 Ves. 295. Sadler *v.* Turner, 8 Ves. 617. But see Williams *v.* Jones, 10 Ves. 77.

(*a*) Farrington *v.* Knightly, 1 P. Wms. 545. Southcot *v.* Watson, 3 Atk. 226.

(*b*) Andrew *v.* Clark, 2 Ves. Sen. 162. Kennedy *v.* Stainsby, 1 Ves. Jun. 66, note.

(*c*) Abbott *v.* Abbott, 6 Ves. 343.

(*d*) 2 Rop. Leg. 643, 3d edit. Randall *v.* Bookey, 2 Vern. 425. Southcot *v.* Watson, 3 Atk. 226. Martin *v.* Rebow, 1 Bro. C. C. 154.

(*e*) Langham *v.* Sanford, 2 Meriv. 21.

(*f*) Granville *v.* Beaufort, 1 P. Wms. 114: *Secùs*, where there is no ulterior disposition: Zouch *v.* Lambert, 4 Bro. C. C. 326: or where the gift is of the *residue* for life: Joslin *v.* Brewet, Bunb. 112. Dicks *v.* Lambert, 4 Ves. 725.

bequeathed to another (*g*). But a gift of a reversionary interest will have that effect (*h*), unless, perhaps, it be contingent (*i*).

Again, the presumption will not arise, where the executor legatee is an infant

legacy given to one of several executors:

Moreover, a legacy to *one of several* executors will not raise the presumption against him (*l*); unless it be given to him *for his care and trouble* (*m*): Nor will the presumption be otherwise raised by unequal legacies to all the executors (*n*): But where *equal* legacies are given to them all, the presumption is as strong as in the case of a legacy to a sole executor (*o*). If a legacy be given to one of several executors *for his care and trouble*, it makes all the executors trustees (*p*).

ineffectual or inchoate residuary clauses:

Where the residuary bequest lapses, the executor is not entitled (*q*); nor where it is void (*r*): Nor where the design of the testator to dispose of the residue, although not carried into effect, is evident: As where he bequeaths the residue in such manner as he shall appoint, and never makes any appointment (*s*): or where he leaves a blank for the name of the residuary legatee (*t*): or where he professes to dispose

(*g*) Griffiths *v.* Rogers, Prec. Chanc. 231. 2 Rop. Leg. 646, 3d edit.

(*h*) Seley *v.* Wood, 10 Ves. 71. Oldman *v.* Slater, 3 Sim. 84.

(*i*) Lynn *v.* Beaver, 1 Turn. & R. 63.

(*k*) Williams *v.* Jones, 10 Ves. 77.

(*l*) Buffar *v.* Bradford, 2 Atk. 222. Griffiths *v.* Hamilton, 12 Ves. 298.

(*m*) White *v.* Evans, 4 Ves. 21. May *v.* Lewin, 2 P. Wms. 159, *in notis*. See Dawson *v.* Thorne, 3 Russ. Chanc. Cas. 235, 239.

(*n*) Blinkhorne *v.* Feast, 2 Ves. Sen. 27, 29. Bowker *v.* Hunter, 1 Bro. C. C. 328. Oliver *v.* Frewen, 1 Bro. C. C. 590. Griffiths *v.* Hamilton, 12 Ves. 309. Russell *v.* Clowes, 2 Coll. 648.

(*o*) Ommanney *v.* Butcher, 1 Turn. & Russ. 260, 269. See also Clennell *v.* Lewthwaite, 2 Ves. Jun. 471, by Lord Alvanley. Taylor *v.* Haygarth, 14 Sim. 8, 12.

(*p*) See *ante*, p. 1267.

(*q*) Bennet *v.* Batchelor, 3 Bro. C. C. 28.

(*r*) Atty. Gen. *v.* Tomkins, Ambl. 216.

(*s*) Davers *v.* Dewes, 3 P. Wms. 40. Mordaunt *v.* Hussey, 4 Ves. 117. Dawson *v.* Clark, 15 Ves. 414, by Sir Wm. Grant.

(*t*) Bishop of Cloyne *v.* Young, 2 Ves. Sen. 91. North *v.* Purdon, 2 Ves. Sen. 495. Dawson *v.* Clark, 15 Ves. 414.

of the residue, but does not (*u*): or where, by an unexecuted codicil, he refers to the Will as not having disposed of the residue, and sketches out a disposition of it, which he leaves imperfect (*v*). So the presumption will be raised against the executor where the testator partially obliterates the residuary clause, leaving nothing but the introductory words (*w*); or where he professes to dispose of *part* only of his personal estate (*x*).

when parol evidence admissible.

It remains to consider briefly the subject of the admissibility of parol evidence with reference to this question. Such evidence is not admissible in the first instance, on behalf of the next of kin, to raise the presumption for the exclusion of the executor (*y*). But when such presumption is raised from the words of the Will, parol evidence is admissible, on behalf of the executor, for the purpose of rebutting such presumption (*z*): and such evidence may then be opposed by similar evidence on behalf of the next of kin (*a*).

If, however, the Will conveys upon the face of it an unequivocal indication of an intention to clothe the executor with a fiduciary character only, as where he is expressly appointed *in trust* (*b*), or a legacy is expressly given to him, for his care and trouble (*c*), parol evidence is not admissible to

(*u*) Oldham *v.* Carleton, 2 Cox, 399.

(*v*) Nourse *v.* Finch, 1 Ves. Jun. 344. S. C. 2 Ves. Jun. 78. But merely leaving a blank between the end of the Will and the signature, is not sufficient to exclude the executor: White *v.* Williams, 3 Ves. & B. 72. S. C. Cooper, 58.

(*w*) Mence *v.* Mence, 18 Ves. 348.

(*x*) Urquhart *v.* King, 7 Ves. 225.

(*y*) White *v.* Williams, 3 V. & B. 72. S. C. Cooper, 58. Langham *v.* Sanford, 2 Meriv. 17.

(*z*) Clennell *v.* Lewthwaite, 2 Ves. Jun. 474. Langham *v.* Sanford, 17 Ves. 442, 443. Lynn *v.* Beaver, 1 Turn. & R. 66. No allegation is necessary to put in issue that he is entitled by the effect of parol evidence, that being included in the allegation that he is entitled as executor: 1 Turn. & R. 66.

(*a*) Cloyne *v.* Young, 2 Ves. Sen. 95.

(*b*) Gladding *v.* Yapp, 5 Madd. 59.

(*c*) Langham *v.* Sanford, 17 Ves. 443. Whitaker *v.* Tatham, 7 Bingh. 628: but see Williams *v.* Jones, 10 Ves. 77, as to one of several executors.

support the claim; for that would be to allow parol evidence to contradict the Will (*d*).

In cases within the operation of the new statute (*e*), parol evidence is, in all cases, inadmissible to shew that the testator intended his executors to take beneficially; for the Act requires that the intention should appear by the Will (*f*).

If the residue be undisposed of, it must be divided amongst all the next of kin, notwithstanding the testator declares by his Will that one of them shall have none of his property.

It may be mentioned, in conclusion of this subject, that where there is no gift of the undisposed of residue, a testator cannot, by negative words, exclude one of his next of kin from participating in it. Thus, where a testator, by his Will, cut off his widow and one of his daughters from any part of his property, and directed that they should not receive any benefit therefrom, *but he made no disposition of his property*; it was held, that the widow and daughter were, nevertheless, entitled to their share in the undisposed of residue, under the Statute of Distributions (*g*).

(*d*) 17 Ves. 443. 2 Meriv. 17. 5 Madd. 58, 59. Hall *v.* Hill, 1 Dr. & W. 115, *per* Sugden, C. of Ireland.

(*e*) 11 Geo. IV. and 1 Wm. IV. c. 40. *Ante*, p. 1264.

(*f*) Love *v.* Gaze, 8 Beav. 472.

(*g*) Johnson *v.* Johnson, 4 Beav. 318.

BOOK THE FOURTH.

OF DISTRIBUTION.

THE office of an administrator, as far as it concerns the collecting of the effects, the making of an Inventory, and the payment of debts, is altogether the same as that of an executor: But as there is no Will, (unless the administration be *cum testamento annexo*), to direct the subsequent disposition of the property, at this point they separate, and must pursue different courses (*a*).

CHAPTER THE FIRST.

OF DISTRIBUTION UNDER THE STATUTE.

AFTER the Ordinary was divested of the power of administering an intestate's effects, and compelled, in the manner mentioned in the preceding part of this Treatise (*b*), to delegate such authority to the relations of the deceased, the Spiritual Court attempted to enforce a distribution, and took bonds of the administrator for that purpose: but such bonds were prohibited by the Temporal Courts, and declared to be void in point of law, on the ground, that, by the grant of administration, the ecclesiastical authority was executed, and ought to interfere no farther (*c*). Thus the administrator was entitled, exclusively, to enjoy the residue of the testator's effects, after payment of the debts and funeral expenses (*d*).

(*a*) Toller, 369.

(*b*) *Ante*, p. 331.

(*c*) Edwards *v.* Freeman, 2 P. Wms. 441, by Sir Joseph Jekyll. Hughes *v.* Hughes, 1 Lev. 233. S. C. Carter, 125. 2 Black. Comm. 515. Toller, 370.

(*d*) Carter *v.* Crawley, Sir T. Raym. 500. Edwards *v.* Freeman, 2 P. Wms. 441. 2 Black. Comm. 515. Bac. Abr. Exors. (I).

The hardships of this privilege upon those of kin to the intestate in equal degree with the administrator, was the occasion of making the Statute of Distributions, 22 & 23 Car. II. c. 10 (*e*). That statute, after empowering the Ordinary, on the granting of administration, to take a bond of the administrator, with two or more sureties, conditioned as before-mentioned in a preceding part of this Work (*f*), proceeds, in section 3, to enact as follows, "And also that the said Ordinaries and Judges respectively shall and may, and are enabled to proceed and call such administrators to account for and touching the goods of any person dying intestate; and upon hearing and due consideration thereof, to order and make just and equal distribution of what remaineth clear, (after all debts, funeral, and just expenses of every sort first allowed and deducted), amongst the wife and children, or childrens' children, if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks, *pro suo cuique jure*, according to the laws in such cases, and the rules and limitation hereafter set down; and the same distributions to decree and settle, and to compel such administrators to observe and pay the same by the due course of his Majesty's ecclesiastical laws; saving to every one, supposing him or themselves aggrieved, their right of appeal, as was always in such cases used."

22 & 23 Car. II. c. 10. Statute of Distributions:

Sect. 3. Ordinaries to have power to call administrators to account, and to make distribution, &c.

By section 4, it is provided, "That this Act or anything herein contained, shall not any ways prejudice or hinder the customs observed within the city of London, or within the province of York, or other places having known and received customs peculiar to them, but that the same customs may be observed as formerly; anything herein contained to the contrary notwithstanding."

Sect. 4. Customs of London and York saved.

(*e*) Petit *v.* Smith, 1 P. Wms. 8, by Lord Holt. There are two objects of that statute: one that the residue shall be forthcoming, and another that it shall be duly divided: By Bayley, B., in the Archbishop of Canterbury *v.* Robertson, 1 Crompt. & Mees. 705.

(*f*) *Ante*, p. 439, *et seq.*

22 & 23 Car. II. c. 10. Sect. 5. How and to whom the surplusage is to be distributed:

And by section 5, it is further enacted, "That all Ordinaries, and every other person (*g*), who by this act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following: that is to say, one-third part of the said surplusage to the wife of the intestate, and all the residue by equal portions to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made: And in case any child, other than the heir-at-law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share, which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated: but the heir-at-law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate."

Advancement by portion:

Heir-at-law to have an equal part.

Sect. 6. If no children.

And by section 6. "In case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of

(*g*) The word "person" here evidently means judge: See Archbishop of Canterbury *v.* Tappen, 8 B. & C. 158, by Lord Tenterden. *Ante*, p. 445.

22 & 23 Car. II. c. 10.

kindred of the intestate who are in equal degree, and those who legally represent them."

Sect. 7. If no wife, or if no wife or child.

And by section 7, it is provided, "That there be no representations admitted among collaterals after brothers' and sisters' children; and in case there be no wife, then all the said estate to be distributed equally to and amongst the children: and in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever."

Sect. 8. No distribution till after a year:

If debts afterwards appear, then all to refund proportionably.

And by section 8, it is likewise enacted, "To the end that a due regard be had to creditors, that no such distribution of the goods of any person dying intestate, be made till after one year be fully expired after the intestate's death, and that such and every one to whom any distribution and share shall be allotted, shall give bond with sufficient sureties in the said Courts, that if any debt or debts truly owing by the intestate, shall be afterwards sued for, and recovered or otherwise duly made to appear; that then and in every such case he or she shall respectively refund and pay back to the administrator his or her rateable part of that debt or debts, and of the costs of suit and charges of the administrator by reason of such debt out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the said debt or debts so discovered after the distribution made as aforesaid."

Sect. 9. Act not to extend to administration *cum testamento annexo.*

Finally, by section 9, it is enacted, "That in all cases where the Ordinary hath used heretofore to grant administration *cum testamento annexo*, he shall continue so to do, and the Will of the deceased in such testament expressed, shall be performed and observed in such manner as it should have been if this Act had never been made."

It is obvious to observe how near a resemblance this Statute of Distributions bears to the ancient English law, *de rationabili parte bonorum;* which Sir Edward Coke, though he doubted, as there has been occasion already to mention (*h*),

(*h*) See *ante*, p. 3.

the generality of it's restraint on the power of bequeathing by Will, held to be universally binding, in point of conscience at least, on the administrator or executor, in case of either a total or partial intestacy (*i*). It also bears some resemblance to the Roman law of succession *ab intestato*, which, and because the Act was also penned by an eminent civilian (*j*), has occasioned a notion that the Parliament of England copied it from the Roman prætor; though it is little more than a restoration, with some refinements and regulations, of our old constitutional law; which prevailed as an established right and custom, from the time of King Canute downwards, many centuries before Justinian's laws were known or heard of in the Western parts of Europe (*k*).

Lord Hardwicke, in the case of *Stanley* v. *Stanley* (*l*), took occasion to observe, that this statute was very incorrectly penned.

Agreement as to distributive share.

Where a party, entitled to a distributive share of the personal estate of an intestate, makes an agreement relating to the distribution, under a supposition that the estate is of a certain value, and it turns out to be greater than was known at the time of the agreement, a Court of Equity will set it aside (*m*): for it is a general principle of equity, that agreements, relative to real or personal estate, if founded on mistake, will be for that reason set aside (*n*).

In the investigation of the rights of the several parties entitled under this statute, it is proposed to consider, First, The rights of a husband, with respect to the personal property of his deceased wife: Secondly, The rights of a widow, with respect to the effects of her husband: Thirdly, The

(*i*) 2 Inst. 32, 33. 2 Black. Comm. 516.

(*j*) Sir Walter Walker: See R. *v.* Raines, 1 Lord Raym. 574, by Lord Holt.

(*k*) 2 Black. Comm. 516.

(*l*) 1 Atk. 457.

(*m*) Cocking *v.* Pratt, 1 Ves. Sen. 400.

(*n*) See Pooley *v.* Ray, 1 P. Wms. 355. Bingham *v.* Bingham, 1 Ves. Sen. 126. Leonard *v.* Leonard, 2 Ball & Beat. 183. Stewart *v.* Stewart, 1 Rob. App. Cas. 431.

rights of the children, and lineal descendants of the deceased: Fourthly, The rights of the next of kin.

Sect. I.

Of the Rights of the Husband and his Representatives, with respect to the Personal Property of his intestate Wife.

Husband's rights as administrator to his wife:

It has been shewn, in a former part of this Treatise, that the husband is entitled to the grant of administration of his wife's effects: and consequently, before the Statute of Distributions, he was entitled, as all administrators were, to the exclusive enjoyment of the residue: Doubts, however, arose, whether the husband's right was not superseded by the force of that statute; and whether he was not thereby bound to distribute her personal estate among her next of kin: To obviate which, it is provided by the 29 Car. II. c. 3, s. 25 (the Statute of Frauds) that neither the Statute of Distributions or anything therein contained, " shall be construed to extend to the estates of *feme coverts* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said Act" (*o*).

rights of the husband's representatives, if he dies without taking out administration to her:

In case the wife dies intestate, and afterwards the husband dies, without having taken out administration to her, the Ecclesiastical Court, until a late period, considered itself bound by the statute 21 Hen. VIII. c. 5, to grant administration to the next of kin of the wife, and not to the representative of the husband (*p*). But such administrator has been regarded, in equity, with respect to the residue, as a trustee for the representatives of the husband (*q*): For the husband

(*o*) See *ante*, p. 741—745, as to the extent of the husband's rights as his wife's administrator. See also *ante*, p. 582, 583.

(*p*) See *ante*, p. 338.

(*q*) Cart *v.* Rees, 1 P. Wms. 381. (cited in Squib *v.* Wyn.) Humphrey *v.* Bullen, 1 Atk. 458. S. C.

surviving the wife, her whole estate vested in him at the time of her death, and no person could possibly be entitled to the rights of the wife but himself; so that her whole property belonged to him (*r*). And the practice of the Prerogative Court of Canterbury, on this head, was altered in Sir John Nicholl's time; and the rule now established is, that the administration shall be granted to the representatives of the husband, unless it can be shewn that the next of kin of the wife are entitled to the beneficial interest (*s*).

or without having fully administered.

So in a case where the husband takes out administration to his wife, and dies without having administered to all her estate, the Ecclesiastical Courts, for a long period, thought themselves obliged to commit administration *de bonis non* of the wife, if required, to the next of kin of the wife at the time of her death (*t*): Still the beneficial interest in her effects has always been held to be in the representatives of her husband (*u*).

It may be a question, what shall constitute the legal relation of husband and wife, so as to confer the rights above discussed: This subject has already been considered, incidentally to the investigation of the husband's right to the administration (*v*).

Sect. II.

Of the Rights of a Widow, in the Distribution of the Effects of her intestate Husband, under the Statute.

The statute, it will be observed, provides, that if the intestate left children, as well as a widow, one-third shall go to the widow, and the residue among the children. If there be no children or lineal descendants of children subsisting,

11 Vin. Abr. 88. Elliott *v.* Collier, 3 Atk. 526. S. C. 1 Ves. Sen. 15. 1 Wils. 168.

(*r*) 3 Atk. 527.

(*s*) See *ante*, p. 339.

(*t*) *Ante*, p. 391.

(*u*) 1 Atk. 458.

(*v*) *Ante*, p. 337, 338.

then a moiety shall go to the widow, and a moiety to the next of kindred.

Where an intestate leaves a widow, but no next of kin, the widow is not entitled to the whole of the personal estate; but one moiety belongs to her, and the other to the Crown (*w*).

Widow's claim may be barred by settlement:

The widow's title, however, under the statute, may be barred by a settlement before marriage (*x*), excluding her from her distributive share of her husband's personal estate: and even in the case of a female infant, she may be barred of her right by such a settlement, made before marriage, with the approbation of her parents or guardians (*y*).

Where the settlement is expressed to be "as and for her jointure, in full lieu, bar, and satisfaction of any dower or *thirds* which she could or might claim *at common law* out of all or any of the estates, real, *personal*, or freehold, of her intended husband," the widow will be excluded from her share under the statute; for the words "common law" must be construed as equivalent to the terms "according to the general law" (*z*).

In such cases, whether the husband die intestate, or dispose of his personal estate by Will, which disposition fails by lapse, the wife will be equally excluded from her distributive share.

Provision by Will for widow, in lieu of her under a *quasi* intestacy.

But it is otherwise when the husband *by Will* makes a provision for his wife, stating it to be in lieu and in bar of all on his personal estate, and then subjects his per-

(*w*) Cave *v.* Roberts, 8 Sim. 214.

(*x*) See Slatter *v.* Slatter, 1 Younge & Coll. 28, as to the effect of a separation deed executed by the wife after marriage.

(*y*) Lord Buckinghamshire *v.* Drury, 3 Bro. P. C. 492. S. C. 2 Eden, 60. 4 Bro. C. C. 506, note. 2 Roper on Husb. & Wife, 26, 2d edit.

(*z*) Gurly *v.* Gurly, 8 Cl. & F. 743. See also Druce *v.* Denison, 6 Ves. 385. But where the husband, on his marriage, settles on the wife a rent-charge *for her jointure, and in lieu of dower and thirds at common law*, she is not thereby precluded from her distributive share in his undisposed of personal estate; because the rent-charge must be regarded as intended to be in lieu only of any claim she might have *on his lands*: Colleton *v.* Garth, 6 Sim. 19.

sonalty to a disposition which lapses, or is void, so that the latter fund is subject to distribution; for then, notwithstanding the words of the Will, the widow is entitled to a share under the statute (*a*): The principle of this distinction is, that where a woman has before marriage agreed to accept a consideration for her widow's share, she is bound by her compact, whether her husband die testate or intestate; but where there is no such contract, but the provision in bar of the distributive share arises upon the husband's Will, it is presumed that the motive for the widow's exclusion originated in a particular design or purpose of the testator, *viz.*, for the benefit of the person in favour of whom the property was bequeathed by him; so that if the purpose be disappointed, there is no reason why the bar or exclusion should continue (*b*).

In what case a widow cannot claim both her distributive share, and money due under a covenant for her provision:

It is necessary to consider the right of the widow under the Statute of Distributions, with relation to the existence of a covenant or agreement, on the part of the husband, to settle or to leave, or that his executors shall pay, to his widow, a portion of his personal estate.

It is a general rule, that if the husband covenants to *leave*, or that his executor shall *pay*, to his widow a sum of money, or part of his personal estate, and he dies intestate, so that she becomes entitled to a portion of his personal property under the statute, such distributive share shall be a performance of the covenant, and she cannot claim both (*c*). The

(*a*) Pickering *v.* Stamford, 3 Ves. 332. Garthshore *v.* Chalie, 10 Ves. 17, 18. 2 Rop. Husb. & Wife, 23, 2d edit.

(*b*) 2 Rop. Husb. & Wife, 23, 2d edition. Lord Alvanley found this principle recognised by Lord Cowper, in Sympson *v.* Hornsby, which he stated from the Registrar's Book: 3 Ves. 335.

(*c*) Blandy *v.* Widmore, 1 P. Wms. 324. S. C. 2 Vern. 709. Lee *v.* D'Aranda, 1 Ves. Sen. 1. S. C. 3 Atk. 419. Garthshore *v.* Chalie, 10 Ves. 1. It will make no difference that the money under the covenant is to be paid at a determinate period within the year after the testator's death, whereas in strictness the distributive share is not payable until the end of that year; for this difference shall not be permitted to repel the legal presumption: 10 Ves. 13. 1 P. Wms. 324. 1 Ves. Sen. 1.

principle seems to be, that the husband, looking forward to the event of his death, when his wife will have an interest in his property by the provision of the law, declines for that reason to give her any interest in it in his lifetime, considering that his covenant will be as effectually performed by what the law provides for her, as if the provisions were made by himself (*d*).

If the widow's distributive share is *less* than the amount of her provision under her husband's covenant, such share will be regarded as a partial performance; so that if the money covenanted to be paid by the husband's executors be 1000*l.*, and the widow's distributive share amount only to 500*l.*, such share will nevertheless be a part performance of the covenant; *viz.*, to the extent of 500*l.* (*e*).

In the case of *Goldsmid* v. *Goldsmid* (*f*), Sir Thomas Plumer, M. R., decided, that if the widow takes a distributive share of her husband's personal estate, not under an actual but a *quasi* intestacy, such share will be a performance of his covenant that his executors shall pay to her a sum of money at his death if she survived him: In that case the husband by marriage articles covenanted, that if he died in the lifetime of his wife, his executors should, within three months after his decease, pay to her 3000*l.*: By his Will he gave all his property to his executors, in trust, after payment of his debts, at the expiration of three years from his decease, to divide it in such ways, shares, and proportions, as to them should appear right: On his death, during the life of his wife, the executors having died or renounced, his property became divisible according to the Statute of Distributions: and the widow's distributive share, exceeding 3000*l.*, was held a performance of the covenant in the marriage articles (*g*).

in what cases she may claim both:

If the husband's covenant be entire, and the provision therein expressed to be secured to the wife is such as the

(*d*) 10 Ves. 16. 2 Roper on Husb. & Wife, 44, 2d edit.

(*e*) 10 Ves. 16. 2 Rop. Husb. & Wife, 52, 2d edit.

(*f*) 1 Swanst. 211.

(*g*) The authority of this decision is doubted in 2 Rop. Husb. & Wife, 50, 2d edit.

covenant in *part* might be held to be performed by the widow's distributive share under the statute, according to the preceding cases, and the remaining part could not be so considered, then, since the covenant is entire, the Court will not split it, and hold a performance and a non-performance at the same time (*h*): Thus, if the husband covenanted with trustees that his heirs, executors, &c., should pay to them 6000*l.* within a certain period after his death, upon trust as to 1500*l.*, part of the sum, for his widow *absolutely*, if she survived him; and as to the remaining sum of 4500*l.*, to pay the interest of it to her during her life, or widowhood; since the last sum, not being given absolutely to the widow, cannot be considered satisfied by her distributive share, neither shall the 1500*l.* be so regarded (*i*).

Again, if the covenant by the husband be so framed as to require the money to be settled during his life, so that there was a breach of it before his death, and a *debt* may be considered as incurred to the widow, in such case the rule above laid down does not apply: Thus, in *Oliver* v. *Brigland* (*k*), the husband covenanted to pay for the benefit of his wife a sum of money within two years after the marriage, and that if he died, his executors should pay it: After surviving the two years, he died intestate, and his widow's distributive share was larger than the sum covenanted to be settled upon her: But Sir Joseph Jekyll decided, that it should not be taken in satisfaction of such debt, but that the widow should have both.

In *Lang* v. *Lang* (*l*), Henry Lang a domiciled Englishman married a lady at the Mauritius, where the French law was in force: By their settlement (which was in the French language and form) they declared that they intended to marry according to the laws of England, the benefit of which they reserved to themselves the power of claiming: And it

(*h*) 2 Rop. Husb. & Wife, 51, 52, 2d edit.

(*i*) Couch v. Stratton, 4 Ves. 391.

(*k*) Cited 3 Atk. 420. 1 Ves. Sen. 1.

(*l*) 8 Sim. 451.

was stipulated that Henry Lang should invest, in certain securities, 4000*l.* (the property of the lady, which he acknowledged he had received from her), and that she should receive the income, on her sole receipts, for her maintenance and personal wants, and that, on her dying in Henry Lang's lifetime without leaving issue by him, the capital should belong to him: There was also a proviso that the fund should go to the children of the marriage in the event of there being any, or to their issue, if they should die under twenty-one, leaving issue; and if Henry Lang did not invest the 4000*l.* in his lifetime, she was to be at liberty to take it out of his assets on his death: Henry Lang died intestate in his wife's lifetime: He never received the 4000*l.*, nor invested a sum to that amount: And Sir L. Shadwell, V. C. held that his widow was entitled to be paid the 4000*l.* out of his assets, and also to receive her distributive share of the residue: His Honor thought that if the wife had filed a bill (living the husband,) to compel him to make the investment, the Court would have considered that the husband had entered into a contract which was to be fulfilled in his lifetime, and would have compelled him to produce the 4000*l.*, and to make the investment: If that were the right conclusion, such cases as *Blandy* v. *Widmore* and *Lee* v. *Cox* and *D'Aranda* (*m*) had no application to the subject; because those cases decide only that, where the husband has bound himself to fulfil some obligation by the payment of money at the time of his death (whether it be at the time of his death, or within six months after, makes no difference), that obligation is satisfied, if, by dying intestate, he allows the law to confer a benefit on the covenantee equivalent to that which he had bound himself to confer: Those cases had no reference to the subject, there being in the present case an obligation, on the husband, to produce the sum in question: and, in his Honor's view, it was the same thing as if there had been a covenant with a trustee to make a settlement of that sum in the manner provided for;

(*m*) *Ante*, p. 1279.

and then, if the husband had died intestate, the trustee would have taken, from his assets, what was sufficient for the purpose, and the wife would have been at liberty to take her share of the residue under the Statute of Distributions.

SECT. III.

Of the Rights of the Children and their Representatives to Distribution under the Statute.

After the allotment of a third to the widow, the statute, as we have seen, directs a distribution of the residue by equal portions to and amongst the children of the intestate, and "such persons as legally represent such children in case any of the said children be then dead." In case there be no wife, then, by section 7, all the estate is to be distributed to and amongst the children.

What is meant by the "legal representatives" of the children.

By the words "such as legally represent such children," their lineal representatives to the remotest degree are admitted (*n*). But the term must be understood of descendants, and not next of kin (*o*); as for example, if a son of the intestate is dead, leaving a widow and child, the widow shall take nothing, and the child the whole of the father's share; yet the widow, though not strictly one of the next of kin, is, in the same sense as the child, a legal representative of the personal estate of the father (*p*).

1. Where none of the intestate's children are dead:

To attain a clear apprehension of the subject of this section, three sorts of cases may be supposed: First, where none of the intestate's children are dead; Secondly, where the intestate's children are all dead, all of them having left children; Thirdly, where some of the intestate's children are

(*n*) Carter *v.* Crawley, Sir T. Raymond, 500.

(*o*) Bridge *v.* Abbot, 3 Bro. C. C. 226, by Lord Alvanley. Evans *v.* Charles, 1 Anstr. 132, by Eyre, C. B.

(*p*) Price *v.* Strange, 6 Madd. 161, 162.

living, and some dead, and such as are dead have each of them left children (*q*).

On the first hypothesis, that is to say, where none of the intestate's children are dead, it is sufficiently obvious, that after the wife has had her third allotted to her, the remaining two-thirds shall, pursuant to the statute, be equally divided among all the children of the intestate; as in this case they all claim in their own right (*r*).

half-blood:

A brother or sister of the half-blood shall be equally entitled to a share with one of the whole blood; inasmuch as they are both equally near of kin to the intestate (*s*).

posthumous child:

A posthumous child has also the same rights; for a child *in ventre sa mere* at the time of the father's death, being a person *in rerum naturâ*, is, by the rules of the common and the civil law, to all intents and purpose a child, as much as if born in the father's lifetime, and consequently is entitled under the statute (*t*).

an only child.

If the intestate leave only one child, such case is not to be considered as omitted by the statute: therefore, in case the intestate also leave a wife, she shall only have a third part, and the other two-thirds shall go to such child (*u*). And where the intestate leaves an only child and no widow, although, literally speaking, there can be no distribution, yet such only child shall be entitled to the whole personal estate (*v*).

2. Where all the intestate's children are

Secondly, where the intestate's children are all dead, all of them having left children. If a father have three children,

Toller, 374.

(*r*) Toller, 374.

(*s*) Smith *v.* Tracy, 1 Mod. 209. S. C. 2 Mod. 204. T. Jones, 93. 1 Vent. 316. 2 Lev. 173. Winchelsea *v* Norcliffe, 1 Vern. 437. Crook *v.* Watt, 2 Vern. 124. S. C. Show. P.C. 108. Brown *v.* Farndell, Carth. 51. Com. Dig. Admon. H. Bac. Abr. tit. Exors. I. 2. Toller, 374.

(*t*) Wallis *v.* Hodson, 2 Atk. 117. Burnet *v.* Mann, 1 Ves. Sen. 156. Ball *v.* Smith, 2 Freem. 230. Edwards *v.* Freeman, 2 P. Wms. 446. Toller, 374.

(*u*) Brown *v.* Farndell, Carth. 52. Bac. Abr. tit. Exors. I. 5.

(*v*) Davers *v.* Dewes, 3 P. Wms. 49, note (D). Palmer *v.* Garrard, Prec. Chanc. 21.

John, Mary, and Henry, and they all die before the father, John, leaving, for instance, two children, Mary three, and Henry four, and afterwards the father die intestate, in that case all his grandchildren shall have an equal share; for as his children are all dead, their children shall take as next of kin (*w*). Such also would be the case with respect to the great-grandchildren of the intestate, if both his children and grandchildren had all died before him (*x*).

dead, all having left children.

In these instances, the parties are said to take *per capita*, or, in other words, equal shares in their own right (*y*).

Thirdly, where some of the intestate's children are living, and some dead, and such as are dead have each of them left children. In this case, the children of the deceased children take *per stirpes*, that is to say, not in their own right, but by representation. Thus, for example, if a father have three children, John, Mary, and Henry, and John die, leaving four children, and Mary die, leaving two, and Henry alone survive the father; on the death of the father intestate, one-third shall be allotted to Henry, one-third to John's four children, and the remaining third to Mary's two children; for these grandchildren are entitled as representing their respective parents (*z*).

3. Where some of the intestate's children are dead, having left children.

The end and intent of the statute was to make the provision for all the children of the intestate equal, as near as could be estimated (*a*). Accordingly, the fifth section of the statute proceeds to provide, that no child of the intestate, except his heir-at-law, who shall have any estate in land by the settlement of the intestate, or who shall be advanced by the intestate in his lifetime by pecuniary portion, equal to the distributive shares of the other children, shall participate with them in the surplus; but if the estate so given to such child by way of advancement be not equivalent to their

Advancement: Exclusion of such children as have any land by settlement or have been advanced by portion:

(*w*) Walsh *v.* Walsh, 1 Eq. Cas. Abr. 249, pl. 7. S. C. Prec. Chanc. 54. Bowers *v.* Littlewood, 1 P. Wms. 595, by Lord Parker. Davers *v.* Dewes, 3 P. Wms. 50, by Lord King. Bac. Abr. Exors. I. 3.

(*x*) Toller, 374.

(*y*) 2 Black. Comm. 517.

(*z*) Bac. Abr. tit. Exors. I 3. Toller, 374.

(*a*) 2 P. Wms. 439, 440, by Sir Joseph Jekyll.

shares, then that such part of the surplus as will make it so, shall be allotted to him or her (*b*).

This just and equitable provision has been also said to be derived from the *collatio bonorum* of the imperial law; which it certainly resembles in some points, though it differs widely in others: But it may not be amiss to observe, that, with regard to goods and chattels, this is part of the ancient custom of London, of the province of York, and of the sister kingdom of Scotland; and with regard to lands descending in co-parcenary, that it has always been, and still is, the common law of England, under the name of *hotch-pot* (*c*).

This provision applies only to the distribution of the estates of intestate *fathers:* And therefore if a mother, being a widow, advances a child, and dies intestate, leaving many children, the child advanced shall not bring what he received from his mother into hotch-pot: This was decided by Lord King, C., on the principle, that the statute was grounded on the custom of London, which never affected a widow's personal estate, and that the Act seems to include those alone within the clause of hotch-pot who are capable of having a wife as well as children, which must be husbands only (*d*).

The statute takes nothing away that has been given to any of the children, however unequal that may have been: How much soever it may exceed the remainder of the personal estate left by the intestate at his death, the child may, if he pleases, keep it all; if he be not contented, but would have more, then he must bring into hotch-pot what he has before received: This manifestly seems to be the intention of the Act, grounded upon the most just rule of equity, equality (*e*).

The provision in the statute applies only to the case of actual intestacy; and where there is an executor, and conse-

(*b*) 2 Black. Comm. 516.

(*c*) 2 Black. Comm. 517. "It seemeth," says Littleton, sect. 267, "that this word 'Hotch-pot,' is in English a pudding; for in a pudding is not commonly put one thing alone, but one thing with other things together:" 2 Black. Comm. 190.

(*d*) Holt *v.* Frederick, 2 P. Wms. 357. S. C. 2 Eq. Cas. Abr. 446.

(*e*) By Lord Raymond, in Edwards *v.* Freeman, 2 P. Wms. 443.

quently a complete Will, though the executor may be declared a trustee for the next of kin, they take as if the residue had been actually given to them: Therefore a child advanced by his father in his life, or provided for in the Will, cannot be called on to bring his share into hotch-pot (*f*).

If a child, who has received any advancement from his father, shall die in his father's lifetime, leaving children, such children shall not be admitted to their father's distributive share, unless they bring in his advancement; since, as his representatives, they can have no better claim than he would have had, if living (*g*).

A child advanced in part, shall bring in his advancement only among the other children: for no benefit shall accrue from it to the widow (*h*).

1. Children who have land by settlement:

It will be convenient to consider this subject further, 1. With respect to children who have any land by settlement of the intestate. 2. With respect to children who have been advanced by pecuniary portions.

The statute extends not only to land, freehold and copyhold, settled on a younger child by the father, but also to charges upon land for such child (*i*): So if a father settle a rent out of his lands on a younger child, this is within the statute (*j*): and so is a reversion settled on any child but the heir (*k*).

Land claimed by marriage settlement has been held an advancement within the statute: but land devised by the father to a younger child is not to be so considered: for a provision to be brought into hotch-pot must be such as is made by an act in the intestate's lifetime, and not by Will (*l*).

In respect to Borough English lands, which descend to the

(*f*) By Sir W. Grant, in Walton *v*. Walton, 14 Ves. 324. 2 P. Wms. 440, 446. See also Vachell *v*. Jeffereys, Prec. Chanc. 169.

(*g*) Proud *v*. Turner, 2 P. Wms. 560.

(*h*) Ward *v*. Lant, Prec. Chanc. 182, 184. Kircudbright *v*. Kircudbright, 8 Ves. 51, 64.

(*i*) By Sir Joseph Jekyll, 2 P. Wms. 441.

(*j*) 2 P. Wms. 441.

(*k*) 2 P. Wms. 442.

(*l*) By Sir J. Jekyll, 2 P. Wms. 440. Twisden *v*. Twisden, 9 Ves. 425, 462, by Lord Eldon.

youngest son, it was once held that he should allow for them, on the ground that the statute intended merely to provide for the heir of the family, that is, the heir by the common law, and not one who is heir only by custom in some particular places (*m*). But that decision has been overruled, and it is now settled, that such youngest son shall have an equal share of the distribution with the other children, without regard to this species of estate: for although the exception in the statute extend only to the eldest son, yet no law exists to oblige the heir in Borough English to bring in his lands: The statute contains no such requisition: It speaks merely of such estate as a child hath by settlement, or by advancement of the intestate in his lifetime (*n*).

Money laid out by the intestate on repairs of houses, which had been given, but not conveyed, by him to his eldest son, and which had therefore descended on him as heir-at-law, has been held not to be an advancement to be brought into hotchpot under the statute: though it would have been otherwise if the father in his lifetime had irrevocably parted with the estate by a conveyance to the son, and afterwards given him a sum of money to ameliorate it (*o*).

2. Children who have been advanced by pecuniary portions:

2. With regard to children who have been advanced by pecuniary portions. By the provisions of the statute, although the heir-at-law shall not abate in respect of the land which came to him by descent, or otherwise, from the intestate, yet if he hath had any advancement from his father out of his personal estate, he shall abate for it in the same manner as the other children (*p*): And were it merely the use of furniture for his life, it shall be regarded as an advancement *pro tanto* (*q*). Co-heiresses shall also, it seems, bring in such ad-

(*m*) By Sir J. Jekyll, M. R., in Pratt *v.* Pratt, 2 Stra. 935. S. C. Fitzgib. 284.

(*n*) By Lord Talbot in Lutwyche *v.* Lutwyche, Cas. temp. Talb. 279. As to whether a coparcener is bound to bring land into hotchpot, see Dillon *v.* Coppin, 4 M. & Cr. 647.

(*o*) Smith *v.* Smith, 5 Ves. 721.

(*p*) Pratt *v.* Pratt, Fitzgib. 285. Com. Dig. Admon. (H.) 4 Burn. E. L. 397, 8th edit. Smith *v.* Smith, 5 Ves. 721.

(*q*) Pratt *v.* Pratt, Fiztgib. 285. Com. Dig. Admon. (H.) Kircudbright *v.* Kircudbright, 8 Ves. 51.

vancement, not being land (*r*), as they may have respectively received from their father, before they shall be entitled to their distributive shares; agreeably to the principle of the Act, and to the object of a just and impartial father to promote an equality among his children (*s*).

what is considered an advancement out of the personal estate:

It remains to consider what is, and what is not, to be regarded as an advancement out of the personal estate of the father, so as to exclude a child from a distributive share of the whole or part of the residue.

A provision made for a child by a settlement, whether voluntary, or for a good consideration, as that of marriage, is such an advancement (*t*).

It is not requisite, to constitute an advancement, that the provision should take place in the father's lifetime (*u*). If by deed he settle an annuity, to commence after his death, on one of his children, it is an advancement (*v*). So a portion secured to the child, although in *futuro*, is an advancement (*w*). Thus a portion for a daughter, to be raised out of land, on her attaining the age of eighteen, or the day of her marriage, was held to be an advancement to her when she married, although she was under that age, and unmarried, at the time of the intestate's death (*x*).

A portion, which was at first contingent, shall clearly be considered an advancement, when the contingency has happened (*y*). And it seems that a portion, even while contingent, being capable of valuation, may be brought into hotch-pot (*z*); or the Court may order, that in case the contingency shall happen, the portion shall be so distributed as to make the rest of the children equal with the child on whom it was

(*r*) See Dillon *v.* Coppin, 4 M. & Cr. 647.

(*s*) 4 Burn. E. L. 397, 8th edit. Toller, 378.

(*t*) Edwards *v.* Freeman, 2 P. Wms. 440, 441. Phiney *v.* Phiney, 2 Vern. 638.

(*u*) 2 P. Wms. 445.

(*v*) 2 P. Wms. 442. Swinb. Pt. 3, s. 18, pl. 25.

(*w*) 2 P. Wms. 445.

(*x*) Edwards *v.* Freeman, 2 P. Wms. 435. S. C. 1 Eq. Cas. Abr. 249, pl. 10. 2 Eq. Cas. Abr. 446, pl. 3.

(*y*) 2 P. Wms. 442.

(*z*) 2 P. Wms. 442, 449. Toller, 377.

settled (*a*): But the contingency must be so limited as necessarily to arise within a reasonable time; as in the case stated above, where the portion was secured to the daughter, on her attaining the age of eighteen, or on her marriage (*b*).

Where a father makes a provision for a son on his marriage, all the limitations in such settlement to the wife and children of such son must be considered as part of that advancement; and it is not the son's estate for life only that ought to be valued, and brought into hotch-pot (*c*).

With respect to the sort of benefit which shall constitute such advancement, it has been held, that if a father buy for a son an advowson, or any other ecclesiastical benefice, or if he buy him any office, civil or military, these are to be considered as advancements, either partial or complete, according to the comparative value of the estate to be distributed (*d*). And although the office be only at will, as a gentleman pensioner's place (*e*), or a commission in the army (*f*), it is to be regarded in the same light.

An annuity is an advancement to be brought into hotchpot (*g*), *viz.*, the value at the date of the grant; or, if it has ceased, the payments received, at the option of the child (*h*).

In a late case a father lent the sum of 10,000*l.* to his son, to assist him in forming a partnership in the business of a sugar-refiner, and took his promissory note for the re-payment of that sum on demand: It appeared, that it was in consequence of the urgent desire of the intestate that the son engaged in the business; and that finding it was a losing concern he became desirous of retiring from it, but that the father urged him to continue it; that, at the earnest entreaty of the intestate, he, with much reluctance, continued the business,

(*a*) 2 P. Wms. 446. Toller, 378.

(*b*) 2 P. Wms. 440, 445, 449. Toller, 378.

(*c*) Weyland *v.* Weyland, 2 Atk. 635. See Dillon *v.* Coppin, 4 M. & Cr. 647, 669.

(*d*) Hender *v.* Rose, 3 P. Wms. 317, note to Pusey *v.* Desbouverie.

(*e*) Norton *v.* Norton, 3 P. Wms. 317, note.

(*f*) Kircudbright *v.* Kircudbright, 8 Ves. 63.

(*g*) Swinb. Pt. 3, s. 18, pl. 29.

(*h*) Kircudbright *v.* Kircudbright, 8 Ves. 51.

and sustained heavy losses in it: The father on his death-bed caused the promissory note to be burned, and died intestate: Sir John Leach, M. R., held, that, although the circumstances under which the note had been destroyed amounted to an equitable release of the debt, yet that the sum which remained due upon it must be considered an advancement to the son (*i*).

What shall not constitute an advancement.

On the other hand, small inconsiderable sums of money given to a child by the father, or mere trivial presents he may make to a child, as of a gold watch, or wedding clothes, shall not be deemed an advancement (*j*): nor shall money expended by the father for the maintenance of a child, nor given to bind him an apprentice, nor laid out in his education at school, at the university, or on his travels (*k*).

It is presumed, indeed, that a distinction must be made when a considerable sum of money is advanced by the father with the child as a premium for instruction, and not merely as a compensation for maintenance, and that the former sum is in strictness liable to be brought into hotch-pot (*l*). In allusion to this distinction, it is conceived that Lord Hardwicke, expressed himself in *Morris* v. *Burroughs* (*m*): "I should think," said his Lordship, "that if a father should give money to put a son out apprentice, or advance him in life by setting him up in trade, &c., that would have the same effect," *i. e.* will be a satisfaction of the custom, or must be brought into hotch-pot, as the case may happen to be.

It has already been stated, that a provision which a father may make for his child by Will, in a case where the testator dies intestate as to part of his personal estate, shall not be brought into hotch-pot (*n*). Such a provision as shall be

(*i*) Gilbert v. Wetherell, 2 Sim. & Stu. 254.

(*j*) 3 P. Wms. 317, note to Pusey v. Desbouverie. Elliott v. Collier, 1 Ves. Sen. 16. S. C. 3 Atk. 528: nor, says Swinburne, money in his purse to spend among his equals, or buy him suits of apparel, or books, or armour for the service of his country: Swinb. Pt. 3, s. 18, pl. 30.

(*k*) Swinb. Pt. 3, s. 18, pl. 19. Bac. Abr. tit. Exors. (K).

(*l*) 2 Rop. Husb. & Wife, 12.

(*m*) 1 Atk. 403.

(*n*) *Ante*, p. 1286, 1287. 14 Ves. 324.

construed an advancement, must result from a complete act of the intestate in his lifetime (*o*), by which he divested himself of all property in the subject: though, as it has just appeared, it is not requisite that it should take effect in possession till after his death (*p*). Still less shall property given or bequeathed to the child by any other person be so denominated (*q*): and least of all, shall a fortune of his own acquisition, however great (*r*).

Sect. IV.

The Rights of the next of Kin of the Intestate under the Statute of Distributions.

The sixth section of the statute provides, that in case there be no children or legal representatives of them, in existence, a moiety of the intestate's estates shall be allotted to his widow, and the residue shall be distributed equally among his next of kin in equal degree, and their representatives; and by the seventh section, in case there be neither wife nor children, then all the estate shall be distributed among the next of kin, in equal degree: but the same section enacts, that there shall be no representatives admitted among collaterals after brothers' and sisters' children.

Who are the next of kin:

The next of kin, referred to by the statute, are to be ascertained by the same rules of consanguinity, as those which determine who are entitled to letters of administration (*s*). These rules have been already considered in a former part of this Treatise (*t*): but it may be convenient to repeat in this place some of their results.

right of the father.

When a child dies intestate, without wife or child, leaving

(*o*) 2 P. Wms. 440. Toller, 380.

(*p*) *Ante*, p. 1289. Toller, 380.

(*q*) Swinb. Pt. 3, s. 18, pl. 18. Bac. Abr. tit. Exors. (K). Toller, 380.

(*r*) Swinb. Pt. 3, s. 18, pl. 18. Bac. Abr. tit. Exors. (K).

(*s*) Lloyd *v.* Tench, 2 Ves. Sen. 214. 2 Black. Comm. 515. Toller, 381. 4 Burn. E. L. 280, 8th ed.

(*t*) *Ante*, p. 344, *et seq.*

a father, the latter is entitled, as the next of kin, in the first degree, to the whole of the personal estate of the intestate, exclusive of all others (*u*).

If a man dies intestate, without a child, but leaving a widow, and a father, then the personal estate shall go in moieties between the wife and father (*v*).

right of the mother: 1 Jac. II. c. 17.

So with respect to the mother; before the Statute of 1 Jac. II. c. 17, if a child had died intestate, without a wife, child, or father, his mother was entitled, as his next of kin, in the first degree, to his whole personal estate: but by that statute, sect. 7, it is enacted, "that if after the death of a father, any of his children shall die intestate, without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her." The principle of this provision is, that otherwise the mother might marry, and transfer all to another husband (*w*).

the brothers and sisters shall share with the mother:

This statute, as well as the Statute of Distributions, was described by Lord Hardwicke as very incorrectly penned (*x*): and several questions have arisen upon the construction of this section of it. In *Keilway* v. *Keilway* (*y*), the intestate left no child, but a wife, a mother, three brothers and sisters, and two nieces, the children of a deceased brother: It was insisted, on the part of the mother, that the case was not within the Statute of 1 Jac. II. c. 17, s. 7, because here the intestate left a wife: whereas the statute was only meant to operate where the mother, before the making of it, would have gone off with the whole personal estate, and it was urged, on her behalf, that the words of the statute "without wife *or* children," must be understood "without wife *and* children;" for it could not possibly be intended in the disjunctive, *i. e.* that in *either* case the brothers and sisters

they shall share with the mother, although the intestate left a widow:

(*u*) Blackborough *v.* Davis, 1 P. Wms. 51. *Ante*, p. 348.

(*v*) Keilway *v.* Keilway, Gilb. Eq. Cas. 190, *per curiam.*

(*w*) Blackborough *v.* Davies, 1 P. Wms. 49, by Lord Holt.

(*x*) Stanley *v.* Stanley, 1 Atk. 457.

(*y*) 2 P. Wms. 344. S. C. Gilb. Eq. Cas. 189. 2 Stra. 710. 2 Eq. Cas. Abr. 441, 442.

should share with their mother, inasmuch as if, after the death of the father, the child should die *without wife*, but leaving *children*, they would clearly take the whole, to the exclusion of the intestate's brothers and sisters: But Lord Chancellor King decreed that the wife of the intestate should have one moiety, and his mother should come in for no more than her share of the other moiety with the intestate's brothers and sisters, and the two nieces, the representatives of the deceased brother: And his Lordship laid down, that the intention of the statute was, in prejudice of the mother, that in every case where, before the statute, she would have had the whole, the deceased child's brothers and sisters should come in equally with the mother as to the whole; and where, before the statute, the mother would have been entitled to the half, the deceased child's brothers and sisters should now come in for a share of that moiety.

though there be no brother of the intestate living, yet if there be nephews, &c. they shall share with their grandmother:

In *Stanley* v. *Stanley* (z), the intestate left a wife, a mother, and several nephews and nieces, the children of a deceased brother: Besides raising the objections taken in the above case of *Keilway* v. *Keilway*, it was insisted, on the part of the mother, that the words of the statute of James are in the conjunctive, "every brother and sister *and* the representatives of them," and therefore that the statute cannot operate in a case where there is *no brother or sister* of the intestate living: But Lord Hardwicke, C., held the contrary; and after recognising *Keilway* v. *Keilway*, as far as it applied, decreed, that the personal estate should be divided into four equal parts, two-fourth parts to be allotted to the widow, one-fourth part to the mother, and the remaining fourth to be equally divided among the nephews and nieces: And his Lordship said, that the word *and* in the statute, immediately preceding the words *the representatives*, must be construed in the disjunctive.

the representatives of the brothers and

In the last case a further objection was raised, that if it should be held, that the nephews and nieces were entitled by

(z) 1 Atk. 455.

representation, it might be carried to the fourth or fifth generation, which would create great confusion and fractions; for there was nothing to restrain it in this Act, as there was in the Statute of Distributions: But Lord Hardwicke said, that the proviso in the statute of James was to be incorporated into the statute of Charles, which expressly says that representation shall not be carried beyond brothers' and sisters' children; agreeably to the rule, that statutes made *in pari materiâ* shall be construed into one another.

sisters of the intestate shall not share with his mother, beyond the brothers' and sisters' children:

In *Jessopp* v. *Watson* (*a*), a widow having an only daughter by her deceased husband, married a second husband, and had two sons by the latter marriage: Afterwards her daughter by the former marriage died intestate, without ever having married: And the question was, whether her mother was entitled exclusively to her daughter's personal estate, or whether the brothers of the half-blood, her children by the second marriage, were entitled to share with her: And Sir John Leach, M. R., held, that by force of the statute of James, the brothers were entitled to a share with their mother (*b*).

brothers and sisters of the half-blood shall share with their mother.

If the intestate left neither wife, nor child, nor father, and there be neither brother or sister, nor nephew or niece, the case is without the statute, and the whole of such intestate's effects shall devolve, as before the statute, to his mother (*c*).

In what case the mother shall take the whole.

It is clear that the mother-in-law or stepmother of an intestate, not being of his blood, can claim nothing under the Statute of Distributions (*d*).

Of the mother-in-law.

(*a*) 1 M. & K. 665.

(*b*) The same point appears to have been determined by Lord Hardwicke in Burnet *v.* Mann, 1 Ves. Sen. 156, *post*, p. 1298; though it is inaccurately stated by Vesey, that the claim of the posthumous brother of the half-blood was there made *under the Statute of Distributions*: but in Jessopp *v.* Watson, Mr. Seton, who was of counsel in the cause, stated that he had examined the case of Burnet *v.* Mann, in the Registrar's Book, from which it appeared that the claim was made under the statute 1 Jac. II. c. 17, s. 7: and that the decision in that case, was, consequently, an express decision in point.

(*c*) Jackson *v.* Prudehome, MS. 11 Viner Abr. 196. tit. Exors. (Z. 12).

(*d*) Rutland *v.* Rutland, 2 P. Wms. 216.

Right of brothers and sisters: preferred to grandfather, &c.

If the intestate left neither children nor parents, but his nearest surviving relations be brothers and sisters, and a grandfather or grandmother, then, since they are all in the second degree of kindred, in strictness they ought all to share the personal estate of the intestate equally under the statute. But in the year 1686, in the case of *Lord Winchelsea* v. *Norcliff* (e), Lord Chancellor Jeffreys decided that a grandmother should have no share with brothers and sisters of the intestate. And it was again decided, in 1708, by the Barons of the Exchequer, in the case of *Pool* v. *Wishaw* (f), by the unanimous opinion of the Court, after hearing civilians, that a grandmother had no right to share in distribution with a brother. This decision was followed by a similar one, as to a grandmother, in the case of *Norbury* v. *Richards*, before Fortescue, M. R. (g). And the same point was afterwards determined by Lord Hardwicke, in *Evelyn* v. *Evelyn* (h), on the authority of the two preceding cases, as well as the prevailing usage since the Statute of Distributions: And his Lordship observed, that if it was *res integra*, he should think there was just ground to prefer the brother: That the words of the statute must be taken together, amongst the next of kin, "*pro suo cuique jure*," according to the laws in such cases; and that if, by settled determinations, an equality or preference had been given, it was confirmed by the statute: And by our law it had been established, previously to the statute, that between brother and brother there was only one degree (i): That, besides, it would be a great inconvenience to carry the portions of

(e) 2 Freem. 95. S. C. 1 Vern. 403. 2 Chanc. Rep. 374, 376.

(f) Cited *per cur.* in Evelyn v. Evelyn, 3 Atk. 763. S. C. Ambl. 192, and in Thomas v. Kettericke, 1 Ves. Sen. 333.

(g) Cited in 3 Atk. 763. Ambl. 192.

(h) 3 Atk. 762. S. C. Ambl. 191.

(i) See Collingwood v. Pace, 1 Ventr. 424, by Hale, C. B. Blackborough v. Davis, 1 P. Wms. 50. Buissieres v. Albert, 2 Cas. temp. Lee, 53, by Sir George Lee. It is enough at law to say, *frater et hæres*, or, *soror et hæres*: 1 Salk. 38. See stat. 3 & 4 W. IV. c. 106, s. 5.

children to a grandfather, who must be supposed to have been provided for, and may very probably be in a dying condition, and not want it; and it would be contrary to the very nature of provisions among children, as every child may very properly be said to have a *spes accrescendi.*

Grandfather preferred to uncle:

Nevertheless, if the intestate leaves no nearer kindred than a grandfather or grandmother, and uncles or aunts, the grandfather or grandmother, being in the second degree, will be entitled to the whole personal estate, exclusive of the uncles or aunts, who are only in the third degree (*k*).

great-grandfather shall share with uncle:

Hence, also, great-grandfathers or great-grandmothers, being in the third degree, are entitled to a distributive share with uncles and aunts (*l*).

grandfather by mother's side.

Where the intestate leaves a grandfather by the father's side, and a grandmother by the mother's side, his next of kin, they shall take in equal moieties, as being in equal degree; for here dignity of blood is not material (*m*).

Uncles and nephews.

Aunts and nieces, uncles and nephews, being all in the third degree, are all equally entitled (*n*). Hence, where the intestate left two aunts, and a nephew and niece, children of a deceased brother, Lord Hardwicke ordered the surplus to be divided into four parts equally among them, holding that as they were all in equal degree, the children were to take in their own right and not by representation; but that if their father had been living, he would have been entitled to the whole (*o*).

Half-blood.

Brothers and sisters of the half-blood are entitled to an

(*k*) Mentney *v.* Petty, Prec. Chanc. 593. Blackborough *v.* Davis, 1 P. Wms. 41. S. C. 1 Lord Raym. 684. Com. Rep. 96. Holt, 43. 1 Salk. 38. 12 Mod. 615. Woodroff *v.* Wickworth, Prec. Chanc. 527.

(*l*) Lloyd *v.* Tench, 2 Ves. Sen. 215. *Ante*, p. 349.

(*m*) Moor *v.* Barham, cited in Blackborough *v.* Davis, 1 P. Wms. 53.

(*n*) Buissieres *v.* Albert, 2 Cas. temp. Lee, 51.

(*o*) Durant *v.* Prestwood, 1 Atk. 454. S. P. Lloyd *v.* Tench, 2 Ves. Sen. 213. Buissieres *v.* Albert, 2 Cas. temp. Lee, 51.

equal share of the intestate's estate with the brothers and sisters of the whole blood, although there are some precedents of judgments given, since the statute, allowing the half-blood to have but a half share (*p*). However, since the decision of the House of Lords, in the case of *Watts* v. *Crooke* (*q*), affirming, on appeal, a decree in Chancery, the law has been settled in favour of the full title of the half-blood (*r*). And this shall extend to a posthumous brother of the half-blood: In *Burnet* v. *Mann* (*s*), Lord Hardwicke said, he could not distinguish this from the case of a brother *in ventre sa mere* of the whole blood, who was clearly entitled (*t*): If, indeed, it were to go to the children born at any distance of time, so as to cause an inconvenience by suspending the distribution, or to cause a taking back again, it might be an objection: But that cannot happen, because the child must be *in rerum naturâ* at the death of the intestate brother, whose estate is in question; so that, at the utmost, it cannot be carried beyond the year in which a distribution is to be made.

posthumous.

Relatives by marriage not entitled.

Affinity or relationship by marriage, except in the instance of the wife of the intestate, gives no title to a share of his property under the statute: Therefore, if the intestate had a son and daughter, and they both die, the former leaving a wife, and the latter a husband; upon the intestate's death afterwards, such husband and wife have neither of them any claim on the estate (*u*).

Representation among collaterals.

The seventh section of the Statute of Distributions provides that there shall be no representations admitted among collaterals after brothers' and sisters' children. This provision must be construed to mean brothers and sisters *of the intestate*, and not as admitting representation, when the dis-

(*p*) Show. P. C. 108.
(*q*) Show. P. C. 108.
(*r*) See *ante*, p. 348.
(*s*) 1 Ves. Sen. 156. See *ante*, p. 1295, note (*b*).
(*t*) See Wallis *v.* Hodson, Barnard. Chanc. Cas. 272.
(*u*) Toller. 386.

tribution happens to fall among brothers and sisters, who are remotely related to the intestate: for the intestate is the subject of the Act; it is his estate, his wife, his children, and for the same reason, his brothers' and sisters' children; for he is equally correlative to all (*v*). Therefore, if the intestate should leave an uncle, and the son of another uncle deceased, the latter shall have no distributive share (*w*). So if the next of kin of the intestate should be nephews and nieces, a child of a deceased nephew or niece will not be admitted to share in the distribution. Again, it has been held, that if the brother of the intestate left a grandson, and a sister left a child, the grandson shall not have distribution with the son or daughter of the sister (*x*). Thus, although, as it has already appeared, lineal representatives, *ad infinitum*, shall share in the distribution of an intestate's personal estate, yet among collaterals, except only in the instance of the intestate's brothers' and sisters' children, proximity of blood shall alone give a title to it (*y*).

when brothers' and sisters' children take *per capita*.

If the intestate's brothers and sisters were, at the time of his decease, all dead, and having left children, such children shall all take *per capita* (*z*). Therefore, if an intestate leave a deceased brother's only son, and ten children of a deceased sister, the ten children of the deceased sister shall take ten parts in eleven with the son of the deceased brother (*a*). But in the event of some of the intestate's brothers and sisters being alive and some dead, and such as are dead having left

(*v*) Carter *v.* Crawley, Sir T. Raym. 496. S. C. 1 Freem. 296, 297, 298. Caldicot *v.* Smith, 2 Show. 286. Beeton *v.* Darkin, 2 Vern. 168. Maw *v.* Harding, 2 Vern. 233. S. C. Prec. Chanc. 28. Pett *v.* Pett, 1 Salk. 250. S. C. 1 Lord Raym. 571. Com. Rep. 87. 1 P. Wms. 25. Bowers *v.* Littlewood, 1 P. Wms. 595.

(*w*) Beeton *v.* Darkin, 2 Vern. 168. Bowers *v.* Littlewood, 1 P. Wms. 595.

(*x*) Pett *v.* Pett, 1 Salk. 250. S. C. 1 Lord Raym. 571. 1 P. Wms. 25. Com. Rep. 87.

(*y*) Toller, 384.

(*z*) Walsh *v.* Walsh, Prec. Chanc. 54. Lloyd *v.* Tench, 2 Ves. Sen. 215. Janson *v.* Bury, Bunb. 157. Buissieres *v.* Albert, 2 Cas. temp. Lee, 51.

(*a*) Bowers *v.* Littlewood, 1 P. Wms. 595. Janson *v.* Bury, Bunb. 157.

children, such children take *per stirpes*, by way of representation (*b*). Therefore, if an intestate left a brother alive, and ten children of a deceased sister, such ten children will take one moiety of the personal estate, and their uncle the other (*c*).

An intestate bastard; or person without kin.

If a bastard, or any other person having no kindred, die intestate without wife or child, his effects, subject to his debts, belong to the king, as *ultimus hæres* (*d*); who, with the exception of a small part, usually grants them by letters patent or otherwise: and then such grantee seems of course entitled to the administration, and consequently to the sole enjoyment of the property (*e*).

(*b*) Lloyd *v*. Tench, 2 Ves. Sen. 215. Buissieres *v*. Albert, 2 Cas. temp. Lee, 51.

(*c*) The same distinction, as to taking *per capita* or *per stirpes*, will prevail, when a *bequest* is made to "relations," or "family," without mentioning the proportions in which the fund is to be divided; in which case the Statute of Distributions will regulate the number and manner in which the legatees, *i. e*. the next of kin, are to take: see *ante*, p. 957, 964. But this mode of division will not be adopted, when a contrary intention of the testator is apparent, as where the bequest is to relations *to be equally divided* amongst them; for there the division shall be *per capita*, although the state of the family is such as would require a distribution *per stirpes* under the statute: Thomas *v*. Hole, Cas. temp. Talb. 251. Butler *v*. Stratton, 3 Bro. C. C. 367. Dowding *v*. Smith, 3 Beav. 541. Rickabe *v*. Garwood, 8 Beav. 579. Heron *v*. Stokes, 2 Dr. & W. 89. But see also Brett *v*. Horton, 4 Beav. 239. Booth *v*. Vicars, 1 Coll. 6. Flinn *v*. Jenkins, *ibid*. 365. Again, if a bequest is made to "issue" as purchasers, or to "descendants," there has already been occasion to show, that all those who answer the description will take *per capita*: *Ante*, p. 953, 954: See also Lincoln *v*. Pelham, 10 Ves. 175, 176: But in this case also, they will take *per stirpes*, if the testator's intention to that effect appears from other expressions in the Will: Rowland *v*. Gorsuch, 2 Cox, 187.

(*d*) Megit *v*. Johnson, Dougl. 548, by Lord Mansfield. Taylor *v*. Haygarth, 14 Sim. 8. See Cave *v*. Roberts, *ante*, p. 1278.

(*e*) *Ante*, p. 357. Toller, 386. 2 Black. Comm. 505, 506.

SECT. V.

Of Distribution, when the Intestate was domiciled abroad.

Hitherto it has been assumed that the intestate was at the time of his death domiciled in a place where the Statute of Distributions is the law of the land.

Distribution shall be according to the country of domicil.

The rule is, that the distribution of the personal estate of an intestate is to be regulated by the law of the country, in which he was a domiciled inhabitant at the time of his death, without any regard whatsoever to the place either of the birth or the death, or the situation of the property at that time (*f*). It is not, however, correct to say, that with respect to the distribution of personal property, the law of England gives way to the law of a foreign country; but that it is part of the law of England, that personal property should be distributed according to the *jus domicilii* (*g*). If, therefore, a man die domiciled in this country, and administration be taken out to him here, debts due to him, or other of his

(*f*) Pipon *v.* Pipon, Ambl. 26. Thorne *v.* Watkins, 2 Ves. Sen. 35. Burn *v.* Cole, Ambl. 415. Bruce *v.* Bruce, 6 Bro. P. C. 566. Toml. edit. S. C. 2 Bos. & Pull. 229, note to Marsh *v.* Hutchinson. Balfour *v.* Scott, 6 Bro. P. C. 550, Toml. edit. Hog *v.* Lashley, 6 Bro. P. C. 577, Toml. edit. Ommaney *v.* Bingham, (also called Sir Charles Douglas' case) stated 5 Ves. 757. Somerville *v.* Somerville, 5 Ves. 786. Curling *v.* Thornton, 2 Add. 14. Anstruther *v.* Chalmer, 2 Sim. 1. Stanley *v.* Bernes, 3 Hagg. 374. Gambier *v.* Gambier, 7 Sim. 263. Price *v.* Dewhurst, 8 Sim. 279. 4 M. & Cr. 76. Thornton *v.* Curling, 8 Sim. 310. Lord Winchelsea *v.* Garretty, 2 Keen, 293. De Zichy Ferraris *v.* Lord Hertford, 3 Curt. 468, 486. However, "the law of the country" must not always be understood to mean the general law as applicable to the subjects thereof, but in some instances the particular law applicable to the case of foreigners dying domiciled therein. Collier *v.* Rivaz, 2 Curt. 855. *Ante*, p. 307. Maltass *v.* Maltass, 1 Robert. 67, 72. *Ante*, p. 307.

(*g*) By Abbott, C. J., in Doe *v.* Vardill, 5 B. & C. 451, 452. The rule as to the law of domicil has never been extended to real property: *Ibid.* S. C. in Dom. Proc. 2 Cl. & F. 571. S. C. *nomine* Birtwhistle *v.* Vardill, 7 Cl. & F. 895.

personal effects, in Scotland or abroad, shall be distributed according to the law of England: for the *lex loci rei sitæ* is not to be recognised (*h*). On the other hand, if a man domiciled abroad die intestate, his whole property here is distributable according to the laws of the country where he was so domiciled (*i*): If it were otherwise, as it was observed by Lord Hardwicke, in *Thorne* v. *Watkins* (*j*), it would destroy the credit of the public funds; for no foreigner would put into them, if, because a title must be made up by administration or probate of the Prerogative Court of England, the property was to be distributed differently from the laws of his own country.

Hence it appears, that a different doctrine prevails with respect to the distribution of the personal estate of a deceased, when in the hands of an executor or administrator, from that which is established with respect to the grant of probate or administration, by which he is empowered to possess himself of such estate: for, with regard to the latter, the *situs* of the property, as it has appeared in an earlier part of this Treatise, regulates the jurisdiction.

It must, however, be borne in mind, that, (as there has already been occasion to point out (*k*)), although the right to succession is to be regulated according to the law of the country where the deceased was domiciled, yet the *adminis-*

(*h*) 2 Ves. Sen. 35. *In re* Ewin, 1 Crompt. & Jerv. 156, by Bayley, B. S. C. 1 Tyrwh. 106.

(*i*) See, however, Leslie *v.* Baillie, 2 Y. & Coll. Ch. C. 91. In that case a testator who died, and whose Will was proved, in England, bequeathed a legacy to a married woman, whose domicil, as well as that of her husband, was in Scotland: The husband died a few months after the testator, without having received the legacy: After his death, the executors of the testator, with knowledge of the before-mentioned circumstances of the domicil, paid the legacy to the widow: It was proved that, according to the Scotch law, the payment should have been made to the husband's personal representatives: Nevertheless it was held by Knight Bruce, V. C., that in the absence of proof that the executors knew the Scotch law on the subject, the payment to the widow was a good payment.

(*j*) 2 Ves. Sen. 37.

(*k*) *Ante*, p. 356.

tration of the estate must be in the country in which possession of it is taken and held under lawful authority (*l*).

It remains to ascertain, what shall constitute a domicil with respect to the proper application of the above rule (*m*).

rules for ascertaining the domicil.

A man's domicil is, *primâ facie*, the place of his residence: but this may be rebutted by shewing that such residence is either constrained from the necessity of his affairs, or transitory (*n*). On this subject, the following propositions may be stated as deducible from the adjudged cases:

1. Though a man may have two domicils for some purposes, he can have only one for the purpose of succession (*o*).

2. The original domicil, or, as it is called, the *forum originis*, or the domicil of origin, is to prevail, until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil, and taking another as his sole domicil (*p*).

By the expression *fòrum originis*, or domicil of origin,

(*l*) Preston *v.* Lord Melville, 8 Cl. & F. 1.

(*m*) On this subject generally, see the erudite and valuable Treatise on the Law of Domicil lately published by Dr. Robert Phillimore.

(*n*) Bempde *v.* Johnson, 3 Ves. 201, 202, by Lord Loughborough. With respect to the effect of *time* in constituting a domicil, see the judgment of Sir Wm. Scott in *The Case of the Harmony*, 2 Rob. Adm. Rep. 324, and *The Case of the Ann*, 1 Dods. Adm. Rep. 221. See further, as to what shall constitute a domicil, Stanley *v.* Bernes, 3 Hagg. 373. Moore *v.* Darell, 4 Hagg. 346. *In re* Bruce, 2 Cr. & Jerv. 436. Tidswell *v.* Bowyer, 7 Sim. 64. Maltass *v.* Maltass, 1 Robert. 67.

(*o*) Somerville *v.* Somerville, 5 Ves. 786. With respect to contemporary domicils, the following distinction is recognised by foreign jurists, and seems to have met with the concurrence of Lord Alvanley, 5 Ves. 789, *viz.* that a person not under an obligation of duty to live in the capital in a permanent manner, as a nobleman or gentleman, having a mansion-house, his residence in the country, and resorting to the metropolis for any particular purpose, or for the general purpose of residing in the metropolis, shall be considered domiciled in the country: on the other hand, a merchant, whose business lies in the metropolis, shall be considered as having his domicil there, and not at his country residence.

(*p*) 5 Ves. 787. *In re* Bruce, 2 Cr. & Jerv. 445, *per* Bayley, B. De Bonneval *v.* De Bonneval, 1 Curt. 856. Atty. Gen. *v.* Dunn, 6 Mees. & W. 511. Dalhousie *v.* M'Douall, 7 Cl. & F. 817. Munro *v.* Munro, *ibid.* 842.

here used, is not meant the domicil of birth: for the mere accident of birth in any particular place cannot in any degree affect the domicil: If the son of an Englishman is born upon a journey in foreign parts, his domicil would follow that of his father: The domicil of origin is that arising from a man's birth and connexions (*q*).

It appears from the terms of the proposition under consideration, that such a domicil cannot be lost by mere abandonment. It is not to be defeated *animo* merely, but *animo et facto*, and necessarily remains until a subsequent domicil be acquired (*r*); unless the party die *in itinere* towards an intended domicil (*s*).

3. The proposition last stated is equally true of an acquired as of an original domicil. The domicil of origin having been abandoned and a new domicil acquired, the new domicil may be abandoned and a third domicil acquired (*t*): But an acquired domicil cannot be lost by mere abandonment, but continues until the intention of another change of domicil is carried into execution (*u*). Again, the domicil of origin does not revive until an acquired domicil has been abandoned, *animo et facto* (*v*).

As an example of what shall constitute an acquired domicil, it may be mentioned that a residence in India, for the purpose

(*q*) 5 Ves. 787.

(*r*) 1 Curt. 857. 6 Mees. & W. 511. 3 Curt. 448. The acquisition of a domicil does not simply depend upon the residence of the party; the fact of residence must be accompanied by an intention of permanently residing in the new domicil, and of abandoning the former: 1 Curt. 863, 864.

(*s*) Munroe *v.* Douglas, 5 Madd. 405. But see, as to this last qualification of the doctrine, Story's Conflict of Laws, Ch. xii. s. 481, a. p. 707, note (2), 2nd edition.

(*t*) 1 Curt. 864.

(*u*) Munroe *v.* Douglas, 5 Madd. 379. Stanley *v.* Bernes, 3 Hagg. 373. Craigie *v.* Lewin, 3 Curt. 435. Commissioners of Charitable Donations *v.* Devereux, 13 Sim. 14.

(*v*) Craigie *v.* Lewin, 3 Curt. 435. In that case a native Scotchman having, by employment in the East India Company's service, acquired a domicil in India, it was held that by his return to Scotland, *animo manendi*, his original domicil did not revive, the party still holding his commission and being liable to be called upon to return to India, and intending to return if called on so to do.

of following a profession there in the service of the East India Company, creates a new domicil (*w*).

4. A new domicil cannot be acquired by a party's own act during pupillage, nor until the party is *sui juris* (*x*).

5. By marriage, the domicil of the husband becomes that of the wife (*y*), and she retains it after the death of her husband (*z*).

6. After the death of the father, children remaining under the care of the mother follow the domicil which she may acquire, and do not retain that which their father had at his death until they are capable of gaining one by acts of their own.

Thus, in *Potinger* v. *Wightman* (*a*), a native of England domiciled in Guernsey died intestate, leaving a widow, and infant children by her, and also by a former wife: The widow, after his death, was appointed guardian of the children by the Royal Court of Guernsey, and in conjunction with another person, who was appointed guardian of the children by the former marriage, sold the property of the intestate, and invested the produce in the English funds, after which she came to England with her children, and was domiciled there: On the death of some of the children under age, a question arose, whether their shares of the property had become distributable according to the law of England, or of Guernsey; and it was held, that the law of England was to govern the succession, the domicil of the children being (according to the opinion of foreign jurists, our own law being silent on the subject), to follow the domicil of the surviving mother (*b*).

(*w*) Munroe *v.* Douglas, 5 Madd. 404. Bruce *v.* Bruce, 6 Bro. P. C. 566, Toml. edit. Craigie *v.* Lewin, 3 Curt. 435.

(*x*) 5 Ves. 787, by Lord Alvanley.

(*y*) Warrender *v.* Warrender, 2 Cl. & Fin. 488. Dalhousie *v.* M'Douall, 7 Cl. & Fin. 817. Whitcomb *v.* Whitcomb, 2 Curt. 351.

(*z*) See Phillimore on the Law of Domicil, Ch. VI. No. XLI., *et seq.* Gout *v.* Zimmerman, 5 Notes of Cas. 440.

(*a*) 3 Meriv. 67.

(*b*) Johnstone *v.* Beattie, 10 Cl. & F. 66, 138, *per* Lord Lyndhurst, C., and Lord Campbell. Accord. But it is only during the mother's widowhood that she can change the domicil of her infant. See Story's Confl. s. 506, note (1). Whether a mere guardian, not being a parent, can change the domicil of his ward, in respect of the right of succession to his estate, is a disputed point. See Story's Confl. s. 505, *et seq.* Phillimore, Ch. VII.

The rule is, however, it appears, subject to the condition that the domicil shall not have been changed for the fraudulent purpose of obtaining an advantage by altering the rule of succession: And it should seem, by the opinion of an eminent foreign jurist (*d*), that such fraud will be presumed, if no reasonable motive can be assigned for the change (*e*).

It must be mentioned, before leaving this subject, that in the case of *Curling* v. *Thornton* (*f*), Sir John Nicholl expressed a doubt whether a British subject is entitled so far *exuere patriam*, as to select a foreign domicil in such complete derogation of his British, as to render his property in this country liable to distribution according to any foreign law. And in the subsequent case of *Stanley* v. *Bernes* (*g*), the same learned Judge said, that there was no case in which the property of a British subject, dying intestate in a foreign country, had been held distributable according to the law of such foreign country. But this doubt must be considered as settled by the decision of the Delegates in the latter case (*h*), and it is now fully established, with reference to the present subject, that a natural born British subject may acquire a foreign domicil; and further, that the *animus revertendi*, and claim to be considered, and treatment as a British subject, will not suffice to preserve his original domicil (*i*).

A domicil in India, is, in legal effect, a domicil in the province of Canterbury; and the law of England is therefore to be applied to the distribution of the property of intestates there domiciled (*k*). At all events the law of England and India are now the same as regards the validity of Wills: For shortly after the passing of the New Statute of Wills,

(*d*) Pothier, in the introductory chapter to his Treatise on the Custom of Orleans.

(*e*) 3 Meriv. 80.

(*f*) 2 Add. 17.

(*g*) 3 Hagg. 441.

(*h*) See *ante*, p. 306.

(*i*) 3 Hagg. 373. Moore *v.* Darell, 4 Hagg. 346.

(*k*) Munroe *v.* Douglas, 5 Madd. 406. See In the goods of Foy, 2 Curt. 328.

(1 Vict. c. 26), an Act was passed by the Legislature in India, assimilating the law of India in respect of Wills to that of England (*l*).

SECT. VI.

Of the Payment of the Residue.

The subject of the duties of an administrator, with respect to the payment of the residue of an intestate's estate, has been in a great measure anticipated by the discussion of the duties of an executor with regard to the payment of the residue under a testamentary disposition of it.

For example, there has already been occasion to consider the subject with respect to the right of retainer by the administrator, in part or full satisfaction of a debt due to the intestate from the party entitled in distribution (*m*): Again, the law with respect to the payment of the residue, where a party entitled to a distributive share is an infant (*n*), or a married woman (*o*), has been considered in a previous part of this Treatise, incidentally to the subject of the payment of legacies.

If a person entitled to distribution die within the year, his executor, &c. may claim.

Although the 8th section of the statute enacts, that no distribution of an intestate's effects shall be made until one year be expired after his death, yet if a person entitled to a distributive share shall die within the year, such interest shall be considered as vested in him, and shall go to his personal representative: for this proviso makes no suspension or condition precedent to the interest of the parties, but was inserted merely with a view to creditors (*p*): The statute, also, is in the nature of a Will framed by the Legislature for

(*l*) See Craigie *v.* Lewin, 3 Curt. 441.

(*m*) *Ante*, p. 1119, *et seq.*

(*n*) *Ante*, p. 1206, *et seq.*

(*o*) *Ante*, p. 1122, 1213, *et seq.*

(*p*) Brown *v.* Farndell, Carth. 51, 52. S. C. Comberb. 112. Bac. Abr. Exor. I. 4.

all such persons as die without having made one for themselves; and, by consequence, the parties entitled in distribution resemble a residuary legatee; and it has been always held, that if such legatee dies before the amount of the surplus is ascertained, still his representative shall have the whole residue, and not the representative of the first testator (*q*).

(*q*) Bac. Abr. Exors. I. 4.

CHAPTER THE SECOND.

OF DISTRIBUTION UNDER THE CUSTOMS OF LONDON AND YORK, &c.

THE fourth section of the Statute of Distributions provides, that the Act shall not in any way prejudice the customs of the city of London, or the province of York, or other places, but that they should be observed as formerly.

So that, although by subsequent statutes, mentioned in an earlier part of this Work (*a*), the restraint on testamentary dispositions in those places has been removed, and the customs may be thereby controlled at the pleasure of a testator; yet if a man dies intestate, the customs remain in the same force, with respect to the distribution of his personal estate, as if no statutes had ever passed. It is therefore necessary to investigate as fully as possible their nature and incidents.

Customs of London and York, &c.

In the city of London, the province of York, (excepting the diocese of Chester) (*b*), and in some parts of Wales (*c*), the effects of the intestate, after payment of his debts, are, to speak generally, divided according to the ancient doctrine of *pars rationabilis* (*d*). Thus, if a freeman of London, or an inhabitant of the province of York, dies intestate, possessed of personal property more than sufficient to pay his debts and funeral expenses, according to the customs his residuary estate will be distributable in the following manner: After deducting for the widow her apparel and the furniture

(*a*) *Ante*, p. 3, 4.

(*b*) Pickering *v.* Stamford, 3 Ves. 338.

(*c*) Concerning this there is little to be gathered, except from the statute 7 & 8 W. III. c. 38.

(*d*) See *ante*, p. 2. The custom of the city of London is the remains of the old common law: By Lord Macclesfield, in Kemps *v.* Kelsey, Prec. Chanc. 596.

of her bedchamber, (which in London is called the widow's chamber), the property is to be divided into three equal parts; one of which belongs to the widow, another to the children, and the third to the intestate's administrator (*e*): if only a widow, or only children, they shall respectively, in either case, take one moiety, and the administrator the other (*f*); if neither widow nor child, the administrator shall have the whole (*g*): And this portion, or as it is termed *dead man's part*, or *death's part*, the administrator formerly applied to his own use (*h*); till the statute 1 Jac. II. c. 17, declared that the same should be subject to the Statute of Distributions (*i*). Hence, if there be neither wife nor child, the whole personal estate will be distributed according to the statute (*j*).

If then, the intestate's residuary personal estate amount to 1800*l*., and he leave a widow and two children, this estate shall be divided into eighteen parts; whereof the widow shall have eight, six by the custom, and two by the statute: and each of the children five, three by the custom, and two by the statute: If he leaves a widow and one child, she still shall have eight parts as before; and the child shall have ten, six by the custom, and four by the statute: If he leaves a widow and no child, the widow shall have three-fourths of the whole, two by the custom, and one by the statute; and the remaining fourth shall go by the statute to the next of kin (*k*). If he leaves a child or children, but no wife, the child or children shall take the whole, one-half by the custom, and the other by the statute (*l*).

It will be observed, that the distribution, according to the

(*e*) Swinb. Pt. 3, s. 16, pl. 6.

(*f*) Read *v.* Duck, Prec. Chanc. 409. Northey *v.* Strange, 1 P. Wms. 341. Swinb. Pt. 3, s. 16, pl. 5. 2 Black. Comm. 518.

(*g*) Swinb. Pt. 3, s. 16, pl. 4. Percivall *v.* Crispe, 2 Show. 175. 2 Black. Comm. 518.

(*h*) Anon. 2 Freem. 85. Matthews *v.* Newby, 1 Vern. 133. 2 Black. Comm. 518.

(*i*) 2 Black. Comm. 518.

(*j*) Goodwin *v.* Ramsden, 1 Vern. 200. Percivall *v.* Crispe, 2 Show. 175.

(*k*) 2 Black. Comm. 518, 519.

(*l*) Northey *v.* Strange, 1 P. Wms. 341.

custom and the statute united, is more favourable to the widow, than that according to the statute only: Thus, if the intestate leaves children, under the custom and the statute, she will be entitled, dividing the property into ninths, to four-ninths, while, by the mere statutory distribution, she can only claim three-ninths: Again, if he left no children, she will be entitled to three-fourths by the custom and statute, and only one-half, if the estate be distributed according to the statute alone.

The customs do not apply in cases of equitable intestacy.

It is therefore a point of great importance to the widow, to ascertain whether the customs shall affect the distribution in all cases of intestacy, *equitable* as well as legal: As where a freeman of London, or inhabitant of the province of York, makes a Will appointing an executor, and yet either makes no disposition of his residuary property, or having made such, the residuary legatee dies before him, and the executor is not allowed to take it beneficially under his legal title, but is declared a trustee for those entitled to distribution: Shall the residue be distributed subject to the customs, or altogether according to the Statute of Distributions? Lord Hardwicke in one case held, that there was no difference between legal and equitable intestacy: But that decision must be considered as overruled (*m*): For subsequent cases have fully established that the customs shall apply only to instances of *legal* intestacy (*n*). In a late case on the subject, the testator, who was resident and domiciled at the time of his death within the province of York, disposed of all the residue of his personal estate, and named executors, but his disposition failed as to

(*m*) Beard *v.* Beard, 3 Atk. 73. It is observed in 2 Roper on Husb. & Wife, p. 5, 2d edit., that this appears to have been a case of actual intestacy, as the Will was revoked *in toto* by the ademption of the whole subject-matter. It is, however, submitted, that, as the appointment of the executor remained unrevoked, it was absolutely necessary to prove the Will in the Ecclesiastical Court: See *ante*, p. 168.

(*n*) Wheeler *v.* Sheer, Mosely, 302. Lawson *v.* Lawson, Reg. Lib. 1771, B. fo. 224, b. 225, b. 4 Bro. P. C. 21, Toml. edit. Walton *v.* Walton, 14 Ves. 324. Wilkinson *v.* Atkinson, 1 Turn. & Russ. 255. Fitzgerald *v.* Field, 1 Russ. Chanc. Cas. 416. See also Cowper *v.* Scott, 3 P. Wms. 119.

part of the residue, by the death of one of the residuary legatees in his lifetime: and it was held by Sir Thomas Plumer, on the authority of a decision by Lord Bathurst (*o*), that the share, which had thus lapsed, should be apportioned between the widow and the next of kin, according to the Statute of Distributions, and should not be affected by the custom of the province: And his Honor said, that he considered it a rule fixed both on principle and authority, that where an executor is appointed, the custom does not apply (*p*). And this case has been followed by a similar decision by Lord Gifford, in *Fitzgerald* v. *Field* (*q*), where the testator had appointed executors, who did not take the residue beneficially, but he had made no disposition of the beneficial interest in that residue.

It seems, however, that if the testator should die leaving a Will, but *without having appointed an executor,* so that, in the legal sense, he is intestate (*r*), his personal estate undisposed of must be distributed, subject to the customs, as if he had died *actually* intestate (*s*).

The custom of York does not attach unless the intestate was resident: *secus* of the custom of London.

It is essential to the attaching of the custom of York, that the deceased should have had his fixed or general residence within the province at the period of his death (*t*) (though it is immaterial where his estate is situated) (*u*). But this is not required by the custom of the city of London: for that custom follows the person of the freeman, and operates though he never resided in the city, or though, having lived there, he had quitted it, and become domiciled in the country. This in *Rutter* v. *Rutter* (*v*), a freeman of London left the town and lived in the country for twenty years, and married; his wife being the survivor, filed a bill for her share of the

(*o*) Lawson *v.* Lawson, *ubi supra.*

(*p*) Wilkinson *v.* Atkinson, 1 Turn. & Russ. 255.

(*q*) 1 Russ. Chanc. Cas. 416.

(*r*) See *ante*, p. 7, note (*n*).

(*s*) Wheeler *v.* Sheer, Mosely, 303, by Lord King, C.

(*t*) By Lord Alvanley in Somerville *v.* Somerville, 5 Ves. 760, 790. Cholmeley *v.* Cholmeley, 2 Vern. 82. Swinb. Pt. 3, s. 18, pl. 1. See also 4 Burn. E. L. 458, 8th edit.

(*u*) Toller, 402.

(*v*) 1 Vern. 180. See also Webb *v.* Webb, 2 Vern. 110.

personal estate, according to the custom, and the defendant pleaded the husband having left the city, and his residence in the country: but the plea was disallowed (*w*).

The custom of the province of York, though in the main agreeing with that of the city of London, and appearing to be substantially the same (*x*), differs from it in some material points, which will be pointed out in the course of this Chapter. It may here be observed, that if the two customs come in competition, as where an inhabitant of the province of York is also a freeman of the city of London, the custom of London will prevail, and control that of the province, so that distribution must be made according to the custom of the city of London (*y*).

the custom of London controls that of York.

The custom of London extends to the distribution of the estate of honorary freeman, who die intestate. In the late case of *Onslow* v. *Onslow* (*z*), it appeared, that, on the occasion of Lord Rodney's victory, in 1782, the intestate, Sir Francis Samuel Drake, being an admiral of the royal navy, was presented with the freedom of the city of London, and was made a liveryman of the Grocers' Company, and took the oaths: Upon his dying intestate, the Lord Mayor and Aldermen, by the mouth of the Recorder, certified to the Vice Chancellor that the deceased was a freeman of the city, in the sense, meaning, and operation of the custom of the city, relating to the distribution of the effects of freemen, who die intestate: And the Vice Chancellor decreed according to this certificate.

the custom of London extends to honorary freemen.

In the further investigation of the rights of parties to

(*w*) It was holden by Lord Macclesfield in Frederick *v.* Frederick, 1 P. Wms. 710, that where a man, for a valuable consideration, contracted to become a freeman of London, but died before he had taken up his freedom, his personal estate should be divided as if he had been a freeman, but that his children should not be city orphans: And this decree was affirmed in the House of Lords: 1 Bro. P. C. 253, Toml. edit.

(*x*) 2 Black. Comm. 519.

(*y*) Cholmeley *v.* Cholmeley, 2 Vern. 48, 82.

(*z*) 1 Sim. 18.

distribution, subject to the customs, it is proposed to treat, 1. Of the rights of the widow. 2. Of the rights of the children and grandchildren of the intestate. 3. Of what are assets subject to the customs.

Sect. I.

The Rights of the Widow of an Intestate to a Distributive Share of his personal estate, subject to the Customs.

If a freeman of London dies without issue, his widow is entitled by the custom to a moiety of her husband's personal estate in value, but not in specie (*a*).

The widow's chamber.

According to the custom of London, the widow of an intestate freeman is entitled to her apparel and the furniture of her chamber, which is called the widow's chamber; or in lieu thereof, in case the estate shall exceed two thousand pounds, it has been said, that she is entitled to fifty pounds (*b*). The custom of the province of York varies only in this respect, that the widow is allowed, by curtesy, to reserve to her own use not only her apparel and the furniture of her chamber, but also a coffer-box containing various ornaments of her person, as jewels, chains, and other articles of the like nature (*c*).

But the wife will be deprived of her widow's chamber, if the assets of her husband be insufficient to pay all his debts (*d*). It should seem, however, that she would be entitled to stand in the place of specialty creditors, in order to be reimbursed the value out of the intestate's freehold estates; and that her claim would not be subject to the demand of legatees (*e*).

(*a*) Kitson *v.* Robins, MS. 8 Vin. Abr. 423, tit. Devise, (Q. d.) pl. 37.

(*b*) Biddle *v.* Biddle, 7 Vin. Abr. 201, tit. Customs of London, (B. 2.) pl. 2. 4 Burn. E. L. 442, 8th edit.

(*c*) Swinb. Pt. 6, s. 7, pl. 5. Toller, 400.

(*d*) Swinb. Pt. 6, s. 7, pl. 5.

(*e*) 2 Roper Husb. & Wife, 14, 2d edit. *Ante*, p. 647.

It is plain that a freeman of London, or inhabitant of the province, may defeat the custom by making a Will disposing of his personal estate: But it sometimes happens that he agrees before his marriage that his personal estate shall go at his death according to the custom: This is a good and binding agreement, and in such case two-thirds of his residuary personal estate will be distributed according to the custom, notwithstanding his Will: but the remaining third, or dead man's part, will pass by it (*f*).

Effect of ante-nuptial agreement by husband that his estate shall go according to the custom:

Nevertheless, a freeman, who has so agreed, may, during his life, make a *bonâ fide* gift or disposition of his property, which will bar his widow's claims under the custom (*g*); and even, it should seem, *in extremis*, he may give away any part of his personal estate, *provided he devests himself of all property in it* (*h*). If, however, the transaction be merely colourable, with circumstances evincing fraud, the disposition will be void as against her, and her rights by the custom will attach (*i*). Retaining possession of the deed by the husband, the settlor (*j*), or keeping possession of the property after assignment, have been considered as badges of fraud on the custom. So the reservation of a life interest in property assigned by deed, has been held to be evidence, that the gift was in effect testamentary, and therefore a fraud upon the custom (*k*). So a voluntary bond, never delivered out of the husband's possession, has been considered fraudulent *quoad* the wife's right to a customary share (*l*).

Again, in cases where an agreement of this nature has been made by the husband, there may be occasion to apply the doctrine of election (*m*): Thus, if a freeman, having

election by the widow:

(*f*) 2 Roper on Husb. & Wife, p. 3, 2d edit. Webb *v.* Webb, 2 Vern. 111.

(*g*) Hall *v.* Hall, 2 Vern. 277. Ambrose *v.* Ambrose, 1 P. Wms. 321.

(*h*) By Lord Hardwicke in Tomkyns *v.* Ladbroke, 2 Ves. Sen. 594.

(*i*) City *v.* City, 2 Lev. 130. Tomkyns *v.* Ladbroke, 2 Ves. Sen. 591.

(*j*) Smith *v.* Fellows, 2 Atk. 62.

(*k*) Turner *v.* Jennings, 2 Vern. 612, 685. Smith *v.* Fellows, 2 Atk. 62. Fortescue *v.* Hennah, 19 Ves. 67.

(*l*) Edmundson *v.* Cox, 7 Vin. Abr. 202, pl. 11, tit. Customs of London, (B. 3.)

(*m*) See *ante*, p. 1236.

entered into an agreement that his personal estate shall go at his death according to the custom, gives a legacy to his wife, or to one of his children, and disposes of his whole personal estate, the legatee shall not have both the legacy and the customary part (*n*), even though the legacy does not exceed the dead man's share (*o*). But it is otherwise, if the legacy be given expressly out of the testamentary part (*p*).

Where some of several children elect to take the orphanage part, and others to accept the provisions under the Will, the customary shares of those who elect to abide by the Will, shall not belong to those who elect to take under the custom, as part of the orphanage share, but shall be considered as part of the testator's estate, and go according to the Will (*q*).

How wife barred of her customary share: by divorce:

It now remains to consider how the widow may be barred of her customary share.

If the wife of a freeman be divorced for adultery *a mensâ et thoro*, she forfeits, it seems, her customary share (*r*).

by settlement before marriage.

The widow's title by the customs, as it has already been shewn of her title under the statute, may be barred by settlement or agreement before marriage (*s*). And it seems, according to the customs of London, as certified in the case of *Lewin* v. *Lewin* (*t*), that when the provision for the wife by settlement is of *personal* estate, although nothing appears from the settlement to shew that her customary rights were then in contemplation, yet that they will be presumed to have been so from the nature of the property settled, so that she will be precluded from claiming part of the same estate by

(*n*) Hervey *v.* Desbouverie, Cas. temp. Talb. 130. Cowper *v.* Scott, 3 P. Wms. 119.

(*o*) Hender *v.* Hender, 3 P. Wms. 123, (note to Cowper *v.* Scott,) Car *v.* Car, 2 Atk. 268. But see Ireton's case, 2 Freem. 28. Bravell *v.* Pocock, *ibid.* 67. Babington *v.* Greenwood, 1 P. Wms. 533.

(*p*) 3 P. Wms. 123, note (A). 2 Atk. 278.

(*q*) Morris *v.* Burrows, 2 Atk. 627.

(*r*) Pettifer *v.* James, Bunb. 16. 4 Burn. E. L. 445, 8th edit.

(*s*) Cleaver *v.* Spurling, 2 P. Wms. 527. Pickering *v.* Lord Stamford, 3 Ves. 336.

(*t*) 3 P. Wms. 15.

settlement, and another part by the custom. It is plain, however, that this presumption may be excluded by the provisions of the settlement (*u*). In a modern case (*v*), a marriage settlement of personal property by the husband, a freeman of London, on the wife, was expressed to be in lieu of all dower and thirds, or other portion at common law or otherwise, which the wife might claim out of the freehold or copyhold lands, hereditaments, and premises of the husband: And the Vice Chancellor decreed, in accordance with a certificate of the Lord Mayor and Aldermen, that the widow was not thereby barred of her customary share of the intestate's personal estate.

If a jointure of *land* be made by a freeman upon his wife, no presumption will arise that it was done in bar of her customary right, and her claims under the custom will not be precluded, unless the intention, that she should be barred, appears upon the deed: Therefore she shall not be precluded by a jointure of land, which is expressed to be in bar of dower (*w*). And the law is the same, if the intestate covenanted to lay out money in the purchase of land by way of jointure; for the money has in equity all the qualities of land (*x*). But a jointure of land, as well as a provision out of personalty, will obviously have that effect, if it be *expressed* to be in bar of her customary part (*y*).

The effect of her being provided for by a settlement out of personal estate, or jointure out of land expressed to be in bar of her claims under the custom, is, to put her into a state of nonentity as to the custom only (*z*): but she shall still be entitled to her share of the dead man's part under the Statute of Distributions (*a*). It is clear, however, that if the settle-

(*u*) Kirkman v. Kirkman, 2 Bro. C. C. 95.

(*v*) Onslow v. Onslow, 1 Sim. 18.

(*w*) Atkins v. Waterson, 1 Eq. Cas. Abr. 157, pl. 5. Babington v. Greenwood, 1 P. Wms. 531, 532. S. C. Prec. Chanc. 505.

(*x*) *Ibid.*

(*y*) 1 P. Wms. 531.

(*z*) Hancock v. Hancock, 2 Vern. 665. Blunden v. Barker, 1 P. Wms. 644. Cleaver v. Spurling, 2 P. Wms. 527. Lewin v. Lewin, 3 P. Wms. 16. Pusey v. Desbouverie, 3 P. Wms. 320. Tomkyns v. Ladbroke, 2 Ves. Sen. 592.

(*a*) Whithill v. Phelps, Prec. Chanc. 327.

ment or jointure be expressly in bar, as well of her share of the dead man's part, as of her share by the custom, she will then be excluded from both: So if it be in satisfaction of her demand out of the husband's personal estate by the custom, *or otherwise,* she shall be barred also of her share under the statute (*b*).

Sect. II.

The Rights of the Children and Grandchildren of an Intestate, with respect to Personal Estate subject to the Customs.

Children born out of the city:

The children of a freeman of London are entitled to the share of his personal estate, though they were born out of the city (*c*).

posthumous child:

A posthumous child shall come in for his customary share with the other children (*d*).

grandchildren not entitled under the custom:

The custom of London extends only to the children, and not the grandchildren of the intestate (*e*). Therefore, if a freeman of London has two sons, and the eldest son dies leaving a son, and then the freeman dies, the grandchild, though in law the representative of the eldest son, has no part by the custom (*f*): Still the grandchild will be entitled to his father's distributive share of the dead man's part under the statute. So if a freeman dies intestate, leaving a wife and no children, but has several grandchildren living at the time of his death; yet they are entitled to no part of their father's share by the custom, though they shall be admitted

(*b*) Benson *v.* Bellasis, 1 Vern. 15. S. C. 2 Chanc. Rep. 252.

(*c*) 4 Burn. E. L. 444, 8th edit.

(*d*) Walsam *v.* Skinner, Prec. Chanc. 499. S. C. Gilb. Eq. Rep. 153.

(*e*) Northey *v.* Strange, 1 P. Wms. 341. S. C. Gilb. Eq. Rep. 137. Prec. Chanc. 470. Fowke *v.* Hunt, 1 Vern. 397. S. C. 2 Show. 467. Finner *v.* Longland, 2 Eq. Cas. Abr. 264, pl. 5.

(*f*) 2 Salk. 426.

to his distributive share of the dead man's part under the statute (*g*): In that case, therefore, by the statute, the wife shall have one-third of the dead man's part, and the representatives of the deceased child shall have the two other thirds (*h*): So that, dividing the whole personal estate into six parts, she shall have four, and the representatives two. If there be neither a widow nor children, but grandchildren, they will share the whole property, as next of kin, under the statute.

Advancement: **child fully advanced:**

If any of the children of the intestate, being a freeman of London, or domiciled within the province of York, are advanced by the father in his lifetime to the full extent of their distributive share under the custom, they shall be entitled by the custom to no further dividend (*i*). Therefore, if all the children, or an only child, shall have been fully advanced, the customs will then have been satisfied, and the intestate will be considered in the same view as if he had left no children (*j*); and his whole personal property, if he left no wife, shall be distributed according to the statute (*k*).

But such advancement shall be in satisfaction merely of a child's share by the custom, and not of his distributive share under the statute; to the whole of which he shall be entitled, without regard to what he shall have received from his father (*l*). If, indeed, the advancement shall have *exceeded* the child's share by the custom, it has been a matter of controversy, whether he must not bring in such excess before he is entitled to his share of the dead man's part under the statute (*m*). On this subject, Mr. Roper has observed (*n*):

(*g*) Fowke *v.* Hunt, *ubi supra.* Finner *v.* Longland, 2 Eq. Cas. Abr. 264, pl. 5. Toller, 390, 391.

(*h*) Toller, 390.

(*i*) Cleaver *v.* Spurling, 2 P. Wms. 527.

(*j*) 2 P. Wms. 527. Clare *v.* Acmooty, cited in Hancock *v.* Hancock, 2 Vern. 665. Gudgeon *v.* Ramsden, 2 Vern. 273.

(*k*) Goodwin *v.* Ramsden, 1 Vern. 200.

(*l*) Gudgeon *v.* Ramsden, 2 Vern. 273. Hearne *v.* Barber, 3 Atk. 214. Wood *v.* Briant, 2 Atk. 523.

(*m*) See 4 Burn. E. L. 460, 8th edit.

(*n*) Law of Husb. & Wife, vol. ii. p. 10, 2d edit.

"The argument for the child's retaining the excess, and also having it's share under the statute, is founded upon a supposed purchase by the father of the child's orphanage share, so as to take it out of the custom, and make it a part of his estate, distributable under the statute; but unless such be the express agreement between them (*o*), this reasoning does not appear to be applicable; since the thing given may be considered a gift or advancement, as well as a consideration for such purchase. When, however, there is this express agreement between the parties, then, whether the child be benefited or not, it will be bound by the contract; but that this is not the case in the absence of such agreement, where the advancement is less than the orphanage share, appears from several cases. It is presumed, therefore, that since in the event of the advancement being less than the full orphanage part, the child is entitled to have the deficiency made good, so on the other hand, equality of justice requires that the child should bring in the excess of advancement before he be entitled to share in the part distributable under the statute; and the more especially, since the statute (with the exception of the heir, as to advancement, or settlement upon him, of freehold estates) provides and declares, with a view to equality among the children, that children advanced by their father in his lifetime, with lands or personalty, shall bring them into hotch-pot before they shall take any shares in his personal estate (*p*). With respect to authorities which may be considered as contradictory to the above observations, it is to be observed, that the decree in *Gudgeon* v. *Ramsden* (*q*), was not acquiesced in, and upon a re-hearing, the suit was compromised; and it may be inferred, from the report in *Hearne* v. *Barber* (*r*), that the advancement exceeded the child's distributive share in the dead man's part under the statute, and it appears that Lord Hardwicke entertained a doubt whether the child should not bring it's advancement

(*o*) Medcalfe *v.* Medcalfe, 1 Atk. 53.

(*p*) See Edwards *v.* Freeman, 2 P. Wms. 435.

(*q*) 2 Vern. 274.

(*r*) 3 Atk. 213.

into hotch-pot before it could take under the statute; his decree, however, was in opposition to such doubt, but it seems to have been pronounced through compassion, or what was considered to be the particular hardship of that case" (*s*).

If one of several children be fully advanced, the effect is, to remove that child entirely out of the way, and to increase the shares of the others, and not of the dead man's part (*t*).

child partially advanced:

If any of the children shall have been advanced partially, they must bring their portion into hotch-pot, before they can derive any advantage from the customs: But such partial advancement, like a full advancement, shall be brought into hotch-pot with the orphanage part only (*u*).

Therefore the children, who have been partially advanced, shall bring their portion into hotch-pot with the other brothers and sisters only, and not with the widow: for the principle is, as also with respect to the Statute of Distributions (*v*), to make an equality among the children, and not to benefit the widow (*w*). Hence, where the intestate has in part advanced his only child, such child shall not bring in his advancement; for there is none to claim with him of equal degree (*x*).

If a child be *married* in the lifetime of the intestate father with his consent, although such child was not fully advanced, yet to entitle himself or herself to a further portion, he or she must produce a writing under the father's hand, expressing the value of the advancement, in order that it may be ascertained what proportion it bore to the share by the custom (*y*).

(*s*) See also 4 Burn. E. L. 461, 8th edit.

(*t*) Folkes *v.* Western, 9 Ves. 460.

(*u*) Beckford *v.* Beckford, 1 Vern. 345.

(*v*) See *ante*, p. 1287.

(*w*) Beckford *v.* Beckford, 1 Vern. 345. S. C. 2 Vern. 281. Cleaver *v.* Spurling, 2 P. Wms. 527.

(*x*) 2 Salk. 426. Fane *v.* Bence, 2 Vern. 234. Dean *v.* Lord Delaware, 2 Vern. 628. Stanton *v.* Platt, 2 Vern. 754. Garon *v.* Trippet, Ambl. 189.

(*y*) Civil *v.* Rich, 1 Vern. 216. Chace *v.* Box, 1 Lord Raym. 484. S. C. 1 Eq. Cas. Abr. 154, pl. 3. Fawkner *v.* Watts, 1 Atk. 406. 2 Salk. 426. Hume *v.* Edwards, 3 Atk. 451, 452. Elliot *v.* Collier, 3 Atk. 527. It is said to be sufficient if he declare the same by *any* writing under his hand, as in an almanack: 4 Burn. E. L. 447, 448, 8th edit. See Blunden *v.* Barker, 1 P. Wms. 643, note.

If no such writing be produced, or if, on the production of such writing, the specific amount does not appear on the face of it, such advancement shall be presumed to have been complete till the contrary be shewn (z). But the mere declarations of the father, that he had fully advanced the child, whether with or without the specification of the value, shall be of no avail (a).

Thus, from what has been stated, it appears, that if a freeman leave no wife, but several children, as for instance three, one of whom is fully advanced, another partly advanced, and the third not advanced; in this case, the child partly advanced, and the child not advanced, after the former has brought in his partial advancement, shall share one-half equally between them by the custom; and the other half, namely, the dead man's part, although the first child has been fully advanced, shall, without his bringing his advancement into hotch-pot, be distributed by the statute equally amongst them all (b). If such advancement exceeded his orphanage part, then, whether the excess shall go in satisfaction of his distributive share by the statute or not, seems to depend on the provision being expressly in satisfaction of the orphanage part, or whether it be general, and without any stipulation (c).

nature of advancement out of real estate:

It remains to consider the nature of an advancement, such as will be subject to the rules just mentioned: And on this head, there is an important difference between the custom of London and that of the province of York: According to the former, the advancement, whether complete or partial, must arise exclusively from personal estate: In the establishment of the custom, the citizens of London had no regard to real property, on the supposition that a freeman would not purchase land, but would employ his whole fortune in

according to the custom of London:

(z) Cleaver v. Spurling, 2 P. Wms. 527. Elliot v. Collier, 3 Atk. 527. Annand v. Honeywood, 2 Freem. 56. Bright v. Smith, 2 Freem. 279.

(a) Dean v. Lord Delaware, 2 Vern. 630. Cleaver v. Spurling, 2 P. Wms. 527. Fawkner v. Watts, 1 Atk. 407.

(b) Toller, 398.

(c) *Ante*, p. 1320. Toller, 398.

commerce (*d*): If, therefore, a citizen settle his real estate on a child, it shall be no advancement (*e*), nor, although it be expressly made for advancement, shall it bar him of his orphanage part (*f*): Nor if money be given by the father to be laid out in land, to be settled on the son on his marriage, shall it be deemed personal estate, nor any exclusion (*g*): Yet as the custom includes chattel interests, it makes a settlement of a term of years an advancement within it's provisions (*h*). On the other hand, in the province of York, not only does land as well as money constitute an advancement (*i*), but, according to the custom there, the heir-at-law, if he takes by inheritance any land, either in fee or in tail general or special, is devested of all claim to any filial portion (*j*): And however small in point of value the land may be in comparison with the personal estate, he is nevertheless excluded (*k*); and even although the estate he inherits be only a reversion (*l*): He is also bound, although the land devolved upon him by settlement made on his father's marriage (*m*): Nor, in case lands held by a mortgage in fee descend to him before redemption, shall he be entitled to a filial portion: but on redemption of the mortgage, and payment of the money to the administrator, it seems he shall be entitled to such portion, because he has nothing by inheritance, nor in fact has had any preferment (*n*). Likewise, the custom is on this

of the province of York:

(*d*) Clavel *v.* Littleton, 1 Eq. Cas. Abr. 150, note (*a*). Tomkyns *v.* Ladbroke, 2 Ves. Sen. 593, by Lord Hardwicke.

(*e*) Cox *v.* Belitha, 2 P. Wms. 274.

(*f*) Rich *v.* Rich, 2 Chanc. Cas. 160. Civil *v.* Rich, 1 Vern. 216. Annand *v.* Honeywood, 1 Vern. 345.

(*g*) Annand *v.* Honeywood, 1 Vern. 345.

(*h*) Cox *v.* Belitha, 2 P. Wms. 274.

(*i*) Constable *v.* Constable, 2 Vern. 375.

(*j*) Swinb. Pt. 3, s. 18, pl. 9. 4 Burn. E. L. 463, 8th edit. Errington *v.* Werg, Ridg. Cas. temp. Hardw. 195. The heir-at-law shall share with the other children by the custom of London: Percival *v.* Crispe, T. Jones, 204.

(*k*) Swinb. Pt. 3, s. 18, pl. 11. 4 Burn. E. L. 464, 8th edit.

(*l*) Swinb. Pt. 3, s. 18, pl. 12. 4 Burn. E. L. *ubi supra.*

(*m*) Constable *v.* Constable, 2 Vern. 375.

(*n*) Swinb. Pt. 3, s. 18, pl. 13. 4 Burn. E. L. 464, 8th edit. Toller, 402.

head construed strictly, and is held to apply merely to the heir at common law, and to lands only which devolve to him in that character: so that if he take them *by purchase*, as tenant in tail, or for life, under his father's Will, and not by descent, or if he inherit them as heir by Borough English, or if the estate be copyhold, to which he succeeds as customary heir, he will in none of these instances be excluded from his filial portion (*o*).

But, since land taken by inheritance is neither a total or partial bar to a distributive share under the statute, the heir-at-law shall still have his portion of the dead man's part: Thus, if an intestate in the province of York die seised of an estate in fee-simple, leaving a widow and three sons; the widow in that case shall have one-third of the whole personal estate under the custom, the other third shall be divided equally between the two younger sons, and of the remaining third the widow shall take one-third under the statute, and the other two-thirds shall be divided equally among the three sons (*p*).

What shall be considered an advancement out of the personal estate.

With respect to the sort of benefit which shall be regarded as an advancement under the customs out of the personal estate, the propositions which have been stated on this head with respect to the construction of the Statute of Distributions are here equally applicable (*q*). It has, indeed, been questioned, whether such provisions as shall amount to an advancement, under the customs, ought not to be made on marriage, or in pursuance of a marriage agreement (*r*). But it seems clear, that the customs, on this head, are not so restricted, but extend to any other establishment of the child in life (*s*).

A child may be barred of the customary

The interest which a child has in his orphanage part is a mere contingency, and no present right, and therefore a re-

(*o*) Swinb. Pt. 3, s. 18, pl. 14. 4 Burn. E. L. 465, 8th edit.

(*p*) Toller, 403.

(*q*) *Ante*, p. 1289, *et seq.*

(*r*) Jenks *v.* Holford, 1 Vern. 61. Fouke *v.* Lewen, 1 Vern. 90. Hearne *v.* Barber, 3 Atk. 213. Hume *v.* Edwards, 3 Atk. 452.

(*s*) Morris *v.* Burroughs, 1 Atk. 403. Northey *v.* Strange, 1 P. Wms. 342. Elliott *v.* Collier, 3 Atk. 528.

lease of it is not valid in point of law; but if founded on a valuable consideration, it shall operate as an agreement, and be binding in equity (*t*). Therefore, a freeman's child, if of age, may, in consideration of a present fortune, waive all claim to the orphanage share: as where a father, on the marriage of his daughter, who had attained twenty-one years, agreed to give her 3000*l.*, and she covenanted to receive it in full of such share, this was held in equity to be a good bar to the custom (*u*).

share by agreement:

So where the husband of a freeman's daughter covenanted, upon receiving a suitable portion, to release her orphanage part to her father's personal representative, this was held good in equity, and the husband was compelled to execute the release (*v*). So where the daughter of a freeman, being under age, and her husband covenanted, in articles before marriage, in consideration of the wife's portion, to release all the right that might accrue to them out of her father's personal estate by the custom of London, it was held by Lord Hardwicke that the husband was bound by his covenant, and that it was no objection to say the wife was under age; for though, in this respect, if the husband had been dead, the articles would not have bound her, and she would have been by survivorship entitled to the customary share, as a *chose in action* not received or recovered by her husband, yet, he being alive, it was a matter that accrued to him in right of his wife, and he might release it, and his release would bind her: And his Lordship observed, that he founded his opinion on an old law, well known in the city by the name of Jud's law (*w*), whereby

(*t*) Blunden *v.* Barker, 1 P. Wms. 636, 639. Cox *v.* Belitha, 2 P. Wms. 273.

(*u*) Lockere *v.* Savage, 2 Eq. Cas. Abr. 272. S. C. Stra. 947. But such release will be altogether ineffectual if extorted or obtained by undue influence, or if it be given without any consideration: Heron *v.* Heron, 2 Atk. 160. S. C. Barnard. Chanc. Rep. 430. Medcalfe *v.* Medcalfe, 1 Atk. 63. Morris *v.* Burroughs, *ibid.* 402. Blunden *v.* Barker, 1 P. Wms. 639.

(*v*) Cox *v.* Belitha, 2 P. Wms. 272. But see Kemp *v.* Kelsey, 2 Eq. Cas. Abr. 267, pl. 18. S. C. Prec. Chanc. 544.

(*w*) This was an act of Common Council in the time of Henry the Sixth: See Hearne *v.* Barber, 3 Atk. 213.

a husband was authorised to agree with the father for the wife, though she was under age (*x*).

In the last mentioned case, a question arose, whether the orphanage part, covenanted to be released by the husband, should fall into the dead man's part, and go wholly according to the disposition of the residue of his estate, as a thing purchased by him; or whether it should fall into his personal estate, and be distributed with it according to the custom: And the Lord Chancellor said, that as in equity things covenanted to be done are things actually done, it must be considered as if the husband had actually released, and so was an extinguishment of his wife's right to the orphanage part; and being an extinguishment of the right, it left the estate of the father as if it had never been charged with it, and must therefore be considered as a part of his general personal estate, aad not go wholly to the executor of the father as part of the dead man's share (*y*).

by marriage without consent.

If a daughter of a freeman of London marries in his lifetime against his consent, this will be a bar to her orphanage share of his personal estate (*z*); unless in case of a reconciliation with her father after the marriage (*a*).

When the share of a child under the custom vests:

by the custom of London:

Lastly, it is necessary to inquire at what time the distributive share of a child under the customs vests. And on this head, there is an important variance between the custom of London and that of the province of York. By the former custom, if a freeman dies intestate, leaving several children, the share or orphanage part of any one of them is not vested in him till the age of twenty-one; after which period, but not before, he may dispose of it by Will, or, in case of his dying intestate, it shall be distributed pursuant to the statute (*b*).

(*x*) Medcalfe *v.* Medcalfe, 1 Atk. 64.

(*y*) 1 Atk. 64. But see Swinb. Pt. 3, s. 16, pl. 6. *Ante*, p. 1316.

(*z*) Foden *v.* Howlett, 1 Vern. 354. S. C. 1 Eq. Cas. Abr. 156, pl. 12. Hume *v.* Edwards, 3 Atk. 451. *Contrà*, Hill *v.* Blankett, Finch. Chanc. Cas. 248.

(*a*) 1 Vern. 354. 3 Atk. 451. Tomkyns *v.* Ladbroke, 2 Ves. Sen. 592.

(*b*) Anon. Prec. Chanc. 537.

If he die under that age, whether sole or married, his share shall survive to the others (*c*); even after a division and partition made between them (*d*). It was formerly considered, that the survivorship of the orphanage part held only as to the orphanage part belonging to the deceased himself; for that if he had, by survivorship, the part of any of his brothers or sisters, that part should go, at his own death, according to the statute (*e*); though it was held that he could not devise what accrued by survivorship any more than his own original share (*f*). But on a late occasion (*g*), the Recorder of London appeared in the Court of Vice Chancellor Shadwell, and certified, on behalf of the Lord Mayor and Aldermen, the custom to be, that "where there are several orphan children of a freeman who dies intestate, the share which any one may take by reason of surviving a child that dies an infant, survives among the other children, in case of the death of the party, to whom it has come, under the age of twenty-one years; and if there be an accumulation of interest upon an orphanage share, the accumulation survives in the same manner as the original share." If, however, there be an only child of an intestate freeman, his orphanage part is vested in him, in the same manner as his share by the statute (*h*). Likewise, it should seem, that if a man marry an orphan under the age of twenty-one, the right is vested in him, so as to prevent his wife's share from surviving, in case of her death, before she attains that age (*i*). But if a man marries a city orphan, and dies before the wife attains the age of twenty-one, and her portion is remaining in the Chamber of London, this shall not be looked upon as a deposition for the

(*c*) Wilcocks *v.* Wilcocks, 2 Vern. 558. Jesson *v.* Essington, Prec. Chanc. 207. Anon. *ibid.* 537.

(*d*) Leoffes *v.* Lewen, Prec. Ch. 370.

(*e*) Anon. Prec. Chanc. 537.

(*f*) By Lord Talbot in Hervey *v.* Desbouverie, Cas. temp. Talb. 135.

(*g*) Bruin *v.* Knott, 12 Sim. 436.

(*h*) Biddle *v.* Biddle, 3 P. Wms. 318, note (Q). Merriweather *v.* Hester, 7 Vin. Abr. 221, tit. Customs of London, (B. 10), pl. 18.

(*i*) Fouke *v.* Lewen, 1 Vern. 88. 4 Burn. E. L. 444, 8th edit. But see Jesson *v.* Essington, Prec. Chanc. 207. Anon. Prec. Chanc. 537.

husband, but as a *chose in action*, which, not having been taken out, and reduced into possession by him, must survive to the wife (*k*).

by the custom of York:

On the other hand, by the custom of the province of York, every child's orphanage part is fully vested immediately on the death of the intestate (*l*); and therefore such child may bequeath it at the age of fourteen, if a son, or twelve, if a daughter (*m*), as he or she may their share under the Statute of Distributions (*n*).

Court of Orphans in London.

Finally, it may be expedient to take some notice of the Court of Orphans, which is held by custom time out of memory, before the Lord Mayor and Aldermen of the city of London, who are guardians of the children of all freemen of London, that are under the age of twenty-one years at the time of their father's decease (*o*).

If a freeman or freewoman die, leaving orphans within age unmarried, the Court of Orphans shall have the custody of their body and goods: and the executors or administrators shall exhibit inventories before them and become bound to the Chamberlain to the use of the orphans, to make a true account upon oath: and if they refuse, he shall commit them till they become bound (*p*): And their being bound to do so in the Spiritual Court excuses them not from this custom (*q*): For if the father is a freeman of London, he cannot devise the disposition of the body of his child; and if he do, yet the infant shall remain in the custody of the Mayor and Aldermen (*r*).

(*k*) Pheasant's case, 2 Ventr. 340. S. C. 1 Chanc. Cas. 181.

(*l*) 2 Black. Comm. 519.

(*m*) See *ante*, p. 14.

(*n*) So a child of a freeman may at that age bequeath a share under the statute: Wilcocks *v.* Wilcocks, 2 Vern. 559. But no Will, made after the year 1837, by any person under the age of twenty-one years shall be valid: Stat. 1 Vict. c. 26, s. 7. *Ante*, p. 14.

(*o*) Roll. Abr. Customs of London, B. 3. 4 Burn. E. L. 443, 8th edit.

(*p*) Luch's case, Hob. 247. Orphans of London's case, 5 Co. 73, b.

(*q*) 4 Burn. E. L. 444, 8th edit.

(*r*) *Ibid.* If an orphan is taken out of the custody of the committee of the Court of Orphans, they may imprison the offender, though a peer, till he produce the infant: Wilkinson *v.* Bolton, 1 Sid. 250.

Sect. III.

What are Assets subject to the Customs.

What are assets subject to the customs.

It remains to consider what shall be considered assets distributable under the customs. It has been held that the custom of London shall not prevent the attendance of a term on the inheritance: Therefore leases for years attending the inheritance of a freeman are not assets within the custom (*s*).

A mortgage in fee shall be accounted part of a freeman's personal estate, and divided according to the custom (*t*).

A mortgage debt shall be paid out of the personal estate in preference to the customary or orphanage part; because the custom of London cannot take place till after the debts are paid (*u*). The law is the same as to the widow's customary moiety in the province of York (*v*).

"Of leases," Swinburne says, "the wife and children cannot have any rateable part within the province of York, or other places where they have been accustomed to have their rateable part of the moveable goods and debts recovered, unless the said wife or children, demanding their rateable parts of leases, do prove that by special custom of that place, namely, of that city, county, deanry, or parish where the intestate dwelled, and had such leases, the wives and children were accustomed to have their rateable part, as well of the leases as of the moveable goods of the intestate: which special custom being

S. C. T. Raym. 116, *nomine* Williamson *v.* Bolton, 1 Lev. 162. So if any one, though not a freeman, without consent of the Court of Aldermen, marry such orphan under twenty-one, though out of the city, they may fine him, and imprison for non-payment: Rex *v.* Harwood, 1 Ventr. 178. S. C. 2 Lev. 32. 1 Mod. 79.

(*s*) Tiffin *v.* Tiffin, 1 Vern. 2. S. C. 2 Freem. 66. Rich *v.* Rich, 2 Chanc. Cas. 160. Dowse *v.* Percival, 1 Vern. 104.

(*t*) Thornbrough *v.* Baker, 1 Chanc. Cas. 285.

(*u*) Rider *v.* Wager, 2 P. Wms. 335.

(*v*) Pockley *v.* Pockley, 1 Vern. 36.

proved, they may recover the rateable part as before" (*w*): But not by the general custom of the province (*x*).

Where the wife and children ought to have a rateable part of the goods of the deceased, be it a third part or half, as the case may be, there also they ought to have a like part of the debts due to the intestate, after they are recovered by the administrator; for then they are numbered or accounted amongst the goods of the intestate, but not before (*y*).

It is laid down, that if a freeman of London gives bond to his mother to be paid after his death, this shall go out of the whole estate, and not out of his own customary part (*z*).

It has been holden, that where loss happens to a freeman's estate by the insolvency of his executors, such loss shall be borne out of the testamentary part of his estate only, and not out of the whole personal estate (*a*).

The funeral expenses of the intestate are to be deducted out of the whole personal estate, and not the dead man's part merely, both by the civil law, and by the laws of the realm (*b*): But if a child of a freeman dies after the father, the funeral expenses of the child shall be paid out of the child's orphanage share (*c*).

(*w*) Swinb. Pt. 3, s. 16, pl. 8.

(*x*) 4 Burn. E. L. 463, 8th edit.

(*y*) Swinb. Pt. 3, s. 16, pl. 7.

(*z*) Strode *v.* Gibbs, Prec. Chanc. 50.

(*a*) Read *v.* Duck, Prec. Chanc. 409.

(*b*) Swinb. Pt. 3, s. 16, pl. 3. See *ante*, p. 833.

(*c*) Coomes *v.* Elling, 3 Atk. 678.

BOOK THE FIFTH.

OF THE STAMP DUTIES ON LEGACIES AND SUCCESSIONS TO PERSONAL ESTATES.

BY the statute 55 Geo. III. c. 184, the stamp duties imposed on legacies, and successions to personal estate upon intestacies, by the statute of 48 Geo. III. c. 149, are repealed, and the following other stamp duties are substituted;

I. *Where the Testator, Testatrix, or Intestate, died before or upon the 5th Day of April,* 1805.

For every legacy specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards given by any Will or testamentary instrument of any person who died before or upon the 5th day of April, 1805, out of his or her personal or moveable estate, and which shall *be paid, delivered, retained, satisfied, or discharged, after the thirty-first day of August,* 1815 (*a*):

Also for the clear residue (when devolving to one person) and for every share of the clear residue (when devolving to two or more persons) of the personal or moveable estate of any person who died before or upon the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy; where

(*a*) As to the construction of these words, see the cases collected, *post*, p. 1371, *et seq*.

such residue, or share of residue shall be of the amount or value of 20*l.* or upwards, and where the same shall be paid, delivered, retained, satisfied or discharged, after the thirty-first day of August, 1815:

Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of a *brother or sister of the deceased, or any descendant of a brother or sister of the deceased;* a duty at and after the rate of two pounds and ten shillings per centum on the amount or value thereof - 2*l.* 10*s.* per cent.

Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of a *brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased;* a duty at and after the rate of four pounds per centum on the amount or value thereof 4*l.* per cent.

Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of a *brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased;* a duty at and after the rate of five pounds per centum on the amount or value thereof - - - 5*l.* per cent.

And where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of any person *in any other degree of collateral consanguinity to the deceased* than is above described, or to or for the benefit of *any stranger in blood to the deceased* (*b*); a duty at and after the rate of eight pounds per centum on the amount or value thereof - - 8*l.* per cent.

(*b*) See the Attorney General *v.* Bacchus, *post*, p. 1377, and The Attorney General *v.* Burnie, *post*, p. 1377.

II. *Where the Testator, Testatrix, or Intestate, shall have died after the 5th Day of April,* 1805 (*c*).

For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards given by any will or testamentary instrument, of any person, who shall have died after the 5th day of April, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged, after the 31st day of August, 1815:

Also, for the clear residue (when devolving to one person) and for every share of the clear residue (when devolving to two or more persons), of the personal or moveable estate, of any person, who shall have died after the 5th day of April, 1805, (after deducting debts, funeral expenses, legacies and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy; where such residue, or share of residue, shall be of the amount or value of 20*l.* or upwards, and where the same shall be paid, delivered, retained, satisfied, or discharged after the 31st day of August, 1815:

And also for the clear residue (when given to one person) and for every share of the clear residue (when given to two or more persons) of the monies to arise from the sale, mortgage, or other disposition, of any

(*c*) The distinctions as to the rates of duties in respect of the Wills and administrations of persons who died before this date, and those who died after it, appear to be these, *viz.* that, under the former, personal estate only is liable to duty, —the rates of duty to collaterals and strangers are lower than under the latter,—and property passing to lineal ancestors or descendants is liable to no duty at all: Gwynne on Probate and Legacy Duties, p. 59, 2d edit.

real or heritable estate, directed (*e*) to be sold, mortgaged, or otherwise disposed of, by any Will or testamentary instrument, of any person, who shall have died after the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies, and other charges first made payable thereout, if any), where such residue or share of residue, shall amount to 20*l.* or upwards, and where the same shall be paid, retained or discharged after the 31st day of August, 1815:

Where any such legacy or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a child of the deceased, or any descendant of a child of the deceased,* or to or for the benefit of *the father or mother, or any lineal ancestor of the deceased;* a duty at and after the rate of one pound per centum on the amount or value thereof
1*l.* per cent.

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the deceased, or any descendant of a brother or sister of the deceased;* a duty at and after the rate of three pounds per centum on the amount or value thereof 3*l.* per cent.

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased;* a duty at and after the rate of five pounds per centum on the amount or value thereof 5*l.* per cent.

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother*

(*e*) As to the construction of this word, see the cases collected, *post,* p. 1385, 1386.

of the deceased; a duty at and after the rate of six pounds per centum on the amount or value thereof 6*l.* per cent.

And where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of any person, *in any other degree of collateral consanguinity to the deceased* than is above described, or to or for the benefit of *any stranger in blood to the deceased;* a duty at and after the rate of ten pounds per centum on the amount or value thereof 10*l.* per cent.

And all gifts of annuities, or by way of annuity (*f*), or of any other partial benefit or interest, out of any such estate or effects as aforesaid, shall be deemed legacies within the intent and meaning of this schedule.

And where any legatee shall take two or more distinct legacies or benefits under any Will or testamentary instrument, which shall together be of the amount or value of 20*l.* each shall be charged with duty, though each or either may be separately under that amount or value.

EXEMPTIONS.

Legacies, and residues, or shares of residue, of any such estate or effects as aforesaid, given or devolving to or for the benefit of the husband or wife of the deceased, or to or for the benefit of any of the Royal Family.

And all legacies which were exempted from duty by the Act passed in the 39th year of his Majesty's reign, c. 73, for exempting certain specific legacies given to bodies corporate, or other public bodies, from the payment of duty (*g*).

Powers and provisions of former acts to extend to 55 G. III. c. 184.

By section 8, of the statute, it is provided, that all the powers and provisions, clauses, regulations, and directions,

(*f*) See Attorney General *v.* Jackson, *post*, p. 1387. Shirley *v.* Lord Ferrers, *post*, p. 1387, 1388.

(*g*) See *post*, p. 1369.

fines, forfeitures, pains and penalties, contained in the former acts relating to the repealed duties, shall extend to the duties granted by the present (*h*). It is therefore necessary to recur to the provisions of the earlier statutes.

20 Geo. III. c. 28.

By the statute 20 Geo. III. c. 28, certain stamp duties were imposed for every receipt or other discharge for any legacy left by any will or other testamentary instrument, or for any share or part of a personal estate divided by force of the Statute of Distributions, or the custom of any province or place: and by section 3, it was enacted, that no such receipt unstamped should be pleaded or given in evidence in any Court.

23 Geo. III. c. 58.

By the statute 23 Geo. III. c. 58, additional stamp duties were imposed: And by section 8, it was enacted, that the receipts, &c., should be stamped before written upon.

29 Geo. III. c. 51.

By the statute 29 Geo. III. c. 51, additional duties were imposed, which, as well as the duties imposed by the preceding acts, were repealed by the statute 36 Geo. III. c. 52.

By these statutes, it will be observed, the duties were imposed merely on the *receipts* for legacies and shares of residue: But this mode of imposition was found to be disadvantageous to the revenue; inasmuch as, if executors or administrators chose to rely on the good faith of legatees or next of kin, and to run the risk of taking no receipts from them, the duties were altogether evaded (*i*).

Stat. 36 Geo. III. c. 52.

To obviate this, the statute 36 Geo. III. c. 52, after repealing the preceding duties, imposes new ones, not upon the receipts, but upon the legacies and shares of residue themselves: And after enacting, by section 27, that no legacy, &c., shall be paid without a receipt, proceeds, by section 28, to lay a penalty on persons paying or receiving legacies, &c., without receipts stamped in pursuance of the act: But it is provided, by section 41, that the receipt so stamped shall not be required to have a receipt stamp also.

(*h*) See this section stated *verbatim*, *ante*, p. 508, 509.

(*i*) See Green *v.* Croft, 2 H. Black. 33, 34. Hill *v.* Atkinson, 2 Meriv. 53.

As a due compliance with the provisions of this Act of Parliament is so necessary for the proper performance of the office of executor or administrator, it is judged expedient to insert in this place, verbatim, some of it's most material enactments.

36 Geo. III. c. 52.

By section 6, it is enacted, "That the duties hereby imposed shall, *in all cases in which it is not hereby otherwise provided*, be accounted for, answered, and paid, by the person or persons having or taking the burthen of the execution of the Will or other testamentary instrument, or the administration of the personal estate of any person deceased, upon retainer for his, her, or their own benefit, or for the benefit of any other person or persons, of any legacy or any part of any legacy, or of the residue of any personal estate, or any part of such residue, which he, she, or they shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons; and also upon delivery, payment, or other satisfaction or discharge whatsoever, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, to which any other person or persons shall be entitled; and in case any person or persons having or taking the burthen of such execution or administration as aforesaid, shall retain for his, her, or their own benefit, or for the benefit of any other person or persons, any legacy, or any part of any legacy, or the residue of any personal estate, or any part of such residue, which such person or persons shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons, and upon which any duty shall be chargeable by virtue of this act, not having first paid such duty, or shall deliver, pay, or otherwise howsoever satisfy or discharge any legacy, or any part of any legacy, or the residue of any personal estate, or any part thereof, to which any other person or persons shall be entitled, and upon which any duty shall be chargeable by virtue of this act, having received or deducted the duty so chargeable, then and in every of such

Duties to be paid by executors or administrators, on retaining or paying legacies.

If duty be not paid before legacies are retained by executors, or discharged, they having deducted it, the amount to be a debt from them to his Majesty; and if they pay legacies without deducting the duty, it shall be a debt from both parties.

36 Geo. III. c. 52.

cases, the duty which shall be due and payable upon every such legacy, and part of legacy and residue, and part of residue respectively, and which shall not have been duly paid and satisfied to his Majesty, his heirs, and successors, according to the provisions of this Act, shall be a debt of such person or persons having or taking the burthen of such execution or administration as aforesaid, to his Majesty, his heirs and successors; and in case any such person or persons so having or taking the burthen of such execution or administration as aforesaid, shall deliver, pay, or otherwise howsoever satisfy or discharge any such legacy or residue, or any part of any such legacy or residue, to or for the benefit of any person or persons entitled thereto, without having received or deducted the duty chargeable thereon (such duty not having been first duly paid to his Majesty, his heirs or successors, according to the provisions herein contained), then and in every such case such duty shall be a debt to his Majesty, his heirs and successors, both of the person or persons who shall make such delivery, payment, satisfaction, or discharge, and of the person or persons to whom the same shall be made."

What shall be deemed legacies within the intent of this Act.

Sect. 7. "And be it further enacted, That any gift by any Will or testamentary instrument of any person dying after the passing of this Act, which shall, by virtue of such Will or testamentary instrument, have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit (*k*), shall be deemed and taken to be a legacy within the intent and meaning of this Act, whether the same shall be given by way of annuity or in any other form, and whether the same shall be charged only on such personal estate, or charged also on real estate of the testator or testatrix who shall give the same; except so far as the same shall be paid or satisfied out of such real estate, in a due execution of the Will or testamentary instrument by

(*k*) See *in re* Cholmondely, *post*, p. 1381. Platt *v.* Routh, *post*, p. 1382, and stat. 8 & 9 Vict. c. 76, s. 4, *post*, p. 1368.

which the same shall be given; and every gift which shall have effect as a donation *mortis causâ*, shall also be deemed a legacy within the intent and meaning of this Act."

36 Geo. III. c. 52.

The value of annuities, and the duty, to be calculated, according to the annexed tables, and the duty paid by instalments, &c.

Sect. 8. "And be it further enacted, That the value of any legacy given by way of annuity, whether payable annually or otherwise, for any life or lives, or for years determinable on any life or lives, or for years or other period of time, shall be calculated, and the duty chargeable thereon shall be charged, according to the tables in the schedule hereunto annexed: and the duty chargeable on such annuity shall be paid by four equal payments, the first of which payments of duty shall be made before or on completing the payment of the first year's annuity, and the three others of such payments of duty shall be made in like manner successively, before or on completing the respective payments of the three succeeding years' annuity respectively; and the value of any such annuity, if determinable upon any contingency besides the death of any person or persons, shall be calculated without regard to such contingency: provided always, That if any such annuity shall determine by the death of any person, before four years' payment of such annuity shall become due and payable, then and in such case the duty shall be payable in proportion only to so many of the payments of the said annuity as actually accrued and became due and payable; and in case any such annuity shall at any time determine upon any other contingency than the death of any person or persons, then and in such case, not only all payments of duty which would otherwise become due after the happening of such contingency, if any such would become due, shall cease; but it shall be lawful for the person or persons who shall have paid any duties which shall have previously become due, to apply for and obtain a return of so much of the duty so paid as will reduce the same to the like duty as would have been payable by such person or persons for such annuity, calculated according to the term for which the same shall have endured, which abatement the said commissioners for management of the stamp duties shall settle and determine according to the

36 Geo. III. c. 52.

tables in the schedule hereunto annexed, and shall cause the amount of such abatement to be paid to the person or persons entitled to the same, out of any monies in their hands arising from the duties imposed by this Act."

The value of annuities payable out of legacies, and the duty, to be calculated according to the annexed tables, and the duty to be charged on the value of such legacies after deducting such annuities, &c.

Sect. 9. "And be it further enacted, That the value of any legacy given by way of annuity for any life or lives, or for years determinable on any life or lives, or for years or other period of time, and charged on and made payable out of any other legacy or legacies, shall be calculated, and the duty shall be charged thereon, in the same manner as hereinbefore directed with respect to other annuities; and the duty on the legacy charged with such annuity, if any duty shall be payable for such legacy, shall be calculated on the value of such legacy, after deducting the value of such annuity; and the duty for such annuity, shall be paid by the person or persons entitled to the legacy or legacies charged with such annuity, by four equal payments, in the same manner as the same would be payable according to the provisions hereinbefore contained, if such annuity had been a direct gift to the annuitant, and subject to the like proviso in case such annuity shall determine before four years' payments shall become due; and the payment which shall be made for such duty, shall be retained by the person or persons paying the same, out of the first four years' payments of such annuity, if so many shall become due, or out of so many of such payments as shall become due by equal portions."

Duty on legacies given to purchase annuities to be calculated on the sums necessary to purchase them.

Sect. 10. "And be it further enacted, That the duty payable upon any legacy given by direction to purchase with any personal estate of the testator or testatrix, or any part thereof, an annuity of a certain amount for the life or lives of any person or persons, or any other term, shall be calculated upon the sum necessary to purchase such annuity according to the tables before mentioned, and shall be deducted from such sum, and paid as in the case of other pecuniary legacies; and the person or persons paying or satisfying such legacy, and the person or persons for whose benefit the same shall be paid or satisfied, shall be discharged, by payment of such

duty so calculated as aforesaid, from all other demands in respect of the duty payable on such legacy; and the annuity to be purchased for the benefit of the person or persons entitled to the benefit of such legacy, shall be reduced in proportion to the amount of the duty payable thereon as aforesaid, such reduction to be calculated in the same manner as the duty so payable is hereinbefore directed to be calculated; and the purchase of such reduced annuity, together with the payment of such duty, shall satisfy and discharge such legacy as fully as if an annuity had been purchased equal in amount to the annuity so directed to be purchased."

36 Geo. III. c. 52.

Sect. 11. "And be it further enacted, That if any benefit shall be given by any Will or testamentary instrument, in such terms that the amount or value of such benefit can only be ascertained from time to time, by the actual application for that purpose of the fund allotted for such purpose, or made chargeable therewith; or if the amount or value of any benefit given by any Will or testamentary instrument, cannot by reason of the form and manner of the gift, be so ascertained that the duty can be charged thereon under any other of the directions herein contained; then and in every such case such duty shall be charged upon the several sums of money or effects which shall be applied from time to time for the purposes directed by such Will or testamentary instrument, as separate and distinct legacies or bequests, and shall be paid out of the fund applicable for such purposes or charged with answering the same."

Duty on legacies whose value can only be ascertained by application of the allotted fund, to be charged on the money as applied (*l*).

Sect. 12. "And be it further enacted, That the duty payable on a legacy or residue, or part of residue of any personal estate given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, who shall be chargeable with the duties hereby imposed at one and the same rate, shall be charged upon and paid out of the legacy or residue, or part of the residue so given, as in the case of a legacy to one person; and where any legacy or

How duty on legacies enjoyed by persons in succession, or having partial interests therein, shall be charged:

(*l*) See *In re* Wilkinson, *post*, p. 1390. Atty. Gen. *v.* Fitzgerald, *post*, p. 1391.

36 Geo. III. c. 52.

residue, or part of residue, shall be given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, some or one of whom shall be chargeable with no duty, or some of whom shall be chargeable with different rates of duty, so that one rate of duty cannot be immediately charged thereon, all persons who, under or in consequence of any such bequest, shall be entitled for life only, or any other temporary interest, shall be chargeable with the duty in respect of such bequest, in the same manner as if the annual produce thereof had been given by way of annuity; and such persons respectively shall be so chargeable with such duty, and the same shall be payable when they shall respectively become entitled to and begin to receive such produce, and shall be paid by equal portions during the aforesaid term of four years, if they shall so long continue to receive such produce; and where any other partial interest shall be given, or shall arise out of such property so to be enjoyed in succession, the duty on such partial interest shall be charged and paid in the same manner as the duty is hereinbefore directed to be charged and paid in like cases of partial interests, charged on any property given, otherwise than to different persons in succession; and all and every person and persons who shall become absolutely entitled to any such legacy or residue, or part of residue, so to be enjoyed in succession, shall, when and as such person or persons respectively shall receive the same, or begin to enjoy the benefit thereof, be chargeable with and pay the duty for the same, or such part thereof as shall be so received, or of which the benefit shall be so enjoyed, in the same manner as if the same had come to such person or persons immediately on the death of the person by whom such property shall have been given to be enjoyed, or in such manner that the same shall be enjoyed in succession."

and by whom payable.

Sect. 13. "And be it further enacted, That the duty payable on any legacy or residue, or part of residue, so given to or so to be enjoyed by different persons in succession, upon whom the duty shall be chargeable at one and the same rate,

shall be deducted and paid by the person or persons having or taking the burthen of the execution of the Will or testamentary instrument under which the title thereto shall arise, upon payment or other satisfaction or discharge of every or any part of such legacy or residue, or part of residue, to any trustee or trustees, or other person or persons to whom the same shall be payable, or paid in trust or for the benefit of the persons so entitled thereto in succession; and if the same shall not be so paid or satisfied to any such trustee or trustees, then such duty shall be deducted and paid out of the capital of the property so given, upon receipt, by any of the persons so entitled in succession, of any produce of such capital, or any part thereof, according to the amount of the capital of which such produce shall be so received; and where the duty chargeable upon any such bequest for the benefit of or to be enjoyed by different persons in succession, shall be chargeable at different rates, so that the same cannot be paid at one and the same time, but must be paid in succession as aforesaid, then and in such case, all and every the person and persons having or taking the burthen of the execution of the Will or testamentary instrument in which such bequest shall be contained, shall be chargeable with such duties in succession, in the same manner as such persons would be chargeable with the like duties in case of immediate bequest; unless the property bequeathed shall have been paid or otherwise satisfied to or vested in any trustees or trustee as aforesaid, in which case such trustees or trustee, or his, her, or their representatives, shall be chargeable with the duties for and in respect of such property so vested in him, her, or them respectively, in such and the same manner as if he, she, or they had had or taken the burthen of the execution of the Will or testamentary instrument, by which such bequest shall have been made; and in like manner, where any partial interest shall be given, or shall arise out of any such property so to be enjoyed in succession, and such partial interest shall be satisfied or paid by the person or persons so enjoying such property, such person or persons

36 Geo. III. c. 52.

36 Geo. III. c. 52.

shall be chargeable with the duties for and in respect of such partial interest, and shall retain and pay the same accordingly, in such and the same manner as if he, she, or they had had or taken the burthen of the execution of the Will or testamentary instrument, by which such partial interest shall have been created; and in all such cases, the person or persons so chargeable with duty shall be debtors to the King's majesty, his heirs and successors, in like manner, and shall be subject to the like penalties, as the person or persons having or taking the burthen of the execution of such Will or testamentary instrument, are hereby made chargeable and subject to."

Plate, &c. while enjoyed in kind, not liable to duty till in possession of persons having power to dispose thereof.

Sect. 14. "Provided always, and be it further enacted, That no duty shall be paid on any articles of plate, furniture, or other things, not yielding any income, and given to or for the benefit of, or so as that the same be enjoyed by, different persons in succession, whilst the same shall be so enjoyed in kind only by any person or persons not having any power of selling or disposing thereof, so as to convert the same into money or other property yielding an income; but if the same shall be actually sold or disposed of, or shall come to any person or persons having power to sell or dispose thereof, or having an absolute interest therein, then, and in each and every such case, the same duty shall be chargeable and paid thereon as if the same had been originally given absolutely, and with full powers to sell or dispose thereof, and shall be chargeable upon and paid by the person or persons for whose benefit the same shall be sold, or who shall have power to sell or dispose thereof or an absolute interest therein, and shall become the debt of such person or persons; but shall not be a charge on any person or persons by reason of his, her, or their having assented to such bequest, as the person or persons having or taking the burthen of the execution of the Will or testamentary instrument by which such bequest shall have been made."

Duty on legacies enjoyed in succession to be charged as such, whether

Sect. 15. "Provided always, and be it further enacted, That where any legacy, or any residue or part of residue, shall be so given by any Will or testamentary instrument,

that different persons shall become entitled thereto in succession, the duty shall be charged thereon as given to be enjoyed in succession, whether the person or persons entitled thereto shall take the same under or by virtue of such Will or testamentary instrument, and the dispositions therein contained, or in default of such dispositions, and as entitled by intestacy."

36 Geo. III. c. 52. taken under Wills or by intestacy.

Sect. 16. "And be it further enacted, That where any legacy, or residue or part of residue, shall be given to or for the benefit of any person or persons in joint tenancy, some or one of whom shall be chargeable with any duty hereby imposed, and some or one of whom shall not be so chargeable, the person or persons chargeable with duty shall pay such duty in proportion to the interest of such person or persons respectively in such bequest; and if any person or persons chargeable with duty, and entitled in joint tenancy as aforesaid, shall become entitled by survivorship, or by severance of the joint tenancy, to any larger interest in the property bequeathed, than that in respect of which such duty shall have been paid, then, and in such case all and every such person or persons so becoming entitled by survivorship, or by severance, shall be charged with the same duty as if the property to which such joint tenant or joint tenants shall so become entitled had been originally given to or for the benefit of such person or persons only."

Duty on legacies in joint tenancy to be paid in proportion to the interests of the parties.

Sect. 17. "And be it further enacted, That when any legacy or any residue, or part of residue, shall be given, subject to any contingency which may defeat such gift, and whereupon the same may go to some other persons or person, such bequest (unless chargeable as an annuity under the provisions herein contained) shall be charged with duty as an absolute bequest, to the person or persons who shall take the same subject to such contingency, and such duty shall be paid out of the capital of such legacy, or residue, or part of residue, notwithstanding the same may, upon such contingency, go to some person not chargeable with the same duty, or with any duty; and if such contingency shall afterwards happen,

Duty on legacies subject to contingencies, to be charged as for absolute bequests, &c.

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and the property so bequeathed shall thereupon go in such manner that the same, if taken immediately after the death of the testator or testatrix under the same title, would have been chargeable with a higher rate of duty than the duty so paid, the person or persons becoming entitled thereto, shall be charged with and shall pay the difference between the duty so paid, and such higher rate of duty."

How duty on legacies subjected to power of appointment shall be charged (*m*);

Sect. 18. "And be it further enacted, That where any legacy, or the residue or any part of the residue, of any personal estate, shall be subjected to any power of appointment to or for the benefit of any person or persons specially named or described as objects of such power, such property shall be charged with duty as property given to different persons in succession; and in so charging such duty, not only the person and persons who shall take previous or subject to such power of appointment, but also any person and persons who shall take under or in default of any such appointment, when and as they shall so take respectively, shall, in respect of their several interests, whether previous, or subject to, or under, or in default of such appointment, be charged with the same duty, and in the same manner, as if the same interests had been given to him, her, or them respectively, in and by the Will or testamentary disposition containing such power, in the same order and course of succession as shall take place under and by virtue of such power of appointment, or in default of execution thereof, as the case may happen to be; and where any property shall be given for any limited interest, and a general and absolute power of appointment shall also be given to any person or persons to whom the property would not belong in default of such appointment, such property, upon the execution of such power, shall be charged with the same duty, and in the same manner, as if the same property had been immediately given to the person or persons having and executing such power, after allowing any duty before paid in respect thereof; and where any

(*m*) See Platt *v.* Routh, *post*, p. 1382.

property shall be given with any such general power of appointment, which property in default of appointment will belong to the person or persons to whom such power shall also be given, such property shall be charged with, and shall pay the duty by this act imposed, in the same manner as if such property had been given to such person or persons absolutely in the first instance, without such power of appointment."

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Sect. 19. " And be it further enacted, That any sum of money or personal estate, directed to be applied in the purchase of real estate, shall be charged with and pay duty as personal estate; unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession, shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued: but no duty shall accrue in respect thereof, after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied: Provided nevertheless, That in case before the same or some part thereof shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase."

and how on personal estates directed to be applied in purchase of real estates(*n*).

Sect. 20. " And be it further enacted, That the estates *pur auter vie*, applicable by law in the same manner as personal estate, shall be charged with the duties hereby imposed as personal estate."

Estates *pur auter vie* applicable as personal estates, to be charged as such.

(*n*) See The Atty. Gen. *v.* Hancock, *post*, p. 1375, 1388.

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Money left to pay duty not chargeable as a legacy (*o*).

Set. 21. "Provided always, and be it further enacted, That if any direction shall be given, by any Will or testamentary instrument, for payment of the duty chargeable upon any legacy or bequest out of some other fund, so that such legacy or bequest may pass to the person or persons to whom or for whose benefit the same shall be given, free of duty, no duty shall be chargeable upon the money to be applied for the payment of such duty, notwithstanding the same may be deemed a legacy, to or for the benefit of the person or persons who would otherwise pay such duty."

Mode of ascertaining duty on property not reduced into money.

Sect. 22. "And be it further enacted, That in cases of specific legacies, and where the residue of any personal estate shall consist of property which shall not be reduced into money, it shall be lawful for the person or persons having or taking the burthen of the administration of such effects, or the person or persons by whom the duty thereon ought to be paid, to set a value thereon, and offer to pay the duty according to such value; or to require the commissioners for management of the stamp duties, to appoint a person to set such value, at the expense of the person or persons by whom such duty ought to be paid; and it shall be lawful for the commissioners to accept the duty offered to be paid, upon the value set by the person or persons having or taking the administration of such effects, or by whom the duty for the same shall be payable, without such appraisement, if the said commissioners shall think fit so to do; but if the said commissioners shall not be satisfied with the value so set, on which the duty shall be so offered, it shall be lawful for the said commissioners, notwithstanding such offer, to appoint a person to appraise such effects, and to set the value thereon, on which value so set the said commissioners shall assess the duty payable in respect thereof, and require the same to be paid; but if the person or persons by whom such duty shall be payable, shall not be satisfied with the valuation made

(*o*) As to what terms in a Will shall entitle a legatee to receive his legacy free of duty, see the cases collected, *infra*, p. 1398, *et seq.*

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under the authority of the said commissioners, and pay the duty accordingly, it shall be lawful for such person or persons to cause the valuation so made under the authority of the said commissioners, to be reviewed by the commissioners of the land tax for the time being, of the district or place where such effects shall be, at their next meeting, after the said commissioners for management of the stamp duties shall have assessed and required payment of such duty as aforesaid, if fourteen days shall have elapsed between such time and the meeting of the said commissioners of land tax, and if not, then at the next succeeding meeting of the said commissioners, of which appeal six days' notice shall be given to the said commissioners of stamp duties; and the said commissioners of the land tax shall and may (if they think fit) appoint a person to appraise such effects, and set a value thereon, and shall and may hear and determine such appeal, in the same manner as in any other cases of appeal to them, and with the like authorities, and their judgment shall be final; and if the valuation made under the authority of the said commissioners of the stamp duties in the case last-mentioned, shall not be duly appealed from within the time aforesaid, or shall be affirmed upon appeal, the duty shall be paid according to such valuation; and if any variation shall be made on such appeal, the duty shall be paid according to such variation; and if the duty assessed in manner aforesaid, shall exceed the duty offered to and refused by the said commissioners of stamp duties, the expense of such appraisement and other proceedings in assessing such duties, shall be borne by the person or persons by whom such duty shall be payable; and if any dispute shall arise between any person or persons entitled to any such legacy, or residue, or part of residue, and any person or persons having or taking the burthen of the administration of such effects, with respect to the value thereof, or with respect to the duty to be paid thereon, the duty shall be assessed by the said commissioners of stamp duties on reference to them by either party for that purpose; and if the value of any property on which such

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duty ought to be paid shall be in dispute, the said commissioners of the stamp duties shall cause an appraisement to be made thereof at the expense of the person or persons by whom such duty ought to be paid, in the manner herein-before directed in other cases, and assess the duty thereon accordingly; and if such person or persons by whom such duty ought to be paid, shall be dissatisfied with such valuation, or with the assessment of duty made upon such valuation by the said commissioners of the stamp duties, the same shall be reviewed and finally determined by the said commissioners of the land tax, upon appeal to them within the time, and under the restrictions, and in the manner herein-before directed in other cases; but if such valuation or assessment shall not be duly appealed from within the time limited for that purpose, or shall be affirmed upon appeal, the duty shall be paid according thereto; and if any variation shall be made therein on such appeal, the duty shall be paid according to such variation; and in case the effects whereon any such duty shall be payable shall be at the distance of ten miles from London, then and in such case, it shall be lawful to make the like application to such person as shall be deputed for that purpose by the said commissioners to act in their stead, in such cases, within the county or district in which such effects shall be; and such person so deputed shall act in such cases, in all respects, in the same manner as the said commissioners are hereby authorized to act, subject nevertheless to the instructions and control of the said commissioners."

Duty on legacies not satisfied in money, &c. to be paid according to the value of the satisfaction.

Sect. 23. "And be it further enacted, That where any legacy, or part of any legacy, or residue, or part of residue, whereon any duty shall be chargeable by this act, shall be satisfied otherwise than by payment of money or application of specific effects for that purpose, or shall be released for consideration, or compounded for less than the amount or value thereof, then and in such case, the duty shall be charged and paid in respect of such legacy, or part of legacy, or residue, or part of residue, according to the amount or value

of the property taken in satisfaction thereof, or as the consideration for release thereof, or composition for the same: Provided always, That if any legacy, or bequest shall be made in satisfaction of any other legacy, or bequest, or title to any residue, or part of residue, of any personal estate remaining unpaid, the duty shall not be paid on both subjects, although both may be chargeable with duty, but shall be paid on the subject yielding the largest duty."

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Sect. 24. "And be it further enacted, That if any person or persons having or taking the burthen of the execution of the Will or other testamentary instrument, or the administration of the personal estate of any person deceased, or any person or persons hereby made chargeable with duty, shall declare himself, herself, or themselves ready and willing, and shall accordingly offer to pay any pecuniary legacy, or residue, or part of residue, deducting the duty payable thereon, or shall in like manner offer to deliver or otherwise dispose of any specific legacy, or any specific property, part of any residue of any personal estate, to or for the benefit of the person or persons entitled thereto, or to any trustee or trustees for such person or persons, upon payment of the duty payable in respect thereof, and the person or persons entitled to such legacy, or residue, or part of residue, or the trustee or trustees for such person or persons, shall refuse to accept such offer, and to give a proper release and discharge for such legacy or residue, or so much thereof as shall be offered to be paid, delivered, or otherwise disposed of as aforesaid, then and in such case, although no actual tender shall be made, if any suit shall be afterwards instituted for such legacy or effects, respecting which such offer shall have been made, it shall be lawful for the Court in which such suit shall be instituted, to order all costs, charges and expenses attending the same, to be paid by the person or persons who shall have refused to accept such offer, and to give or join in such release or discharge, or to order such costs, charges, and expenses, to be deducted and retained out of such legacy or effects, together with the duty payable thereon, as

If legatees refuse to accept legacies, duty deducted, the Court, in of suit, may order them to pay costs;

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and in suits where the party sued may wish to stop proceedings on payment of bequests, deducting duty, the Court may make order therein.

the said Court shall see fit; and in case any suit shall be instituted for payment of any legacy, or residue, or part of residue, of any personal estate, and the person or persons sued for the same shall be desirous of staying proceedings in such suit, on payment of the money due, or delivering, or otherwise disposing of the specific effects demanded, after deducting or receiving the duty payable thereon, it shall be lawful for the Court in which such suit shall be instituted, if it shall see fit, on application in a summary way, to make such order for payment of such legacy, or residue, or part of residue, or for delivering or otherwise disposing of such effects, and for payment of the duty payable thereon, and all such costs, charges, and expenses, attending such suit as shall be just."

If suit be instituted concerning administration, the Court to provide for payment of the duty (*p*).

Sect. 25. "And be it further enacted, That if any suit shall be instituted concerning the administration of the personal estate of any person dying testate, or intestate, or any part of such estate in which any direction shall be given touching the payment of any legacies or legacy of such person, or the residue of his or her personal estate, or any part thereof, the Court wherein such suit shall be instituted shall in giving directions concerning the same, provide for the due payment of the duties hereby imposed; and in taking any account of any personal estate, or otherwise acting concerning the same, such Court shall take care that no allowance shall be made in respect of any legacy, or part of legacy, or of any residue, or part of residue in any manner whatsoever, without due proof of the payment of the duties hereby imposed."

Executors may discharge legacies on payment of the duty accrued.

Sect. 26. "Provided always, and be it further enacted, That any person or persons having or taking the burthen of the execution of any Will or other testamentary instrument, or the administration of the personal estate of any person deceased, may from time to time pay, deliver, or otherwise dispose of any legacy, or any part of any legacy, or make

(*p*) See Foster *v.* Ley, *post*, p. 1365, note. See also Hicks *v.* Keat, 3 Beav. 141. 1402. *In re* Sammon, *post*, p.

distribution of any part of the residue of any personal estate, on payment, from time to time, of such proportions of the duty hereby imposed, as shall accrue in respect of such part of such personal estate as shall be so administered."

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No legacy liable to duty, to be paid without a receipt containing certain particulars;

Sect. 27. "And be it further enacted, That no person or persons having or taking the burthen of the execution of any Will or testamentary instrument, or the administration of the personal estate of any person deceased, nor any trustee or trustees, or other person or persons hereby directed and required to account for any duty, shall, from and after the passing of this Act, pay, deliver, or otherwise dispose of, or in any manner satisfy, discharge, or compound for any legacy whatsoever, or any part thereof, or the residue of any personal estate, or any part thereof, in respect whereof any duty is hereby imposed, without taking a receipt or discharge in writing for the same, expressing the date of such receipt or discharge, and the names of the testator, testatrix, or intestate, under whose Will or testamentary disposition, or upon whose intestacy the title to such legacy or part of legacy, or to such residue or part of residue, shall accrue, and of the person or persons to whom such receipt or discharge shall be given, and of the person or persons to whom such legacy or residue or part of residue, shall have been given, or shall have belonged in consequence of intestacy, and the amount or value of the legacy or part of legacy, or residue, or part of residue, for which such receipt or discharge shall be given, and also the amount and rate of the duty payable and allowed thereon; and that no written receipt or discharge for any legacy or part of any legacy, or for the residue of any personal estate, or any part of such residue, in respect whereof any duty is hereby imposed, shall be received in evidence, or be available in any manner whatever, unless the same shall be stamped, as required by this Act; and no evidence whatsoever shall be given of any payment, satisfaction, or discharge whatsoever, or of any release or composition of such legacy, or any part thereof, or of such residue, or any part thereof, without producing such receipt

no receipt available unless duty stampt, &c.

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or discharge, duly stamped as aforesaid, unless the actual payment of the duty hereby imposed, shall first be given in evidence: Provided always, That a copy of the entry, in the books of the commissioners of the stamps, of the payment of such duty, shall be admitted as evidence thereof: Provided also, That payment of any annuity shall not be deemed a payment for which such stamped receipt shall be required, under the directions of this Act, except the several payments which shall complete the payments for each of the first four years, during which such annuity shall be payable; and in like manner any payment in respect of any legacy or bequest, hereby directed to be charged with the duty in the same manner as annuities are hereby made chargeable with duty, shall not be deemed a payment for which such stamped receipt shall be required, except the several payments which shall complete the payments for each of the first four years in respect of which such legacy or bequest shall be chargeable with duty as an annuity."

Copy of entry at stamp office of payment of duty, evidence.

Stampt receipts for annuities not required but on completing payments for each of the first four years.

Penalty of 10*l.* per cent. for paying for receiving legacies without stampt receipts.

Sect. 28. "And be it further enacted, That any person having or taking the burthen of the execution of any Will or testamentary instrument, or the administration of the personal estate of any person deceased, and any trustee or trustees, or other person or persons, hereby directed and required to account for any duty, who shall pay, deliver, or otherwise dispose of, or in any manner satisfy or discharge, or compound for any legacy given by such Will or testamentary instrument, or the residue, or any part of the residue, of such personal estate to or for the benefit of any person or persons entitled to such legacy, or any part thereof, or to such residue, or any part thereof, without taking such receipt or discharge in writing as aforesaid, and causing the same to be stamped within the time hereby allowed for stamping the same, shall forfeit and lose the sum of ten pounds *per centum* on the sum of money, or the value of the property if not money, for which such receipt or discharge ought to have been given in pursuance of this Act; and all and every person and persons receiving or taking the benefit of any such money, or other

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property, without giving a written receipt or discharge for the same, in which the duty payable in respect thereof shall be expressed to have been allowed or paid to the person or persons to whom such receipt or discharge shall be given, and which shall bear date on the day of signing the same, shall forfeit and lose the sum of ten pounds *per centum* on the sum of money, or on the value of the property, so received or taken."

Receipts to be stampt within twenty-one days after date, on which an acknowledgment of payment of the duty shall be written, &c.

Sect. 29. "And be it further enacted, That every such receipt or discharge shall be brought within the space of twenty-one days after the date thereof, to the said head office of the said commissioners, or to some other office to be appointed by the said commissioners for such purpose, to be stamped, paying the duty for the same, and upon such payment either at the said head office, or at any other office to be appointed as aforesaid, the receiver-general or other proper officer to be appointed for that purpose by the said commissioners, as the case shall require, shall write upon such receipt or discharge an acknowledgment of the payment of the duty so paid in words at length, and bearing date the day on which such payment shall be made, and shall subscribe his name thereto, and enter an account thereof in a book or books to be provided for that purpose, to the intent that he may be thereby charged with the sum so paid; and in case the duty shall be so paid at the said head office, then the receipt or discharge so brought to be stamped, shall be forthwith stamped with one of the said four stamps as the case shall require; and in case the duty shall be so paid at any other office to be appointed by the said commissioners as aforesaid, the receipt or discharge whereon such acknowledgment of the payment of duty shall be so written and subscribed, shall be transmitted within the space of twenty-one days from the day of payment of such duty, to the said head office to be stamped, and the same shall be stamped accordingly with one of the said four stamps as the case shall require; and in case the person or persons paying such duty at any such office to be appointed as aforesaid, shall be desirous that the same should be transmitted to the said head

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office, by the officer to whom such duty shall be paid, and shall leave the same with such officer for such purpose, such officer shall thereupon sign and deliver an acknowledgment, that such receipt or discharge has been left with him for such purpose, and shall transmit such receipt or discharge to such head office to be stamped as aforesaid, and the same shall be sent again to such officer as soon as conveniently may be after the stamping thereof; and such officer shall deliver back the same to the person or persons entitled thereto, upon re-delivery to him of the acknowledgment which he shall have given for the same: Provided always, That if any such receipt or discharge shall not be so brought to any such office as aforesaid, within such space of twenty-one days as aforesaid, it shall nevertheless be lawful to carry such receipt or discharge to the said head office to be stamped in like manner, within three calendar months after the date thereof, paying the duty for the same, and also the further sum of ten pounds *per centum* on such duty, by way of penalty for not having before paid such duty, on payment of which duty and penalty, the said commissioners are hereby authorized and required to stamp such receipt or discharge, in the same manner as if the same had been brought to the said office within the space of twenty-one days from the date thereof; but the said commissioners, or any of their officers, shall not on any pretence whatever, except as hereinafter directed, stamp any vellum, parchment, or paper, upon which any receipt or discharge for any legacy or part of legacy, or any residue of any personal estate, or any part thereof, shall be written or signed with the said new stamps, or any of them, unless the duty for the same shall be paid, and such receipt or discharge shall be produced to be so stamped in manner aforesaid, within the times and in the manner hereinbefore respectfully limited and appointed" (*q*).

Receipts may be stampt within three months after date, on payment of duty, and 10*l.* per cent. penalty;

but none to be stampt unless the duty be paid and they are brought to be stampt within the limited time.

48 Geo. III. c. 149, s. 44; Commissioners may stamp receipts for lega-

(*q*) But now, by stat. 48 G. III. c. 149, s. 44, it is enacted, that "in all cases not provided for by the preceding clause, where any receipt or discharge given for any legacy, or for the residue, or any share of the residue, of any personal estate, which shall have been given by

36 Geo. III. c. 52.

Mistakes in paying duty may be rectified, if no suit be instituted, on payment of the difference within three months, and 10*l.* per cent.

Sect. 30. "And be it further enacted, That if it shall appear to the satisfaction of the said commissioners of stamp duties, upon oath or affirmation to be administered by a justice of the peace, or master or masters extraordinary in Chancery, which oath or affirmation such persons are hereby empowered to administer, that less duty has been paid for any legacy, or residue, or part of residue, than ought to have been paid for the same, by mistake, without any intention to defraud; and if application shall be made to the said commissioners to rectify such mistake, and accept the duty really due before any suit shall be instituted concerning the same, and within three calendar months after payment of the money actually paid instead of the just duty, it shall be lawful for the said commissioners to accept the difference between the money paid and the just duty, together with the sum of ten pounds *per centum* on such difference by way of penalty in full for the just duty, and which shall be in discharge of all penalties incurred by non-payment of such duty, and to cause an acknowledgment of the payment of the just duty to be written on the receipt or discharge given for such legacy or residue or part of residue, and to be subscribed by the proper officer, and also to cause such receipt or discharge to be properly stamped, if necessary, in the same manner as would have been done if the just duty had been originally paid."

Will or other testamentary instrument, or have devolved to any person or persons upon intestacy, shall be brought to the head office, to be stamped after the expiration of three calendar months from the date thereof, it shall be lawful for the said commissioners to cause the same to be duly stamped, for making the same available, on payment of the duty, which shall be payable in respect thereof, together with the penalty incurred, in consequence of the same not having been brought to be stamped, before the expiration of such three calendar months; and where any such receipt or discharge shall have been signed out of Great Britain, if the same shall be brought to be stamped, within twenty-one days after it's being received in Great Britain, it shall be lawful for the said commissioners to remit any penalty that may have been incurred thereon, and to cause the same to be duly stamped, on payment of the duty payable in respect thereof; any thing contained in any former Act or Acts to the contrary notwithstanding."

cies, after three months from the date, on payment of duty and penalty; and remit penalty (within twenty-one days,) if signed out of Great Britain.

36 Geo. III. c. 52.

Persons paying or receiving money contrary to this Act, indemnified on discovering the other offender:

Sect. 31. "Provided always, and be it further enacted, That the party or parties paying or satisfying any legacy, or any residue of any personal estate, or any part of such residue, or receiving the same, contrary to the provisions of this Act, who shall, within the space of twelve calendar months after the offence committed, discover the other party or parties offending therein, so that such party or parties so discovered be thereupon convicted, such person so discovering shall be indemnified and discharged from all penalties incurred for any offence against this Act."

If by infancy or absence legacies cannot be paid, the money may be paid into the Bank, and laid out in the 3*l.* per cents. (*r*)

Sect. 32. "Provided always, and be it further enacted, That where, by reason of the infancy, or absence beyond the seas, of any person entitled to any legacy, or to the residue of any personal estate, or any part thereof, chargeable with duty by virtue of this Act, the person or persons having or taking the burthen of any Will or testamentary instrument, or the administration of such personal estate, cannot pay such legacy or some part thereof, although he, she, or they may have effects for that purpose, or cannot pay such residue, or some part thereof, although he, she, or they may have the same, or some part thereof, in his, her, or their hands, it shall be lawful for such person or persons to pay such legacy, or residue, or any parts or part thereof respectively, or any sum or sums of money on account thereof, after deducting the duty chargeable thereon, into the Bank of England, with the privity of the accountant-general of the Court of Chancery, to be placed to the account of the person or persons for whose benefit the same shall be so paid; for payment of which money the said accountant-general shall give his certificate as usual in such cases, on production of the certificate of the commissioners of stamps, that the duty thereon has been duly paid: and such payment into the Bank shall be a sufficient discharge for the money so paid in, provided the duty be also paid thereon as aforesaid; and such money when paid in shall be laid out by the said accountant-general, with-

(*r*) See *ante*, p. 1208, 1209.

out any formal request for that purpose, in the purchase of three pounds *per centum*, consolidated annuities, which, with the dividends thereon, shall be transferred and paid to the person or persons entitled thereto, or otherwise applied for his or their benefit, on application to the Court of Chancery, by petition or motion, in a summary way: Provided always, That if it shall afterwards appear that such money, or any part thereof, has been improperly paid into the Bank as aforesaid, it shall also be lawful for the said Court of Chancery, upon petition, in a summary way to dispose thereof, and of the annuities purchased therewith, and the dividends received thereon, in such manner as justice shall require: Provided also, That if it shall appear that the duty paid in respect of any such sum of money was more than ought to have been paid, it shall be lawful for the person or persons who shall have paid such duty, to apply to the said commissioners for management of the stamp duties, to repay such excess of duty; and the said commissioners are hereby authorized, upon such application, to repay such excess of duty to the person or persons who shall appear to them entitled to receive the same, or to pay such excess of duty into the Bank, with the privity of the said accountant-general, for the benefit of the person or persons entitled, there to be placed to the same account, and to be applied in the same manner as the same would have been applicable, if paid together with the remainder of the legacy, or sum of money, in respect of which the same shall have been paid; and the said commissioners are hereby authorized to make such payments respectively out of the monies in their hands, arising from duties imposed by this Act; and if the duty paid to the said commissioners shall appear to be less than the duty which ought to have been paid, it shall be lawful for the person or persons who paid such money into the Bank as aforesaid, upon payment of the full duty to the said commissioners, in such manner as the same ought to be paid, with such penalties, if any, as ought to be paid in respect thereof, to apply to the Court of Chancery, in a summary way, for the repayment of the further sum paid to the said

36 Geo. III. c. 52.

If such money be improperly paid in, the Chancery may dispose thereof if more than the proper duty has been paid, the commissioners for stamps may return the excess;

and if less, on payment of the full duty, the Chancery may order re-payment to the party.

36 Geo. III. c. 52.

commissioners for such duty, out of the money in the Bank so paid in by such person or persons, or the produce thereof, which payment the said Court is hereby authorized to order."

If it shall appear to the commissioners for stamps, at the end of two years after the death of any person, that it will require time to collect the effects, or be difficult to ascertain the residue of the personal estate, the duty may be compounded for:

Sect. 33. " And be it further enacted, That if at the end of two years after the death of any person deceased, it shall appear to the satisfaction of the said commissioners of stamp duties, that it will require time to collect the debts or effects of such person then outstanding, or that from circumstances it will be difficult to ascertain or adjust the amount of the clear residue of the personal estate of such person liable to duty, and the parties interested therein shall be desirous of compounding for the duty thereon, it shall be lawful for such parties respectively, with the consent of the commissioners of stamp duties, to make application to the Court of Exchequer at Westminster, if the deceased person resided in England or elsewhere, except in Scotland, and to the Court of Exchequer in Scotland, if the deceased resided in Scotland, for leave to compound such duty, stating upon oath the particulars of the personal estate for which such composition shall be proposed to be made, by affidavit to be filed in the said Court, and declaring at the same time upon oath, whether any other property of the deceased then outstanding besides the property for which such composition shall be proposed to be made, hath come to the knowledge of the said parties, or any of them, and the nature thereof, and the circumstances attending the same; and in such case it shall be lawful for the said Court of Exchequer in England or Scotland, as the case may be, to appoint a proper person to set a value on the personal estate, or such part thereof, for which no duty shall have been charged, and which shall be specified in such affidavit as the property for which such composition shall be desired, and to adjust and settle the duty which, justly and equitably under all circumstances, ought to be paid in respect of such personal estate so specified, and thereupon it shall be lawful for the said commissioners, and they are hereby required, if the said Court of Exchequer to which such application shall

36 Geo. III. c. 52.

be made, shall confirm the said adjustment and settlement, and order the duty to be accepted accordingly, and by authority of such order to accept payment of the sum so adjusted and settled, in full discharge of the duty on so much of such personal estate as shall be so specified, and according to such order, and to enter the same in their books accordingly, and to grant certificates thereof, expressing the receipt of such duty by way of composition under such order; and every such person to whom such certificate shall be granted, and every future representative of the same estate, and all persons entitled to the benefit of the property for which such composition shall be so paid, shall be discharged from any further payment of duty on the same; and in all future payments of such property, it shall be lawful for the persons having or taking the burthen of the execution of any Will or testamentary instrument disposing such property, or the administration thereof, to pay, apply, and dispose of the same, and for all persons entitled to the benefit thereof to receive the same, without having the receipts and discharges in writing, hereby required to be given and taken for the same, stamped as herein-before directed; provided such receipts or discharges shall express the same to be given under the authority of such composition as aforesaid, and not liable to duty: Provided always nevertheless, That the duty shall be charged and paid upon all and every part of the personal estate of such person deceased, other than that which shall be specified in such affidavit as aforesaid, and included in the valuation in which such composition shall have been made as aforesaid, and for which the Court of Exchequer shall allow and order such composition to be taken as aforesaid in the same manner as if no such composition had been made; and all and every person and persons shall be liable to all the like penalties and forfeitures for not duly paying the duty for such personal estate not compounded for, and subject to the like rules, methods, and directions, for charging such duty, as such person and persons respectively would be liable to if such composition had not been made.

duty to be paid on any part of tates not included in the composition.

36 Geo. III. c. 52.

If any legacy be refunded, the duty to be repaid.

Sect. 34. "And be it further enacted, That if at any time after payment of duty on any legacy, or residue, or part of residue, of the personal estate of any person deceased, any debt shall be recovered against the estate of such deceased person, or any loss shall happen, by reason whereof, or for any other just cause, any legatee or other person, by whom any legacy or part of legacy, or any residue of any personal estate hath been received or retained, shall be obliged to refund the same, or any part thereof, then in every such case it shall be lawful for the said commissioners of stamp duties and they are hereby required, on due proof made on oath as aforesaid, to their satisfaction, of the amount of such sums refunded, and that by reason thereof there hath been an over-payment of duty, to settle and adjust the amount of such over-payment, and to repay the same out of the money in their hands, arising from the duties by this Act imposed, or to allow the same in future payments as the case may permit or require.

Executors previous to retaining their legacies to transmit the particulars, with the duty offered, to the commissioners of stamps, who shall charge the same agreeable to this Act.

Sect. 35. "And be it further enacted, That whenever any person or persons having or taking the burthen of the execution of any Will or testamentary instrument, or the administration of any personal estate as aforesaid, shall be entitled to any legacy, or the residue, or any part of the residue, of the personal estate of any testator, testatrix, or intestate, such person shall be chargeable with the duty whenever he, she, or they shall be entitled, in the due course of administration, to retain to his, her, or their own use, any part of the said estate, in satisfaction of such legacy, or residue, or any part thereof; and every such person, before any such retainer shall transmit to the said commissioners of stamp duties, or their officers, a note containing the particulars of such legacy, residue or part of the residue, intended to be retained, and the amount or value thereof, and the duty which such person or persons shall offer to pay thereon, and the said commissioners shall charge and assess the duty thereon, in such manner as the duty shall be chargeable thereon by virtue of the provisions in this Act contained, and such duty shall be

paid accordingly; and on payment of the duty, the said receiver general of the said duty, or officer appointed to receive the same, shall, at the foot of a duplicate of the said assessment duly stamped, in such manner as the said commissioners shall direct for such purpose, give a receipt for such duty in such form of words as the said commissioners shall direct, which receipt shall be a discharge for the duty expressed therein: and in case any such person or persons shall neglect to pay such duty as aforesaid, within fourteen days after the same ought to have been paid as aforesaid, every such person and persons shall forfeit and pay treble the value of the duty which ought to have been paid."

36 Geo. III. c. 52.

Penalty for neglect of payment of duty for fourteen days.

Sect. 37. "And be it further enacted, That if the authority under or by colour of which any person shall have administered the estate or effects of any person deceased, or any part thereof, shall be void, or be repealed, or declared void, and such person shall before the avoidance repeal, or declaration of avoidance, have paid any duty hereby imposed, or any duty imposed by any of the said former acts, which shall not be allowed to such person out of the estate or effects of such deceased person, by reason that the same duty was not really due or payable, the money paid for such duty shall, on proof thereof to the satisfaction of the said commissioners of stamp duties, be repaid to the person or persons who shall have paid the same, or his, or her, or their representatives, by the said commissioners, out of any monies in their hands arising from the duties imposed by this act, or the said former acts; but in case such duty ought to have been paid by the rightful executor or executors, administrator or administrators, of such deceased person, then and in such case, the payment of such duty shall be valid and effectual, notwithstanding such avoidance, repeal, or declaration of avoidance as aforesaid; and no such person shall, by reason of the avoidance, repeal, or declaration of avoidance of such authority, be sued, molested, or troubled for or in respect of such payment; but all such payments, in respect of the said duty, shall be allowed in account with such rightful executor

If administration be made void, and any duty shall have been improperly paid, it shall be repaid, but if it ought to have been paid, it shall be allowed in account with the rightful executor.

42 Geo. III. c. 99.

or executors, administrator or administrators, and the same shall be deemed payments in the due course of administration, as fully and effectually as if such payments had been made by rightful executors or administrators; any law, usage, or custom, to the contrary notwithstanding" (s).

Where executors, &c. shall not have paid the duties on legacies, the Court of Exchequer may grant a rule against such executors, to deliver in an account on oath of legacies paid, &c.

The statute 42 Geo. III. c. 99, s. 2, enacts, "That in every case in which any executor or executors, or administrator or administrators, shall not have paid the duties granted and payable upon or in respect of any legacies, or any personal estate, or any share or shares of any personal estate, of any persons dying intestate, by and in pursuance of an act passed in the thirty-sixth year of the reign of his present Majesty, or any other act or acts of Parliament relating to duties on legacies or shares of personal estates, within proper and reasonable time, it shall be lawful for his Majesty's Court of Exchequer, upon application to be made for that purpose on behalf of the commissioners appointed for managing the duties on stamped vellum, parchment, or paper, on such affidavit or affidavits as to the said Court may appear to be sufficient, to grant a rule, requiring such executor or executors, administrator or administrators, to shew cause why he, she, or they, should not deliver to the said commissioners an account, upon oath, of all the legacies, or of the personal property, respectively paid, or to be paid, or administered by him, her, or them, as the case may be, and why the duties on

(s) By an instrument purporting to be the Will of S. deceased, the whole of S.'s personalty, amounting in the net to 12,748*l*., was bequeathed to I., a stranger in blood, who was executor: I. took out probate, and paid the duty of ten per cent. on the whole net: Afterwards T., the next of kin to S. disputed the Will, on the ground that S. was not of disposing mind: I. paid 6000*l*. to T., and consented that the Will should be revoked, and administration taken out by T., who, in consideration thereof, released to I. her claim on the 12,748*l*.: T., from her nearness of blood, was liable to a duty of less than ten per cent.: It was held that, under the enactments of this section, I. was entitled to a return of duty, not only on the 6000*l*. but also on the remaining 6748*l*., and that the duty on the whole 12,748*l*. was to be accounted for between T. and the commissioners of stamps, as duty charged on T., at the lower rate. Reg. *v*. The Commissioners of Stamps, 6 Q. B. 657.

any such legacies, or any shares or residue of any such personal estate, have not been paid or should not be forthwith paid according to law, and to make any such rule of Court absolute in every case in which the same may appear to the said Court to be proper and necessary for the better enforcing the payment of any of the said duties" (*t*).

42 Geo. III. c. 99.

The statute 44 Geo. III. c. 98, after reciting that the several duties therein mentioned, are become very numerous, intricate and complicated, and it will materially contribute to the

44 Geo. III. c. 98.

(*t*) The power given to the Court by this statute is discretionary: Therefore, where a rule had been obtained, in the year 1833, for the surviving executor of the executrix of the executor of a testator to account for legacy duties due on the estate of the original testator, and it appeared that the original testator died in 1812,—that the surviving executor had never acted, except in signing documents,—that he knew nothing of the estate of his testatrix, and that he had received no assets of her's or of the original testator, the Barons declined to compel an account, and discharged the rule: *In re* Pigott, 1 Crompt. & M. 827. S. C. 3 Tyrwh. 859. The pendency of a suit in equity, at the instance of a legatee, praying that an account may be taken of the personal estate and effects of a testator received by the executors, and that the personal estate may be administered and his legacy paid, is no answer to an application by the commissioners of stamps under this statute, if any duties have become payable on legacies which have been paid, notwithstanding the statute 36 Geo. III. c. 52, s. 25, (see *ante*, p. 1352,) which provides, that the Court in which such suit shall be instituted shall in giving directions concerning the payment of legacies, take care that no allowance shall be made in respect of any legacy, &c. without due proof of the payment of the duties thereby imposed: *In re* Sammon, 3 Mees. & W. 381. Where a rule obtained under this statute is made absolute, it is not imperative upon the Court to make it absolute with costs: *Ex parte* Siratt, 3 Dowl. 209. The Barons have lately directed, that it shall, in future, form part of the rule, that if, upon the delivery of the account, there shall be found to be any duties payable to his Majesty, the executor or administrator shall pay the costs of the Crown, to be taxed in the usual manner: *In re* Robinson, 2 Mees. & W. 407. If the executor neglects to account, pursuant to the rule obtained for that purpose, the rule for an attachment is not absolute in the first instance, but is a rule *nisi*, which makes itself absolute by a certain day, unless in the meantime cause be shewn; *In re* Vivian, 1 Cr. & Jerv. 409. The attachment may be granted, notwithstanding the rule to account has not been personally served, if it be shewn that the defendant keeps out of the way to avoid being served, and that a copy has been left at his house with his wife or daughter: *In re* Barwick, 3 Dowl. 703. S. C. 5 Tyrwh. 431.

44 Geo. III. c. 98.

public benefit to consolidate and simplify the same, enacts, "That from and after the 10th of October, 1804, all and singular the duties, &c. (aforesaid) shall cease and determine," and imposes the several duties contained in the schedule in lieu thereof.

45 Geo. III. c. 28.

Legacies, &c. out of real estate subject to duties (*u*).

Legacies charged upon or payable out of the produce of real estate were not subject to the payment of duty until the 45 Geo. III. c. 28: By that statute duties are imposed "Upon all legacies specific or pecuniary, or of any other description, whether the same be charged upon or payable out of *any real* or personal *estate*, and upon all residues or shares of personal estate left by any Will or testamentary instrument, or divided by force of the Statute of Distributions, or the custom of any province or place, and upon monies, or residues or shares of monies, *arising from the sale of real estates*, by any Will or testamentary instrument directed to be sold." And by section 4, it is enacted, "That every gift by any Will or testamentary instrument of any person dying after the passing of this Act, which, by virtue of any such Will or testamentary instrument, shall have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of, as he or she shall think fit, or which shall have been charged upon or made payable out of any real estate (*w*), or be directed to be satisfied out of any monies to arise by the sale of any real estate, of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity, or in any other form, shall be deemed and taken to be a legacy within the true intent and meaning of this Act: Provided always, that nothing herein contained shall be construed to extend to the charging with the duties by this Act granted, any

What shall be deemed a legacy under this Act (*v*).

Acts shall not extend to appointment by Will under settlements, &c.

(*u*) See also stat. 8 & 9 Vict. c. 76, s. 4, *post*, p. 1368, 1369.

(*v*) See stat. 8 & 9 Vict. c. 76, s. 4, *post*, p. 1368, 1369.

(*w*) See Atty. Gen. *v.* Pickard, *post*, p. 1384. Atty. Gen. *v.* Lord Hertford, *post*, p. 1385.

specific sum or sums of money, or any share or proportion thereof charged by any marriage settlement or deed or deeds upon any real estate, in any case in which any such specific sum or sums, or share or proportion thereof, shall be appointed or apportioned by any Will or testamentary instrument under any power given for that purpose by any such marriage settlement or deed or deeds."

45 Geo. III. c. 28.

Sect. 5. "And be it further enacted, That the duties hereby granted upon legacies, or charged upon or made payable out of any real estate, or out of any monies to arise by the sale of any real estate, or upon residues, or parts or shares of residues of any such monies, shall be accounted for, answered, and paid by the trustee or trustees to whom the real estate shall be devised, out of which the legacy or legacies, or share or shares, of any money arising out of the sale or mortgage, or other disposition of such real estate, shall be to be paid or satisfied; or if there shall be no trustees, then by the person or persons (*x*) entitled to such real estate, subject to any such legacy; or by the person or persons empowered or required to pay or satisfy any such legacy; and the said duties shall be retained (*y*) by the person paying or satisfying any such legacy or share of money, in like manner, and according to such rules and regulations, and under and subject to such penalties, as far as the same can be made applicable, as are contained in an act passed in the thirty-sixth year of the reign of his present Majesty, intituled, *An Act for repealing certain duties on legacies and shares of personal estates, and for granting other duties thereon in certain cases.*"

Duties on legacies charged on real estates shall be paid by the trustees, or the persons entitled to such estate, and retained as under 36 Geo. III. c. 52.

The statute 48 Geo. III. c. 149, repealing the duties granted by the last Act (except arrears, which are to be recoverable by the same ways and means, &c. in all respects, as if this Act had not been made), enacts by sect. 2. "That from and after the 10th of October, 1808, there shall be raised, levied, and paid," the several duties specified in the

48 Geo. III. c. 149.

(*x*) See the Atty. Gen. *v.* Jackson, *post*, p. 1398.

(*y*) See Hales *v.* Freeman, *post*, p. 1398.

48 Geo. III. c. 149.

schedule; in which schedule, part 3, is contained the following:—"For every legacy, &c. given by any Will or testamentary instrument of any person who died before or upon the 5th of April, 1805, out of his or her personal or moveable estate, and which shall be paid, delivered, retained, satisfied, or discharged, after the 10th October, 1808," the several duties, after the rates therein specified. And "for every legacy, &c. &c. of any person who shall have died after the 5th of April, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged after the 10th day of October, 1808," the several other duties thereafter specified.

This statute was succeeded by the latest stamp act, 55 Geo. III. c. 184, which repeals the last-mentioned duties, with the same exception of arrears, and imposes the new duties above specified at large (z).

8 & 9 Vict. c. 76, s. 4.
What gifts are to be deemed legacies.

A fuller and more explicit definition of a legacy is contained in the recent statute of 8 & 9 Vict. c. 76, s. 4, by which, after reciting that "under and by virtue of the said several recited Acts (55 Geo. III. c. 184, 5 & 6 Vict. c. 82, 8 & 9 Vict. c. 2), certain duties have been granted and are now payable in Great Britain and Ireland respectively upon legacies, and doubts have been entertained whether certain gifts by Will or testamentary instrument are legacies liable to the said duties, and it is expedient to remove such doubts, it is enacted, "that from and after the passing of this Act, every gift by any Will or testamentary instrument of any person, which by virtue of any such Will or testamentary instrument is or shall be payable, or shall have effect or be satisfied out of the personal or moveable estate or effects of such person, or out of any personal or moveable estate or effects which such person hath had or shall have had power

(z) *Ante*, p. 1331.

to dispose of, or which gift is or shall be payable, or shall have effect or be satisfied out of, or is or shall be charged or rendered a burden upon the real or heritable estate of such person, or any real or heritable estate, or the rents or profits thereof, which such person hath had or shall have had any right or power to charge, burden, or effect with the payment of money, or out of or upon any monies to arise by the sale, burden, mortgage, or other disposition of any such real or heritable estate or any part thereof, whether such gift shall be by way of annuity or in any other form, and also every gift which shall have effect as a donation *mortis causâ*, shall be deemed a legacy within the true intent and meaning of all the several Acts granting or relating to duties on legacies in Great Britain and Ireland respectively, and shall be subject and liable to the said duties accordingly: Provided always, that no sum of money, which by any marriage settlement is or shall be subjected to any limited power of appointment to or for the benefit of any person or persons therein specially named or described as the object or objects of such power, or to or for the benefit of the issue of any such person or persons, shall be liable to the said duties or legacies under the Will in which such sum is or shall be appointed or apportioned in exercise of such limited power."

8 & 9 Vict. c. 76, s. 4.

The statute 39 Geo. III. c. 73, after reciting that "Whereas it is expedient that certain specific legacies given to bodies corporate, and other public bodies and societies, should be exempted from the duties imposed on legacies;" proceeds to enact, "that no legacy, consisting of books, prints, pictures, statues, gems, coins, medals, specimens of natural history, or other specific articles, which shall be given or bequeathed to or in trust for any body corporate, whether aggregate or sole, or to the society of Serjeants' Inn, or any of the inns of Court or Chancery, or any endowed school, in order to be kept and preserved by such body corporate, society or school, and not for the purposes of sale, shall be liable to any duty imposed on legacies by any law now in force."

39 Geo. III. c. 73.

Legacies of books, &c. bequeathed to body corporate, &c.

Having thus collected the principal statutory provisions now in force with respect to duties on legacies and successions, it remains to point out the construction which has been put on these Acts by the courts of law and equity: And for this purpose, it is proposed to consider, 1st, the amount of duty payable; 2ndly, on what subjects the duties are payable; 3dly, by whom the duties are payable.

CHAPTER THE FIRST.

AS TO THE AMOUNT OF DUTIES PAYABLE ON LEGACIES AND SUCCESSIONS.

What shall be considered a legacy paid, &c. before 31st August, 1815.

It will be observed, that by the latest Stamp Act (55 Geo. III. c. 184), the present rates of duties are respectively imposed only on legacies and successions, in cases where the testator or intestate died before or on the 5th of April, 1805, and the legacies or residue shall be paid, delivered, retained, satisfied, or discharged, *after* the 31st of August, 1815, and on legacies and successions, in cases where the testator or intestate died after the 5th day of April, 1805, and the legacies, &c., shall be paid, delivered, retained, or discharged, *after* the 31st of August, 1815. And the preceding Stamp Act (48 Geo. III. c. 149), contained a similar provision, *mutatis mutandis*, with respect to the dates of the 5th of April, 1805, and the 10th of October, 1808.

It is therefore material to ascertain, under what circumstances a legacy shall be said to be "paid, delivered, retained, satisfied, or discharged," within the meaning of the statute.

In the case of *The Attorney General* v. *Manners* (*a*), Lord William Manners, who died in the year 1771, bequeathed the sum of 13,000*l.* to his executors, in trust to place the same out at interest, and pay the proceeds to his natural son, Thomas Manners, for his life, and after his decease to pay one moiety to the eldest son of the said Thomas Manners, and the other moiety to his younger children: In the year 1794, the executors invested the money in the funds in their own names, and the interest was duly paid to Thomas Manners till his death in 1812: The question was, whether

(*a*) 1 Price, 411.

the legacy to his children was subject to a duty of 8*l.* per cent. imposed by the statute of 48 Geo. III. c. 149: And the Court of Exchequer held in the affirmative, as being a legacy given by Will of a person dying before the 5th of April, 1805, and not paid, retained, satisfied, or discharged, till after the 10th of October, 1808. So in the case of *The Attorney General* v. *Wood* (*b*), William Combes, who died in 1794, bequeathed a legacy, in consolidated stock, to executors, in trust to pay the interest to Ann Buckland for life; remainder, after her decease, to her surviving children, on their attaining twenty-one; remainder, if no surviving children, to her appointees; remainder, in default of appointment, to her next of kin: Upon the testator's death, the executors transferred the legacies into their own names from that of the testator, paid his debts, and accounted for the residuary estate to the residuary legatee: The dividends were regularly paid by the executors to Ann Buckland until 1826, when she died, leaving three children: And the Court of Exchequer held, that the transfer did not amount to a payment, delivery, retainer, satisfaction, or discharge of the legacy, before the 31st of August, 1815; and that it was therefore liable to the duty under the 55 Geo. III. c. 184.

But in the case of *Hill* v. *Atkinson* (*c*), the sum of 3000*l.* was given by Will to trustees, who were also appointed executors, upon trust to invest and pay the interest to Ann Atkinson for life, and, after her death, to apply the same to the maintenance of the child of which she was then *enceinte*, and to transfer the principal to such child, on attaining twenty-one; but in case it should die under twenty-one, then to Tabitha Leake, her executors, &c.: The testator died in 1776: Ann Atkinson never was with child; and under a decree, the 3000*l.* was, in the year 1779, paid by the trustees into Court, and invested in stock, in the name of the Accountant General, Tabitha Leake being then an infant: And Lord Eldon determined that the executors, by paying

(*b*) 2 Younge & Jerv. 290. (*c*) 2 Meriv. 45. S. C. 3 Price, 399.

in the money under the decree of the Court, effected a sufficient appropriation of the legacy to be within the words of the Act of 48 Geo. III. c. 149, "paid, retained, satisfied, or discharged," before the 10th of October, 1808: and therefore, upon a question arising at the time of the principal becoming payable, his Lordship determined that no legacy duty was chargeable in respect of it.

In this case of *Hill* v. *Atkinson*, Lord Eldon observed (*d*), that the ground of the decision of *The Attorney General* v. *Manners* must have been, that the Barons were of opinion, that an executor, who is also a trustee, shifting a legacy from his hands as executor into his hands as trustee, does not thereby appropriate the legacy: And, according to the report of the case by Mr. Price, his Lordship seems to have been of opinion, that appropriation means payment: But with reference to this part of his Lordship's judgment, it was observed by Alexander, L. C. B., in the above-mentioned case of *The Attorney General* v. *Wood* (*e*), after remarking that the case of *Hill* v. *Atkinson* could not be justly considered as opposed to *The Attorney General* v. *Manners*: "If I were disposed to give the utmost effect to these words to the utmost extent that the counsel for the defendant could desire, I should not think myself at liberty to consider that which is but an *obiter dictum*, and not necessary to the decision of that case, an authority sufficient to overrule that which was actually done by this Court, upon great consideration: But I do not think, even giving full effect to those words, that such a consequence should follow: All that the Lord Chancellor says, is, that a transfer by an executor to himself as trustee is an appropriation of the legacy: It has been so held for a considerable length of time: For particular purposes, unquestionably it is an appropriation: If an executor transfer into his own name as trustee the amount of a particular legacy, and acts upon that transfer, that is an appropriation as against many persons, and in particular as against himself: But the question here

(*d*) 2 Meriv. 53, 54. 3 Price, 404. (*e*) 2 Younge & Jerv. 300.

is, whether that act so done is to be considered as a delivery of the legacy as against the revenue, and this Act of Parliament: whether it is a retainer, or a satisfaction, or a discharge: Now the fact is, that it has not been delivered, it has not been retained, it has not been satisfied, and it has not been discharged, but the executor and trustee is at this moment liable, in consequence of having this fund in his hands." His Lordship further observed, in the course of his judgment: "The case of *Hill* v. *Atkinson* is a case in which the executor or trustee, or whatever name you give him, was actually discharged, as much as if there had been persons in being entitled to give him a legacy receipt, if a receipt were necessary at that time: The money was paid into Court, and distinguished from all the rest of the testator's effects, but above all, taken out of the hands of the executor, and paid into the name of the Accountant General of the Court, under the directions of the Court, for the benefit of the legatees: That therefore was an actual payment by the executor, for the use of those persons, whoever they might be: Whether it was a vested interest, or a contingent interest, the executor was discharged, which in this case he undoubtedly is not."

In the case of *Coombe* v. *Trist* (*f*), a testator bequeathed a sum of money to Ann Venning for life, and after her decease to her children, as she should appoint, and in default of appointment, equally among all her children, who, if sons, should attain twenty-one, or, if daughters, should attain that age, or be married; and if she should have no such children, then according to her appointment, and, in default of appointment, over: Upon the death of the testator, a suit was instituted for the purpose of having this legacy secured: Under the decree made in that suit in the year 1798, the executors paid the amount into Court, and, prior to November, 1802, the whole of it was invested in stock in the name of the Accountant General, and placed to the separate account of Ann Venning, who continued to receive the dividends during

(*f*) 1 Myl. & Cr. 69.

her life: And Lord Lyndhurst, held, that this was a sufficient payment of the legacy within the stat. 55 Geo. III. c. 184; and, therefore, that upon Ann Venning's death in the year 1834, the parties interested in remainder, who were the children of Ann Venning, were entitled to receive their several shares of the fund, without producing receipts for the legacy duty: His Lordship, in giving his judgment, observed, that "according to the Act of Parliament, the duty is to attach on all legacies paid after a certain day; and the sole question is, whether the legacy was in this instance paid before or after the particular day. Now it is admitted that the executors here paid the entire fund into Court before that day, under the authority of an order, and that the money was afterwards transferred into the name of the Accountant General, and invested on the account, and for the benefit of the tenant for life: and, upon the authority of *Hill* v. *Atkinson*, I consider that proceeding to have been a payment to such parties, whoever they might be, as should become eventually entitled to the legacy."

In *The Attorney General* v. *Hancock* (g), one Samuel Melbon, by his Will devised all his real estates, except his mortgages in fee, unto William Vivian and James Morell, their heirs and assigns, to and upon the uses and trusts therein mentioned, *viz.*, to the use of William Malbon and his assigns for life, with remainder in tail to his issue, with divers remainders over, and the said Samuel Malbon, the testator, by his Will gave and devised all the residue of his personal estate (after payment of debts and legacies), as also all such real estates as he was seised of as mortgagee in fee, unto William Vivian and William Malbon, their heirs, executors, administrators, and assigns, upon trust, to convert the whole of the said residue into money, and to lay out and invest the same, as soon as conveniently might be, in the purchase of real estate, to be conveyed to the said William Vivian and James Morell, (the trustees of his real estates),

(g) 2 Mees. & Wels. 563.

their heirs and assigns, to and upon the same uses and trusts as were therein-before declared of and concerning his real estates: And the testator thereby declared, that until such purchases were made, his said executors should place out or continue all the said residue at interest, in the names of his said executors, on mortgage of real estate; or, if the same should not offer, that the residue should be placed out at interest in the public funds, and the interest and dividends were directed to be paid to the persons to whom the rents and profits of the real estate, therewith to be purchased, would belong by virtue of his Will: The testator appointed the said William Vivian, and William Malbon, his executors, and died in 1791, when they took upon themselves the execution of the Will: The residue amounted to 14,000*l.*, and was invested in mortgage, in the names of the executors, before the year 1796, and before the Act of 36 Geo. III. c. 52; after which William Vivian died, and William Malbon, who enjoyed the interest during his life, became the surviving executor: William Malbon died without issue in 1825, and appointed William Hancock and George Reade his executors: The money was never applied in the purchase of real estate; and William Hancock and George Reade, the executors under the Will of William Malbon, on the 26th of January, 1832, paid the residue of the personal estate of Samuel Malbon, (the original testator), to James Morell, he being the person entitled to it under Samuel Malbon's Will: And the Court of Exchequer held, that this was a legacy given by the Will of a person dying before the 5th of April, 1805, and paid, satisfied, or discharged, after the 31st day of August, 1815, within the meaning of the stat. 55 Geo. III. c. 184, and was liable to the payment of legacy duty under that Act.

Amount of duty payable in case of a legacy to husband and wife, where the one

Another question, with respect to the amount of the duties payable, has arisen in the instance of legacies given to a husband and wife for life, in a case where the one is of kin to the testator, so as to be within the lower scale of duties, and

is a child of the testator, and the other a stranger.

the other a stranger in blood, so as to be within the highest. In *The Attorney General* v. *Bacchus* (*h*), where a legacy of the residue of a testator's personal estate was bequeathed to B. his son-in-law, and P. the wife of B. (the testator's daughter), the executors, &c., for their absolute benefit, it was held, that such legacy was not liable to the duty of 1*l.* per cent. on the whole, as a bequest to or for the benefit of P., a daughter of the testator, nor to 10*l.* per cent. on the whole, as being given to, or devolving on, or for the benefit of B., a stranger in blood to the deceased; but that it was liable to the payment of 1*l.* per cent. as to one moiety, and 10*l.* per cent. as to the other. And this decision was confirmed in the Exchequer Chamber (*i*). Again, it was holden, in the case of *The Attorney General* v. *Burnie* (*k*), that a bequest of "the remainder of my property, of whatever it may consist, such money as arises from it to be invested in the public funds, the interest to be appropriated to the use of my son and his wife (a stranger in blood), for their lives, with remainder to my grandchildren, in equal proportions," was liable to legacy duty to be calculated at the rate of 1*l.* per cent. for the son's moiety, and 10*l.* per cent. for that of the wife; upon the principle that the son and his wife each took a life interest in one moiety of the income of the residue.

In what cases duty is payable on the interest as well as the principal of a legacy.

It may be remarked, that the Acts do not specify any time at which the executor or administrator must render his final or residuary account at the stamp office; for the obvious reason, that the peculiar circumstances of the property of the deceased would, in many cases, preclude the possibility of complying with any such restriction: But the duty must be paid on the accruing profits and income of the effects of the deceased, from the time of his death to that of delivering the account and offering to pay the duty at the stamp office (*l*). In the case of *The Attorney General* v. *Cavendish* (*m*), Lord

(*h*) 9 Price, 30.
(*i*) 11 Price, 547.
(*k*) 3 Younge & Jerv. 531.
(*l*) 1 Rop. Leg. 787, 3d edit.
(*m*) Wightw. 82.

F. Cavendish died in October, 1803, and on the 20th of July, 1808, the defendant, as executor and residuary legatee, delivered in his residuary account of the testator's personal estate intended to be retained by him, and offered to pay the duty on the residuary estate, exclusive of the interest which had accrued since the testator's decease, *324l.* less than it would have been had the duty been computed on the interest accrued: And it was decided, that the duty was payable on the interest accrued from the death up to the time of the delivering of the account.

So in the late case of *Thomas* v. *Montgomery* (*n*), it was holden, that when a legacy is not paid at the time appointed by the testator, legacy duty is payable, not merely on the capital sum bequeathed, but on the aggregate amount of capital and interest, which is ultimately received by the legatee.

But it was holden by the Court of Exchequer, in *The Attorney General* v. *Holbrook* (*o*), that where by a Will a specific debt is forgiven, which is known and ascertained at the time of the testator's death, legacy duty is not payable upon the interest accruing in respect of such debt, between the time of such death and the period when the executors close their accounts.

(*n*) 3 Russ. Chanc. Cas. 502. (*o*) 3 Younge & Jerv. 114.

CHAPTER THE SECOND.

UPON WHAT SUBJECTS THE DUTIES ARE PAYABLE.

What are to be regarded as legacies payable out of personalty:

IT has appeared that legacies of every description, given by Will or other testamentary instrument, of or above the value of 20*l.* each (*a*), payable out of personal estate, including donations *mortis causâ* (*b*), and whether given by way of annuity or otherwise (*c*), and also legacies given subject to contingencies (*d*), are liable to the duties imposed by the statute 55 Geo. III. c. 184.

what is a testamentary instrument:

In the case of *The Attorney General* v. *Jones* (*e*), a man conveyed by deed, for a nominal consideration, his leasehold and personal property to trustees, for the use of himself for life, and several persons therein named at his death, with a power reserved of revocation or alteration of the trusts: He never parted with the deed, or with any part of the property during his life; and he confirmed, in most respects, such disposition of it by Will at his death: And it was holden by the Court of Exchequer (Wood B., *dissentiente*), that the two instruments should be considered as to be taken and construed together as testamentary instruments, and that the property passing under them should pass as legacies, and be subject to duty (*f*).

But in the case of *Thompson* v. *Browne* (*g*), Sir C. Pepys, M. R., held, that an instrument, vesting property in trustees for the benefit of the grantor for his life, and after his decease for the benefit of other persons, with a power of revocation,

(*a*) *Ante*, p. 1333.
(*b*) *Ante*, p. 1338, 1339, 1369.
(*c*) *Ante*, p. 1335, 1338, 1369.
(*d*) *Ante*, p. 1345.
(*e*) 3 Price, 368.
(*f*) See *ante*, p. 85—86, as to what instruments are to be regarded as testamentary. See also Gaskell v. Gaskell, 2 Y. & Jerv. 502.
(*g*) 3 M. & K. 32.

was not testamentary, and, consequently, not liable to the payment of legacy duty: And his Honor observed, that "the decision in *The Attorney General* v. *Jones* seems to have proceeded upon the ground that, under the circumstances of that case, nothing passed from the maker of the instrument so as to entitle any other person to interfere with his property in his lifetime. If there be anything in that decision to support the notion, that, where a person by deed settles property to his own use during his life, and after his decease for the benefit of other persons, a power of revocation reserved in such a deed alters the character of the instrument, and renders it testamentary, and consequently subject to legacy duty, I can only say, that if this were law, a great number of transactions of which the validity has never been doubted would be liable to be impeached" (*h*).

In *Woodbridge* v. *Spooner* (*i*), where the deceased, in her

(*h*) See also Marjoribanks v. Hovenden, 1 Drury, 11, 27, 29, *coram* Sir E. Sugden, C. of Ireland. In Sheldon v. Sheldon, 1 Roberts. 83, Dr. Lushington (sitting for Sir H. Jenner Fust) said, he had always understood that the case of Atty. Gen. v. Jones had been disapproved of; and that in his judgment it was an erroneous decision. In Fletcher v. Fletcher, 4 Hare, 79, in which case it was argued that a voluntary covenant by a testator, for payment by his executors of a sum of money to trustees in trust for his two natural sons, if they should survive him, was testamentary, and the cases collected, *ante*, p. 85, 86, were cited, Wigram, V. C., said, "I certainly was not prepared to find that the cases had gone so far as they have upon the subject. Those cases, however, are very distinguishable from the one before me. This is not a case where there is a general power of revocation reserved—a general power to dispose by Will notwithstanding the execution of the instrument. In the case referred to there has been a general reservation—or something like a reservation—of the party's right to deal with the property, notwithstanding the instrument; and the Courts have held, that in such cases the instrument being one which was not to have effect until the death of the party, or rather, I would say, to use the language of Sir John Nicholl, in one of the cases, in which, until the death of the party, the instrument itself was not consummated—until then no conclusive effect could be given to it. If that does not occur, the instrument is not to be considered as testamentary. In this case the party clearly was bound; and there is, therefore, no ground for the argument that the interest is testamentary."

(*i*) 1 Chitt. Rep. 661. S. C. 3 Barn. & Ald. 233.

lifetime, gave to the plaintiff a promissory note to pay him or order "on demand the sum of 100*l.* for value received and his kindness to me," with a verbal engagement on the part of the plaintiff, that the note should not be demanded until after her death, it was holden by the Court of King's Bench, that parol evidence could not be received to shew that it was not given for a valuable consideration; and that such a note did not operate by way of testamentary disposition; nor was it void on the ground that it was a fraud on the legacy duty, that duty never having attached upon it, and there being nothing to shew that the amount passed by way of a *donatio mortis causâ.*

With respect to the suggestion of fraud on the legacy duty, it should be observed, that a man may well make a settlement or create a trust *inter vivos* for the purpose of avoiding legacy duty: It is often done, and may reasonably and properly be done (*k*).

money taken under a testamentary appointment by virtue of a power:

The duties imposed by the statutes are payable, not only upon a legacy payable out of the personal estate, strictly considered, of the testator, but out of any personal estate which the testator had the power of disposing of, as he or she might think proper: Thus, *In re Cholmondeley* (*l*), by the marriage settlement of Mrs. Cholmondeley, 20,000*l.* was vested in trustees, upon trust to pay the dividends to Sir Philip Francis for life, and after his death to Mr. Cholmondeley for his life, with remainder to Mrs. Cholmondeley for her life, and with a power of appointment amongst her children, in case there should be any; and, in default of issue, to such persons as she should by Will appoint, in case she died in her husband's lifetime, or by deed or Will, in case she should survive her husband; and in default of appointment, amongst her next of kin: Mrs. Cholmondeley

(*k*) Farquharson *v.* Cave, 2 Coll. 366, *per* Knight Bruce, V. C. So it was said by Lord Lyndhurst, C. B., that every subject has a right so to shape the disposition of his property as to avoid the legacy duty, if possible; and that there is no fraud in so doing. 2 Cr. M. & R. 221, *In re* Evans.

(*l*) 1 Crompt. & Mees. 149. S. C. 3 Tyrwh. 10.

died in her husband's lifetime, having, by her Will, appointed this sum of 20,000*l.* to certain persons mentioned in her Will: And the Court of Exchequer held, that legacy duty was payable on the 20,000*l.*: The Barons were of opinion that, taking all the Acts together, applicable to the same subject, and passed *in pari materiâ*, and the Legislature in the 36 Geo. III. (*m*), and the 45 Geo. III. (*n*), having described and defined what they meant by a legacy, it was impossible to come to a conclusion that they meant to use that term in a more limited sense in the statute of 55 Geo. III.

In *Platt* v. *Routh* (*o*), John Ramsden, by his Will dated the 10th of March, 1825, after giving various legacies, and directing his real estates to be sold and converted into personalty, gave the general residue of his personal estate to his daughter, Judith Ann Platt, and three other persons, his executrix and executors, upon trust, to permit his said daughter to receive the interest and dividends thereof during her life, and after her death (subject to certain payments then to be made) upon trust for such person or persons, *other than and except Joseph Woodhead and his relations, Moses Hoper and his relations, and the relations of the late husband of his said daughter and every of them*, in such parts, shares, and proportions, and in such manner and form as the said Judith A. Platt, whether sole or covert, should by Will appoint, and in default of appointment, in trust for the next of kin of Dyson Ramsden; and the testator declared, that in case his said daughter should intermarry with the said Joseph Woodhead or any of his relations, or should reside with or receive visits from him or them, then the bequest in her favour should utterly cease: The testator died in May, 1825, and his Will was duly proved by his executrix and executors: After his death, the said Judith A. Platt married George E. Platt, and the interest and dividends of the testator's residuary estate (which was very considerable),

(*m*) See *ante*, p. 1338.

(*n*) See *ante*, p. 1336. See also stat. 8 & 9 Vict. c. 76, s. 4. *Ante*, p. 1368.

(*o*) 6 Mees. & W. 756.

were regularly paid to her until her death, on the 7th of September, 1837: In April, 1837, she made a Will, and thereby, in exercise of the power under her father's Will, she gave 10,000*l.* consols to the descendants of the before-named Dyson Ramsden, and all the rest of her late father's property to various persons, strangers in blood both to her father and herself: By order of the Master of the Rolls, a case was stated for the opinion of the Barons of the Exchequer, as well as to the liability of Judith A. Platt's Will to the probate duty (*p*), as also as to the legacy duty payable in respect to the bequests contained in the two Wills: Their Lordships thought that the question, so far as regarded the legacy duty, depended entirely on the construction to be put upon the 18th section of the 36 Geo. III. c. 52 (*q*), which regulates the duty in cases where legacies are given subject to power of appointment; and they were of opinion, that the power under consideration must be treated as a general and absolute power within the meaning of that section: The Barons were also of opinion, that according to the true construction of the 7th section of the same statute (*r*), the property subject to the power was personal estate, which Judith A. Platt had power to dispose of as she should think fit: Their Lordships accordingly certified to the Master of the Rolls their opinion, that, on the death of Judith Ann Platt, a duty of one per cent. became payable in respect of the bequest in the Will of John Ramsden of the residue of his estate and effects to the said Judith Ann Platt, after allowing any duty already paid in respect thereof: And also their further opinion, that legacy duty was payable in respect of the bequest contained in the Will of the said Judith Ann Platt, at the same rate at which it would have been payable, if they had been mere legacies given by her, payable out of her own personal estate. This opinion of the Barons was afterwards affirmed by the

(*p*) See *ante*, p. 523, 524.

(*q*) *Ante*, p. 1346, 1347.

(*r*) *Ante*, p. 1338. See also stat. 8 & 9 Vict. c. 76, s. 4, *ante*, p. 1368.

decree of Lord Langdale (*s*); and finally by the decision of the House of Lords (*t*).

legacy charged on land by the execution of a power created *by Will:*

In *The Attorney General* v. *Pickard* (*u*), a testator devised real estates to William Trenchard for life, with remainder to his first and other sons in tail, with remainder to Thomas Pickard for life, remainder to his first and other sons in tail, remainder to George Pickard for life, with remainders over, and gave a power to the several persons who, by virtue of the limitations in the Will, should be in actual possession of the estates, by deed or Will, to appoint to any woman or women they should marry, by way of jointure, rent-charges not exceeding 750*l.* per annum for life, to be issuing out of and chargeable upon the devised estates, clear of all taxes and deductions whatsoever: William Trenchard died without issue, and Thomas Pickard entered into possession of the estates, and, by his Will, charged them with 750*l.* per annum by way of jointure to his wife, under the power, and died without issue male; whereupon George Pickard entered into possession: And the Barons of the Exchequer held, that George Pickard was chargeable with legacy duty after the rate of 10*l.* per cent. on the value of the rent-charge of 750*l.* per annum; their Lordships being of opinion, that the annuity in question being a legacy, was charged upon the real estates by the Will which created the power to charge, in like manner as if the person, to whom it was given by the execution of the power, had been mentioned by name as the object of the testator's bounty in the Will which gave the power. And this decision was afterwards affirmed in the Exchequer Chamber (*v*)

by the execution of a power created *by deed:*

In giving the judgment of the Court of Exchequer Chamber in this case, Lord Denman intimated his opinion, that charges of this nature would be exempt, if originally made by deed, under the proviso contained in stat. 45 Geo. III. c. 28 s. 4 (*w*). And this opinion was subsequently acted upon by the Court of Exchequer in *The Attorney General*

(*s*) 3 Beav. 257.
(*t*) 10 Cl. & F. 257.
(*u*) 3 Mees. & Wels. 552.
(*v*) 6 Mees. & Wels. 348.
(*w*) See *ante*, p. 1366, 1367.

v. *Lord Hertford* (*x*). There A. by deed, dated in 1802, conveyed certain lands to trustees, to the use of himself for life, remainder to B., his son, for life, with remainders over: The deed contained a proviso, that it should be lawful for B., by his last Will, to limit and appoint to the use of himself, or any other person or persons, any annual sum or sums of money, not exceeding the yearly sum of 700*l*., to be charged upon and payable out of the lands included in the deed, to commence from the death of B., and to be either perpetual or in fee, or payable for such times and in such manner in all respects as B. should think fit: B., by his Will, by virtue of this power, appointed an annuity of 700*l*. a year to C. for her life, charged upon and payable out of the said land: And it was held by the Court of Exchequer, that legacy duty was not payable in respect of such annuity.

It may be observed, that this proviso is much wider in its terms than the corresponding one introduced into the late statute 8 & 9 Vict. c. 76, sect. 4 (*y*).

Duties on legacies, &c. out of real estate:

It has appeared (*z*), that legacies of every description of the value of 20*l*. or upwards, given out of or charged upon real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of real or heritable estate, or any part thereof, and also the clear residue, when given to one person, and every share of the clear residue, (when given to two or more persons) of the monies to arise from the sale, mortgage, or other disposition of any real or heritable estate *directed to be sold*, mortgaged, or otherwise disposed of, by any Will or testamentary instrument, where such residue or share shall amount to 20*l*. or upwards, are subjected to the stamp duties (*a*). With respect to the construction of this part of the statute of the 55 Geo. III. c. 184, the Court of Exchequer, in one case, *In re Evans* (*b*), appear to have decided that where there is a bequest of real property to

land directed to be sold:

(*x*) 14 Mees. & Wels. 284.
(*y*) See *ante*, p. 1369.
(*z*) *Ante*, p. 1333, 1334.
(*a*) See also stat. 45 Geo. III. c. 28, *ante*, p. 1366, and stat. 8 & 9 Vict. c. 76, s. 4, *ante*, p. 1369.
(*b*) 2 Cr. M. & R. 206.

trustees and a discretion given to them to sell or not to sell, as they shall think best for the *cestuis que trust*, the duty does not attach, notwithstanding the trustees shall have exercised their discretion by an actual sale; for that a sale made under a *discretion* given to trustees to sell and distribute the proceeds, but without any positive direction imposing on them the obligation of selling, is not to be considered a sale *directed* by the testator within the meaning of the statute. But this doctrine has been overruled by the cases of *The Atty. Gen.* v. *Mangles* (*b*), and *The Atty. Gen.* v. *Simcox* (*c*), and it appears to be now fully established that *if an actual sale* takes place, the proceeds are liable to duty whether the sale is made by the trustees under an absolute direction given to the trustees to sell at all events, or under a direction given to them to sell in case they shall deem it expedient to do so.

But where the trustees have a discretion to sell or not to sell, *and they think fit not to sell*, the legacy duty does not attach (*d*). And consequently, in every Will of this kind, where *no actual sale* takes place, a question of construction arises, *viz.* whether, taking the Will altogether, there is a *direction* to the trustees to convert the estate into money; or whether it is realty left in their *discretion*, not to convert it into money, but to leave it as land. The words of discretion may be so controlled as to shew that they are only in semblance words of discretion, and in reality words of direction (*e*); and if they are of the latter description, the legacy duty will attach under the Act, notwithstanding the *cestui que trust* in fact takes the property in *statu quo*, and the trustees do not convert it into money by sale, according to the directions of the Will, there being no claim to render such claim necessary (*f*).

(*b*) 5 M. & W. 120.

(*c*) Exchequer H. T. 1848 (not yet reported).

(*d*) 5 M. & W. 120.

(*e*) Advocate General *v.* Ramsay's Trustees, 2 Cr Mees. & Rosc. 224, note (*a*).

(*f*) Atty. Gen. *v.* Holford, 1 Price, 426. Williamson *v.* Advocate General, 10 Cl. & F. 1. Accord.

Duty on a bequest of rent-charge, annuity, &c. &c.

In the case of *The Attorney General* v. *Jackson* (*g*), the testator, Samuel Jackson, gave a life estate in his freehold property to Charlotte Troughton, and after her death, and in the event of her husband, Joseph Troughton, surviving her, he gave him "one annuity or yearly rent-charge" of 500*l.* a-year, payable quarterly, out of his real estate, with a landlord's powers of distress and entry, and subject to that annuity, he gave his real estate in moieties to Randle Jackson and William Jackson, Randle Jackson having an estate in fee, and William Jackson an estate for life: The question was, whether the annuity of 500*l.* a-year thus given to Joseph Troughton, was to be considered a legacy within the meaning of the Acts of Parliament imposing duties on legacies: It was contended, on behalf of the defendants, that the subject-matter was in fact real property; that it was a rent-charge, *i. e.* a freehold interest in the party in whose favour it was granted; that it was as much so, as far as related to the 500*l.* per annum, as the estate out of which it issued; and that it was not the intention of the Legislature, in imposing the legacy duties, to impose any duty whatever upon real property: But the Court of Exchequer held, that the annuity in question fell precisely within the terms made use of by the Legislature in the stat. 55 Geo. III. c. 184, with respect to gifts by way of annuity, *viz.* "all gifts of annuities, or by way of annuity, or of any partial interest or benefit, out of any such estate or effects as aforesaid" (*h*), and was therefore liable to the duty (*i*).

But in *Shirley* v. *Lord Ferrers* (*k*), testator devised certain estates to the use of trustees for the term of 500 years, and subject thereto, to the use of other trustees, to preserve contingent remainders, with remainder to the first and other sons of C. S., (then an infant), with divers remainders over, and he directed that the trustees of the term should, after

(*g*) 2 Crompt. & Jerv. 101.

(*h*) *Ante*, p. 1335.

(*i*) See also Stow *v.* Davenport, 5 B. & Adol. 359. 2 Nev. & M. 805, in which case the Court of K. B. recognised and acted on this decision.

(*k*) 1 Phill. Ch. C. 167.

paying certain annuities, apply so much of the rents and profits of the estate as they should think fit, (not exceeding in any one year a certain amount), in aid of another fund, to the maintenance and education of C. S., until she should attain twenty-one or marry, and that they should accumulate the surplus rents and profits for the benefit of C. S. when she should attain twenty-one or marry, and if she died under twenty-one and unmarried, then for the benefit of the parties entitled under the subsequent limitations of the estates, and that upon her attaining twenty-one or marrying, they should, during her lifetime, pay the surplus rents, after paying the annuities, to her for her separate use: It was contended, on behalf of the Crown, that the trust for maintenance amounted to "a gift by way of annuity," or "to a partial interest or benefit:" But it was held, by Lord Lyndhurst, that the sums annually applied out of the rents and profits, under the trusts of the term, to the maintenance and education of C. S. until her marriage, were not liable to legacy duty: And his Lordship expressed his opinion, that nothing but what is a charge upon the estate of another person is within the Act.

Duty on legacies to be laid out in land.

Legacies of personal estate to be laid out in land were within the scope of the Acts, prior to the statute 36 Geo. III. c. 15, imposing a stamp duty on receipts (*l*): And there is no reason for excepting this class of legacies from the operation of the retrospective schedules (*m*).

Duty on a legacy consisting of forgiveness of a debt.

It was holden, in the case of *Izon* v. *Butler* (*n*), that a bequest by the obligee of a bond to the obligor in these terms, "I remit and forgive to Thomas Whithurst the sum of 500*l*., which he stands indebted to me on his bond, and I direct the said bond to be delivered up to him and cancelled," was merely a personal legacy, and subject to the incidents affecting legacies. And accordingly, in *The Attorney General* v. *Holbrook* (*o*), the obligee of a bond, after the death of one James

(*l*) See *ante*, p. 1336, 1347.

(*m*) Atty. Gen. *v*. Hancock, 2 Mees. & W. 563, *ante*, p. 1375.

(*n*) 2 Price, 34.

(*o*) 3 Younge & Jerv. 114. S. C. 12 Price, 407.

Willis, the principal therein, but during the life of the surety, who was the testator's brother, made by his Will, containing the following directions relative to the bond; "I hereby forgive the bond debt, both principal and interest due to me and entered into by James Willis and my brother James Holbrook with and for him, for the said James Willis's paying me the principal sum of 4000*l.* and interest, &c. &c., and do order the said bond, at my decease, to be delivered up and cancelled:" The interest upon the bond was paid up to the death of the testator, whom his brother, James Holbrook, survived: And it was holden, that this was a legacy, whereon legacy duty was payable by James Holbrook.

Duty on a bequest to creditors.

In *Foster* v. *Ley* (*p*), where a testatrix bequeathed property in trust to pay off the debts of her first husband that could be legally and satisfactorily proved against him, as it was her will and desire that the same should be discharged, the Court of Common Pleas held, that the creditors ought to pay the legacy duty on their several debts. But in *Williamson* v. *Naylor* (*q*), where a testator by his Will declared that one-fifth of the residue of his personal estate should be divided amongst certain of his creditors, named in a schedule to his Will, and the schedule contained both the names of the creditors, and the debts due to them respectively, the remedy for the recovery of which was barred by the Statute of Limitations; it was held by Lord Lyndhurst, C. B., and afterwards by Alderson, B., that the parties so named in the schedule were not to be considered as legatees but as creditors; for that the bequest was not a legacy subject to the payment of legacy duty, but a trust created by the testator in satisfaction or reduction of debts, the remedy for the recovery of which was barred by the statute (*r*).

On a late occasion, *In re Franklin's Charity* (*s*), Joseph

(*p*) 2 Bingh. N. C. 269.
(*q*) 3 Younge & Coll. 208.
(*r*) See also Philips v. Philips, 3 Hare, 290.
(*s*) 3 Younge & Jerv. 544. S. C. 3 Sim. 147.

Duty on a legacy given to a charity.

Franklin bequeathed to the poor of the parish of Haddenham 50*l.* per annum for ever, to be laid out in bread at Christmas, and distributed by the minister and churchwardens to the most needy objects in the parish: And the testator charged all his leasehold and personal property with this, amongst other legacies; And Sir L. Shadwell, V. C., held, that this was a legacy on which duty ought to be paid; on the ground that, although it was not expressed to be given to any individual, yet, in effect, it was given in such a manner, as that the executor held it in trust for certain purposes: And his Honor, in giving his judgment, observed, that where legacies have been given to treasurers of hospitals, and other charitable institutions, it has been considered as a matter of course to pay the duty.

But in a subsequent case, *In re Wilkinson* (*t*), the Barons of the Exchequer held, that executors cannot be called upon to pay legacy duty upon the whole of a residue bequeathed to them in trust to divide the interest "among poor pious persons, male or female, old or infirm, in ten or fifteen pounds, as they see fit, not omitting large and sick families, if of good character (*u*)." This judgment, which was afterwards affirmed in the Exchequer Chamber (*v*), has been regarded, in effect, as having overruled the above decision of the Vice Chancellor: And it has been observed, that the 11th section of the statute 36 Geo. III. c. 52 (*w*), on which much stress was laid by the Barons, and the Judges in Error, does not appear to have been brought under his Honor's notice, in the argument of the case before him.

However, in the later case of *The Attorney General*

(*t*) 1 Cr. Mees. & Rosc. 142. S. C. 4 Tyrwh. 513.

(*u*) If any of the objects of the above bounty should have received to the amount of 20*l.* or upwards, by having been selected to receive such bounty on more than one occasion, legacy duty would attach on such amount, and the duty would be calculated according to the nearness of blood of such individual, and in that case the executors would be accountable for, and bound to return the duty chargeable on such amount: *Ibid.*

(*v*) Atty. Gen. *v.* Nash, 1 Mees. & Wels. 237.

(*w*) See *ante*, p. 1341.

v. *Fitzgerald* (x), where the testator gave his residuary estate (which amounted to 13,000*l.*) to his executors to be by them appropriated to the education of the children of the poor in Ireland, principally those in or about Limerick; the same learned Judge held that legacy duty was payable on the residue. And his Honor said, that there was a material distinction between the case *In re Franklin's Charity* and the case *In re Wilkinson:* That in the former there was a gift of a perpetual annuity of 50*l.* to be disposed of in charity; in the latter, the Judges seem to have considered that there was a gift of a sum in gross, which was at once to be disposed of by the executors, apparently, as if it was not a charity: But that this of itself furnished a material difference between the two cases; because, if the bequest was to be considered as a charitable bequest in its origin, then the Court of Chancery must, of necessity, have a dominion over the subject of the bequest, and would, from time to time, determine in what manner the property should be enjoyed; and long before any person participated, the legacy must be paid: And his Honor added, that he much doubted whether either portion of the 11th section of the 36 Geo. III. c. 52, applies to a case, where the whole subject of the bequest must be taken *in solido*, at once, for the purpose of being applied, in perpetuity, in some manner that may be such that no one individual will ever participate in the subject itself, but will have a benefit which results from the application of a large sum of money in some given manner, not consisting in the payment of money: The learned Judge proceeded to express his opinion, that the legacy in question was liable to duty in the same manner as if it had been given to the trustees for an existing school for the purposes specified. This view of the subject was recognised and acted upon by Parke B., in a similar case, on a subsequent occasion, *In re Griffiths* (y); and the learned Baron expressed his concurrence in this opinion of V. C. Shadwell.

(x) 13 Sim. 83.

(y) 14 M. & W. 510.

Duty on legacies of property in this country belonging to a foreigner:

It has been long established that property in this country, belonging to a foreigner who dies domiciled abroad, and appoints an English executor, and bequeaths to English legatees, is not liable to legacy duty (*z*).

Duty on legacies of property situate out of Great Britain:

If the testator was a British subject domiciled in Great Britain, all his personal property, in whatever part of the world it may be situate, is considered as English personal estate, and is liable to the duties imposed by the statutes on legacies and successions: For the rule is, that personal property follows the person, and is not in any way to be regulated by the *situs* (*a*): Thus, *In re Ewin* (*b*), it was held by the Court of Exchequer, that American, Austrian, French, and Russian stock, the property of a testator domiciled in England, was liable to legacy duty.

But it is clear that the legacy Acts are co-extensive with the limits of this kingdom, and this kingdom only, and do not extend to the territorial possessions of the Crown in the colonies (*c*). Hence, where persons die domiciled in India, whose estates, though the estates of British subjects, are distributed in India, they are not chargeable with any legacy duty (*d*). Hence, also, if a testator die domiciled in India, and his personal estate be wholly in India, and his executor be resident there, and the executor remit to a legatee in England, or to some other person in England, for the specific use of the legatee, the amount of his legacy, it has uniformly been held that no legacy duty is payable on such remittance, inasmuch as the whole estate is administered in India, and the remittance is in respect of a demand which is considered as established there (*e*). Accordingly, in *Hay* v. *Fairlie* (*f*), a testator, resident in India, bequeathed to an infant a sum

(*z*) *In re* Bruce, 2 Crompt. & Jerv. 436. S. C. 2 Tyrwh. 475.

(*a*) See *ante*, p. 1301, *et seq.*

(*b*) 1 Crompt. & Jerv. 151. S. C. 1 Tyrwh. 91.

(*c*) 1 Crompt. & Jerv. 153. 1 Tyrwh. 103, by Alexander, L. C. B. 1 Crompt. & Jerv. 158. 1 Tyrwh. 107, by Bayley, B.

(*d*) By Alexander, L. C. B. 1 Crompt. & Jerv. 153. 1 Tyrwh. 103.

(*e*) By Sir J. Leach, V. C., in Logan *v.* Fairlie, 2 Sim. & Stu. 291.

(*f*) 1 Russ. Chanc. Cas. 117.

of money, to be invested in the Company's securities, of which the interest was to be applied to her maintenance, and the principal to be settled upon herself for life, with remainder to her children: He was lost on his voyage to England, leaving all his property in India: His executors, resident in that country, proved his Will at Calcutta, invested the legacy in the Company's securities, and for several years remitted the interest to their correspondents in London, for the benefit of the legatee, who had come to England: A part of that interest was brought into Court, in a suit established by her for the appointment of a guardian and for the allowance of maintenance, and an order was made for the payment to her guardian, out of the fund so created, of 200*l.* a-year, as maintenance: And Lord Gifford, M. R., held, that there was a specific appropriation in India of the legacy, and that the payment of 200*l.* a-year was not liable to the legacy duty. So in *Logan* v. *Fairlie* (*g*), a testator resident in India, and having all his property there, bequeathed his residuary personal estate to his brother, J. H., and his sister H. L., in equal shares; but in case his sister should die before him, then to her children: The executor, who was also resident in India, having proved the Will there, remitted the residue to his agent in England, with a letter, in which he desired the agent to appropriate the fund according to the annexed extract of the Will, by which it would be perceived that half went to J. H. and half to H. L. or her children: H. L. had died in the lifetime of the testator, leaving nine infant children: A suit was instituted in England by the children against the agent, and also against the executor and J. H., who were both out of the jurisdiction, for the purpose of having a moiety of the fund secured: And it was held, by the Lords Commissioners Pepys and Bosanquet, that no legacy duty was payable upon such moiety, inasmuch as it had been appropriated in India.

The rule was at one time supposed to be different, where,

(*g*) 1 Myl. & Cr. 59.

although the testator was domiciled abroad, the assets came to be administered in England: Thus, in *The Attorney General* v. *Cockerell* (*h*), the Barons of the Exchequer held, that legacies bequeathed by a British subject resident in the East Indies, out of his personal estate, to persons living in England, are liable to the duty, if the executor proves the Will in England, and pays the legacies here, notwithstanding the testator realized and possessed his property in India, resided there, made his Will there, and died there; and although the executors were in India at the time of their appointment, and the Will was originally proved there. So in *The Attorney General* v. *Beatson* (*i*), it was holden by the Court of Exchequer, that the legacy duty is payable on bequests of personal property in India, by a Will there, and administration granted under it there, if it be remitted to England, and applied by another administrator in Scotland, under administration granted in England. Again, in *Logan* v. *Fairlie* (*k*), Sir John Leach, V. C., expressed his opinion, that if a part of the assets of a testator, who at his death was resident in India, and had all his property there, is found in England, in the hands of the agent of his executor, without any specific appropriation, and a legatee in England institute a suit here for the payment of his legacy, out of such unappropriated assets, then such assets are to be considered as administered in England, and the legacy duty is payable in respect of them.

But modern decisions appear to have overruled this distinction: And it must be regarded as now fully established, that the personal assets, situate in India, of a testator who resides, and makes his Will, and dies in India, are not subject to legacy duty, although such assets are afterwards remitted to this country, by an executor who has proved the Will in India, to executors who have proved the Will in England, and are administered under a decree of the Court of Chancery here. Thus, in *Jackson* v. *Forbes* (*l*), a tes-

(*h*) 1 Price, 165.
(*i*) 7 Price, 560.
(*k*) 2 Sim. & Stu. 284.
(*l*) 2 Crompt. & Jerv. 382.

tator born in Scotland, who resided and died in India, leaving real and personal property there situate, but no assets in England, by his Will and testamentary papers, left the whole of his property in equal divisions to his four natural children, or the survivors of them, and their heirs, subject to legacies and annuities: His executors obtained an Indian probate, and paid the debts and bequests, and converted the principal part of the estate into money which they sent to their bankers in England, and invested it in the funds in their own names: Proceedings were commenced in England against the executors, to determine the claims under the Will; whereupon the stock was transferred into the name of the Accountant General of the Court of Chancery, and the Court made a decree, ascertaining the shares of the several claimants: And the Barons of the Exchequer held, that the legacy duty was not payable on legacies or shares of the residue bequeathed. And this decision was affirmed in the House of Lords (*m*). Again, in *Arnold* v. *Arnold* (*n*), a man possessed of personal estates, situate partly in England, but principally in the East Indies, where he was employed in the service of the East India Company, made his Will in the East Indies, and died there: After specifically bequeathing his property in England to his wife, his Will gave considerable pecuniary legacies to his infant children, and to various other persons, some of whom were native inhabitants of India: One of the executors lived in Calcutta, and proved the Will there, and having collected the Indian assets, and thereout paid the testator's Indian debts and funeral expenses, he remitted the surplus to England to the other executors, by whom probate of the Will, in respect of the property in England, had been already obtained in this country: In a suit instituted in this Court by the testator's children against the executors, for the administration of the estate, the fund so remitted was transferred into Court, and having proved insufficient to pay the pecuniary legacies in

(*m*) Atty. Gen. *v.* Jackson, 8 Bligh. 15. S. C. *nomine* Atty. Gen. *v.* Forbes, 2 Clark & F. 48.

(*n*) 2 Myln. & Cr. 256.

full, it was ultimately ordered to be apportioned among the different legatees, in proportion to their respective legacies: And Lord Cottenham held, that the legacy duty was not payable in respect of any of the sums so appropriated to the respective legatees: His Lordship considered the decision by the House of Lords in *The Attorney General* v. *Jackson*, as precisely in point, and conclusive of the case before him: But the learned Judge also stated, that independently of that authority, he should upon the construction of the Act (36 Geo. III. c. 52, s. 2) (*o*), have been of opinion that the legacies in question were not legacies given by the Will of a person intended by the Act; for that when the Act speaks of "any Will of any person" and of the legacies being payable out of the personal estate, it must be considered as speaking of persons and Wills, and personal estates in this country; that being the limit of the sphere of the enactment (*p*).

If the deceased, whether a British born subject or a foreigner, died domiciled here, all the assets, wherever situate, are liable to the duty; if he died domiciled abroad, all the assets, wherever situate, are exempt.

It may be observed that there were still several questions connected with these authorities, which must be regarded as not precisely settled by them. Thus, it was undecided, whether property situate abroad, or in this country, belonging to an alien who is domiciled here, is liable to the duty; or whether property, situate in this country, belonging to a British subject who dies domiciled in the British colonies, or domiciled in a foreign country (*q*), is so liable. In a former edition of this Work, the writer ventured to suggest that the principle ought to be applied to these cases (as it appears to have been in the decision of the case *In re Ewin*) (*r*), that personal

(*o*) See *ante*, p. 1330, 1333, 1338.

(*p*) The decision of this case must not be understood as at all qualifying the decision of the Court of Exchequer, *In re* Ewin, *ante*, p. 1392. On the contrary it has been lately decided by the Barons of that Court (*In re* Coales, 7 M. & W. 390) that if a British born subject, domiciled in England, dies here and makes his Will here, leaving assets in India, which are administered by his executor here, they are subject to the legacy duty, notwithstanding they were received in India and remitted to the executor here by an administrator *cum testamento annexo* appointed under an Indian grant of administration.

(*q*) See Atty. Gen. *v.* Dunn, 6 Mees. & W. 511.

(*r*) *Ante*, p. 1392.

property follows the person and is to be considered as situate wherever the domicil of the proprietor is (*s*); and consequently, that if the deceased, whether a British subject or a foreigner, died domiciled in England, all his personal estate, wherever situate, is to be regarded as English estate, and therefore liable: But if he died domiciled out of England, then the whole of his personal property, wherever it happened to be at the time of his death, is to be regarded as situate in the country of domicil, and therefore exempt. This suggestion has been fully justified by the subsequent decision of the House of Lords in the case of *Thompson* v. *The Advocate General* (*t*). There a British born subject died domiciled in a British colony: At the time of his death, he was possessed of personal property locally situate in Scotland: Probate of his Will was taken out in Scotland, for the purpose of there administering this property; and out of the fund thus obtained by the executor, legacies were paid to legatees residing in Scotland: And it was held, on the principle above mentioned, that legacy duty was not payable in respect of these legacies. In the course of the discussion of this case, the following question was put by the House to the Judges; *viz.* "A., a British born subject, born in England, resided in a British colony: He made his Will, and died domiciled there: At the time of his death, he had debts owing to him in England: His executors, in England collected these debts, and out of the money so collected paid legacies to certain legatees in England. The question is, are such legacies liable to the payment of legacy duty?"—And the Judges were unanimously of opinion in the negative.

(*s*) See *ante*, p. 1301, *et seq.*

(*t*) 12 Cl. & F. 1. S. C. 13 Sim. 153. See also *Accord.* The Commissioners of Charitable Donations *v.* Devereux, 13 Sim. 14.

CHAPTER THE THIRD.

BY WHOM THE DUTIES ARE PAYABLE.

IT will be observed, by referring to the statute 36 Geo. III. c. 52, s. 6, that the duties, in all cases wherein it is not otherwise thereby provided for, must be paid by the executor or administrator, upon retainer for his own benefit, or for the benefit of any other persons, of any legacy or part of legacy, or of the residue or any part of such residue, which he shall be entitled so to retain; and also upon delivery, payment, or discharge of any legacy or residue, &c. to which any other person shall be entitled (*a*). It is the duty of the executors to deduct the legacy duty when they pay the legacy, and if they do not do so, they are made personally responsible (*b*).

By the statute 45 Geo. III. c. 28, s. 5 (*c*), it is provided, that the duties imposed on legacies charged upon, or made payable out of real estate, &c. shall be paid by the trustee or other person entitled to the real estate which is subject to the legacy, and that the duty shall be retained by the person paying such legacy, in like manner as is provided, respecting legacies out of personal estate, by the statute 36 Geo. III. (*d*) In the case of *The Attorney General* v. *Jackson*, before stated (*e*), the land out of which the legacy was payable, had been devised to two persons in moieties; the one moiety to the one for life, and the other moiety to the other in fee: And the Court of Exchequer held, that both the parties, the tenant for life of the one moiety, and the tenant in fee of the other, were liable to the Crown for the payment of the legacy duty.

(*a*) See *ante*, p. 1337.
(*b*) *Per* Parke, B., *In re* Sammon, 3 Mees. & W. 386.
(*c*) See *ante*, p. 1367.
(*d*) See *ante*, p. 1337.
(*e*) See *ante*, p. 1387.

It was holden by the Court of Common Pleas, in *Hales* v. *Freeman* (*f*), upon the construction of these statutes, that a trustee under a Will, who had paid the legacy duty upon an annuity, charged on land, after the expiration of four years from the death of the testator, might recover the amount of duty so paid from the legatee, notwithstanding a previous assignment of the annuity by such legatee.

But a question may arise, whether the legacies are not, by the terms of the Will, to be paid in full, free of the legacy duty, so as to make it incumbent on the executor to retain the duty out of the residue, instead of deducting it from the payment to the legatee (*g*).

In *Barksdale* v. *Gilliat* (*h*), the testator directed all the legacies to be paid at the expiration of six months after his decease, *without any deduction:* And Lord Eldon held, that the legatees were entitled to the full amount, and that the legacy duty must be paid by the executors. So in *Smith* v. *Anderson* (*i*), the testator gave certain annuities, and directed them to be paid *without any deduction whatsoever:* And Sir John Leach, M. R., held, that the annuities should be paid clear of legacy duty, on the ground, that, from the nature of the property out of which the annuities were to be paid, there could be no deduction, except in respect of the legacy duty: His Honor, in giving judgment, said, that he admitted that it was to be stated as the fair result of Lord Eldon's judgment in the above case of *Barksdale* v. *Gilliat*, that his Lordship considered that a direction to pay annuities without deduction would not extend to exempt the annuitants from the legacy duty, if, from the nature of the property out of which the annuities were payable, there was any other deduction to which the annuities might be subject. The correctness,

(*f*) 1 Brod. & Bing. 391. S. C. 4 Moore, 21: recognised by the Court of K. B. in Stow *v.* Davenport, 5 B. & Adol. 366.

(*g*) In such cases, no duty shall be chargeable on the money to be applied to the payment of the duty: See stat. 36 Geo. III. c. 52, s. 21, *ante*, p. 1348.

(*h*) 1 Swanst. 562.

(*i*) 4 Russ. Chanc. Cas. 352.

however, of this view of Lord Eldon's judgment was denied by Lord Brougham in *Louch* v. *Peters* (*k*), and by Alderson, B., in *Gude* v. *Mumford* (*l*).

In *Dawkins* v. *Tatham* (*m*), an annuity was given by a Will *clear of all deductions*, and was directed to be paid out of certain sums of stock standing in the testator's name: And Sir L. Shadwell, V. C., held, that the executors were bound to pay the legacy, free from the legacy tax.

In *Stow* v. *Davenport* (*n*), lands were devised to the use, among others, that M. A. F. should take, from and out of the same premises, an annuity or yearly rent-charge of 500*l.* a-year, to be paid *clear of all taxes and deductions*, remainder to S. for life, subject to the annuity: And the Court of King's Bench held, that the annuity was to be paid clear of legacy duty, and was a charge upon the land; and consequently, that S., who had entered into possession under the devise to him, and been compelled to pay the legacy duty on the annuity, pursuant to 45 Geo. III. c. 28, s. 5, could not recover it again from the annuitant.

Again, in *Louch* v. *Peters* (*o*), a testatrix gave to L. for his life an annuity or clear yearly sum of 500*l.*, to be paid and payable half-yearly, out of real estate, *clear of all taxes and outgoings:* And it was held, by Sir J. Leach, M. R., and afterwards by Lord Brougham on appeal, that the annuitant took it clear of the legacy duty.

Further, in *Courtoy* v. *Vincent* (*p*), a testator directed his executors and trustees to pay certain annuities and legacies *clear* of the property tax, and *all expenses attending the same:*

(*k*) *Infra.*

(*l*) *Post*, p. 1401.

(*m*) 2 Sim. 492. It must be observed, that in the case already mentioned of Hales *v.* Freeman, 1 Brod. & Bingh. 391, the Court of C. B. held that a legatee, to whom an annuity was given "clear of all deductions," was compellable to refund the amount of the duty: But the point which might have been raised upon the construction of these words does not appear to have been noticed by either the bar or the bench; and the argument and decision proceeded on a totally distinct ground.

(*n*) 5 B. & Adol. 359. S. C. 2 Nev. & M. 805.

(*o*) 1 M. & K. 489.

(*p*) 1 Turn. & Russ. 433.

And it was held by Sir T. Plumer, M. R., that the legacy duty ought to be paid out of the assets of the testator, and that the annuitants and legatees were entitled to receive the full amount of their respective legacies and annuities, without any deduction in respect of legacy duty.

So in *Godsden* v. *Dotterill* (*q*), a testator bequeathed to his sister a legacy of 100*l.*, to be paid to her *free from all expense:* And it was held by Sir J. Leach, M. R., that this legacy was to be paid discharged of duty.

Again, in *Gude* v. *Mumford* (*r*), a testator devised to James Metherell, for his life, "one annuity or *clear* yearly sum of 100*l.*," and charged his estates at Chobham with the payment of "the said annuity or yearly sum of 100*l.*:" He then devised the estates at Chobham to trustees, in trust to levy and raise the annuity, and pay the same to James Metherell; and subject thereto, and all costs, charges, and expenses attending the raising and paying the same, in trust for A. for life, with remainder to B. in fee: And Alderson, B., held, that James Metherell was entitled to the annuity clear of all deductions for legacy duty, and that the residuary estate was chargeable with the duty payable thereon: The learned Baron observed, that it was clear, from the authorities on the subject, that if, from any directions contained in the Will, an intention on the part of the testator can be collected, that the legacy duty should be paid by the executor, the Court will carry that direction into effect: And the learned Judge denied that the view taken by Sir J. Leach (*s*), of Lord Eldon's judgment in *Barksdale* v. *Gilliat* was correct; but declared his opinion, that the right construction of it was, that Lord Eldon considered the words "without deduction," to mean, in their ordinary sense, "clear of all deduction," and then went on to examine, whether, in the four corners of the Will, he could find the same words used in another sense, or in a more definite and limited sense; and whether, if he could

(*q*) 1 M. & K. 56.

(*r*) 2 Younge & Coll. 448.

(*s*) See *ante*, p. 1399.

find an intention to use them in a limited sense, he could carry that intention into effect; and upon the whole, he arrived at the conclusion, that the words must be used in their ordinary sense without qualification (*t*).

But in *Foster* v. *Ley* (*u*), where a testatrix bequeathed property in trust "to pay off the debts of her first husband, as it was her will that the same should be discharged," and the monies remaining unexpended, to her nephew; the Court of Common Pleas held, that the creditors ought to pay the legacy duty upon their several debts; and that the matter having been overlooked in an order made by the Court of Chancery for the payment of the debts, the executors, who had paid the debts in full, and then paid the legacy duty, might recover the amount from the creditors respectively, in an action for money paid to their use.

Again, in *Sanders* v. *Keddell* (*v*), a testatrix gave to trustees such a sum of money as that the annual produce thereof, when invested in the funds, would produce the *clear* yearly sum of 500*l.*, upon trust to pay the annual produce to certain of her relations in succession for life, and afterwards, as to one-fifth part, upon trust to pay it to M. C. Gascoigne for his life, and after his decease, to any wife who might survive him, during her life, and after the decease of the survivor of them, upon trust for his children: And Sir L. Shadwell, V. C., held, that the fund was not exempted from legacy duty; for that it appeared, from the language of the Will, that the testatrix meant that what she had directed to be done, should be done at once; that M. C. Gascoigne might or might not marry a relation of the testatrix, and his children might be related in some degree to the testatrix, or they might not; and, therefore, that the word "clear" must be taken to refer not to the legacy duty, but to the expenses of investment, and so on (*w*).

(*t*) See also *Accord.* Marris *v.* Burton, 11 Sim. 167. Ford *v.* Ruxton, 1 Coll. 403.

(*u*) 2 Bingh. N. S. 269.

(*v*) 7 Sim. 536.

(*w*) In this case the testator did

In *Calvert* v. *Selbon* (*x*), a testator bequeathed some specific chattels and a sum of 200*l.* to A., and he directed his executors to invest in the funds such a sum as would produce 200*l.* a-year, clear of the legacy duty, and all other deductions, which annual sum was to be paid to A. for her life, and after her decease the principal was to be paid to other parties; and the testator directed his executors to pay the legacy duty on the specific and pecuniary legacies and yearly sum given to A.: A., and the legatees in remainder, were strangers in blood to the testator: And Lord Langdale, M. R., held, that the legacy duty was payable out of the testator's residuary estate, both in respect to the interest given to A., and to those in remainder.

Where one legacy is given by Will free of duty, and by a codicil another is given in *substitution* of that given by the Will, and upon the same trusts, the substituted legacy is also to be considered as given free from the duty; because, being a mere substitution, it is *primâ facie* attended with the same incidents: So where a subsequent addition is made to a prior legacy, the addition will have the same qualities (*y*).

Thus in *Cooper* v. *Day* (*z*), the testator gave to his widow 800*l.*, payable within three months from his death, and free from legacy duty: He also gave 4000*l.* to trustees, payable to them within the same period, free from legacy duty, in trust for his two daughters, to be paid at twenty-one, with intermediate interest for their maintenance: By a codicil, the testator bequeathed to his wife an additional sum of 200*l.*, free from legacy duty: He also revoked the legacy of 4000*l.*, and in substitution gave in trust for his daughters 5000*l.*,

not use the words "clear of all deductions," and besides, the parties were to take in succession: 11 Sim. 163, *per* Shadwell, V. C. Where a legacy, the fund being in Court, was assigned by a deed which represented it was *unincumbered*, it was held, that the legacy duty did not constitute an "incumbrance." Bliss *v.* Putnam, 7 Beav. 40.

(*x*) 2 Keen, 672.

(*y*) By Sir J. Leach, V. C., 6 Madd. 31. See also Day *v.* Croft, 4 Beav. 561.

(*z*) 3 Meriv. 154.

"upon the trusts, and to and for the same intents and purposes, and under and subject to the same powers, provisoes, and limitations, as expressed in his Will concerning the legacy of 4000*l.*:" By a second codicil, the testator revoked the gift of 5000*l.*, and gave in its place 6000*l.* to the same trustees, upon the trusts, &c., following the words in the first codicil: The only question was, whether the legacy of 6000*l.* was to be paid free of the legacy duty: And Sir William Grant declared, upon the authority of the cases of *Leacroft* v. *Maynard* (*a*), and *Crowder* v. *Clowes* (*b*), that the substituted legacy of 6000*l.* was to be taken as exempted from the legacy duty, in like manner with the original legacy, in the place of which it was given. So in *Shaftesbury* v. *Marlborough* (*c*), a testator by his Will gave an annuity to his grandson, and directed his executors to pay the legacy duty on all the legacies and annuities given by his Will: By a codicil, he gave an annuity to his grandson *in lieu of* the annuity given by his Will: And Sir L. Shadwell, V. C. held, that the annuity given by the codicil was free from legacy duty; his Honor observing, that when the thing bequeathed by a codicil is given as a mere substitution for that which is bequeathed by the Will, it is to be taken with all its accidents.

But in *Chatteris* v. *Young* (*d*), the testator bequeathed to his daughter 50,000*l.*, of which 20,000*l.* was to be paid to her absolutely, and, as to the remaining 30,000*l.*, she was to receive the interest to her separate use during her life, and, after her death, the principal was to be paid to such person or persons as she might by her Will appoint; and, after giving various other legacies, and bequeathing to the same daughter a share of the residue of his personal estate, he directed that all the specific and pecuniary legacies therein-before bequeathed should be paid to the respective legatees free of the legacy duty: The daughter having died in his lifetime, he

(*a*) 3 Bro. C. C. 233. S. C. 1 Ves. Jun. 279.

(*b*) 2 Ves. Jun. 449, 450.

(*c*) 7 Sim. 237.

(*d*) 2 Russ. Chanc. Cas. 183.

afterwards, by a codicil, "instead of the legacies given to her by my Will, which are now lapsed," bequeathed to her husband 20,000*l.*: Sir John Leach, V. C., decreed (*e*), that the husband was not entitled to have the 20,000*l.* paid to him free of legacy duty: And upon appeal to the Lord Chancellor his Lordship (Lord Lyndhurst) was of opinion (*f*), that the legacy given to the husband by the codicil could not be considered as given by way of substitution for the legacy which the Will had destined for his wife, but was an independent, distinct, substantive bequest: He therefore confirmed the judgment of the Vice-Chancellor, and dismissed the appeal.

In *Byne* v. *Currey* (*g*), a testator, by his Will, bequeathed certain legacies to charitable institutions, and directed that they should be paid as follows, "Which charitable legacies I direct may be paid out of my personal estate, prior to the payment of my debts, and the said legacies hereby by me given and bequeathed:" He then directed "all his legacies to be paid within two years after his decease, free of any deduction for tax or duty:" By a codicil, he bequeathed legacies payable and raiseable immediately: And the Court of Exchequer held, that the charitable legacies, and the legacies given by the codicil raiseable immediately, were payable free from legacy duty.

In *Douglas* v. *Congreve* (*h*), a testator gave to M. S. 50,000*l.*, three per cent. consols, to be transferred within six months after his decease, and, after giving a variety of specific and pecuniary legacies, he directed that the duty upon all the pecuniary legacies thereinbefore bequeathed should be paid out of his general personal estate: And Lord Langdale, M. R., held, that the legacy of the stock was not a pecuniary legacy, and consequently not exempted under this clause of the Will from the payment of legacy duty.

In *Noel* v. *Lord Henley* (*i*), a legacy was bequeathed to be

(*e*) 6 Madd. 30.

(*f*) 2 Russ. Chanc. Cas. 185.

(*g*) 2 Cr. & Mees. 603. S. C. 4 Tyrwh. 479.

(*h*) 1 Keen, 410.

(*i*) 7 Price, 241. S. C. in Dom. Proc. 12 Price, 213.

paid out of the rents and profits, and the produce of the sale of a real estate devised to be sold for the payment of such legacy, *inter alia:* In a subsequent part of the Will, this legacy was directed by a general clause, extending to all the legacies before given, to be paid in full, free of the duty: And the Court of Exchequer held, that the duty on that particular legacy must be paid out of the real fund, and not out of the personalty; the exemption from the duty being an augmentation of the legacy, and therefore payable out of the specific fund (*k*).

(*k*) See also Stow *v.* Davenport, *ante*, p. 1400.

PART THE FOURTH.

OF THE LIABILITIES OF AN EXECUTOR OR ADMINISTRATOR.

BOOK THE FIRST.

OF ASSETS.

HAVING investigated in a former part of this Work the quantity of the estate which devolves to an executor or administrator, it remains, 1st, to consider what portion of that property is regarded in law as applicable by him to the satisfaction of the different claimants on the estate in his hands, as well upon valuable consideration as volunteers: and 2ndly, to complete the examination already commenced in an earlier stage of this Treatise (*a*), of the order in which that application must be made, with reference to the priority subsisting among the claimants.

The property which will be the subject of these two inquiries, is called *assets* in the hands of the executor or administrator, that is, sufficient, from the French *assez*, to make him chargeable to a creditor, and a legatee or party in distribution, so far as such property extends.

This portion of the estate of the deceased is sometimes designated by the older writers by the term "*assets enter mains*," in contradistinction to "*assets per descent*," by which last expression is denoted that portion which descends to the heir, and which is sufficient to charge him, as far as it goes, with specialty debts of his ancestor.

(*a*) *Ante*, p. 848, *et seq*.

CHAPTER THE FIRST.

OF PERSONAL ASSETS, LEGAL OR EQUITABLE.

What shall be said to be assets in the hands of an executor:

THE general rule, with respect to what shall be said to be assets in the hands of an executor or administrator to charge him, is thus laid down in a book of authority (*b*): "All those goods and chattels, actions and commodities, which were of the deceased in right of action or possession as his own, and so continued to the time of his death, and which after his death the executor or administrator doth get into his hands as duly belonging to him in the right of his executorship or administratorship, and all such things as do come to the executor or administrator in lieu or by reason of that, and nothing else, shall be said to be assets in the hands of the executor or administrator to make him chargeable to a creditor or legatee."

assets which were never in the testator:

There are many instances in which property, in the hands of an executor, is regarded as assets, although it was never in the testator: Thus if an executor renew a lease, he shall account for the new lease, as well as the old, as assets (*c*).

by contract:

So if A. covenants with B. to make him a lease of certain land by such a day, and B. dies before the day, and before any lease made, A. is bound to make the lease to the executor of B., and the lease so made shall be assets in his hands; or if A. refuses to grant the lease, he is liable to make the executor a compensation in damages, which are also assets (*d*).

(*b*) Touchst. 496.

(*c*) Anon. 2 Chanc. Cas. 208. Bromfield *v.* Chichester, 2 Dick. 480. James *v.* Dean, 11 Ves. 392. Randall *v.* Russell, 3 Meriv. 190. See also Fitzroy *v.* Howard, 3 Russ. Chanc. Cas. 225. Giddings *v.* Giddings, *ibid.* 241. Fosbrooke *v.* Balguy, 1 M. & K. 226.

(*d*) Wentw. Off. Ex. 188, 14th edit. Chapman *v.* Dalton, Plowd. 286. Com. Dig. Assets, (C).

So if A. promises, on good consideration, to deliver to B. by such a day certain wares or merchandizes, and this is not performed in the life of B., but delivery is made to his executor, the goods will be assets in his hands, as well as the money recovered in damages for not performing would have been (*e*).

by remainder:

Again, chattels which were never vested in the testator in possession, but accrue to the executor by remainder, will be assets in his hands: Thus, if a lease be made to one for life, remainder to his executor for years (*f*), such remainder will be assets in the hands of the executor, though it were never in the testator (*g*). So where a lease for years is bequeathed to A. for life, and afterwards to B., who dies before A., although B. never had this term in him, it shall be assets in the hands of his executor (*h*). So a remainder in a term for years, though it never vested in the testator's possession, and though it still continue a remainder, shall be assets in the hands of the executor; for it bears a present value, and is vendible (*i*).

by increase:

So goods which have accrued by increase since the testator's death are assets in the hands of the executor: Thus if the sheep or other cattle of the testator bear lambs, &c., after the testator's death, these, although never the property of the testator, will be assets (*j*). So if the executor of a lessee for years enter into the tenements, the profits, over and above the rent, shall be assets (*k*). Therefore, if an executor has a lease for years of land of the value of 20*l.* a-year, rendering rent of 10*l.* a-year, it is assets in his hands only for 10*l.* over and above the rent (*l*). Again, if an executor employ the

(*e*) Wentw. Off. Ex. 188, 14th edit. Com. Dig. Assets, (C).

(*f*) See *ante*, p. 584, *et seq.*

(*g*) Wentw. Off. Ex. 189, 14th edit. Com. Dig. Assets, (C).

(*h*) *Ibid.*

(*i*) *Ibid.*

(*j*) Wentw. Off. Ex. 190, 14th edit.

(*k*) Buckley *v.* Pirk, 1 Salk. 79. Wentw. Off. Ex. 190, 191, 14th edit. But the profits, as far as the amount of the rent, are received by the executor as tertenant, and appropriated to the use of the lessor: 1 Salk. 79. See *post*, Pt. IV. Bk. II. Ch. I. § II.

(*l*) Body *v.* Hargrave, Cro. Eliz. 712. Godolph. Pt. 2, c. 24, s. 1. A leasehold estate, though not sold, is

testator's goods in trade, the profits shall be assets (*m*): And whether the executor takes upon himself to carry on the testator's trade, or does so in pursuance of a provision in articles of partnership entered into by the deceased (*n*), or by direction of the testator, contained in his Will, or under the direction of the Court of Chancery, the profits of such trade shall be assets, for which he shall be accountable. Thus in *Gibblett* v. *Read* (*o*), Lord Hardwicke held, that a share in a newspaper should be considered as the personal property of the deceased, transmissible to his representatives, and that the profits of printing the same subsequent to his death should be distributed accordingly: And his Lordship said, that there were many cases where no part of the property of a testator had been employed or made use of in carrying on the business, and yet the executor had been held accountable for the profits of the business as the testator's personal estate; as in the instance of physical secrets or nostrums, where everything was carried on with materials purchased after the testator's death, and yet the nostrum was part of the personal estate of the testator (*p*). So in

assets, *ad valorem*: Jury *v.* Woodhouse, Barnes, 333. Vincent *v.* Sharp, 2 Stark. 507.

(*m*) Godolph. Pt. 2, c. 24, s. 4. Com. Dig. Assets, (C). See *infra*, Pt. iv. Bk. ii. Ch. ii. § ii.

(*n*) Generally speaking, the death of a partner, of itself, works a dissolution of the partnership: Vulliamy *v.* Noble, 3 Meriv. 614.

(*o*) 9 Mod. 459.

(*p*) His Lordship further observed, that if the house of the testator were a house of great trade, the executor must account for the value of what is called the goodwill of it. See also Worral *v.* Hand, Peake, N. P. C. 74, *Acc.* But in Spicer *v.* James, Rolls, M. T. 1830, cited in Collyer on Partnership, p. 82, where an attorney having died intestate, another attorney, a friend of the family, by arrangement with the widow, took out administration, and continued the business of the deceased until her son came of age, paying the widow half the profits; Sir J. Leach held, that the goodwill of a trade of a personal nature, as that of an attorney, was not a subject of administration, and was not assets in the hands of the administrator. With respect to the goodwill of a business, in which several are partners, it seems that, as to a partnership between professional persons, on the death of one, the goodwill shall survive to the other, although the deceased paid a large premium on entering into the partnership: Farr *v.* Pearce, 3 Madd. 78. But whether this survivorship of the goodwill exists in the case of com-

Pitt v. *Pitt* (*q*), the administratrix of a deceased ropemaker in the king's yard at Woolwich was cited in the Prerogative Court of Canterbury, to exhibit an Inventory and account: The deceased had four apprentices; and the question was, whether the administratrix was bound to insert in the Inventory the amount of the wages earned by them, in the yard of the deceased, since his death: And Sir G. Lee was clearly of opinion, that she, who did not belong to the yard, could have apprentices there only as administratrix to the deceased; and the learned Judge accordingly decreed her to charge herself with the profits arising from the apprentices.

by condition:

So chattels, real or personal, to which the executor becomes entitled, after the death of the testator, by force of a condition, will be assets: As where a lease for years, or cattle, plate, or other chattel, was granted by the testator, upon condition that if the grantee did not pay such a sum of money, or do other acts, &c., and this condition is broken or not performed after the testator's death, the chattel will be brought back to the executor, and be assets (*r*). The law is the same where the condition is, that the testator shall pay money or do any other act to avoid the grant: Accordingly, it has been decided, that chattels, whether real or personal, mortgaged or pledged by the testator, and redeemed by the executor, shall be assets in the hands of the executor, for so much as they are worth beyond the sum paid for their redemption (*s*). And it was held at N. P. by Abbott, C.

mercial partnerships, is not clear. In Hammond *v.* Douglas, 5 Ves. 539. Lord Loughborough determined that the goodwill of a trade carried on in partnership without articles, survives, and is not partnership stock: But in Crawshay *v.* Collins, 15 Ves. 227, Lord Eldon doubted the propriety of that decision: See also Featherstonhaugh *v.* Fenwick, 17 Ves. 298.

(*q*) 2 Cas. temp. Lee, 508.

(*r*) Wentw. Off. Ex. 181, 14th edit.

(*s*) Wentw. Off. Ex. 182, 14th edit. Hawkins *v.* Lawse, 1 Leon. 155. Harecourt *v.* Wrennam, or Harwood *v.* Wrayman, Moore, 858. 1 Roll. Rep. 56, pl. 32. 1 Brownl. 76. 1 Roll. Abr. 920, (G). pl. 5. Alexander *v.* Lady Gresham, 1 Leon. 225. A testator being indebted to R., deposited with him a policy of insurance on the testator's life, as security for the debt, and for a further advance then made by R.; and died, leaving R. and M. his executors: R. still

J., (*t*) that a lease which belonged to an intestate, upon which the plaintiff had a lien, on account of which he retained it in his hands, was nevertheless to be considered as assets in the hands of the administrator, who had the power to redeem it. But if the executor redeem with his own money the goods pledged by the testator, he shall be indemnified in respect to the sum he has disbursed, out of the effects of the testator, or, if necessary, by the sale of the chattel itself; and in that case the surplus over and above such indemnity shall be assets (*u*). In case he have no fund as executor, and he advance the money out of his own purse for the redemption, and it be fully equivalent to the value of the chattel, the property is altered by such payment, and shall be vested in the executor as a purchaser in his own right (*v*). But if the executor redeem the chattel after the time specified for redemption is elapsed, then it is said that the chattel, without any distinction in respect to it's value, shall at law belong to the executor in his own right; since in such case it must be deemed to be sold to him by the mortgagee or pawnee, who after the forfeiture is incurred, has a legal right to dispose of it at his pleasure to him; or to any other person: But in equity, the excess in the value of the thing beyond the money paid for the redemption shall be regarded as assets in the hands of the executor (*w*).

property of the testator shall be assets in whatever part

" Assets in any part of the world," says the author of the *Touchstone* (*x*), " shall be said to be assets in every part of the

holding the policy, applied to the insurers for the amount due on it (200*l.*), which they refused to pay unless R. and M. gave a receipt for it as executors: They did so, R. making protest that he signed as executor, merely to satisfy the insurers: In an action by a judgment creditor, the executors pleaded *plene administraverunt* except as to 4*l.* (the surplus out of the 200*l.* after payment to R.): And the Court of K. B. held, that the executors were not chargeable with the 200*l.* as assets, but only with the surplus after payment to R.: Glaholm *v.* Rowntree, 6 Ad. & Ell. 710.

(*t*) Vincent *v.* Sharp, 2 Stark. N. P. C. 507.

(*u*) Wentw. Off. Ex. 182, 14th edit.

(*v*) Anon. Dyer, 2. a. pl. 3. Wentw. Off. Ex. 182, 14th edit.

(*w*) Wentw. Off. Ex. 186, 187, 14th edit. See *infra*, p. 1432.

(*x*) Touchst. p. 496.

world." So it was laid down by Lord Lyndhurst, in delivering the judgment of the Barons of the Exchequer in *The Attorney General* v. *Dimond* (*y*), that "the effects of the testator are assets wherever situated, whether at home or abroad; and such effects as are in a foreign country at the time of the testator's death, although they remain and are wholly administered there by the executor, are equally assets." Again, it was laid down by Bayley, B., in the case *In re Ewin* (*z*), that if the testator or intestate dies entitled to stock in the French or other foreign funds, and there is a deficiency of assets in this country to meet the debts of the deceased, it is the duty of the executor or administrator to sell the stock, and bring the proceeds into this country, in order to satisfy the creditors; and if he neglects to do so, he will be guilty of a *devastavit* (*a*). Accordingly, as early as the reign of James I., in *Dowdale's Case* (*b*), where the jury found that assets within the kingdom of Ireland came to the hands of the executor, it was resolved that the finding the assets to be beyond sea, was surplusage; for that if executors have goods of their testators in any part of the world, they shall be charged in respect of them; since many merchants and other men, who have goods to a great value beyond sea, are indebted here in England: and it would be a great defect in the law, that those goods should not be liable to their debts.

of the world they are situate:

But this doctrine has been questioned. In *Story's Conflict of Laws* (*c*), that eminent writer, in commenting on the resolution in *Dowdale's Case*, says, "This language, in its broad import, is certainly unmaintainable in our day; for it

(*y*) 1 Crompt. & Jerv. 370. S. C. 1 Tyrwh. 258.

(*z*) 1 Crompt. & Jerv. 157. S. C. 1 Tyrwh. 107.

(*a*) So it has been laid down that a leasehold estate for years in Ireland is personal assets in England, and may be sold here by the executor: Bligh *v.* Lord Darnley, 2 P. Wms. 622. And where there was a question as to the quality of an estate in land situate in a foreign country, the Court of Chancery referred it to a Master, to inquire whether the testator's interest in it was in it's nature real or personal. Gardiner *v.* Fell, 1 Jac. & Walk. 24.

(*b*) 6 Co. 47, b. S. C. Cro. Jac. 55.

(*c*) Ch. xiii. s. 514, a.

goes to the extent of making a domestic executor or administrator liable for all assets of the testator or intestate which are locally situate abroad; although (as it has appeared in an earlier part of this Work) (*d*), he has not, in virtue of the domestic letters of administration, any authority to collect them, or to compel payment or delivery thereof to himself."

In *Dowdale's Case*, it will be observed, the foreign assets had actually come to the hands of the executor; so that the more general question, embraced by the terms of the resolution, did not, in truth, arise. But Mr. Justice Story doubts the authority of the case, even in the aspect which the actual facts of it present; observing that according to the doctrine maintained in England in modern times, the executor was not at all liable to be sued in England as executor under letters testamentary taken out in Ireland; and *a fortiori* not for assets received and administered in Ireland under that appointment: And that learned Commentator considers it as at least a doubtful question, whether if an executor or administrator, appointed in the country where the deceased died, should collect assets in a foreign country without obtaining a grant of administration there, the assets so received would constitute a part of the home assets which he would be bound to administer, and for which he would be liable to account under the domestic administration according to the domestic laws.

It has certainly been established (as there has already been occasion to shew) (*e*), that although where different administrations are granted in different countries, that administration is deemed the principal or primary one which is granted in the country of the domicil of the deceased, yet each portion of the estate must be administered in the country in which possession of it is taken and held under lawful authority: And that the administrator under a foreign grant has a right to hold the assets received under it against the home administrator, even after they have been remitted to

(*d*) See *ante*, p. 303, 304. (*e*) *Ante*, p. 356.

this country (*f*). The only mode, it seems, of reaching such assets is to require their transmission or distribution, after all the claims against the foreign administration have been duly ascertained or settled (*g*). Again, though the right of the home executor or administrator to an ancillary probate or grant of administration in a foreign country is usually admitted, by the comity of nations, as a matter of course (*h*), yet this new administration is made subservient to the rights of creditors and other claimants resident within the country where it is granted; and the *residuum* is transmissible to the country of the original administration only when a final account has been settled in the proper tribunal where the new administration is granted, upon the equitable principles adopted, by it's own law, in the application and distribution of the assets found within it's jurisdiction (*i*).

5 Geo. II. c. 7. Lands, houses,

By the statute 5 Geo. II. c. 7, s. 4, it is enacted, that "the houses, lands, negroes (*k*), and other hereditaments and real

(*f*) *Ante*, p. 357. Story's Confl. ch. xiii. s. 518. See, however, Sandilands *v.* Innes, 3 Sim. 263. In that case it appeared, that Erskine Nimmo died intestate at Madras; and William Fairlie, a creditor of the deceased, took out letters of administration to him in the Supreme Court there: Fairlie afterwards came to England, and obtained letters from the Prerogative Court of Canterbury: Afterwards, one of the intestate's next of kin procured the latter administration to be revoked, and letters to be granted to himself: He then filed a bill against Fairlie, praying for an account of the effects of the intestate, both in India and in this country, which had been possessed by Fairlie: It was objected, that the bill being filed by the plaintiff in the character of personal representative only of the deceased, and not also as one of the next of kin, he was not entitled to sue for an account of the assets of the deceased possessed by Fairlie in India, but only of the assets possessed by him in this country: Sir L. Shadwell, V. C., said, that if Fairlie had brought any of the intestate's assets from India to this country, the plaintiff would clearly be entitled to have an account taken as to them; and that the taking of that account would, incidentally, make it necessary to have an account taken of all the assets possessed by Fairlie or his agents in India.

(*g*) Story's Confl. ch. xiii. s. 518.

(*h*) See *ante*, p. 303, 304, 354, 355.

(*i*) Story's Confl. ch. xiii. s. 513.

(*k*) Repealed as to negroes by stat. 37 Geo. III. c. 119. The compensation fund for slaves in Jamaica was held to be legal assets in Lyon *v.* Colville, 1 Coll. 449.

negroes, &c. in the plantations:

estates, situate or being within any of the said plantations [British Plantations in America] belonging to any person indebted, shall be liable to and chargeable with all just debts, duties, and demands of what nature or kind soever, owing by any such person to his Majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings, and process in any Court of law or equity, in any of the said plantations respectively, for seizing, extending, selling or disposing of any such houses, lands, negroes, and other hereditaments, and real estates, towards the satisfaction of such debts, duties, and demands, and in like manner as personal estates in any of the said plantations respectively are seized, extended, sold or disposed of, for the satisfaction of debts."

In the case of *Thomson* v. *Grant* (*l*), Alexander Donaldson devised plantations in Jamaica to several trustees, whom also he appointed his executors: Of these, Thomson alone proved the Will in the Prerogative Court of Canterbury; and Grant, Campbell, Meekin, and Green, proved it in Jamaica: Thomson died, and Grant, who was one of his executors, proved his Will here in the Prerogative Court: Both Thomson and Grant were creditors of Donaldson to a large amount: In a suit which was instituted by Thomson on behalf of himself and other creditors, for the administration of Donaldson's estate, and which was afterwards revived by Grant, the devise of the plantations had been declared fraudulent as against creditors, and Grant had been appointed consignee: Grant then claimed to be entitled to retain, in priority to the other creditors, out of the balances in his hands as consignee, both the debt due from Donaldson to him individually, and also the debt due to him as the executor of Thomson: And Sir Thomas Plumer, M. R., held, that Grant was entitled as

(*l*) 1 Russ. Chanc. Cas. 540, note to Player *v.* Foxhall.

executor to retain both debts out of the balances in question: His Honor said, that the executor's right of retainer over personal property was clear; and by the Act of Geo. II., plantations in Jamaica are converted, with respect to the payment of debts, into personal assets, and, as such, are possessed by the executor: Grant, therefore, was in a situation in which he could not sue either for the debt due to himself personally, or for that which he, as the executor of Thomson, had the sole legal right to demand: His coming over to this country, and acting as consignee, could not take away from him a right which attached on the property in his hands: That property was personal assets, and in all respects to be administered as such: In the character of consignee, he retained only the charges incident to that situation: As an executor, he was entitled to retain both debts (*m*).

It seems, that, even before this statute, it was held, that a foreign plantation, though an inheritance, yet being in a foreign country, was to be looked upon as a chattel to pay debts, and a testamentary thing (*n*).

It has been lately held, however, that notwithstanding West India estates are made legal assets by this statute, they may be devised so as to make them equitable assets (*o*).

9 Geo. IV. c. 33:

By statute 9 Geo. IV. c. 33, after reciting that doubts have arisen whether and to what extent the real estates of British subjects and others (not being Mahomedans or Gentoos), situate within the jurisdiction of his Majesty's Supreme Courts of Judicature in India, are liable, as assets in the hands of executors and administrators, to the payment of the debts of their deceased owners, it is declared and enacted, "That whenever any British subject shall die seised of or entitled to any real estate in houses, lands, or hereditaments, situate within or being under the general civil jurisdiction of his Majesty's Supreme Courts of Judicature at Fort William, in Bengal,

whenever any British subjects, or persons not being Mahomedans or Gentoos, shall die, entitled to any

(*m*) See also Manning *v.* Spooner, 3 Ves. 118.

(*n*) Noell *v.* Robinson, 2 Ventr. 358. See also Blankard *v.* Galdy, 4 Mod. 226.

(*o*) Charlton *v.* Wright, 12 Sim. 274. See also Lyon *v.* Colville, 1 Coll. 449, 472.

9 Geo. IV. c. 33. real estate in India, such estate shall be deemed assets:

Fort St. George, and Bombay respectively, or whenever any person (not being a Mahomedan or Gentoo) shall die seised of or entitled to any such real estate, situate within the local limits of the civil jurisdiction of the same Courts respectively, such real estate of such British subject or other person as aforesaid (not being a Mahomedan or Gentoo) is and shall be deemed assets in the hands of his or her executor or administrator, for the payment of his or her debts, whether by specialty or simple contract, in the ordinary course of administration" (*p*).

executors may sell such real estates for the payment of debts:

By section 2, it is declared and enacted, "That it is and shall be lawful for such executor or administrator of such British subject or other person as aforesaid (not being a Mahomedan or Gentoo), to sell and dispose of such real estate for the payment of such debts as aforesaid, and to convey and assure the same estate to a purchaser, in as full and effectual a manner in law as the testator or intestate of such executor or administrator could or might have done in his lifetime."

in any action for debt, the executor may ... amount of such real estate:

By section 3, it is declared and enacted, "That in any suit or action to be commenced and prosecuted in any of the said Courts respectively, against such executor or administrator as aforesaid, for the recovery of any debt or demand due and owing by such testator or intestate in his lifetime and at the time of his death, such executor or administrator shall and may be charged with the full amount in value of such real estate as aforesaid, not exceeding the actual net proceeds of such estate when sold by the sheriff, as assets in the hands of such executor or administrator to be administered."

in suits against executors Courts may order writs of sequestration:

By section 4, it is declared and enacted, "That in any such suit or action against such executor or administrator as aforesaid, it is and shall be lawful for the said Courts respectively to award and issue such writs of sequestration and execution against such houses, lands, and real effects of such testator or

(*p*) Real estate in India being made by this statute personal assets, it is unnecessary to make the heir a party to an administration suit: Story *v.* Fry, 1 Y. & Coll. Ch. C. 603.

intestate, in the hands of such executor or administrator as aforesaid, and to cause the same to be seized, sequestered, and sold, or possession thereof delivered under such writs respectively, in the same manner as such Courts could and might have done in the lifetime of such testator or intestate as aforesaid."

9 Geo. IV. c. 33.

What assets shall be considered as *come to hand* so as to charge the executor.

The general rule has long been established, that an executor or administrator shall not be charged with any other goods as assets than those *which come to his hands* (q). But considerable difficulty exists in ascertaining what is to be esteemed such a coming to the hands of the executor or administrator: It is said in *Wentworth's Office of an Executor* (r), that if the testator at the time of his death has a stock of sheep in Cumberland, bullocks in Wales, fat oxen in Bucks, money, household stuff, and plate in London, and his executor dwells at Coventry, *viz.* far from all these places, the executor has such an actual possession presently upon the testator's death, that he may maintain trespass against any stranger taking them away or spoiling them; and, therefore, that author considers it doubtful whether this shall not be such a possession in the executor, and such a coming of these goods to his hands, as to charge him with payment of debts and legacies, and make his own goods liable instead of them. However, it was laid down by Lord Holt, in *Jenkins* v. *Plombe* (s), that if an executor live at London, and the goods of which the testator died possessed, are at Bristol, although the executor has such an immediate possession of them that he may maintain trover in his own name against any converter of them, and the damages recovered shall be assets in his hands, yet if he do not recover so much in damages as really the goods were worth, and that happens not through any fault of his, he shall answer for no more than he recovers (t).

Again, upon the supposition that goods come fully into the

(q) Read's case, 5 Co. 33, b. 34, a.

(r) P. 227, 14th edit.

(s) 6 Mod. 181.

(t) See also Com. Dig. Assets, (D).

possession and hands of an executor or administrator, but are afterwards wrongfully taken from him, a question arises whether such goods shall be considered assets in his hands: There are some authorities for asserting that things taken out of the possession of the executor are assets in his hands (*u*), unless they were taken by the Queen's enemies (*v*). But it should seem, at least in a Court of Equity, that an executor or administrator stands in the condition of a gratuitous bailee; with respect to whom the law is, that he is not to be charged, without some default in him (*w*): Therefore, if any goods of the testator are stolen from the possession of the executor, or from the possession of a third person, to whose custody they have been delivered by the executor, the latter shall not, in equity, be charged with these as assets (*x*).

Again, if a trespasser takes goods out of the possession of an executor or administrator, although he is bound to sue the trespasser, if known, yet the executor or administrator shall not be answerable in assets for more than he recovers in the suit: But if he omits to sell the goods at a good price, and afterwards they are taken from him, then the value of the goods shall be assets in his hands, and not what he recovers; for there was a default in him (*y*). Again, if the goods be perishable goods, and before any default in the executor to preserve them, or sell them at due value, they are impaired, he shall not answer for the first value, but shall give that matter in evidence to discharge himself (*z*). So if the testator's sheep or other beasts die, or if his ships perish by tempest, the executor shall not be charged with them as assets (*a*).

(*u*) Read's case, 5 Co. 34, a. Bethel *v.* Stanhope, Owen, 132.

(*v*) Wentw. Off. Ex. 234, 14th edit.

(*w*) Wentw. Off. Ex. 235, 14th edit. Com. Dig. Assets, (D).

(*x*) Jones *v.* Lewis, 2 Ves. Sen. 240. Wentw. Off. Ex. 236, 14th edit. Com. Dig. Assets, (D). But a contrary rule is said to prevail at law: See Crosse *v.* Smith, 7 East, 258, 259, *infra*, Pt. IV. Bk. II. Ch. II. § II.

(*y*) 6 Mod. 181, 182.

(*z*) 6 Mod. 181.

(*a*) Wentw. Off. Ex. 236, 14th edit. Com. Dig. Assets, (D). But see 7 East, 258, 259. *Infra*, Pt. IV. Bk. II. Ch. II. § II.

With respect to that part of the estate of an executor or administrator, which consists of *choses in action*, the law has long been settled, that although debts of every description due to the testator are assets, yet the executor or administrator is not to be charged with them till he has received the money (*b*): So if the executor or administrator recovers at law or in equity any damages or compensation for any injury done to the personal estate of the testator before or since his decease, or for the breach of any covenant or contract made with the testator (*c*), or with himself in his representative character (*d*), all such damages thus recovered shall be assets in his hands, the costs and charges of recovering them being deducted (*e*): but he shall not be charged with them until he has reduced them into possession (*f*): Thus in *Williams* v. *Innes* (*g*), in order to prove assets in the hands of the defendants who were executors, an account rendered by them was given in evidence, in which they stated that 1000*l.* had been awarded as due to the testator's estate from a person who had been jointly concerned with him in underwriting policies of insurance: But Lord Ellenborough held, that this was not sufficient proof of assets, as it did not shew that any part of the sum awarded had been received by the executors.

But such debts or damages will be regarded as assets, although never, in point of fact, received, if they be released by the executor: For the release, in contemplation of law, shall amount to a receipt (*h*). So if the executor take an

(*b*) Com. Dig. Assets, (D). Bac. Abr. Exors. (H). 2.

(*c*) Co. Lit. 124, a. 1 Roll. Abr. 920. Exors. (G). pl. 4, 5. Godolph. Pt. 2, c. 24, s. 1, 2. Bac. Abr. Exors. (H). 2. Com. Dig. Assets, (C).

(*d*) See *ante*, p. 748, *et seq.*

(*e*) Wentw. Off. Ex. 191, 14th edit. If the testator recover a judgment for debt and costs, and his executor sue out a *sci. fa.* upon that judgment, the debt and costs due to the testator are assets when received; but the sum due for costs to the executor is only by way of indemnity to himself, and is not assets: *Per* Parke, B. in Smedley *v.* Philpot, 3 M. & W. 586.

(*f*) Godolph. Pt. 2, c. 24, s. 5. Jenkins *v.* Plume, 1 Salk. 207. 11 Vin. Abr. 239, 240.

(*g*) 1 Campb. 364.

(*h*) Cocke *v.* Jennor, Hob. 66. Brightman *v.* Keighley, Cro. Eliz. 43.

obligation in his own name for a debt due to the testator, he shall be equally chargeable as if he had received the money; for the new security has extinguished the old right, and is a *quasi* payment (*i*).

And it has been laid down, that where an executor sues for money had and received to his use as executor, the debt or damages is assets immediately: for if the money was had and received by the defendant, by the consent or appointment of the executor, it was assets in his hands forthwith; and if without his consent, yet the bringing the action is such a consent, that, upon judgment obtained, it shall be assets immediately, without execution (*k*).

This subject will be further discussed hereafter, when the nature of a *devastavit* by an executor or administrator is considered (*l*).

Next avoidance of a church.

There may be personal property of the testator or intestate, to which his personal representative, as such, is entitled, which is not assets in his hands, by reason of not being vendible: For example, the patron of a church grants to the testator the next avoidance, and the church becomes void; and the testator dies before he presents: After his death his executor presents, and has the benefit of preferring his son or his friend: Yet this shall make no assets in his hands; because he could not lawfully take money to present (*m*): But if a stranger presents, and gets his clerk admitted, and the executor recovers damages in a *quare impedit*, the money so recovered will be assets (*n*): And if the testator had died before the church had become void, then, because the exe-

(*i*) Norden *v.* Levit, 2 Lev. 189. Hosier *v.* Arundell, 3 Bos. & Pull. 7. Partridge *v.* Court, 5 Price, 419, 420, 421.

(*k*) Jenkins *v.* Plume, 1 Salk. 207. S. C. 6 Mod. 181.

(*l*) *Infra*, Pt. IV. Bk. II. Ch. II. § II.

(*m*) Wentw. Off. Ex. 173, 14th edit. Godolph. Pt. 2, c. 24, s. 8. See also Lord Tenterden's judgment in Rennell *v.* Bishop of Lincoln, 7 B. & C. 195.

(*n*) Wentw. Off. Ex. 173, 14th edit. Godolph. Pt. 2, c. 24, s. 8. Sale *v.* Bishop of Lichfield, Owen, 99. Smallwood *v.* Bishop of Lichfield, 1 Leon. 205.

cutor might lawfully have sold it, it should seem that he will be charged with the value as assets, if he has neglected a proper opportunity to make a sale (*o*).

Office for years.

A grant for years of an office is assets in the hands of the executor or administrator of the grantee (*p*).

Estates *pur autre vie*.

There has been occasion to state, in an earlier stage of this Work (*q*), that the Statute of Frauds (29 Car. II. c. 3, s. 12), after enacting that estates *pur autre vie* shall be devisable by a Will in writing, signed by the devisor or by some other person in his presence and by his express directions, and attested and subscribed in the presence of the devisor by three or more witnesses (*r*), proceeds to enact, that if no such devise thereof is made, the same shall be chargeable in the hands of the heir, if it shall come to him by special occupancy, as assets by descent; and in case there shall be no special occupant, it shall go to the executors or administrators of the grantee, and shall be assets in their hands. It must be remarked that this statute does not declare to whom the residue or surplus, which shall remain in the hands of the executors or administrators, shall belong, in case the estate goes to them under the statute: And in the case of *Oldham* v. *Pickering* (*s*), it was determined, that such residue was *not* distributable amongst the next of kin; for, notwithstanding the alteration by the statute, the estate remained freehold. This gave occasion to the passing of the stat. 14 Geo. II. c. 20, s. 9, which, after reciting the statute of

(*o*) Wentw. Off. Ex. 173, 14th edit. So an archbishop's options (see *ante*, p. 562), are assets in the hands of his executor. The archdeaconry of Rochester was named by Archbishop Herring as his option, and sold, dignity included, by his executors, at Garraway's Coffee-house.

(*p*) Sir Geo. Reynel's case, 9 Co. 97, a. Schellinger *v.* Blackerby, 1 Ves. Sen. 347.

(*q*) *Ante*, p. 570.

(*r*) Lands held under leases for lives will pass by a devise under the words "lands and hereditaments:" Fitzroy *v.* Howard, 3 Russ. Chanc. Cas. 223: See also Weigall *v.* Brome, 6 Sim. 99; and the statute 1 Vict. c. 26, s. 26, Preface.

(*s*) 2 Salk. 464. S. C. Carth. 376.

Car. II., and that doubts had arisen, where no devise was made of such estates, to whom the surplus of such estates, after the debts of such deceased owners thereof are fully satisfied, shall belong, enacts, "that such estates *pur autre vie*, in case there be no special occupant thereof, of which no devise shall have been made according to the said Act for Prevention of Frauds and Perjuries, or so much thereof as shall not have been so devised, shall go, be applied and distributed, in the same manner as the personal estate of the testator or intestate."

Neither of these statutes, however, provides expressly for the case of a tenant *pur autre vie* dying intestate as to that estate, but having made a valid Will of his personalty: or in other words, the statutes omit to state whether the surplus shall in such case go according to the personal estate disposed of by the Will, or as undisposed of personal estate (*t*). Nor is any provision made by these statutes for the surplus which may be in the hands of an executor or administrator, as special occupant. Both these points were fully considered by Lord Eldon in the case of *Ripley* v. *Waterworth* (*u*). There lands had been limited to a man, his executors, administrators, and assigns *pur autre vie:* He died, having published his Will (not attested according to the Statute of Frauds), and appointed an executor, and made a residuary bequest of his personal estate: There were four distinct claimants, the heir-at-law, the residuary legatee, and the next of kin; and a claim was made by the executor for his own benefit: For the heir-at-law it was urged, that it was real estate, *viz.* a descendible freehold; that it would not pass by an unattested Will, and an executor could not at common law take as special occupant; and, therefore, the heir-at-law was entitled: For the residuary legatees and next of kin it was urged, that an executor might at common law take an estate *pur autre vie*, as special occupant; and that even prior to the Statute of Frauds, it was assets in his

(*t*) See Watkins on Conveyancing, 71, note by Morley and Coote.

(*u*) 7 Ves. 425.

hands; and that it would be strange if (the statute providing, that where there is no special occupant, it shall go to the executor) it should not go to the executor, where it is expressly given to him; and that the executor would, as special occupant, take it as personal estate, chargeable with debts, and subject to application as personal estate, after debts paid': The Lord Chancellor was of opinion, that it could in no event go to the heir; that it did not belong to the executor; and that, as between the next of kin and residuary legatee, the executor was in equity a trustee for those to whom the testator had given the personal estate, by a Will sufficient to pass personal estate, and therefore he must be considered as holding it for the residuary legatee (*v*).

With respect to estates *pur autre vie* of any deceased person, who shall not have died before the 1st day of January, 1838, the statute 1 Vict. c. 26, after repealing the above mentioned statutes of Car. II. and Geo. II., and enacting, by section 3, that the power of every person to devise his estate shall extend to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be a corporeal or incorporeal hereditament, proceeds to enact, by section 6, that "if no disposition by Will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant, and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be

1 Vict. c. 26.

(*v*) Watk. Convey. edition by Morley and Coote, p. 71, note. See also James *v.* Dean, 11 Ves. 392: and the observations of Lord Lyndhurst, in Fitzroy *v.* Howard, 3 Russ. Chanc. Cas. 230.

assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate."

Property to which an executor is entitled as *persona designata.*

In the case last cited Lord Eldon observed, with respect to the claim of the executor for his own benefit, that he doubted whether an executor or administrator ever takes anything as such which he will not be bound to apply as personal estate of the testator or intestate (*w*): And in *Miller* v. *Harewood* (*x*), his Lordship recurring to his decision in *Ripley* v. *Waterworth*, said, " I have determined, and I see no reason to dissent from it, that, where the executor is the special occupant, taking as executor, he must hold that as all other property taken by an executor, and therefore distributable in this Court." From this principle it seems to be a necessary deduction, that whenever personal estate is limited to executors or administrators, as purchasers, they will take for the benefit of the persons entitled to the personal estate. There has already been occasion, in a previous part of this Treatise (*y*), to state, at some length, the authorities which are connected with this question.

Property in testator as trustee.

The absolute property of the goods must have been vested in the testator, in order to make them assets in the hands of the executor (*z*). Therefore, if the testator takes a bond for another in trust, and dies, this is not assets in the hands of his executor: So if the obligee assigns over a bond, and covenants not to revoke, and dies, that bond is not assets in the hands of the executor of the obligee (*a*).

Terms attendant on the

It is necessary in this place to advert to the nature of terms

(*w*) 7 Ves. 438.
(*x*) 18 Ves. 273.
(*y*) *Ante*, p. 977, *et seq.*
(*z*) Bac. Abr. Exors. (H) 1. See Parker *v.* Baylis, 2 Bos. & Pull. 78.
(*a*) Deering *v.* Torrington, 1 Salk. 79. But in Byrn *v.* Godfrey, 4 Ves. 6, it was held that a promissory note given to the testator was assets, notwithstanding his declaration to his executor that he never meant to call for payment of it.

attendant on the inheritance. When a term for years is created for a particular purpose, as for raising money for payment of debts, or portions for younger children, and the purpose for which the term was created is satisfied, the termor is considered in equity as a trustee for the owner of the inheritance; and though at law the term is deemed a term in gross in such trustee, yet in equity it follows the fee, and is looked upon as completely consolidated with it (*b*): Hence it is not regarded as personal assets in the hands of the executor of the person entitled to the fee, but as real assets which go to his heir (*c*). Yet this must not be understood of every term which attends the inheritance: for where a termor purchases the freehold and inheritance, and takes a conveyance thereof in the name of a trustee, although the term in himself will be attended on his equitable fee-simple, yet, at his death, it will be assets in the hands of his personal representatives (*d*).

Inheritance of testator.

It must be observed, that executors or administrators cannot be in a better condition, with respect to the estate of the deceased, than he himself would have been in; and therefore they cannot employ as general assets, property which he would have been bound to apply to a particular purpose (*e*): Thus, in ***Hassall*** v. ***Smithers*** (*f*), a remittance in bills and notes for a specific purpose, *viz.*, to answer acceptances, was received by an administrator, in consequence of the death of the party to whom the remittance was made: and it was held, that the special purpose operated as a lien, and that the sum remitted could not be applied by the administrator as general assets.

Fund for specific purposes not general assets.

Other instances may occur, where personal property may

(*b*) See Watk. Convey. 48, note by Morley and Coote.

(*c*) Tiffin *v.* Tiffin, 1 Vern. 1. Thruxton *v.* Atty. Gen. 1 Vern. 341.

(*d*) Dowse *v.* Percival, 1 Vern. 104. Thruxton *v.* Atty. Gen., 1 Vern. 341.

(*e*) See *Acc.*, *per* Lord Ellenborough, in Taylor *v.* Plumer, 3 M. & S. 578: and *per* Littledale, J., in Ashby *v.* Ashby, 7 B. & C. 453.

(*f*) 12 Ves. 119.

be in the hands of the executor, and yet not applicable to any but a special purpose: Thus, in *Parry* v. *Ashley* (*g*), the testator charged his real estate, which consisted of one house only, with an annuity to his widow, and subject to that annuity he devised it to Sarah Ashley in fee, and appointed her his executrix: The testator had insured the house; and on the expiration of the policy a few months after his death, it was renewed by Sarah Ashley: The house was afterwards burnt down: And Sir L. Shadwell, V. C., held, that as she, being executrix, renewed the policy, it must be taken that she did so in the character of executrix (*h*): But his Honor was of opinion, that the proceeds of the policy could not be considered as part of the testator's personal estate, but that they were affected with a trust for the benefit of the parties interested in the real estate (*i*). Again, in *Thacker* v. *Wilson* (*k*), the Court of King's Bench held, that under the statute 14 Geo. III. c. 78 (Building Act), s. 41, where a party wall has been rebuilt, the person who is owner of and entitled to the improved rent of the adjoining premises, is liable to contribution out of such rent, though he be no otherwise owner than as an executor or administrator; and this, although there be a judgment outstanding, of a date prior to the pulling down of the wall, and no sufficient assets to meet it: For the portion of the rent claimable in respect of such contribution is not assets, inasmuch as this claim is a lien upon so much of the rent.

In *Smedley* v. *Philpot* (*l*), the defendant's testatrix, Jane Carter, had commenced a suit in Chancery for an account under a Will, in which she employed as her solicitors, first

(*g*) 3 Sim. 97.

(*h*) It may here be mentioned that it has been held that an executor in trust has a sufficient interest to enable him to make an insurance in his own name, on the life of a person who has granted an annuity to the testator: Tidswell *v.* Ankerstein, Peake, N. P. C. 151.

(*i*) See Rook *v.* Warth, 1 Ves. Sen. 461. See also Cruickshank *v.* Robarts, 6 Madd. 104, for another instance of assets in the hands of executors not being regarded as part of the general personal estate.

(*k*) 3 Adol. & Ell. 142. S. C. 4 Nev. & M. 659.

(*l*) 3 M. & Wels. 573.

one Jones, then the present plaintiff, who successively gave up the cónduct of the suit, and then one Johnson, who continued to act up to her death in 1829: After her death the present defendant, her executor, filed a bill of revivor, and Johnson continued to conduct the suit for him: In 1833, a decree was made, whereby the rights of the several parties were declared, and it was ordered that the Master should settle the costs of all the parties, and that the same, when taxed and settled, should be paid out of the fund in Court in the following manner: *viz.*, the plaintiff's (the now defendant's) costs, to Johnson his solicitor, and the costs of the several defendants in the suit to their respective solicitors (naming them): The plaintiff's (now defendant's) costs were taxed, including the costs both of Jane Carter in her lifetime, and of him as her executor, and consequently the taxation was founded on the bills of Jones, of the present plaintiff, and of Johnson: Certain sums in respect of them were afterwards paid by the officer of the Court of Chancery to Johnson: The present plaintiff sued the present defendant, as executor of Jane Carter, for the amount of his bill, and had judgment of assets, *quando acciderint:* He afterwards brought another action on the judgment and gave notice of trial, and it was then agreed between them, that, on his withdrawing the record, the defendant would then pay him 100*l.* on account of his bill, and the remainder *out of the assets which should first come to the defendant's hands* as executor of Jane Carter: A further sum was afterwards paid out of the Court of Chancery to Johnson in respect of the same costs; and the plaintiff having brought an action on the agreement, the question was, whether this sum was assets which had come to the hands of the defendant within the meaning of the agreement: Parke, B. and Alderson, B., were of opinion in the affirmative, considering that all the money received by Johnson, over and above what paid the amount of his own bill, was received on account of the executor, and was equivalent to a receipt by *him* in point of law: But Lord Abinger, C. B., was of a contrary opinion, and thought that the plaintiff ought to

have been nonsuited; not because the money ought not to have been paid to him, but because it was in effect appropriated by the order, and the circumstances of the case, to him, and did not therefore form any part of Jane Carter's assets.

Property assigned in fraud to creditors.

Where a deed is set aside as fraudulent against any of the creditors of the deceased, the property becomes assets, and subsequent creditors are let in (*m*). An assignment within the statute 13 Eliz. c. 5, is utterly void against creditors, and the property assigned is assets in the hands of the executor (*n*). It should seem, that to render a conveyance fraudulent within that statute, the party, at the time of making it, must be indebted to the extent of insolvency (*o*). But in *Shears* v. *Rogers* (*p*), where a person, owing 102*l.* on a bond, wrote to the obligee that he and his wife were bowed down by pecuniary embarrassments, and that the obligee's proceeding to extremities would render the debtor's wife after his death perfectly destitute, and a month afterwards, for a nominal sum of ten shillings, and in consideration of natural love and affection, assigned a lease (of the value of 206*l.*) to A., in trust for his own benefit for life, and after his death for that of one of his daughters-in-law, and he soon afterwards died, having by his will made the assignee of the lease his executor; by which assignment of the lease, the residue of his property became insufficient to discharge the bond-debt; the Court of King's Bench held, that the assignment was within the meaning of the statute, and utterly void against creditors, and that the lease was assets in the hands of the executor: and Patteson, J., remarked, that if the defendant had not been executor, then, by the assignment in question, he would have been executor in his own wrong (*q*), and chargeable by the creditors in respect of the property taken by him under that instrument; and that the lease could not be less assets, because the defendant was rightful executor.

(*m*) Richardson *v.* Smallwood, 1 Jac. 552. See *ante*, p. 638.

(*n*) 3 B. & Adol. 362.

(*o*) See *ante*, p. 636, note (*u*). Jackson *v.* Bowley, Carr. & M. 97. But see also 1 Smith's Leading Cas. 12—13.

(*p*) 3 B. & Adol. 362.

(*q*) See *ante*, p. 212, 213.

Equitable assets in the hands of an executor.

Hitherto the subject has been confined to the consideration of assets, such as may be reached at law, and such as a creditor, suing the executor in an action at law for a debt due from the testator, might bring forward in evidence on an issue joined on the executor's plea of *plene administravit:* But there are, besides, various interests frequently forming part of the estate of an executor or administrator, which are not recognised as assets at law; and which, therefore, if administered at all, must be administered in equity: This latter portion of the estate in the hands of an executor or administrator is called *equitable assets*, in contradistinction to the former, which is called legal assets. In other words, legal assets are such as are liable to debts in the temporal courts, and legacies in the spiritual, by the course of law: Equitable assets are such as are liable only by the help of a Court of Equity.

A most important distinction exists, with respect to the administration of these two kinds of assets: If they are legal, they must de administered by the executor or administrator of the deceased in a due course of administration, having regard to those rules of priority among creditors, which have already been investigated in this Treatise (*r*): But if the assets in the hands of an executor are equitable, then, although the precedence in payment of debts to legacies must be respected, yet, as among creditors, the assets must be applied in satisfaction of all the claimants, *pari passu*, without any regard to the priority in rank of one debt to another: The principle of this distinction is, that in natural justice and conscience, and in the contemplation of a Court of Equity, all debts are equal, and the debtor is equally bound to satisfy them all, whether by specialty or by simple contract: Therefore, since a claimant upon equitable assets is under the necessity of going to a Court of Equity in order to reach them, that Court will act only according to the rule of doing justice to all creditors, without any distinction as to priority (*s*).

In accordance with this principle, it has been considered

(*r*) *Ante*, p. 848, *et seq.*

(*s*) Plunket *v.* Penson, 2 Atk. 294.

that the equity of redemption of a term for years is equitable, and not legal assets in the hands of an executor or administrator; because the mortgage being forfeited at law, and the whole estate thereby vested in the mortgagee, the right of redemption is merely equitable property at the time of the death of the testator or intestate: And to this effect Sir Joseph Jekyll delivered his opinion, after great deliberation, in the case of *The Creditors of Sir Charles Cox* (*t*): And Lord Hardwicke held accordingly, in the case of *Hartwell* v. *Chitters* (*u*).

It must, however, be observed, that in *Sharpe* v. *Scarborough* (*v*), it was stated by Mitford, Solicitor General, in argument, that *The Case of Sir Charles Cox's Creditors* and *Hartwell* v. *Chitters* have been considered as overruled: and Mr. Cox, in a note to his edition of *Peere Williams*, doubts the authority of those decisions (*w*), and cites several cases (*x*) to shew that it has been decided that chattels, whether real or personal, mortgaged or pledged by the testator, and redeemed by the executor, shall be assets *at law* in the hands of the executor, for so much as they are worth beyond the sum paid for their redemption, though recoverable only *in equity* (*y*): But Mr. Justice Bayley, in his judgment in *Clay* v. *Willis* (*z*), cites *The Creditors of Sir Charles Cox*, and *Hartwell* v. *Chitters*, as establishing that the equity of redemption of a term is equitable assets.

(*t*) 3 P. Wms. 342. It is said in the note by Mr. Cox, 3 P. Wms. 344, that it appears from the Reg. Lib. that the point was not in fact determined; but it seems unquestionable that the Master of the Rolls delivered a solemn opinion that the equity of redemption was equitable assets.

(*u*) Ambl. 308.

(*v*) 4 Ves. 541.

(*w*) 3 P. Wms. 344.

(*x*) Hawkins *v.* Lawse, 1 Leon. 155. Alexander *v.* Lady Gresham, 1 Leon. 225. Harcourt *v.* Wrenham, or Harwood *v.* Wraynam, Moore, 858. 1 Roll. Rep. 56. 1 Brownl. 76. 1 Roll. Abr. 920 (G), pl. 5.

(*y*) But the author of Wentworth's Office of an Executor says that where the redemption by the executor is after the day of payment, *equity only and not law* can make any part of the value assets in his hands: p. 186, 14th edit. *Ante*, p. 1412.

(*z*) 1 B. & C. 372. This part of Mr. Justice Bayley's judgment is also cited and relied upon by Lord Tenterden, C. J., in Barker *v.* May, 9 B. & C. 493.

It appears, notwithstanding, to be the prevailing opinion at this day, that equities of redemption are not necessarily equitable assets (*a*): And according to the opinion of an eminent writer (*b*), the more accurate statement of the doctrine is, that legal assets are such as come into the hands and power of an executor or administrator, or such as he is entrusted with by law, *virtute officii*, to dispose of in the course of administration; or, in other words, whatever an executor or administrator takes, *qua* executor or administrator, or in respect to his office, is to be considered as legal assets.

Accordingly, in *Wilson* v. *Fielding* (*c*), it was adjudged by Lord Macclesfield, that personal assets, as a lease for years, a bond, or the grant of an annuity, in a trustee's name, should be applied as legal assets in a due course of administration, although a creditor could not come at them without the aid of a Court of Equity: And the same law was laid down by Sir Joseph Jekyll, in *The Case of Sir Charles Cox's Creditors* (*d*).

With respect to that portion of the property in the hands of an executor or administrator, which consists of the proceeds of the sale of real estate, it is now fully settled, that such proceeds are *equitable* and not legal assets. In some of the older cases, indeed, it has been holden, that where land is devised to executors for the payment of debts and legacies, or is devised to be sold by executors, or devised to executors to be sold for that purpose, the proceeds arising from the sale are legal assets (*e*): But later cases have completely established, that in all cases they constitute merely equitable assets (*f*): In

(*a*) See 2 Jarman on Wills, 545. Story on Equity, Ch. ix. s. 551, note (1).

(*b*) Story on Equity, Ch. ix. s. 551.

(*c*) 2 Vern. 763. It should seem, by the report of this case in 10 Mod. 427, that Lord Macclesfield, at this period, altogether denied the doctrine of administering equitable assets *pari passu*. The case was cited before Lord Hardwicke in Hartwell *v*. Chitters, *ubi supra*.

(*d*) 3 P. Wms. 342.

(*e*) Girling *v*. Lee, 1 Vern. 63. Cutterback *v*. Smith, Prec. Chanc. 127. Bickham *v*. Freeman, Prec. Chanc. 136. Anon. 2 Vern. 133. Greaves *v*. Powell, 2 Vern. 248. Anon. 2 Vern. 405. Burwell *v*. Corrant, Hardr. 405.

(*f*) Lewin *v*. Okeley, 2 Atk. 50.

Clay v. *Willis* (g), A. mortgaged lands in fee to B. and Co., with a power of sale upon trust, to repay themselves the monies advanced, &c., and to pay over the surplus to A., his executors, and administrators: Before any sale was made, A. died, having devised all his real and personal property to C. and D. (whom he also made executors) upon trust, to sell and pay debts, &c.: During the lifetime of C. and D., B. and Co. sold the estate, and paid the surplus into the hands of E., who was agent for C. and D.: Whilst the money remained in E.'s hands, C. and D. died; E. also died soon after, leaving the defendant his executor: The plaintiff having taken out administration *de bonis non*, with the Will of A. annexed, brought an action for money had and received against the defendant: And it was held by the Court of King's Bench that it could not be maintained; for that the money in the defendant's hands was equitable, and not legal assets, and therefore would not have been recoverable by C. and D. in their representative character. In *Barker* v. *May* (h) the testator devised to his executors, their heirs and assigns, his lands upon trust to sell the same; and directed that the money arising from the sale should be deemed part of his personal estate, and that it should be subject to the disposition made concerning his personal estate: He then directed his personal estate to be sold; and when the money arising from the sale of his personal and real estate should be collected, he disposed of it in the manner mentioned in the Will, and among other dispositions he bequeathed a legacy to A. B.: The Court of King's Bench held, that the money arising from the sale of the real estate was equitable assets: And a prohibition was granted to the Consistorial Court at Norwich, in which the legatee had sued for his legacy, and the exe-

Silk *v.* Prime, 1 Bro. C. C. 138, *in notis*. Barton *v.* Boucher, 1 Bro. C. C. 140, *in notis*. Newton *v.* Bennet, 1 Bro. C. C. 134. Batson *v.* Lindegreen, 2 Bro. C. C. 94. Baily *v.* Ekins, 7 Ves. 310. Shiphard *v.* Lutwidge, 8 Ves. 26. Clay *v.* Willis, 1 B. & C. 364. Barker *v.* May, 9 B. & C. 489. S. C. 4 Mann. & R. 336.

(g) 1 B. & C. 364.

(h) 9 B. & C. 489. S. C. 4 Mann. & R. 336.

cutor, having accounted for all the personal estate, admitted that he had in his hands a sum of money arising from the sale of the real estate: And Lord Tenterden observed, that it was quite clear that the testator could not alter the legal character of the property, by directing that it should be considered as part of his personal estate.

Marshalling of assets, partly legal and partly equitable.

Where the assets are partly legal, and partly equitable, though equity cannot take away the legal preference on legal assets, yet if one creditor has been partly paid out of such legal assets, when satisfaction comes to be made out of equitable assets, the Court will postpone him until there is an equality in satisfaction to all the other creditors out of the equitable assets, proportionable to so much as the legal creditor has been satisfied out of the legal assets (*i*).

Beneficial interest under a power.

Where a man has a general power of appointment over a fund, and he actually exercises his power, whether by deed or Will, the property appointed shall form part of his assets, so as to be subject to the demands of his creditors at his death, in preference to the claims of his legatees or appointees (*k*). But in order to raise this equity, the power must be actually executed (*l*); for equity never aids the non-execution of a power (*m*). And although creditors in these cases prevail over volunteers, yet if a party taking under a voluntary appointment sell to a person *bonâ fide*, and for a valuable consideration, such person, in analogy to the decisions on the statute of voluntary conveyances, will be preferred to the creditors, as having a preferable equity to them (*n*).

(*i*) Morrice *v.* Bank of England, Cas. temp. Talb. 220, by Lord Talbot.

(*k*) Thompson *v.* Towne, 2 Vern. 319. Hinton *v.* Toye, 1 Atk. 465. Bainton *v.* Ward, 2 Atk. 172. Townsend *v.* Windham, 2 Ves. Sen. 9. Pack *v.* Bathurst, 3 Atk. 269. Troughton *v.* Troughton, 3 Atk. 656. George *v.* Milbanke, 9 Ves. 190. Jenney *v.* Andrews, 6 Madd. 264. Platt *v.* Routh, 6 Mees. & W. 789.

(*l*) As to Wills made or republished since the year 1837, every residuary bequest operates as a testamentary appointment, unless a contrary intention appears. See stat. 1 Vict. c. 26, s. 27, Preface. 2 Jarman on Wills, 546.

(*m*) Holmes *v.* Coghill, 7 Ves. 499. 12 Ves. 206.

(*n*) George *v.* Milbanke, 9 Ves. 190. Hart *v.* Middlehurst, 3 Atk. 377. 2 Sugd. Pow. 29, 6th edit.

CHAPTER THE SECOND.

OF REAL ASSETS: AND OF THE EXONERATION OF THE REAL ESTATE BY THE PERSONAL: AND HEREWITH OF THE MARSHALLING OF ASSETS.

SECT. I.

Of the Exoneration of the Real Estate by the Personal.

Real assets in the hands of the heir:

BESIDES the liability of the executor or administrator in respect of the personal assets in his hands, the heir of the deceased is liable, at the common law, to the extent of the real assets descended, for the payment of his ancestor's debts of a certain quality; *viz.*, those due on bonds, covenants, or other specialties, in cases where the deceased bound himself and his heirs (*a*).

It is not thought necessary to discuss, in this place, what portion of the real property of the deceased the law regards as assets by descent; nor to investigate the circumstances under which the real assets are to be considered as legal or equitable: Questions of this nature are rather matters between the heir and the creditors, than relative to the office of an executor or administrator, and therefore appear foreign to the subject of this Treatise.

(*a*) The heir is also liable on a judgment recovered against his ancestor, or a recognizance acknowledged by him: but he is chargeable only as *tenant of the lands*, and not as heir: and therefore an action of debt does not lie against him on the judgment or recognizance, as it does on the bond of his ancestor; but a *scire facias* only, to have execution of the lands in his hands: 2 Saund. 7, note (4) to Jeffreson *v.* Morton.

of the devisee:

Creditors by specialties which affected the heir, provided he had assets by descent, had not, at common law, the same remedy against the devisee of their debtor. To obviate this mischief, the statute of 3 Wm. & M. c. 14, was passed: which has been lately repealed and re-enacted with additional provisions calculated to remedy certain omissions in the former statute. By statute 11 Geo. 4 & 1 Wm. IV. c. 47, after reciting that "it is not reasonable or just, that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts, and nevertheless it hath often so happened, that where several persons having, by bonds, *covenants* (*b*), or other specialties, bound themselves and their heirs, and have afterwards died seised in fee-simple of and in manors, messuages, lands, tenements, and hereditaments, or had power or authority to dispose of or charge the same by their Wills or testaments, have, to the defrauding of such their creditors, by their last Wills or testaments, devised the same or disposed thereof in such manner as such creditors have lost their said debts;" it is, by section 2, enacted, "that all wills and testamentary limitations, dispositions, or appointments, already made by persons now in being, or hereafter to be made by any person or persons

1 W. IV. c. 47.

(*b*) The former statute, giving the specialty creditor a remedy against the devisee, (3 W. & M. c. 14,) did not extend to damages for breaches of covenant or contracts under seal made by the testator: And it was therefore held, that an action of covenant did not lie upon this statute against the heir and devisee to recover damages for a breach of covenant made by the devisor, but the remedy thereby given was confined to cases where debt lies: Wilson *v.* Knubley, 7 East, 128. It was further held, in the construction of the old statute, that it applied only where a *debt*, in the ordinary sense of the word, existed between the parties in the lifetime of both; and therefore that an action of debt did not lie against the devisee of a surety in respect of breaches of covenant which did not occur in the lifetime of the testator, even though the damages were liquidated, so that in form they might be sued for in an action of debt: Farley *v.* Briant, 3 A. & E. 839. But such damages, though not a debt within this statute, are a debt payable out of the real estate of the testator, under a charge of debts thereon created by his Will: Morse *v.* Tucker, 5 Hare, 79.

1 W. IV. c. 47. whomsoever, of or concerning any manors, messuages, lands, tenements, or hereditaments, or any rent, profit, term, or charge out of the same, whereof any person or persons, at the time of his, her, or their decease, shall be seised in fee-simple, in possession, reversion, or remainder, or have power to dispose of the same by his, her, or their last Wills or testaments, shall be deemed or taken (only as against such person or persons, bodies politic or corporate, and his and their heirs, successors, executors, administrators, and assigns, and every of them, with whom the person or persons making any such Wills or testaments, limitations, dispositions, or appointments, shall have entered into any bond, *covenant*, or other specialty, binding his, her, or their heirs), to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect; any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding."

And, by section 3, "for the means that such creditors may be enabled to recover upon such bonds, *covenants*, and other specialties, be it further enacted, that in the cases before mentioned every such creditor shall and may have and maintain his, her, and their action and actions of debt or *covenant* upon the said bonds, covenants, and specialties against the heir and heirs-at-law of such obligor or obligors, covenantor or covenantors, and such devisee and devisees, or the devisee or devisees of such first-mentioned devisee or devisees jointly by virtue of this Act; and such devisee and devisees shall be liable and chargeable for a false plea by him or them pleaded in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended."

And, by section 4, "it is enacted, that if in any case there shall not be any heir-at-law against whom, jointly with the devisee or devisees, a remedy is hereby given, in every such case every creditor to whom by this Act relief is given shall and may have and maintain his, her, and their action and

actions of debt or covenant, as the case may be, against such devisee or devisees solely; and such devisee or devisees shall be liable for false plea as aforesaid" (*c*).

1 W. IV. c. 47.

Again, by section 9, of the same statute, it is further enacted, "that from and after the passing of this Act, where any person being, at the time of his death, a trader, within the true intent and meaning of the laws relating to bankrupts, shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, or other real estate, which he shall not by his last Will have charged with or devised subject to or for the payment of his debts, and which would be assets for the payment of his debts due on any specialty in which the heirs were bound, the same shall be assets to be administered in Courts of Equity for the payment of all the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs-at-law, devisee or devisees of such debtor, and the devisee or devisees of such first-mentioned devisee or devisees, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as they are liable to at the suit of creditors specialty, in which the heirs were bound: provided always, that in the administration of assets by Courts of Equity, under and by virtue of this provision, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands" (*d*).

real assets of trader:

Further, by the stat. 3 & 4 Wm. IV. c. 104, after reciting it is expedient that "the payment of the debts of all persons

3 & 4 W. IV. c. 104.

(*c*) This section is new. Under the stat. of Wm. & M., the specialty creditor could not maintain an action against the devisee alone, there being no heir: Hunting *v.* Sheldrake, 9 M. & W. 256.

(*d*) In the construction of the repealed statute, 47 Geo. III. sess. 2, c. 74, which had the same object, it was held, that the Act applied only to persons who were traders at the time of their decease, and not to persons who have left off trade before they died: Keene *v.* Riley, 3 Meriv. 436. Hitchon *v.* Bennett, 4 Madd. 180.

Freehold and copyhold estates of persons dying after 29th August, 1833, in all cases to be assets for the payment of simple contract or specialty debts.

shall be secured more effectually," it is enacted, "that from and after the passing of this Act, (29th Aug. 1833), when any person shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last Will have charged with or devised subject to the payment of his debts (*e*), the same shall be assets to be administered in Courts of Equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs-at-law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs-at-law, devisee or devisees of any person or persons who died seised of freehold estates, was or were before the passing of this Act liable to in respect of such freehold estates, at the suit of creditors by specialty in which the heirs were bound: Provided always, that in the administration of assets by Courts of Equity, under and by virtue of this Act, all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands."

The statutes 1 W. IV. c. 47, and 3 & 4 W. IV. c. 104, do not charge the real assets, but make the heir or devisee personally liable.

It was held by Sir L. Shadwell, V. C. in *Spackman* v. *Timbrell* (*f*), that the repealed statutes (3 W. & M. c. 14, and 47 Geo. III. sess. 2, c. 74) did not charge the real assets descended or devised with the debts of the ancestor, but only made the heir or devisee liable, *personally*, to answer for the value of the assets descended or devised: Therefore, where H., who was a trader at his death, and indebted by specialty and simple contract, devised freehold estates to his son in fee; and the son, on his marriage, settled the estates on his wife and children, and afterwards died; his Honor decided that

(*e*) See Ball *v.* Harris, 4 Mylne & Cr. 268.

(*f*) 8 Sim. 253

the son's widow and children were entitled to hold the estates discharged from the debts of the father. So in *Richardson* v. *Horton* (*g*), a settlement by the heir, upon his marriage, of the ancestor's estates was supported against the claims of the specialty creditors of such ancestor: And Lord Langdale, M.R., laid down that, though by taking proper proceedings, the specialty creditors may obtain payment out of the descended or devised real estate in the hands of the heir or devisee, yet if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee, the land is not liable, though the heir or devisee remains personally liable, to the extent of the value of the land alienated. And there does not appear to be any reason why these decisions should not be applied to the construction of the statutes now in operation (1 Wm. IV. c. 47, and 3 & 4 Wm. IV. c. 104) (*h*).

Primary liability of personal estate to debts of every description:

It is, however, a well known rule, that, as between the real and personal representatives of all persons deceased, the personal estate in the hands of the executor or administrator is the primary and natural fund, which must be resorted to in the first instance, for the payment of debts, of every description, contracted by the testator or intestate.

But it is clear, that this principle can only regulate the equitable administration of assets, and does not extend to the legal control of the creditor of the deceased: for it is discretionary with him, if his debt is of a nature to bind both the real and personal estate, whether he will resort to the personal estate in the hands of the executor, or to the real estate descended or devised: Hence, if the obligee of a bond bring

(*g*) 7 Beav. 112.

(*h*) But it has been held that the stat. 3 & 4 Wm. IV. c. 104, make the lands themselves, and not merely the estate or interest of the deceased, assets for the payment of his debts: Therefore if he dies without heirs, they are made assets against the lord claiming by escheat, notwithstanding his right is by title paramount: Evans *v.* Brown, 5 Beav. 114. Downe *v.* Morris, 3 Hare, 399. In order to obtain a decree for a sale for payment of the debts, it is not necessary that the bill should be filed by a creditor: Dinning *v.* Henderson, 2 Coll. 330.

an action of debt against the heir, he cannot plead that there is an executor who has assets (*i*).

consequent right of heir or devisee to have the real estate exonerated by the personal.

In order, therefore, to support and enforce the primary liability of the personal estate, as between the representatives of the deceased debtor, it is an established rule in equity, that if the creditor proceeds against the real estate, descended or devised, the heir or devisee, who has sustained the loss, shall be allowed to stand in the place of the specialty creditor, to reimburse himself out of the personal estate in the hands of the executor (*k*): provided such reimbursement will not prejudice *any of the creditors, or any other party having an equal or a more favoured claim* than the heir or devisee respectively.

Thus, if the testator enters into a bond for himself and his heirs, and dies, and the obligee proceeds against the heir, and compels him to pay the debt out of the real assets, the heir may recover it out of the assets in the hands of the executor (*l*). And this exoneration is extended not only to the *hæres natus*, the heir-at-law, but also to the *hæres factus*, the general devisee (*m*), or a particular devisee (*n*).

(*i*) Bro. Assets *per* Descent, 33. Davy *v.* Pepys, Plowd. 439, b. Quarles *v.* Capell, Dyer, 204, b. Davies *v.* Churchman, 3 Lev. 189. Galton *v.* Hancock, 2 Atk. 426.

(*k*) Treat. Eq. B. 3, c. 2, s. 1. Accordingly, where a person domiciled in England, who was indebted in money upon bond, died intestate, leaving real estate in Scotland, and the bond debts were paid by the heir out of the produce of the real estate in Scotland; Lord Langdale, M. R., held, that the right of relief or demand against the personal estate, which, by the law of Scotland, is given to the heir who has paid moveable debts, is capable of being made available in England: Winchelsea *v.* Garetty, 2 Keen, 293. And in all cases, where, in the course of administrations in different countries, the question arises whether particular debts are properly and ultimately payable out of the personal estate, or are chargeable on the real estate, of the deceased, the law of his domicil will govern in cases of intestacy, and, in cases of testacy, his intention. Story Confl. Ch. xiii. s. 528.

(*l*) Armitage *v.* Metcalf, 1 Chanc. Cas. 74. Anon. 2 Chanc. Cas. 5. Treat. Eq. B. 3, c. 2, s. 1.

(*m*) Lutkins *v.* Leigh, Cas. temp. Talb. 54. Galton *v.* Hancock, 2 Atk. 436.

(*n*) Pockley *v.* Pockley, 2 Chanc. Cas. 84. S. C. *nomine* Popley *v.* Popley, 1 Vern. 36. Galton *v.* Hancock, 2 Atk. 436. Fonbl. Treat. Eq. B. 3, c. 2, s. 3, note (*e*).

Again, it is discretionary with a mortgagee, whether he will proceed, for the recovery of his mortgage debt, against the mortgaged land which has come to the heir or devisee of the mortgagor, or against his executor: But if the mortgagee recovers against the land, the heir or devisee shall be reimbursed out of the personal estate of the mortgagor (*o*).

But the land cannot be exonerated out of the personal estate to the prejudice of any person having a prior claim to be satisfied: And therefore the heir or devisee shall not stand in the place of the mortgagee against the personal assets, if by so doing he would disappoint any creditor (*p*),

(*o*) Cope *v.* Cope, 2 Salk. 449. Howel *v.* Price, 1 P. Wms. 292. Johnson *v.* Milksopp, 2 Vern. 112. Lutkins *v.* Leigh, Cas. temp. Talb. 54. Galton *v.* Hancock, 2 Atk. 436. And it will make no difference, that the devise is of the lands *subject to the incumbrances thereon;* for such a qualification is no more than what is implied; since the testator could not devise them otherwise: Serle *v.* St. Eloy, 2 P. Wms. 386. Bickham *v.* Cruttwell, 3 Mylne & Cr. 769. Accordingly, where a testator directed estates to be sold, and the produce to be applied in payment of the mortgages due from him, and the residue of the produce to be considered and applied as part of the residue of his personal estate; and he gave and devised the residue of his real and personal estate upon trust, after payment of his just debts, for the benefit of all his children; and the testator afterwards, by a codicil, confined the residuary gift of the produce of the estates directed to be sold, to his younger children; it was held, that the devisees of the produce of the real estate directed to be sold were entitled to have the personal estate applied in payment of the mortgages; because the gift was in effect a gift of the estates subject to the mortgages; and the gift of an estate, subject to a mortgage, does not deprive the devisee of the right to satisfaction of the mortgage out of the personal estate: Wythe *v.* Henniker, 2 M. & K. 635. But where a testator, having an estate subject to a mortgage of 4460*l.* created by himself, devised it to A. B. in fee "he paying the mortgage thereon;" and devised his residuary real and personal estates to trustees for the payment of his debts, and he gave to the mortgagee, through the medium of his executors, 2000*l.* to exonerate the estate; it was held that the words "he paying the mortgage thereon," imposed a duty on the devisee, and amounted to a direction or condition that he should pay the mortgage, or take the estate subject to the burden upon it, so far as the same exceeded 2000*l.*: Lockhart *v.* Hardy, 9 Beav. 379.

(*p*) Bartholomew *v.* May, 1 Atk. 487.

or any legatee, except the residuary legatee (*q*), or his wife's claim to *paraphernalia* (*r*).

It has, indeed, been laid down, as a general proposition, that the equity, to have the personal estate applied to the exoneration of the real, subsists only between the heir or devisee, and the residuary legatee, and not against specific or general legatees (*s*). And this is unquestionably true with respect to the exoneration of the heir (*t*). But it appears to be clear that if a creditor, with a *general* lien on the land, as a mere bond creditor, recovers the bond debt against the real estate *devised*, the devisee will be entitled to exoneration out of the personal estate, to the disappointment of general legacies (*u*). —— Whether he would also be entitled to exoneration to the disappointment of *specific* legacies, is a question which, for some time, was doubtful (*v*). But it seems to be now settled, that the devisee would be entitled to compel the specific legatees to *contribute* to the payment of the debt, but not wholly to exonerate the land (*w*).

It must be further observed, that the exoneration of the real estate out of the personal is confined to cases, where

(*q*) O'Neal *v.* Mead, 1 P. Wms. 693. Lutkins *v.* Leigh, Cas. temp. Talb. 53. Davis *v.* Gardiner, 2 P. Wms. 190. Rider *v.* Wager, 2 P. Wms. 335. *A fortiori*, a specific legatee of a mortgaged leasehold shall not have contribution towards his mortgage from other specific legatees of leasehold: Halliwell *v.* Tanner, 1 Russ. & M. 633. Wythe *v.* Henniker, 2 M. & K. 635. Johnson *v.* Child, 4 Hare, 87.

(*r*) Tipping *v.* Tipping, 1 P. Wms. 736. *Ante*, p. 647.

(*s*) Hamilton *v.* Worley, 2 Ves. Jun. 65. Fonbl. Treat. Eq. B. 3, c. 2, s. 3, note (*e*).

(*t*) Lutkins *v.* Leigh, Cas. temp. Talb. 54. Snelson *v.* Corbet, 3 Atk. 369.

(*u*) It is clear that general legatees cannot marshal the assets so as to stand in the place of a mere bond creditor against the land *devised*: See *post*, p. 1460, 1461: and therefore it seems to follow, that the devisee shall be exonerated out of the general legacies: Besides, if it were otherwise, it would have the effect of making a devisee of land, who in every case is as much a specific devisee as a legatee of a specific legacy, bear the burthen of the debt, before the general pecuniary legatees.

(*v*) See Cornewall *v.* Cornewall, 12 Sim. 298.

(*w*) Long *v.* Short, 1 P. Wms. 403. Young *v.* Hassard, 1 Jones & Lat. 466. Tombs *v.* Roch, 2 Coll. 490. Gervis *v.* Gervis, 14 Sim. 654.

the claim in question is the *proper debt* of the deceased: for if it be not so, his heir or devisee must take the land *cum onere:* Thus if a settlor covenants for payment of the portions of children, or widow's jointure (*x*), or if a person makes a voluntary gift, by way of charge, and covenants for the payment of the money (*y*), the land will be the primary fund for payment; for in these cases the charge is in its nature real and the covenant only an additional security. Accordingly, in *Graves* v. *Hicks* (*z*), a father having agreed to secure a marriage portion for his daughter, mortgaged part of his estates for that purpose, and covenanted to pay the money: By his Will he directed his debts to be paid, first out of the residue of his personal estate, then, out of his money in the funds, and lastly, out of his residuary real estates: And Sir L. Shadwell, V. C., held, that the mortgaged estate was not to be exonerated from the portion, out of the personal estate; his Honor being of opinion that, by the plain intention of the parties, the covenant of the father was meant to be auxiliary only to the charge upon his land; and that what he contracted to do, was to give security for the marriage portion (*a*).

Again, if a man buys an estate, subject to an existing mortgage, the land remains the proper fund for it's discharge, and the heir or devisee of the purchaser cannot throw the debt on the personal estate, as the primary fund for payment (*b*). So if an estate descends on an heir-at-law (*c*), or is devised (*d*), charged with a mortgaged debt, and the heir or devisee dies, leaving the debt unpaid, the land will be the fund for it's payment, and not the personal estate of the deceased heir or devisee: Thus in *Scott* v. *Beecher* (*e*), a

(*x*) Lanoy *v.* Athol, 2 Atk. 444. Edwards *v.* Freeman, 2 P. Wms. 438. Coventry *v.* Coventry, 2 P. Wms. 222.

(*y*) Wilson *v.* Darlington, 1 Cox, 172. S. C. 2 P. Wms. 664, in the notes. *Ex parte* Digby, 1 Jac. 253. Coote, Mortg. 588, 2d edition.

(*z*) 6 Sim. 398.

(*a*) See also Ibbetson *v.* Ibbetson, 12 Sim. 206.

(*b*) Coote, Mortg. 578, 2d edit.

(*c*) Noel *v.* Lord Henley, Daniell's Rep. 322. S. C. 7 Price, 241. S. C. in Dom. Proc. 12 Price, 213. Coote, Mortg. 583, 584, 2d edition.

(*d*) 2 P. Wms. 664, note to Evelyn *v.* Evelyn. Coote, Mortg. 584, 2d ed.

(*e*) 5 Madd. 96. Coote, Mortg. 584, 2d edition.

person seised of an estate, subject to a mortgage created by himself, devised all his real and personal estate to his wife absolutely, and appointed her executrix: The residuary personal estate was more than sufficient to discharge the mortgage, which was, however, continued on the estate during the life of the widow, who died intestate, leaving her brother her heir-at-law: Administration *de bonis non* to the effects of the husband, and also administration to the effects of the wife, were granted to the defendants, against whom the brother filed his bill, claiming to be indemnified against the mortgage, out of the personal estate of the husband: But Sir John Leach, V. C., rejected the claim, chiefly on the ground, that although the residuary personal estate of the husband had, by the Will, become the property of the wife, yet the debt of her husband, not having become her debt, her heir-at-law had no claim to be indemnified out of her personal estate against the debt of another person (*f*).

And even a direct and original mortgage made by the person to whom land has descended or been devised, will not operate to make his personal estate the primary fund for the discharge of the mortgage debt, if the money borrowed was for the purpose of paying off the debts (*g*) or legacies (*h*) of the ancestor or devisor (*i*); and the law will be the same, if a bond (*k*) or note of hand (*l*) is given by the heir or devisee for the payment of debts or legacies charged on the land. However, in the case of *Barham* v. *Lord Thanet* (*m*), a mort-

(*f*) See also *Acc.* Lord Ilchester *v.* Lord Carnarvon, 1 Beav. 209. Lord Clarendon *v.* Barham, 1 Y. & Coll. Ch. C. 688.

(*g*) Tankerville *v.* Fawcett, 1 Cox, 237. S. C. 2 Bro. Chanc. Cas. 57. Perkyns *v.* Bayntun, 2 P. Wms. 664, (note to Evelyn *v.* Evelyn). Coote, Mortg. 586, 2d edition.

(*h*) Basset *v.* Percival, 1 Cox, 268. S. C. 2 P. Wms. 664, note. Mattheson *v.* Hardwicke, 2 P. Wms. 665, note. Billinghurst *v.* Walker, 2 Bro. Chanc. Cas. 604. Hamilton *v.* Worley, 2 Ves. Jun. 62. Coote, Mortg. 586, 2d edition.

(*i*) 2 Bro. Chanc. Cas. 604. 1 Cox, 268. Coote, Mortg. 586, 2d edition.

(*k*) Billinghurst *v.* Walker, 2 Bro. C. C. 604. Woods *v.* Huntingford, 3 Ves. 131, by Lord Alvanley. Coote, Mortg. 587, 2d edition.

(*l*) Mattheson *v.* Hardwicke, 2 P. Wms. 665, note.

(*m*) 3 M. & K. 607.

gage was made of the manor and lands of Silsden and other valuable estates, to secure a debt of 80,000*l.* and interest: The mortgagor died intestate, leaving the debt wholly unpaid; and his heir, being pressed to pay off 30,000*l.* part of the 80,000*l.*, procured a person to advance the sum required for the purpose, and the original mortgagee thereupon joined with the heir of the mortgagor in a deed conveying the manor and lands of Silsden to the person making the advance, subject to a proviso for redemption at the end of five years, being an equity of redemption altogether different from the prior equity of redemption, and the interest reserved being five per cent. instead of four and a half per cent., which was the rate reserved in the original mortgage: And it was held by Sir J. Leach, M. R., that it was in effect a new mortgage by the heir, and the 30,000*l.* was thereby constituted his personal debt.

It must here be observed, that although the debt is not originally the debt of the party, yet it is optional in him, by sufficient testimony of intention, to render the debt *his own*: in which case his personal estate will, as between his real and personal representatives, become primarily liable to discharge the debt.

But it requires clear evidence of intention to make the debt his own: Thus a charge by Will of debts, generally, on his real and *personal* estate, will not be sufficient of itself to shift the *onus* from land which came to him already mortgaged, whether by descent, or by devise, or by sale (*n*). So, in cases where the lands came to the deceased by descent or devise, his concurrence in the deed, and his personal covenant for payment of the money, on assignment or transfer of the mortgage, being only by way of additional security to the mortgagee, will not alter the burthen, as between his real and

(*n*) Lawson *v.* Hudson, 1 Bro. Chan. Cas. 58. S. C. 3 Bro. P. C. 424, Toml. edit. Ancaster *v.* Mayer, 1 Bro. Chanc. Cas. 454. Hamilton *v.* Worley, 2 Ves. Jun. 62. S. C. 4 Bro. Chanc. Cas. 199. Butler *v.* Butler, 5 Ves. 534. Lord Ilchester *v.* Lord Carnarvon, 1 Beav. 209. See *infra*.

personal representatives (*o*): The same principle applies, if other estates are added to the security on a further sum being lent (*p*), or if there be a covenant on his part for increasing the rate of interest (*q*). And it seems that if the sums borrowed by him, and added to the original mortgage, be comparatively small, equity will not consider that he had different intentions as to the different sums, but will charge the real estate with the whole (*r*). In case the deceased was a purchaser of the equity of redemption, the rule may, perhaps, be stated to be, that unless the mortgage money form part of the consideration money for the estate, or the purchaser, by communication with the mortgagee, clearly take the mortgage debt on himself, it will be considered, as between his real and personal representatives, a charge on the land (*s*): And the mere covenanting with the mortgagor to pay the debt will not make it his personal debt (*t*): If, however, the purchaser

(*o*) Bagot *v.* Oughton, 1 P. Wms. 347. Evelyn *v.* Evelyn, 2 P. Wms. 664. Leman *v.* Newnham, 1 Ves. Sen. 52. Barham *v.* Lord Thanet, 3 M. & K. 607, 622. Lord Ilchester *v.* Lord Carnarvon, 1 Beav. 209. So where there had been a mortgage of gavelkind lands, which upon the death of the mortgagee intestate, descended to his two brothers as coparceners, and the elder brother, who was the common law heir of the mortgagor, purchased of the other brother his moiety of the gavelkind lands, and covenanted with him to pay the whole mortgage money; it was held that he did not thereby make the mortgage money his personal debt: Barham *v.* Lord Thanet, 3 M. & K. 607.

(*p*) Ancaster *v.* Mayer, 1 Bro. Chanc. Cas. 454, 464.

(*q*) Shafto *v.* Shafto, 1 Cox, 607. 2 P. Wms. 664, note.

(*r*) Lewis *v.* Nangle, Ambl. 150. S. C. 2 P. Wms. 664, note. Coote, Mortg. 585, 586, 2d edition: This latter doctrine must, it should seem, be received with much caution: Coote, Mortg. 586, 2d edition.

(*s*) 1 Sugd. V. & P. 310, 10th edit. Where, however, the deceased described himself, in his Will, as having purchased a property, subject to a mortgage, but it appeared, on an examination of the history of the transaction, that he was the person who owed the money, although, as between himself and the mortgagee, he did not appear as the party who contracted the debt, Lord Cottenham held, that the personal estate was primarily liable: For that if a man borrows money in the name of a trustee, the debt is, in one way or other, his from the commencement, either to the person who advances the money, or to the trustee in whose name it is borrowed: Bickham *v.* Cruttwell, 3 Mylne & Cr. 763.

(*t*) 1 Sugd. V. & P. 310, 10th edit. "I entirely concur," said

borrows a sum of money to enable him to complete his contract, and the estate is, on the purchase, limited to the lender either for a term of years, or in fee, by way of mortgage, the debt is the proper debt of the purchaser, and his personal estate will be primarily liable, even although part of the money borrowed be applied in discharge of an existing mortgage (*u*).

Exoneration of real estate charged with debts and legacies:

It frequently occurs that the deceased has devised his real estate for the payment of his debts, or of his debts and legacies, or has charged his real estate with their payment (*v*). With respect to the exoneration of the real estate from legacies, the general rule is equally clear, as it is with respect to debts, that the personal estate is the first and natural fund for the payment of them; and the real estate is only to be resorted to in aid of the personal. Therefore, even in cases where there is no doubt as to debts and legacies being effectually charged by the testator on the real estate, yet the

Sir John Leach, M. R., in Barham *v.* Lord Thanet, 3 M. & K. 624, "in the opinions expressed by Lord Alvanley and Sir William Grant, that the purchaser of an estate subject to a mortgage, who has no contract or communication with the mortgagee, and who merely covenants with the vendor to pay the mortgage debt, does not thereby make the mortgage-money his personal debt; and that his covenant is to be considered simply as an indemnity to the vendor, who has permitted the amount of the mortgage-money to be deducted from the price." A distinction has been made between the case of a man contracting to purchase a mere equity of redemption, and a contract for the purchase of an estate for a given sum, of which the mortgage debt forms part, and which, on the purchase, is discounted out of the consideration money; in which latter case, it has been considered, the personal estate of the purchaser will be the primary fund: Parsons *v.* Freeman, Ambl. 116. S. C. 2 P. Wms. 664, note (1). Belvidere *v.* Rochfort, 5 Bro. P. C. 299, Toml. edit.: But see Coote, Mortg. 579, 2d edition. 2 Jarman on Wills, 561, *et seq.*

(*u*) Waring *v.* Ward, 5 Ves. 670. S. C. 7 Ves. 332. Coote, Mortg. 578, 2d edition. See also Marquis of Bute *v.* Cunynghame, 2 Russ. Chanc. Cas. 275.

(*v*) As to what shall be sufficient to charge the real estate with debts and legacies, see 1 Rop. Leg. 571, *et seq.* 3d edit. 2 Pow. Dev. 644, *et seq.* Jarman's edit. 2 Jarman on Wills, 509, *et seq.*

personal estate remains undischarged from it's primary liability to those claims (*w*).

Accordingly it has long been the settled rule of Courts of Equity, that the direction of the testator to sell or mortgage his real estate for the payment of his debts and legacies, is not alone evidence of the intention of the testator that the personal estate should be exempt from those charges, and amounts only to a declaration that the real estate shall be so applied to the extent in which the personal estate, which by law is the primary fund, shall be insufficient for those purposes (*x*).

Nevertheless, it is clear, that a testator may, if he pleases, give the personal estate, as against his heir or any other real representative, discharged from the payment of his debts and legacies (*y*): And in such case the rules of exoneration in favour of the heir or the devisee, which have hitherto been the subject of this chapter, altogether fail of application.

A most important question, therefore, arises, *viz.*, what is the mode of expression, on the part of the testator, which will give the personal estate exempt from such payment, in contravention of the ordinary rule that such estate is first liable.

In the earlier cases, it was laid down, that express words of exemption were necessary (*z*): But this rule has been relaxed by subsequent decisions: and it is now settled that the personal fund will be exempted, if the intention of the

(*w*) Davies *v.* Ashford, 15 Sim. 42. Roberts *v.* Roberts, 13 Sim. 336.

(*x*) Rhodes *v.* Rudge, 1 Sim. 84, 85. Walker *v.* Hardwick, 1 M. & K. 396.

(*y*) Ancaster *v.* Mayer, 1 Bro. Chanc. Cas. 462. See Fisher *v.* Fisher, 2 Keen, 610, as to the consequence, in such a case, of a partial failure, by lapse, of the devise of the real estate by the death of one of the devisees in the testator's lifetime.

(*z*) Fereyes *v.* Robertson, Bunb. 302. Dolman *v.* Smith, Prec. Chan. 458.

testator in it's favour can be collected from a sound interpretation put upon the whole Will; in other words, if there appears from the whole testamentary disposition taken together, an intention on the part of the testator so expressed, as to convince a *judicial* mind, that it was meant, not merely to charge the real estate, but so to charge it as to exempt the personal (*a*).

It is obvious, therefore, that it is impossible to lay down any general rule as a guide upon this question: since the construction of every Will, in which the point arises, must depend merely upon the individual circumstances of the particular case: and in these, as in all other cases of inference or implication, except necessary or logical implication, there may be a difference of opinion between the most eminent Judges who are called on to consider the circumstances. The difficulty with which the whole subject is surrounded is demonstrated by the following observations of Lord Eldon, in *Bootle* v. *Blundell* (*b*): "On a comparison of all the cases which have arisen, it is scarcely possible to find any two in which the Court altogether agrees with itself; there being scarcely a single circumstance that is considered in one case as a ground of inference in favour of the intention, but it is considered in other cases as against the same inference; and I can find no rule deducible from all that has been said on the subject, but this (which appears to be a rule supported by all the cases taken together), namely, that since it has been laid down that express words are not necessary to exempt the personal estate, there must be in the Will that which is sometimes denominated 'evident demonstration,' sometimes 'plain intention,' and 'necessary implication,' to operate that exemption" (*c*).

In some of the earlier cases, evidence *dehors* the will was received, to shew the testator's intention: But on this point, Lord Eldon expressed his clear opinion, in *Bootle* v. *Blun-*

(*a*) By Lord Eldon, in Bootle *v.* Blundell, 1 Meriv. 230. Dawes *v.* Scott, 5 Russ. 32.

(*b*) 1 Meriv. 219.

(*c*) See the observations made on this passage by Knight Bruce, V. C., in Collis *v.* Robins, 1 De Gex & Sm. 141.

dell (*d*), that with regard to circumstances *dehors* the Will, which have been sometimes called in to assist in explaining it, such as the respective amount of the real and personal estate, the greater or less degree of personal favour which the testator may be presumed to have entertained towards this or that object of his bounty, and others of that nature, they ought all to be set aside in the consideration of a question depending on a Will, such question being fit to be decided only by an examination of the whole Will taken together (*e*).

The principle which has the greatest influence on the determination of this question, and which has been uniformly supported by all the cases, is, that it is not enough for the testator to have charged his real estate with, or in any manner devoted it to, the payment of his debts and legacies: The rule of construction is such as aims at finding, not that the real estate is charged, but that the personal estate is discharged (*f*). In other words, it is not by an intention to charge the real, but by a plain intention to discharge the personal estate, that the question is to be decided (*g*).

Thus it has been held, that a mere bequest of residuary personal estate by the term "residue" (*h*), or "*all* my personal estate" (*i*), or a like bequest, after previous sums or articles given out of it (*k*), or as of personal property "not otherwise disposed of" (*l*), is not singly sufficient to exempt the personal fund from it's natural primary obligation to pay debts and legacies, although the real estate be also subjected to

(*d*) 1 Meriv. 216.

(*e*) See also Inchiquin *v.* French, 1 Cox, 9. Stephenson *v.* Heathcote, 1 Eden, 39. Andrews *v.* Emmot, 2 Bro. Chanc. Cas. 297. Standen *v.* Standen, 2 Ves. Jun. 589. Coote *v.* Coote, 3 Jones & Lat. 175.

(*f*) 1 Meriv. 220.

(*g*) 1 Meriv. 230. Bickham *v.* Cruttwell, 3 Mylne & Cr. 763. Collis *v.* Robins, 1 De Gex *v.* Sm. 131, 141.

(*h*) Samwell *v.* Wake, 1 Bro. Chanc. Cas. 144. Tait *v.* Lord Northwick, 4 Ves. 824.

(*i*) Harewood *v.* Child, cited Cas. temp. Talb. 204. Haslewood *v.* Pope, 3 P. Wms. 324. Brummel *v.* Prothero, 3 Ves. 111. Aldridge *v.* Wallscourt, 1 Ball & Beat. 312: but see *post*, p. 1455.

(*k*) Brydges *v.* Phillips, 6 Ves. 567.

(*l*) Hartley *v.* Hurle, 5 Ves. 540.

their payment by the Will. Again, charging the real estate ever so anxiously for the discharge of debts, will not of itself exempt the personal (*m*): And whether the whole real estate be charged with debts and legacies (*n*), or a sufficient part of it (*o*), or a specific part of it (*p*), or it be given in trust to pay debts and legacies by sale of it (*q*), or a term of years be created out of it for those purposes (*r*), still the personal estate must be *first* applied. Again, neither a devise for payment of debts and legacies out of the rents of real estates (*s*), nor a devise on condition of the devisee paying the debts (*t*), nor a mere charge of funeral and testamentary expenses, as well as debts, on the land (*u*), nor an express charge of only *some* of the debts upon the *personalty* (*v*), will exempt the personal fund from it's legal primary liability (*w*).

A very strong inference against the claim of exemption of the personal estate, appears to be the circumstance of it's falling to the executor for his benefit *virtute officii* (*x*), prior to the statute 1 Wm. IV., c. 40 (*y*), or in an instance of the gift of the personal estate to the executor as a legacy, and the appointment of him to be executor, being in one and the same sentence (*z*): but the converse of the proposition above

(*m*) By Lord Loughborough, in Tait *v.* Northwick, 4 Ves. 824.

(*n*) Dolman *v.* Smith, Prec. Chan. 456.

(*o*) Inchiquin *v.* French, Ambl. 33, 37. S. C. 1 Cox, 1. Rhodes *v.* Rudge, 1 Sim. 79.

(*p*) White *v.* White, 2 Vern. 43. Bridgman *v.* Dove, 3 Atk. 201. Fitzgerald *v.* Field, 1 Russ. Chanc. Cas. 428.

(*q*) Inchiquin *v.* French, 1 Cox, 1. S. C. Ambl. 33. Hancox *v.* Abbey, 11 Ves. 186.

(*r*) Tower *v.* Rous, 18 Ves. 132.

(*s*) Hartley *v.* Hurle, 5 Ves. 540.

(*t*) Bridgman *v.* Dove, 3 Atk. 201.

(*u*) Walker *v.* Jackson, 2 Atk. 626. Stephenson *v.* Heathcote, 1 Eden, 38. Brydges *v.* Phillips, 6 Ves. 570. See also Gray *v.* Minnethorpe, 3 Ves. 103. Hartley *v.* Hurle, 5 Ves. 540. M'Cleland *v.* Shaw, 2 Scho. & Lef. 538. Bootle *v.* Blundell, 1 Meriv. 228, 229: but see *post*, p. 1454.

(*v*) Watson *v.* Brickwood, 9 Ves. 447.

(*w*) 1 Rop. Leg. 609, 3d edit.

(*x*) Gray *v.* Minnethorp, 3 Ves. 106. Coote, Mortg. 547, 2d edit.

(*y*) See *ante*, p. 1264.

(*z*) Bromhall *v.* Wilbraham, Cas. temp. Talb. 274. Rhodes *v.* Rudge, 1 Sim. 79. Coote, Mortg. 548, 2d edition.

stated, *i. e.* the gift of the legacy, and the appointment of the legatee to be executor, being in distinct sentences, will not of itself afford an inference for the exemption of the personal estate. Cases are, however, to be found, in which the executor has been held to take the personal estate, or residue of a personal estate, as a specific legacy, exempt from the payment of debts (*a*).

Again, the circumstance of the *same persons* being appointed trustees and executors, has had considerable weight in inducing Judges to draw an inference, that the personal estate is not to be exempted (*b*): and Lord Alvanley has remarked (*c*), that the circumstance of the trustees not being the executors, affords a strong inference as to the real intention, and is always favourable to the exemption of the personal estate (*d*).

It has been already stated, that a *mere charge* of funeral expenses upon the real estate will not exempt the personal fund from it's primary liability to debts, &c. However, such a charge, in concurrence *with other circumstances*, has, in some cases, had importance attached to it, in exempting the personal estate from debts, &c., upon the reasoning, that, as funeral expenses primarily attach themselves to the personal fund in the hands of executors, the testator by transferring that duty from them to the trustees of the real estate, must have intended to give the whole of the personalty to the legatee, specifically discharged from every obligation to which it was naturally liable (*e*). On the other hand, in some instances, the omission to charge funeral expenses on the real estate has been considered a circumstance of some weight, to shew that the personal estate is not to be exempt, because it shews that the testator intends the personal estate to be charged beyond the particular legacies or charges

(*a*) Hall *v.* Brooker, Gilb. Eq. Rep. 73. Coote, Mortg. 548, 2d edit.

(*b*) Dolman *v.* Smith, Prec. Chan. 456. Coote, Mortg. 549, 2d edit.

(*c*) Burton *v.* Knowlton, 3 Ves. 108.

(*d*) Coote, Mortg. 549, 2d edit.

(*e*) Burton *v.* Knowlton, 3 Ves. 108. See also Greene *v.* Greene, 4 Madd. 157. Michell *v.* Michell, 5 Madd. 69.

mentioned in the Will, and being once broken in upon, the argument of it's being specific is destroyed (*f*).

Again, there has been occasion to state that the personalty is not exempted by the fact of the debts, &c. being charged upon the real estate, and a mere concomitant bequest of *all* the personal estate (*g*). However, in several instances, the circumstance of such a bequest, as distinguished from a gift of the *residue*, has been treated as having weight (*h*).

The limits of this Treatise will not allow that the different instances, in which the intention of the testator in favour of the exemption of the personal estate has been established, should be stated at large. The principal decisions of that nature will be found collected in the note below (*i*), and the attention of the reader is particularly directed to the case of *Bootle* v. *Blundell* (*k*), in which almost every circumstance occurred which had been the subject of judicial observations

(*f*) Brydges *v.* Philips, 6 Ves. 570. Coote, Mortg. 551, 2d edit.

(*g*) *Ante*, p. 1452.

(*h*) Tower *v.* Rous, 18 Ves. 139. Bootle *v.* Blundell, 1 Meriv. 228. Greene *v.* Greene, 4 Madd. 148. Michell *v.* Michell, 5 Madd. 69.

(*i*) Waise *v.* Whitfield, 8 Vin. Abr. 437, tit. Devise, (Z. d.) pl. 19. Adams *v.* Meyrick, 1 Eq. Cas. Abr. 271, pl. 13. March *v.* Fowke, Finch, Rep. 414. Wainwright *v.* Bendlowes, 2 Vern. 718. S. C. Prec. Chanc. 451. Anderton *v.* Cooke, cited 1 Bro. Chanc. Cas. 457. Bamfield *v.* Wyndham, Prec. Chanc. 101. Bicknel *v.* Page, 2 Atk. 79. Kynaston *v.* Kynaston, 1 Bro. Chanc. Cas. 457, *in notis*. Holliday *v.* Bowman, cited 1 Bro. Chanc. Cas. 145. Gaskill *v.* Hough, cited 3 Ves. 110. Atty. Gen. *v.* Barkham, cited Cas. temp. Talb. 206. Stapleton *v.* Colvile, Cas. temp. Talb. 202. Phipps *v.* Annesley, 2 Atk. 57. Bicknel *v.* Page, 2 Atk. 79. Walker *v.* Jackson, 2 Atk. 624. S. C. 1 Wils. 24. Williams *v.* Bishop of Llandaff, 1 Cox, 254. Webb *v.* Jones, 1 Cox, 245. S. C. 2 Bro. Chanc. Cas. 60. Burton *v.* Knowlton, 3 Ves. 107. Hancox *v.* Abbey, 11 Ves. 179. Bootle *v.* Blundell, 1 Meriv. 193. Gittins *v.* Steele, 1 Swanst. 24. Greene *v.* Greene, 4 Madd. 148. Michell *v.* Michell, 5 Madd. 69. Welby *v.* Rockliffe, 1 Russ. & M. 571. Driver *v.* Ferrand, *ibid.* 681. Clutterbuck *v.* Clutterbuck, 1 M. & K. 15. Blount *v.* Hipkins, 7 Sim. 43. Vandeleur *v.* Vandeleur, 9 Bligh, 157. Jones *v.* Bruce, 11 Sim. 221. And see the cases stated 1 Rop. Leg. 610, *et seq.* 3d edit. 2 Pow. Dev. 681, *et seq.* Jarman's edit. Coote, Mortg. 544, *et seq.* 2d edit. 2 Jarm. Dev. 564, *et seq.* Ashby *v.* Ashby, 1 Coll. 549. Bateman *v.* Roden, 1 Jones & Lat. 356. Lamphier *v.* Despard, 2 Dr. & Warr. 59. Coote *v.* Coote, 3 Jones & Lat. 175.

(*k*) 1 Meriv. 193.

in preceding cases, and upon which different Judges had formed different opinions as to their effect singly to exonerate the personal estate: and Lord Eldon, after going through a review of those cases, and making full observations upon every part of the Will, determined that the personal estate was exonerated from the primary liability to pay debts.

legacies given out of a particular fund:

It is necessary, before leaving this subject, to advert to a distinction which exists with respect to it, between debts and legacies. It has already appeared, that a pecuniary legacy, given generally, without specification of a particular fund for it's payment, is primarily chargeable upon the personal estate, although, in other parts of the Will, the real estate is made expressly liable to it; the rule of law considering the personal estate as the natural fund to bear such a charge (*l*): But if the pecuniary legacy be not given generally, but given only out of a particular fund, there the legatee can have recourse only to the particular fund (*m*): and in this, there is an essential difference between debts and legacies (*n*).

Mixed fund of real and personal estate directed to be applied to payment of debts and legacies.

Where a testator creates a mixed and general fund from real and personal estate, and directs that fund to be applied in payment of debts and legacies, the real and the personal estate must contribute, in proportion to their relative amounts, to the payment of the debts and legacies; and if some of the legacies fail by lapse or otherwise, that part of the fund which would have been applicable to those purposes being undisposed of belongs, as far as it is composed of real estate, to the heir, and, as far as it is composed of personal estate, to the next of kin (*o*).

(*l*) *Ante*, p. 1450, 1452.

(*m*) Kirke *v.* Kirke, 4 Russ. Chan. Cas. 435, 449. See Spurway *v.* Glynn, 9 Ves. 483. Hancox *v.* Abbey, 11 Ves. 179. Gittins *v.* Steele, 1 Swanst. 24. Rickets *v.* Ladley, 3 Russ. Chanc. Cas. 418. Roberts *v.* Roberts, 13 Sim. 336. But see Mann *v.* Copeland, and the other cases cited, *ante*, p. 1004, 1005. See also Colvile *v.* Middleton, 3 Beav. 570.

(*n*) 4 Russ. Chanc. Cas. 449. See Noel *v.* Lord Henley, 7 Price, 241. S. C. Daniell, 211. S. C. in Dom. Proc. 12 Price, 213.

(*o*) Roberts *v.* Walker, 1 Russ. & M. 752. Dunk *v.* Fenner, 2

SECT. II.

Of Marshalling the Assets in favour of Creditors and Legatees.

It is a general principle of equity, that if a claimant has two funds to which he may resort, a person, having an interest in one only, has a right to compel the former to resort to the other; if that is necessary for the satisfaction of both (*p*). This principle is not confined to the administration of the estate of a person deceased, but applies wherever the election of a party having two funds will disappoint the claimant having the single fund: And accordingly, a Court of Equity will, if necessary, control that election, and compel the one to resort to that fund, which the other cannot reach (*q*). But the more general practice is, to protect the claimant on the single fund by marshalling the assets.

In favour of creditors;

Thus if there are creditors of the deceased by specialty, and creditors by simple contract, and the specialty creditors, instead of resorting to the real assets, which they alone can reach (unless the deceased died after the passing of the stat. 3 & 4 Wm. IV. c. 104 (*r*), *i. e.* after the 29th of August, 1833), proceed against the personal estate, to the exclusion of the simple contract creditors, who have no other fund, a Court of Equity will marshall the assets by permitting the simple contract creditors to stand in the place of the specialty creditors against the real assets, so far as the latter shall have exhausted the personal (*s*): And the rule is the same with respect to real assets devised, as those descended (*t*).

Russ. & M. 557. Fourdrin *v.* Gowdey, 3 M. & K. 383. Stocker *v.* Harbin, 3 Beav. 479. Salt *v.* Chattaway, 3 Beav. 576. West *v.* Cole, 4 Y. & Coll. 460. Young *v.* Hassard, 1 Jones & Lat. 466. Barry *v.* Harding, *ibid.* 475. Atty. Gen. *v.* Southgate, 12 Sim. 77.

(*p*) 8 Ves. 388.

(*q*) See Fonbl. Treat. Eq. B. 3, c. 2, s. 6, note (*i*).

(*r*) See *ante*, p. 1439, 1440.

(*s*) But they shall not stand in the place of the specialty creditors as to the interest which would have accrued on the specialty debts if they had remained unsatisfied. Cradock *v.* Piper, 15 Sim. 301.

(*t*) Sagitary *v.* Hyde, 1 Vern. 455. Neave *v.* Alderton, 1 Eq. Cas.

So in a modern case (*u*), the testator died seised of freehold and copyhold estate, both of which were subject to mortgage: The personal estate were exhausted in payment of the mortgage and of two bonds upon which the testator was indebted to the mortgagee: And Lord Eldon held, that the simple contract creditors were entitled to stand in the place of the mortgagee, *pro tanto*, against both the freehold and copyhold estate. So in another case (*v*), the specialty creditors of a deceased mortgagor of copyhold and freehold estate were allowed to stand in the place of the mortgagee against the copyholds, to the extent of the sum which the mortgagee had received from the freehold estate (*w*).

Again, if the vendor of an estate, the contract for which was not completed in the lifetime of the testator, who was the purchaser, is afterwards paid his purchase money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor, with respect to his lien on the estate sold, against the devisee of that estate (*x*).

It may here be observed that in *Greenwood* v. *Taylor* (*y*), Sir John Leach, M. R., appears to have considered, that this principle of equity extends to the case of a specialty creditor, whose debt is also secured by a mortgage, so as to preclude him from proving under a decree in a creditor's suit for the full amount of his debt, but only for so much as the mort-

Abr. 144, pl. 21. Wilson *v.* Fielding, 2 Vern. 763. Galton *v.* Hancock, 2 Atk. 436. Selby *v.* Selby, 4 Russ. Chanc. Cas. 341. So covenantees, who claim under a merely voluntary covenant, have been held entitled, as against devisees, to stand in the place of mortgagees, who have exhausted the fund provided by the testator for the payment of debts: Lomas *v.* Wright, 2 M. & K. 769. But the assets shall not be marshalled against judgment creditors: Sharpe *v.* Lord Scarborough, 4 Ves. 538.

(*u*) Aldrich *v.* Cooper, 8 Ves. 381, overruling Robinson *v.* Tonge, 1 P. Wms. 679, note.

(*v*) Gwynne *v.* Edwards, 2 Russ. Chanc. Cas. 289, *in notis*.

(*w*) The specialty creditors could not otherwise have reached the copyhold: for copyhold estates (previous to the passing of the stat. 3 & 4 Wm. IV. c. 104, see *ante*, p. 1440), were not liable either at law or equity to the testator's debts, further than he had subjected them thereto.

(*x*) Selby *v.* Selby, 4 Russ. Chanc. Cas. 336.

(*y*) 1 Russ. & M. 185.

gaged estate will not extend to pay: In that case, a mortgagee petitioned for the sale of his security, and to be permitted to prove the full amount of his debt, in a suit for the administration of the assets of the deceased mortgagor: But the learned Judge held, that the rule in bankruptcy must be applied (z), and that the mortgagee, who had two funds, as against the other specialty creditors who had but one fund, must resort first to the mortgage security, and could claim against the common fund only what the mortgaged estates was deficient to pay. However, in *Mason* v. *Bogg* (a), Lord Cottenham appeared to doubt the propriety of this decision: And his Lordship observed, that as a mortgagee has a double security, he has a right to proceed against both, and to make the best he can of both; and that it is not easy to see why he should be deprived of this right, because the debtor dies, and dies insolvent (b).

A similar equity will be extended in favour of legatees: in favour of legatees:

(z) In bankruptcy, if a creditor of a bankrupt holds a security on part of the bankrupt's estate, he is not entitled to prove his debt under the commission, without giving up or realizing his security. See 1 Phill. C. C. 56, *In re* Plummer.

(a) 2 M. & Cr. 443.

(b) See also Davis v. Dowding, 2 Keen, 245. Tipping v. Power, 1 Hare, 410. Brocklehurst v. Jessop, 7 Sim. 438. King v. Smith, 2 Hare, 239. Greenwood v. Firth, 2 Hare, 241, note. Aldridge v. Westbrook, 5 Beav. 193. Bonser v. Cox, 6 Beav. 84. Marshall v. M'Aravey, 3 Dr. & W. 232. Cockerell v. Dickens, 3 Moo. Priv. C. 98. Lockhart v. Hardy, 9 Beav. 349. In Rome v. Young, 3 Younge & C. 199, a vendor of an estate had obtained a decree for specific performance, with a declaration that, if the purchase-money was not paid by a given day, the estate should be sold, the proceeds paid to the vendor, and the purchaser be made personally liable in the event of any deficiency: The Master fixed the day of payment, but the purchaser died before that day insolvent, and a creditor's suit was instituted for the administration of his assets: Upon a bill of revivor and supplement filed by the vendor, praying to have the benefit of the creditor's suit as well as his own, Lord Abinger held, that he was not entitled to prove against the general assets of the testator, and at the same time to reserve his lien on the estate contracted to be sold, in case of a deficiency in the general assets: And his Lordship added, that although he agreed with what Lord Cottenham said in Mason v. Bogg, he did not see how it applied to the present case. See also S. C. 4 Y. & Coll. 204. *Accord.*

Thus, where a specialty creditor, who has a general lien on the real estate, as a creditor by bond in which the deceased bound himself and his heirs, receives satisfaction out of the personal estate, and thereby exhausts it so as to leave nothing for the payment of legacies, a legatee shall stand in the place of such specialty creditor as against the real assets which have *descended* to the heir (*c*). "In the case of legatees," said Lord Eldon, in *Aldrich* v. *Cooper* (*d*), "against assets, descended, a legatee has not so strong a claim to this species of equity as a creditor: but the mere bounty of the testator enables the legatee to call for this species of marshalling; that if those creditors, having a right to go to the real estate descended, will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not."

And on the same principle it seems to be clear, that if, since the passing of the stat. 3 & 4 Wm. IV., c. 104 (*e*), by which the real estate is made liable to simple contract debts, a simple contract creditor should receive satisfaction out of the personal estate and thereby exhaust it, the legatees would be allowed to stand in his place against the real assets which have descended.

But where the real estate does not descend to the heir, but is *devised* to a stranger, or to the heir taking as devisee (*f*),

(*c*) Bowaman *v.* Reeve, Prec. Chanc. 578. Lutkins *v.* Leigh, Cas. temp. Talb. 54. Hanby *v.* Roberts, Ambl. 128. S. C. Dick. 105.

(*d*) 8 Ves. 396.

(*e*) *Ante*, p. 1439, 1440.

(*f*) See the MS. note of Serjeant Hill, in Blunt's edition of Ambler, p. 383, on the question, whether a devise of land to the heir, which is void as to passing the estate, shall not exempt the lands from the legatees' right to stand in the place of specialty creditors. It has been held by Sir L. Shadwell, V. C., that, since the stat. 3 & 4 W. IV. c. 106, (*Act for the Amendment of the Law of Inheritance*), wherever there is a devise to the heir, he must be considered to all intents and purposes as taking by devise and not by descent: for that the third section of that statute (whereby it is provided that when any land shall have been devised by any testator, who shall die after Dec. 31, 1833, to his heir, such heir shall be considered to have acquired the land as devisee and not by descent) is not to be considered as relating exclusively to the law of inherit-

the assets are not marshalled in favour of general legatees, so as to throw the specialty creditors on the real assets *devised* (*g*). And this rule is not confined to specific devises of land, but extends to land which pass under a residuary devise (*h*). If, indeed, the lands devised are *charged with debts*, the assets will be marshalled (*i*); for lands so charged are applicable to the payment of debts before general pecuniary legacies (*k*).

With respect to specific legatees, the assets shall be so far marshalled against the devisees of real estate, upon failure of the general personal estate, that the devisee and specific legatee shall each, in proportion to their respective gifts, *contribute* to the payment of the specialty debt (*l*).

It must likewise be observed, that if a creditor has a specific lien on the real estate, and resorts to the personal, the assets will be marshalled in favour of general legatees, as well against real assets devised as descended: Thus it is now fully settled, that if the real estate subject to a mortgage be devised, and the mortgagee exhaust the personal assets, a pecuniary legatee shall stand in the place of the mortgagee upon the devised estate (*m*). It seems, therefore, that,

ance, but has also application with regard to assets: Strickland *v.* Strickland, 10 Sim. 374. And even in cases where the testator died before Dec. 31, 1833, so as not to be within the operation of this Act, the estates devised to the heir are not in equity to be applied to the payment of the testator's debts in priority to other parts of his estate devised to other persons: Biederman *v.* Seymour, 3 Beav. 368.

(*g*) Clifton *v.* Burt, 1 P. Wms. 678. Scott *v.* Scott, Ambl. 383. S. C. 1 Eden, 458. Hamby *v.* Fisher, Dick. 105. S. C. Ambl. 128. Keeling *v.* Brown, 5 Ves. 359. Aldrich *v.* Cooper, 8 Ves. 397.

(*h*) Mirehouse *v.* Scaife, 2 M. & Cr. 695. Whether the law is the same in respect of a Will made since the new Wills' Act (1 Vict. c. 26) came into operation, has not been decided. By that statute, a testator is empowered to devise real estate acquired between the date of his Will and his death. See *ante*, p. 6.

(*i*) Foster *v.* Cook, 3 Bro. C. C. 347. 2 Jarman on Wills, 601, 602.

(*k*) 2 Jarman on Wills, 546.

(*l*) Long *v.* Short, 1 P. Wms. 403. Tombs *v.* Roch, 2 Coll. 490. Gervis *v.* Gervis, 14 Sim. 654.

(*m*) Lutkins *v.* Leigh, Cas. temp. Talb. 54. Forrester *v.* Leigh, Ambl. 172. Selby *v.* Selby, 4 Russ. Chanc. Cas. 341. Wythe *v.* Henniker, 2 M. & K. 635.

although, generally speaking (as there has already been occasion to shew) (*n*), a testator, by devising land expressly "subject to a mortgage," does not thereby declare any intention that the devisee shall take *cum onere*, as against the testator's personal estate, yet the Court does discover such an intention, if his personal estate be insufficient for the payment of his debts and legacies (*o*).

Whether the law is the same with respect to an equitable lien, such as a vendor has upon the purchased estate for the purchase money unpaid, is a question which has been much discussed (*p*). It has already appeared, that it has been decided, in favour of a *creditor*, that simple contract creditors are entitled to stand in the place of the vendor against the devisees of the land subject to the equitable lien: And in *Selby* v. *Selby* (*q*), Sir John Leach, M. R., seemed to be of opinion that a pecuniary legatee had a right to the same benefit; and that no good reason could be assigned why, in this case alone, an exception is to be made to the equitable rule on which the marshalling of assets rests, that he who has power to resort to two funds shall not, by his election, altogether disappoint another person who has power to resort to one fund only (*r*). But in the subsequent case of *Wyth* v. *Henniker* (*s*), the same learned Judge decided against the right of pecuniary legatees to stand in the place of the vendor upon the land *devised*, his Honor, at the same time, expressing an opinion, that if the estate purchased had *descended*, they would have been so entitled. And, accordingly, in the subsequent case of *Sproule* v. *Prior* (*t*), where the purchased estate had *descended*, Sir L. Shadwell, V. C., after reviewing all the previous cases, ordered the assets to be marshalled in favour of a pecuniary legatee.

(*n*) *Ante*, p. 1443, note (*o*).

(*o*) 4 Hare, 94.

(*p*) See 2 Sugd. Vend. p. 67, *et seq*. 9th edition.

(*q*) 4 Russ. 340.

(*r*) The principal cases on this point are Pollexfen *v*. Moore, 3 Atk. 272. Coppin *v*. Coppin, 2 P. Wms. 295. Austen *v*. Halsey, 6 Ves. 475. Trimmer *v*. Bayne, 9 Ves. 209. Mackreth *v*. Symmons, 15 Ves. 344. Headley *v*. Readhead, Cooper, 50.

(*s*) 2 M. & K. 635.

(*t*) 8 Sim. 189.

Again, if a *leasehold* estate subject to a mortgage be specifically bequeathed, the specific legatee must take the legacy *cum onere*, if the testator's personal estate be insufficient for the payment of his debts and legacies; and consequently the pecuniary legatees are entitled to have the assets marshalled, and to stand in the place of the mortgagee as against the leasehold estate (*u*).

Another instance of marshalling the assets in favour of legatees occurs where one or more legacies are charged on the real estate, and there is another legacy which is not so charged. There the legatee, whose legacy is not so charged, shall stand in the place of the former legatees, to be satisfied out of the real assets (*v*).

It is clearly established, that the Court will not marshall assets in favour of a charitable bequest, so as to give it effect out of the personal assets, it being void so far as it touches any interest in land (*w*).

(*u*) Johnson *v.* Child, 4 Hare, 87.

(*v*) Bligh *v.* Lord Darnley, 2 P. Wms. 620. Bonner *v.* Bonner, 13 Ves. 379. 2 M. & Cr. 700.

(*w*) Mogg *v.* Hodges, 2 Ves. Sen. 52. S. C. 1 Cox, 9. Atty. Gen. *v.* Tyndall, Ambl. 614. S. C. 2 Eden, 207. Foster *v.* Blagden, Ambl. 704. Hillyard *v.* Taylor, Ambl. 713. Foy *v.* Foy, 1 Cox, 163. Ridges *v.* Morrison, 1 Cox, 180. Atty. Gen. *v.* Hurst, 2 Cox, 364. Makeham *v.* Hooper, 4 Bro. Chanc. Cas. 153. Hobson *v.* Blackburn, 1 Keen, 273. Williams *v.* Kershaw, *ibid.* 274, note. Philanthropic Society *v.* Kemp, 4 Beav. 581.

BOOK THE SECOND.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR, IN RESPECT OF THE ACTS OF THE DECEASED: AND OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR, IN RESPECT OF HIS OWN ACTS.

CHAPTER THE FIRST.

OF THE LIABILITY OF THE EXECUTOR OR ADMINISTRATOR IN RESPECT OF THE ACTS OF THE DECEASED.

SECT. I.

The general question as to what Claims upon the Deceased survive against the Executor or Administrator.

In matters of contract.

The general rule has been established from very early times, with respect to such personal claims as are founded upon any obligation, contract, debt, covenant, or other *duty*, that the right of action, on which the testator or intestate might have been sued in his lifetime, survives his death, and is enforceable against his executor or administrator (*a*). Therefore, it is clear that the executors or administrators are answerable, as far as they have assets, for debts of every description due from the deceased, either debts of record, as judgments,

(*a*) Touchs. 482. 1 Saund. 216, *a.* note (1) to Wheatley *v.* Lane. It was said by Willes, C. J., in Sollers *v.* Lawrence, Willes, 421, that "actions on the case for all sorts of debts and duties are now daily brought against executors, though this was formerly doubted: But the law has been now so settled at least 150 years."

statutes, or recognizances; or debts due on special contract, as for rent or on bonds, covenants and the like, under seal; or debts on simple contract, as notes unsealed, and promises not in writing, either expressed or implied (*b*). So an executor may be sued by the lord of a manor for a relief due from the testator (*c*).

In the case of *Eton College* v. *Beauchamp* (*d*), there was a rent issuing out of lands, and the tertenant died, leaving arrears due to Eton College: And it was decreed that, though the person of the tertenant was not chargeable with the rent at law, but only the land by way of distress, yet his executor should pay the arrears as far as he had assets. So it is said, that where a man binds himself and his heirs, and leaves real assets, the heir, taking the profit, becomes so far a debtor, that his executor shall be charged (*e*).

In the case of *Wilson* v. *Tucker* (*f*), an action was sustained against the executor of an attorney for negligence by the deceased, in transacting the business of the plaintiff.

And there is no difference between a promise to pay a debt certain, and a promise to do a collateral act, which is uncertain, and rests only in damages, as a promise by the testator to give such a fortune with his daughter, to deliver up such a bond, &c.: For wherever in those cases the testator himself is liable to an action, his executors shall be liable also (*g*).

It must be observed, however, that certain *forms* of action do not, at the common law, survive against the executor or administrator, as will hereafter be shewn in the investigation of the subject of Remedies generally (*h*): But other actions were substituted in their room upon the very same cause,

(*b*) Bac. Abr. Exors. (P.) 1. Com. Dig. Admon. (B. 14).

(*c*) St. John *v.* Bawdripp, Noy, 43. Com. Dig. Admon. (B. 14).

(*d*) 1 Chanc. Cas. 121.

(*e*) Wentw. Off. Ex. 249, 256, 14th edit. Henningham's case, Dyer, 344, *b*.

(*f*) 3 Stark. N. P. C. 154. S. C. 1 Dow. & Ryl. N. P. C. 30. See also Dutton *v.* Tayley, 18 Hill, MS. 285

(*g*) Bac. Abr. Exors. (P.) 2. Berisford *v.* Woodroff, Cro. Jac. 404. Clark *v.* Thomason, Cro. Jac 571. Fawcett *v.* Carter, W. Jones, 16. S. C. Palm. 329. Cro. Jac. 662. Sanders *v.* Esterbie, 1 Roll. Rep. 266. S. C. Cro. Jac. 417.

(*h*) *Infra*, Pt. v. Bk. II. Ch. I.

which do survive and lie against the executor or administrator (*i*).

The executors or administrators so completely represent their testator or intestate, with respect to the liabilities abovementioned, that every bond, or covenant, or contract of the deceased includes them, although they are not named in the terms of it (*j*): for the executors or administrators of every person are implied in himself (*k*).

In *Harwood* v. *Hilliard* (*l*), a sale was to be made of a parcel of land, and it was agreed, between the plaintiffs and the defendant's testator, that if it should not produce a certain sum, then they should repay each other proportionably to the abatement; and the defendant's testator covenanted for himself and his executors, to pay his proportion to the plaintiffs, so as the plaintiffs gave him notice in writing of the said sale, by the space of ten days; but it was not said, that such notice was to be given to his executors or administrators: And the whole Court agreed, that, as the covenant ran in interest and charge, the executor was bound to pay the testator's proportion, although the notice was given to the executor, and not to the testator.

It is clear, also, that in many cases a liability may accrue against the executor or administrator, after the death of the testator or intestate, upon a contract made in his lifetime, although the executor or administrator be not named therein: Thus the executor is liable upon a bond which becomes due, or a note payable, subsequently to the death of the testator (*m*). So where a man covenanted that A. should serve B. as an apprentice for seven years, and died, it was holden, that if A. departs within the term, a writ of covenant lies against the executor of the covenantor, without naming him (*n*). So if A. is bound to build a house for B. before

(*i*) Hambly *v.* Trott, Cowp. 375, by Lord Mansfield.

(*j*) Wentw. Off. Ex. c. 11, p. 239, 243, 14th edit.

(*k*) By Lord Macclesfield in Hyde *v.* Skinner, 2 P. Wms. 197.

(*l*) 2 Mod. 268.

(*m*) Toller, 463.

(*n*) Bro. Covenant, 12. Bac. Abr. Exors. (P.) 1.

such a time, and A. dies before the time, his executors are bound to perform this contract (*o*). And in cases of this kind the executors will be liable even where the heir is named, and the executors are not named, in the contract (*p*).

Hence it appears, that executors or administrators more actually represent their testator or intestate, than the heir does the ancestor: for if a man binds himself, his executors or administrators are bound, though not named; but it is not so of the heir, however large an amount of real assets may have descended to him (*q*).

The proposition, however, that executors or administrators are liable upon every contract of the deceased, although they be not named, must be understood as not extending to cases where the contract is *personal* to the testator or intestate: for in such instances, no liability attaches upon the executors or administrators, unless a breach was incurred in the life-time of the deceased (*r*). Thus, if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract: for the undertaking is merely personal in it's nature, and, by the intervention of the contractor's death, has became impossible to be performed (*s*). So a covenant by a master for the instruction of

(*o*) Quick *v*. Ludborrow, 3 Bulstr. 30, by Coke, C. J. In the case of Gordon *v*. Calvert, 2 Sim. 253. 4 Russ. Chanc. Cas. 581, A. on taking B. as a clerk, took a bond from him and a surety, to secure his duly accounting for his receipts: No time was fixed for the continuance of the service, but it was to be determinable at the option of either party: The surety died: His executrix gave notice to A. that she should no longer consider herself liable on the bond: A. read the notice to B., and required him to execute a new bond, with another surety, which was done: Then B. died, and deficiencies were found in his accounts, subsequent to the notice: And it was held that the executrix of the surety had no equity to support an injunction to restrain an action on the bond.

(*p*) Williams *v*. Burrell, 1 C. B. 402.

(*q*) Co. Lit. 209, *a*. Wentw. Off. Ex. c. 11, 239, 240, 14th edit.

(*r*) Hyde *v*. The Dean of Windsor, Cro. Eliz. 553. See the remark of Parke, B., in Siboni *v*. Kirkman, 1 Mees. & Wels. 423.

(*s*) Marshall *v*. Broadhurst, 1 Tyrwh. 349, by Lord Lyndhurst. In Wentworth *v*. Cock, 10 A. & E. 45, Patteson, J. said, that there was a case at Liverpool, where a contract to build a lighthouse was held to be personal, on the ground

his apprentice is personal to the master, and his executors are not liable upon it (*t*). Again, in *Cooke* v. *Colcroft* (*u*), one William Cooke, the plaintiff's intestate, being a newsman, and entitled to receive every morning thirty copies of the Daily Advertiser, assigned his right to the same, and all other his business of a newsman, to the defendant, and covenanted, "that he the said William Cooke should not thereafter exercise the business of a newsman, but should use his utmost endeavours to procure for the said defendant his customers in the said business:" And in consideration of the premises, the defendant covenanted to pay eight shillings a week to the said William Cooke, his executors, administrators, and assigns, during the lives of the said William Cooke and Ann his wife, and the survivor of them: Cooke died, and his wife took out administration, and commenced the business of a newspaper-vender on her own account: The Court held, that the administratrix was not bound by the covenant, and grounded their judgment on the difference of expression in the two clauses, *viz.*, that Cooke himself, without naming his executors, &c., should abstain from the business of a newsman, but that the payment was to be made to him, his executors, &c.; and that this was now payable to the plaintiff, not as wife, but as administratrix of William Cooke, and was assets for the payment of his debts: Besides, it would be very hard, they said, to bar her from exercising a lawful occupation for her own livelihood, in consequence of this personal covenant of her husband.

So it is said, that if a lessee for years covenants for himself to repair the houses demised, omitting other words, he is bound to repair only during his life, and the executors or administrators are not bound (*v*). And it is also said, that if a lessor covenants, for himself only, to discharge the lessee of

of it's being a matter of personal skill and science.

(*t*) Baxter *v.* Burfield, Bott. P. L. pl. 696, 6th edit. S C. 2 Stra. 1266. *Infra*, p. 1501.

(*u*) 2 W. Bl. 856. S. C. 3 Wils. 380.

(*v*) Touchst. 178: but see Wentw. Off. Ex. p. 250, 14th edit. *contrà*.

all quit-rents out of the land, this covenant is only personal, and will bind the covenantor only during his life (*w*). But if in these cases the words "during the term," be added in the covenant, as on a covenant by a lessee for himself to repair the houses during the term, or on a covenant by a lessor for himself to discharge the lessee of all quit-rents during the term; in these cases, it appears, the executors and administrators also will be charged after his death (*x*).

In *Wentworth* v. *Cock* (*y*), the plaintiffs had entered into an agreement with one Cock to supply him with a certain quantity of slate immediately; and with a certain other quantity monthly, at a fixed price; and with any further quantity, monthly, that he might require: He engaged to receive the slate, not exceeding 200 tons per month, and the agreement was to be in force till January 1st, 1838: An action having been brought against his administrator, for refusing to receive slate sent, in pursuance of the contract, after his death, and before January 1st, 1838, it was contended that the contract was personal to the deceased, and was not obligatory on his representatives: But the Court of Queen's Bench held, that the plaintiff might well sue the administrator: And Lord Denman said, it was like any ordinary case of goods ordered by a testator, which the executor must receive and pay for: And Littledale, J., observed, that the administrator was bound to pay damages, out of the assets, if he did not take the contract upon himself.

It must here be observed, that in the case of *Perrot* v. *Austin* (*z*), it is said to have been resolved by the Court that if one covenants that his executors shall pay 10*l.*, no action lies for this against them. But Lord Mansfield, in *Plumer* v. *Marchant* (*a*) said, that *Perrot* v. *Austin* was an extraordinary case, and there is a query in the very report (*b*). And in *Powell*

(*w*) Touchst. 178. Ingery *v.* Hyde, Dyer, 114, *a.*: but see Wentw. Off. Ex. *ubi supra.*

(*x*) Touchst. 178, 482. See also Williams *v.* Burrell, 1 C. B. 402.

(*y*) 10 A. & E. 42. S. C. 2 Perr. & D. 251.

(*z*) Cro. Eliz. 232.

(*a*) 3 Burr. 1383.

(*b*) In fact, it appears from the statement of the case, in Wentw. Off. Ex. p. 250, 14th edit. that the

v. *Graham* (c), it was held, that an action might be sustained against an executor, upon a promise by the testator, that his executor should pay to the plaintiff the sum of 20*l.*, in consideration that the plaintiff would continue in the service of the testator till his death; and that it was not necessary to aver any promise by the executor to pay it.

in matters of tort:

With regard to the liability of an executor in respect of the tortious acts of the deceased, it was a principle of the common law, that if an injury was done either to the person or property of another, for which *damages* only could be recovered in satisfaction, the action died with the person by whom the wrong was committed (*d*): And at this day (unless the case falls within the statute 3 & 4 Wm. IV. c. 42, s. 2, hereafter to be mentioned) (*e*), where the cause of action is founded upon any *malfeasance or misfeasance,* is a tort, or arises *ex delicto,* such as trespass for taking goods, &c., trover, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, obstructing lights, and in many other cases of the like kind, where the *declaration* imputes a tort done either to the person or property of another, and the *plea* must be not guilty, the rule is, *actio personalis moritur cum personâ;* and if the person by whom the injury was committed dies, no action of that kind can be brought against his executor or administrator (*f*).

decision of Perrot *v.* Austin, was merely as to the form of action. "In some cases," says that author, "no action of debt lieth upon a covenant to pay money; as if A. covenant that his executor shall within a year, or such a time after his death, pay 10*l.* to B.; now for that no action of debt was maintainable against A. himself, it lieth not against his executor, but only an action of covenant; as was held in the late Queen's time." See Randall *v.* Rigby, 4 M. & W. 132, *per* Parke, B.; and *Ex parte* Tindal, 8 Bing. 402. S. C. 1 M. & Scott, 607, where Tindal, C. J., and Littledale, J., expressed their opinion, in which Lord Brougham concurred, that if a man covenants that his executors shall pay a sum of money after his death, this creates a debt just as much as if he himself had covenanted to pay it.

(*c*) 7 Taunt. 580. S. C. 1 B. Moore, 305.

(*d*) 1 Saund. 216, *a.* note (1) to Wheatley *v.* Lane.

(*e*) *Post*, p. 1475.

(*f*) 1 Saund. 216, *a.* note (1).

Accordingly, no action lies against an executor or administrator on a penal statute (*g*): So if a man, served with a *subpœna*, and having had his expenses tendered to him, neglects to appear as a witness, and dies, no action lies against his executor or administrator (*h*). Again, if a sheriff, gaoler, or keeper of a prison, suffer one in execution for debt or damages to escape, though hereby the party, at whose suit the execution was, be entitled not only to an action upon the case against such officer by the common law, but also to an action of debt by the statutes Westm. 2, and 1 Rich. II. c. 12; yet if the officer die, no action lies against his executor for the same; because the suffering the escape was a wrong of the nature of a trespass (*i*). So at the common law, if a man was appointed executor, and committed a *devastavit* and died, the executor of such executor was not liable for the *devastavit*, upon the principle that it was a personal tort in his testator, which died with the person (*j*). But now, by the statute 30 Car. II. c. 7, explained and made perpetual by 4 & 5 Wm. & M. c. 34, s. 12, the executors or administrators of any executor or administrator, whether rightful or of his own wrong, who shall waste or convert to his own use the estate of his testator or intestate, shall be liable and chargeable in the same manner as their testator or intestate would have been if they had been living (*k*).

(*g*) Wentw. Off. Ex. 255, 14th edit.

(*h*) Wentw. Off. Ex. 255, 14th edit.

(*i*) Anon. Dyer, 271, *a*. Whitacres *v*. Onsley, Dyer, 322, *a*. Perkinson *v*. Gilford, Cro. Car. 540. Bro. Escape, 28. Exors. 100. Execution, 86. Parliament, 80. Wentw. Off. Ex. 254, 14th edit. Berwick *v*. Andrews, Lord Raym. 973, by Lord Holt. Hambly *v*. Trott, 1 Cowp. 375. 1 Saund. 216, *a*. note (1). But debt lies against the executors of a sheriff, &c. upon a judgment obtained against the testator for an escape: See *post*, p. 1480, 1481.

(*j*) Sir Brian Tucke's case, 3 Leon. 241. Browne *v*. Collins, 1 Ventr. 292. But he was liable in equity: Price *v*. Morgan, 2 Chanc. Cas. 217.

(*k*) 1 Saund. 219, *d*. note to Wheatley *v*. Lane. In the case of Hammond *v*. Gatliffe, Andr. 254, the Court were strongly inclined to be of opinion that an executor *de son tort* of an executor *de son tort* is not liable at common law for a *devastavit* committed by the first; and that such an executor is not within the statute of Car. II.; be-

In some, however, of the cases above mentioned, a remedy may be had against the executor or administrator in another form: Thus, although, at the common law, an action of trover upon a conversion of the testator dies with him, yet if the goods, &c. taken away, continue still *in specie*, in the hands of the executor or administrator of the wrong doer, replevin or detinue will lie against such executor or administrator to recover them back (*l*): or trover, laying the conversion to have been by the executor (*m*): or, in case they are sold, an action for money had and received to recover their value (*n*). Again, an action on the custom of the realm against a common carrier is for a tort and supposed crime; and the plea is not guilty; therefore, at the common law, it will not lie against the carrier's executors: But an action of assumpsit will lie against them, upon the very same cause (*o*). So if a man take a horse of another, and bring him back again, an action of trespass will not lie, at the common law, against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor (*p*).

So in the case of *Perkinson* v. *Gilford* (*q*), debt was brought against the executors of a sheriff, for money which he had levied under a *fi. fa.* and had not paid over: the not paying over the money was a misfeasance as well as a nonfeasance: yet it was determined, that by the receipt of the money, the sheriff became debtor, and that debt might be maintained for it: that is to say, though he was guilty of a breach of his duty as sheriff, and though no action could be maintained for that breach of duty after his death, yet for the money so recovered his executors were chargeable.

cause (as Probyn, J., said) in the first part of the Act, executors *de son tort* are not named, though afterwards they are expressly mentioned.

(*l*) Le Mason *v.* Dixon, W. Jones, 173, 174. 1 Saund. 217, note (1).

(*m*) 1 Cowp. 373.

(*n*) 1 Cowp. 377. 1 Saund. 217, note (1).

(*o*) Cowp. 375, by Lord Mansfield. S. P. by Sir J. Mansfield, C. J., in Powell *v.* Layton, 2 New Rep. 370.

(*p*) Cowp. 375, by Lord Mansfield.

(*q*) Cro. Car. 539, S. C. W. Jones, 430. Adair *v.* Shaw, 1 Scho. & Lef. 265. See also Packington *v.* Culliford, 1 Roll. Abr. 921, tit. Exors. H. pl. 2.

Again, at the common law, an action of trespass for mesne profits cannot be maintained against an executor or administrator (*r*): yet he is liable in an action for use and occupation for the rent up to the day of the demise in the action of ejectment (*s*). But if there has been a recovery in ejectment, no action will lie against the executor for use and occupation for the rent subsequent to the day of demise laid in the declaration; because, having treated the holding as founded in trespass, the plaintiff cannot afterwards treat it as founded on contract (*t*): And in such instances the simple case of the death of the occupier will not sustain a bill in equity for an account of mesne profits under the head of accident (*u*): However, in *Pulteney* v. *Warren* (*v*), an account of mesne profits, since the title accrued, was decreed against executors, upon the special ground, that the plaintiff was prevented from recovering in ejectment by a rule of the Court of law, and by an injunction at the instance of the occupier; who ultimately failed both at law and in equity: And in a late case (*w*), the widow of a testator, with the acquiescence of his heir, was let into possession of certain freehold houses, under an erroneous supposition that they passed by the Will along with other property, in which a life interest was devised to her; and before the error was discovered or her right disputed, she died: On a bill filed by the heir against her personal representative, praying the delivery of title deeds and an account, it was held by Sir J. Leach, M. R., and afterwards by Lord Brougham on appeal, that the suit was maintainable for the rents received during her continuance in possession.

(*r*) Pulteney *v.* Warren, 6 Ves. 86.

(*s*) 6 Ves. 87.

(*t*) Birch *v.* Wright, 1 Term Rep. 378. See also 6 Ves. 87; and Bridges *v.* Smyth, 5 Bing. 410. S. C. 2 Moo. & P. 740. However the mere *bringing* of an ejectment, and laying the demise before the time of the rent accruing, is no bar to an action for use and occupation: Cobb *v.* Carpenter, 2 Campb. 14, note to Balls *v.* Westwood.

(*u*) Pulteney *v.* Warren, 6 Ves. 88.

(*v*) 6 Ves. 72.

(*w*) Monypenny *v.* Bristow, 2 Russ. & M. 117.

So an action of waste does not lie, at the common law, against an executor, for waste committed by his testator; it being a tort which dies with the person (*x*): Nor shall an executor be chargeable for the injury done by his testator in cutting down another man's trees: But for the benefit arising to his testator from the sale or value of the trees, he shall (*y*). Accordingly, in *Powell* v. *Rees* (*z*), it was held that an executor is liable to an action for money had and received by his testator, for coal tortiously taken by him from the plaintiff's land, if the testator had sold it, and received the money: And this although no direct evidence be given of the actual sum received on the sale, if the jury believe the fact of the sale. So Lord Chancellor Cowper held, in the case of *The Bishop of Winchester* v. *Knight* (*a*), that the lord of a manor might bring a bill for an account of ore dug, or timber cut by the defendant's testator: And his Lordship observed, that it would be a reproach to equity, to say, where a man has taken my property, as my ore or timber, and disposed of it in his lifetime, and dies, that in this case I must be without remedy: And his Lordship further remarked that it was true, as to the trespass of breaking up meadow, or ancient pasture ground, it died with the person; but as to the property of the ore or timber, it would be clear, even at law, if it came to the executor's hands, that trover would lie for it; and if it had been disposed of in the testator's lifetime, the executor, if assets are left, ought to answer for it. So if a man commits equitable waste, and dies, as where tenant for life without impeachment of waste, and as such having a right at law to cut timber on

(*x*) 2 Inst. 302. 2 Roll. Abr. 828, pl. 7. 2 Saund. 252, note to Green *v.* Cole. A bill was brought against the executors of a jointress, to have satisfaction out of assets for permissive waste upon the jointure of the testatrix: But by Cowper, C. The bill must be dismissed; for here is no covenant that the jointress shall keep the jointure in good repair, and in the common case, without some particular circumstances, there is no remedy in law or equity for permissive waste after the death of the particular tenant: Turner *v.* Buck, 22 Vin. Abr. p. 523, pl. 9, tit. Waste (s. a.)

(*y*) Cowp. 376, by Lord Mansfield.

(*z*) 7 A. & E. 426. S. C. 2 Nev. & P. 571.

(*a*) 1 P. Wms. 406.

the estate, and a property in the trees, abuses that power, but cutting ornamental trees, or trees not ripe for cutting, a Court of Equity has jurisdiction to make the personal representatives of the party, who has committed such waste, accountable for the produce of it (*b*). But a Court of Equity will not direct an account, against the executor or administrator of tenant for life without impeachment of waste, of dilapidations permitted by him in and about the mansion-house (*c*).

Again, an action will not lie against the executor of a parishioner, by whom tithes were subtracted, to recover the treble value under the statute of Edward the Sixth, even although the testator were a lessee for years, so that his estate comes to his executor; for, being founded on a personal tort, it dies with the person (*d*): But the executor will be liable in another form of proceeding; for the tithes, when severed, belong to the tithe-owner; and the case, therefore, falls within the principle that where property is acquired which benefits the testator, an action for the value of the property shall survive against the executor (*e*).

3 & 4 W. IV. c. 42:

And now by stat. 3 & 4 Wm. IV. c. 42, s. 2, after reciting that there is no remedy provided by law for certain wrongs done by a person deceased in his lifetime to another, in respect of his property, real or personal; for remedy thereof it is enacted, "that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration

actions may be brought against executors for an injury to property real or personal, by the testator, committed six months before his death:

within what time to be brought.

(*b*) Lansdowne *v.* Lansdowne, 1 Madd. 116.

(*c*) Lansdowne *v.* Lansdowne, 1 Jac. & Walk. 522.

(*d*) Wentw. Off. Ex. 254, 14th edit. Holl *v.* Bradford, 1 Sid. 88. Weekes *v.* Trussell, 1 Sid. 181. Moreton *v.* Hopkins, 2 Keb. 502. Com. Dig. Admon. (B. 15).

(*e*) By Lord Eldon, in Pulteney *v.* Warren, 6 Ves. 89, 90.

of the estate and effects of such person; and the damages to be recovered in such action, shall be payable in like order of administration as the simple contract debts of such person."

It was held, in the case of *Powell* v. *Rees* (*f*), where coal had been tortiously taken from the plaintiff's land by an intestate, who had sold it and received the money, and part had been raised more than six months before his death, and part within six months, that the plaintiff might bring trespass, under this statute, against the administrator, for so much as was raised within the six months, and also money had and received for so much as was raised before (*g*); the acts being distinct, and therefore the two actions not incompatible.

In *Richmond* v. *Nicholson* (*h*), which was an action of trover for a watch against the defendant, as the executor of one Harriet Reeves, the declaration stated that Harriet Reeves died on the 27th of March, 1839, and alleged a conversion by her within six calendar months next before her decease: The defendant pleaded, that Harriet Reeves was not guilty within six calendar months before the time of her death: It appeared on the trial that the watch had been given by Harriet Reeves to one Spencer, in September, 1837; that Spencer redelivered it to her in March, 1838, for the purpose of it's being pawned by her; that, on it's being demanded by the plaintiff in December, 1838, Harriet Reeves said, "I shall not talk to you any more, but shall see my solicitor:" She died in March, 1839: And the Court of Common Pleas held, that this was sufficient evidence of a conversion within six months before her death.

Liability of executor of rector, &c. for dilapidations.

In conclusion of this branch of the subject, it may be mentioned, that an action on the case lies, by the custom of England, as it is sometimes expressed, but to speak more correctly, by the common law, against the executors of a parson, vicar, or other ecclesiastical person, at the suit of his successor, for dilapidations of the houses or buildings upon

(*f*) 7 A. & E. 426. S. C. 2 Nev. & P. 571, *ante*, p. 1474.

(*g*) *Ante*, p. 1474.

(*h*) 8 Scott, 134.

his spiritual benefice (*i*). So an action for dilapidations of a prebendal house may be maintained by a succeeding prebendary against the executor of his predecessor (*j*). And such an action is maintainable where the hedges and fences, belonging to the glebe, are left in a state of decay, or where there has been a felling of timber growing thereon, otherwise than for repairs or fuel (*k*). But neglect to cultivate the glebe land in a husbandlike manner is not a dilapidation for which the executors of an incumbent are liable (*l*). Formerly, indeed, it was doubted whether any action at law, or elsewhere than in the Spiritual Court, would lie for dilapidations, even by a succeeding rector, &c. against his predecessor who had vacated by cession or otherwise (*m*): but that point was determined in *Jones* v. *Hill*, 2 Wm. & M. (*n*): And the Temporal Courts having once taken cognizance of such matters, it should seem that the action was considered to lie against the executors of a deceased rector, &c., from the necessity of the thing; and it is at this day of common occurrence (*o*).

The reason for the liability of the executor or administrator for such dilapidations was thus stated by Lord Chief Justice Willes, in *Sollers* v. *Lawrence* (*p*), "Because it is not considered as a tort in the testator, but as a duty which he ought to have performed; and therefore his representatives, so far as he left assets, shall be equally liable as himself: And, for this reason, it is not contrary to the rule, that *actio*

(*i*) Wentw. Off. Ex. 255, 14th edit. And by stat. 13 Eliz. c. 10, s. 2, if any spiritual person fraudulently grants away his goods, &c. so as nothing be left to his executors, such grantee shall be liable to the successor's suit in any Court Ecclesiastical, as he might have been, if the grantee was executor of the grantor.

(*j*) Radcliffe *v.* D'Oyly, 2 T. R. 630, 637.

(*k*) 4 B. & Adol. 830.

(*l*) Bird *v.* Relph, 4 B. & Adol. 826. S. C. 1 Nev. & M. 415.

(*m*) See the observation of Buller, J., 2 T. R. 637. It is said in Wentw. Off. Ex. p. 255, 14th edit. that the executors are liable, *by the spiritual or ecclesiastical law.*

(*n*) 3 Lev. 268.

(*o*) See the judgment of Buller, J., in Radcliffe *v.* D'Oyly, 2 T. R. 637.

(*p*) Willes, 421.

personalis (which is always understood of a *tort*) *moritur cum persona.*" It is observable, however, that this action is in form an action on the case in *tort;* and that it could not possibly be framed in *assumpsit,* as on a contract; for the plaintiff must be the succeeding rector, &c., who cannot be known until after the death of the predecessor, and of course could not contract with him: It is clearly an exception to the general rule, that no action will lie against an executor to which his testator was not liable; for the testator never can be liable, inasmuch as during his life there is no person who can sue. For the same reason this action, however anomalous in other respects, is not contrary to the rule, that *actio personalis moritur cum personâ;* an action cannot be said to die, which never had nor could have had existence. It seems, therefore, not to be quite correctly stated, that "the executor shall be equally liable as the testator."

An allotment made to a vicar in lieu of tithes, under an Inclosure Act, is subject to the law and custom of England, as to dilapidations, equally with the ancient glebe; and if, when he comes into it, there are fences upon it which he ought to repair, but he dies leaving them unrepaired, his executors are liable at the suit of his successor (*q*). In *Bird* v. *Relph* (*r*), by an inclosure Act, land was to be allotted to a vicar in lieu of tithes, and was to be first well and sufficiently fenced, in such manner as the commissioners should direct, at the public charge, but for ever afterwards to be repaired by the vicar and his successors: An appeal, to be brought within four months, was given to parties aggrieved by anything done in pursuance of the Act: The land was allotted, and fenced by the commissioners; but the fences being only calculated to last three or four years, became ruinous, and remained so till the incumbent died, about eleven years after the inclosure: No step had been taken to obtain a remedy for the neglect to fence properly: And the Court of King's Bench held, that the commissioners, by making the fences according to their

(*q*) 2 Adol. & Ell. 773. 1 Nev. & M. 415.

(*r*) 2 Adol. & Ell. 773. S. C. 1 Nev. & M. 415.

discretion, had *primâ facie*, fulfilled the condition precedent to the vicar's liability to repair; that if the work was improperly done, steps should have been taken at the time to enforce a due performance of it; and that the executrix of the late vicar was liable to his successor for the dilapidation of the fences.

It may be convenient to investigate, in this place, the extent to which the executor or administrator of a rector, &c., is liable for dilapidations. In *Percival* v. *Cooke* (*s*), Best, C. J., expressed an opinion at *nisi prius*, that the representatives of a prior incumbent are only liable for such repairs as an outgoing tenant would be bound to perform, and not for complete and finished repairs (*t*). In *Wise* v. *Metcalfe* (*u*), the subject was fully considered by the Court of King's Bench: and the Judges of that Court were of opinion that the incumbent is bound to maintain the parsonage (which must be assumed to be suitable in point of size, and other respects, to the benefice) and also the chancel, and to keep them in good and substantial repair, restoring and rebuilding, when necessary, according to the original form, without addition or modern improvement (*v*); and that he is not bound to supply or maintain anything in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay) and whitewashing and papering belong: And that on this principle the damages must be calculated in an action for dilapidations against the executor or administrator of a deceased rector by the successor.

The successor may have separate actions against the executor or administrator of the late rector, for dilapidations to different parts of the rectory (*w*).

(*s*) 2 Carr. & P. 460.

(*t*) And his Lordship in that case expressed his further opinion, that the executors were entitled to be allowed, in such estimate, for timber which the late incumbent might have cut and used in such repairs, and which his successor had used for that purpose.

(*u*) 10 B. & C. 299. S. C. 5 Mann. & R. 235.

(*v*) In North *v*. Baker, 3 Phillim. 309, Sir John Nicholl intimates that, in some cases, the thorough repair of old building is not all to fall on one incumbent.

(*w*) Young *v*. Munby, 4 M. & S. 183.

Liability of executor for breaches of trust by testator.

It has been the constant habit of Courts of Equity to charge persons in the character of trustees with the consequence of a breach of trust, and to charge their representatives also; whether they derive benefit from the breach of trust or not (*x*).

It is no bar to an action against an administrator on a covenant made by the deceased that the defendant took out administration on a parol promise of the plaintiff that he would not sue.

It may here be observed, that if an action is brought against an administrator for a breach of a covenant made by the deceased, it cannot be pleaded in bar that the defendant took out administration at the request of the plaintiff, and on his promise, *not under seal*, that he would not charge, or seek to charge, the defendant as administrator or otherwise with any breaches of the covenant in question (*y*).

Sect. II.

Of particular instances where the Executor or Administrator is liable with respect to the Acts of the Deceased.

In the preceding section, it has been attempted to collect the principal cases illustrative of the general principle as to the liability of executors and administrators with respect to claims which might be enforced against the deceased himself, if he were living: It remains to advert to some particular instances in which such liability has been established.

Debts of record:

First, as to debts of record. The executor or administrator is bound, as far as he has assets, to satisfy all judgments recovered against the testator or intestate, without regard to the circumstance whether a judgment was founded on a cause of action which would not have survived his death: Thus, although the executor of a sheriff is not liable to be sued for

(*x*) Adair *v.* Shaw, 1 Scho. & Lef. 272. Montford *v.* Cadogan, 17 Ves. 489.

(*y*) Harris *v.* Goodwyn, 2 M. & Gr. 405. Perhaps the defendant might have relieved by application to the Court to restrain the action: *Per* Tindal, C. J., 2 M. & Gr. 418.

an escape permitted by his testator (*z*), yet, if judgment was recovered for such escape against him in his lifetime, his executor is liable upon the judgment (*a*).

An executor or administrator is also liable upon all statutes and recognizances entered into by the deceased (*b*); and upon all the inferior debts of record of the deceased, as fines imposed by the Justices at Westminster, or at assizes, or quarter sessions, or by commissioners of sewers or of bankrupts, by stewards in leets, or the like (*c*).

Liability of executor on joint contracts of testator:

In the case of a joint contract, where several contract on the same part, if one of the parties die, his executor or administrator is at law discharged from all liability, and the survivor or survivors alone can be sued (*d*): And if all the parties are dead, the executor of the survivor is alone liable: Thus, if two retain an attorney, and both die, the executor or administrator of the survivor only shall be charged, and not the executors of both: for a personal contract survives of both parties; otherwise of real contracts, as warranty: and therefore, where, in an action against the executors of both, they pleaded jointly, and judgment was given for the attorney, it was stayed on motion, because the executor of the survivor only was chargeable, notwithstanding the pleading and admission of the parties (*e*).

So in debt upon bond, it appeared upon oyer that A., B., and C. were bound jointly, and that A. was dead; whereas the action was brought against his executor, and the other two: Upon demurrer, the Court were of opinion, that the

(*z*) See *ante*, p. 1471.

(*a*) Whitacres *v.* Onsley, Dyer, 322, a. b.

(*b*) It seems to have been once doubted whether the executor of the conusor of a statute merchant was liable: See Wentw. Off. Ex. c. 11, p. 243, 14th edit.

(*c*) Wentw. Off. Ex. c. 11, p. 240: but see Anon. Cro. Jac. 219.

(*d*) Godson *v.* Good, 2 Marsh. 300, by Gibbs, Ch. J. S. C. 6 Taunt. 594.

(*e*) Hamond *v.* Jethro, 2 Brownl. 99. See also Calder *v.* Rutherford, 3 Brod. & Bing. 302. Slater *v.* Wheeler, 9 Sim. 156.

action was not well brought; for by the death of one of the obligors, his executor is wholly discharged (*f*).

Again, if two enter into a joint bond, and one dies at any time before judgment, the survivor shall be charged alone (*g*): And if one of two defendants dies after judgment, and the plaintiff elects to take execution against the personalty, the execution must be against the survivor alone (*h*): So a release given by the obligee to the representatives of the deceased obligor is no answer to an action against the survivor (*i*).

But if the contract be several, or joint and several, the executor of the deceased contractor may be sued at law in a separate action (*k*): but he cannot be sued jointly with the survivor; because one is to be charged *de bonis testatoris*, the other *de bonis propriis* (*l*).

With regard to the liability in Equity of the executor of the deceased joint contractor, it is completely settled that in the case of a partnership debt, although, at law, upon the death of a partner, the remedy against his executors is extinguished (inasmuch as a partnership contract is joint), yet they may be sued in Equity (*m*). But though it has long ceased to be disputed, that if the surviving partner prove to be unable to pay the whole debt, the joint creditor may then obtain full satisfaction in Equity from the assets of the deceased partner, yet it has been lately a subject of much controversy, and still, it is believed, continues to be regarded as an unsettled point, whether the creditor has any right to resort to the representatives of the deceased partner, so long

(*f*) Osborne *v.* Crosbern, 1 Sid. 238. See also Towers *v.* Moor, 2 Vern. 99. Richardson *v.* Horton, 6 Beav. 185.

(*g*) Lampton *v.* Collingwood, 4 Mod. 315. See statute 8 & 9 W. III. c. 11, s. 7. *Ante*, p. 769.

(*h*) If he takes out execution upon the real lien, the charge must be equally against the survivor and the real representative of the deceased; for though a personal execution survives, a real does not: Sir W. Harbert's case, 3 Co. 14, *a*. 2 Saund. 51, note (4) to Trethewy *v.* Ackland.

(*i*) Ashbee *v.* Pidduck, 1 M. & W. 564.

(*k*) May *v.* Woodward, 1 Freem. 248.

(*l*) Hall *v.* Huffam, 2 Lev. 228.

(*m*) 3 Meriv. 619. 4 Mylne & Cr. 109.

as there is a surviving solvent partner, or so long as the insolvency of the surviving partner is not established. On the one hand, it has been asserted, that the principle on which the creditor is entitled to relief against the assets of the deceased partner is merely through the medium of the equities subsisting between the partners themselves, and these equities, in respect of creditors, are, that joint debts shall be satisfied out of the joint estate, and that the separate estates of the partners shall not be liable to the demands of the creditors until the insufficiency or insolvency of the joint estate is established: And therefore, it has been said, the joint creditor must pursue the surviving partner in the first instance, and shall not be permitted to resort to the assets of the deceased partner, until it is established that full satisfaction cannot be obtained from the surviving partner. On the other hand, it is contended, that, in the consideration of a Court of Equity, a partnership debt is several as well as joint, and therefore that the joint creditor may, in the first instance, resort to the assets of the deceased partner, leaving it to the personal representatives of the deceased partner to take proper measures for recovering what, if anything, shall appear upon the partnership accounts to be due from the surviving partner to the estate of the deceased partner. The more recent decisions are strongly in favour of the latter proposition: In *Devaynes* v. *Noble* (*n*), Sir W. Grant, in effect, decided that a partnership contract is, upon the death of a partner, to be considered as joint and several, and that where the surviving partners are insolvent, a creditor has a right to resort to the estate of the deceased partner, without regard to the state of the accounts as between him and the surviving partners: Two separate petitions of appeal were presented against this decision: The appeals were thrice argued: first before Lord Eldon; again in December, 1829, before Lord Lyndhurst; both of whom resigned the Great Seal, without delivering judgment; and again, for the third time, before Lord Brougham, who affirmed the decree (*o*).

(*n*) 1 Meriv. 530. Sleech's case, 1 Meriv. 539. (*o*) 2 Russ. & M. 495

Again, in the subsequent case of *Wilkinson* v. *Henderson* (*p*), Sir John Leach, M. R., held, that in a suit by a joint creditor against the representatives of a deceased partner and the surviving partner, the plaintiff was entitled to satisfaction out of the assets of the deceased partner, though it was not proved that the surviving partner was insolvent: And his Honor, in giving his judgment, said, that all the authorities establish that, in the consideration of a Court of Equity, a partnership debt is several, as well as joint. And it has been laid down that the principle of the latter proposition extends to every joint contract for a loan of money, giving to the creditor the benefit of the security of several persons; without any distinction that the debt must be a mercantile debt incurred by joint traders: Thus, in *Thorpe* v. *Jackson* (*q*), where four persons had opened a joint account with certain bankers, who advanced them money on such joint account, Alderson, B., held, that upon the decease of one of the joint contractors, the bankers had a right in Equity to immediate relief out of his assets, without claiming any relief against the surviving joint contractors, or shewing that the latter were unable to pay by reason of their insolvency (*r*).

In *Barker* v. *Buttress* (*s*), a question arose as to the application of these doctrines to the executors of a deceased member of a Joint Stock Banking Company, with reference to the stat. 7 Geo. IV., c. 46 (The Banking Act): After the expiration of three years from his death, a suit had been instituted for the administration of his estate, and the common decree made for taking an account of his debts, and persons who were creditors of the Banking Company at his death claimed before the Master; and it was contended on their behalf that the testator having been liable to them in their lifetime, though, at law, the debts had survived against his copartners, yet his estate continued liable in

(*p*) 1 M. & K. 582. See also Brown *v.* Weatherby, 12 Sim. 6. Way *v.* Bassett, 5 Hare, 68.

(*q*) 2 Younge & Coll. 533.

(*r*) But see Slater *v.* Wheeler, 9 Sim. 157.

(*s*) 7 Beav. 134.

Equity: But it was held that the remedies given by the Act were not cumulative, but substitutional for the ordinary liabilities of partners (*t*); and that consequently the claims were barred by the lapse of the three years, being the time limited by the Act.

The true doctrine on the subject of obtaining relief in Equity by considering joint contracts as several, appears to be, that wherever a Court of Equity sees that in a contract joint in form, the real intention of the parties was, that it should be joint and several, it will give effect to such intention. Accordingly, in certain cases, a joint bond has, in Equity, been considered as several (*u*). But it is not a rule that every joint contract shall be considered as several in a Court of Equity: for a joint contract cannot be extended beyond its legal operation, unless the party seeking so to extend it shews some previous equity entitling him to demand a several contract from each of the joint contractors, or unless there is some ground on which to infer mistake in the nature of the instrument (*v*). In the case of a partnership debt, all the partners have had a benefit from the money advanced, or the credit given, and the obligation to pay exists independently of any instrument by which the debt may have been secured (*w*). So where a joint bond has, in equity, been considered as several, there has been a credit previously given to the different persons who have entered into the obligation, and it was not the bond which first created the liability to pay. But where the obligation exists only by virtue of a joint covenant or bond, the extent of it's operation can be measured only by the words in which it is conceived; and a Court of Equity cannot give the instrument any other than it's legal effect (*x*). Accordingly, where a joint

(*t*) See Steward *v.* Greaves, 10 M. & W. 711. *Accord.*

(*u*) Primrose *v.* Bromley, 1 Atk. 90. Bishop *v.* Church, 2 Ves. Sen. 100, 371. Hoare *v.* Contencin, 1 Bro. Chanc. Cas. 27. Thomas *v.* Frazer, 3 Ves. 399. Burn *v.* Burn, 3 Ves. 573. *Ex parte* Kendall, 17 Ves. 525.

(*v*) In case of such a mistake, it seems that equity will relieve as well against a surety as a principal: Rawstone *v.* Parr, 3 Russ. 424, 539.

(*w*) 2 Meriv. 37.

(*x*) Sumner *v.* Powell, 2 Meriv. 30. S. C. affirmed, 1 Turn. & R. 423.

promissory note, signed " J. and J. Ewing—James Parr *surety*," was given to a creditor of the firm of John and James Ewing, and James Parr died, John and James Ewing being both alive, one of whom afterwards became bankrupt, and the other insolvent; it was held, that the promissory note could not be considered as several, against James Parr the surety (*y*). So where A. and B. were obligors in a joint bond, and A., who was alleged to be the principal debtor, died; it was held that his assets were not, in equity, liable upon the bond, but that the liability survived to B. (*z*). Again, where premises had been demised to A. and B., who were copartners, upon which they carried on their partnership business, and A. died during the lease, and, after his death, his executors carried on the business in copartnership with B. on the premises; it was held, nevertheless, that the covenants in the lease, which were joint only, were not to be considered in Equity as several as well as joint, so as to make A.'s estate liable for breaches of the covenant which occurred after his death (*a*).

It being now settled, beyond dispute, that the estate of a deceased partner is liable in Equity to the creditors of the firm, although the legal remedy exists only against the survivors, a further question remains to be considered, *viz.*, when and by what means that liability is to terminate. It seems clear that the deceased partner's estate must continue liable until the debts, which affected him at the time of his death, are, in some way, fully discharged (*b*). The discharge, however, may take place in various ways; not only by direct payment, but also by dealings with the continuing partners operating as a payment of the joint debt, or from the creditors having agreed to take and taking the security of the surviving partners in discharge of the joint debt (*c*): Or there may be

(*y*) Rawstone *v.* Parr, 3 Russ. 424, 539.

(*z*) Richardson *v.* Horton, 6 Beav. 185.

(*a*) Clarke *v.* Bickers, 14 Sim. 639.

(*b*) Vulliamy *v.* Noble, 3 Meriv. 619.

(*c*) Thompson *v.* Percival, 5 B. & Adol. 925. 4 Mylne & Cr. 110. See also Blair *v.* Bromley, 5 Hare, 555, *per* Wigram, V. C.

an equitable bar to the remedy; for as the right stands only upon equitable grounds, if the dealing of the creditor with the surviving partners has been such as to make it inequitable that he should go against the assets of the deceased partner, he will not, upon general rules and principles, be entitled to the benefit of the demand (*c*). But the estate of the deceased partner is not discharged by the mere circumstance that the creditor, knowing of the death, continues his transactions with the surviving partners, and forbears, for several years, at their request, to take any steps to enforce payment of his debt (*d*).

With respect to the right of a surviving co-contractor to enforce contribution from the personal representatives of his deceased companion; although it cannot be stated as a universal proposition that in all cases where two or more jointly employ a third person, there is an implied undertaking in all to contribute rateably *inter se*, so as to bind the executors of a deceased co-contractor; yet if several persons jointly contract for a chattel, to be made or procured for the common benefit of all, (for instance the building of a ship or the furnishing of a house) *and as to which the executors of any party, dying before the work is completed, are by agreement to stand in the place of the party dying;* in such a case, though the legal remedy of the party employed would be solely against the survivors, yet the law would certainly imply a contract on the part of the deceased co-contractor, that his executors should contribute his proportion of the price of the article to be furnished (*e*).

covenants concerning the realty:

In every case, where the testator is bound by a covenant, the executor shall be bound by it, if it be not determined by the death of the testator (*f*); that is, unless it is such a covenant as was to be performed by the person of the tes-

(*c*) *Ex parte* Kendall, 17 Ves. 526, by Lord Eldon. 4 Mylne & Cr. 110.

(*d*) Winter *v.* Innes, 4 Mylne & Cr. 101.

(*e*) Prior *v.* Henbrow, 8 M. & W. 873.

(*f*) Bro. Covenant, pl. 12. Com. Dig. Covenant (C. 1).

tator (*g*). Thus, in *Thursden* v. *Warthen* (*h*), a lord of a manor covenanted for himself, his heirs, and executors, within seven years to convey, upon request, a copyhold to the plaintiff for life, *secundum consuetudinem manerii:* The covenantor died and the plaintiff requested his executor to convey the copyhold, which he refused; and thereupon, the plaintiff brought an action of covenant against the executor: It was objected, that the declaration did not show what estate the covenantor had in the manor, and therefore it should be intended to be a fee-simple; and if so, then the request ought to have been made to him who was to make the estate, and this was the heir; for the executor could not possibly perform the covenant, and so no breach by him: But Coke, Chief Justice, said, that the request made to the executor was good; because executors represent the person of the testator as to the performance of covenants to be in covenant performed: And to this the whole Court (except Houghton, Justice) agreed; and judgment was given for the plaintiff.

So in the case of *Macartney* v. *Blundell* (*i*), in Dom. Proc., the appellant claimed the renewal of a lease, pursuant to a covenant, against the heirs of the covenantor: They refused, alleging that the covenantor was bare tenant for life: And it was holden, that this refusal was a breach of the covenant, for which an action could be maintained at law against his representatives.

The executor is not only liable upon all covenants by the testator which have been broken in his lifetime (*k*), but, moreover, he is answerable for all breaches in his own time, as far as he has assets: For the privity of contract of the testator is not determined by his death (*l*). Thus, if a tenant in tail leases for years, and dies, and the issue in tail ousts the termor, he shall have covenant against the executors, upon an express covenant for quiet enjoyment (*m*).

(*g*) Hyde *v.* Dean of Windsor, Cro. Eliz. 553. Bally *v.* Wells, 3 Wils. 29.

(*h*) 2 Bulstr. 158.

(*i*) 2 Ridgw. P. C. 113.

(*k*) Wentw. Off. Ex. 251, 14th edit.

(*l*) Coghil *v.* Freelove, 3 Mod. 326.

(*m*) F. N. B. 145 (E), note (*a*).

Again, although a covenant in a lease should be of a nature such as to run with the land, so as to make the assignee of the term liable for a breach of it after the assignment, yet this shall not discharge the executor of the original lessee from a concurrent liability on the covenant, as far as he has assets, even although the lessor shall have accepted the assignee as his tenant.

liability of executor of landlord and tenant:

Therefore, where the lessee has assigned the term in his lifetime, the lessor may still maintain an action of covenant against the executor of the lessee, upon an express covenant for payment of rent, even although the lessor has accepted the assignee for his tenant: And so may the assignee of the reversion, by virtue of the stat. 32 Hen. VIII. c. 34 (*n*).

in covenant:

So if the executor himself assigns the term, the lessor may afterwards bring covenant against the executor, notwithstanding any acceptance of the assignee as tenant: And so also may the assignee of the reversion (*o*).

Hence an executor, when he carries a lease to market, has a right to require that the purchaser shall covenant for indemnity against the payment of rent and performance of covenants, notwithstanding the executor himself is not bound to enter into a covenant for the title, but only that he has done no act to encumber (*p*).

(*n*) Brett *v.* Cumberland, Cro. Jac. 521, 522. 1 Saund. 241, *a.* note (5) to Thursby *v.* Plant. But although the executor of the *original lessee* will be liable for breaches of covenant, incurred after an assignment by the testator or by himself, it is otherwise where the testator was the *assignee of the lessee:* for no action will lie against him except in respect of breaches in his own time: and therefore, all future liability may be discharged by assignment over, even to a pauper: Taylor *v.* Shum, 1 Bos. & Pul. 21. And since such a course is quite justifiable, morally as well as legally, after an offer to surrender the lease to the landlord, the executor may be guilty of a *devastavit* in neglecting to adopt it: Rowley *v.* Adams, 4 M. & Cr. 534.

(*o*) Hellier *v.* Casbard, 1 Sid. 266. S. C. 1 Lev. 127. Coghill *v.* Freelove, 3 Mod. 325.

(*p*) Staines *v.* Morris, 1 Ves. & B. 8. Wilkins *v.* Fry, 1 Meriv. 265, 266. Even if there be no such covenant, yet if the lessor proceeds against the executor, and recovers damages for a breach of the covenant after assignment, the executor may have an action on the case, or *assumpsit*, against the assignee, for

It must be observed, however, that there is a distinction, with respect to this liability, between an express covenant and a mere covenant *in law:* For no action lies against an executor or administrator upon a covenant in law, which is not broken till after the death of the testator (*q*). Accordingly, in the case of *Adams* v. *Gibney* (*r*), a tenant for life, remainder over, demised to the lessee, his executors, &c., for the term of fifteen years, *without any express covenant for quiet enjoyment:* The lessee was evicted by the remainder-man, after the death of the tenant for life, but before the expiration of the fifteen years: And the Court of Common Pleas held, that the lessee could not maintain an action of covenant, against the executor of the tenant for life, in respect of such eviction, although it was admitted that the word "demise" in the lease imported and made a covenant *in law* for quiet enjoyment by the lessee during the continuance of the estate out of which the lease was granted.

in debt:

With respect to the liability of the executor of the lessee to an action of *debt* for rent accrued after the death of the testator, it is fully established, that the executor will be liable as long as the lease continues, and as far as he has assets, as well in that form of action as in covenant, notwithstanding the lessor assigned the term before his death, or the executor has done so since (*s*). But if the lessor has *accepted*

having neglected to perform the covenant, whereby the executor sustained damage: Burnett *v.* Lynch, 5 B. & C. 589. Marzetti *v.* Williams, 1 B. & Ad. 424, by Lord Tenterden. But this liability in the assignee continues no longer than his interest as such: Wolveridge *v.* Steward, 1 Cr. & M. 644. Humble *v.* Langston, 7 M. & W. 530. Rowley *v.* Adams, 4 M. & Cr. 540: though, perhaps, the executor has the same remedy against each subsequent assignee in respect of the breaches committed during the continuance of the interest of each. 1 Cr. & M. 660.

(*q*) Swann *v.* Stransham, Dyer, 257, *a.* Bragg *v.* Wiseman, 1 Brownl. 22. Proctor *v.* Johnson, 2 Brownl. 214. Newton *v.* Osborn, Style, 387. Porter *v.* Swetnam, Style, 407. Netherton *v.* Jessop, Holt, 412. Andrew *v.* Pearce, 1 New Rep. 158. Touchst. 160. Com. Dig. Covenant (C. 1). Adams *v.* Gibney, 6 Bing. 656. See also Williams *v.* Burrell, 1 C. B. 402, as to what shall constitute an implied or an express covenant within the meaning of this rule.

(*r*) 6 Bing. 656.

(*s*) It is true that Lord Coke, in Walker's case, 3 Co. 24, *a.*, says

the assignee as his tenant, then no action of debt will lie against the executor for rent accrued since the assignment, although, as it just appeared, an action of covenant may be maintained on an express covenant for it's payment during the continuance of the lease.

personal liability of executor for rent accrued after testator's death:

This may be the proper place to consider more fully a subject, which has been already partially discussed (*t*), *viz.*, the personal responsibility of the executor for the rent incurred under a demise to his testator.

If the whole rent incurs in the lifetime of the testator, the action to recover it from the executor must be brought against him in his representative character: and therefore, if the form of action be in debt, it must be in the *detinet* only, and not in the *debet* and *detinet*: and the judgment must be *de bonis testatoris* (*u*).

But in an action of debt for rent incurred after the death of the lessee, *if the executor enters* upon the demised premises, the lessor has his election, either to sue him as executor, or to charge him personally as assignee in respect of the perception of the profits (*v*). Therefore, if the action be brought in debt, the lessor may either sue the defendant as executor in the *detinet* (*w*), or in the *debet* and *detinet* (*x*),

that "it was adjudged in Overton *v.* Sydhall, that if the executor of a lessee for years assigns over his interest, an action of debt does not lie against him for rent due after the assignment; and that if lessee for years assigns over his interest and dies, the executor shall not be charged for rent due after his death; for by the death of the lessee the personal privity of contract as to the action of debt in both cases was determined:" But this is contrary to all the subsequent authorities: See Coghill *v.* Freelove, 3 Mod. 325. Pitcher *v.* Tovey, 4 Mod. 76. 1 Saund. 241, *b.* note (5).

(*t*) *Ante*, p. 568, 869.

(*u*) 1 Roll. Abr. 603 (S), pl. 9. Fruen *v.* Porter, 1 Sid. 379.

(*v*) Boulton *v.* Canon, 1 Freem. 337. S. C. Pollexf. 125. 1 Saund. 1, note (1) to Jevens *v.* Harridge.

(*w*) Royston *v.* Cordrye, Aleyn, 42. Hope *v.* Bague, 3 East, 2.

(*x*) Hargrave's case, 5 Co. 31. Rich *v.* Frank, Cro. Jac. 238. Caly *v.* Joslin, Aleyn, 34. 1 Saund. 1, note (1). So if the executor enters, he may be charged in the *debet* and *detinet* for the current half-year's rent which commenced before the testator died: The Bailiffs of Ipswich *v.* Martin, Cro. Jac. 411. Jevens *v.* Harridge, 1 Saund. 1. But if one sum of money is due for arrears of rent which *became due* in the lifetime of the testator,

as assignee of the term (*y*). So, in covenant, the lessor has his election, either to charge the executor as executor (*z*), or as assignee, without naming him executor, stating generally in the declaration that the estate of the lessee in the premises lawfully came to the defendant (*a*).

If the executor does not enter (*b*), he is still chargeable

and another sum for arrears due in the executor's own time, the lessor cannot in one action charge the executor in the *detinet* for the one part, and in the *debet* and *detinet* for the other; for then two different judgments would be necessary: Salter *v.* Codbold, 3 Lev. 74: but one action may be brought for both sums in the *detinet* only: Aylmer *v.* Hide, 13 Geo. ii. B. R. M. S. Selw. N. P. 610, 6th edit.: If the lessor in such case will not waive his right of demanding satisfaction out of the estate of the executor, he must bring two actions.

(*y*) In such cases it appears to have been the practice to name the defendant executor, and to state in the declaration, in the *debet* and *detinet*, the demise to the deceased, his death, the grant of administration to the defendant, his entry into the demised premises, and the subsequent accruing of rent: See the entry in Jevens *v.* Harridge, 1 Saund. 1, and the case of Caly *v.* Joslin, Aleyn, 34. But it is sufficient to charge the defendant in the *debet* and *detinet* as assignee generally, without naming him executor: See Lyddall *v.* Dunlapp, 1 Wils. 4, 5. Wollaston *v.* Hakewill, 3 M. & Gr. 297. *Infra*, note (*b*).

(*z*) Buckley *v.* Pirk, 1 Salk. 317.

(*a*) Tilney *v.* Norris, 1 Ld. Raym. 553. S. C. 1 Salk. 309. Carth. 519. Buckley *v.* Pirk, 1 Salk. 317. 1 Saund. 1, note (1).

(*b*) There seems to be some doubt, whether this distinction, as to the entry of the executor, has not, in a great measure, ceased to exist, since the decision of Williams *v.* Bosanquet, 1 Brod. & B. 238. That case decided, (overruling Eaton *v.* Jacques, Dougl. 455), that the assignee, in fact, of a lease, may be charged as assignee on a covenant contained in it for the payment of rent, though he has never occupied, or actually become possessed. And it does not appear altogether clear, whether it is not a consequence, that an executor may likewise be charged, as assignee in law, without entry: See the observation of Parke, B., at the conclusion of his judgment, in Nation *v.* Tozer, 1 Crompt. M. & R. 176. 4 Tyrwh. 565. Since these remarks were written, the point above suggested has been much discussed in the C. P., in the case of Wollaston *v.* Hakewill, 3 M. & Gr. 297. S. C. 3 Scott. N. R. 593. In that case the plaintiffs declared, as assignees of a lessor, on certain covenants contained in a lease for ninety-nine years, and alleged that all the estate of the lessee, Thomas Stead, of and in a great part of the demised premises, "by assignment thereof then made, came to and vested in the defendant, whereupon and whereby the defendant became and was possessed of the said part of the said demised premises, and continued so possessed, until the commencement of this suit:" And the plaintiffs then pro-

as executor in the *detinet*, because he cannot so waive the term as not to be liable for the rent as far as he has assets (*c*).

Where the executor, having entered, is sued in the *debet* and *detinet*, as assignee, for rent incurred after his entry, he cannot plead *plene administravit* (*d*), even although he be named executor in the declaration (*e*): for if the rent be of less value than the land, as the law *primâ facie* supposes, so much of the profits as suffices to make up the rent is appropriated to the lessor, and cannot be applied to anything else; and therefore the plea of *plene administravit* confesses a misapplication, since no other payment out of the profits can be justified till the rent is answered (*f*): And if judgment be

ceeded to assign a breach of covenant for the nonpayment of certain additional rents reserved by the lease, and also a breach of covenant in not keeping the premises in repair: The defendant, by her plea, traversed "that all the estate, &c. of the said Thomas Stead, of and in the said part of the said premises by assignment thereof made, came to and vested in her, in manner and form, &c.;" upon which issue was joined: After trial and verdict for the plaintiffs, a motion for a nonsuit was made on the ground of an alleged variance between the allegation in the declaration, charging the defendant generally as assignee of the lease, and the proof offered at the trial, whereby she appeared to be only executrix of an assignee, and that she had never entered or taken the profits: But the Court was of opinion that there was no variance: And Tindal, C. J., in delivering the judgment of the Court, said, that as to the argument that the executor, by being charged generally as assignee, becomes thereby liable *de bonis propriis*, the answer is that he may, by proper pleading, discharge himself from personal liability, by alleging that he is not otherwise assignee than by being executor of the lessee, and that he has never entered or taken possession of the demised premises; and from all liability as executor, by alleging that the term is no value, and that he has no assets: But that, if, instead of relieving himself by pleading, he takes issue on the fact, whether he is assignee or not, the evidence that he is executor proves the affirmative of the issue that he takes the term by assignment: And his Lordship referred to the case of Green *v.* Lord Listowell, 2 Irish Law Rep. 384, as having determined this precise point. See also Ackland *v.* Pring, 2 M. & Gr. 937.

(*c*) Howse *v.* Webster, Yelv. 103. Helier *v.* Casebert, 1 Lev. 127.

(*d*) Caly *v.* Joslyn, Aleyn, 34. Helier *v.* Casebert, 1 Lev. 127, 128. Sackvill *v.* Evans, Freem. 171. Buckley *v.* Pirk, 1 Salk. 317.

(*e*) See *ante*, p. 1492, note (*y*).

(*f*) Buckley *v.* Pirk, 1 Salk. 317.

given against the executor, it is *de bonis propriis* (g). But if the land be of less value than the rent, the executor may plead the special matter, *viz.*, that he has no assets, and that the land is of less value than the rent, and pray judgment whether he shall be charged otherwise than in the *detinet* only (h). If, however, such a plea be pleaded to the whole rent in the declaration, it will not be a good bar, unless it shows that there were no profits at all; because the executor is chargeable personally for so much of the rent as the premises are worth: If, therefore, the profits have been less than the rent, and therefore cover a part only, that part should be confessed and the plea pleaded to the remainder (i). In

(g) Wentw. Off. Ex. 285, 286, 14th edit. 1 Saund. 1, note (1). So if the executor be sued in *assumpsit* for use and occupation in his own time, he shall be liable *de bonis propriis*, though it be laid that the defendant occupied *as executor*: Wigley *v.* Ashton, 3 B. & A. 101. See Atkins *v.* Humphrey, 2 C. B. 654.

(h) Billinghurst *v.* Spearman, 1 Salk. 297. Buckley *v.* Pirk, 1 Salk. 317. 1 Saund. 1, note (1). In many instances the profits of the land may be insufficient for a given period, although the lease may, on the whole, be beneficial: As in respect to the rent for the occupation of premises from Michaelmas to Lady-day, especially where almost the whole profit is taken in the summer; as in the case of a lease of tithes, or of meadow grounds which are usually flooded in the winter: Wentw. Off. Ex. 289, 14th edit. So the profits for a series of years may be less than the amount of the rent, although the lease for the whole term may be of no small value; as in the case of a lease of woods, which are fellable only once in eight or nine years, and the felling has been very recent: *Ibid.* 290. In these and the like instances the executor is personally liable only to the extent of the profits, and for such proportion of the rent as shall exceed the profits is chargeable merely in the capacity of executor, or, in other words, as far only as he has assets; and in such case, to an action brought by the lessor against him in the *debet* and *detinet*, he must disclose the matter by special pleading: 1 Salk. 317. Toller, 280.

(i) Rubery *v.* Stevens, 4 B. & Adol. 241. S. C. 1 Nev. & M. 185. In that case the plaintiff having declared, in covenant, for rent at 26*l.* a-year, the defendants pleaded that they were only chargeable as executors, and that the term came to them as such; that the premises were of less yearly value than the said rent of 26*l.*, *viz.*, of no value; and that they had fully administered, &c.: The plaintiff replied, that the premises were of the yearly value of 26*l.*, and issue was joined thereon: At the trial the yearly value was found by the jury to be 20*l.*: And the Court of King's Bench held, that the replication

Remnant v. *Bremridge* (*k*), which was an action for use and occupation generally, where it appeared that the defendant, who was the administrator of the original tenant under an agreement for a lease, had taken possession after the intestate's death, yet, it having been proved by the defendant, under the general issue, that the premises had been productive of no profit to him, and that eight months after the death of the intestate, he had offered to surrender them to the plaintiff, it was held that this constituted a good defence to the action.

And on the same principle, although, as it has already appeared (*l*), an executor, generally speaking, cannot waive the term, for he must renounce the executorship *in toto*, or not at all; yet, if the value of the land is of less amount than the rent, and there is a deficiency of assets, he may waive such a lease (*m*). And if there are assets to bear the yearly loss for some years, but not during the whole term, then, it seems, the executor must pay the rent as long as the assets will hold out, and must then waive the possession, giving notice to the reversioner (*n*).

But if the executor be sued *as executor*, in debt in the *detinet*, for rent incurred after the death of the testator, he may plead *plene administravit*: for that is a good plea wherever no other judgment can be given but only against the defendant as executor (*o*).

So, where the executor is charged *as executor*, in an action of covenant, for non-payment of rent incurred in the defendant's own time, *plene administravit* is a good plea, although

was, in substance, that the premises were of some value; that the issue was merely informal and cured by verdict; and that the plaintiff might recover the arrears of rent at the rate fixed by the jury.

(*k*) 8 Taunt. 191. S. C. 2 B. Moore, 94.

(*l*) See *ante*, p. 568.

(*m*) Wentw. Off. Ex. c. 11, p. 244, c. 12, p. 290, 14th edit. Wilkinson *v.* Cawood, 3 Anstr. 909, by Macdonald, C. B. He must, it should seem, promptly offer to surrender the lease, and this will help him, as to subsequent breaches of covenant: See Reid *v.* Lord Tenterden, 4 Tyrwh. 118, 120.

(*n*) Wentw. Off. Ex. *ubi supra*.

(*o*) Lyddall *v.* Dunlapp, 1 Wils. 5.

the defendant might have been charged as assignee of the term (*p*).

It remains to consider how these points are affected by the assignment of the lease. If the term was assigned by the testator, it seems clear that the executor cannot be charged as assignee, because the lease did not pass to him: but still he will be liable as executor in debt in the *detinet* for the rent, unless the lessor has accepted the assignee as his tenant (*q*); and even in that case, the executor will be liable, *as executor*, in covenant (*r*). If the executor enters, and afterwards himself assigns the lease, then he is chargeable *as assignee*, for that time only during which he occupied (*s*). And if he is sued for rent incurred since the assignment by himself, he is liable in his representative character only: Therefore, if the lessor brings an action of covenant against the executor, and charges that after the testator's death, and the proving of the Will by the defendant, the demised premises came by assignment to one A. B., and that such assignee has broken the covenants in the lease, the defendant may plead *plene administravit* (*t*).

personal responsibility of executor for repairs after testator's death.

It must here be observed, that the Court of Common Pleas held, in the case of *Tremeere* v. *Morison* (*u*), that although in respect of rent, the personal liability of an executor of a lessee does not exceed the value of the demised premises, yet this qualification does not extend to a covenant for repairs; but that where an executor is sued as assignee on a covenant to repair, he is liable as any other assignee: Accordingly, in that case a plea by the executor that the demised pre-

(*p*) 1 Wils. 4. Wilson *v.* Wigg, 10 East, 315. But if issue be joined upon this plea, and it should be proved that the executor has received any profit from the land, there would, it should seem, be a verdict against him: for he could not legally apply the profits to any other purpose than payment of the rent: Therefore, if the land yields some profit, but less than the rent, the executor ought to plead *plene administravit præter* the profit.

(*q*) Helier *v.* Casebert, 1 Lev. 127. See *ante*, p. 1490, 1491.

(*r*) See *ante*, p. 1489. See Leigh *v.* Thornton, 1 B. & A. 625.

(*s*) See *ante*, p. 1489, note (*n*).

(*t*) Wilson *v.* Wigg, 10 East, 313.

(*u*) 1 Bing. N. S. 89. S. C. 4 M. & Sc. 607.

mises had yielded no profit, nor had been of any value whatever, since the testator's death, with the addition of an averment of *plene administravit,* and an offer to surrender before the breaches occurred, was held bad on demurrer (*v*): The principal ground of this decision appears to have been, that the law is clear that an action of waste will lie against an executor for any waste done in his time, as well permissive as voluntary (*w*).

This decision appears to have been to some extent confirmed by the subsequent case in Q. B. of *Hornidge* v. *Wilson* (*x*). That was an action of debt for rent against the defendant as assignee of a term: The defendant pleaded that he was administrator: that the premises were of less value, and had yielded less profit than the arrears of the rent, that is to say, £—— ; that he had paid over to the plaintiff all the profit he had received, and had fully administered, and had offered to surrender: Replication, that the premises were worth more than the sum in the plea mentioned, and a denial of the surrender: The premises were demised by a party, through whom the plaintiff claimed, to N. for twenty-one years, in 1818, the lease containing a covenant by the lessee to repair: N. in 1827, underlet to E. for twelve years, wanting ten days, at a rent exceeding that reserved in the lease: N. died in 1829, and administration was granted to the defendant in 1830: E. died in 1828, and the premises since that time had been occupied by E.'s sister, who for some years had paid the rent, out of which the plaintiff's rent was paid, but had since become insolvent, and her rent had fallen into arrear: The premises had become out of repair, and had been for some years, at the time of the commencement of the action, of less value than the rent reserved in the original lease; but would be of that value if repaired: The defendant had given the plaintiff notice of his willingness to surrender:

(*v*) But see the observations of Bayley, B., in Reid *v*. Lord Tenterden, 4 Tyrwh. 118, 120.

(*w*) See Ives *v*. Sammes, 2 Anders. 51. 2 Inst. 302.

(*x*) 11 A. & E. 645. S. C. 3 Perr. & D. 641.

And the Court of Queen's Bench held, first, that the proof of non-payment of rent by the under-lessee was no defence to this action, on the issue as to the value of the premises: Secondly, that under the same issue, the defendant could not rely on the premises being out of repair as a ground of defence, being himself bound by the covenant to repair.

personal liability of executor of tenant from year to year continuing to occupy:

In *Buckworth* v. *Simpson* (*y*), A. demised to B. certain lands and premises for one year certain, and then from year to year, so long as the parties should think proper, with power to determine it on giving notice to quit; and the lease contained various terms and conditions, as to the management of the lands, and repairing the buildings: The lessee died, and his executors entered into the occupation of the premises, and continued to occupy and paid rent: And the Court of Exchequer held, that they were chargeable in their personal character, upon the terms contained in the original demise; their continuing to occupy, and the landlord's abstaining from giving notice to quit, raising an implied promise on their parts to abide by the terms of the original contract.

liability from occupation of co-executor:

It may be useful, in this place, to recur to the remark which there has already been occasion to make (*z*), *viz.*, that if lands are leased for years by demise not under seal, and one of the two executors of the lessee enters into the demised premises, such entry does not enure as the entry of the two executors, so as to make them both liable in an action for use and occupation (*a*).

liability of executor of lessee as to party-walls:

It has been held (*b*), that under the stat. 14 Geo. III. c. 78, (The Building Act), where a party-wall has been rebuilt, the person who is owner of and entitled to the improved rent of the adjoining premises, is liable to contribution out of such rent, though he be no otherwise owner than as an executor or administrator (*c*).

(*y*) 1 Cr. Mees. & Rosc. 834.

(*z*) *Ante*, p. 813.

(*a*) Nation *v.* Tozer, 1 Crompt. Mees. & R. 172. S. C. 4 Tyrwh. 561.

(*b*) Thacker *v.* Wilson, 3 Adol. & Ell. 142.

(*c*) See *ante*, p. 1428.

liability of executor of assignee of insolvent debtor, for breaches of covenant in a lease granted to the insolvent.

In *Abercrombie* v. *Hickman* (*d*), the provisional assignee of the Insolvent Court, under stat. 1 Geo. IV. c. 119, s. 7, assigned the estate of an insolvent to an assignee, who assented to such assignment, and acted under it as tenant of premises which the insolvent held as lessee for years after the death of such last-mentioned assignee: And the Court of Queen's Bench held, that his executor was liable to the lessor for breaches of covenants in the lease subsequent to the testator's death, it not appearing that the Insolvent Court had appointed fresh assignees.

Liability of executor of vendee of a real estate to complete the purchase:

If the purchaser of a real estate dies, without having paid the purchase-money, his heir-at-law, or the devisee of the land purchased, will be entitled to have the estate paid for by the executor or administrator (*e*): And if the personal estate cannot be got in, and the heir or devisee pays for the land out of his own pocket, he may afterwards call upon the personal representative to reimburse him (*f*). So if the personal estate is insufficient to perform the contract, and the agreement is on that account rescinded, yet the heir or devisee will, it should seem, be entitled to the personalty so far as it goes: And it has been decided, that if by reason of the complication of the testator's affairs, the purchase-money cannot be immediately paid, and the vendor for that reason rescinds the contract, yet on the coming in of the assets, the devisee of the estate contracted for may compel the executor to lay out the purchase-money in the purchase of other estates for his benefit (*g*).

But if a title cannot be made, or there was not a perfect contract, or the Court should think the contract ought not to be executed, in all these cases there is no conversion of real

(*d*) 8 A. & E. 683. S. C. 3 Nev. & P. 676.

(*e*) Milner *v.* Mills, Mosely, 123. Broome *v.* Monck, 10 Ves. 597.

(*f*) 10 Ves. 614, 615. 1 Sugd. V. & P. 180, 9th edit. See Lord *v.* Lord, 1 Sim. 505.

(*g*) Whittaker *v.* Whittaker, 4 Bro. Chanc. Cas. 31. Broome *v.* Monck, 10 Ves. 597. 1 Sugd. V. & P. 180, 9th edit.

estate into personal, in consideration of the Court, upon which the right of the executor on the one hand (*h*), and of the heir or devisee on the other, depends: And therefore, if the vendor dies, the estate will go to the heir-at-law of the vendor, in the same manner as if no contract had been entered into (*i*): and the heir or devisee of the purchaser will not be entitled to the money agreed to be paid for the lands, or to have any other estate bought for him (*k*): The Court cannot speculate upon what the deceased party would or would not have done; but in these cases the inquiry must be, whether at his death a contract existed by which he was bound, and which he would be compelled to perform (*l*): That alone can give the heir of the purchaser a right to call for the personal estate to be applied, or to the personal representative of the vendor, a right to call upon his heir (*m*).

Liability of an executor to exonerate specific legatees.

Where a specific legacy is pledged or charged by the testator, the specific legatee is entitled to have his legacy redeemed or exonerated by the executor; and if the executor fails to perform that duty, the specific legatee is entitled to compensation to the amount of his legacy out of the general assets of the testator (*n*).

Therefore if a legacy be of a silver cup or a jewel, and it be in pledge at the testator's death, the legatee has a right to call upon the executor to redeem it, and to deliver it to him (*o*).

So in *Stewart* v. *Denton* (*p*), the testator, a wine merchant, directed by his Will that A. B. and C. D. should carry on his trade, and he bequeathed to them his stock of wines: Before the death of the testator, certain wines belonging to

(*h*) See *ante*, p. 552, 553.

(*i*) Lacon *v.* Mertins, 3 Atk. 1. Atty. Gen. *v.* Day, 1 Ves. Sen. 218. Buckmaster *v.* Harrop, 7 Ves. 341. See also Johnson *v.* Le Gard, 1 Turn. & Russ. 281.

(*k*) Green *v.* Smith, 1 Atk. 573. Broome *v.* Monck, 10 Ves. 597.

(*l*) See Curre *v.* Bowyer, 5 Beav. 6, note (*b*). *Ante*, p. 553.

(*m*) 1 Sugd. V. & P. 189, 9th ed.

(*n*) Knight *v.* Davis, 3 M. & K. 358.

(*o*) Swinb. Pt. 7, s. 20, pl. 18.

(*p*) 4 Dougl. 219. S. C. 2 Chitt. Rep. 456.

him arrived in a vessel at the port of London, and the vessel was reported: After his death the wines were entered: And it was held, that the executors, and not the legatees, were chargeable with the duties.

Again, in *Marshall* v. *Holloway* (*q*), A. having a leasehold estate on which he had covenanted to erect buildings within a certain time, bequeathed it and also his personal estate, subject, as to the latter, to the payment of his debts, to trustees for B. for life with several limitations over: A. died before the time expired, leaving the covenant unperformed in part: And Sir L. Shadwell, V. C., held, that his general personal estate was liable to the performance of the covenant.

Liability of executor as to apprentices.

There has already been occasion to shew, that on the death of the master, the agreement for service on the part of the apprentice is at an end (*r*): And it seems equally well established, that the executors of the master are discharged from all agreements and covenants *for the instruction* of the apprentice; for these are considered as personal to the testator, and determined by his death (*s*). But the covenant on the part of the master *for maintenance* of the apprentice still continues in force (*t*); and therefore the executor is liable in an action of covenant, as far as he has assets, if he neglects to maintain him (*u*). By the custom of London, the executor shall put the apprentice to another master of the same trade (*v*). As to maintenance of parish apprentices by

(*q*) 5 Sim. 196.

(*r*) *Ante*, p. 690, *et seq.*

(*s*) R. *v.* Peck, 1 Salk. 66. Baxter *v.* Burfield, 1 Bott. P. L. pl. 696, 6th edit. S. C. 2 Stra. 1266. Wadsworth *v.* Guy, 1 Keb. 820. S. C. 1 Sid. 216. The decision in Walker *v.* Hull, 1 Lev. 177, was *contrà*: but the Court denied this case in Baxter *v.* Burfield, 2 Stra. 1267.

(*t*) R. *v.* Peck, 1 Salk. 66. S. C. *nomine* R. *v.* Pett, 1 Show. 405. Baxter *v.* Burfield, 1 Bott. P. L. pl. 696, 6th edit. S. C. 2 Stra. 1266. Soam *v.* Bowden, Finch. Rep. 396.

(*u*) But an order of magistrates, that the executor or administrator shall maintain and provide for the apprentice, is bad, and may be quashed: R. *v.* Pett, 1 Show. 405. S. C. Carth. 231. 1 Salk. 66. 3 Salk. 41. 12 Mod. 27. R. *v.* Chaplin, Comberb. 324.

(*v*) By Lord Holt, in R. *v.* Peck, 1 Salk. 66.

executors, particular provisions on this head have been made by the statute 32 Geo. III. c. 57, which has already been stated at large (*w*).

Liability of executor for poor rate, where testator being assessed dies before payment:

In case a person assessed to the poor rate dies before payment, it has been doubted how far the goods of the deceased in the hands of his executor or administrator are liable to answer the same: In the case of *Stevens* v. *Evans* (*x*), the point was discussed, but not decided, as the case was determined on it's own peculiar circumstances, *viz.*, on the ground that it was necessary to convene the administrator before the justices, before a warrant could legally issue to distrain: So that the principal point was undecided; which includes in it these particulars: 1. Where the warrant of distress is made out during the lifetime of the person assessed, whether the officers can follow the goods into the hands of the administrator or any other, without taking notice of any person as executor or administrator: 2. Where the warrant of distress is not made out till after the death of the person assessed, whether on summoning the administrator, and refusal by him, the officers can distrain the goods in the hands of such administrator: 3. Whether the administrator himself may be assessed in a succeeding rate, as for arrears; and on the assessment being confirmed at the sessions upon his appeal, whether distress may be made as of his own goods, and whether for defect of distress he may be committed: 4. In what course of administration such assessment shall be estimated: And if the administrator shall plead before the justices debts of a higher nature, or insufficiency of assets, whether and how far the justices are to take notice of such plea, and how or in what manner they shall determine the same (*y*).

Church-rates.

It has been held in the Ecclesiastical Court that the obli-

(*w*) *Ante*, p. 692.

(*x*) 2 Burr. 1152. 1 W. Black. 284.

(*y*) Burn's Justice, title Poor, vol. iv. p. 228, 229, edit. of 1836.

gation to pay a church-rate is a personal obligation: And that the executor of a deceased parishioner cannot be cited in respect of a church-rate due from his testator (*y*).

Debts of husband and wife.

With respect to debts which a wife contracted while single, and which remained due at the time of the marriage, it is clear that the husband is liable, as long as both parties are alive: But this liability, which originated in the marriage, ceases with it: And therefore upon the death of the husband before the wife, and before payment, the debts survive against her, and executor of the husband is discharged from them (*z*).

Again, if the husband survives the wife, he will not be individually responsible for her debts contracted before marriage, however large a fortune he may have received with her (*a*). Nevertheless, as her administrator, he will be liable to answer for them, to the extent of her assets (*b*).

On a late occasion (*c*), Sir John Leach, V. C., expressed a doubt, whether the husband has a right to throw his wife's funeral expenses upon her separate estate.

With respect to debts contracted by a wife after marriage, as far as a supply of necessaries, it shall be presumed, as long as he lives, that she had the authority of the husband, as his agent, to procure them for her own use: He may, consequently, be compelled to pay for them, and so may his executors if he has assets: But the authority will be revoked by the death of the husband; and therefore his executor is not liable for necessaries supplied to the wife after the decease of the husband, although the fact of his being dead were unknown at the time the necessaries were pro-

(*y*) Williams *v*. George, 3 Curt. 343.

(*z*) Woodman *v*. Chapman, 1 Campb. 189.

(*a*) Wentw. Off. Ex. 369, 14th edit.

(*b*) *Ibid.* 370. Heard *v*. Stanford, Cas. temp. Talb. 173. S. C. 3 P. Wms. 409. As to what her assets comprise, see *ante*, p. 718, *et seq*. p. 577, *et seq*.

(*c*) Gregory *v*. Lockyer, 6 Madd. 90. See Bertie *v*. Chesterfield, 9 Mod. 31.

vided: Accordingly in a modern case (*d*), a man, who had for some years cohabited with a woman that passed for his wife, went abroad, leaving her and her family at his residence in this country, and died abroad: And it was held, that the woman might have the same authority to bind him by her contracts for necessaries, as if she had been his wife; but that his executor was not bound to pay for any goods supplied to her after his death, although before no information of his death had been received (*e*).

Work and labour with a view to a legacy.

It may be observed, that if a man performs services for the testator, as if a stockbroker transacts all the money concerns of the deceased, without any view to a reward, but in the expectation of a legacy, he cannot set up any demand for such services against the executor or administrator (*f*). Where, however, a surgeon forbore to send in his bill for medicines and attendance to a deceased patient in her lifetime *under the expectation* of a legacy; and on her death, finding she had left him nothing, he made a claim on her executors; it was held that he was entitled to recover, no proof having been given of any *understanding* between the parties that he was to be paid only by a legacy (*g*).

Executor of tenant for life who neglects to renew lease.

In *Colegrave* v. *Manby* (*h*), a tenant for life of a hospital lease, who was directed to lay by, out of the rents and profits, for the purpose of paying the fine on renewal, had neglected to renew, and the lease having been renewed by the remainder-man, after his death, a reference, on a bill against his executrix, was made, to ascertain what was a reasonable sum to be paid for the renewal; and the same was ordered to be paid by the executrix.

(*d*) Blades *v.* Free, 9 B. & C. 167.

(*e*) See also Smout *v.* Ilbery, 10 M. & W. 11.

(*f*) Osborn *v.* Guy's Hospital, 2 Stra. 728. Le Sage *v.* Coussmaker, 1 Esp. 188.

(*g*) Baxter *v.* Gray, 3 M. & Gr. 771.

(*h*) 6 Madd. 72. S. C. 2 Russ. Chanc. Cas. 238.

It was once held, that executors continued the estate which their testator had in a copyhold, and, therefore, that they needed no admission: But it is now settled, that they must be regularly admitted, and pay their fines (*h*).

Executors must be admitted to copyhold and pay fines.

If a bill of exceptions be sealed by a Judge, and he dies, a *scire facias* lies against his executors or administrators to certify (*i*). So if the person who ought to certify a record, as a justice of the peace, &c., who hath taken a recognizance, or a Judge of *nisi prius* who hath taken a verdict, or a coroner who hath taken an inquest, &c., happen to die, having such a record in his custody, it seems that a *certiorari* may be directed to his executor or administrator to certify it (*k*).

Scire facias or *certiorari* against executor of judge, &c.

As a Court of Equity will not, *inter vivos*, compel a party to complete his gift, so it will not compel the executor to complete the gift of the testator: Therefore an act of bounty which has not been perfected by the testator, is of no avail against his executor (*l*).

Executor not compellable to complete the gift of testator.

If a person, who has delivered a deed as an escrow, to be handed over to the party, for whose use it is made, upon the performance of some condition, happen to die before the performance of the condition, and the condition be afterwards performed, the deed is available notwithstanding the death of him that made it (*m*).

Liability of executor of a man who has delivered a deed as an escrow.

It may here be mentioned, that if a testator has given a

A note made payable with

(*h*) Bath *v.* Abney, 1 Burr. 206. S. C. Dick. 260. 1 Watk. Cop. 301.

(*i*) 2 Inst. 428.

(*k*) 2 Hawk. B. 2, c. 27, s. 39.

(*l*) Hooper *v.* Goodwin, 1 Swanst. 485. Cotteen *v.* Missing, 1 Madd. 176. Meek *v.* Kettlewell, 1 Phill. Ch. C. 342. Callaghan *v.* Callaghan, 8 Cl. & F. 374. Searle *v.* Law, 15 Sim. 95. Dillon *v.* Coppin, 4 M. & Cr. 647. Ward *v.* Audland, 8 Beav. 201. An executor may be compelled to execute an agreement by the testator to grant an annuity: Nield *v.* Smith, 14 Ves. 491.

(*m*) By Lord Ellenborough, in Copeland *v.* Stephens, 1 B. & A. 606, where *executor* appears to be printed by mistake for *escrow*.

interest by executors at a certain period from the testator's death, bears interest from the date.

promissory note in this form, "I promise for myself and my executors to pay A. B. or his executors, one year after my death, 300*l.*, with legal interest," and no proof of the consideration can be given, the note bears interest from it's date, and not merely from the testator's death; for, in the absence of all particular proof, it must be presumed that the note was given for value (*n*).

Executor not liable on a continuing guarantee of testator.

If a man enters into a continuing guaranty and dies, his executor, it seems, is not liable upon it for advances made after the testator's death, which operates as a revocation (*o*).

(*n*) Roffey *v.* Greenwell, 10 A. & E. 222. S. C. 2 Perr. & D. 365.

(*o*) Smith's Comm. L. 425, 4th edition.

CHAPTER THE SECOND.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR WITH RESPECT TO HIS OWN ACTS.

SECT. I.

Of the Liability of an Executor or Administrator on his own Contracts.

IN this section it is proposed to investigate, First, The liability of an executor or administrator, *as such,* in respect of his own contracts *as executor* or administrator: Secondly, The personal responsibility of the executor or administrator on his own contracts.

1st. Of the liability of an executor, as such, on his own contracts.

1st. As to the liability of the executor, not personally, but out of the assets of the testator. It seems to have been once considered, that wherever an action was brought against an executor or administrator, on promises laid to have been made by him after the death of the testator or intestate, he was chargeable in his own right, and not in his representative capacity (*a*). The more modern authorities have, however, established, that, in several instances, the executor may be sued, *as executor*, on a promise made by him as executor, and that a declaration founded on such a promise will charge the defendant no further than a declaration on a promise of the testator.

Thus in *Dowse* v. *Coxe* (*b*), the declaration stated, that a cause depending in Chancery, in which Thomas Biddle was

(*a*) See Trewinian *v.* Howell, Cro. Eliz. 91. Hawkes *v.* Saunders, Cowp. 289. Jennings *v.* Newman, 4 T. R. 348.

(*b*) 3 Bingh. 20. S. C. 10 Moore, 272.

a party, was referred to arbitration, and that it was one of the terms of submission that in case either of the parties should die, the death was not to abate the reference; that Thomas Biddle died before the making of the award; that the arbitrator awarded that the executor should pay the plaintiff 225*l.* out of the assets of Thomas Biddle; and that being so liable, the defendant, executor as aforesaid, *promised to pay:* And the Court of C. B. held that the executor was not charged thereby personally, but as executor only, and that the judgment must be *de bonis testatoris* (*c*).

So in *Powell* v. *Graham* (*d*), one count of the declaration stated a promise by the testator in his lifetime, that, in consideration the plaintiff would enter into his service as a nurse and housekeeper, and would continue to serve him till his death, his executor should, after his decease, pay the plaintiff 20*l.*, and then averred the defendant's liability as executor, and that in consideration thereof, *the defendant promised to pay* the plaintiff that sum, whenever he, the defendant, as executor, should be requested so to do: And the Court of C. B. held, that, upon this count, the defendant was not liable individually, but as executor only: And in the same case the Court held, and it is now fully settled, that a count averring an account stated between the plaintiff and the defendant as executor, and that in consideration thereof *the defendant as executor promised to pay* the balance, does not charge him personally; but he may plead *plene administravit*, and the only judgment which can be given in favour of the plaintiff is *de bonis testatoris* (*e*): And it makes no difference whether the account be averred to have been stated of money due from the testator to the plaintiff (*f*) or of money due from the defendant *as executor* to the plaintiff (*g*).

(*c*) This judgment was reversed in K. B., but on a different ground, the Court of Error declining to give any opinion on this point: 6 B. & C. 255.

(*d*) 7 Taunt. 581. S. C. 1 B. Moore, 305.

(*e*) Ashby *v.* Ashby, 7 B. & C. 444. S. C. 1 Mann. & Ryl. 180.

(*f*) Secar *v.* Atkinson, 1 H. Bl. 102. Ellis *v.* Bowen, Forrest. Exch. Rep. 98. This is the common mode of declaring against executors to save the Statute of Limitations: 1 H. Bl. 105.

(*g*) Powell *v.* Graham, 7 Taunt.

So it should seem that a count averring that the defendant, *as executor*, was indebted to the plaintiff for so much money, paid by the plaintiff to the use of the defendant, *as executor*, and that in consideration thereof the defendant, *as executor, promised to pay*, charges the defendant in his representative character only, and that he may plead *plene administravit* to it, and that the judgment ought to be *de bonis testatoris* (*h*). For instance, suppose two persons are jointly bound as sureties, and the one dies, and the survivor is sued and obliged to pay the whole debt: In such case, if the deceased had been living, the survivor might have sued him for contribution in an action for money paid: and it should therefore seem that he is entitled to sue the executor of the deceased for money paid to his use as executor (*i*). Again, a plaintiff may in many cases have an advantage in proceeding against the assets rather than against the executor personally: the executor in his individual capacity may be insolvent; in his character of executor he may have assets adequate to answer any claim: and when the money is paid to his use as executor, justice seems to require that the person, who has made the payment, should have the liberty of looking to the fund which the executor has in that character (*j*).

But a count alleging that the defendant, *as executor*, was indebted to the plaintiff for so much money *lent* by the plaintiff to the defendant *as executor*, and that the defendant, in consideration thereof, *as executor, promised to pay*, charges him personally, and he cannot plead *plene administravit*, and the only possible judgment is *de bonis propriis* (*k*).

And so it is of a count which charges that the defendant, *as executor*, was indebted to the plaintiff *for money had and received* by the defendant, *as executor*, for the use of the

580. Ashby *v.* Ashby, 7 B. & C. 444: but see Rose *v.* Bowler, 1 H. Bl. 108. 2 Saund. 117, *h.* note to Coryton *v.* Lithebye.

(*h*) Ashby *v.* Ashby, 7 B. & C. 448, 449, 451, 452. This point was conceded by the counsel and the Court, in Corner *v.* Shew, 3 M. & W. 350.

(*i*) 7 B. & C. 449, 451, 452.

(*j*) 7 B. & C. 449.

(*k*) Rose *v.* Bowler, 1 H. Black. 108. Powell *v.* Graham, 7 Taunt. 586.

plaintiff, and that in consideration thereof, the defendant, *as executor, promised to pay;* for to such a count *plene administravit* cannot be pleaded, and the judgment on it must be *de bonis propriis* (*l*). But on a late occasion (*m*) Lord Tenterden said, that although he felt himself bound by the authorities on the point, yet if the matter were quite new, it might, perhaps, be as well to hold that a plaintiff might elect to treat the receipt of the money as an act done by the executor in his character of executor, and take his chance whether he would get paid out of the assets or not, and that if he elected so to treat it, then he must shew that the money came into the defendant's hands because he was executor: And Bayley, J., concurred in this opinion, and put the following case: "Suppose a bill payable to the testator were remitted from a foreign country, half the amount applicable to the personal use of the testator, and the other half to be paid over by him to some other person: Before the bill arrives, the testator dies, and his executor receives the money: It is possible that he may not have received advice as to the mode in which it is to be applied, until after he has applied it in the ordinary course of administration: He may be insolvent in his individual capacity; and it would be hard that the party, under such circumstances, should not have his election to be paid out of the funds of the testator:" The learned Judge, however, proceeded to observe, that the authorities were so strong, that he felt himself bound by them, although his reason was not convinced (*n*).

(*l*) Rose *v.* Bowler, 1 H. Black. 108. Jennings *v.* Newman, 4 T. R. 347. Brigden *v.* Parkes, 2 B. & P. 424. Powell *v.* Graham, 7 Taunt. 585, 586. Ashby *v.* Ashby, 7 B. & C. 444. S. C. 1 Mann. & Ryl. 180.

(*m*) Ashby *v.* Ashby, 7 B. & C. 448.

(*n*) 7 B. & C. 450. But Littledale, J., expressed his opinion that, if the case were perfectly new, the defendant ought to be held personally liable upon the count in question; and observed, that where an executor receives money to the use of a particular individual, it operates as a specific appropriation of that money belonging to the party, and he, in his individual capacity, must be liable for the money so received, it having nothing to do with the accounts of the testator: 7 B. & C. 452, 453. Perhaps an illustration of this view

Again, a count upon a promise by the defendant *as executor*, for *use and occupation* after the death of the testator, has been held to charge the defendant personally, and not in his character of executor (o). So a count alleging that the defendant *as executor*, was indebted to the plaintiff for *goods sold and delivered* by the plaintiff to the defendant, *as executor*, at his request, or for *work done* and materials for the same used and provided by the plaintiff for the defendant, *as executor*, at his request, and that the defendant, *as executor*, promised to pay, charges the defendant in his personal and not in his representative character; for such a claim must necessarily be from debts due from the defendant in his own right, as no goods can be sold to, or work performed for another in his representative character (p).

In actions like those above mentioned, which are brought against an executor, in the character of executor, to recover the demand out of the testator's estate, a promise by the executor is a mere *nudum pactum*, if there were no assets (q). But it is not necessary to aver in the declaration that the defendant had assets (r).

2. Of the personal liability of an executor on his own promise:

2ndly, It is now proposed to investigate the personal responsibility of an executor or administrator, arising from his own contracts.

A promise by an executor or administrator to pay a debt of the testator, or to answer damages, will not make him personally liable, unless there be a sufficient consideration to support

may be found in Churchill *v.* Bertrand, 3 Q. B. 568, where an intestate had granted an annuity to the plaintiff, and, after his death, his administratrix procured it to be set aside for a defect in the memorial: and it was held, that the consideration money for the annuity could not be recovered back as money had and received *by the intestate* for the use of the plaintiff.

(o) Wigley *v.* Ashton, 3 B. & A. 101. But see Atkins *v.* Humphrey, 2 C. B. 654. *Post*, Pt. v. Bk. II. Ch. I.

(p) Corner *v.* Shew, 3 M. & W. 350. See *post*, p. 1522, *et seq.* as to charging an executor for the expenses of the funeral.

(q) 1 Saund. 210, c. 211, note (1) to Forth *v.* Stanton. Pearson *v.* Henry, 5 T. R. 8. Rann *v.* Hughes, 7 T. R. 350, note (a).

(r) Powell *v.* Graham, 7 Taunt. 580. S. C. 1 B. Moore, 305. Dowse *v.* Coxe, 3 Bingh. 20. S. C. 10 B. Moore, 272. See also Pinchon's case, 9 Co. 90, *b*.

the promise: For a bare promise by the executor does not make him liable out of his own estate, but he is still chargeable only as executor, and to the extent of the assets in his hands, in the same manner as he would have been had no such promise been made (*s*). And by the Statute of Frauds, the executor or administrator will not be liable, unless the promise is in writing. It is clear, however, that although the promise be in writing, it is of no more effect since the statute than before, unless it be by deed, or there be a good consideration for it (*t*). Hence, since the statute, there are two things necessary for the validity of the promise of the executor or administrator to pay the debt of the testator, or answer damages, out of his own estate: 1st, the common law requires that there should be a sufficient consideration to support the promise; 2nd, the statute adds a still further requisite, that the promise should be in writing (*u*). It is, therefore, expedient to examine, in the first place, what is a valid consideration for a promise by an executor or administrator to charge him *de bonis propriis;* and then to inquire what is a reduction of the promise into writing, sufficient to satisfy the Statute of Frauds.

Before entering upon this inquiry, it may be remarked, that a promise by an *administrator*, by word of mouth, made *before* administration granted, may, under certain circumstances, be binding upon him afterwards: Thus in *Tomlinson* v. *Gill* (*v*), a person promised the widow of an intestate, that if she would permit him to be joined in the letters of administration, he would make good any deficiency of assets to discharge the intestate's debts: And Lord Hardwicke held

(*s*) Reech *v.* Kennegal; 1 Ves. Sen. 126.

(*t*) The statute has made no alteration in the pleading, and consequently, it does not appear upon the declaration, whether there was a promise in writing or not: It is a matter of evidence only: Anon. 2 Salk. 519. Williams *v.* Leper, 3 Burr. 1890, by Yates, J.

(*u*) Rann *v.* Hughes, 4 Bro. P. C. 27, Toml. edit. S. C. 7 T. R. 350, note (*a*). Hawkes *v.* Saunders, Cowp. 289. Philpot *v.* Briant, 4 Bingh. 717. S. C. 1 M. & P. 754. But see Herbert *v.* Powis, 1 Bro. P. C. 355, Toml. edit.

(*v*) Ambl. 330.

that this promise was not within the Statute of Frauds, because the party promising was not administrator at the time of making the promise; and it was no answer to say that he was administrator afterwards (*w*): His Lordship further held, that this was an engagement which could be made good only in a Court of Equity; because it was not made to the creditors, who could, therefore, claim only through the widow; but that they were entitled in equity to the performance of the promise made to her, because it was to be considered there as made to her in trust for them (*x*).

what is a sufficient consideration for his promise:

1st. What is a valid consideration: If a creditor, at the request of an executor, *forbears* to sue him, that is considered a sufficient consideration to charge him *de bonis propriis*, whether he has assets or not at the time of the promise; and therefore it is not necessary to aver in the declaration that he had assets: As if A., to whom the testator was indebted, comes to the executor, and says that he intends to sue him for the debt, whereupon the executor promises, in consideration that the plaintiff will forbear him for a reasonable time, to pay him, and A. accordingly forbears to sue him for a rea-

(*w*) See *ante*, p. 332, 526, 527, as to the difference between the relation of probate and letters of administration to the death of the testator and intestate.

(*x*) This case was recognised by Lord Northington in Griffith *v.* Sheffield, 1 Eden, 77; and by Sir W. Grant in Gregory *v.* Williams, 3 Meriv. 590. A promise, however, by a party who is neither the executor nor administrator, to pay a debt of a deceased person, is merely *nudum pactum;* and even if such a party should give his promissory note to the creditor for the debt, without any other consideration for making it, the payment of the note cannot be enforced by the payee, if at the time of the making thereof there was no personal representative of the debtor: Nelson *v.* Serle, 4 Mees. & W. 795, overruling Serle *v.* Waterworth, *ibid.* 9. *Ante*, p. 215, note (*d*). If, indeed, the note be made payable at a future date, *and the maker be entitled to take out administration*, as being the widow or next of kin of the debtor, perhaps the creditor might enforce the note; because the effect of giving it is to preclude the payee, during its currency, from suing the maker, in case the latter should take out administration: 4 M. & W. 9. Where a widow gave a promissory note " for value received by my late husband," it was held that the note was valid on the face of it: Ridout *v.* Bristow, 1 Cr. & Jerv. 231, *post*, p. 1516, note (*k*).

sonable time, that is a good consideration to charge the defendant, in an action upon the case, out of his own estate, without assets; for by this promise it is intended as well to forbear to sue the executor, as to forbear the debt; and a forbearance of a suit is a good consideration, without assets at the time of the promise (*y*). So if a man declares upon a promise against an administrator, that the intestate was indebted to him in 10*l.* by bond, and died, and the defendant being his administrator, in consideration of the premises, and that the plaintiff *would spare him* till such a time after, promised to pay him the debt; and avers that he spared him till the time, and the defendant had not paid him, &c., though he did not say that he would spare him *the debt*, or to *sue him*, yet it shall be so intended, and therefore the consideration is good (*z*). So it was said by Hale, C. J., that though a bare accounting by the executor with a creditor of his testator will not bind the executor to pay *de bonis propriis*, yet a promise in consideration of forbearance will (*a*). Also, where the plaintiff having a debt owing to him from the testator on a simple contract, the executor, in consideration the plaintiff would forbear to sue him until such a time, promised to pay, and the plaintiff averred that he did forbear accordingly, this is a good promise; but if the *heir* had promised, on forbearance of the suit, to pay this debt, no *assumpsit* would have been against him, because without consideration; for the heir is not chargeable to any debt without specialty (*b*). So where in *assumpsit* the plaintiff declared, that J. S. devised a legacy to him, and made the defendant executor, and the plaintiff intending to sue him for

(*y*) Johnson *v.* Whitchcott, 1 Roll. Abr. 24, tit. Action sur Case (V) pl. 33, upon a demurrer, where the defendant pleaded that he had no assets when the promise was made. It is said in Bane's case, 9 Co. 94, *a.*, that if there be no assets, *it shall be given in evidence:* but this opinion has been overruled since: See the cases cited in the text, *supra.*

(*z*) Gardener *v.* Fenner, 1 Roll. Abr. 15, tit. Action sur Case, (S.) pl. 3. Chambers *v.* Leversage, Cro. Eliz. 644.

(*a*) Hawes *v.* Smith, 2 Lev. 122.

(*b*) Fish *v.* Richardson, Yelv. 55, 56. S. C. Cro. Jac. 47.

the legacy, the defendant, in consideration of forbearance, promised to pay him; the defendant pleaded divers bonds and judgments, and no assets *ultra;* upon which the plaintiff demurred, and had judgment without argument; for it was not material whether he had assets or not; for he was charged upon his own promise, in consideration of forbearance; and a forbearance of a suit for a legacy was a sufficient consideration; although it was said, that if it had appeared by the declaration that the plaintiff had no cause of action, the forbearance would not be sufficient (*c*). It is true, that it is now settled, that no action at law lies for a legacy (*d*), but in this case the forbearance might have been to sue in Chancery, or in the Ecclesiastical Court, for the legacy, and then the consideration may, perhaps, be a good one (*e*). So if A. together with B. is bound to C. for the proper debt of B., and A. pays the money, and B. dies and makes D. his executor, and D., in consideration that A. will forbear to sue him until such a time, promises to pay him, this is sufficient consideration to support the promise (*f*). So if an executor be indebted to J. S. in 100*l.* who demands the money, the executor is chargeable only in respect of assets, and not otherwise; but if he promises to pay the debt *at a future day,* it becomes *his own debt,* and to be satisfied out of *his own estate* (*g*). So B. having died indebted to G. for work and labour done, his executors signed the following memorandum on the back of G.'s account: "Mr. G. having consented to wait for the payment of the within account, we, as the executors of B., engage to pay Mr. G. interest for the same, at 5*l.* per cent., until the same is settled:" And it was held, that the executors were personally liable to pay the debt and interest (*h*).

(*c*) Davis *v.* Reyner, 2 Lev. 3. S. C. *nomine* Davis *v.* Wright, 1 Ventr. 120. 2 Keb. 758.

(*d*) Deeks *v.* Strutt, 5 T. R. 690. See *infra*, Pt. V. Bk. II. Ch. I.

(*e*) See 2 Saund. 137, *d.* note to Barber *v.* Fox.

(*f*) Scott *v.* Stevens, 1 Sid. 89.

(*g*) Goring *v.* Goring, Yelv. 11. See Reech *v.* Kennegal, 1 Ves. Sen. 126.

(*h*) Bradly *v.* Heath, 3 Sim. 543.

Accordingly, in a modern case (*i*), two executors gave a promissory note to the plaintiff, in the following words, "*As executors* to the late T. T., we severally and jointly promise to pay to N. C. the sum of 200*l.* on demand *with lawful interest* for the same:" And the Court of C. B. held that they were personally liable upon the instrument, upon the ground, that the promise, from the circumstance of interest being added, necessarily imported a payment at a future day, and an executor promising to pay a debt at a future day, makes the debt his own (*k*).

Again, where the plaintiff declared in *assumpsit* that the defendant's testator was indebted to A., who, after the testator's death, assigned the debt to the plaintiff, and appointed him to receive it to his own use, and that the defendant, in consideration that the plaintiff would accept the defendant as his debtor, promised to pay it to the plaintiff; it was held that this was not a sufficient consideration to support the promise, so as to charge the defendant *de bonis propriis* (*l*):

(*i*) Childs *v.* Monins, 2 Brod. & Bing. 460. S. C. 5 Moore, 281. Barnard *v.* Pumfrett, 5 M. & Cr. 71.

(*k*) See also Ridout *v.* Bristow, 1 Cr. & J. 231, where a widow had given a promissory note for "value received by my late husband;" and it was held that the note was valid on the face of it: And Bayley, J. said, "If an administratrix takes upon herself to give a security, which may have the effect of inducing forbearance, and which purports to bind her individually, is it competent for her to say, you must prove assets? To my mind, the act of giving such a security, supersedes the necessity of an investigation as to there being assets: It seems to me that the words 'value received by my late husband,' do not make the proof of assets necessary; and I go still further and say, that it was not competent for her to shew that there were no assets." But where an executrix gave an acceptance for a debt due from her testator, taking an engagement from the drawer, to renew the bill from time to time, until sufficient effects were received from the estate of the testator, it was held that this meant sufficient effects in the ordinary course of administration; and that she had not precluded herself from first applying assets to pay 3000*l.* to trustees for her own use in discharge of a bond given by her husband before marriage to that effect, before she paid the acceptance: Bowerbank *v.* Monteiro, 4 Taunt. 844. Where a bill is endorsed to certain persons *as executors*, and they again endorse it, they become personally liable: *Per* Buller, J., King *v.* Thom, 1 T. R. 489.

(*l*) Forth *v.* Stanton, 1 Saund. 210.

But if the promise had been in consideration of forbearance by such assignee of the debt to sue the executor or administrator, that would have been sufficient (*m*): for it is sufficient, in the case of any other debtor, whom the assignee of the debt forbears, at his request, to sue (*n*).

So where the plaintiff declared *in assumpsit* that the husband of the defendant was indebted to the plaintiff in 50*l.* for beer, and died intestate, and administration was committed to the defendant, and that afterwards, she, in consideration that the plaintiff would deliver to her six barrels of beer, promised to pay to the plaintiff, as well the 50*l.* due by the intestate, as for the six barrels delivered to herself, and that he thereupon delivered the six barrels; it was held that the action was well brought against her on her own *assumpsit*, and that the judgment should be for both debts *de bonis propriis* (*o*).

So where an attorney delivered up deeds to an executor, which he was not obliged to do till his bill was paid, and these deeds were of great use to the executor in several suits which were then carrying on; it was held, that this was a sufficient consideration to make the executor liable to the attorney's whole demand, whether there were assets or not (*p*).

It should seem that the having assets is a good consideration for a promise by an executor or administrator to pay a debt of the deceased, or to answer damages out of the executor's own estate: Thus in *Reech* v. *Kennegal* (*q*), Lord Hardwicke observed, "At law, if an executor promises to pay the debt of his testator, a consideration must be alleged; *as of assets come to his hands;* or of forbearance; *or if an admission of assets* is implied by the promise; otherwise it

(*m*) Pitt *v.* Bridgwater, 1 Roll. Abr. 20, pl. 11. S. C. Hardr. 74. Russel *v.* Haddock, 1 Lev. 188. 1 Saund. 210, note (1).

(*n*) Reynolds *v.* Prosser, Hardr. 71. Oble *v.* Dittlesfield, 1 Ventr. 153. 1 Saund. 210, note (1).

(*o*) Wheeler *v.* Collier, Cro. Eliz. 406.

(*p*) Hamilton *v.* Incledon, 4 Bro. P. C. 4, Toml. edit.

(*q*) 1 Ves. Sen. 126.

will be but *nudum pactum*, and not personally binding upon the executor." So it was held in *Atkins* v. *Hill* (*r*) and in *Hawkes* v. *Saunders* (*s*), that the circumstance of the executor having assets sufficient to pay all the debts and legacies, was a sufficient consideration to support a promise to pay a legacy, so as to render the executor individually liable on that promise in an action at law (*t*): And although the doctrine of these cases, as far as the liability of an executor to be sued at law for a legacy, has been since exploded (*u*), yet it should seem that their authority, with respect to the sufficiency of the consideration in question, to support a promise to pay debts, remains unimpeached. The consequence is, that if an executor or administrator promises, in writing, that, in consideration of having assets, he will pay a particular debt of the testator or intestate, he may be sued on this promise in his individual capacity, and the judgment against him will be *de bonis propriis* (*v*).

It may here be observed, that in cases like the above-mentioned, where the nature of the debt is such as necessarily to make the defendant liable personally, the judgment will be *de bonis propriis*, although he be charged as promising *as executor* (*w*).

What is a sufficient reduction of the executor's promise into writing.

It remains to consider 2ndly, What is a sufficient reduction into writing of the promise of an executor or administrator. The fourth section of the Statute of Frauds (29 Car. II. c. 3), enacts, (*inter alia*) "that no action should be brought, whereby to charge any executor or administrator, upon any special promise to answer damages out of his own estate, or whereby to charge the defendant, upon any special promise

(*r*) Cowp. 284.

(*s*) Cowp. 289.

(*t*) See also *Accord.* Barnard *v.* Pumfrett, 5 M. & Cr. 71, *per* Lord Cottenham.

(*u*) See *infra*, Pt. V. Bk. II. Ch. I.

(*v*) Trewinian *v.* Howell, Cro. Eliz. 91. But see Rann *v.* Hughes, 7 Term. Rep. 350, note (*a*).

(*w*) Powell *v.* Graham, 7 Taunt. 585. Wigley *v.* Ashton, 3 B. & A. 101. Corner *v.* Shew, 3 M. & W. 350.

to answer for the debt, default, or miscarriage of another person, &c. &c., unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be *in writing*, and *signed* by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The word "agreement" used in this section means the *consideration* of the promise (*x*): and, therefore, it was held in the case of *Wain* v. *Warlters* (*y*), that the *consideration* of the promise, as well as the promise itself, must be in writing, otherwise it is void: This doctrine was very much doubted in several subsequent cases, but has been fully established by the more recent decisions (*z*). It is however sufficient, if the consideration can be gathered from the whole tenor of the writing; and it is not necessary that it should be stated on the face of it in express terms (*a*).

Personal responsibility of executor on a submission to arbitration.

This may be the proper place to consider how far an executor or administrator is liable, upon a submission to arbitration of a claim upon him as the representative of the deceased. Where the executor submits in broad terms, to pay whatever shall be awarded, and the arbitrator awards that he shall pay a certain sum, he is personally bound to perform the award, whether he has assets or not (*b*): For if an executor or administrator thinks fit to refer generally all matters in dispute to arbitration, without protesting against the reference being taken as an admission of assets, it will amount to such an admission (*c*). Thus in *Barry* v. *Rush* (*d*), an action of debt was brought on a bond given by the defend-

(*x*) 1 Saund. 211, note (2).

(*y*) 5 East, 10.

(*z*) Saunders *v*. Wakefield, 4 Barn. & Ald. 595. Jenkins *v*. Reynolds, 3 Brod. & Bing. 14. Morley *v*. Boothby, 3 Bingh. 107.

(*a*) Stadt *v*. Lill, 9 East, 348. S. C. 1 Campb. 242. Bateman *v*. Phillips, 15 East, 227. Morris *v*. Stacey, Holt. N. P. C. 153. Russell *v*. Moseley, 3 Brod. & Bingh. 211. S. C. 6 Moore, 521. Stead *v*. Liddard, 1 Bing. 196. S. C. 8 Moore, 2. 1 Saund. 211, note (*d*).

(*b*) See Lord Kenyon's judgment, 5 Term Rep. 7.

(*c*) By Lord Eldon in Robson *v*. ——, 2 Rose, 50. See also Wansborough *v*. Dyer, 2 Chitt. Rep. 40.

(*d*) 1 Term Rep. 691.

ant, by which he, as administrator, bound himself, his heirs, &c.: The condition, after reciting that the plaintiff and defendant had agreed to submit to arbitration certain disputes which had arisen between the plaintiff and the defendant's intestate, touching certain articles of agreement between the intestate and the plaintiff's testator, was for the performance of an award to be made by the arbitrators concerning the matters assigned, and also concerning all other matters, &c. between the said parties: The declaration stated, that the arbitrator had awarded that the defendant, as administrator, should pay to the plaintiff as executrix, 298*l.* on the 27th June following, and that the parties should execute general releases: The defendant pleaded *plene administravit,* and that at the time of entering into the bond, he had no assets: To this plea there was a demurrer: and the Court of K. B. held that the plea was bad; on the ground that the bond was a personal engagement by the defendant to perform the award. So in *Worthington* v. *Barlow* (*e*), where the arbitrator, under a reference between A., a claimant on the estate of an intestate, and B. the administrator, ascertained the amount of the demand, and directed that B. should pay it; it was held that B. could not afterwards object that he had no assets, but that he might be attached for non-payment: And Lord Kenyon said, that as the arbitrator had awarded the defendant to pay the amount of the plaintiff's demand, it was equivalent to determining, as between these parties, that the administrator had assets to pay the debt. So in *Riddell* v. *Sutton* (*f*), an administratrix referred to the final award of an arbitrator certain disputes between the plaintiff and herself as executrix, to be finally settled by the said arbitration: The arbitrator found a balance due from the defendant to the plaintiff, and without finding assets, awarded her to pay it on or before a certain day: And the Court of Common Pleas held that *plene administravit* was no bar to an action on the award.

But the personal liability of the executor or administrator

(*e*) 7 Term Rep. 453.

(*f*) 5 Bingh. 200.

may obviously depend, not only on the terms of the submission, but also on those of the award. Thus in *Pearson* v. *Henry* (*g*), the defendant, as administrator, submitted to an award, and the arbitrator awarded that a certain sum was due from the intestate's estate, *without awarding that the administrator was to pay it:* And it was held that the administrator was not thereby precluded from denying that he had assets (*h*). So in *Love* v. *Honeybourne* (*i*), a cause and all matters in difference between the plaintiff's testator and the defendant were referred to arbitration by a Judge's order, and the arbitrator, upon an investigation of the accounts, ascertained that there was a certain balance against the testator, and, by his award, directed the plaintiff to pay that sum, *out of the assets*, on or before a certain day: The Court was moved to set aside this award for uncertainty, on the ground that the arbitrator had not ascertained whether there were any assets in the hands of the executor to pay the sum awarded: The Court refused to set aside the award, on the ground that although in that respect it might be uncertain, yet that would not vitiate the other part of the award, which was unquestionably certain, namely, that part which found that the plaintiff, as executor, was indebted, upon a balance of accounts, to the defendant: But Lord Tenterden observed, that it appeared to him, that the latter part of the award did not conclude the question of assets, but left it open: And Holroyd, J., remarked that the arbitrator had awarded that the money should be paid by the plaintiff out of the assets, upon a day which he fixed, *i. e.* if there were any assets in his hands at that time; and that if the plaintiff had fully administered at that time, he would not be bound to pay.

Liability of executor for acts done under his power of attorney.

It was held by the Court of K. B., in *Gardner* v. *Baillie* (*k*), that a power of attorney from an executor, to ask, demand, sue for, and receive, all sums due to him as executor, and to do all further acts for receiving debts, &c. with power to do

(*g*) 5 T. R. 6.
(*h*) See 7 Term Rep. 453.
(*i*) 4 Dowl. & Ryl. 814.
(*k*) 6 T. R. 591.

and act touching the premises as effectually as the principal could do, does not authorize the attorney to bind his principal by accepting bills, for debts due from his testator. But in *Howard* v. *Baillie* (*l*), the Court of Common Pleas inclined to hold, that a letter of attorney given by an executor to A. enabling him to transact the affairs of the testator in the name of the executor as executor, and to pay, discharge, and satisfy all debts due from the testator, conveyed a sufficient authority to A. to accept a bill of exchange, in the name of the executor, drawn by a creditor for the amount of a debt due from the testator, so as to make the executor personally liable: And clearly, if the executor admits that such a bill, which has been so accepted by A. with the knowledge of the executor, is for a just debt, and that it ought to be paid, it affords sufficient evidence of an authority given by him to A. to accept that particular bill; without resorting to the letter of attorney (*m*).

Liability of executor with respect to the expenses of the funeral.

With respect to the liability of an executor or administrator to the expenses of the funeral of the deceased, it appears to be clear, that if an executor or administrator gives orders for the funeral, or ratifies or adopts the acts of another party who has given such orders, he makes himself liable individually, and not in his representative character, for the reasonable expenses (*n*). And notwithstanding that, generally speaking, an administrator is not bound, as such, by his acts done before the letters of administration were obtained (*o*), yet it should seem that if, before taking out letters, he gives orders, or sanctions the orders which another person has given, for the funeral of the deceased, he will be thereby bound, after he has become administrator, to satisfy the charges incurred under such orders (*p*).

(*l*) 2 H. Black. 618.

(*m*) *Ibid.*

(*n*) Brice *v.* Wilson, 8 A. & E. 349, note (*c*). S. C. 3 Nev. & M. 512. Corner *v.* Shew, 3 Mees. & W. 350.

(*o*) See *ante*, p. 332, 526, 527.

(*p*) Lucy *v.* Walrond, 3 Bingh. N. C. 841. In this case, the action was sustained against the defend-

A question, however, of some difficulty arises, in cases where the executor or administrator has neither given nor adopted any directions for the burial, but he is sought to be charged on an implied contract arising out of his situation, with reference to his character and the estate of the deceased. According to one report of the case of *Ashton* v. *Sherman* (q), Lord Holt laid down that, "If A. employs B. to work for C., without warrant from C., A. is liable to pay for it: an executor is not liable to pay for funeral expenses unless he contracts for them." This *dictum* is not mentioned by the other reporters (r) of the same case; and indeed, from the nature of the facts, it is difficult to see how the remark could have been introduced into the discussion : But an anonymous case is to be found in the twelfth volume of Modern Reports (s), which contains the mere statement that "an executor is not liable to pay for funeral expenses, without he contracts for it:" And this probably is but a reference to the *dictum* of Lord Holt, inserted in the report of *Ashton* v. *Sherman*. Recent decisions, although the propriety of them has been much questioned (t), must be considered as having overruled this doctrine: and it seems now established, that, in the absence of evidence to charge any other individual, an executor *with assets* is answerable, in point of law, without any express contract, for the funeral expenses of his testator, suitable to his degree (u). Thus in *Tugwell* v. *Heyman* (v), Lord Ellenborough held, that if executors neglect to give orders for the funeral of the testator, and have sufficient assets for that purpose, they are liable, upon an implied promise, to the person who furnishes the funeral in a manner suitable to the testator's degree and circumstances. So in *Rogers* v. *Price* (w),

ant in his character *as administrator*; but the point, as to whether he could be properly sued otherwise than individually, was precluded by the circumstance of the defendant having paid money into Court.

(q) Holt, 309.

(r) 1 Lord Raym. 263. Carth. 429. 12 Mod. 153. Comberb. 444, 449.

(s) P. 256.

(t) See 3 M. & W. 356.

(u) See the remark of Bayley, J. in Hancock v. Podmore, 1 Barn. & Adol. 262.

(v) 3 Campb. 298.

(w) 3 Younge & Jerv. 28.

it appeared that the testator died in Wales, at the house of his brother, who thereupon sent for the plaintiff, an undertaker residing at a distance: The plaintiff afterwards furnished the funeral, and the brother of the deceased attended it as chief mourner: It was admitted that the funeral was suitable to the degree of the deceased: There was no evidence of any contract made by the defendant, or that he knew of the funeral, until it had taken place: But the Court of Exchequer held, that assuming him to have assets, he was liable, upon an implied promise, to pay the expenses of the burial.

However, it was said by Patteson, J. in *Brice* v. *Wilson* (*x*), that " it has been decided by several cases, that an executor is liable upon an implied promise, at common law, to pay reasonable expenses for the funeral of his testator, *where no other person is liable upon an express contract*, although he does not give orders for it: But there is no case, which goes the length of deciding that if the funeral be ordered by another person to whom credit is given, the executor is liable:" In that case the testator's widow ordered an extravagant funeral without the knowledge of the executor, who, however, was present at the funeral, and did not object to it as extravagant: The undertaker, in his bill, charged the widow, but subsequently applied for payment to the executor, who promised to pay: An action was brought against the executor in his own right, in which he suffered judgment by default: And it was held, that the defendant was liable to the whole amount of the reasonable charges for the funeral as ordered by the widow; not, it must be observed, on the ground of a common law liability of the defendant as executor, but on the ground of his having rendered himself liable by adopting the acts of the widow, and treating her as his agent (*y*). But the learned Judge, in this case, probably intended to lay down no more than that the executor, where credit has been given to another person, is not liable *to the undertaker;* for it should

(*x*) 3 Nev. & M. 512. S. C. 8 A. & E. 349, note (*c*).

(*y*) See Walker *v.* Taylor, 6 C. & P. 752.

seem, that if the person, who gives the order for the funeral, pays for it, he may have an action against the executor for the reasonable expenses: Accordingly, it was held in *Green* v. *Salmon* (z), that in an action by an undertaker for funeral expenses, against a person not the executor, a residuary legatee was a competent witness for the plaintiff: For although a person, other than the executor, might have rendered himself liable to the undertaker, the estate was ultimately answerable for so much of the cost as an executor might reasonably pay, and no more; and the witness, therefore, had no disqualifying interest.

These authorities do not involve the decision of the question whether, in an action on the promise implied by law on the part of an executor to pay for the funeral of his testator, the judgment should be *de bonis propriis* or *de bonis testatoris*, or consequently, whether *plene administravit* is a good plea: It should seem, however, that the naming the defendant executor in the declaration is surplusage, and that he is liable *de bonis propriis*, if liable at all (a): but that, since the maintenance of the action is dependent on the fact of his being an executor *with assets*, it is a good defence, under the general issue, that his testator left none. And, accordingly, in a late case (b), the Court of Exchequer held, that the only point really determined, by *Tugwell* v. *Heyman*, and *Rogers* v. *Price*, was, that the law implies a contract on the part of an executor, who has assets, *personally*, and not in his *representative character*; inasmuch as the implied promise cannot place the defendant in a different condition than if he had made an express contract to the same effect; which certainly would have bound him personally only.

Liability of executor continuing the trade of testator.

With respect to the liability of an executor or administrator carrying on the trade of the deceased, the general principle is, that a trade is not transmissible, but is put an end to by the death of the trader: Executors, therefore, have no

(z) 8 A. & E. 348. S. C. 3 Nev. & P. 388.

(a) See Hayter *v.* Moat, 2 Mees. & W. 56.

(b) Corner *v.* Shew, 3 Mee. & W. 350.

authority in law to carry on the trade of their testator, and if they do so, unless under the protection of the Court of Chancery, they run great risk, even although the Will contains a direction that they should continue the business of the deceased (*c*). The case of an executor or administrator, in this respect, is very hard: For, if the trade be beneficial, the profits are applicable to the purposes of the trust, and the executor or administrator derives no personal benefit from the success: If, on the contrary, the trade prove a losing concern, the executor, on failure of assets, will be personally responsible for the debts contracted in the business since the testator's death, to the extent of all his own property; also, in his person; and he may be proceeded against as a bankrupt though he is but a trustee (*d*). Accordingly, in a case (*e*) where the executors of a deceased partner continued his share of the partnership property in trade for the benefit of his infant daughter, the Court of K. B. held, that they were liable upon a bill drawn for the accommodation of the partnership, and paid in discharge of a partnership debt; although their names were not added to the firm, but the trade was carried on by the other partners under the same firm as before, and the executors, when they divided the profits and loss of the trade, carried the same to the account of the infant, and took no part of the profits themselves.

If an executor, without any authority from the Will, take upon himself to trade with the assets, the testator's estate will not be liable in case of his bankruptcy; the testator's creditors and legatees will have a right to prove demands for such of the assets as have been wasted by the executor in the trade, in proportion to their respective interests; and with respect to such of the assets as can be specifically distinguished to be a part of the testator's estate, they will not

(*c*) Barker *v.* Barker, 1 T. R. 295. *Ex parte* Garland, 10 Ves. 119.

(*d*) *Ex parte* Garland, 10 Ves. 119. *Ex parte* Richardson, 1 Buck, 209.

(*e*) Wightman *v.* Townroe, 1 M. & S. 412.

pass to the assignees; the executor holding them *alieno jure*, they will not be liable to his bankruptcy (*f*).

Again, the testator may, by his Will, qualify the power of his executor to carry on trade, and limit it to a specific part of the assets, which he may sever from the general mass of his property for that purpose; and then, in the event of the bankruptcy of the executor, the rest of the assets will not be affected by the commission, although the whole of the executor's private property will be subject to it's operation (*g*). Accordingly, in *Cutbush* v. *Cutbush* (*h*), a testator directed his widow to carry on his business, until his youngest child should attain twenty-one; and, for that purpose, gave her the "entire use, disposal, and management of the capital, stock, and effects which should be in, due, and owing, or belonging to him in his said trade," at the time of his decease; and he authorized his executors to augment the capital employed therein: The executors renounced, and the widow took out administration: And Lord Langdale, M. R., held, that the specified property of the testator only (and not his general assets), was liable to the debts contracted by the widow in carrying on the trade.

Where an executor of a trader only disposes of his testator's stock, it will not constitute him a trader, even though he buy ingredients to make it marketable; but if the executor increases the stock and continues to sell, he becomes a trader: The distinction is, that if an executor or administrator only buys with an intent of selling the testator's stock as soon as it can conveniently be done, he would not be considered a trader; but if he carries on the trade with an intent of continuing it indefinitely, and to make a general profit for the benefit either of himself or of those beneficially entitled to the stock, he clearly would be a trader (*i*).

(*f*) *Ex parte* Garland, 10 Ves. 110. Toller, 487. *Ex parte* Richardson, 1 Buck, 202. *Ante*, p. 533.

(*g*) *Ex parte* Garland, 10 Ves. 110. Toller, 487. *Ex parte* Richardson, 1 Buck, 202. Thompson *v.* Andrews, 1 M. & K. 116.

(*h*) 1 Beav. 184.

(*i*) Eden. Bankr. 5.

Thus, where the executor of a wine-cooper found it necessary to buy wines to refine the stock left by the testator, this was held not to constitute him a trader (*k*).

It must be observed, that when the law speaks of executors not carrying on the business of their testator, it means, that they are not to buy and sell: There are many cases, when executors not only may, but are bound to continue the business to a certain extent: Thus if a party contracts for himself and his executors to build a house, and dies, the executors must go on, or they will be liable in damages for not completing the work (*l*). So if a party engages to build a house, and dies, after having procured all the necessary materials, it should seem that his executors ought to complete the work, and not dispose of the materials at a loss to the estate (*m*). Again, if a bookseller undertakes to publish a work in parts, and, before the completion, he dies, a subscriber has a claim upon the estate to complete the work; for otherwise those parts which he has purchased, upon the faith of the work being completed, are useless: So if a man makes half a wheelbarrow, or half a pair of shoes, and dies, the executors may complete them, and they are not bound to sacrifice the property of their testator by selling articles in an imperfect state (*n*). So if the deceased died possessed of a manufactory, his executors, it should seem, would be justified in continuing the works for a reasonable time, if this should be requisite for the purpose of selling the machinery and premises to advantage; and they will not, at least in Equity, be charged with any loss sustained in employing the assets in so continuing the trade, if they act *bonâ fide*, and according to the best of their judgment (*o*).

It may here be mentioned, that if executors, who are by

(*k*) Toller, 487.

(*l*) Marshall *v.* Broadhurst, 1 Crompt. & Jerv. 405. S. C. Tyrw. 350. *Ante*, p. 1467.

(*m*) 1 Crompt. & Jerv. 405. See also Edwards *v.* Grace, 2 Mees. & Wels. 190.

(*n*) 1 Crompt. & Jerv. 405, 406. See Dakin *v.* Cope, 2 Russ. Chanc. Cas. 170.

(*o*) Garrett *v.* Noble, 6 Sim. 504.

the testator's Will to carry on his trade for the benefit of his family, suffer a person to conduct the trade in his own name, such person may bring actions in his own name for goods sold by him, though afterwards accountable to the executors (*p*).

In a modern case (*q*), connected with this subject, the facts were, that A., the widow and administratrix of B., continued B.'s trade after his decease: B., at his death, was indebted to C. on the balance of an account: A. continued to receive goods from and to make payments to C. as B. had done, and she was charged in account by C. with the debt: The payments made by her to C. exceeded the debt; but a balance was ultimately due to C.: And it was held, that B.'s debt was discharged by A.'s payments, and that the ultimate balance could not be proved as a debt against B.'s estate.

Sect. II.

Of the Liability of an Executor or Administrator in respect of his own tortious or negligent Acts: and herewith of Devastavit; and of Executors' Accounts and Allowances.

It remains to investigate what shall amount to such a violation or neglect of duty by an executor or administrator, as shall make him personally responsible.

This species of misconduct is called in law a *devastavit:* that is, a wasting of the assets; and is defined to be, a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the duty imposed on them, for which executors or administrators shall answer out of their own pockets, as far as they had, or might have had, assets of the deceased (*r*).

An executor is personally liable in equity for all breaches

(*p*) Wilkes *v.* Lister, 6 Esp 78.

(*q*) Sterndale *v.* Hankinson, 1 Sim. 393.

(*r*) Bac. Abr. Exors. (L) 1.

of the ordinary trusts which, in courts of equity, are considered to arise from his office. And it may here be observed, that where personal property is bequeathed to executors, as trustees, the circumstance of taking probate of the Will is, in itself, an acceptance of the particular trusts: Therefore, where the Will contains express directions what the executors are to do, an executor, who proves the Will, must do all which he is directed to do as executor, and he cannot say, that though executor, he is not clothed with any of those trusts (*s*).

The general rule adopted, with respect to the liability of executors and administrators on this head, is founded upon two principles: 1st. That, in order not to deter persons from undertaking these offices, the Court is extremely liberal in making every possible allowance, and cautious not to hold executors or administrators liable upon slight grounds. 2nd. That care must be taken to guard against an abuse of their trust (*t*).

Executors and administrators may be guilty of a *devastavit* not only by a direct abuse by them, as by spending or consuming, or converting to their own use (*u*), the effects of the deceased, but also by such acts of negligence and wrong administration, as will disappoint the claimants on the assets (*v*).

Devastavit by direct acts of abuse:

With respect to incurring the charge by plain and palpable acts of abuse, an example of this sort of *devastavit* may be afforded by recurring to a subject already considered: *viz.* the application of the assets to the satisfaction of the executor's own debt to a third party (*w*). So where the executor

(*s*) Mucklowe *v.* Fuller, Jacob. 198. Booth *v.* Booth, 1 Beav. 125. Stiles *v.* Guy, 4 Y. & Coll. 571, 575. Williams *v.* Nixon, 2 Beav. 472.

(*t*) Powell *v.* Evans, 5 Ves. 843. Raphael *v.* Boehm, 13 Ves. 410. Tebbs *v.* Carpenter, 1 Madd. 298.

(*u*) A disposing of the goods of the testator to the executor's own use is no *devastavit*, if he pays the testator's debts to the value, with his own money, in such order as the law appoints: Merchant *v.* Driver, 1 Saund. 307. Com. Dig. Admon. (I. 2.) *Ante*, p. 543.

(*v*) Bac. Abr. Exors. (L) 1.

(*w*) See *ante*, p. 800, 801.

collusively sells the testator's goods at an undervalue, when he might have obtained a higher price for them, it is a *devastavit*, and he shall answer the real value (*x*).

With regard to a *devastavit* arising from the mal-administration of the executor or administrator, the charge will be incurred by misapplying the assets in undue expenses for the funeral (*y*): in the payment of debts out of their legal order, to the prejudice of such as are superior (*z*): or by an assent to, or payment of a legacy, when there is not a fund sufficient for creditors (*a*).

by mal-administration;

It must, however, be observed, that it is not a *devastavit* in an executor or administrator to pay a debt of an inferior degree, before one of higher, *of which he had no notice* (*b*): And it has been doubted whether it is any *devastavit* to pay over the whole of the assets to the legatees or parties entitled in distribution, so as to leave nothing to satisfy a claimant for a valuable consideration, if the executor had no notice of the existence of the demand, and a reasonable time elapsed, after the death of the testator, before the payment by the executor to the legatees, or next of kin (*c*). But the modern authorities appear to establish that the mere circumstance of want of notice of a debt or claim against the estate of the deceased will not excuse the executor from the payment or satisfaction of it, if the assets were originally sufficient for that purpose, notwithstanding that, in ignorance of the existence of the debt or claim, he may have handed over the assets *bonâ fide* to legatees or parties entitled in distribution (*d*).

If the executor surrenders, or otherwise fails to preserve

(*x*) Wentw. Off. Ex. 302, 14th edit. Bac. Abr. Exors. (L) 1.

(*y*) *Ante*, p. 829, *et seq.*

(*z*) *Ante*, p. 883, *et seq.* But if the executor pays an inferior debt with his own money, though it be to the value of the testator's goods in his hands, it should seem that it will not be a *devastavit:* for the property of the assets will not be changed thereby, but they remain, as against a creditor of a debt of a superior degree, in the same plight as they were before: Com. Dig. Admon. (I. 2). Wheatley *v.* Lane, 1 Saund. 218, by Pemberton, *arguendo.*

(*a*) *Ante*, p. 1149, 1175.

(*b*) See *ante*, p. 883, 884.

(*c*) See *ante*, p. 1155, *et seq.*

(*d*) *Ante*, p. 1158, *et seq.*

the residue of a term of years, where the land is of greater yearly value than the rent, it is a *devastavit* (*e*). On the other hand, if the rent be greater than the yearly value of the land, and the testator was the assignee of the term, the executor may be guilty of a *devastavit* in neglecting to exonerate the estate of the testator from its liabilities in respect of the lease by assigning it to some other person (*f*). If a term be assigned by an executor in trust to attend the inheritance, he is liable to the creditors for a *devastavit;* for the term has by this means become not assets at law (*g*).

by releasing or compounding debts, &c.:

If the executor releases a debt due to the testator, or cancels or delivers to the obligor a bond of which the testator was the obligee, this shall charge him to the amount of the debt, whether in point of fact he received it or not (*h*). So if he releases a cause of action founded on a tort accruing either in the lifetime of the testator, or in his own time in right of the testator, this will be a *devastavit* (*i*). So if he agrees with an executor *de son tort* and accepts his covenant for payment, he will be liable for so much, though nothing be paid (*j*). So if the executor takes an obligation in his own name, for a debt due by simple contract to the testator, this shall charge him as much as if he had received the money; for the new security had extinguished the old right and is a *quasi* payment to him (*k*). So if the husband of a

(*e*) Wentw. Off. Ex. c. 13, p. 312, 14th edit. Thompson *v.* Thompson, 9 Price, 476.

(*f*) Rowley *v.* Adams, 4 M. & Cr. 534. *Ante*, p. 1489, note (*n*).

(*g*) Charlton *v.* Low, 3 P. Wms. 330.

(*h*) Wentw. Off. Ex. 303, 14th edit. Cocke *v.* Jennor, Hob. 66. Veghelman *v.* Kighley, And. 138. S. C. *nomine* Brightman *v.* Keighley, Cro. Eliz. 43. S. C. 4 Leon. 102. S. C. Godb. 29. But a receipt for so much due on the bond as the executor receives, is not a *devastavit* for the residue: Wentw. Off. Ex. 303, 14th edit. Com. Dig. Admon. (I. 2). Nor a parol agreement that he will not sue for more: *Ibid.* Nor a delivery of the bond into another hand, that it may not be sued: *Ibid.*: but see *post*, p. 1537, note (*k*).

(*i*) Wentw. Off. Ex. 304, 4th edit. Com. Dig. Admon. (I. 1). Bac. Abr. Exors. (L) 1.

(*j*) Com. Dig. Admon. (I. 1).

(*k*) Goring *v.* Goring. Yelv. 10. Bac. Abr. Exors. (L) 1, *ante*, p. 1421, 1422. But where the executor delivered up a bond due to his testator, and took a new bond, with

feme covert executrix indulge the debtor with further time, in consideration of an express promise to pay the husband, who afterwards recovers on such promise, this is a *devastavit:* For the money recovered will not be assets of the testator's estate, and if the husband dies before execution sued, the executor or administrator of the husband, and not the wife, shall have execution (*l*). So if an executor, in his representative character, commences an action in which he has a right to recover, and afterwards covenants with the defendant to receive a specific sum at a future day as a compensation, he will be answerable for the money as assets immediately (*m*).

Again, if the executor submits a debt due to the testator to arbitration, and the arbitrators award him less than his due; this, being his own voluntary act, shall bind him, and he shall answer for the full value as assets (*n*).

But though, generally speaking, an executor, compounding or releasing a debt, must answer for the same, yet if it appears to have been for the benefit of the trust estate, it is an excuse: Therefore, in a case where there were arrears of rent on a lease, and, on the tenant's becoming insolvent, the executor released the arrears, and gave him a sum of money to quit possession, Lord Talbot held, that as the executor appeared to have acted for the benefit of the estate, he should be allowed both sums (*o*). So in *Pennington* v.

surety to himself for the debt, it was held, that this, though a conversion in law, was none in equity: Armitage *v.* Metcalfe, 1 Chanc. Cas. 74.

(*l*) Yard *v.* Ellard, 1 Salk. 117. S. C. Carth. 463. 1 Lord Raym. 368.

(*m*) Norden *v.* Levit, 2 Lev. 189. S. C. T. Jones, 88. 1 Freem. 442. S. C. cited and said to have been affirmed on error, in Dom. Proc., Barker *v.* Talcot, 1 Vern. 474. Jenkins *v.* Plombe, 6 Mod. 94. It seems to have been once holden, that if an executor to an obligee in a penal bond, after the bond is forfeited, releases the penalty on receipt of the principal and interest, this is a *devastavit:* Went. Off. Ex. 303, 14th edit. But the contrary was held by three Judges, in Kniveton *v.* Latham, Cro. Car. 490: And since the statute 4 Ann. c. 16, s. 13, it is obviously no *devastavit.*

(*n*) Wentw. Off. Ex. 304, 14th edit. Anon. 3 Leon. 53. Com. Dig. Admon. (I. 1). Bac. Abr. Exors. (L) 1. Yard *v.* Ellard, 1 Lord Raym. 369, by Holt, Ch. J.

(*o*) Blue *v.* Marshall, 3 P. Wms. 381. In Legh *v.* Holloway, 8 Ves.

Healey (*p*), an administrator sued a debtor to his intestate, and recovered a verdict against him; and the debtor, being in gaol, subsequently petitioned to be discharged under the Insolvent Act: The debtor offered terms, whereby he was to be liberated on the payment of 150*l.*, a sum less than the costs incurred in the action: The administrator agreed to the terms, and liberated the debtor: And the Court of Exchequer held, in an action brought against him by a creditor of the intestate, that he was not chargeable with any part of the debt as assets.

by unnecessary payments:

An executor will be guilty of a *devastavit*, if he applies the assets in payment of a claim which he is not bound to satisfy (*q*): as if he makes disbursements in the schooling, feeding, or clothing of the children of the deceased, subsequently to his decease (*r*). So if he pays a bond founded on a usurious contract, or a bond *ex turpi causâ*, such payment will amount to a *devastavit*, as well against legatees as creditors (*s*). So if the testator was bound in a *joint* obligation, and he dies before the co-obligor, the executor is not liable on the instrument at law, and therefore if he pays the sum due upon it, he will be guilty of a *devastavit* (*t*): However,

213, an executor, having, under a misconception of a Will, at a trial of an issue, entered into a compromise with the creditor, expressly subject to the approbation of the Court, was permitted to try the issue, paying the costs of the former proceedings.

(*p*) 1 Crompt. & M. 402. S. C. 3 Tyrwh. 319.

(*q*) Com. Dig. Admon. (I. 1). Vez *v.* Emery, 5 Ves. 141. In this case, Lord Alvanley said, that if the executor had taken advice as to the propriety of making the payment, and had been advised, by any gentleman of the law in this country, that he was bound to do so, he (the learned Judge) would not have held him liable. However, the general rule is, that, if, under the best advice he can procure, an executor acts wrong, it is his misfortune; but public policy requires that he should be the person to suffer: if he has been misadvised, the Court must act, not upon the improper advice under which he may have acted, but upon the acts he has done: Doyle *v.* Blake, 2 Scho. & Lef. 243.

(*r*) Giles *v.* Dyson, 1 Stark. N. P. C. 32.

(*s*) Winchcombe *v.* Bishop of Winchester, Hobart, 167. S. C. cited 1 Brownl. 33. Robinson *v.* Gee, 1 Ves. Sen. 254. Com. Dig. Admon. (I. 1).

(*t*) *Ante*, p. 869, 870, 1481.

in equity, the executor is in some instances chargeable *pari passu* with the survivor; and in such cases he is justified in applying the assets accordingly (*u*). But the executor is not bound to plead the Statute of Limitations to an action commenced against him by a creditor of the testator (*v*): Thus if the surplus of the personal estate after payment of the debts and legacies, he bequeathed to a residuary legatee, and several creditors, although barred by the Statute of Limitations, commence actions against the executor, equity will not, on his refusal to plead the statute, compel him to plead it in favour of the residuary legatee (*w*). But in *Shewen* v. *Vandenhorst* (*x*), under the common decree in an administration suit, a creditor applied to prove a debt which was barred by lapse of time; and the executor refusing to interfere, the plaintiff, a residuary legatee, insisted upon setting up the objection of the statute: Sir John Leach, M. R., held, that it was competent for the plaintiff, or any other person interested in the fund, to take advantage of the statute before the Master, notwithstanding the refusal of the executor: And this decision was confirmed by Lord Brougham on appeal.

Such acts of negligence, or careless administration, as defeat the rights of creditors, or legatees, or parties entitled in distribution, amount to a *devastavit:* For if persons accept the trust of executors, they must perform it; they must use due diligence, and not suffer the estate to be injured by their neglect (*y*). Thus if an executor has a lease for years, determinable upon the life of J. S., which is upon a reasonable estimate worth 200*l*., if the executor will not sell this but

by negligence:

(*u*) *Ante*, p. 870, 1485.

(*v*) Norton *v.* Frecker, 1 Atk. 526. See also *Acc.*, *per* Lord Lyndhurst, C. B., in Williamson *v.* Naylor, 3 Younge & Coll. 211, note (*a*). But see *contrà*, *per* Bayley, J., in McCulloch *v.* Dawes, 9 Dowl. & Ryl. 43.

(*w*) Castleton *v.* Fanshaw, Prec. Chanc. 100. S. C. 1 Eq. Cas. Abr. 305. 2 Eq. Cas. Abr. 254, pl. 1. 259, pl. 1. *Ex parte* Dewdney, 15 Ves. 498.

(*x*) 1 Russ. & M. 347. 2 Russ. & M. 75.

(*y*) Tebbs *v.* Carpenter, 1 Madd. 298.

keeps it, and J. S. dies in a short time, yet the executor shall answer for the value of it at the time of the death of the testator; for it was his own fault that he would not sell it (z). So if an executor delays the payment of a debt payable on demand with interest, and suffers judgment for the principal and interest incurred after the testator's death, this is a *devastavit* for the interest, unless the executor can shew that the assets were insufficient to discharge the debt immediately (a). And where the executor permits debts carrying interest at 5*l.* per cent. to run on, when he had in his hands a fund to pay them, he shall be charged with interest at that rate (b). But it must be observed, that where there is a sufficiency of assets for payment of debts, executors may pay simple contract debts not bearing interest, before specialty debts bearing interest, if not objected to by the specialty creditors; and the legatees are not at liberty to complain of the order of payment (c).

in not paying debts carrying interest:

in not getting debts in.

Again, if the executor by his delay in commencing an action, has enabled the debtor of his testator to protect himself under a plea of the Statute of Limitations, this amounts to a *devastavit* (d). So where the testator had lent out money on bond, and the executor during several years made one application, by an attorney, to the obligor, but brought no action against him, Lord Thurlow held, that the executor should be liable for the sum due, as having not been got in by reason of his neglect, although it did not appear

(z) Phillips v. Phillips, 2 Freem. 12. Taylor v. Tabrum, 7 Sim. 28. See *ante*, p. 1420.

(a) Seaman v. Everard, 2 Lev. 40. Com. Dig. Admon. (I. 1). Bac. Abr. Exors. (L) 1. So if an executor may save the penalty of a bond by payment of the less sum specified in the condition, or by other performance of the condition, and he neglect to do so, it will be a *devastavit* in him, if he have assets: 1 Saund. 333, *a.* note (7) to Hancocke v. Prowd.

(b) Hall v. Hallet, 1 Cox, 134, 138. Dornford v. Dornford, 12 Ves. 130, note (29), 2nd edit. See *infra*, p. 1567, *et seq.*, as to charging executors with interest.

(c) Turner v. Turner, 1 Jac. & Walk. 39.

(d) By Holt, Ch. J., in Hayward v. Kinsey, 12 Mod. 573. But see East v. East, 5 Hare, 348.

whether the debt was or was not recoverable (*e*). So where, for more than three years, the executors permitted money to remain due on bond to their testator, without inquiring into the circumstances and situation of the obligor, or calling upon him to pay in the money, Lord Alvanley, held, that, on the obligor's becoming bankrupt, the executors were responsible (*f*). So where executors had suffered rent to be in arrear for several years, without taking any legal steps, by distress or otherwise, Sir Thomas Plumer held, that they should be charged with such arrears (*g*). And it has been held, that the usual indemnity clause does not exonerate one of two executors and trustees from a loss occasioned by a debt, due from the other, having been suffered to remain outstanding (*h*).

Devastavit by loss of the assets:

There has been occasion to discuss, in a previous part of this Work (*i*), the question of the liability of an executor or administrator, in respect of assets come fully into his possession and hands, and afterwards lost to the estate (*k*). It was there stated, that an executor or administrator has been considered to stand in the condition of a gratuitous bailee, with respect to whom the law is, that he shall not be charged without some default in him. But this, as it appears from the judgment of Lord Ellenborough, in *Crosse* v. *Smith* (*l*), must not be understood of the extent of the

at law;

(*e*) Lowson *v*. Copeland, 2 Bro. Chanc. Cas. 156.

(*f*) Powell *v*. Evans, 5 Ves. 839. See also Atty. Gen. *v*. Higham, 2 Y. & Coll. Ch. C. 634, and *post*, p. 1544.

(*g*) Tebbs *v*. Carpenter, 1 Madd. 290. See Buxton *v*. Buxton, 1 Mylne & Cr. 95, by Sir C. Pepys, M. R. *Post*, p. 1544.

(*h*) Mucklow *v*. Fuller, Jacob. 198. Stiles *v*. Guy, 4 Y. & Coll. 571.

(*i*) *Ante*, p. 1419, 1420.

(*k*) In a case where the executor had lost a bond due to the testator, the Court inclined to charge the executor with the debt; but for the present directed only that the defendant should prosecute a suit brought by him in equity against the obligor with effect, in order to recover the money due upon the bond that was lost: Goodfellow *v*. Burchett, 2 Vern. 299. It is now established, that a lost bond may be put in suit at law, and declared on as lost, with an excuse for *profert* pleaded on that ground: Read *v*. Brookman, 3 T. R. 151.

(*l*) 7 East, 258.

liability of an executor or administrator at law, but merely in equity: His Lordship there observed, that it had been suggested in argument, that an executor was to be considered as a mere ordinary bailee; but that this was an idea probably then for the first time suggested in a Court of law (*m*): "As no case at law," continued the learned Judge, "has yet decided that an executor once become fully responsible, by actual receipt of a part of his testator's property, for the due administration thereof, can found his discharge in respect thereof, as against a creditor seeking satisfaction out of the testator's assets, either on the score of inevitable accident, as destruction by fire, loss by robbery, or the like, or reasonable confidence disappointed, or loss by any of the various means which afford excuse to ordinary agents and bailees, in cases of loss without any negligence on their part (*n*), I say, as no such case in respect to executors has yet occurred in a Court of Law, we are not, from the particular hardship of the present case, authorized to make such a precedent in favour of this defendant."

in equity:

However, a more lenient doctrine has, at all events, been established in the Courts of Equity (*o*), as will fully appear in the course of this section.

loss by theft or casualty:

Thus, if any goods of the testator are stolen from the possession of an executor, or from the possession of a third person to whose custody they have been delivered by the executor, or are lost by casualty, as by accidental fire (*p*), the executor shall not, in equity, be charged with these as assets (*q*).

loss by invalid security:

Again, where an executor puts out the money of his testator, though without the indemnity of a decree, upon a

(*m*) See, however, Wentw. Off. Ex. 235, 14th edit.

(*n*) But see Wentw. *ubi supra.* Com. Dig. Assets, (D). *Ante,* p. 1419, 1420.

(*o*) See the judgment of Lord Eldon in Massey *v.* Banner, 1 Jac. & Walk. 248.

(*p*) Croft *v.* Lyndsey, 2 Freem. 1. It seems that executors are not bound either to insure or to continue the insurances of their testator: Bailey *v.* Gould, Excheq. Eq. *coram* Alderson, B., 4 Y. & Coll. 221.

(*q*) Jones *v.* Lewes, 2 Ves. Sen. 240.

real security, which there was no reason then to suspect, but afterwards such security proves bad, the executor is not accountable for the loss, any more than he would have been entitled to the profits, had it continued good (*r*).

But the rule is, never to permit a trustee or executor *after a decree* to account, to lay out money on mortgage, or to deal with the assets for the purposes of investment, without the leave of the Court: Where, therefore, the executor, after a decree, and consequently after he might have had the directions of the Court, chooses to lay out the money on mortgage, if the transaction should appear to be for the benefit of the party entitled, the Court will give him the advantage of it; but if otherwise, will consider the fund as money, and make the executor bring it into Court (*s*).

With respect to loans upon personal security, the Court of King's Bench, in *Webster* v. *Spencer* (*t*), was of opinion that an executor, who had lent out, on the security of a promissory note, money belonging to the testator, but not wanted for the immediate uses of the Will, was not guilty of a *devastavit*, provided he exercised a fair and reasonable discretion on the subject (*u*). Nevertheless, although the lending itself may not amount to a legal *devastavit*, yet the rule is now completely established in equity, that an executor or administrator, lending money of the deceased upon bond, promissory note, or other personal security, is guilty of a breach of trust (*v*), and shall be personally answerable if the security prove defective.

(*r*) Brown *v*. Litton, 1 P. Wms. 141: but see Norbury *v*. Norbury, 4 Madd. 191.

(*s*) Widdowson *v*. Duck, 2 Meriv. 494, 498, 499.

(*t*) 3 Barn. & Ald. 360.

(*u*) In this case, one of two executors had lent the money in question on the promissory note, and the question was, whether both the executors were properly joined as plaintiffs in an action to recover it: It was assumed, that if the loan had been a *devastavit*, the executor who was the lender ought to have sued alone in his individual character: But see the observations of Bayley, J., in Clark *v*. Hougham, 2 B. & C. 155. *Ante*, p. 752.

(*v*) Terry *v*. Terry, Prec. Chanc. 273. S. C. Gilb. Eq. Rep. 10. Ryder *v*. Bickerton, 3 Swanst. 80, note. S. C. 1 Eden. 149, note. Adye *v*. Feuilleteau, 1 Cox, 24. S. C. 3

If, however, the Will directs the executors to lay out the fund in real *or personal* securities, they would be justified, as against legatees, using a sound discretion, and fairly and honestly lending it to a person whom they considered responsible, at a reasonable interest (*w*): But the rule is different, it should seem, as against creditors (*x*): And though the Will gives the executors power to lend on personal security, this does not enable them, even as against legatees, to *accommodate* a trader with a loan on his bond (*y*).

loss from loans to each other:

It must further be observed, that where a testator empowers his executors to lend money on personal security, he must be taken to rely upon the united vigilance of them all, with respect to the solvency of the borrower: If one of them lends to the other, this object is defeated; consequently such a loan is a breach of trust, and a misappropriation of the fund; and if any mischief arises to the estate of the testator therefrom, the executors will be liable (*z*). Accordingly, in *Stickney* v. *Sewell* (*a*), two executors were empowered, by Will, to lend money on government, real, or personal security: One of them, in 1815, lent part of the fund to the other executor and his partner in trade, upon mortgage: The mortgagors became bankrupts, in 1831, and then the mortgaged property, which consisted, in part, of a windmill, a watermill, and a house in a town, being sold, produced considerably less than the sum advanced: And it was held

Swanst. 84, note. Holmes *v.* Dring, 1 Cox, 1. Wilkes *v.* Steward, Coop. 6. Vigrass *v.* Binfield, 3 Madd. 62. Walker *v.* Symonds, 3 Swanst. 63: overruling Harden *v.* Parsons, 1 Eden, 145. Bacon *v.* Clark, 3 Mylne & Cr. 294.

(*w*) Forbes *v.* Ross, 2 Cox, 116.

(*x*) See Doyle *v.* Blake, 2 Scho. & Lef. 239, 240.

(*y*) Langston *v.* Ollivant, Coop. 33. See, further, as to *devastavit* by suffering money to remain in the hands of bankers, &c., which, according to the directions of the trust, should have been invested in a particular mode, Bacon *v.* Clark, 3 Mylne & Cr. 294. Lowry *v.* Fulton, 9 Sim. 115.

(*z*) — Walker, 5 Russ. 7. Gleadow *v.* Atkin, 2 Crompt. & Jerv. 548, 555. S. C. 2 Tyrwh. 593. But if the one should give a bond to the other, to save him harmless from the consequences of such a breach of trust, the bond would be valid at law: Warwick *v.* Richardson, 10 M. & W. 284.

(*a*) 1 Mylne & Cr. 8.

by Sir C. Pepys, M. R., that the executors were liable for the deficiency.

loss by fall of stocks:

However, as it will presently appear (*b*), an executor is not justified in unnecessarily keeping his testator's money dead in his hands: and therefore, if the exigencies of his office do not require otherwise, the executor should invest the unemployed money in government securities, taking care to lay it out in that fund which the Court of Chancery adopts, *viz.*, the three per cent. consols (*c*). The rule is, that if an executor lays out the testator's money in the three per cents., he is not liable for the fall of stocks (*d*). But if he invests it in any other fund, which afterwards sinks in value, the loss will be thrown on him, although there be no *mala fides* on his part (*e*). On the other hand, if any profit happens by

(*b*) *Post*, p. 1544.

(*c*) Holland *v.* Hughes, 16 Ves. 114. Tebbs *v.* Carpenter, 1 Madd. 306. Norbury *v.* Norbury, 4 Madd. 191. Where a trustee has trust money in his hands, which he is authorized to lay out in the public funds or on real security, he is justified, pending the necessary delay in completing an anticipated mortgage, in investing the money in Exchequer Bills: Matthews *v.* Brise, 6 Beav. 239.

(*d*) Peat *v.* Crane, 2 Dick. 499, note. Franklin *v.* Frith, 3 Bro. Chanc. Cas. 434. Howe *v.* Lord Dartmouth, 7 Ves. 150. 4 Madd. 306. 3 Mylne & Cr. 496. So if he invests money in the three per cents., and *duly* appropriates the same for the benefit of a legatee, the executor shall not be liable for the fall of stocks: *Ex parte* Champion, cited in Hutcheson *v.* Hammond, 3 Bro. Chanc. Cas. 147. Fonbl. Treat. Eq. B. 2, c. 7, s. 6, note (*p*). But it is otherwise where the appropriation is unduly made: Thus, where a legacy was left to A. on marrying with consent, and, till marriage, interest to be paid at three per cent.; and the executrix laid out a sum equal to the legacy, and conveyed to trustees in trust to pay the legacy with three per cent. interest, and to pay the surplus interest to her; it was holden that this was not a good appropriation, and, the stocks having fallen in value, that the executrix's estate should make it good: Cooper *v.* Douglas, 2 Bro. Chanc. Cas. 232. See *ante*, p. 1203.

(*e*) Hancom *v.* Allen, 2 Dick. 498. Howe *v.* Lord Dartmouth, 7 Ves. 150. 3 Mylne & Cr. 497. See also Gordon *v.* Bowden, 6 Madd. 342. He will not be answerable for any further loss than was occasioned by his buying the other stock instead of the three per cents.: Hynes *v.* Redington, 1 Jones & Lat. 589. It may be doubted whether, where trustees have the power of investing monies in government securities, they are absolutely bound to select three per cents. for that purpose: See Angell *v.* Dawson, 3 Younge & Coll. 316, *per* Alderson, B.

by not investing in the three per cents.:

the rise of the stock in which the executor has laid out the money, he shall not have the benefit, but it shall accrue to the estate of his testator (*f*).

And it should seem, that if the testator dies, leaving stock in other funds than the three per cents., it is the duty of the executor to transfer such stock into the latter fund (*g*).

consequence of not converting property bequeathed for life, with remainder over, into three per cents.:

Again, it has already appeared (*h*), that where personal property is bequeathed for life with remainder over, and not specifically, it is the duty of the executor, with certain exceptions, to convert it into three per cents.; and the tenant for life is entitled only upon that principle. In the case of *Dimes* v. *Scott* (*i*), a testator gave the residue of his personal estate to trustees, directing them to convert it into money, and invest the proceeds in government or real securities, of which they were to stand possessed, upon trust for A. during her life, and after her death, for B.: The trustees permitted a share, which the testator had in an Indian loan, bearing interest at 10*l.* per cent., to remain for several years on that security, during which time, they paid to A. the interest at 10*l.* per cent., which it yielded annually; and the loan being afterwards paid off, they invested the money in the three per cents., at a time when the funds were so low, that the amount of stock purchased was considerably greater than if the conversion had taken place at the end of a year from the testator's death: And it was held, by Lord Gifford, that the tenant for life was not entitled to the actual interest which the money yielded, while it remained on the Indian security, but only to the dividends of so much three per cent. stock as would have been purchased with it at the end of a year from the testator's death; that the trustees ought to be charged with the whole of the stock actually purchased, and all the sums actually received in respect of the Indian rate of interest; and that they ought to be allowed in their discharge, as payments to the tenant for life, not the sums which they had, in fact, paid her,

(*f*) Phayre *v.* Peree, 3 Dow. 128.

(*g*) 7 Ves. 151, 152. 16 Ves. 114.

(*h*) *Ante*, p. 1196.

(*i*) 4 Russ. Chanc. Cas. 195.

but only a sum equal to what she would have received for dividends, if the money had been transferred from the Indian security, and invested in the three per cent. stock at the end of a year from the testator's death: And this decision was confirmed, on appeal, by Lord Lyndhurst. In the case of *Mackenzie* v. *Taylor* (*k*), where the testator gave his residuary personal estate to his executors, upon trust, as soon as convenient after his death, to convert into money and invest the same, and the executors allowed it to be enjoyed in specie by Mrs. M., the tenant for life, as long as she lived, but three years after her death, they accounted for the value and paid it into Court; it was held by Lord Langdale, that they ought to pay interest at four per cent. from her death to the day of such payment.

consequences of retaining in hand instead of investing; or of investing on a deficient security:

Where trustees are bound by the terms of their trust to invest the money in the public funds, and instead of doing so, they retain the money in their hands, or invest it upon an insufficient security, the *cestuis que trust* may elect to charge them either with the amount of the money, or with the amount of the stock which they might have purchased with the money (*l*): Where, however, the trustees are not bound to invest the money in the public funds, or in any specific security, but by the terms of the trust have a discretion to invest it in various ways, the authorities are conflicting on the question whether, if the trustees fail to invest as prescribed, the *cestui que trusts* can claim to charge them with the value of some particular security that might have been obtained, or whether they are merely chargeable with the whole amount of the trust fund, together with interest (*m*).

loss by not calling in money on securities, or in hands of banker:

This consideration leads to the question, how far an executor or administrator is liable, in respect of losses occasioned by not calling in the money of the testator already invested

(*k*) 7 Beav. 467.

(*l*) 4 Hare, 503, 504. Pride *v.* Fooks, 2 Beav. 430.

(*m*) Hockley *v.* Bantock, 1 Russ. 141. Watts *v.* Girdlestone, 6 Beav. 188. Ames *v.* Parkinson, 7 Beav. 379, are in favor of the former view: Marsh *v.* Hunter, 6 Madd. 295, and Shepherd *v.* Mouls, 4 Hare, 500, of the latter.

upon securities. Executors ought not, without great reason, to permit money to remain upon personal security longer than is absolutely necessary: Accordingly, in ***Powell* v. *Evans*** (*n*), executors were charged with a loss caused by neglecting to call in money lent by the testator on bond (*o*). So in *Moyle* v. *Moyle* (*p*), executors and trustees who, for upwards of a year after the testator's death, allowed a considerable portion of the assets to be unproductive in the hands of a banker who failed, were, under the circumstances, charged with the loss. So executors were held personally liable in respect of the loss to the testator's estate of a sum outstanding on personal security, although the security was that of a bond of the testator's solicitor, and the money had been invested in that security by the testator some years before his death, and by his Will he directed that his trustees should get in his outstanding estate "as soon as conveniently might be" after his decease (*q*). But in *Buxton* v. *Buxton* (*r*), an executor who allowed part of a testator's assets to remain invested in Mexican bonds for a year and seven months after the testator's death, and eventually sold the bonds at a lower price than might have been obtained by a sale at an earlier period, but who appeared to have acted throughout with diligence and good faith, was held, by Sir C. C. Pepys, M. R., under the circumstances, not to be liable for the loss consequent on his not having sold them sooner: And his Honor further held, that a difference of opinion between two executors, as to the propriety of converting the assets at a particular period, followed by a demand, made by one of them upon the other, to concur in effecting an immediate conversion, does not

(*n*) 5 Ves. 839.

(*o*) See also *ante*, p. 1536, 1537. 4 Mylne & Cr. 496, and Eagleton *v.* Kingston, 8 Ves. 466, 467. Atty. Gen. *v.* Higham, 2 Y. & Coll. Ch. C. 634. The money, when called in, should be invested in the three per cents., if there is no present occasion for it: See 7 Ves. 149, 150. This seems a sufficient answer to the inquiry of Lord Camden, in Orr *v.* Newton, 2 Cox, 276.

(*p*) 2 Russ. & M. 710.

(*q*) Bullock *v.* Wheatley, 1 Coll. 130.

(*r*) 1 Mylne & Cr. 80.

deprive the latter of the right to exercise his own discretion, or render him liable for the loss that may arise from the delay consequent on his declining to comply with the demand (*s*).

It is not the duty of an executor to call in money invested on real security, where no risk is apparent; nor are executors bound to convert leasehold property into three per cent. stock, unless under particular circumstances (*t*).

loss by failure of banker, solicitor, &c.

Generally speaking, if an executor appoints another to receive the money of his testator, and he receives it, it is the same thing as if the executor himself had actually received it, and will be assets in his hands: and, consequently, appointing another to receive, who will not repay, is a *devastavit* (*u*). Thus, in a case where the Will directed that one Edward Pistor should carry on the business of the testator to a given day, for the benefit of his estate, and the executors, from the confidence thus reposed by the testator in Pistor, permitted him to get in debts, without anything appearing on the Will to shew the testator's intention to that effect, the Court of Exchequer held, that the executors must answer to the residuary legatee for the money so received by their agent (*v*). So where trustees for sale sold the trust property and placed the conveyance, executed by them and having their receipt indorsed, in the hands of a solicitor, who received and misapplied the purchase money, they were held liable for a breach of trust (*w*). Again, where trustees left some Exchequer Bills, in which they had properly invested trust money, in the hands of a broker, they were held personally liable upon a misapplication of the bills by the broker (*x*).

But with respect to losses sustained by the failure of bankers, or other persons into whose hands the money of the testator has been deposited by the executor, the rule, at least

(*s*) See also East *v.* East, 5 Hare, 348.

(*t*) 7 Ves. 150.

(*u*) Jenkins *v.* Plombe, 6 Mod. 93.

(*v*) Pistor *v.* Dunbar, 1 Anstr. 107.

(*w*) Ghost *v.* Waller, 9 Beav. 497.

(*x*) Matthews *v.* Brise, 6 Beav. 239.

in equity, seems to be, that where the deposit was made from necessity, or conformably to the common usage of mankind, the executor will not be responsible for the loss (*y*). So if the executor, living in London, and receiving money of the testator, should remit to an attorney in the country to pay the debts there, and the attorney becomes insolvent, the executor will not be chargeable, if the business was transacted in the ordinary manner, without any circumstance to shew suspicion (*z*). So where executors employ an auctioneer to sell the leaseholds, or other portion of the assets, who receives the deposit and fails to pay it over, the executors will not, generally speaking, be held personally liable for the loss (*a*). But in *Darke* v. *Martyn* (*b*), where a testator died in March, 1823, and in January, 1824, and January, 1825, the executors and trustees deposited part of the assets in the hands of bankers on their notes carrying interest; and the bankers failed in November, 1825; Lord Langdale, M. R., held, that, *as no necessity had been shewn for such deposit*, the trustees were personally responsible for the loss. So where a trustee deposited a trust fund with his bankers, accompanied by an order in writing to invest the money in consols, he was held answerable for the omission of the bankers to make the investment, where he made no subsequent inquiry respecting it, until about five months afterwards, when the bankers became bankrupt (*c*). And if an executor pays the money of the testator into a banker's, not on any distinct account, but *mixing it with his own money*, it should seem that the executor will be answerable for the loss sustained by the failure of the banker (*d*).

(*y*) Churchill *v.* Hobson, 1 P. Wms. 243. Knight *v.* Lord Plymouth, 3 Atk. 480. S. C. 1 Dick. 120. *Ex parte* Belchier, Ambl 219. Rowth *v.* Howell, 3 Ves. 565. Adams *v.* Claxton, 6 Ves. 226.

(*z*) Bacon *v.* Bacon, 5 Ves. 334, 335.

(*a*) Edmonds *v.* Peake, 7 Beav. 239.

(*b*) 1 Beav. 525.

(*c*) Challen *v.* Shippam, 4 Hare, 555.

(*d*) Wren *v.* Kirton, 11 Ves. 377. Fletcher *v.* Walker, 3 Madd. 73. Massey *v.* Banner, 4 Madd. 413. S. C. 1 Jac. & Walk. 241. Robinson *v.* Ward, Ry. & Mood. 274. S. C. 2 C. & P. 59. See also Salway *v.* Salway, 2 Russ. &

General result of authorities as to the liability of executors for loss of assets.

The result of all the best authorities on this subject was thus stated by Lord Cottenham, in his judgment in the case of *Clough* v. *Bond* (*e*): "Although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be entrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive. Thus if he omit to sell property when it ought to be sold, and it be afterwards lost without any fault of his, he is liable (*f*); or if he leave money due upon personal security, which, though good at the time, afterwards fails (*g*). And the case is stronger if he be himself the author of the improper investment, as upon personal security, or an unauthorized fund. Thus he is not liable, upon a proper investment in the three per cents., for loss occasioned by the fluctuations of that fund (*h*), but he is for the fluctuations of any unauthorized fund (*i*). So when the loss arises from the dishonesty or

M. 215, in which case Lord Brougham held (overruling the decision of Sir J. Leach, M. R., 4 Russ. 60), that a receiver appointed by the Court is answerable for the loss of monies consequent on the failure of a banker with whom they have been deposited for security, if the deposit be made in such a way that the receiver parts with the absolute control over the fund: This judgment was afterwards affirmed in Dom. Proc.: White *v.* Baugh, 9 Bligh, 181.

(*e*) 3 Mylne & Cr. 496.

(*f*) Phillips *v.* Phillips, 2 Freem. 11. *Ante*, p. 1535, 1536.

(*g*) Powell *v.* Evans, 5 Ves. 839. Tebbs *v.* Carpenter, 1 Madd. 290. *Ante*, p. 1544. See also p. 1537.

(*h*) Peat *v.* Crane, 2 Dick. 499, note, *ante*, p. 1541.

(*i*) Hancom *v.* Allen, 2 Dick. 498. Howe *v.* Lord Dartmouth, 7 Ves. 137. *Ante*, p. 1541.

failure of any one to whom the possession of part of the estate has been entrusted: Necessity, which includes the regular course of business in administering the property, will, in Equity, exonerate the personal representative. But if, without such necessity, he be instrumental in giving to the person failing possession of any part of the property, he will be liable, although the person possessing it be a co-executor or co-administrator" (*k*).

In what cases an executor is liable for the *devastavit* of his co-executor.

A *devastavit* by one of two executors or administrators shall not charge his companion (*l*), provided he has not intentionally or otherwise contributed to it: For the testator's having misplaced his confidence in one shall not operate to the prejudice of the other (*m*).

Hence, an executor shall not, under ordinary circumstances, be responsible for the assets come to the hands of his co-executor (*n*). Hence, also, the circumstance that one of two executors had notice of the existence of a debt of superior degree, which he concealed from his co-executor, shall not affect the latter, so as to make him guilty of a *devastavit* by paying an inferior debt (*o*); though, perhaps, if notice to one executor be proved, and nothing more appears, it shall be presumed that he communicated it to his co-executor (*p*).

But where an executor, possessing assets of his testator,

(*k*) Langford *v.* Gascoyne, 11 Ves. 333, *post*, p. 1551. Shipbrook *v.* Lord Hinchinbrook, 11 Ves. 252. 16 Ves. 477, *post*, p. 1551. Underwood *v.* Stevens, 1 Meriv. 712, *post*, p. 1555. The following cases, bearing on the general principles above stated, have been lately decided: *viz.* Bacon *v.* Clark, 3 Mylne & Cr. 294. Lowry *v.* Fulton, 9 Sim. 115. Munch *v.* Cockerell, 9 Sim. 339. 5 M. & Cr. 178. Broadhurst *v.* Balguy, 1 Y. & Coll. Ch. C. 16. Booth *v.* Booth, 1 Beav. 125.

(*l*) Wentw. Off. Ex. 306, 14th edit. Anon. Dyer, 210, *a.* Hargthorpe *v.* Milforth, Cro. Eliz. 318. Williams *v.* Nixon, 2 Beav. 472.

(*m*) Cro. Eliz. 319.

(*n*) Cro. Eliz. 319. Littlehales *v.* Gascoyne, 3 Bro. Chanc. Cas. 74. Williams *v.* Nixon, 2 Beav. 472. See *infra*, Pt. V. Bk. II. Ch. I. as to a finding by a jury, upon a plea of *plene administravit* by several executors, that one only had assets.

(*o*) Hawkins *v.* Day, Ambl. 162. S. P. S. C. 1 Dick. 157.

(*p*) Ambl. 162. See Timson *v.* Ramsbottom, 2 Keen, 35. Smith *v.* Smith, 2 Cr. & M. 231. Meux *v.* Bell, 1 Hare, 73.

hands over those assets to a co-executor, and they are misapplied by that co-executor, there the executor, who so hands them over, shall be answerable for their misapplication, unless he can show a good reason for having so acted (*q*).

The rule may, perhaps, be stated to be, that where, by any act done by one executor, any part of the representative estate comes to the hands of his co-executor, the former will be answerable for the latter, in the same manner as he would have been for a stranger, whom he had entrusted to receive it (*r*).

But if an executor is merely passive, by not obstructing his co-executor from getting the assets into his possession, the former is not responsible (*s*). If, however, the one, in any way, contributes to enable the other to obtain possession, he is answerable, notwithstanding his motive be innocent, unless he can assign a sufficient excuse (*t*). Thus, in the case of several executors, if, by agreement among themselves, one

(*q*) Townsend *v*. Barber, Dick. 356. However, in the case of Davis *v*. Spurling, 1 Russ. & M. 66, an executor was employed by his co-executor as his agent to sell an estate, which, under the Will of the testator, the co-executor alone had power to sell: The executor so employed handed over the price of the estate to the co-executor, who afterwards misapplied it: And Sir John Leach, M. R., held, that, although, by the Will of the testator, the price of the estate, when sold, was to be considered as part of his personal estate, yet the executor, so handing it over, was not accountable for the misapplication of it; inasmuch as he had no legal right to retain it; for it was in his hands, not as executor, but simply as agent of his co-executor, who alone had power to sell the estate, and to receive the price of it.

(*r*) See Mr. Cox's note to Churchill *v*. Hobson, 1 P. Wms. 241, and Lord Thurlow's judgment in Sadler *v*. Hobbs, 2 Bro. Chanc. Cas. 117. Accordingly in Homer *v*. Pringle, 8 Cl. & F. 264, 268, the rule was stated to be that the appointment of one of several trustees to manage the property would not *per se* make the other trustees responsible for his acts; but it would make the trustee so appointed the agent of the other trustees for those purposes, and render them responsible for his acts, so far as they would have been responsible for the acts or receipts of a stranger.

(*s*) Langford *v*. Gascoyne, 11 Ves. 335.

(*t*) 11 Ves. 335. Hewett *v*. Foster, 6 Beav. 259. Broadhurst *v*. Balguy, 1 Y. & Coll. Ch. C. 16.

is to receive and intermeddle with such a part of the estate, and another with such a part, each of them will be chargeable for the whole; because the receipts of each are pursuant to the agreement made between them (*u*). So where A., B., C., D., and E. (the two latter being married women) took out administration to an intestate, and afterwards appointed C. to be the acting administrator, and directed the creditors to pay their debts to him; and C. became insolvent; it was held that A. B., and the husbands of D. and E., were responsible for C.'s receipts (*v*). So where a man made several executors, who all joined in the sale of the testator's goods, but one only received the money, and he afterwards became insolvent; it was holden that they should all be charged (*w*).

Accordingly, an executor, having a fund standing in the joint names of himself and another, cannot, upon the mere representation of the co-executor, if false, be justified in doing an act that is an exercise of power over that fund: First, the act must be necessary for the purposes of the Will, and then the person, to whom the representation is made, has imposed upon him at least ordinary and reasonable diligence to inquire whether the representation is true (*x*).

Also, if an executor has been dealing with the assets a considerable time, much beyond that period in which, according to the ordinary course, the debts would be paid, and he applies to the other executor to have a fund put into his hands exclusively, and the other does inquire, and satisfies himself that there are debts unpaid, and the real purpose of the executor making the application, was to apply the fund to the discharge of debts; if it turns out afterwards, that he had in his own hands a fund sufficient for the payment of those debts, and therefore the application of the other fund to that purpose was unnecessary, and that fund was not in

(*u*) Gill *v.* Atty. Gen., Hardr. 314.

(*v*) Lees *v.* Sanderson, 4 Sim. 28.

(*w*) Aplyn *v.* Brewer, Prec. Chan. 173.

(*x*) 11 Ves. 254. Hewett *v.* Foster, 6 Beav. 259. Broadhurst *v.* Balguy, 1 Y. & Coll. Ch. C. 16.

fact devoted to the purpose for which it was provided, it would be impossible for the executor, who parted with it, to discharge himself: He would be subject to the imputation of negligence, as having been too easy with his co-executor; too remiss in not asking how he had been dealing with the assets in his hands (*y*).

Upon these principles, Lord Eldon held, in *Shipbrook* v. *Hinchinbrook* (*z*), that where executors joined in a transfer of stock, vested in the name of all the executors, to a co-executor, upon his groundless representation that it was required for debts, the executors were answerable for the whole of the produce of the stock which they could not prove to have been applied by the co-executor to the payment of debts of the testator (*a*): But his Lordship further held, that they were not liable so far as they could prove the application to that purpose, although he possessed other funds, part of the assets, not through them, which funds he wasted.

Again, in *Langford* v. *Gascoyne* (*b*), it appeared from the affidavit of a witness, that on the day after the testator's funeral, his three executors, Gascoyne, Spurrell, and Lambert, met at his house, and his widow, being present, left the room to fetch a bag of money: Upon her return with it, she asked the witness to which of the executors she should deliver it; and the witness, not then having a good opinion of Gascoyne's circumstances, advised her to give it to Spurrell; upon which, she passed by Gascoyne and Lambert, who were sitting near the door, and gave the bag into the hands of Spurrell, who counted the money over, and then delivered it into the hands of Gascoyne: The witness further stated, that at that time Gascoyne was not reputed to be in good circumstances: And Sir Wm. Grant held, that the money

(*y*) 11 Ves. 254.

(*z*) 11 Ves. 252. S. C. 16 Ves. 477.

(*a*) See also Chambers *v.* Minchin, 7 Ves. 186. Underwood *v.* Stevens, 1 Meriv. 713. Williams *v.* Nixon, 2 Beav. 472. Hewett *v.* Foster, 6 Beav. 259. Broadhurst *v.* Balguy, 1 Y. & Coll. Ch. C. 16.

(*b*) 11 Ves. 333.

must be considered to have been so far in the hands of Spurrell, that he was answerable for what afterwards became of it: but that as to the other executor, Lambert, it was impossible to charge him; for that he had neither done nor said anything that in any degree contributed to the loss of the money, or to it's getting into the hands of Gascoyne: And his Honor observed, that it was not incumbent in one executor by force to prevent the money getting into the hands of another.

So in *Moses* v. *Levi* (c), a testatrix bequeathed the residue of her property to certain persons, some of whom lived in the west of England, and others in Norfolk, and she appointed two persons to be executors, one of whom lived at Clifton, and the other at Diss: The executors, having paid all the debts and specific legacies of the testatrix, entered into an arrangement by which the Clifton executor was to pay the residuary legatees in the west of England, and the Diss executor those in Norfolk; and the residuary funds were apportioned between them for that purpose: The Diss executor made default in payment of one of the legatees in that neighbourhood: And Alderson, B., held, that the other executor was responsible for the default.

But if one executor places the property of the testator in the hands of the other, who happens to be a banker, or in such a situation that the act is not imprudent, the executor so depositing shall not be charged in case of a loss: for if he had been a sole executor, and had, under the same circumstances, placed the money in a banker's hands, he would not have been liable (d): So if an executor in the country executes a power of attorney to a co-executor in town for the purpose of changing a fund of the testator, as the Court would order it to be changed, as from the long annuities to three per cents., the act is justifiable, being for a purpose

(c) 3 Younge & Coll. 359.

(d) Churchill *v.* Hobson, 1 P. Wms. 241. Chambers *v.* Minchin, 7 Ves. 198. See also Atty. Gen. *v.* Randell, MS. Rep. 21 Vin. Abr. 534, tit. Trust. (N. a.) pl. 9.

belonging to the administration of assets; but not to change it to bank stock (*e*). So, in *Bacon* v. *Bacon* (*f*), where an executor, living in London, paid money to his co-executor, who had been the confidential agent and attorney of the testator, for the purpose of paying debts in the country where he resided, and the money was lost by his insolvency, Lord Loughborough held, that the executor, who had paid the money under such circumstances, should not be charged with the loss (*g*).

Again, it has been held, that one executor in trust is not answerable for the receipt of the other, merely by taking probate, permitting the other to possess the assets, and joining in acts necessary to enable him to administer (*h*): Accordingly, where a bill of exchange was remitted to two agents, payable to them personally, who, on the death of the principal, became his executors, Lord Alvanley held, that the mere indorsement of one, after they were executors, in order to enable the other to receive the money, was not sufficient to charge him who did not receive it (*i*). So it was laid down by Lord Redesdale, in *Joy* v. *Campbell* (*k*), that

(*e*) Chambers *v.* Minchin, 7 Ves. 193, by Lord Eldon.

(*f*) 5 Ves. 331.

(*g*) This decision was approved of by Lord Eldon, in Chambers *v.* Minchin, 7 Ves. 193. See Davis *v.* Spurling, 1 Russ. & M. 66, where Sir John Leach, M. R., intimates, that an executor, handing over assets to his co-executor for the express payment of a particular debt, will not be answerable for their misapplication. But in Hanbury *v.* Kirkland, 3 Sim. 265, on a marriage, a sum of stock was settled for the separate use of the wife for life, remainder for the husband for life, remainder for their children, with power to change securities with consent of the wife: The dividends on the stock being reduced, one of the trustees, in whom the husband and wife principally confided, and who, with his partners, was their solicitor, informed his co-trustees that he had an opportunity of investing the property in a mortgage at five per cent., and, with the consent of the husband and wife, requested his co-trustees to execute a power of attorney to enable him to sell the stock: The co-trustees, without inquiring into the matter, complied: The trustee sold the stock and absconded: And Sir L. Shadwell, V. C., held, that the co-trustees were liable. See also *Accord.* Broadhurst *v.* Balguy, 1 Y. & Coll. Ch. C. 16.

(*h*) Hovey *v.* Blakeman, 4 Ves. 596.

(*i*) 4 Ves. 608, 609.

(*k*) 1 Scho. & Lefr. 341.

if an executor, living in London, remits money to his co-executor to pay debts in Suffolk, "he is considered to do this of necessity: he could not transact business without trusting some persons, and it would be impossible for him to discharge his duty, if he is made responsible where he remitted to a person to whom he would have given credit, and would in his own business have remitted money in the same way: It would be the same, were one executor in India, and another in England, the assets being in India, but to be applied in England; there the co-executor is appointed for the purpose of carrying on such transactions; and the executor is not responsible; for he must remit to somebody, and he cannot be wrong, if he remits to the person in whom the testator himself reposed confidence."

But the rule, it should seem, is different at law: Thus, in *Cross* v. *Smith* (*l*), it was held, that an executor administering, having once received money, assets of his testator, could not discharge himself, under a plea of *plene administravit* to an action by a bond creditor, by shewing that he paid the money over to his co-executor, even for the purpose of satisfying the bond creditor, who had applied for payment to such co-executor, if the co-executor afterwards misapplied the money by retaining it to satisfy his own simple contract debt.

Liability of executor trustee who stands by and sees a breach of trust committed by his co-trustee:

It may here be mentioned, that by the established rules of Courts of Equity, a trustee who stands by and sees a breach of trust committed by his co-trustee, becomes responsible for that breach of trust. Accordingly in *Booth* v. *Booth* (*m*), a testator bequeathed to his partner and to one Batkin, his personal estate, upon trust to invest the same, for the benefit of his wife and children: Both the executors proved the Will, and the surviving partner retained the testator's monies in the trade, which were lost: Batkin took no active part in the trusts, but was cognizant of the breach of trust, and took no proceedings to prevent it: And Lord Langdale, M. R., held, that Batkin was responsible for the consequences of

(*l*) 7 East, 246.

(*m*) 1 Beav. 125.

the breach of trust. So, in *Lincoln* v. *Wright* (*n*), two executors, permitting their co-executor to retain in his hands the ascertained residue, were held by the same learned Judge to be liable for a breach of trust.

not precluded by the usual indemnity clause.

In cases of the description lately above considered, a trustee or executor will not be protected by the usual indemnity clause, exonerating him from all responsibility on account of the acts of his co-trustees or co-executors (*o*).

Liability of an executor who renounces after an act of administration.

It may here be observed, that if an executor administers part of the assets, he shall be charged with such as he has received, although he has renounced the executorship, and paid the money to a co-executor who proved the Will (*p*): For executors must either wholly renounce, or if they act to a certain extent as executors, and take upon them that character, they can be discharged only by administering the assets themselves, or by putting the administration into the hands of a Court of Equity (*q*). Thus in *Doyle* v. *Blake* (*r*), A., named executor in a Will, acted on behalf of particular legatees, disclaiming an intention of interfering generally: He afterwards renounced formally in favour of B. who was named a trustee in the same Will, who thereupon obtained administration *cum testamento annexo:* B. possessed himself of the assets, and afterwards died insolvent: And it was held that A. was liable, as executor, notwithstanding his renunciation; and was answerable for the acts of B., it appearing that he had a control over the assets, and B. being considered as having obtained possession thereof by his means. So in *Underwood* v. *Stevens* (*s*), one of two executors and trustees did not act, otherwise than by joining with his co-executor and trustee in the sale of stock, under a representation that the sale was necessary for payment of debts, which it was not; the produce was received by the latter, and the greater

(*n*) 4 Beav. 427.

(*o*) Mucklow *v.* Fuller, Jacob. 198. See also Underwood *v.* Stevens, 1 Meriv. 712. Hanbury *v.* Kirkland, 3 Sim. 265. Williams *v.* Nixon, 2 Beav. 472.

(*p*) Read *v.* Truelove, Ambl. 417.

(*q*) 2 Scho. & Lefr. 245. See Riky *v.* Kemmis, 1 Lloyd & Goold, 101.

(*r*) 2 Scho. & Lefr. 231.

(*s*) 1 Meriv. 712.

part applied by him to his own private purposes: And the first executor was held chargeable for the amount, except so far as any part was applied to the trust purposes; together with interest at four per cent.; notwithstanding the parties beneficially interested consented to and approved of the sale, under a similar misrepresentation. Again, in *Rogers* v. *Frank* (*t*), the defendant, named in the Will as executor, did not prove the Will, but before he renounced, he collected large sums belonging to the estate of the testator: And it was held that he was liable to be sued in equity in the character of executor by the legatees under the Will, one of whom was also executrix, and had proved the Will (*u*).

But an executor, who has not proved, is not to be considered as acting, by assisting a co-executor who has proved, in writing letters to collect debts, nor by writing directly to a debtor of the testator, and requiring payment (*v*). So, if one of two persons named executors disclaims and renounces, and afterwards possesses himself of assets as agent to the other, who has proved the Will, the former does not thereby become accountable as executor (*w*). So in *Stacy* v. *Elph* (*x*), a person named as executor and trustee under a Will did not formally renounce probate until after the death of the acting executrix, nor did he ever disclaim by deed the trust of the real estate; but he purchased a part of the real estate, and took the conveyance from the widow, who was tenant for life, and the heir, to whom the estate must have descended upon the disclaimer of the trust: During the life of the acting executrix, however, he interfered in the disposition of the testator's property, as her friend or agent: And it was held, that he was not, under the circumstances, chargeable as executor or trustee. But in *Harrison* v. *Graham* (*y*), the case was as follows: Barbara Graham by Will appointed

(*t*) 1 Younge & Jerv. 409.

(*u*) See also Harrison *v*. Graham, stated, *infra*.

(*v*) Orr *v*. Newton, 2 Cox, 274.

(*w*) Dove *v*. Everard, 1 Russ. & M. 231. See also Lowry *v*. Fulton, 9 Sim. 104.

(*x*) 1 M. & K. 195.

(*y*) 3 Hill's MSS. 239. 1 P. Wms. 241, note (*y*) to 6th edition.

her mother, her sisters Margaret and Elizabeth, and her brother Robert, her executors, and died: Margaret alone proved the Will, and acted chiefly as executrix, and was described as the only acting one, in a letter of attorney executed by the others, who were therein described as executors, to empower Margaret to receive a quantity of stock: Robert, by virtue of another letter of attorney, executed by the other executors, transferred a quantity of the testatrix's S. S. Stock, received the money, and paid it over the same day to Margaret: After this she and the mother died, making Robert their executor: It did not appear that Robert had, under the first executorship, done any other act as executor, besides giving the one letter of attorney, and receiving the other: The question was whether this was such an act of administration in Robert, as should make him chargeable as to his own estate: The Master had charged him, and the case came on, upon exceptions to the report: Lord Hardwicke:—"The question in the case is, whether or no this defendant had acted as an executor, and consequently whether he is chargeable? I agree that there may be cases where an executor may act as an attorney to the other executors. If an executor renounces, and then acts under a letter of attorney, it is no administration; for it depends on the nature of the act, accompanied with any other acts. Here is a Will and four executors. The Will is proved by one only, with a reservation of the rights of the other three. Here appear to have been acts done by them all, and a letter of attorney given by the defendant, together with the other executors, to Margaret, who indeed is described therein as the only acting executrix. But the defendant describes himself there as an executor. This was clearly acting as an executor. Then he afterwards accepts another letter of attorney from Margaret, and the rest of the executors. Shall executors be allowed to discharge themselves at their pleasure from being liable to assets? Money comes into his hands, he pays it over to Margaret; this cannot discharge him" (*n*).

(*n*) See also James *v*. Frearson, 1 Y. & Coll. Ch. C. 370.

Liability of an executor who has proved, but declines to act as executor.

It is a general rule, that where an executor has once proved the Will, he cannot renounce his representative character, and act under another: He can do no act in regard to the estate for which he is not answerable as executor. In the case of *Graham* v. *Keble* (*o*), a partner in a house of agency in India, where a deposit was made in trust for a particular purpose, was made one of the executors of him who made the deposit, and proved the Will: A power of attorney was sent from the executors in Europe, to the house of agency, for them to act under: But it was held, that as the partner named executor had proved the Will, the house could only act under his authority, and that he himself could not renounce the executorship, and act in another character. But a co-executor, who proved, but never acted, cannot be charged by reason of the mere circumstance that he received a letter by the post from a debtor to the estate, inclosing a bill of exchange on account of his debt, which bill the co-executor immediately sent to the acting executor, who afterwards became insolvent (*p*).

Liability of a co-executor joining in a receipt.

The most difficult point connected with this subject, is with regard to the liability of an executor, who merely joins his co-executor in an act, which might have been done with equal validity by the co-executor alone. At one period, a well recognised distinction on this head existed between trustees and executors: This distinction was founded on the difference between the power and authority of a co-trustee, and that of a joint executor, *viz.*, that trustees cannot act separately as executors may, but must join both in conveyances and receipts; and therefore it may be taken that a co-trustee joins only for conformity: But a co-executor, as it is not necessary for him to join, interferes in the transaction unnecessarily; he was, therefore, to be considered as assumi a power over the fund, and consequently answerable for application, as far as it was connected with the particular transaction in which he joined: Therefore, the rule was,

(*o*) 2 Dow. P. C. 17.

(*p*) Balchen *v.* Scott, 2 Ves. Jun. 678.

that where the executors joined in a receipt, both having the whole power over the whole fund, both were chargeable; where trustees joined, each not having the whole power, and the joining being necessary, only the person receiving the money was chargeable (*w*). But this rule was much relaxed, in favour of executors, by the opinion expressed by Lord Harcourt in *Churchill* v. *Hobson* (*x*), and by the decision of Lord Northington in *Westley* v. *Clarke* (*y*), which latter case was expressly approved of by Lord Alvanley in *Hovey* v. *Blakeman* (*z*). Again, in *Scurfield* v. *Howes* (*a*), the last-mentioned Judge observed, that he dissented from the rule, as broadly stated, that if one executor receives the money, and two sign the receipt, both are chargeable, *if it appear that the second joined for conformity only.*

In *Westley* v. *Clarke*, as Lord Thurlow observed in giving judgment in the case of *Sadler* v. *Hobbs*, Thompson, one of the executors, had actually received the money without the concurrence of the co-executors, and they signed the receipt afterwards; and that therefore was not an act which put it in the power of Thompson to get at the money, since in fact he had it at the time; and his Lordship added, that, according to a note in that case, with which he had been furnished by the then Master of the Rolls (Sir L. Kenyon), Lord Northington said, he should have thought the co-executors liable, if they had been present at the time when the money was paid (*b*). And Lord Redesdale, in *Joy* v. *Campbell* (*c*), took the distinction to be, that if a receipt be given for the

(*w*) Aplyn *v.* Brewer, Prec. Chan. 173. Murrell *v.* Cox, 2 Vern. 570. Treat. Eq. B. 2, c. 7, s. 5. Darwell *v.* Darwell, 2 Eq. Cas. Abr. 456, pl. 5. Fellows *v.* Mitchell, 1 P. Wms. 83. *Ex parte* Belchier, Ambl. 219. Leigh *v.* Barry, 3 Atk. 584. Chambers *v.* Minchin, 7 Ves. 198. Brice *v.* Stokes, 11 Ves. 324. Gregory *v.* Gregory, 2 Younge & Coll. 315, 316.

(*x*) 1 P. Wms. 243.

(*y*) 1 Eden, 357. S. C. 1 P. Wms. 82, note by Mr. Cox. See also the observations of the Lord Keeper in Harden *v.* Parsons, 1 Eden, 147, 148.

(*z*) 4 Ves. 608.

(*a*) 3 Bro. Chanc. Cas. 95, according to the report from Lord Colchester's MSS. in Belt's edition.

(*b*) 1 P. Wms. 241, note by Cox.

(*c*) 1 Scho. & Lefr. 341.

mere purposes of form, then the signing will not charge the person not receiving: but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge; and the true question in all those cases seems to have been, whether the money was under the control of both executors: if it was so considered by the person paying the money, then the joining in the receipt by the executor who did not actually receive it, amounted to a direction to pay his co-executor; for it could have no other meaning; he became responsible for the application of the money, just as if he had received it (*d*). Again, in *Doyle* v. *Blake* (*e*), the same learned Judge observed, that "where executors have been jointly charged where one only has received the money, and the other joined in the receipt, it has been on the ground that the property was under the control of both: That is, where two executors joined in the receipt to a debtor for a sum of money, though the receipt of one would have been a discharge to the debtor, yet, they joining in the discharge, the debtor is taken to have paid to them both: his requiring the discharge of the executor, who has not received the money, amounts to saying, 'I make this payment to you both, and not to him only who actually received the money.' The true consideration in a question of this kind is, whether the executor, who merely joins in the receipt, had a control, and his joining in the receipt is evidence of that control, although the money was actually received by the other. I believe, if the case of *Westley* v. *Clarke* were seen with all the circumstances that were before Lord Northington, we should find, that he meant to establish no more than this; that the mere joining in the receipt should not have the conclusive effect of charging both."

The relaxation of the rule in favour of executors has been lamented by Lord Eldon on several occasions (*f*), so much so,

(*d*) See *Acc.*, Gregory *v.* Gregory, 2 Younge & Coll. 316, *per* Alderson, B.

(*e*) 2 Scho. & Lefr. 242.

(*f*) Chambers *v.* Minchin, 7 East, 198. Brice *v.* Stokes, 11 Ves. 324.

as to lead to doubts whether the original rule must not be considered as re-established (*g*). But his Lordship, when last he had an opportunity to consider the rule (*h*), alludes to its alteration as having been completely effected: "Executors seem formerly to have been charged on much stricter principles, if they joined unnecessarily, though without taking the control of the money; that rule is now altered; whether the alteration is wholesome may be a question: It may be laid down now, as in *Brice* v. *Stokes*, that though one executor has joined in a receipt, yet whether he is liable shall depend on his acting: The former was a simple rule, that joining shall be considered as acting; but in the cases since the rule, that joining alone does not impose responsibility, scarcely two judges agree."

Distinction as to executors' liability between creditors and legatees.

It may be observed, in concluding this subject, that in *Churchill* v. *Hobson* (*i*), Lord Harcourt took a distinction between creditors and legatees (*k*): But Lord Thurlow, in *Sadler* v. *Hobbs* (*l*), said that this seemed to him an odd distinction, that a creditor should have a right to charge an executor and a legatee not. It should seem, however, that there may be cases where the strictness of law would charge a man as executor as to creditors, in which a Court of Equity would not charge him as to legatees: For example, legatees are bound by the terms of the Will, but creditors are not so; and therefore, in many instances executors would be discharged as against legatees, though not as against creditors (*m*).

Shipbrook *v.* Hinchinbrook, 16 Ves. 479. A simpler rule, said his Lordship, never existed, than that if an executor acts without necessity, he takes the power over the fund; and he shall not say, he has not the power over it: 7 Ves. 199.

(*g*) See 1 Eden, 360, note (*b*) by Lord Henley. 2 Bro. Chanc. Cas. 114, note (1) by Mr. Belt.

(*h*) Walker *v.* Symonds, 3 Swanst. 64.

(*i*) 1 P. Wms. 242.

(*k*) See the remark of Lord Northington on this distinction, Harden *v.* Parsons, 1 Eden. 148.

(*l*) 2 Bro. Chanc. Cas. 117.

(*m*) Doyle *v.* Blake, 2 Scho. & Lefr. 239, 240.

Liability of husband and *feme covert* executrix for *devastavits*:

before marriage:

It remains to consider the doctrine of *devastavit*, as applied to the case of a married woman, executrix or administratrix. If a *feme sole*, being an executrix or administratrix, wastes the goods of her testator or intestate and then marries, her husband is liable, as long as the coverture lasts, for the *devastavit* (*f*). But, upon her death, his liability ceases: And such being the principle of law, Courts of Equity have held, that they could not establish any rule upon the difference whether the husband had or had not received a portion with his wife (*g*).

It must, however, be observed, that if the wife was entitled to any *choses in action*, which the husband did not reduce into possession in her lifetime, so that it becomes necessary for him to take out administration to her, he will be liable, as her administrator, for her *devastavit*, by virtue of the statute 30 Car. II. (*h*).

during coverture:

With respect to the *devastavit* of the wife committed during the coverture, the husband is liable in law and in equity, as long as both parties are alive, for the acts of his wife as executrix or administratrix: for, as she has no power to act alone, his assent will be presumed (*i*): And it has been holden, that the husband, though living separate from his wife, shall be charged with her *devastavit* (*k*). So if an executrix and her husband admit assets in answer to a bill filed against them, the assets become a debt of the husband in respect of this admission, and may be proved under a commission of bankruptcy issued against him (*l*).

Upon the death of the wife, the general rule is, that the liability of the husband (except as her administrator) for his wife's *devastavit*, committed as well during coverture as

(*f*) Kings *v.* Hilton, Cro. Car. 603. Heyward's case, Moore, 761. Lumley *v.* Hutton, 1 Roll. Rep. 268, 269. Bachelor *v.* Bean, 2 Vern. 60. Com. Dig. Baron & Feme (N). Palmer *v.* Wakefield, 3 Beav. 227.

(*g*) 1 Scho. & Lefr. 263.

(*h*) See *ante*, p. 1471.

(*i*) 1 Scho. & Lefr. 266.

(*k*) Paget *v.* Read, 1 Vern. 143.

(*l*) *Ex parte* M'Williams, 1 Scho. & Lefr. 173.

before, ceases (*m*): And therefore no proceeding can be had, either by action of debt on a *devastavit*, or by a *scire fieri* inquiry, against the husband of an executrix, if she dies after judgment had against her and her husband *de bonis testatoris:* Yet if a general judgment be had against husband and wife executrix, either upon the *scire fieri* inquiry, or in the action of debt, and afterwards the wife dies, the husband shall be charged (*n*).

husband's liability after coverture for assets come to his hands:

But in Equity, the surviving husband is liable for whatever assets came to the hands of his wife, or his own hands, during the coverture; upon the principle that all persons coming into possession of property bound by a trust, are chargeable in Equity as trustees: The cases establishing this head of Equity are collected and commented upon by Lord Redesdale in his elaborate judgment in *Adair* v. *Shaw* (*o*); in which case his Lordship held, that where a *feme covert* obtains administration, and the goods are wasted during coverture, and the husband dies, his assets are chargeable in Equity for the waste committed during coverture. Accordingly, in *Clough* v. *Bond* (*p*), on the death of an intestate, administration to her estate was granted to her son and daughter: The daughter being then under coverture, the assets were, in May, 1831, paid into a banking-house, to the joint account of her husband and her brother, the administrator, and the whole of the fund, with the exception of the share of one of the next of kin, who was abroad, was soon afterwards paid away among the several parties entitled, by means of cheques signed by the two persons in whose names the account stood: The husband of the administratrix died in December, 1831, and, ten months afterwards, her brother

liability of his estate where the wife survives.

(*m*) 1 Scho. & Lefr. 261.

(*n*) Mounson *v.* Bourn, Cro. Car. 519. Baron *v.* Berkley, 1 Lutw. 670. 1 Saund. 219, *d.* note to Wheatley *v.* Lane. Likewise, if the goods of the testator remain *in specie* in the hands of the husband, the party entitled to them may, after the death of the wife, bring an action of trover or detinue against the husband to recover them: 1 Scho. & Lefr. 262.

(*o*) 1 Scho. & Lefr. 243.

(*p*) 3 Mylne & Cr. 490. S. C. *nomine* Clough *v.* Dixon, 8 Sim. 594.

and co-administrator drew out the balance, and having applied it to his own use, absconded: And it was holden by Sir L. Shadwell, V. C., and afterwards, on appeal, by Lord Cottenham, that the estate of the husband of the administratrix was amenable for the loss. In this case the deposit was held to have been an improper one, and to have amounted to a *devastavit* of which the husband was the author; inasmuch as by depositing the money in his own name and that of the co-administrator, he excluded his wife, the administratrix, from possessing the control over the co-administrator which she would and ought to have possessed in the event, which happened, of the husband's death before the wife, and gave the co-administrator the absolute power over the fund, and enabled him to appropriate it to himself without the control of his co-administratrix.

However, although the husband of an administratrix may have become liable to make good, to the next of kin of the intestate, the assets received by himself or his wife during the coverture, yet if the husband, at his death, makes his wife his executrix, and she possesses assets more than sufficient to answer the demands of the next of kin, after paying the other debts, the estate of the husband is discharged, and therefore the next of kin cannot sue an administrator *cum testamento annexo* of the husband (*q*).

liability of wife executrix surviving her husband for *devastavit* during coverture.

Another branch of this subject may now be considered, *viz.*, the responsibility of the married executrix, after the death of her husband, for a *devastavit* committed during the coverture. The rule is, according to the judgment of Lord Redesdale in *Adair* v. *Shaw*, that though the waste during the coverture be the act of the husband, yet it is an act for which the wife, after the determination of the coverture, is responsible to creditors at law, and, as it should seem, to legatees in Equity (*r*).

(*q*) Tyler *v.* Bell, 2 Mylne & Cr. 89.

(*r*) 1 Scho. & Lefr. 258. 1 Rop. Husb. & Wife, 198, 2d edit. However, in Clough *v.* Dixon, 8 Sim. 598, *ante*, p. 1563, Sir L. Shadwell, V. C. said, that he had considerable doubt whether, where the plaintiff

A distinction, indeed, has been taken between cases where the wife is executrix or administratrix *before* the marriage, and those where she became so *afterwards:* In the first case, if she survive her husband, she will be liable to answer, not only for her own wrongful acts in the administration previously to the coverture, but even for those of her husband during the continuance of the marriage; because her title as executrix or administratrix having commenced and become complete before the marriage, it was her own folly to take a husband who would so misconduct himself, as to waste her testator's or intestate's assets: But in the second case, it is said, the act of the husband, in obtaining probate or letters of administration in his wife's name, if against or without her consent, and she does not afterwards intermeddle in the administration, is an act from which she may dissent, after his death, by renunciation, and avoid the consequences of his misconduct (*s*). If, however, the husband procure probate or letters of administration in his wife's name and *with her consent*, then it seems that she surviving him will be personally answerable, upon the insolvency of his estate, for the waste committed by him of her testator's or intestate's assets; because she by her own act and assent having assumed the office of executrix or administratrix, and being the only legal personal representative of the testator or intestate (which distinguishes this case from that before mentioned, of the husband's discharge by her death from her *devastavit*, he being neither executor nor administrator), became liable with her husband for every act relating to it; and an action or suit lay against both of them, and upon his death the right of action survived against her (*t*).

claimed as one of the next of kin of the intestate, the Court could make the widow responsible for the *devastavit* which was the act of her husband: And his Honor added, that he did not think the reasoning of Lord Redesdale was satisfactory, where he said that a married woman, an executrix, would be responsible to the creditors of the testator, after the coverture, for a *devastavit* committed by the husband during the coverture.

(*s*) 1 Rop. Husb. & Wife, 196, 2d edit. See *ante*, p. 191.

(*t*) 1 Rop. Husb. & Wife, 197, 2d edit.

Executors' accounts:

they shall account for all profits:

On the subject of the accounts of an executor or administrator, there has already been occasion to state, that he must account for all profits which have accrued in his own time, either spontaneously, or by his acts, out of the estate of the deceased (*u*). Therefore, if an executor has a lease for years which yields profits to the value of 20*l.* a-year, rendering rent of 10*l.* a-year, he shall account for 10*l.* a-year as assets (*v*). So if the executor carries on the trade or business of the testator, whether in pursuance of a provision in articles of partnership entered into by the deceased, or by direction of the testator contained in his Will, or under the direction of the Court of Chancery, the profits must be accounted for as assets (*w*). Accordingly, in *Cooke* v. *Collingbridge* (*x*), a sale of a testator's share in a partnership trade, and the property belonging to it, made by his executors to his partners, for the purpose of being resold to one of his executors, was set aside, and his estate held entitled to his *aliquot* proportion of the subsequent profits, as if the partnership had continued (*y*). And it is a general rule, that an executor cannot be allowed, either immediately or by means of a trustee, to be a purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased (*z*). So if an executor compounds debts or mortgages, and buys them in for

(*u*) *Ante*, p. 1409.

(*v*) Godolph. Pt. 2, c. 24, s. 1. Com. Dig. Assets (C).

(*w*) *Ante*, p. 1410, 1525, 1526. Palmer *v.* Mitchell, 2 M. & K. 672, note. See Dakin *v.* Cope, 2 Russ. Chanc. Cas. 175, 176.

(*x*) Jacob, 607.

(*y*) "One of the most firmly established rules is, that persons dealing as trustees and executors must put their own interest entirely out of the question, and this is so difficult to do in a transaction in which they are dealing with themselves, that the Court will not inquire whether it has been done or not, but at once says that such a transaction cannot stand:" By Lord Eldon, Jacob, 621. See *Acc.* Wedderburn *v.* Wedderburn, 2 Keen, 722. 4 Mylne & Cr. 11. Willett *v.* Blanford, 1 Hare, 253. See also Portlock *v.* Gardner, 1 Hare, 594, 603.

(*z*) Hall *v.* Hallet, 1 Cox, 134. Watson *v.* Toone, Madd. & Geld. 153. *Ante*, p. 801.

less than is due upon them, he shall not take the benefit of it himself, but other creditors and legatees shall have the advantage of it; and for want of them, the benefit shall go to the party who is entitled to the surplus (*a*). So in a case where the executor of a mortgagee for a term of years purchased the equity of redemption in fee for a small sum in his own name, and for his own benefit, it was held that he was a trustee of the fee for the benefit of the testator's estate (*b*).

Again, if an executor lays out the assets on private securities, although he shall answer for all deficiencies which may be caused thereby (*c*), he must account to the estate for all the benefit (*d*). Indeed, the principle is general, that an executor, if he will take upon himself to act with regard to the testator's property in any other manner than his trust requires, puts himself in this situation; that if there be any loss, he must replace it; but he cannot possibly be a gainer by it; any gain must be for the benefit of his *cestui que trust* (*e*).

In what cases executors are charged with interest:

This may be the proper place to inquire, under what circumstances executors or administrators shall be charged with interest on the assets retained in their hands. There are two grounds on which an executor or administrator may be charged with interest: 1st. That he has been guilty of negligence in omitting to lay out the money for the benefit of the estate; 2d. That he himself has made use of the money to his own profit and advantage, or has committed some other *misfeasance* (*f*).

(*a*) Anon. 1 Salk. 155. *Ex parte* James, 8 Ves. 346. Where an executor contracted with legatees for the purchase of their legacies, which were accordingly assigned to a trustee for him, in consideration of sums of money less in amount than the legacies, it was admitted that the transaction could not be sustained for the benefit of the executor; and it was also held, that the deed of assignment did not operate as a release of the estate, and could not be upheld, as against the legatees who executed it, for the benefit of their co-legatees: Barton *v.* Hassard, 3 Dr. & W. 461.

(*b*) Fosbrooke *v.* Balguy, 1 M. & K. 226. 3 Sugd. V. & P. 271, 10th edit.

(*c*) See *ante*, p. 1538, 1539.

(*d*) Adye *v.* Feuilleteau, 1 Cox, 24.

(*e*) Piety *v.* Stace, 4 Ves. 622.

(*f*) Rocke *v.* Hart, 11 Ves. 59.

1st. With respect to neglect on the part of the executor in not laying out balances, it must be observed, that it frequently may be necessary and justifiable for an executor to keep large sums in his hands to answer the exigency of the testator's affairs (*g*), especially in the course of the first year after the decease of the testator; in which case such necessity is so fully acknowledged, that, according to the ordinary course of the Court, the fund is not considered distributable until after that time (*h*). But if the Court observes that an executor keeps money dead in his hands without any apparent reason or necessity, then it becomes negligence, and a breach of trust, and the Court will charge the executor with interest (*i*). And it seems, that outstanding demands, even on probable grounds, are no reason why the executors should not lay the testator's money out (*k*). But an executor shall not be charged with interest for a balance in his hands, retained under a fair apprehension of his right to it (*l*).

As to the rate of interest which the executor shall pay,

60. Tebbs *v.* Carpenter, 1 Madd. 306, 307. Kildare *v.* Hopson, 4 Bro. P. C. 550, Toml. edit. Lincoln *v.* Allen, 4 Bro. P. C. 553, Toml. edit. Ashburnham *v.* Thompson, 13 Ves. 401.

(*g*) See Dawson *v.* Massey, 1 Ball & B. 231.

(*h*) Forbes *v.* Ross, 2 Cox, 115, 116, by Lord Thurlow.

(*i*) Littlehales *v.* Gascoyne, 3 Bro. Chanc. Cas. 73. Browne *v.* Southouse, 3 Bro. Chanc. Cas. 108. Franklin *v.* Frith, 3 Bro. Chanc. Cas. 433. Hall *v.* Hallet, 1 Cox, 134. Seers *v.* Hind, 1 Ves. Jun. 294. Longmore *v.* Broom, 7 Ves. 124. Ashburnham *v.* Thompson, 13 Ves. 401. Turner *v.* Turner, 1 Jac. & Walk. 39. Goodchild *v.* Fenton, 3 Younge & Jerv. 481. The executors may be charged with interest on balances, though not claimed by the bill: 1 Jac. & Walk. 39.

(*k*) 3 Bro. Chanc. Cas. 434. 1 Madd. 305. It was resolved by Sir Joseph Jekyll, in Taylor *v.* Gerst, Mosely, 99, that if money placed out at interest be called in by the executor without any cause, he shall pay interest for it: But in Newton *v.* Bennet, 1 Bro. Chanc. Cas. 361, Lord Thurlow said, that an executor had an honest discretion to call in a debt bearing interest, if he thought the same in hazard. It should seem, that he ought to lay it out again immediately in the three per cents.

(*l*) Bruere *v.* Pemberton, 12 Ves. 386. An administrator *pendente lite* is not liable to pay interest upon a balance in his hands, during the pendency of the suit in the Ecclesiastical Court: Gallivan *v.* Evans, 1 Ball & B. 191.

the rule appears to be, that in these cases, where negligence alone is imputable to him, he shall be charged only with 4*l.* per cent., in respect of the balances, which he ought to have laid out, either in compliance with the express directions of the Will, or from his general duty, where the Will is silent on the subject (*m*). In order to induce the Court to charge the executor with more than 4*l.* per cent., a special case is necessary (*n*).

But, 2dly. Where there has been a direct breach of trust, the executor may be charged with a higher rate of interest. With respect to employing the assets to his own advantage, Lord Hardwicke, on two occasions (*o*), expressed an opinion that an executor might do so without impropriety, and without being liable to any charge for interest. But this doctrine has been entirely overruled by more modern cases (*p*). And it is now established, that if the executor makes use of the money, he ought to pay the interest he made (*q*); upon the principle just above considered, that he ought not to derive any profit from the trust property (*r*). Hence it has become a settled rule that if a trustee, having trust money in his hands, knowingly applies it to his own use, or in his trade, he shall be charged with interest at the rate of 5*l.* per cent. (*s*). If the fund is employed in trade, the *cestui que trusts* have a right to an option of taking either the interest, or the profits which have arisen from the trade (*t*): but they must elect to take either the profits for the whole period, or the interest for the whole period (*u*). If it be shewn that the

(*m*) Dornforth *v.* Dornforth, 12 Ves. 130, note (29), 2d edit. S. C. cited 1 Madd. 302. Ashburnham *v.* Thompson, 13 Ves. 401. Rocke *v.* Hart, 11 Ves. 58, 60, 61. Tebbs *v.* Carpenter, 1 Madd. 307. Sutton *v.* Sharp, 1 Russ. Chanc. Cas. 151. Melland *v.* Gray, 2 Coll. 295.

(*n*) 1 Madd. 306. Mousley *v.* Carr, 4 Beav. 49. Hosking *v.* Nicholls, 1 Y. & Coll. Ch. C. 478, 480.

(*o*) Adams *v.* Gale, 2 Atk. 106. Child *v.* Gibson, 2 Atk. 603.

(*p*) Perkyns *v.* Baynton, 1 Bro. Chanc. Cas. 375. Newton *v.* Bennet, 1 Bro. Chanc. Cas. 361. Forbes *v.* Ross, 2 Bro. Chanc. Cas. 430. Tebbs *v.* Carpenter, 1 Madd. 304.

(*q*) Forbes *v.* Ross, 2 Cox, 116. Rocke *v.* Hart, 11 Ves. 60.

(*r*) *Ante*, p. 1566.

(*s*) Mousley *v.* Carr, 4 Beav. 49.

(*t*) Burden *v.* Burden, cited 1 Jac. & Walk. 134.

(*u*) Heathcote *v.* Hulme, 1 Jac. & Walk. 122.

executor used the property in his trade, and the amount of the profits made by him does not appear, the Court takes it for granted that he made 5*l.* per cent. at the least, and it is incumbent on him to shew that he made less (*u*). It has been further established, that if an executor or other trustee mixes trust funds with his private monies, and employs them both in a trade or adventure of his own, the *cestui que trust* may, if he prefers it, insist upon having a proportionate share of the profits, instead of interest on the amount of the trust funds so employed (*v*). And it should seem to be now settled, that an executor, who, being a trader, and having, of course, an account with a banker, places the assets at his banker's in his own name, by that means increasing the balances in his favour, acquiring additional credit, and enjoying in his business the advantages naturally arising from that circumstance, must be considered as having employed the money for his own benefit, and must, therefore, be charged with interest at 5*l.* per cent. (*w*).

There are many other cases where executors, who have applied the assets in direct dereliction of their duty, have been charged with 5*l.* per cent. interest. Thus in *Forbes* v. *Ross* (*x*), there was an express trust, by a direction in the Will, to lay out the fund in the purchase of lands, or upon heritable or personal securities, at such a rate of interest as the executors should think reasonable; so that they were at liberty, using their discretion soundly and fairly and honestly,

(*u*) Rocke *v.* Hart, 11 Ves. 61. It should seem, that interest shall in no case be charged at less than 5*l.* per cent., when the fund has been embarked in trade without authority: 1 Jac. & Walk. 134, 135.

(*v*) Docker *v.* Somes, 2 M. & K. 655. Wedderburn *v.* Wedderburn, 2 Keen, 722. 4 Mylne & Cr. 41. Willett *v.* Blanford, 1 Hare, 253. Portlock *v.* Gardner, 1 Hare, 594, 603.

(*w*) Treves *v.* Townshend, 1 Bro. Chanc. Cas. 385. Rocke *v.* Hart, 11 Ves. 61. Sutton *v.* Sharp, 1 Russ. Chanc. Cas. 151, 152. S. P. although the Will authorized the executor to invest the residue on "good private securities:" Westover *v.* Chapman, 1 Coll. 177. See also, *In re* Hilliard, 1 Ves. Jun. 90. Melland *v.* Gray, 2 Coll. 295. But see *contrà*, Perkyns *v.* Baynton, 1 Bro. Chanc. Cas. 375. Browne *v.* Southouse, 3 Bro. Chanc. Cas. 107.

(*x*) 2 Cox, 113. S. C. 2 Bro. Chanc. Cas. 430.

to lend it to any body that they might suppose would give a reasonable interest for it, considering at the same time the degree of responsibility of the person to whom it was lent: They lent the fund to one of themselves, on bond at 4*l.* per cent., when 5*l.* per cent. might have been made by heritable or government securities: And it was held, that he should be charged with 5*l.* per cent. interest. So in *Piety* v. *Stace* (*y*), the Will directed the executor to place the money in the public funds, or upon mortgages, or other good securities, and to pay the dividends and interest to certain persons for life, and after their death to dispose of the capital in a certain mode: The executor called in part of the property which was out on security, used it generally in his trade, and in various transactions in the public funds, paying only the dividends of the stock to the persons entitled under the Will, and he lent part to his son: And Lord Alvanley directed an account of all the executor had made, with the interest at the rate of 5*l.* per cent. upon the balances in his hands. In *Pocock* v. *Reddington* (*z*), the executor and trustee having been guilty of a breach of trust by selling out stock and dealing improperly with the money, Lord Alvanley held that the *cestui que trust* had an option to have the stock replaced, or the money produced by the sales, with interest at 5*l.* per cent., or more, if more had been made by it, and the costs occasioned by the executor's misconduct (*a*). In *Mosley* v. *Ward* (*b*), an executor in trust for infants, unnecessarily calling in the property, out upon good security at 5*l.* per cent. except a small part, keeping large balances in his hands, and using it as his own, was ordered by Lord Eldon to be charged with interest at 5*l.* per cent. and costs. In *Bick* v. *Motley* (*c*), the Master found that two executors had, by signing joint cheques, enabled each other to receive sums belonging to the estate of their testatrix, when they were both largely indebted to that estate; and that the sums so received by them were

(*y*) 4 Ves. 620.

(*z*) 5 Ves. 794.

(*a*) See also Bate *v.* Scales, 12 Ves. 402.

(*b*) 11 Ves. 581.

(*c*) 2 M. & K. 312.

debts proveable under their respective commissions, both executors having become bankrupt: Sir C. Pepys, M. R., said, that as, in respect of such sums, the executors had each committed a *devastavit*, each was chargeable, according to the uniform practice of the Court, with interest at 5*l.* per cent. upon the sums which he had enabled his co-executor to receive: And his Honor accordingly made an order, that interest at that rate should be added to the principal sums to be proved against the bankrupts' estates respectively (*d*).

As a general rule, the Court decrees the computation of simple interest to be made (*e*). But there are instances in which an executor has been charged with compound interest. Thus in *Raphael* v. *Boehm* (*f*), a legacy was given to the executor, with a declaration in the Will, that such a legacy should be in full for the trouble he might have in performing the duties of the Will, and that he should not have any claim for commission, or derive any advantage from keeping in his possession any sums of money, without duly accounting for the legal interest thereof: The testator then disposed of the residue upon certain trusts for his children, and directed that a sufficient part of the interest of the portions should be applied to the maintenance, &c. of each child, and the surplus should be accumulated: The executor did not lay the money out as directed, but kept upwards of 30,000*l.* in his hands, and used it in his trade, so that there was a wilful violation of the Will, which prohibited retainer and directed accumulation: And Lord Loughborough decreed, that an account should be taken from the moment of the testator's death, and interest be charged upon all the sums received, and rests to be made half-yearly upon the balance, including intermediate interest; so that double compound interest was given: The cause came on afterwards before Lord Eldon, upon excep-

(*d*) See also Munch *v.* Cockerell, 9 Sim. 339, 351; confirmed, as to charging the trustees with interest at 5*l.* per cent., by Lord Cottenham, 5 M. & Cr. 178, 220.

(*e*) Robinson *v.* Cumming, 2 Atk. 410.

(*f*) 11 Ves. 92. 13 Ves. 407, 590.

tions to the Master's report, and though his Lordship did not approve of the decree, yet he agreed in the propriety of giving compound interest. Again, in *Stackpoole* v. *Stackpoole* (*g*), administration was taken out in 1771, and distribution to a certain extent made, but a large sum was retained on unfounded pretences: No effectual suit was brought against the administrator till 1792, and that was protracted till 1810, in a great measure by the administrator's fault, in the Court below: And it was held by the House of Lords, reversing in that respect decrees of the Irish Chancery, that, notwithstanding the lapse of twenty years before effectual suit for account commenced, the administrator ought to be charged with the full legal interest on the sum remaining undistributed, about 16,000*l.* or 17,000*l.*, during the whole period of retention; and that the account should be taken with annual rests, and that interest should be charged on the annual balances: and also that the administrator should pay to the plaintiff his costs of suit incurred subsequent to the original decree, &c. &c. (*h*).

But in order to make out a claim for compound interest, a very strong case of violation of duty by the executor is required: Thus in *Crackelt* v. *Bethune* (*i*), the Will contained a direction to lay out the testator's personalty in the funds: The executor unnecessarily sold out stock, kept large balances in his hands, and resisted payment of debts by a false pretence of outstanding demands: It was contended that 5*l.* per cent. interest should be charged, with annual rests: But Sir Thomas Plumer, M. R., held, that although this was a case for charging 5*l.* per cent., yet, in order to be a case for rests, it ought to go much further (*j*).

(*g*) 4 Dow. 209.

(*h*) See also, for other instances where, in executors' accounts, interest has been given with rests, Willson *v.* Carmichael, 2 Dow. & Clark, 58. Walker *v.* Woodward, 1 Russ. Chanc. Cas. 107. See also, on this subject, Binnington *v.* Harwood, 1 Turn. & R. 481, and Lord Brougham's judgment in Docker *v.* Somes, 2 M. & K. 655.

(*i*) 1 Jac. & Walk. 586.

(*j*) See also Tebbs *v.* Carpenter, 1 Madd. 290. In Dornford *v.* Dornford, as reported in 12 Ves. 127, an executor, under a direction to ac-

It may here be observed, that a considerable difference of opinion has existed as to the effect of a direction to the Master "to make annual rests" in taking the account: On a late occasion (*k*), Lord Langdale, M. R., after reviewing all the authorities, denied that a direction to ascertain balances, to compute interest on such balances, and "in taking the said accounts" to make annual rests, followed by a direction that the party shall be charged with interest "after the rate and in the manner aforesaid upon such balances," could, without more, be considered as a direction to charge the defendant with compound interest, as so much principal received into the account of the following year: And his Lordship expressed his opinion that where compound interest is intended to be charged, a specific direction for that purpose should be given. But on appeal to Lord Cottenham, C., his Lordship, in an elaborate judgment, arrived at a different construction of the direction in question, and held that, under it, the interest computed on the balance due at the end of the first year was to form part of the balance due at the end of the second year, and upon which interest was then to be computed, and so on from year to year to the end of the account (*l*).

Allowances to executor:

An executor or administrator is entitled to be allowed all reasonable expenses which have been incurred in the conduct of his office (*m*), except those which arise from his own default (*n*).

for his expenses:

But it is a general principle, that an executor or administrator shall have no allowance, at law or in equity,

cumulate for an infant, having become bankrupt, it was ordered by Sir W. Grant that his estate should be charged with interest at 5*l.* per cent. with rests: But, in fact, it seems, that his Honor, although he thought the direction in the Will, to accumulate, as strong as in Raphael *v.* Boehm, did not direct compound interest: See the order extracted from the Registrar's book, and stated by Sir Thomas Plumer, 1 Madd. 302, 303.

(*k*) 5 M. & Cr. 258.

(*l*) Heighington *v.* Grant, 5 M. & Cr. 258.

(*m*) Potts *v.* Leighton, 15 Ves. 277. Hide *v.* Haywood, 2 Atk. 126.

(*n*) Pannell *v.* Fenn, Cro. Eliz. 348. He shall not be allowed the costs of an action against him as executor, which he ought never to have defended: Chambers *v.* Smith, 2 Coll. 742. Smith *v.* Chambers, 2 Phill. Ch. C. 221.

for personal trouble and loss of time in the execution of his duties (*o*). Nor is the case altered by the executor's renunciation of the executorship, and his afterwards assisting in it; nor although it should appear that he has deserved more, and has benefitted the estate to the prejudice of his own affairs (*p*). And even where an executor in trust, who had no legacy, in a case in which the execution of the office was likely to be attended with trouble, at first declined, but afterwards agreed with the residuary legatee, in consideration of a hundred guineas, to act in the executorship, and on his dying before the execution of the trust was completed, his executors filed a bill to be allowed that sum out of the trust money in their hands; the Court refused the claim, observing, that independently of the executor's having died before the trust was executed, such bargains ought to be discouraged, as tending to dissipate the property (*q*). So a surviving partner, being executor, is not entitled, without express stipulation, to any allowance for carrying on the trade after the testator's death (*r*). Again, in *New* v. *Jones* (*s*), it was held by Lord Lyndhurst, C. B., that if a solicitor or attorney, who is an executor, does professional business himself for the benefit of the estate, he is not entitled to be paid his bill of costs for such services; it would be placing his interest

for his trouble:

(*o*) Robinson *v*. Pett, 3 P. Wms. 251. Scattergood *v*. Harrison, Mosely, 130. Brocksopp *v*. Barnes, 5 Madd. 90.

(*p*) Robinson *v*. Pett, 3 P. Wms. 249.

(*q*) Gould *v*. Fleetwood, 3 P. Wms. 251, note (A). So in Ayliffe *v*. Murray, 2 Atk. 58, two persons, executors and trustees under a Will, would not prove the Will, nor suffer the *cestui que trust* to take out letters of administration *cum testamento annexo*, till he had executed a deed, by which he was to pay a hundred pounds to one executor, and two hundred pounds to the other, within six months after they should have exhibited an inventory: Lord Hardwicke declared the deed was unduly obtained, and decreed that no allowance should be made for the sum of 100*l*. and 200*l*. to the plaintiffs.

(*r*) Burden *v*. Burden, 1 Ves. & B. 170. Stocken *v*. Dawson, 6 Beav. 371. Nor is an executor and legatee of such surviving partner: 6 Beav. 371.

(*s*) Exchequer, Aug. 9, 1833. The writer is indebted to the kindness of Mr. Younge, for the note of this decision, which is inserted in 9 Bythewood's Convey. p. 337, 338.

at variance with the duties he has to discharge (*t*). Accordingly in *Moore* v. *Frowd* (*u*), Lord Cottenham held, that a trustee, who is a solicitor, is entitled to be repaid such costs, charges, and expenses only as he has properly paid out of his pocket; and that it makes no difference in this respect, that the instrument creating the trust may have directed that the trust monies should be applied (*inter alia*) in payment of all expenses, disbursements, and charges to be incurred, sustained, or borne by the trustee, in professional business, journeys or otherwise, and that the trustee might retain all reasonable costs, charges, and expenses which he might sustain, or be put unto, such costs, charges, and expenses to be reckoned, stated, and paid as between attorney and client. Again, in *Collins* v. *Carey* (*v*), where business relating to a trust estate had been transacted by two solicitors in partnership, one of whom was a trustee of the estate, Lord Langdale, M. R., held, that, in passing the accounts of the trustee, costs out of pocket alone could be allowed. And the general rule that a trustee acting as solicitor in the trust matters is merely entitled to costs out of pocket has been firmly established by several subsequent decisions (*w*).

when executor entitled to commission:

Again, an agent, who is appointed executor of his principal, is not entitled to charge commission on business done sub-

(*t*) See also Willson *v.* Carmichael, 2 Dow. & Clark, 51.

(*u*) 3 Mylne & Cr. 45.

(*v*) 2 Beav. 128.

(*w*) Fraser *v.* Palmer, 4 Y. & Coll. 515, *coram* Alderson, B. *In re* Sherwood, 3 Beav. 338. Bainbrigge *v.* Blair, 8 Beav. 588. But the rule does not preclude an executor who acts as solicitor in a cause in which he is a party in his representative character, from being allowed, as against the estate, that proportion of the whole costs which his town agent in the cause was entitled to receive: Burge *v.* Brutton, 2 Hare, 373. And the costs of a defendant trustee, notwithstanding he was a solicitor, will be ordered to be taxed as between solicitor and client: York *v.* Brown, 1 Coll. 260. And it must be observed, that the rule does not disentitle a solicitor, who is a trustee, from claiming his professional charges under a special contract, nor, it should seem, under a Will authorizing him expressly to make such charges: 3 Beav. 341. Compensation may, in special cases, be made, under the authority of the Court, to a trustee acting as solicitor in the trust matters; though not by allowing him to make the usual professional charges: 8 Beav. 588.

sequently to the testator's death (*x*). So an executor, who is one of a banking firm, cannot charge the ordinary banker's commission against his testator's estate (*y*). But where a testator, a victualler, directed his trade to be carried on by his executors, brewer and spirit merchants, who had been in the habit of serving him in his lifetime, and supplies were furnished for that purpose by them, the Court would not declare that the executors were entitled to receive the cost price only for these supplies, but directed an inquiry whether the supplies were proper, and furnished at the ordinary market price (*z*). So in *Willis* v. *Kimble* (*a*), a testator devised and bequeathed his freehold and leasehold estate to trustees for sale, and he declared, that his trustees respectively should be entitled to have and receive, out of the trust-monies, all costs, charges and expenses, fees to counsel and for advice, and for professional assistance, and loss of time, paid, incurred, sustained, or occasioned in or about the execution of the said trusts, or in anywise relating thereto: One of the trustees was a land surveyor, and he superintended the management and sale of the estates: And Lord Langdale, M. R., held, that he was entitled, upon the terms of the Will, to a compensation for loss of time. Again, it is competent for the Court to appoint an executor and trustee consignee with the usual profits (*b*): And when the Court, in it's discretion, has made such an appointment, and the appointment has been acted upon, the Court will not afterwards withdraw it's sanction from it (*c*).

It has been holden that agents, being also appointed executors, are not entitled to commission upon remittances from India to this country by the testator, not received until after his death (*d*). But the Courts of India, in order to induce

(*x*) Sheriff *v.* Axe, 4 Russ. Chanc. Cas. 33.

(*y*) Heighington *v.* Grant, Rolls' Hil. T. 1840. 5 M. & Cr. 258, 262.

(*z*) Smith *v.* Langford, 2 Beav. 362.

(*a*) 1 Beav. 559.

(*b*) Marshall *v.* Holloway, 2 Swanst. 432.

(*c*) Morison *v.* Morison, 4 Mylne & Cr. 215.

(*d*) Hovey *v.* Blakeman, 4 Ves. 596. However, in Scatterwood *v.* Harrison, Mosely, 130, Lord King

proper persons to accept the office of executor, have adopted a rule, opposed to the principles above stated, by permitting an executor to charge a commission upon the amount of assets collected by him in India. And if assets, collected in India, come to be administered, not in India, but by the Courts in England, the Courts here are of necessity bound to follow that rule of policy which has been adopted in India: For if, in the event of the accounts having been passed in India, the executors would have been entitled to a commission, it would be great injustice to withhold that allowance, because the accounts happened to be passed in this country, and not in India (*e*). It has, therefore, been long established, that the Courts here must follow that peculiarity of the law of India, and that executors, in passing their accounts, shall, in respect of assets collected in India, be allowed the same commission here, which would have been allowed them there (*f*). And this claim to commission shall extend to the collection of monies, belonging to the testator, which were in the hands of a commercial house in which the executor is, and the testator was, a partner (*g*).

The same exception to the general rule has been established with respect to the West Indies. The principle upon which the Court of Chancery has gone, in this respect, appears to be this: that the commission is in the nature of a remuneration to a trustee, who, besides the usual trouble belonging to the execution of his trust, has also to undergo all the inconveniences arising from being in a foreign country, and conducting the business of a merchant there: And although, as it has above appeared, no commission is allowed to a trustee in this country for what he does, however laborious his duty may be, yet inasmuch as it is of great importance to get per-

held, that where a factor was made executor, if anything appeared to have been consigned to him by the testator in his lifetime, though it came to his hands after his death, since the executor acted as factor, he should be allowed commission for it.

(*e*) 2 Russ. Chanc. Cas. 589, 590.

(*f*) Chetham *v.* Audley, 4 Ves. 72.

(*g*) Cockerell *v.* Barber, 1 Sim. 23. S. C. 2 Russ. Chanc. Cas. 585.

sons to assume the character of trustees in the East and West Indies, therefore, so long as they are actually in the country there discharging the duty of trustees, the Court allows the commission (*h*). But no commission is payable where the remittant himself is actually, at the time of the remittance, in this country (*i*): And it should seem, that in order to entitle himself to the commission, the party must himself be actually in the colony where the remittance was made: For if, by any means, money which has not been received by him upon the spot and remitted by him from the spot to this country, is remitted to this country, it appears to be the settled rule of the Court of Chancery, that the commission shall not be allowed (*j*). And accordingly, in a late case (*k*), it was held that if an executor in India collects part of the assets there, and then comes to England, and has the remainder remitted to him by his agent, he is entitled to commission on that part only which he collected in India (*l*).

Where, indeed, the Will gives a legacy to the executor, expressly in respect of his trouble in the execution of his duty, in India, as executor, the question no longer is what is the law of India, but what was the intention of the testator,

(*h*) 1 Moore, Pr. Counc. Cas. 40.

(*i*) 4 Ves. 72. *Ibid.* 596.

(*j*) Chambers *v.* Goldwin, 5 Ves. 834. Denton *v.* Davy, 1 Moore, Priv. Counc. Cas. 15, 32. In this last case it was holden by the Lords of the Privy Council, that the commission of 6*l.* per cent. given by the Jamaica Act, 24 Geo. II. c. 19, to agents, trustees, guardians, executors, &c. for the management and disposal of the rents and profits of an estate, being in the nature of a remuneration for the trouble and responsibility of conducting the business of a merchant on the island, is payable only to persons actually resident on the island, and capable and willing to act in the trusts of the estate; and the commission of 5*l.* per cent. given by the same Act for receiving and remitting monies can only be claimed where the receipts or payments are actually made on the island.

(*k*) Campbell *v.* Campbell, 13 Sim. 168.

(*l*) Where the testator died possessed of certain notes of the Bengal government, which the executors took from the treasury at Calcutta, and handed over to certain trustees, in discharge of a legacy of the testator of equal amount with the notes, it was held that the notes were assets, in respect of which Indian commission ought to be allowed: Campbell *v.* Campbell, 2 Y. & Coll. Ch. C. 607.

in the expressions used by him, as applied to the law of India: And it has been holden, in such case, that the terms of the Will must be considered as a declaration of the intention of the testator, that the executor should be excluded from the commission to which the law of India would have entitled him, and that he can claim nothing more than the legacy which the testator has expressed to be a sufficient compensation for his trouble in performing the duties of executor (*m*). But where the legacy is not given to the executor *in his character of executor* (*n*), he will be entitled to commission on all assets collected by him in India, including the assets which he retains in respect of his own legacy (*o*).

allowances for payments to collectors, &c.

Generally speaking, an executor who has proved the Will, or a person taking out letters of administration, cannot retire from his duty, but must collect the estate himself (*p*). However, an executor is justified in having recourse to an agent to collect the assets, in cases where a provident owner might well employ a collector; and the executor will, therefore, be allowed the expense so incurred, in his accounts (*q*). Accordingly, where a testator gave annuities to his executors for their trouble in the execution of his Will, and died possessed of

(*m*) Freeman *v.* Fairlie, 3 Meriv. 24. And the executor cannot be allowed, in passing his accounts, after a series of years, to renounce his legacy and charge commission: *Ibid.*

(*n*) See *ante*, p. 1100, as to the question where a legacy is to be regarded as given to an executor in that character.

(*o*) Cockerell *v.* Barber, 1 Sim. 23. 2 Russ. Chanc. Cas. 585.

(*p*) Weiss *v.* Dill, 3 M. & K. 26.

(*q*) See Bonithon *v.* Hockmore, 1 Vern. 316. Davis *v.* Dendy, 3 Madd. 170. See also Hopkinson *v.* Roe, 1 Beav. 180, in which case Lord Langdale, M. R., held, that the executors under the circumstances were justified in appointing an agent to get in the testator's debts, and in allowing him a salary for his trouble: But the costs of transferring funds, from the name of a testator into the names of the executors, were disallowed: And his Lordship held, that the sum to be allowed executors for the expenses of transferring a large sum of money into Court is one guinea; and extra brokerage was, therefore, disallowed. But where an executor, upon transferring stock to a legatee, paid one-sixteenth per cent. to a stock broker for identifying him (the executor) at the Bank, it was held, that he ought to be allowed this payment: Jones *v.* Powell, 6 Beav. 488.

several houses, let at weekly rents, it was held, that the executors were justified in paying a person to collect the rents, and did not, therefore, lose their annuities (*r*). So if there are assets in India, the executor shall be allowed the expense of an agent to collect them: And, therefore, the Court will appoint a receiver in India of a testator's assets, on the application of an executor resident in England (*s*).

So, on one occasion (*t*), it was holden, that from the nature of the accounts, the executor was justified in employing an accountant, and that the expense ought to be allowed to the executor.

Again, if an executor pays an attorney for his trouble and attendance, in the transacting and conduct of the testator's affairs, he ought to be allowed and repaid what he so pays (*u*). But an executor is not entitled to be allowed, without question, the amount of the bill of costs which he has paid, *bonâ fide*, to the solicitor to the trust; and the Master, without regularly taxing the bills, will moderate their amount (*v*).

Allowance of interest to executor for money advanced by him.

With respect to the allowance of interest to executors upon sums advanced by them for the purposes of their trust, it has been held, that if an executor borrows money, or advances it out of his own pocket, to pay debts of his testator which carry interest, or satisfy some of his testator's creditors who are very importunate and threaten to bring actions, he is entitled to an allowance of interest for the money so advanced or

(*r*) Wilkinson *v.* Wilkinson, 2 Sim. & Stu. 237. S. P. as to an administrator, Trezevant *v.* Fraser, Hil. Term, 1832, before Sir L. Shadwell, V. C. So, even at law, it should seem, that an executor, under a plea of *plene administravit*, will be allowed the reasonable charges of collecting the testator's debts: Giles *v.* Dyson, 1 Stark. N. P. C. 32.

(*s*) Cockburn *v.* Raphael, 2 Sim. & Stu. 453: But the receiver must give sureties resident in England: *Ibid.*

(*t*) Henderson *v.* M'Iver, 3 Madd. 275.

(*u*) Macnamara *v.* Jones, Dick. 587. In Stackpoole *v.* Stackpoole, 4 Dow. P. C. 226, an administrator was not allowed to set off a charge for poundage alleged to have paid to his agent in the administration.

(*v*) Johnson *v.* Telford, 3 Russ. Chanc. Cas. 477.

borrowed (*w*). It may be observed, that it is contrary to the course of practice to allow interest to an executor on costs paid by him, pending a suit regarding the estate (*x*). Where interest is allowed on sums carrying interest, it should be calculated from the time of a balance being struck on the general report; for, until that time, it cannot be ascertained that the executor had not money in his hands (*y*).

Executor receiving money, to which he is not entitled, must refund, although he has paid it away to creditors.

In *Pooley* v. *Ray* (*z*), a mortgage came to an executor, who received the mortgage-money, and paid it away to his testator's creditors: Afterwards it appeared, that the mortgage had been satisfied in the testator's lifetime: And Lord Cowper held, that the executor must refund, although he had before paid the money away in debts, which he had not otherwise assets to pay, and that he must have his remedy against such creditors as by mistake he had paid: His Lordship observed, that "though this might be a hard case, yet, if the plaintiffs had a right to be paid their money, which they had overpaid on the mortgage, this right could not be overthrown by the defendant, the executor's applying the money in any manner he should think fit; any more, than if an executor at law should recover a debt, and pay the testator's debts with it, and afterwards this judgment recovered by the executor is reversed in error; the executor must restore the money to the plaintiff in error; and his having paid it away in debts of his testator, will not excuse him from paying it back. So in the same manner, if there were a decree for the executor to be paid a sum of money by the defendant, and the executor, having received the money, pays it away in debts; and then the defendant, against whom the executor had recovered the decree, brings an appeal, and reverses the decree; the plaintiff in the appeal shall be restored to the money."

This doctrine of Lord Cowper was approved of by Lord Alvanley, in *Pickering* v. *Stamford* (*a*), but his Lordship

(*w*) Small *v.* Wing, 5 Bro. P. C. 72, Toml. edit.

(*x*) Gordon *v.* Trail, 8 Price, 416.

(*y*) *Ibid.*

(*z*) 1 P. Wms. 355.

(*a*) 2 Ves. Jun. 583.

remarked, that it would be otherwise, if the defendant had delayed the appeal, and willingly stood by, while the executor paid away the money; for that would be drawing the executor into a snare.

Power of the Master under a reference of just allowances.

It may be proper in this place to mention the case of *Brown* v. *Spooner* (b). There the testator gave an annuity of 50*l.* to be purchased by his executor, and, till purchased, directed him to pay the annuitant 40*l.* a-year: The executor, instead of purchasing, paid 50*l.* a-year from the testator's rents: And Lord Thurlow held, that although the executor was bound to purchase the annuity immediately after the expiration of the first year from the testator's death, and, therefore the Court might charge him for the overpayment from the estate, yet the Master, on a general reference of just allowances, could not do so. So in *Garland* v. *Littlewood* (c), a case was alleged, on the pleading, to charge executors for what they might, but for their wilful default, &c., have received: At the hearing the common accounts only were directed against them: The case coming on for further directions on the Master's report, Lord Langdale, M. R., held that the executors could not be charged as for their wilful default, &c., and that no inquiry could then be directed on the subject, although the Master's report laid a foundation for such an inquiry.

(b) 1 Ves. Jun. 291. (c) 1 Beav. 527.

END OF THE FOURTH PART.

PART THE FIFTH.

OF REMEDIES.

BOOK THE FIRST.

OF REMEDIES FOR EXECUTORS AND ADMINISTRATORS.

IN a previous part of this Treatise (*a*), there has been occasion to investigate, what rights of action are comprised in the estate of an executor or administrator: It remains to consider the remedies by which those rights may be enforced in the Courts of Law and of Equity.

CHAPTER THE FIRST.

OF REMEDIES FOR EXECUTORS AND ADMINISTRATORS AT LAW.

Instances where the executor has not the remedy.

IT must be observed, in the commencement of this subject, that there are some cases where an executor or administrator, although he has an interest in a chose in action, is not entitled to the remedy: Thus, where one of two *joint* obligees, covenantees, or partners die, the action on the contract must be brought in the name of the survivor, and the executor or

(*a*) *Ante*, p. 664, *et seq*.

administrator of the deceased cannot be joined, nor can he sue separately: For example, two joint-merchants appoint a person to be their factor; one dies, leaving an executor; this executor and the survivor cannot join in an action against the factor; for the remedy survives, though not the duty; and therefore, on the recovery, the survivor must be accountable to the executor for that (*a*). And the general rule is now settled, that though the right of a deceased partner devolves on his executor (*b*), yet the *remedy* survives to his companion, who alone must enforce the right by action, and will be liable, on recovery, to account to the executor or administrator for the share of the deceased (*c*).

Again, where two have the legal interest in the performance of a contract, though the benefit be only to one of them, the remedy survives, upon the death of the latter, and the executor or administrator of the deceased cannot be made a party, or sue separately: Thus, in *Anderson* v. *Martindale* (*d*), there was a covenant to and with A., his executors, administrators, and assigns, and to and with B. and her assigns, to pay an annuity to A., his executors, &c., during B.'s life: And it was held, that this was a joint covenant to A. and B., in which they had joint legal interest, although the benefit was for A. only: and that, therefore, on the death of A., the right of action survived to B., and A.'s administrator could not sue on the covenant (*e*).

It follows, that where a contract is made jointly with several persons, and they all die, the executor or administrator of the survivor alone can sue, and the personal representatives of those who died before him cannot be joined.

(*a*) Martin *v*. Crump, 2 Salk. 444. S. C. 1 Lord Raym. 340. Comb. 474.

(*b*) *Ante*, p. 546, 547, 715.

(*c*) Martin *v*. Crompe, 1 Lord Raym. 340. S. C. 2 Salk. 444. Comberb. 474. Kemp *v*. Andrews, Carth. 171. S. C. 1 Show. 188. 3 Lev. 290. Golding *v*. Vaughan, 2 Chitt. Rep. 437, *per cur*. Rex *v*. Collector of Customs, 2 M. & S. 225, by Dampier, J. 2 Saund. 117, note to Coryton *v*. Litheby. It appears therefore, that the case of Hall *v*. Huffam, 2 Lev. 118. 3 Keb. 798. 1 Freem. 468, is not law.

(*d*) 1 East, 497.

(*e*) See Barford *v*. Stuckey, 2 Brod. & Bingh. 333. S. C. 5 Moore, 23.

But if the interest of the covenantees is several, and one of them dies, his executor may maintain a separate action on the covenant, notwithstanding the other covenantee be living: And if the *interest* be several, it shall make no difference that the *language* of the covenant is joint: Thus, in *Withers* v. *Bircham* (*f*), by deed reciting the grant of two distinct annuities to A. and B. during the life of the grantors and the survivor, it was witnessed, that C. covenanted with A. and B. and their executors, to pay the annuities, or either of them, when the grantors should make default in payment: A. died: And it was held, that, the interest in the annuities being several, the covenant was also several, and that the annuity granted to A. being in arrear, his executor might maintain an action against C.

On the other hand, wherever the interest of the covenantees is joint, the rule of survivorship above stated will be enforced, although the covenant be in terms joint and several (*g*).

The rule is the same with respect to remedies in form *ex delicto*, as those in form *ex contractu*: Therefore, if one or more of several parties jointly interested in property, at the time an injury was committed, is dead, the action must be in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately (*h*).

Process.

If the plaintiff sue as executor or administrator, and the action be not bailable, the process need not state his special character. And even in a bailable case, where the plaintiff sued out general process, and declared specially as administratrix, the Court of King's Bench refused to enter an *exoneretur* on the bailpiece (*i*). Yet this rule will not hold

(*f*) 3 B. & C. 254. S. C. 5 D. & R. 106.

(*g*) See the authorities cited in the note to Eccleston *v.* Clipsham, 1 Saund. 154. See also 3 B. & C. 256; and Lane *v.* Drinkwater, 1 Cr. Mees. & R. 599. S. C. 5 Tyrwh. 40.

(*h*) *Ante*, p. 715.

(*i*) Ashworth *v.* Ryal, 1 Barn. & Ad. 19. So the Court of Exchequer refused to order a bail bond to be delivered up to be cancelled on the ground that the process was general and the affidavit to hold to bail as executor: Ilsley *v.* Ilsley, 2 Cromp.

e converso: for where the process is to answer the plaintiff as executor or administrator, and the declaration is in his own right, this is a sufficient variance for discharging the defendant out of custody upon filing common bail (*j*). But where the affidavit of debt and writ stated the debt to be due to the plaintiffs "executors of" and not "*as* executors of," and the declaration stated it to be due to them in their own right, it was held no variance; for the words, "executors of" are mere description of the plaintiffs (*k*).

Where, in a declaration in ejectment, the lessors of the plaintiff are described to be executors, the affidavit of service need not, in stating the name of the cause, notice the character of the lessors stated in the declaration (*l*).

Executor of attorney bringing action on his bill:

It was not necessary, under the statute 2 Geo. II. c. 23, for the executor or administrator of an attorney to deliver a bill of costs, for business done by his testator or intestate, before the commencement of an action (*m*), that statute being confined to actions brought by the attorney himself, and not extending to his personal representatives. But the 37th section of the stat. 6 & 7 Vict. c. 73, enacts, that no action shall be brought by any attorney or solicitor, or *by their executors, administrators*, or assignees, for the recovery of any fees, &c., until the expiration of one month after the delivery of a bill, &c.

taxation of bill of deceased attorney.

Again, it was held that the executor of a deceased attorney or solicitor was not within the statute of Geo. II. for any purpose; and therefore that the bill of costs delivered by the executor could not be taxed (*n*), even though an action was

& Jer. 330. 1 Dowl. 310. But in Manesty *v.* Stevens, 9 Bing. 400, the Court of Common Pleas held, that the bail are discharged if a plaintiff on general process declares as executor.

(*j*) Douglas *v.* Irlam, 8 T. R. 416. 1 Barn. & Adol. 20.

(*k*) 1 Dowl. 97. See also Free *v.* White, 1 Dowl. N. S. 586.

(*l*) Doe d. Jenks *v.* Roe, 2 Dowl. 55.

(*m*) Spink *v.* Hare, 1 Barnard. 433. Wellis *v.* Nicholson, Andr. 276. Lester *v.* Lazarus, 4 Dowl. 401, 402.

(*n*) Maddeford *v.* Austwick, 3 Mylne & Cr. 423. Doe *v.* Sabin, 8 Dowl. 468.

brought upon it (*o*). And further, that if the attorney or solicitor had delivered his bill in his lifetime, and after his death it was taxed, and above a sixth part taken off, the executor was not liable to the costs of taxation (*p*). But now, by stat. 6 & 7 Vict. c. 73, s. 37, upon the application of the party chargeable with the bill delivered, the bill and the attorney's or solicitor's, *or his executors' or administrators'*, or assignee's demand thereon, may be referred to be taxed; and if the bill, when taxed, be less by a sixth part than the bill delivered, then the attorney, his *executor, administrator*, or assignee, shall pay the costs.

Parties.

If there are several executors or administrators, they must all join in bringing actions (*q*), though some be within the age of seventeen years (*r*), or have not proved the Will (*s*), or refused before the Ordinary (*t*).

But if one alone of several executors or administrators bring an action, either in form *ex contractu* or *ex delicto*, the defendant can only take advantage of it by pleading in abatement, after oyer of the probate, that the other executor mentioned therein is alive not named (*u*): If the defendant pleads

(*o*) Williams *v.* Griffith, 10 M. & W. 125. Where, however, the executor of the client applies, as the party chargeable by the attorney's bill for business done for the testator, to have it referred to taxation, he is liable to the costs, if less than a sixth is taken off: Jefferson *v.* Warrington, 7 M. & W. 137.

(*p*) Weston *v.* Poole, 2 Stra. 1056. Willasey *v.* Mashiter, 3 M. & K. 293.

(*q*) Bro. Exors. 88.

(*r*) Smith *v.* Smith, Yelv. 130.

(*s*) Brookes *v.* Stroud, 1 Salk. 3.

(*t*) Hensloe's case, 9 Co. 37, *a.* S. P. by Lord Holt, in Wankford *v.* Wankford, 1 Salk. 307. 1 Saund. 291, *l.* note to Cabell *v.* Vaughan. Creswick *v.* Woodhead, 4 M. & Gr. 811. S. C. 5 Scott, N. R. 779. If an action be brought in the name of several executors, and one or more will not join with the rest in prosecuting the suit, the Court will issue a summons *ad sequendum simul*, and upon their non-appearance at the return of it, will give judgment of *severance; viz.* "*Ideo consid. est quod præd A. sequatur solus sine ipsis T. & R. versus præd W. de placito præd.;*" so as to enable the others to proceed without them: Wentw. Off. Ex. 212, 14th edit.: And it should seem, that an executor, who has been so severed, cannot sue execution, if he live to judgment: *Ibid.* 225. He certainly cannot acknowledge satisfaction: *Ibid.*

(*u*) 1 Saund. 291, *l.* note.

the general issue, he is too late; he cannot then come at the fact of there being another executor (*v*). It is not necessary, in the plea in abatement, to aver that the executors, not joined as plaintiffs, have administered; because the refusing executors may come in at any time and administer, notwithstanding their refusal, either during the lives of their co-executors who have proved, or after their death (*w*).

It must be observed, that if one executor of several alone sell goods of the testator, he alone may maintain an action for the price, not naming himself executor (*x*). So if goods be taken out of the possession of one of several executors, he may sue alone to recover them (*y*). And, generally, if one executor alone contracts on his own account alone, he *must* sue alone on such contract, notwithstanding the money recovered will be assets (*z*).

It is clear that two out of three co-executors may recover lands of their testator in ejectment on a joint demise (*a*).

Arrest.

An executor or administrator may arrest the defendant, in cases where a plaintiff suing in his own right may do so: And it has already appeared (*b*), that an executor may exercise this right before probate. If the defendant was arrested by the testator, and the action abated by his death, his executors may arrest the defendant again for the same cause of action (*c*).

With respect to the affidavit of the cause of action, re-

(*v*) 1 Saund. 291, *l.* note.

(*w*) See *ante*, p. 234, 313, 314. Selw. N. P. 784, 6th edit. cited by Lord Tenterden, 1 Mood. & M. 363.

(*x*) Godolph. Pt. 2, c. 16, s. 1. Wentw. Off. Ex. 224, 14th edit. Brassington *v.* Ault, 2 Bingh. 177.

(*y*) Godolph. *ubi supra.* Wentw. Off. Ex. *ubi supra.*

(*z*) Heath *v.* Chilton, 12 M. & W. 632. *Ante*, p. 751.

(*a*) Doe *v.* Wheeler, 15 M. & W. 623.

(*b*) *Ante*, p. 245. In the Common Pleas, no outlawry shall be reversed after the death of the plaintiff in the action, without the defendant's appearance and putting in special bail, if required, to the executor or administrator of the plaintiff; provided the plaintiff's attorney do, within fourteen days after notice given to him of the defendant's intention to reverse the outlawry, deliver to the prothonotary the name of the plaintiff's executor or administrator: Tidd. 143, 9th edit.

(*c*) Mellin *v.* Evans, 1 Crompt. & Jerv. 82.

quired by the statute, it is sufficient, where the plaintiff sues as executor or administrator, that he, or a clerk of the testator, or intestate, should swear that the defendant is indebted, &c., *as appears by books, &c., and as he verily believes:* but a mere reference to books, unsupported by the party's belief, is not sufficiently positive (*d*): And an affidavit by an executor, of a debt due to his testator, as appears by a statement made from the testator's books by an accountant employed to investigate the same, *as deponent verily believes,* has been held to be insufficient to hold a defendant to special bail (*e*).

In such an affidavit it is not incorrect to allege the defendant to be indebted to the plaintiff and his wife, administratrix (*f*). If the debt was to the intestate on bond, the death of the latter need not be alleged, nor to whom the payment was to be made (*g*). But if the affidavit were entitled "Between A. B. administrator, &c., plaintiff, and C. D. defendant," it would, perhaps, be held bad, as not shewing in what character the plaintiff was administrator (*h*).

Executors or administrators, who have holden a party to bail, without reasonable or probable cause, for a debt due to the deceased, are within the statute 43 Geo. iii. c. 46, s. 3 (*i*).

Declaration: when executor must declare as such:

With respect to the mode of declaring by an executor or administrator, the first inquiry is, upon what causes of action he is bound to declare in his representative character. Every action brought by an executor or administrator, where the cause of action accrues in the time of the deceased, must be brought in the *detinet* only, that is, in his representative capacity (*k*). But where the cause of action accrues after

(*d*) Tidd. 182, 9th edit.

(*e*) Rowney *v.* Dean, 1 Price, 402. Tidd. 182, 9th edit.

(*f*) Coppin *v.* Potter, 2 Dowl. 785. S. C. *nomine* Coppin *v.* Coppin, 10 Bing. 441. 4 M. & Sc. 272.

(*g*) *Ibid.*

(*h*) Fletcher *v.* Lechmere, 5 M. & Gr. 265.

(*i*) Feely *v.* Reed, 5 B. & A. 515, (*a*). Tidd. 984, 9th edit.

(*k*) 1 Saund. 112, note to Dean of Bristol *v.* Guyse. Com. Dig. Pleader, (2 D. 1.) Gallant *v.* Bouteflower, 3 Dougl. 36, by Buller, J.

the death of the testator or intestate, the executor or administrator may sue as such, or not, at his option (*l*). Thus, there has already been occasion to shew (*m*), that, in respect of injuries done to the goods and chattels of the testator, after his death, the executor has his option, either to sue in his representative capacity, and declare as executor or administrator, or to bring the action in his own name, and in his individual character. So it has already appeared, with respect to contracts made with the executor or administrator in that character, that the same option exists, wherever the money recovered will be assets (*n*). In a modern case (*o*), P. orally agreed to grant the defendant a lease for sixty years: the defendant paid part of the consideration, but P. died before the contract was carried into effect. The plaintiffs, P.'s executors, then granted the lease, which recited that P.'s agreement had been treated as void by the Court of Chancery, and that the lease was granted pursuant to a proposal of the plaintiff's, thereinafter mentioned: The plaintiffs paid their own attorney his charges for drawing this lease: And the Court of Common Pleas held, that they were entitled to sue the defendant for money paid, and that, in their own right.

In a declaration of assumpsit brought by an administrator *de bonis non*, the promise may be laid to have been made to the first administrator (*p*).

It should be observed that if a man names himself executor

(*l*) 3 Dougl. 36, by Buller, J. But an action of *assumpsit* cannot be maintained by a surviving co-executor, in his own right, against the surviving partner of a deceased co-executor, without stating himself to be such surviving co-executor: Fitzgerald *v.* Boehm, 6 Moore, 332. *Ante*, p. 778, 779.

(*m*) *Ante*, p. 746, *et seq.*

(*n*) *Ante*, p. 748, *et seq.* See also Shipman *v.* Thomson, Willes, 103. An executor may bring debt in the *debet* and *detinet*, for rent on his own lease of land, although he has the lease as executor: Holman *v.* Chute, Cro. Jac. 685. Com. Dig. Pleader, (2 D. 1): So in debt for not setting out tithes, where he has the rectory as executor: Bedel *v.* Sherman, cited in Reynell *v.* Langcastle, Cro. Jac. 545. Com. Dig. Pleader, (2 D. 1).

(*o*) Grissell *v.* Robinson, 3 Bing. N. S. 10.

(*p*) Hirst *v.* Smith, 7 T. R. 182.

or administrator, and it appears that the cause of action is in his own right, it will be no objection: for the calling himself executor is but surplusage (*q*).

But if the action be in the *debet* and *detinet*, where it should be in the *detinet* only, or *e contra*, it is substance (*r*). But now it is aided after verdict by the statute 16 & 17 Car. ii. c. 8 (*s*): And by the statute 5 & 6 Ann. c. 16, on a general demurrer: or after a judgment by default (*t*).

joinder of counts:

The plaintiff cannot join, in the same declaration, a demand as executor or administrator, with another which accrued in his own right: And such misjoinder is a defect in substance, and therefore bad on a general demurrer, or in arrest of judgment, or in error (*u*). Thus, if an executor takes a bond from a simple contract creditor, he cannot join a count on such bond with a count on a promise made, or debt due, to the testator: because the demand on the bond must be in the executor's own right (*v*). However, it is now settled, after much contrariety of cases, that if the money recovered on each of the counts will be *assets*, the counts may be joined in the same declaration (*w*). Therefore the same declaration which contains counts on promises to the testator may contain a count on an account stated with the plaintiff *as executor*, concerning money due to the testator from the defendant, or concerning money due to the plaintiff *as executor* (*x*), or a

(*q*) Hornsey *v.* Dimocke, 1 Vent. 119. Com. Dig. Pleader, (2 D. 1). Hargraves *v.* Holden, 1 Cr. M. & R. 580, note (*a*). As to rejecting the words "as executor," as surplusage, see Aspinall *v.* Wake, 10 Bingh. 51. S. C. 3 Moore & Sc. 426.

(*r*) Reynell *v.* Langcastle, Cro. Jac. 545. Com. Dig. Pleader, (2 D. 1). But in a late case, a special demurrer to a declaration in debt by executors, commencing in the *debet* and *detinet*, was overruled, on the ground that this allegation might be rejected: Collett *v.* Collet, 3 Dowl. 211. See also Ferguson *v.* Mitchell, 4 Dowl. 513. S. C. 2 Cr. M. & R. 687.

(*s*) Coomber *v.* Watton, 1 Sid. 342. Frevin *v.* Paynton, 1 Lev. 251. Com. Dig. Pleader, (2 D. 1).

(*t*) Lee *v.* Pilmy, 2 Ld. Raym. 1513.

(*u*) 2 Saund. 117, *e.* note to Coryton *v.* Lithebye, Tidd. 12, 9th edit.

(*v*) Hosier *v.* Lord Arundell, 3 Bos. & Pull. 7. Partridge *v.* Court, 5 Price, 419, 420, 421. *Ante*, p. 762.

(*w*) 2 Saund. 117, *y.* note to Coryton *v.* Lithebye. Gallant *v.* Bouteflower, 3 Dougl. 34.

(*x*) Needham *v.* Corke, 1 Freem.

count for money lent by the plaintiff *as executor* (*y*), or a count for money had and received by the defendant to the use of the plaintiff *as executor* (*z*), or a count for money paid by the plaintiff *as executor* to the use of the defendant (*a*), or a count for goods sold and delivered by the plaintiff *as executor* (*b*), or a count for materials found, and for work and labour done, by the plaintiff *as executor* (*c*), or a count on a bill of exchange endorsed to the plaintiff *as executor* (*d*), or on a promissory note made to him *as executor* (*e*). So in a declaration in debt, a count on a judgment recovered by the plaintiff *as executor*, may be joined with counts on debts which accrued to the testator (*f*).

But it must be stated in the count that the duty accrued to the plaintiff in his representative character of executor: It is not enough to say that it accrued to him, "executor," or "being executor;" it must be averred that it accrued to him, "*as executor:*" And, therefore, where a count, upon an account stated with the plaintiff *executrix* (not saying *as* executrix), was joined with a count on a promise to the testator, it was held, in error, after judgment by *nil dicit*, and a writ of inquiry and final judgment, that those two counts

538. Thompson *v.* Stent, 1 Taunt. 322. Cowell *v.* Watts, 6 East, 405. *Ante*, p. 748, 749.

(*y*) Webster *v.* Spencer, 3 B. & A. 365. Gallant *v.* Bouteflower, 3 Dougl. 34.

(*z*) Foxwist *v.* Tremaine, 2 Saund. 208. Petrie *v.* Hannay, 3 T. R. 659. Gallant *v.* Bouteflower, 3 Dougl. 34. Smith *v.* Barrow, 2 T. R. 477, by Ashurst, J. Webster *v.* Spencer, 3 B. & A. 364. Clark *v.* Hougham, 2 B. & C. 149. Dowbiggen *v.* Harrison, 9 B. & C. 669, by Lord Tenterden. *Ante*, p. 749.

(*a*) Ord *v.* Fenwick, 3 East, 103. *Ante*, p. 749.

(*b*) Cowell *v.* Watts, 6 East, 405. S. C. 2 Smith, 410. Dowbiggen *v.* Harrison, 9 B. & C. 669, by Lord Tenterden. *Ante*, p. 749.

(*c*) Marshall *v.* Broadhurst, 1 Crompt. & Jerv. 403. S. C. 1 Tyrwh. 308. Edwards *v.* Grace, 2 Mees. & Wels. 190. *Ante*, p. 749.

(*d*) King *v.* Thom, 1 T. R. 487. Catherwood *v.* Chabaud, 1 B. & C. 150. *Ante*, p. 750. See also Murray *v.* E. I. Company, 5 B. & A. 204. *Ante*, p. 752.

(*e*) Partridge *v.* Court, 5 Price, 412. S. C. affirmed on error, 7 Price, 591. *Ante*, p. 752.

(*f*) Crawford *v.* Whittal, 1 Doug. 4, note (1). *Ante*, p. 748, note (*n*). So an executor may in the same declaration declare for rent due in his own time, and for that which accrued in the testator's time: Tayler *v.* Holmes, 1 Freem. 367.

could not be joined (*g*). However, in a modern case in the House of Lords (*h*), in a declaration by executors, a count stating that the defendant had accounted with the plaintiffs, "Executors as aforesaid," was joined with counts stating promises to the testator: After a verdict and judgment for the plaintiffs, a writ of error was brought upon the ground of the misjoinder: But the judgment was affirmed with costs.

averment of grant of letters of administration:

A declaration by an administrator should contain a statement of the grant of the letters of administration, which is usually in this form: "To which A. B., after the death of the said E. F., to wit on, &c., administration of all and singular the goods, chattels, and credits, which were of the said E. F., deceased, at the time of his death, who died intestate, by [the Ordinary] in due form of law, was granted." In *Hughes* v. *Williams* (*i*), in a declaration by an administratrix, the plaintiff made profert of letters of administration, "duly granted by the *Consistory Court of St. Asaph*," without making the usual statement of the grant of the letters of administration in the body of the declaration: And it was held bad on special demurrer, as not sufficiently shewing that the letters of administration were granted by the proper authority. In the same case, the Court appeared to be of opinion that the omission of the *date* of the grant was immaterial though assigned as a cause for special demurrer (*j*).

It is necessary for an executor when he declares *as such*, to make a *profert in curiâ* of the letters testamentary; and

(*g*) Henshall *v*. Roberts, 5 East, 150. 2 Saund. 117, *h*. note. Tidd. 13, 9th edit. Webb *v*. Cowdell, 14 M. & W. 820.

(*h*) Lancefield *v*. Allen, 1 Bligh, N. S. 592.

(*i*) 2 Crompt. M. & Rosc. 331.

(*j*) Where, however, a count in *indebitatus assumpsit* stated the time of the defendants being indebted to the plaintiff's testator in his lifetime and of his making the promise on the 2d of Jan. 1832, and stated the time of the grant of the letters of administration to the plaintiff on the 1st of Jan. 1831, it was held, on special demurrer, that the allegations were inconsistent, and the count bad; and that one of the allegations of time could not be rejected as surplusage, as then a material and traversable fact would be laid without a time: Ring *v*. Roxbrough, 2 Cr. & J. 418. S. C. 2 Tyrwh. 468.

for an administrator to make a *profert* of the letters of administration (*k*). It is sufficient, it should seem, for an administrator *de bonis non* to make *profert* of the letters of administration *de bonis non* granted to himself, without any *profert* of the letters of the first executor or administrator (*l*). It is usual for executors or administrators in declaring in *scire facias* to make a *profert* of the letters: but it may be inserted either in the middle or at the end of the writ (*m*). It is enacted by the statute 4 & 5 Ann. c. 16, s. 1, that no advantage or exception shall be taken of or for the default of alleging the bringing into Court letters testamentary or letters of administration; but the Court shall give judgment according to the very right of the cause, without regarding any such imperfections, omissions, and defect, or any other matter of like nature, except the same shall be specially and particularly set down and shewn for cause of demurrer.

If an executor, declaring as such, makes *profert* of the letters testamentary, not having, in fact, at that time obtained probate, the defendant, it should seem, in order to raise the objection, must demand oyer: for if he pleads that the plaintiff never was nor is executor "in manner and form as alleged in the declaration," the plaintiff will succeed on this issue, if he obtains probate at any time before the trial (*n*).

Oyer of letters testamentary.

The "letters testamentary" incorporate by necessary and express reference the Will annexed: Therefore, if oyer be craved of the "letters testamentary," the plaintiff should give a copy as well of the Will as of the certificate of the Ordinary (*o*).

Pleas:

By stat. 2 Geo. II. c. 22, s. 13, where either party sues or

(*k*) But where the plaintiff unnecessarily describes himself as executor or administrator, a profert is not requisite: Crawford *v*. Whittal, 1 Dougl. 4, n. (1).

(*l*) Catherwood *v*. Chabaud, 1 B. & C. 150. See also Gradell *v*. Tyson, 2 Stra. 716.

(*m*) 2 Saund. 9, *f*. note (12). Tidd. 1128, 9th edit. See also Bosworth *v*. Ringole, Show. 60. S. C. Carth. 69. Com. Dig. Pleader, (2 D. 1).

(*n*) Thompson *v*. Reynolds, 3 C. & P. 123. See *ante*, p. 242.

(*o*) Daly *v*. Mahon, 4 Bingh. N. C. 235. S. C. 3 Scott, 299.

Set-off.

is sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other. But in an action by an executor in his own name to recover money due to the testator in his lifetime and received by the defendant after his death, the defendant cannot set-off a debt due to him from the testator (*p*). Again, if a stranger receives rent due to the testator in his lifetime, and afterwards, by desire of the tenant in possession, pays the demand of ground rent, due at the same time, for the same premises, he may deduct such payment in an action, by the executor, for the rents received: but he cannot deduct a payment of ground rent arising after the death of the testator (*q*).

In *Henderson* v. *Henderson* (*r*), an action was brought on a decree on the equity side of the Supreme Court of Newfoundland, awarding a sum of money to be paid by the defendant to the plaintiff; and the defendant, by his plea, after alleging that the plaintiff had sued in the Supreme Court as the representative of a deceased person, proceeded to rely on a set-off for debts due from the deceased, or his estate, to the defendant: And it was held that this plea was bad; because the plaintiff was now suing in his own right, and the defence, if available at all, was one which ought to have been made in the Supreme Court.

It should seem that, under this statute, an equitable demand cannot be set-off at law. In *Tucker* v. *Tucker* (*s*), one

(*p*) Shipman *v.* Thompson, Willes, 103. Tegetmeyer *v.* Lumley, 25 G. 3, B. R., reported in Durnford's note to Hutchinson *v.* Sturges, Willes, 264. Schofield *v.* Corbett, 6 Nev. & Mann. 527. And according to the case of Kilvington *v.* Stevenson, cited by Erskine from Yates' MSS. in Tegetmeyer *v.* Lumley, the same rule holds, where the plaintiff declares *as executor*, if the cause of action arose after the death of the testator. This rule does not apply where an executor is defendant: Blakesley *v.* Smallwood, 8 Q. B. 538. *Post*, Bk. II. Ch. I. As to set-off in an action brought by husband and wife in right of the wife as executrix, see Field *v.* Allen, 9 M. & W. 694.

(*q*) Wilkinson *v.* Cawood, 3 Anstr. 905.

(*r*) 6 Q. B. 288.

(*s*) 4 B. & Adol. 745. S. C. 1 Nev. & M. 480.

Sarah Tucker, in the year 1791, gave a bond to William Tucker, conditioned for the payment of money: William Tucker made one Charlotte Tucker his executrix and residuary legatee: She proved the Will, and assented to the bequest to herself, and died, not having fully administered, making the defendant her executrix: A sum due on this bond remained unpaid: Charlotte Tucker, in the year 1774, in consideration of a marriage about to take place between herself and the father of Sarah Tucker, had given a bond to a trustee, conditioned for payment of a sum of money to the use of Sarah Tucker, if she, Charlotte Tucker, (then Charlotte Small), should marry, and survive her intended husband: She did marry, and survived him, and the money not having been paid in her lifetime, the trustee's executor sued the defendant as her executrix on that bond: And the Court of King's Bench held, that in this action, the claim of the defendant upon Sarah Tucker's bond could not be set-off.

Where an equitable set-off exists, the proper course is to apply to a Court of Equity for an injunction. And although the rule is as fully established in equity as at law, that demands due in different rights cannot be set-off,—the principle being, that one's money shall not be applied to pay another man's debts,—yet a Court of Equity will have regard to the beneficial ownership of the debts, and will give effect to the right of set-off accordingly, notwithstanding any technical difficulties as to forms of action or the like: Thus in *Jones* v. *Mossop* (*t*), A. was indebted on bond to B.: B. died, leaving C. his sole next of kin, who obtained letters of administration of his estate: The estate of B., after all debts, &c. were paid, left a clear residue exceeding the amount of the bond debt: A. became surety for C. by joining in promissory notes: C. became an insolvent debtor, and A. was compelled to pay the notes: C. died, and then the Assignee under his Insolvency took out letters of adminis-

(*t*) 3 Hare, 568.

tration *de bonis non* of B., and sued A. on the bond: It was held, that A. might set-off the sums which he had been compelled to pay as surety for C. against the bond debt (*u*).

In *Bridges* v. *Smyth* (*v*), the Court of Common Pleas held, that a judgment for the plaintiff in that Court might be set-off against a judgment for the defendant in the King's Bench, although the plaintiff was dead and the judgment was assets in the hands of her administrator. In that case, Mrs. Brydges had judgment against Miss Smyth in the Common Pleas, in two actions, to the amount of 816*l.* 15*s.*; and Mrs. Brydges dying after the judgments were entered up, Frowd, her attorney, who claimed to be a judgment creditor, had taken out letters of administration: Miss Smyth had a judgment in the King's Bench to the amount of 3,052*l.* against Mrs. Brydges, and Frowd was requested to set-off the 816*l.* 15*s.* against the 3,052*l.*: This he refused to do, on the ground that, she being dead, and he being her administrator, the judgments in the Common Pleas were in a different right, and could not be set-off, without compromising the interest of the creditors: But the Court of Common Pleas ordered satisfaction to be entered on the judgment rolls in that Court, upon acknowledging satisfaction for 816*l.* 15*s.*, on the judgment for 3,052*l.* in the King's Bench.

In answer to a set-off, the executor or administrator may give in evidence the advance of money by him *as executor* or administrator to the defendant (*w*).

plea of Statute of Limitations:

If, in *assumpsit* by an executor, in which all the promises are laid to be made *to the testator* in his lifetime, the defendant pleads that he did not promise within six years next before the obtaining of the original writ of the plaintiff, and

(*u*) It must not, however, be understood that the mere existence of cross-demands is sufficient to constitute an equitable set-off as contradistinguished from the set-off at law. It will be found that this equitable set-off exists in cases where the party seeking the benefit of it can shew some equitable grounds for being protected against his adversary's demand: Rawson *v.* Samuel, 1 Craig & Ph. 161, 178.

(*v*) 8 Bingh. 29.

(*w*) Gallant *v.* Bouteflower, 3 Dougl. 34.

the plaintiff replies that the original was sued on such a day, and that within six years before the day of obtaining thereof, that is to say, on such a day, letters testamentary were granted to him, by which the plaintiff's action accrued to him within six years; this replication is bad; because the time of limitation must be computed from the time when the action first accrued to the testator, and not from the time of proving the Will; for that gave no new cause of action, and therefore the time of proving the Will is perfectly immaterial (*x*).

But where to an action by an administrator for money had and received to his use by the defendant, who had received the intestate's money *after his death*, six years and upwards before the commencement of the action, but within six years after letters of administration granted to the plaintiff, the defendant pleaded the Statute of Limitations, and the plaintiff replied the special matter above mentioned; it was held, upon demurrer, that the statute was no bar, because this was not a cause of action in the intestate, the money having been received after his death, and the plaintiff's title commenced by taking out letters of administration, before which time no cause of action accrued to him (*y*). So where an action was brought by an administrator against the acceptors of bills of exchange payable to the intestate, and accepted after his death, but before the grant of letters of administration, it was held that the statute ran only from the grant of the letters (*z*).

It must be observed, that where, in *assumpsit* by an executor on a contract made with *his testator*, all the promises in the declaration are laid to be made to the testator, and the defendant pleads the Statute of Limitations, the plaintiff

(*x*) Hickman *v.* Walker, Willes, 27. 2 Saund. 63, *k.* note to Hodsden *v.* Harridge.

(*y*) Cary *v.* Stephenson, 2 Salk. 421. S. C. Carth. 335. Skinn. 555. 4 Mod. 372. See Stanford's case, cited Cro. Jac. 61. These special replications must conclude with an averment, to give the defendant an opportunity of answering the special matter: 4 Mod. 372. 2 Saund. 63, *k. l.* note.

(*z*) Murray *v.* E. I. Company, 5 B. & A. 204. See also *ante*, p. 527. Pratt *v.* Swaine, 8 B. & C. 285. S. C. 1 Mann. & Ryl. 351. Perry *v.* Jenkins, 1 Mylne & Cr. 118.

cannot in his replication set forth a promise made *to himself* within six years, without being guilty of a departure, any more than he can in such case give evidence of a promise made to himself within six years upon an issue joined on the plea of the Statute of Limitations (*a*). However, in *Heylin* v. *Hastings* (*b*), it is said to have been admitted, that a promise made to an executor is sufficient to prove the issue of *assumpsit* to the testator within six years; because the promise does not give any new cause of action, but only revives the old cause, and is of no other use but to prevent the bar by the Statute of Limitations: But this seems not to be well founded; and it has since been determined, that evidence of an acknowledgment by the defendant within six years of an old existing debt, of above six years' standing, due to the plaintiff's intestate, but which acknowledgment was made after the intestate's death, will not support a count by the administrator, laying the promise to be made to his intestate (*c*). Therefore, where it is necessary to rely on an acknowledgment, made since the death of the testator, to bar the statute, counts must be inserted in the declaration, laying promises to the plaintiff as executor (*d*).

Accordingly, if an executor brings an action on a bill or note, and intends to rely on an acknowledgment or promise made to himself in order to bar the statute, he must in his declaration state the making of the bill or note, and then proceed to aver that after the death of his testator or intestate, the defendant promised him (the plaintiff) as executor or administrator, to pay him. And where the declaration is so framed, such promise may be denied by a plea of *non-assumpsit*, notwithstanding the new rule, H. T. 4 Wm. iv.

(*a*) Hickman *v.* Walker, Willes, 29. Dean *v.* Crane, 1 Salk. 28. S. C. 6 Mod. 309, 310. Executors of the Duke of Marlborough *v.* Widmore, 2 Stra. 890. 2 Saund. 63, *l.*

(*b*) Carth. 471.

(*c*) Sarell *v.* Wine, 3 East, 409. S. P. Ward *v.* Hunter, 6 Taunt. 210. S. P. by Bayley, J., in Short *v.* M'Carthy, 3 B. & A. 631.

(*d*) As to what is sufficient evidence of an account stated with the plaintiff as executor, see Purdon *v.* Purdon, 10 M. & W. 562.

(Assumpsit 2), that in all actions upon bills of exchange and promissory notes, the plea of *non-assumpsit* shall be inadmissible: For the mere production and proof of the note would not prove the promise laid as made *to the executors*, as it would if the promise were laid as made *to the testator:* The right of action indeed is transferred to the executor, but no promise is implied by law to pay him; otherwise the Statute of Limitations would run from the death of the payee, and not from the time of the note becoming due: In order, therefore, to support the action, there must be an express promise to the executor, that is to say, an express promise as contradistinguished from a promise contained in the note itself, or anything implied out of it; and the cause of action is the existence of the note, *with* the express promise to the executor to pay the amount of it; whereas the new rule is confined to cases where the action is *only* on the note (*e*): The effect of the plea of non-assumpsit in such a case, is to admit that the bill or note was signed by the defendant, but to deny that he made any promise to the executor.

In *Clark* v. *Hooper* (*f*), payment of interest on a promissory note to an administrator, who had omitted to take out administration in the diocese in which the note was a *bonum notabile*, was held a sufficient acknowledgment of the debt to bar the statute.

If an executor takes out proper process in *assumpsit*, within a year after the death of his testator, the six years not being elapsed before, though they expire within that period, yet, it is said, that will be sufficient to take the case out of the statute (*g*).

But where a plaintiff dies, a writ by journeys accounts cannot be brought by his executor (*h*). It was, indeed, ruled

(*e*) Timmis *v.* Platt, 2 Mees. & W. 720. Gilbert *v.* Platt, 5 Dowl. 748. Rolleston *v.* Dixon, 2 Dowl. & L. 892. *Post*, p. 1658.

(*f*) 10 Bing. 480. 4 M. & Sc. 353.

(*g*) Cawer *v.* James, Bull. N. P. 150. Tidd. 28, 9th edit.

(*h*) Kinsey *v.* Heyward, 1 Lord Raym. 432. If a writ abates, without the default of the plaintiff, he may have a new writ by journeys accounts, *i. e. per dietas computatas:* The word *dieta* means a day's journey; and the origin of the ex-

in *Estob* v. *Thorowgood* (*i*), that a general executor might bring a writ by journeys accounts upon a writ brought by the executor *durante minore ætate*, although it was otherwise in the case of a writ brought by an administrator *durante minore ætate*. But in *Kinsey* v. *Heyward* (*k*), Treby, C. J., said, that although he concurred in that opinion on the former occasion, he was never ashamed to retract his opinion, when convinced upon better reason; and he, therefore, now declared that he thought that the executor could in neither case have the writ; because in no case can a writ of journeys accounts be, but by the same person, not only in representation, but strictly and truly the same person (*l*).

However, where a party brings an action before the expiration of six years, and dies before judgment, the six years being then expired, it has been held that his executor or administrator may, within the equity of the fourth section of the Statute of Limitations (21 Jac. i. c. 16), bring a new action (*m*); provided he does it recently, or within a reasonable time. No precise time is fixed as to what shall be deemed a reasonable time; but it should seem that the statute is the best guide upon the subject, and as that provides that a new action, in the cases enumerated in it, must be commenced *within a year*,

pression is said to be, that the Court of Chancery, being a moveable Court and following the King's Court, and the writs being to be purchased out of Chancery, the party was bound to apply to the King's Court as hastily as the distance of the place would allow, accounting twenty miles for every day's journey: and, for this reason, he was to shew, that he had purchased it as hastily as possible, accounting the days' journies he had to the Court: 1 Lord Raym. 433. Termes de la Ley, Art. Journies Accounts. Com. Dig. Abatement, P. There are some authorities for the proposition that the writ by journies accounts is a continuance of the former writ. But Lord Coke calls it "*quodammodo*, a continuance." And Lord Lyndhurst, C., in Davies *v.* Lowndes, 1 Phill. 328. 6 M. & Gr. 529, and the Court of Common Pleas in a further stage of the same cause, 7 M. & Gr. 762, expressed a very strong opinion that it is not a continuance, strictly and properly, of the old writ, but is a new writ.

(*i*) 1 Lord Raym. 283.

(*k*) 1 Lord Raym. 433.

(*l*) See Spencer's case, 6 Co. 10, *b*.

(*m*) Matthews *v.* Phillips, 2 Salk. 425. Kinsey *v.* Hayward, 1 Lutw. 260.

so an executor ought also to bring a new action within that period (*n*). In *Kinsey* v. *Heyward* (*o*), a year is said to be a reasonable time; and the Court of King's Bench appears to be of this opinion in *Wilcocks* v. *Huggins* (*p*), where it is said, that the most that had ever been allowed was a year, and that within the equity of the proviso in the statute, which gives the plaintiff a year to commence a new action, where the judgment is arrested or reversed; and that they would not go a moment further, for it would let in all the inconveniences which the statute was made to avoid: Indeed if the executor had been retarded by suits about the Will or administration, and had shewn that in pleading, it would have been otherwise, because the neglect would then have been accounted for: And Lee, J., said, "I think what is or is not a recent prosecution in a case of this nature, is to be determined by the discretion of the Court from the circumstances of the case; but generally, the year in the statute is a good direction." However, in *Lethbridge* v. *Chapman* (*q*), the action was allowed to be brought within fourteen months after the testator's death, though no reason was assigned for it. Upon the whole, therefore, it seems prudent for the executor to bring a new action as soon as he possibly can after the death of his testator, and at all events not to delay it beyond a year (*r*).

The form of the replication by an executor to a plea of the statute, where he recently brings a new action after the death of the testator, is to state, that the testator, on such a day sued out a writ of summons against the defendant, whereby he was commanded, &c., (and then continue the writ down to the time of the testator's death): that he appointed the plaintiff his executor, recently after whose death, to wit, on such a day, &c., the plaintiff sued out the writ upon which the action is founded; that the several writs so prosecuted by the testator against the defendant

(*n*) 2 Saund. 64, *a.* note to Hodsden *v.* Harridge.

(*o*) 1 Lord Raym. 434.

(*p*) 2 Str. 907. Fitzg. 170, 289.

(*q*) 15 Vin. 103, *in margine.*

(*r*) 2 Saund. 64, *b.* note.

were with an intent to have impleaded the defendant upon the several promises in the declaration specified; and that the writ sued out by the plaintiff against the defendant was prosecuted against him with an intent to implead him for the causes of action in the declaration specified, and upon his appearance to declare against him for the said several causes of action, and that he afterwards, on, &c., declared against the defendant, &c., with an averment that the several causes of action accrued within six years next before the suing out of the writ first above specified by the testator (*s*).

Again, if an executor bring *assumpsit*, but die before judgment, and the six years run, his executor may, notwithstanding, bring a fresh action, so as he bring it in a reasonable time, which is to be decided at the discretion of the justices upon the circumstances of the case (*t*).

The principle of these cases, according to the judgment of Lord Chief Justice Treby, in the above mentioned case of *Kinsey* v. *Heyward*, is, that when once the proviso in the Statute of Limitations is complied with by the commencement of an action within due time, the party is out of the purview of the Act, and set at liberty out of the restraint of the said statute. But the true ground of these decisions appears to be that they proceed upon the equity of the fourth section of the statute, and that the Courts have extended that section to the case of an executor whose testator has died pending an action brought by him; which, though not within the words of it, was evidently within the mischief (*u*). Accordingly in *Adam* v. *The Inhabitants of the City of Bristol* (*v*), the premises of A., a termor, having been burnt by a riotous assembly, A. complied with all the requisites of the statute 7 & 8 Geo. iv. c. 31, and commenced an action against the inhabitants of the city and county, within three months from

(*s*) 2 Saund. 64, *c*. note. As to the alteration of this form, consequent on the Uniformity of Process Act (2 Wm. iv. c. 39, s. 10), see Williams *v*. Williams, 10 M. & W. 174.

(*t*) Bull. N. P. 150, *a*.

(*u*) 2 Adol. & Ell. 403, 404.

(*v*) 2 Adol. & Ell. 389. S. C. *nomine*, Till—Adam *v*. Inhabitants of Bristol, 4 Nev. & M. 144.

the offence: Before verdict or judgment, and after the expiration of the three months, A. died: His executrix commenced an action against the inhabitants on the seventh day from A.'s death: And the Court of King's Bench held, that supposing an executrix entitled to sue in any such case (as to which the Court gave no opinion) (*w*), the action, having been commenced more than three months from the offence, was too late under the provision in section 3, of the statute, *viz.*, "Provided also, that no person shall be enabled to bring any such action, unless he shall commence the same within three calendar months after the commission of the offence;" and that there was no analogy between this case and the above decisions on the general Statute of Limitations.

judgment as in case of a nonsuit:

The statute of 14 Geo. II. c. 17, by which judgment as in case of a nonsuit may be entered up against a plaintiff neglecting to proceed to trial, has been holden to extend to actions brought by executors or administrators (*x*).

in an action by husband and wife as executrix.

Where, in an action by husband and wife in right of the wife as executrix, a rule for judgment as in case of a nonsuit had been discharged on a peremptory undertaking to try at a specified time, and the husband afterwards died, and the wife failed to proceed to trial according to the undertaking; it was held, that the defendant was not entitled to judgment; for that the undertaking was altogether the act of the husband, who was a necessary party to the action, and under whose control the wife must be supposed to be in the conduct of it, and by which she was not bound (*y*).

Evidence of plaintiff's being executor:

where necessary:

Where the plaintiff declares as executor or administrator, upon a cause of action arising in the time of his testator or intestate, and makes profert of the probate or letters of administration, the defendant, cannot, at the trial, deny the title of the plaintiff as executor or administrator, unless there be a plea of *ne unques executor*, or *ne unques administrator:* Thus, in an action of *assumpsit* by an administrator, on

(*w*) See *ante*, p. 673.

(*x*) Howard *v.* Ratborne, Willes, 316. Tidd. 762, 9th edit.

(*y*) Lee *v.* Armstrong, 9 M. & W. 14.

promises to the intestate, the plea of *non assumpsit* admits the title of the plaintiff as administrator, and the defendant will not be allowed to insist on the production of the letters of administration, or to object that they are not duly stamped (*z*), nor that the supposed intestate has made a Will and appointed an executor (*a*). So, in an action of trover by an executor or administrator, on the possession of his intestate, if the defendant pleads the general issue, he will not be allowed to controvert the title of the plaintiff as administrator (*b*). So where the plaintiff sues as executor, and there is no plea of *ne unques executor*, he cannot be called upon to prove that the testator is dead (*c*).

However, the plea of the general issue only admits the title stated in the declaration; and therefore, if that title be insufficient, the plaintiff cannot recover. Thus in an action by an administrator on a judgment recovered by his intestate in the King's Bench at Westminster, (which is *bonum notabile* in Middlesex) (*d*), where the plaintiff made profert of letters of administration from the Archdeacon of Dorset, and the defendant pleaded a plea which admitted the letters of administration, it was held, on a motion of arrest in judgment, that the plea only admitted the plaintiff's title as stated, which appeared on the record an insufficient title (*e*); for that the Court would take judicial notice that the King's Bench was not under the jurisdiction of the Archdeacon of Dorset, and by consequence, that an administration granted by him could not entitle the plaintiff to bring an action upon a judgment recovered there: But Holt, C. J., said, that if the plaintiff had not set forth what kind of administration he claimed by, but had only generally alleged himself administrator of the goods and chattels of the intestate, and the defendant had not put him upon shewing it by craving *oyer*

(*z*) Thynne *v.* Protheroe, 2 M. & S. 553.

(*a*) Marsfield *v.* Marsh, 2 Lord Raym. 824. S. C. *nomine* Blainfield *v.* Marsh, 7 Mod. 141. 1 Salk. 285. Holt, 44.

(*b*) *Ibid.* 2 Saund. 47, *z.* note to Wilbraham *v.* Snow.

(*c*) Loyd *v.* Finlayson, 2 Esp. 564.

(*d*) See *ante*, p. 263.

(*e*) Adams *v.* Savage, 6 Mod. 134.

of the letters of administration, but had pleaded over, it would have been an admission of the plaintiff's right of suing as administrator as he had alleged (*f*).

Again, where the plaintiff declared *on a cause of action arising in his own time,* and made *profert* of the probate or letters of administration, and the defendant pleaded the general issue, such plea did not formerly admit the plaintiff's title as executor or administrator. Thus, where the plaintiff declared as administrator, in an action of trover, on a conversion in his own time, it was held, that the plea of *not guilty* did not admit his title as administrator, and that as the letters of administration were not properly stamped, he could not recover (*g*).

But now by *Reg. Gen.* (Pleading) H. T., 4 Wm. IV., No. 21, in all actions by or against executors or administrators, the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as an issue, unless specially denied.

However, where the plaintiff declares, in trespass or trover, on his *constructive* possession as executor or administrator, without naming himself executor, he must, if his right to the property be put in issue, shew his title as executor or administrator at the trial (*h*).

But where the executor has been in *actual* possession of the property which is the subject of the suit, it will not be necessary for him to give evidence of his title as executor or administrator, in an action against a wrong doer (*i*). And in such case, it should seem, that the naming himself executor or administrator in the declaration may be regarded as mere surplusage (*k*).

An affidavit in support of a rule absolute for judgment on a *scire facias*, issued at the suit of executors to revive a

(*f*) 6 Mod. 136.

(*g*) Hunt *v.* Stevens, 3 Taunt. 115, by Lawrence, J. 2 Saund. 47, *z.* note to Wilbraham *v.* Snow: but see Watson *v.* King, 4 Campb. 272, and Loyd *v.* Finlayson, 2 Esp. 564.

(*h*) *Ante*, p. 242.

(*i*) *Ante*, p. 243.

(*k*) Com. Dig. Pleader, (2 D. 1).

judgment obtained by their testator against the defendant, must shew that probate has been granted to them (*l*).

what is sufficient proof of the plaintiff being executor, &c.:

It remains to consider, what shall be sufficient evidence of the plaintiff's title as executor or administrator, when it becomes necessary to prove it, either under a plea denying the representative character of the plaintiff, or in a suit on a cause of action arising in the plaintiff's own time.

probate:

Although the executor derives his title from the Will by which he is appointed, and not from the probate of the Will, yet it is the probate alone which authenticates his right, and the probate, or something tantamount thereto, is the only legitimate evidence of personal property being vested in an executor, or of the executor's appointment (*m*). Therefore, the original Will cannot be read in evidence for that purpose, although produced by the officer of the Ecclesiastical Court, unless it bears the seal of the Court, or some other mark of authentication (*n*). The seal of the Ecclesiastical Court on the probate proves itself (*o*).

If the probate is lost, it is not the practice of the Ecclesiastical Court to grant a second, but only an exemplification from the records of the Court; which will be evidence of the proving the Will (*p*). And an examined copy of the probate is evidence of the person, there named, being executor; because the probate is an original, taken by authority, and of a public nature (*q*).

It must be observed, that all that is required, either in the case of an executor or administrator, is to shew by legitimate evidence that the Ecclesiastical Court has given authority to the person to administer: It is only the act of the Ecclesiastical Court that is to be proved: The probate is only a copy

(*l*) Vogel *v.* Thompson, 1 Exch. Rep. 60.

(*m*) *Ante*, p. 240. Hamilton *v.* Aston, 1 Carr. & Kirw. 679.

(*n*) R. *v.* Barnes, 1 Stark. N. P. C. 243. Pinney *v.* Pinney, 8 B. & C. 335: Nor is a copy of the Will evidence: Bull. N. P. 246.

(*o*) Kempton *v.* Cross, Cas. temp. Hardw. 108.

(*p*) Shepherd *v.* Shorthose, 1 Stra. 412. Bull. N. P. 246.

(*q*) Hoe *v.* Nelthorpe, 3 Salk. 154. S. C. 1 Lord Raym. 154. S. P. by Holt, C. J., in R. *v.* Haines, Skinn. 584. Bull. N. P. 246.

of this act: The original book containing the entry of the act of Court is the original, and therefore the primary evidence: Hence the act-book, containing an entry of a Will having been proved, and of probate granted to the executors therein named, is admissible evidence of those persons being the executors, without accounting for the non-production of the probate (*r*).

Accordingly it has been held, that, in order to prove the title of a lessor of the plaintiff in ejectment, claiming as executor, it is sufficient (without laying ground for the reception of secondary evidence) to produce minutes of the proof of the Will and sealing of probate, indorsed on the Will by the Surrogate and Registrar of the Ecclesiastical Court; it being proved also that, by the practice of the particular Court, no other record of such grants is kept (*s*).

An exemplification of letters of administration *de bonis non*, reciting the former grant of administration, requires to be stamped only as an exemplification of a single proceeding under stat. 55 Geo. III. c. 184, Sched. Part II. tit. "Proceedings in the Ecclesiastical Courts:" For the one title appears merely as identifying the party on whom the other was conferred (*t*).

To prove that the probate of a Will has been revoked, an entry of the revocation in a book of the Prerogative Court, in which all causes were entered by the Registrar, and which was kept as the only record of such proceedings, and of the decree of the Court, has been admitted to be good evidence (*u*).

The title of several plaintiffs, claiming as executors, is well evidenced by probate, granted to one only, of the Will appointing them all (*v*): And the rule is the same whether

(*r*) Cox *v*. Allingham, Jacob. 514.

(*s*) Doe *v*. Mew, 7 A. & E. 240. S. C. 2 N. & P. 260.

(*t*) Doe *v*. Gunning, 7 A. & E. 240.

(*u*) Ramsbottom's case, 1 Leach, Cr. C. 30, n. (*c*). 1 Phill. Ev. 378, 6th edit.

(*v*) Walters *v*. Pfeil, 1 Mood. & Malk. 362. Scott *v*. Briant, 6 Nev. & M. 381.

they sue in their representative character or not (*w*); for probate granted to one of several executors enures to the benefit of all (*x*).

The title of an administrator *de bonis non* is sufficiently proved by the profert of the letters of administration *de bonis non*, without those granted to the first executor or administrator (*y*).

Where an executor or administrator produces the probate or letters in proof of his representative character, and his case shews that he sues for a greater value than is covered by the probate or administration stamp, he cannot recover (*z*). Thus, in *Hunt* v. *Stevens* (*a*), the plaintiff declared in trover as administrator, upon a conversion in his own time: It appeared that the deceased employed the defendant, who was an upholsterer, to furnish his house, and the defendant, accordingly, a fortnight before his death, sent in goods to the amount of at least 1,300*l.*: During the night of the day on which the intestate died, the defendant privately conveyed away the furniture from the house: The plaintiff afterwards took out administration, on a stamp for a value not exceeding 1000*l.*: And it was held, that, as he had himself shewn that he sued for a greater value than was covered by the stamp, he could not recover. So in *Carr* v. *Roberts* (*b*), an intestate had granted an annuity to Anne Smith, and afterwards by deed conveyed his property to the defendant, who covenanted to indemnify him against the payment of the annuity: Default having been subsequently made in the payment, during the intestate's life, the annuitant sued his administratrix, and recovered judgment for debt and costs, exceeding 20*l.*: The administratrix paid this, and then sued the defendant on his covenant for the amount: And the Court of King's Bench held, (on the authority of *Hunt* v. *Stevens*, and overruling

(*w*) 1 Mood. & Malk. 362.

(*x*) *Ante*, p. 313. Watkins *v.* Brent, 7 Sim. 512.

(*y*) Catherwood *v.* Chabaud, 1 B. & C. 150. See also Gradell *v.* Tyson, 2 Stra. 716.

(*z*) See *ante*, p. 496, *et seq.*, as to the amount of stamp.

(*a*) 3 Taunt. 113.

(*b*) 2 B. & Adol. 905.

the decision of Lord Tenterden at *nisi prius* (*c*)), that the right to recover this was a part of the intestate's estate, and rendered the letters of administration liable to stamp duty (*d*).

letters of administration:

The title of the plaintiff, as administrator, may be proved by the production of the letters of administration, or of a certificate or exemplification thereof granted by the Ecclesiastical Court (*e*), or, without producing the letters of administration, by the original book of acts, directing the grant of the letters (*f*). The original book of acts, directing letters of administration to be granted, with the Surrogate's *fiat* for the same, is evidence of the title of the party, to whom administration of the intestate's effects is granted, without producing the letters of administration themselves, (notwithstanding subsequent letters of administration granted to another), if the first are not recalled; for the original book was the authority for the proper officer to make out letters of administration, and the letters of administration were only the copy of the original minutes of the Court, drawn up in a more formal manner (*g*). So an examined copy of the act-book, stating that administration was granted to the defendant at such a time, is proof of his being administrator in an action against him, without giving him notice to produce his letters of administration (*h*).

how far probate, &c. conclusive in evidence.

There has already been occasion to consider how far a probate or letters of administration, when produced by the plaintiff, are conclusive upon the defendant (*i*). But it may

(*c*) 2 Mood. & Malk. 45.

(*d*) See *ante*, p. 514.

(*e*) Kempton *v.* Cross, Cas. temp. Hardw. 108. Bull. N. P. 246. Roscoe on Evid. 60, 2d edition. Administration is generally granted under seal: but it may also be granted by entry in the registry without letters under seal: 11 Vin. Abr. 70. Exor. (D). pl. 4. 1 Phill. Evid. 378, 6th edit.

(*f*) *Ibid.* Elden *v.* Keddell, 8 East, 187. S. P. by Bayley, J., in Ramsbottom *v.* Buckhurst, 2 M. & S. 567. 1 Phill. Evid. 378, 6th edit.

(*g*) Elden *v.* Keddell, 8 East, 187. Garrett *v.* Lister, 1 Lev. 25. Bull. N. P. 246. 2 M. & S. 567. 1 Phill. Ev. 378, 6th edit.

(*h*) Davis *v.* Williams, 13 East, 232. 1 Phill. Evid. 378, 6th edit.

(*i*) *Ante*, p. 450, *et seq.*

be convenient, in this place, to recapitulate some of the points established on this subject.

The defendant cannot prove that another person was appointed executor or administrator, or that the testator was insane, or that the Will, of which probate has been granted, was forged: for that would be directly contrary to the seal of the Ordinary in a matter within his immediate jurisdiction (*k*).

But it may be proved, on the part of the defendant, under a plea of *ne unques executor*, that the deceased had *bona notabilia* in divers dioceses, and consequently that the bishop or other inferior judge had no jurisdiction to grant probate or administration (*l*). But a defence that, although the probate is valid, the particular debt does not pass under it, must be specially pleaded, and cannot be shewn under *ne unques executor* (*m*).

Again, it may be proved, under a plea of *ne unques executor, &c.*, that the supposed testator or intestate is alive: for in such case, the Ecclesiastical Court can have no jurisdiction (*n*). And it may be shewn, that the seal attached to the supposed probate has been forged, or that the letters have been revoked (*o*).

Again, the defendant may plead in his defence, that he has paid the debt, which is the subject of the action, to an executor who had obtained probate of a forged Will, unrepealed at the time of the payment (*p*). But payment of money under the probate of a supposed Will of a living person would be void; because, in such case, the Ecclesiastical Court has not jurisdiction, and the probate can have no effect (*q*).

Before Lord Denman's Act, it had been established that

(*k*) *Ante*, p. 450, 451.

(*l*) *Ante*, p. 267. Marriot *v.* Marriot, 1 Stra. 671.

(*m*) *Ante*, p. 267. Stokes *v.* Bate, 5 B. & C. 491.

(*n*) *Ante*, p. 461.

(*o*) *Ante*, p. 461, 462.

(*p*) *Ante*, p. 451. Allen *v.* Dundas, 3 T. R. 125.

(*q*) 3 T. R. 130. Roscoe Ev. 465, 2d edit.

legatees (*r*) and creditors (*s*) of the deceased were competent witnesses, in actions by or against his personal representatives, to increase or protect the estate (at all events unless the estate were insolvent (*t*)); but that a residuary legatee (*u*), or party entitled in distribution (*v*) was not. But by that statute (6 & 7 Vict. c. 85) it is enacted, that no person shall be excluded as a witness, by reason of incapacity from interest; with a proviso, that the Act shall not render competent any person "in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively." In the construction of this latter clause it has been held (*w*), that in an action on a promissory note, brought by the administrator of his mother, to whom it had been given before marriage, her husband, notwithstanding his possible benefit from her estate, was a competent witness for the administrator. And this decision appears to demonstrate that a residuary legatee, or party entitled in distribution, is rendered competent by the Act.

Competency of witnesses for executor.

It may be doubted whether admissions made by an executor or administrator, before he was clothed with that character, are receivable in evidence against him in an action brought by or against him in his representative capacity (*x*). However, in *Smith* v. *Morgan* (*y*), Tindal, C. J., admitted the declaration of the assignees of a bankrupt made by them before their appointment, stating that he was not aware of any distinction between the admissions of parties suing in a representative character and in their own right (*z*).

Whether admissions made by an executor, &c. before appointment, are receivable against him as executor:

(*r*) Clarke *v.* Gannon, Ryan & M. 31. Nowell *v.* Davies, 5 B. & Adol. 368. S. C. 2 Nev. & M. 746.

(*s*) Paull *v.* Brown, 6 Esp. 34. Carter *v.* Pearce, 1 T. R. 164. Davies *v.* Davies, Mood. & M. 345.

(*t*) Craig *v.* Cundell, 1 Campb. 380. Bloor *v.* Davies, 7 M. & W. 240, 241. Burghart *v.* Hall, 4 M. & W. 727, note.

(*u*) Baker *v.* Tyrwhitt, 4 Campb. 27.

(*v*) Allington *v.* Bearcroft, Peake's Add. Cas. 212. Mathews *v.* Smith, 2 Younge & J. 428. Yardley *v.* Arnold, 10 M. & W. 141.

(*w*) Hall *v.* Stephens, 6 Q. B. 937.

(*x*) See Stewart *v.* Edmonds, *ante*, p. 334, note (*u*).

(*y*) 2 M. & Rob. 257.

(*z*) See *contrà*, Fenwick *v.* Thornton, M. & M. 51, *coram* Lord Tenterden.

Admissions by co-executor.

The admission of one of several executors or administrators will not bind the others; at all events, unless it is made in the character of executor. Therefore where two executors were sued as such on a covenant of their testator for quiet enjoyment, and the question was whether the defendants who had evicted the plaintiff had done so under lawful title, it was held that an admission of *one* of the defendants was no evidence of such title (*a*).

Costs.

At a common law, no costs were recoverable by a defendant. But by the statute 23 Hen. viii. c. 15, s. 1, it is enacted, that the defendant shall be entitled to costs, if the plaintiff be nonsuited, or a verdict pass against him, in any action, &c. upon a wrong personal *done to the plaintiff*, or in any action, &c., upon any specialty *made to the plaintiff*, or upon any contract supposed to have been made *between the plaintiff* and any other person. This Act, however, was held not to apply to an action brought by executors or administrators for a wrong done in the time of the deceased, or upon a contract made with him: because the words of the Act extend only to wrongs done to, and contracts made with *the plaintiff*. Accordingly, it was uniformly held, up to the time of the passing of the statute 3 & 4 Wm. iv. c. 42 (hereafter to be mentioned), that executors and administrators were not liable to costs, when plaintiffs, upon a nonsuit or verdict, where the action was brought upon a contract entered into by the testator or intestate, or for a wrong done in his lifetime. Thus, where the plaintiff sued as executor for a cause of action arising in the lifetime of the testator, and was nonsuited, the defendant moved to have his costs taxed, upon an affidavit shewing that the plaintiff must have known the action to be groundless: But the Court refused the application, and said, that a judgment for the costs against the plaintiff would be a ground of error upon the record (*b*). So where the plaintiffs sued, as executors, for money lent by the testator to the defendant,

(*a*) Fox *v.* Waters, 12 A. & E. 43. See also Scholey *v.* Walton, 12 M. & W. 510.

(*b*) Jones *v.* Williams, 6 M. & S. 178.

and it appeared at the trial that the balance claimed arose out of matters of account between the plaintiffs in their own right, as surviving partners of the testator, and they were nonsuited; it was held, that the Court had no power to order the defendant to have his costs allowed him as costs in the cause, because the action was not founded on a contract made *with the plaintiff*, but with the testator; and so not within the statute (*c*). Again, where an executor or administrator sued necessarily in his representative character, it was held that he was not liable to costs upon a judgment as in case of a nonsuit (*d*).

But now by stat. 3 & 4 Wm. IV. c. 42, s. 31 (an Act for the further amendment of the Law), it is enacted, "that in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the Court in which such action is brought, or a Judge of any of the said superior Courts, shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner" (*e*).

In the construction of this statute, it has been held, that the Act has put executors and administrators, when plaintiffs, on the same footing as other plaintiffs, as to their liability to costs, unless where the Court sees that they have been

(*c*) Barnard *v.* Higdon, 3 B. & A. 213. S. C. 1 Chitt. Rep. 628. So where plaintiff sued as executor, and was nonsuited, upon evidence being given at the trial that the supposed testator was alive, the Court refused to allow costs to the defendant, it appearing from affidavits on both sides, that it was at least doubtful, whether the testator were living or not: Zachariah *v.* Page, 1 B. & A. 386.

(*d*) Woolley *v.* Sloper, 9 Bingh. 754. Pickup *v.* Wharton, 2 Crompt. & Mees. 401. S. C. 4 Tyrwh. 224.

(*e*) This provision has been held to apply to actions already commenced when the statute came into operation: Freeman *v.* Moyes, 1 Ad. & Ell. 338. Pickup *v.* Wharton, 2 Crompt. & M. 406. S. C. 4 Tyrwh. 229. Grant *v.* Kemp, 2 Crompt. & M. 636.

misled by some misconduct on the part of the defendant, or unless some other very peculiar ground be laid for the interference of the Court: Therefore it is not a sufficient claim for relief, that the action was brought *bonâ fide* with apparently reasonable grounds for suing, and that the plaintiff was taken by surprise by the defence (*f*). The Court of King's Bench have held that where a single Judge has made an order under the statute to exempt the plaintiff from liability to costs, such order is final, and cannot be reviewed by the Court (*g*). But, in a subsequent case, the Barons of Exchequer expressed their dissent from this decision in K. B. (*h*). The application for relief should regularly be made before the taxation takes place (*i*).

It should be observed, that even before the passing of the above statute, it was held that where the plaintiff sued on a wrong done in his own time, or on a contract made with himself, he was within the statute of Hen. viii., and should not be excused from payment of costs, although he brought the action as executor or administrator. Thus, in an action of trover by executors, if the trover and conversion were both laid to have been in the testator's lifetime, the executor was not liable to pay costs (*k*); but where the plaintiff declared on his own possession as executor, and a conversion in his own time (*l*), or on the possession of the testator, and a conversion in his own time (*m*), he was liable to costs if he failed in the action, inasmuch as the conversion, which is the gist

(*f*) Southgate *v.* Crowley, 1 Bingh. N. C. 518. Godson *v.* Freeman, 2 Crompt. Mees. & R. 585. S. C. 1 Tyrwh. & Gr. 35. Farley *v.* Bryant, 3 A. & E. 839. Engler *v.* Twisden, 2 Bingh. N. C. 263. Birkhead *v.* North, 2 Bail Court Rep. 9. See also Wilkinson *v.* Edwards, 1 Bingh. N. C. 301. Prole *v.* Wiggins, 3 Bingh. N. C. 235.

(*g*) Maddock *v.* Phillips, 3 Ad. & Ell. 198.

(*h*) Lakin *v.* Massie, 4 Dowl. 239.

(*i*) Ashton *v.* Pointer, 5 Tyrwh. 326, by Parke, B.

(*k*) Cockerill *v.* Kynaston, 4 T. R. 277. S. C. cited by Le Blanc, J., in Ord *v.* Fenwick, 3 East, 110.

(*l*) Eaves *v.* Mocato, 1 Salk. 314. Hole *v.* King, Com. Rep. 162.

(*m*) Hollis *v.* Smith, 10 East, 293. Grimstead *v.* Shirley, 2 Taunt. 116.

of action, was after the death of the testator (*n*). It may here be observed, that if the goods were taken in the testator's lifetime, and kept to the time of his death, although not used till after, the executor may declare of a trover and conversion in the testator's lifetime (*o*). Where a declaration in trover by an executor consisted of two counts, one on a conversion in the lifetime, and another after the death of the testator, the executor was holden to be liable to costs on a nonsuit (*p*).

Again, if the plaintiff brings an action upon a contract, express or implied, made with himself, though he sues as executor or administrator, he shall pay costs to the defendant, if he fails in the action, by virtue of the statute of Hen. VIII., and independently of the statute of Wm. IV. (*q*). Thus, in *Dowbiggin* v. *Harrison* (*r*), the first five counts of a declaration by an administratrix were on promises made to the intestate in his lifetime: The sixth count was upon an account stated with her, as administratrix, of monies *due to her as administratrix* and a promise to pay her: And it was holden, that it thereby appeared that the contract was one made between the *plaintiff* and another person within the words of the statute 28 Hen. VIII. c. 15, and that, therefore, after a nonsuit, the defendant was entitled to costs on that count, though not upon the counts upon promises to the intestate: The master accordingly allowed the defendant the costs upon the sixth count only, and reduced the amount claimed by him nearly one-half (*s*). Again, in *Jobson* v. *Forster* (*t*), the plaintiff sued as administratrix, upon promises to the intestate, for work and labour, and also upon an account stated with the plaintiff as administratrix, concerning money due *to the intestate*, and a promise to pay to her: The plaintiff was nonsuited; and it was contended, on her behalf, that this case

(*n*) 2 Saund. 47, *y*. note to Wilbraham *v*. Snow.

(*o*) Crossier *v*. Ogleby, 1 Stra. 60.

(*p*) Grimstead *v*. Shirley, 2 Taunt. 116. Tidd, 978, 9th edit.

(*q*) Tidd, 978, 9th edit.

(*r*) 9 B. & C. 666.

(*s*) See also Jones *v*. Jones, 1 Bingh. 249.

(*t*) 1 Barn. & Adolph. 6.

was distinguishable from the above case of *Dowbiggin* v. *Harrison*, because, in that case, both the consideration and the promise were between the plaintiff and defendant, whereas in the present, the consideration was shewn to have moved from the intestate, and not from the plaintiff: But it was holden, that there was no substantial difference between the two cases, that before the Court being, in effect, a case upon a contract supposed to have been made between the plaintiff and defendant: and that, therefore, the defendant was entitled to costs: but so far as the pleadings were concerned, to the costs of that count only, in which the promise was laid to be to the administratrix. Again, in *Slater* v. *Lawson* (*t*), a declaration by an executor contained counts on a promissory note made by the defendant to the testatrix, with the usual money counts and a count on an account stated, in all of which the promises were laid to have been made to the testatrix: Then followed two counts, one of which averred, that the defendant made his promissory note to the testatrix; that the note was unpaid at the time of her death, and that the defendant afterwards, in consideration thereof, promised to the plaintiff, as executor, to pay him the sum due: The remaining count stated that the defendant, being indebted to the testatrix at the time of her death for monies lent, paid, had, and received, and for interest, promised the plaintiff, as executor, to pay him the amount: The Statute of Limitations was pleaded, and the plaintiff was nonsuited: It was contended, that as there was no count on an account stated, the executor was not liable to costs: But the Court held, that the last counts came within the description in the stat. 23 Hen. viii. c. 15, of "a contract supposed to have been made between the plaintiff and any other person," and that, therefore, the executor should pay costs.

It is important to remark, with reference to actions of this description, that the plaintiff cannot, in any instance, in an action *upon a promise made to himself*, be relieved from his

(*t*) 1 Barn. & Adolph. 893.

liability to costs, by the provisions of the above statute of Wm. IV.: For the operation of that Act is confined to cases where the executor or administrator was not liable to costs under the statute of Hen. VIII.: Therefore where an executor sues on a count upon promises made to himself as executor, and is nonsuited, he is liable to costs, and the Court or a Judge have no discretion to exempt him from them under the statute of Wm. IV. (*u*).

Again, it was held, previously to the Statute for the further amendment of the Law, that it did not follow, because the statute of Hen. VIII. had not given costs against executors or administrators suing on contracts made with, or wrongs done to, their testators or intestates, that in such actions the Court had not the power of punishing the plaintiffs, for misbehaviour in the conduct of the suit, by the imposition of costs (*v*). Accordingly, in *Comber* v. *Hardcastle* (*w*), the plaintiff sued as administrator upon a contract made with his intestate and assigned by the plaintiff to J. S., for whose benefit the action was brought: It appeared that the contract had been annulled with the privity both of the plaintiff and J. S., and that the former was indemnified by the latter: And on a verdict being found for the defendant, the Court made an order on the plaintiff to pay costs. So, it was held, that where an executor or administrator has knowingly brought a wrong action, or otherwise been guilty of a wilful default, he should pay costs upon a discontinuance (*x*), or for not proceeding to trial according to notice (*y*). Again, an executor is liable, independently of the statutes, to costs upon judgment of *non pros* (*z*); and if he wishes to be relieved

(*u*) Spence *v.* Albert, 2 Ad. & Ell. 785. Ashton *v.* Poynter, 1 Crompt. M. & R. 738. S. C. 5 Tyrwh. 322: overruling Lysons *v.* Barrow, 10 Bingh. 563. It is too late to strike out such a count after the cause has been taken down to trial: Tomlinson *v.* Nanny, 2 Dowl. 17.

(*v*) 3 Bos. & Pull. 117, 118.

(*w*) 3 Bos. & Pull. 115.

(*x*) Harris *v.* Jones, 1 W. Black. 451. Melhuish *v.* Maunder, 2 New Rep. 72. Tidd, 979, 9th edit.

(*y*) Woolley *v.* Sloper, 9 Bingh. 754. Pickup *v.* Wharton, 2 Crompt. & M. 401. S. C. 4 Tyrwh. 224.

(*z*) 2 Crompt. & Mees. 403. 4 Tyrwh. 226.

from costs, he should apply to the Court for leave to discontinue, without payment of costs (*a*). So executors or administrators have always been held liable to costs upon interlocutory motions (*b*). It should be observed, that in the cases above stated, where, before the passing of the statute of Wm. iv., an executor and administrator was subjected to costs by reason of misconduct, or as the terms on which the Court granted him a favour, there must have been a special order by the Court that the defendant's costs should be taxed, and that the plaintiff should pay the same; and the judgment must have been entered without costs; for if they had been made part of the judgment, the record would have been erroneous (*c*). The Court will not suspend the payment of such costs, until the plaintiff has received sufficient assets, to be paid *quando acciderint* (*d*).

Executors and administrators are liable to costs in error, in cases where they are liable to costs in the original action (*e*).

Plaintiffs, who live out of the jurisdiction of the Court, may be compelled to give security for costs, though such plaintiffs sue as executors (*f*).

Remedy on judgment obtained by testator.

There has already been occasion (*g*) (in considering the subject of what suits commenced by a testator may be continued by the executor or administrator) to point out the course by which a judgment obtained by the deceased may

(*a*) 1 Chit. Rep. 629. In Blakewey *v.* Edwards, 2 Younge & Jerv. 559, after a double default, and peremptory undertaking given, the Court permitted an administratrix to discontinue an action, where the declaration contained two sets of counts, the one laying the promises to the intestate, and the other to the plaintiff as administratrix; upon the terms of paying the costs of the latter counts; there appearing to be no vexation on the part of the plaintiff. See Lakin *v.* Massie, 4 Dowl. 239.

(*b*) Tidd, 979, 9th edit.

(*c*) 3 Bos. & Pull. 118. 3 B. & A. 214.

(*d*) Andrews *v.* Sealy, 8 Price, 212. Tidd, 979, 9th edit.

(*e*) Williams *v.* Riley, 1 H. Black. 566.

(*f*) Chevalier *v.* Finnis, 1 Brod. & Bingh. 277. S. C. 3 Moore, 602. Chamberlain *v.* Chamberlain, 1 Dowl. 366.

(*g*) *Ante*, p. 766, *et seq.*

be enforced by his personal representative. It may here be added, that although, generally speaking, a *scire facias* is requisite, in order to obtain execution on the judgment, yet if a writ of *fi. fa.* or *ca. sa.* issues in the lifetime of the testator or intestate, tested before his death, it may be executed after his death (*h*).

Relief by *auditâ querelâ* for defendant when executor obtains judgment and then the probate is revoked.

If an executor or administrator obtains judgment, and then the probate or letters of administration are revoked, the regular mode for the defendant to obtain relief is by an *auditâ querelâ* (*i*); though, perhaps, at this day, the Court would relieve the defendant, in a summary way, by motion. In *Kennedy* v. *Kennedy* (*k*), upon a rule to shew cause why a trial should not be put off, it appeared that the action was brought by an administrator, and that a suit was depending in the Spiritual Court for revoking the letters of administration: But the Court said, that there was no need to put off the trial; for if the plaintiff should proceed to execution, and the letters of administration should afterwards be revoked, an *auditâ querelâ* would lie for the defendant.

Where an *auditâ querelâ* was brought against two executors, and only one appeared, and the other made default, he who appeared was awarded to answer alone (*l*).

Executors within the Court of Requests Act:

It was held, in *Wase* v. *Wyburd* (*m*), that if an action of *assumpsit* is brought against an inhabitant of Middlesex by an executor or administrator, and the damages are under 40*s*., the defendant is entitled, under the stat. 23 Geo. II. c. 33, to have that suggested on the roll, in order to deprive the plaintiff of his costs, and give double costs to the defendant, in the same manner as if the plaintiff had sued in his own right (*n*).

Small Debts Act.

By stat. 9 & 10 Vict. c. 95, s. 66, (Small Debts Act), any

(*h*) Ellis *v.* Griffith, 16 M. & W. 106.

(*i*) Turner *v.* Davies, 2 Saund. 148. S. C. 1 Mod. 62.

(*k*) Sayer, 99.

(*l*) 2 Saund. 148, *a.* note to Turner *v.* Davies.

(*m*) 1 Dougl. 246.

(*n*) See also, *Accord.*, Bishop *v.* Marsh, 6 Bingh. N. C. 12.

executor or administrator may sue and be sued in any of the County Courts in like manner as if he were a party in his own right, and judgment and execution shall be such as in the like case would be given or issued in any Superior Court.

Executors giving the note under the Lords' Act.

Where a prisoner was detained in custody by several co-executors, it was held that the note or security for payment of his allowance, under the Lords' Act, must be signed by all of them: for that the defendant had a right, under the statute, to the security of all the plaintiffs personally, and a note signed by one executor only would not bind the others (*o*).

Presentment of bill of exchange by executor.

If the holder of a bill be dead, and the executor has not yet proved the Will, it is said that the bill must, nevertheless, be presented for payment at the regular time: but it should seem, that the drawer and indorsers would not be discharged, provided presentment be made, and notice given of the dishonour by the executor or administrator, in a reasonable time (*p*).

(*o*) Lepine *v.* Bayley, 8 T. R. 325. (*p*) See Roscoe on Bills, 147.

CHAPTER THE SECOND.

OF REMEDIES FOR EXECUTORS AND ADMINISTRATORS IN EQUITY.

What suits an executor may have.

AN executor or administrator is entitled to all the equitable interests of the deceased, and may, in his representative capacity, enforce them in a Court of Equity (*a*).

There has already been occasion to point out (*b*), that, at law, the interest which the testator had in a *chose in action* jointly with another, shall not pass to his executor. But in Equity the same rule does not prevail. Therefore, where a mortgage is made to several persons jointly, they are, in Equity, tenants in common of the mortgage-money, and the representatives of such of them as may be dead are necessary parties, with the survivor, to a bill for foreclosure or redemption (*c*).

The executors of the writer of letters may maintain a bill in Equity to restrain the defendant from publishing them. Accordingly, Mrs. Stanhope was, on bill filed by the executors of Lord Chesterfield, restrained from publishing the letters which had been received by her husband, his natural son, from the testator (*d*). So the representatives of Lord Clarendon obtained an injunction to restrain the printing of an unpublished copy of his *History of the Rebellion*, which had been given by a former representative of the Author to a person under whom the defendant claimed, but not with an intention that he should publish it (*e*).

(*a*) Com. Dig. Chancery, (2 B. 1.) (3 G. 1.)

(*b*) *Ante*, p. 716.

(*c*) Vickers *v.* Cowell, 1 Beav. 529.

(*d*) Thompson *v.* Stanhope, Ambl. 734. See also Granard *v.* Dunkin, 1 Ball & B. 207.

(*e*) Queensberry *v.* Shebbeare, 2 Eden, 329.

An executor or administrator may exhibit a bill for the discovery of the personal estate of the deceased (*f*).

If the executor finds the affairs of the testator so complicated as to render the administering of the estate unsafe, he may institute a suit against the creditors, for the purpose of having their several claims adjusted by the decree of the Court (*g*).

An executor may, under certain circumstances (*h*), file a bill to compel a legatee to refund his legacy (*i*): though a Court of law cannot entertain an action for that purpose (*k*).

Bill of revivor.

There has been already occasion to shew (*l*), that a suit in Equity, commenced by the deceased, may be continued, on the part of his executor or administrator, by a bill of revivor merely. So in the case of administration determined by death, a bill of revivor, by a subsequent administrator, has been admitted (*m*).

Again, upon the determination of an administration *durante minore ætate* (*n*), or *pendente lite*, the suit may be added to, and continued by supplemental bill (*o*).

In case of a suit by co-executors, the proceedings do not abate by the death of one of them; because the whole of his interest survives to the others. The suit may, therefore, be continued by them, without revivor (*p*). So where one of the plaintiffs in a creditor's suit dies, his death does not abate

(*f*) Com. Dig. Chancery, (2 B. 1.) Wright *v.* Bluck, 1 Vern. 106.

(*g*) Buccle *v.* Atleo, 2 Vern. 37. Fonbl. Treat. Eq. B. 4, Pt. 2, c. 2, s. 3, note (*u*). But Lord Talbot, in Morrice *v.* Bank of England, Cas. temp. Talb. 224, said, "As to bills of conformity, indeed, the case of Buccle *v.* Atleo, is a case where they have been allowed; but they have since been discountenanced; and the reason is, because this Court is satisfied that they have no right to take away the preference that one creditor gains over another by his legal diligence." But see *infra*, p. 1629, as to friendly bills. See also Knatchbull *v.* Fearnhead, 3 M. & Cr. 126, *per* Lord Cottenham.

(*h*) See *ante*, p. 1244.

(*i*) See Doe *v.* Guy, 3 East, 123, by Lord Ellenborough.

(*k*) Johnson *v.* Johnson, 3 Bos. & Pull. 169. 3 East, 124.

(*l*) *Ante*, p. 760.

(*m*) *Ante*, p. 786.

(*n*) *Ante*, p. 401, 402.

(*o*) Mitf. Pl. 64, 4th edit.

(*p*) Toller, 457.

the suit (*t*); though, if he died after the decree, his personal representative has a right to file a bill of revivor (*u*).

But, generally, where one of several plaintiffs dies, unless his interest survives to the others, the suit wholly abates (*v*); and it may be revived by his representative, either in conjunction with them, or separately but making them parties (*w*). So one of the survivors may, if the others refuse to join, file a bill of revivor alone, making the others, and the representatives of the deceased, defendants (*x*).

Suit by one executor against another.

Although an executor cannot bring any action at law against a co-executor (*y*), yet, in a Court of Equity, one executor may sue another (*z*). If one of the executors of a mortgagee be himself the mortgagor, the bill by the co-executors should not be for a foreclosure, but for a sale (*a*).

Form of bill by executor.

There has already been occasion to shew that an executor may file a bill before probate (*b*): And so may an administrator before he has taken out letters of administration (*c*): And the subsequent probate or letters will make the bill a good one, if obtained at any time before hearing (*d*). Nevertheless, the bill must allege that the executor or administrator has obtained probate or letters (*e*). So an executor, bringing a *scire facias* to revive a decree, must shew that he has proved the Will (*f*). However, it is sufficient for the plaintiff to allege by the bill that he has duly proved the Will or taken out administration, without mentioning in what Court (*g*).

(*t*) Boddy *v.* Kent, 1 Meriv. 364.

(*u*) Burney *v.* Morgan, 1 Sim. & Stu. 358. *Quære*, if before a decree: *Ibid.*

(*v*) Cave *v.* Cork, 2 Y. & Coll. Ch. C. 130.

(*w*) Fallowes *v.* Williamson, 11 Ves. 306. Daniell. Pr. 1414, 2d edit.

(*x*) Daniell. Pr. 1414, 2d edit.

(*y*) *Ante*, p. 819.

(*z*) Allen *v.* Story, Toth. 150.

(*a*) Lucas *v.* Seale, 2 Atk. 56.

(*b*) *Ante*, p. 332, 333.

(*c*) *Ante*, p. 246.

(*d*) *Ante*, p. 246, 333. See Simons *v.* Milman, 2 Sim. 241.

(*e*) Humphreys *v.* Ingledon, 1 P. Wms. 753. S. C. Dick. 38.

(*f*) Comber's case, 1 P. Wms. 766.

(*g*) 1 P. Wms. 753. Stone *v.* Baker, 1 P. Wms. 753 (in a note by the reporter, who adds a *quære*, whether there is any difference, as to this point, between an administration and an executorship). But see Jossaume *v.* Abbott, 15 Sim. 127, *post*, p. 1732.

Parties.

If there are several executors, they must all sue, though one of them be an infant (*d*). But where one executor of several has alone proved, it has been decided that he may sue without making the other executors parties, although they have not renounced (*e*).

A bill is not demurrable, on the ground that the legatees of a testator join with the executor in suing for a debt due to his estate (*f*).

Pleas: denial that the plaintiff is executor:

A plea that the plaintiff, who entitles himself as executor or administrator, is not executor or administrator, though a negative plea, is good in abatement of the suit (*g*). So where a plaintiff entitled himself as administrator of an intestate, and the defendant pleaded that the supposed intestate was living, the plea was allowed (*h*).

In *Moons* v. *Bernales* (*i*), it was held, that production by a plaintiff, suing as administrator to A., of the letters of administration, was not *primâ facie* evidence of A.'s death (*k*); but at the hearing, liberty was given to the plaintiff to exhibit interrogatories to prove the death, and the cause permitted to stand over for that purpose (*l*).

outlawry:

Where a bill was brought to be relieved touching a debt due to the plaintiff as executor, the defendant pleaded an outlawry of the plaintiff in bar: but the plea was overruled, the suit being *in auter droit* (*m*).

(*d*) 16 Vin. Abr. 251, tit. Parties, (B.) pl. 20.

(*e*) Davies *v.* Williams, 1 Sim. 5. In this case the Vice Chancellor is reported to have said that where one executor has alone proved, he may sue in equity, *as well as at law*, without naming the others as parties: But see *ante*, p. 1588, and Kilby *v.* Stanton, 2 Younge & Jerv. 77.

(*f*) Rhodes *v.* Warburton, 6 Sim. 617.

(*g*) Winn *v.* Fletcher, 1 Vern. 473. Mitf. Pl. 230, 4th edit. Fry *v.* Richardson, 10 Sim. 475.

(*h*) Ord *v.* Huddleston, Dick. 510. S. C. cited 1 Cox, 198.

(*i*) 1 Russ. Chanc. Cas. 301.

(*k*) See *ante*, p. 461.

(*l*) See Hood *v.* Pimm, 4 Sim. 101. It may here be observed, that where money is ordered to be paid to A. or his representatives, (the constant course upon payment to creditors) the mere production of the probate is not sufficient to enable the representative to obtain payment: Proof of the death is now required, and that the testator was the party in the cause: Clayton *v.* Gresham, 10 Ves. 289.

(*m*) Killegrew *v.* Killegrew, 1 Vern. 168. See *ante*, p. 192.

Statute of Limitations:

The Statute of Limitations may be pleaded to a bill by revivor, if the executor or administrator does not proceed within six years after the abatement of a suit, provided there has been nó decree (*n*); for a decree being in the nature of a judgment, the Statute of Limitations cannot be applied to it (*o*). If an executor or administrator, trustee for an infant, neglects to sue within six years, the Statute of Limitations shall bind the infant (*p*).

set-off.

As to set-off; no rule is better established than that demands due in different rights cannot be set-off against each other. Therefore, a debt due from an executor cannot be set-off against a debt due to his testator: Accordingly, where the plaintiff was residuary legatee and surviving executrix of her husband, to whom A. and a bankrupt had given a joint bond, the other obligor being dead, and the plaintiff was indebted upon her private account to the bankrupt, Lord Hardwicke refused an injunction to a suit upon the bond, saying, that the debts were in different rights, and that there was no mutual credit (*q*).

But there has already (*r*) been occasion to point out that a Court of Equity, in regulating the right of set-off, will regard a debt or demand as due in the right of him who is beneficially entitled to it.

When an injunction can be obtained in a creditor's suit to restrain proceedings at law, &c.

When the Court has pronounced a decree for an account and payment of debts or legacies, under which all creditors or legatees may claim, the executor or administrator may obtain an injunction to restrain proceedings by a separate creditor or legatee, either at law or equity; as the just administration of the assets would be greatly embarrassed by such proceedings (*s*).

(*n*) Hollingshead's case, 1 P. Wms. 742. Mitf. Pl. 272, 273, 4th edit.

(*o*) *Ibid.*

(*p*) Wych *v.* East India Company, 3 P. Wms. 309.

(*q*) Bishop *v.* Church, 3 Atk. 691. See also Moneypenny *v.* Bristow, 2 Russ. & M. 117.

(*r*) *Ante*, p. 1597.

(*s*) Mitf. Pl. 168, 4th edition. Drewry *v.* Thacker, 3 Swanst. 541, 544. Hayward *v.* Constable, 2 Younge & Coll. 43.

Thus if a decree be obtained on a creditor's bill for the administration of assets, and the Court has thus taken on itself the administration of the estate, a creditor seeking, and not having yet obtained satisfaction at law, shall not be suffered to proceed there; it being impossible, while the decree is considered as a proceeding for the benefit of all the creditors, to permit some of them to proceed elsewhere (*u*). So the Court will restrain a person, who is in the character of a creditor, from proceeding at law, although he sues for unascertained damages, as upon breaches of a covenant to repair; for the Master may ascertain whether any breach of covenant has been committed, and what is the amount of the damage (*v*).

Formerly the course was for the executor to file a bill, against the creditor suing at law, to obtain the injunction: However, according to the modern practice, it is unnecessary to file a separate bill for that purpose, but an injunction may be applied for, in the existing suit, by a motion on behalf of the plaintiff, or the defendant, the executor or administrator, that the creditor may be restrained from proceeding at law, and be directed to come in and prove his debt before the Master, with the other creditors of the testator or intestate (*w*).

It must be observed, however, that Courts of Equity will not restrain proceedings of creditors at law against executors to obtain payment of debts, merely on the bill filed *until there is a decree* (*x*): But from the moment of the decree, the Court proceeds on the ground that the decree is a judgment in favour of all the creditors, and that they ought all to be paid according to their priorities as they then stand; and that the Court cannot execute it's own decree, if it permits

(*u*) Drewry *v.* Thacker, 3 Swanst. 544. Clarke *v.* Ormonde, Jacob. 123, 124. Whitaker *v.* Wright, 2 Hare, 310.

(*v*) Sutton *v.* Mashiter, 2 Sim. 513.

(*w*) Paxton *v.* Douglas, 8 Ves. 520. Perry *v.* Phelips, 10 Ves. 39, 40. A legatee may make the application: Clarke *v.* Ormonde, Jacob. 122.

(*x*) Rush *v.* Higgs, 4 Ves. 638. Teague *v.* Richards, 11 Sim. 46.

Courts of law to alter the course of payment (*y*). The Court, however, cannot interfere unless there is in existence a decree under which the creditor has a *present right* to go in and prove his debt (*z*).

It is obvious, that, by means of this practice, an executor or administrator may compel the creditors of the deceased to take an equal distribution of the assets: and Courts of Equity have, accordingly, of late years allowed, for this purpose, friendly bills to be filed against executors or administrators, which are, in truth, suits by them in the name of a creditor against themselves: The principle, on which this sort of suit is allowed, is that as executors have great powers of preference at law (*a*), the Courts have not disapproved of their coming in the shape of an application by a creditor to give a judgment to all the creditors, and to secure a distribution of the assets without preference to any (*b*). Considerable in-

(*y*) Largan *v.* Bowen, 1 Scho. & Lef. 299.

(*z*) Rankin *v.* Harwood, 2 Phill. Ch. C. 22. 5 Hare, 215. The Court of Equity restrains the proceedings at law only on the principle that the creditor is enabled to bring into equity all his legal rights: Whitaker *v.* Wright, 2 Hare, 310. Where a creditor had recovered judgment against the testator and sued out a *fi. fa.* thereon in his lifetime, and on the day after his death, placed the writ in the sheriff's hands, an injunction to restrain execution was refused, on the ground that the creditor had acquired a right to the goods by virtue of the writ of *fi. fa.*, from the teste of the writ, (see *post*, Bk. II. Ch. I.) and therefore paramount to the right of the executor: Rankin *v.* Harwood, 5 Hare, 215.

(*a*) See *ante*, p. 887, *et seq.*

(*b*) 18 Ves. 469. In Brady *v.* Sheil, 1 Campb. 147, it was stated on behalf of the defendant, an executor, that at a meeting of creditors of a deceased insolvent, called by the executor, they agreed to a rateable distribution, on the faith of which he executed a deed of assignment of all the assets which had come to his hands, for the benefit of the creditors: And Sir James Mansfield seemed to think that this, if made out by evidence, would be a good defence: And the learned Judge said, that he wished it were more generally known (for he believed, that lawyers in the Court of K. B. were not aware of it,) that through the medium of a Court of Equity, the creditors of a deceased insolvent may always be compelled to take an equal distribution of the assets: It was only necessary for a friendly bill to be filed against the executor or administrator, to account; after which, the Chancellor would enjoin any of the creditors from proceeding at law. It would appear, from the expressions of Lawrence, J., in

convenience, however, arose from the practice as it at first prevailed; the executor frequently applying for the purpose, not of preventing a preference, but of preventing the payment of any creditor, and keeping the assets himself: Lord Eldon, therefore, introduced the rule, that, where the answer does not state what the assets are, the executor shall be called upon to state them by affidavit, so as to enable the Court, if, in it's discretion, it should think fit, to order him to pay in the balance in his hands (*c*).

The plaintiff at law is entitled, upon the injunction being granted, to have his costs of the action paid by the executor, up to the time when he had notice of the decree (*d*): And if the creditor commences his action at law before bill filed, and then discontinues it, and comes in under the decree, he will be entitled to prove his costs at law, in addition to his debt (*e*). He is also, it should seem, entitled to the costs of the motion to restrain him from suing at law (*f*). But he shall not be allowed the costs of further proceedings at law after actual notice of the decree (*g*), nor in such case his costs of the motion to restrain his proceedings (*h*).

Meux *v.* Howell, 4 East, 10, that the same object might be gained, by the executor confessing a judgment to a trustee, to a sufficient amount to cover the assets, and afterwards pleading this judgment to an action by a litigious creditor: But it is clear, from the subsequent decision of Tolputt *v.* Wells, 1 M. & S. 395, that such a course is impracticable; for it was held in that case, that such a judgment as that proposed could not be pleaded in bar to the action: See *ante*, p. 889.

(*c*) Gilpin *v.* Lady Southampton, 18 Ves. 469. Paxton *v.* Douglas, 8 Ves. 520. Drewry *v.* Thacker, 3 Swanst. 546. Clarke *v.* Ormondé, Jacob. 125. Vernon *v.* Thellusson, 1 Phill. Ch. C. 466, 471.

(*d*) Dyer *v.* Kearsley, 2 Meriv. 483, note to Terrewest *v.* Featherby. Paxton *v.* Douglas, 8 Ves. 520. In Drewry *v.* Thacker, 3 Swanst. 541, Lord Eldon said, that the usual form, in which the order for the injunction was drawn, (*i. e.* "on payment of costs") was improper; inasmuch as the parties entitled to the injunction, if they were required to pay costs as a preliminary, might, from the situation of the assets, be unable to obtain it in time.

(*e*) Goate *v.* Fryer, 3 Bro. Chanc. Ca. 23. S. C. 2 Cox, 201.

(*f*) Jones *v.* Jones, 5 Sim. 678. But see Anon. 2 Sim. & Stu. 424.

(*g*) Paxton *v.* Douglas, 8 Ves. 521. Curre *v.* Bowyer, 3 Madd. 456. Jones *v.* Brain, 2 Y. & Coll. Ch. C. 170.

(*h*) 3 Madd. 456. 2 Y. & Coll.

With respect to the time within which the injunction should be applied for, it was observed by Lord Lyndhurst (*i*), that any delay in the application before judgment will, in most cases, properly resolve itself into a mere question of costs.

If, after a decree to account, the executor permits the creditors to proceed at law, he will be responsible: and if the creditors take property of the testator in execution, the executor will not be able to charge it to the estate: he may be allowed to stand in the place of those creditors against the estate, but he cannot do more (*k*). But if the creditors obtain judgment after notice of a decree, and levy on the testator's property, the Court of Equity will compel them to restore it (*l*).

Where the executor, in an action at law against him by a creditor of the deceased, has pleaded according to the truth of the case, he is clearly entitled, when the assets are taken from him and administered by the Court of Equity, to all the protection which that Court can give him against any personal liability in respect of the judgment at law (*m*).

But with respect to restraining a creditor from proceeding, after a decree, upon a verdict or judgment recovered by him against an executor or administrator, the following distinction was taken by Lord Eldon, in *Brook* v. *Skinner* (*n*): That if the plaintiff at law has recovered judgment *de bonis testatoris*, the Court will restrain the creditor from taking execution on such judgment; but that if he has recovered *de bonis propriis*, the Court will not restrain the execution. So, in *Clarke* v. *Ormonde* (*o*), his Lordship said, that if a creditor has obtained a judgment by which the executor is personally liable, *de bonis propriis*, the Court had nothing to do with it; but if it is a judgment *de bonis testatoris*, it certainly would be a case for an injunction. And, in *Terrewest* v. *Featherby* (*p*),

Ch. C. 170. See Hayward *v.* Constable, 2 Younge & Coll. 43. Moore *v.* Prior, *ibid.* 375.

(*i*) Rouse *v.* Jones, 1 Phill. Ch. C. 464.

(*k*) Clarke *v.* Ormonde, Jacob. 122.

(*l*) *Ibid.*

(*m*) Gaunt *v.* Taylor, 2 Hare, 413.

(*n*) 2 Meriv. 481, note.

(*o*) Jacob. 124.

(*p*) 2 Meriv. 480.

where the executor pleaded, to an action on a bond, ***non est factum***, and ***plene administravit***, upon both which pleas issue was joined, and a verdict entered for the plaintiff, his Lordship refused an injunction, on a decree to account being obtained, observing, that the Court had never so interfered upon a judgment *de bonis propriis*. And, in *Drewry* v. *Thacker* (*q*), his Lordship expressed strong doubts whether if judgment is recovered against an executor, under such circumstances that he cannot be permitted at law to dispute assets, he can obtain an injunction in a Court of Equity on an affidavit denying assets: And his Lordship intimated his opinion, that there was no instance in the history of the Court of Chancery, where, after a judgment at law *de bonis testatoris, et si non, de bonis propriis* of an executor, and execution issued, the proceedings at law had been restrained, on a decree subsequently obtained for administration of the assets. But, in *Lord* v. *Wormleighton* (*r*), the executor pleaded, to an action by a creditor, *non assumpsit*, a set-off, and *plene administravit*, and the verdict was against him on all these pleas: And, on a decree for the administration of the estate having been pronounced pending the action, Lord Eldon granted an injunction against the creditor, with a direction that the executor should pay the costs at law, including the costs of the trial: And his Lordship observed, that the case had been argued as if it was the case of a judgment *de bonis testatoris, et si non, de bonis propriis:* but that, in fact, it was a judgment for the damages *de bonis testatoris*, and for the costs only *de bonis propriis;* and as to the plea of ***non assumpsit***, it was not a false plea; for that if the executor merely puts in issue the fact of the debt, that is not false: and his Lordship added, that he was not sure that he had not a wrong notion of this at the time of deciding *Terrewest* v. *Featherby* (*s*). So, in *Fielden* v. *Fielden* (*t*), after a decree for the administration of assets, the executor pleaded, to an action by a bond creditor, *non est factum* and *plene adminis-*

(*q*) 3 Swanst. 542, 543, 547, 548.

(*r*) Jacob. 148.

(*s*) *Ubi supra.*

(*t*) 1 Sim. & Stu. 255.

travit; after which, an application was made for an injunction to restrain the creditor from proceeding in the action: It was contended, on behalf of the creditor, that as the executor, instead of giving notice of the decree, had pleaded pleas which, upon being falsified, would entitle the plaintiff to judgment *de bonis testatoris, et si non, de bonis propriis,* the Court would not restrain the creditor from proceeding at law; and *Terrewest* v. *Featherby,* and *Brook* v. *Skinner,* were cited: To which it was answered, that the case of *Harrison* v. *Beccles,* before Lord Mansfield (*u*), had decided, that an executor who pleaded *plene administravit* was only liable to the extent of assets come to his hands: And Sir John Leach, V. C., granted the injunction, observing, that he considered the law to be now settled according to the doctrine laid down by Lord Mansfield in *Harrison* v. *Beccles:* And his Honor further observed, that since, in the present case, it appeared, from affidavits, that the executor had pleaded to the action merely for the purpose of getting time to apply to a Court of Equity, that Court would have protected the executor, on that ground alone, according to the decision of Lord Eldon, in *Dyer* v. *Kearsley* (*v*), where the executor submitted to a judgment by default, merely with a view to apply to a Court of Equity (*w*).

With great deference, it is submitted, that some of the above distinctions and observations appear to have been made without a perfectly clear apprehension of the nature and consequences of judgments at law against executors and administrators. In the first place, it must be observed, that there are but two cases in which the judgment against an executor is *de bonis testatoris, et si non, de bonis propriis: viz.* where he pleads a release to himself, or *ne unques executor* (*x*): In all other cases, without respect to the plea being false or even false within the knowledge of the executor, the judg-

(*u*) Cited 3 T. R. 688.

(*v*) 2 Meriv. 482.

(*w*) See also Vernon *v.* Thellusson, 1 Phill. Ch. C. 466, 470, 471. *Accord.*

(*x*) 1 Saund. 335, 336, *b.* note to Hancocke *v.* Prowd. See *infra,* p. 1686, 1687.

ment for the debt or damages is *de bonis testatoris* merely, and, ***for the costs only**, de bonis testatoris, et si non, de bonis propriis* (y). Hence it appears, that, upon a plea of *plene administravit*, the judgment can in no case be entered *de bonis testatoris, et si non, de bonis propriis;* and the case of *Harrison* v. *Beccles* does not go to authorize a judgment of that nature to the extent of the assets found by verdict to be in the hands of the executor, but decides merely that the judgment shall be entered *de bonis testatoris* for that sum only, and not for the whole debt or damages proved. But, secondly, every judgment at law recovered against an executor, (except a judgment of assets *in futuro*) whether by default or upon demurrer, or upon verdict, whatever may be the nature of the plea, is conclusive on the executor that he has assets to satisfy it (z); and, consequently whether the judgment be *de bonis testatoris, et si non, de bonis propriis*, or *de bonis testatoris* merely, the executor is equally compellable to pay the debt and costs ultimately out of his own pocket, if the assets are deficient (a). The course of compelling the payment is, indeed, different; for, on the former judgment, the creditor may have execution *de bonis propriis* forthwith, if no goods can be found by the sheriff which were the testator's: whereas, on the latter judgment, the creditor, unless the sheriff returns a *devastavit* to the *fieri facias*, must proceed by *scire fieri* inquiry, or by action of debt suggesting a *devastavit* (b).

Hence, it should seem to follow, that if the principle were,

(y) *Ibid.* In some instances, indeed, the judgment is against the executor *de bonis propriis* in the first instance, and not *de bonis testatoris* at all: as where the executor is sued as assignee for rent accrued since the death of the testator, on a lease made to him: *Ante*, p. 1491: or on his own promise in writing, upon good consideration, to pay the debt of the testator: *Ante*, p. 1511: or, in debt on a judgment suggesting a *devastavit:* See *infra*, p. 1697. But in these cases he is sued in his individual capacity, in the *debet* and *detinet*, and he cannot plead *plene administravit.*

(z) 1 Saund. 219, *b.* note to Wheatley *v.* Lane. See *infra*, p. 1695.

(a) 1 Saund. 337, note (1).

(b) See *infra*, p. 1694, *et seq.*

that a Court of Equity will not, by injunction, exclude creditors, proceeding at law, from the benefit of that due diligence by which they have established a right to be satisfied, either out of the assets of the deceased, or *de bonis propriis* of the representative (*c*), that principle would apply to every case where the creditor has obtained a judgment at law of any kind other than a judgment of assets *quando acciderint*, (except cases such as *Dyer* v. *Kearsley* and *Fielden* v. *Fielden*, where the executor has taken steps merely with a view to gain time to apply to the Court of Equity :) because by the judgment, in every case, the creditor has established a right to proceed against the goods of the representative, in the event of a deficiency of the goods of the deceased.

These observations appear in some degree justified by the late decision of *Lee* v. *Park* (*d*), in which Lord Langdale, M. R., refused a motion to restrain a creditor, after a decree in an administration suit, from issuing execution on a judgment obtained before the decree, *de bonis testatoris, et si non*, as to the costs, *de bonis propriis :* For although his Lordship grounded his refusal on the particular circumstances of the case, yet the learned Judge, in giving his judgment, stated that he did not accede to the argument, that in cases of this nature the Court pays no regard to the question whether the decree or judgment has priority in time, but considers only the quality of the judgment, so that the judgment being to recover *de bonis testatoris*, the executors are, of course, entitled to restrain the judgment creditors from issuing execution: And his Lordship further laid down, that it is not the ordinary rule that if a creditor has got a judgment before a decree, he must not take out execution; though there may be cases where, in reference to the conduct of the parties, and perhaps, to the nature of the claim, he ought to be restrained therefrom.

In *Kent* v. *Pickering* (*e*), which was a creditor's suit, one

(*c*) See 3 Swanst. 547.

(*d*) 1 Keen, 714.

(*e*) 5 Sim. 569.

of the testator's creditors, who was not a party to the suit, had recovered judgment *de bonis testatoris, et, si non, de bonis propriis* (*f*), in an action brought by him against the defendants, the executors: A motion was made, after decree, for an injunction to restrain him from taking out execution on the judgment: Sir L. Shadwell, V. C., said, that where there is a decree for the administration of the assets of a testator, the Court will interfere, so far as may be necessary, to give effect to it's own decree; but that it will not interpose to protect the executors from any liability to which they may have subjected themselves personally: And his Honor granted an injunction to restrain the creditor from proceeding at law, against the assets of the testator only. And in *Burles* v. *Popplewell* (*g*), a similar injunction was granted by the same learned Judge, his Honor observing, that he apprehended the rule of the Court to be, that if the executor does, at law, so manage the matter as to make himself personally liable, the Court of Equity will leave him to be dealt with at law as the Court of law will permit, but will not suffer any judgment that may be recovered at law to interfere with its own decree. It may be doubted, however, whether there is, in effect, any difference between such a special injunction and the general one, inasmuch as the creditor, in proceeding at law upon a judgment against the executor, must have resorted, and have resorted in vain, to the assets, before he can have recourse to the property or the person of the executor.

It must, however, be observed, that if, on a judgment *de bonis testatoris*, the plaintiff, not being able to find goods of the testator's whereupon to levy in execution, were to resort to the personal liability of the executor by means of a *scire fieri* inquiry or by action of debt suggesting a *devastavit*, and by this course were to compel the executor to satisfy the judgment out of his own property, the executor would become

(*f*) *Sic* in the report; but *quære*, whether it was not a judgment *de bonis testatoris et si non* for the costs only *de bonis propriis*.

(*g*) 10 Sim. 383.

entitled to the assets for which he had thus paid an equivalent. For where a claim is made against an executor, if it is shewn that he has goods in his hands which were the testator's, he may prove that he has paid to that value with his own money, and this will be a sufficient discharge (*g*).

This principle was stated and acted on by Lord Lyndhurst, in *Vernon* v. *Thellusson* (*h*). In that case an application was made by the executor to stay further proceedings, at law, on a *scire facias* issued on a judgment which had been obtained against the testator, on paying to the plaintiff at law his costs up to the time he had notice of the decree: It was objected that the executor had pleaded *plene administravit*, and consequently that the plaintiff had a right to proceed to trial to falsify that plea; and that the injunction, if granted at all, ought to be confined, according to *Kent* v. *Pickering*, to restraining execution against the assets of the testator: But Lord Lyndhurst, C., was of opinion, that further proceedings at law ought to be restrained: And his Lordship, after stating the doctrine above mentioned, as to the right of the executor to the assets, in the event of the judgment being satisfied out of his own property, observed, that if the action were allowed to proceed to judgment and execution, the result would be that the assets would thus be withdrawn from the general fund which ought to be distributed by the Court of Equity for the common benefit of all the creditors: For that this consequence would follow whether the assets were discovered and taken in execution by the sheriff on the judgment, or, upon the return of *nulla bona*, were ultimately, upon a *scire fieri*, to be satisfied out of the goods of the executor: And his Lordship added, that he concurred, therefore, in the decision of *Lord* v. *Wormleighton* (*i*).

(*g*) 1 Phill. Ch. C. 470. *Ante*, p. 542, 543. But see Hearn *v.* Wells, 1 Coll. 323, 333, *per* Knight Bruce, V. C.

(*h*) 1 Phill. Ch. C. 466.

(*i*) *Ante*, p. 1632. His Lordship, in the course of his observations, remarks, that the judgment on the plea of *plene administravit*, if the verdict were found for the plaintiff,

In *Kirby* v. *Barton* (*k*), a judgment creditor of the testator issued a *scire facias* out of the Court of Exchequer, on the 2nd of February, 1843, and on the 27th of April, the executor let judgment go by default: On the 3rd of April, 1844, a decree was obtained: On the 25th of May, the executor procured the Court of Exchequer to set aside the judgment, on the terms that he should plead *plene administravit*, and that judgment, if obtained, should be entered *nunc pro tunc:* On the eve of the trial, the executor applied to Lord Langdale, M. R., for an injunction to stay proceedings at law: His Lordship was of opinion, that he ought to stay execution on the judgment, but doubted whether, after so much delay, he ought to stay the trial: However, on the executor consenting to give judgment, his Lordship ordered execution to be stayed and that the judgment should be dealt with as the Court might direct; and ultimately refused to allow any further proceedings at law to be taken on the judgment: In the course of his observations, his Lordship remarked, "The plaintiffs at law say, 'why are we not to get the benefit of our judgment? We do not intend to go against the assets but against the executor personally, after nominally proceeding against the assets.' I do not think that would be right."

Again, with respect to restraining proceedings at law against the *heir:* In *Price* v. *Evans* (*l*), the heir of an intestate, in an action by a bond creditor against him, had pleaded a false plea, and Shadwell, V. C., after a decree obtained in a suit by another creditor, for the administration of the assets, restrained the plaintiff at law from taking execution against the assets, but not from proceeding against the heir personally. But in *Rouse* v. *Jones* (*m*), which was a cre-

would be *de bonis testatoris* only, and not *de bonis testatoris, et si non, de bonis propriis;* and appears in some measure, perhaps, to concede that if the judgment were in the latter form the principle on which he granted the injunction would be inapplicable. *Sed quære de hoc.*

(*k*) 8 Beav. 45.

(*l*) 4 Sim. 514.

(*m*) 1 Phill. Ch. C. 462.

ditor's suit against the real and personal representatives of an intestate for payment of his debts, the defendant, the heir, after the usual decree had been obtained, moved before Shadwell, V. C., for an injunction to restrain further proceedings in an action which had been brought against him by a bond creditor of the intestate: The application was resisted on the ground that, before the decree was made, issue had been joined in the action on a plea of *riens per descent præter*, &c., and that if such plea should be falsified the plaintiff would be entitled to judgment against the heir *de bonis propriis*, and thus have a personal remedy against him: The Vice Chancellor having refused the motion with costs, it was renewed, by way of appeal, before Lord Lyndhurst, C., who held that the injunction ought to be granted: His Lordship observed, that if, on the trial of the issue, the jury should find that the heir had assets by descent, other than those mentioned in his plea, it would be their duty to assess the value of such lands, and for their value thus found (*n*) the plaintiff would be entitled to judgment and execution against the heir as for his own debt: But upon the amount being levied or paid, the lands, in respect of which the levy or payment was made, would become the property of the heir: And thus these assets would be withdrawn from the fund which ought to be applied for the general benefit of the creditors under the decree; and this too in a case where the decree was prior in date to the judgment.

Injunction to restrain the executor from proceeding at law against the plaintiff in the creditor's suit.

In *Oldfield* v. *Cobbett* (*o*), a creditor of the testator filed a bill against the executor for administration, and obtained an injunction and Receiver: The plaintiff was found a creditor; and the cause was heard on further directions; but the injunction and Receiver were not continued: The executor afterwards brought an action at law against the plaintiff for

(*n*) *Semble*, the plaintiff would in such case be entitled to a general judgment for the debt, damages, and costs. See 2 Saund. 7, c. n. (4).

(*o*) 5 Beav. 132.

monies due to the testator: But the Court, by injunction, summarily restrained the proceedings. And on a subsequent occasion (*p*), Lord Langdale determined, that after the estate of the testator has been fully administered in a Court of Equity, the defendant, the executor, cannot be permitted, without the leave of the Court, to commence an action to recover from the plaintiff in the suit a portion of the testator's property.

Executor cannot sue or defend *in formâ pauperis.*

It may be observed, in conclusion, that an executor or administrator will not be allowed to sue or defend as a pauper, "because the indulgence intended poor persons not of ability to sue for their rights *in formâ pauperis* only extends to persons suing in their own rights, and not as executor or administrator" (*q*).

(*p*) 6 Beav. 515.

(*q*) Paradise *v.* Sheppard, 1 Dick. 136. Beames on Costs, 78. Oldfield *v.* Cobbett, 1 Phill. Ch. C. 613.

BOOK THE SECOND.

OF REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS.

IN the last place, it is proposed to treat of the Remedies against executors and administrators, by means of which their various duties and liabilities may be enforced in the Courts of Law and of Equity.

Foreign executors.

Before entering on this subject, it may be remarked, that no suit can be brought against any executor or administrator, in his official capacity, in the Court of any country but that from which he derives his authority to act by virtue of the probate or letters of administration there granted to him (*a*). Therefore, if a foreign creditor wishes a suit to be brought here, in order to reach the effects of a deceased testator or intestate situate in England, it will be necessary, before the suit can be maintained, notwithstanding an executor or administrator has been appointed abroad, that an English personal representative should also be duly constituted by grant from the proper Ecclesiastical Court here; for the foreign executor or administrator is not liable to be sued, in his official character, in this country (*b*). But it must be observed, that if he should collect the effects or debts of the deceased found or due in England, without taking out letters of administration here, he would thereby become liable as executor *de son tort*, to the extent of the assets so received by him (*c*).

(*a*) Story's Confl. s. 513.

(*b*) Tyler *v.* Bell, 1 Keen, 826, 829. S. C. 2 M. & Cr. 89, 100. Story's Confl. ss. 513, 514.

(*c*) See *ante*, p. 210, 218. But, in a suit in equity, the presence of an executor *de son tort* in Court will not dispense with that of a regular representative. 2 Phill. Ch. C. 152. *Post*, p. 1727.

CHAPTER THE FIRST.

OF REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS AT LAW.

No action lay at common law against an executor in which the testator could have waged his law.

AN action of *debt* did not formerly lie against an executor or administrator upon a simple contract, when the testator or intestate could have waged his law (*c*): not because such action dies with the person, but because the executor or administrator, as he is presumed to be ignorant of the contract made by the testator or intestate, could not wage his law (*d*). Accordingly, debt did not lie against an executor or administrator upon an award made in the lifetime of his testator, because he might, if living, have waged his law to this action (*e*). But where the testator or intestate himself could not have waged his law, debt lay against his executor or administrator; as debt for rent upon a parol lease made to the deceased, or by a gaoler for diet provided for him while in prison (*f*). For the same reason, debt on simple contract lay against an executor or administrator in the Exchequer, because, in that Court, no wager of law was allowed (*g*).

(*c*) Barry *v.* Robinson, 1 New Rep. 293.

(*d*) Pinchon's case, 9 Co. 87, *b.* Bowyer *v.* Garland, Cro. Eliz. 600. Hambly *v.* Trott, Cowp. 375.

(*e*) Hampton *v.* Boyer, Cro. Eliz. 567. Bowyer *v.* Garland, 2 Roll. Abr. 107, (C), pl. 3. 2 Saund. 73, note (2), to Roberts *v.* Mariett.

(*f*) 9 Co. 87, *b.*

(*g*) 9 Co. 87, *b.* So a *concessit solvere*, which lies by custom in the courts of the cities of London and Bristol, the county of the borough of Carmarthen, and other places, being an action of debt upon simple contract, could not be brought against an executor or administrator, because he could not wage his law: but by the custom of London, the defendant could never wage his law in this action, and therefore, a *concessit solvere* always lay there against an executor or administrator: Snelling's case, 5 Co. 82, *b.* S. C. Cro. Eliz. 409. 1 Saund. 68, note (2).

Again, debt lay, at common law, against an executor or administrator upon a simple contract made with himself after the death of the testator or intestate: for the principle, that the defendant could not wage his law, does not apply in such a case, where the undertaking to pay originates with the personal representative, who is, therefore, well acquainted with the transaction (*h*). And it has always been held, that *assumpsit* lay against an executor or administrator, upon the simple contract of his testator or intestate; because, in that action, no wager of law was allowed (*i*).

And now by stat. 3 & 4 Wm. IV. c. 42, s. 13, it is enacted, that "no wager of law shall be hereafter allowed." And by s. 14, "an action of debt on simple contract shall be maintainable in any Court of Common Law against any executor or administrator."

Action of account.

No action of account lay against an executor or administrator at common law; because the account rested in the privity and knowledge of the deceased only (*k*): But this action is given by stat. 4 & 5 Ann. c. 16, s. 27.

No action at law lies against an executor for a general legacy:

It was holden, in *Atkins* v. *Hill* (*l*), and *Hawkes* v. *Saunders* (*m*), that an action might be maintained in a Court of Common Law against an executor, upon his promise to pay a general legacy, in consideration of assets. But these cases are considered as overruled by the decision of *Deeks* v. *Strutt* (*n*). There an action of assumpsit was brought against the executor for the arrears of an annuity bequeathed to the wife of the plaintiff: The executor never made any express promise to pay; but the assets were sufficient to satisfy the plaintiff's demand: It was contended for the plaintiff, that where a man is under a legal or equitable obligation to pay, the law implies a promise, though none were ever made:

(*h*) Riddell *v.* Sutton, 5 Bingh. 206.

(*i*) *Ante*, p. 669, note (*s*). 1 Saund. 217, note: notwithstanding what is said to the contrary, in Slade *v.* Morley, Yelv. 20. Plowd. 182. 9 Co. 87, *b*.

(*k*) Co. Litt. 89, *b*. 2 Inst. 404.

(*l*) Cowp. 284.

(*m*) Cowp. 289.

(*n*) 5 Term Rep. 690.

And for this the case of *Hawkes* v. *Saunders* was cited: But the Court of K. B. decided, that the action could not be maintained: And Lord Kenyon, in giving his judgment, made the following observations: "The supporting of the present action would be attended with the most pernicious consequences; and I believe, that no action till lately (except one, in the time of the Commonwealth) for a legacy, has been supported in a Court of Law. The arguments, which have of late years been advanced in support of this action, are founded on the supposed justice of the case, and the convenience of the parties: But when it is considered in what manner a Court of Equity interposes in suits for legacies, in taking care that provision is made for the different parties entitled, and what inconvenience and even ruin to private families would have ensued from determining that an action can be brought in a Court of Law for a legacy, I think that those who have wished to support the action in a Common Law Court, would hesitate before they came to the conclusion that the action can be maintained: If an action will lie for a legacy, no terms can be imposed on the party who is entitled to recover; and, therefore, when the legacy is given to a wife, the husband would recover at law, and no provision could be made for the wife or family: whereas, a Court of Equity will take care to make some provision for the wife in such a case: But the whole of this admirable system, which has been founded in a Court of Equity, will fall to the ground, if a Court of Law can enforce the payment of a legacy: I mention these as decisive reasons in my mind against the jurisdiction of the Courts of Law over this subject; and I know that they have influenced those who once entertained an idea that this action could be supported."

It will be observed that, in *Deeks* v. *Strutt*, the executor had not expressly promised to pay; and this circumstance has led to doubts whether the decision of that case went further than to determine that an action for a legacy cannot be supported upon an implied assent in law of the executor, and whether an action will not still lie upon an express

promise by him in consideration of assets, or upon an express admission by him, that he has money in his hands for the payment of the legacy (*o*). However, the judgment of Lord Kenyon has been generally considered as an unqualified decision, that an action at law cannot be maintained for a legacy (*p*). And in a late case (*q*), it was holden by the Court of K. B., that an action at law for a distributive share of an intestate's property cannot be maintained against the personal representative, although he may have expressly promised to pay (*r*).

secus, as to a specific legacy after assent:

But the law is different with respect to *specific* legacies; for, after an assent by an executor to a specific legacy, he is clearly liable at law to an action by the legatee; because the interest in any specific thing bequeathed vests at law in the legatee, upon the assent of the executor (*s*). Therefore, a devisee of chattel leaseholds may bring ejectment to recover them against the executor, after an assent by him to the bequest (*t*). So an action of trover will lie for a specific legacy, after the executor has assented (*u*).

or where he has ceased to hold the money as executor.

It must also be observed, that executors may, by arrangement with the legatees, cease to hold the money bequeathed in their character of executors; in which case they are obviously liable to be sued at law: Thus, in *Gregory* v.

(*o*) See the judgment of Grose, J., in Deeks *v*. Strutt, 5 Term Rep. 693, and of Lawrence, J., in Doe *v*. Guy, 3 East, 124, and the case of Gorton *v*. Dyson, 1 Brod. & B. 219.

(*p*) By Littledale, J., 7 B. & C. 544. See also Nicholson *v*. Sherman, T. Raym. 23. S. C. Sid. 45. Farish *v*. Wilson, Peake, N. P. C. 73.

(*q*) Jones *v*. Tanner, 7 B. & C. 542.

(*r*) See *Accord*. 1 Y. & Coll. Ch. C. 167, *per* K. Bruce, V. C., in Holland *v*. Clark. See also Johnson *v*. Johnson, 3 Bos. & Pull. 169, where Lord Alvanley, C. J., observed that, "if an executor, thinking that he has settled the affairs of his testator, pay the legacies, I have no difficulty in saying that a Court of common law would not entertain an action for money had and received against a legatee, since such a Court cannot take into consideration, as a Court of Equity would do, the mode in which the funds might have been applied." See, as to an action for a legacy charged on land, Braithwaite *v*. Skinner, 5 Mees. & W. 313.

(*s*) *Ante*, p. 1182.

(*t*) Doe *v*. Guy, 3 East, 120.

(*u*) Williams *v*. Lee, 3 Atk. 223.

Harman (*v*), the plaintiff and three others being residuary legatees under the Will of one T. P., the defendants, as the executors named in the Will, accounted with them, and having paid to the latter the respective sums due to them thereon, took from them, and from the plaintiff, a release, but did not pay the plaintiff his share, he having consented to allow it to remain in their hands: And it was held, that the money not being retained by the defendants in their character of executors, the plaintiff was entitled to recover it in an action at law. Again, in *Hart* v. *Minors* (*w*), E. by Will bequeathed, subject to debts and legacies, the residue of his personal estate to his executors, upon trust to divide the same into two equal parts, and to divide one of such parts into six equal shares, and to pay one of such shares unto each of his cousins, E. T., J. W., and J. H., and the remaining share as therein mentioned, and appointed M. his executor, who duly proved the Will: M., having taken upon himself the execution of the Will, called a meeting of the residuary legatees, at which J. H. was present, and exhibited an account, charging himself with assets, and paid some of the legatees the greater portion of their share of the residue, and was about to pay J. H., but was prevented from so doing: Another meeting was afterwards called, at which J. H. was not present, when the executor exhibited another account, charging himself with assets, and crediting himself with payments and disbursements, and, amongst others, with having paid "cash for legacy duties:" To this was appended a supplemental account, containing, amongst others, the following item: "By cash retained for J. H., 179*l.* 10*s.*:" In an action for money had and received, and on an account stated, brought by J. H. against the executor to recover the amount of the legacy, it was held by the Barons of the Exchequer, that the action was maintainable, on the ground of a certain sum having been received and retained by the defendant for the plaintiff's use, by which

(*v*) 1 Moore & P. 209.

(*w*) 2 Crompt. & M. 700.

the defendant ceased to hold the money in his character of executor (*x*).

9 & 10 Vict. c. 96: legacy, &c. under 20*l.* recoverable in County Court.

The jurisdiction of the County Courts under the Small Debts Act (9 & 10 Vict. c. 96), is extended (by sect. 65) to the recovery of a demand under 20*l.*, for a distributive share under an intestacy, or a legacy under a Will.

Parties.

It has been shewn, that in the case of an action brought *by* executors, they must all join, whether they have administered or not (*y*). But the rule as to joinder is different in actions *against* executors or administrators: Therefore, where the defendant pleads in abatement that he has one or more co-executors who ought to be joined, he must aver, not only that the co-executor is alive (*z*), but that he has *administered;* because it is only necessary to sue so many of the executors as have administered (*a*).

In an action against a married woman executrix, the husband must be joined as a defendant (*b*). And they must both plead; otherwise it will be a discontinuance (*c*). If a *feme covert* and a stranger are executors, the action must be against the stranger, executor, and the husband and wife, executrix (*d*).

If trover be brought against a defendant executor, and others not executors, and the jury either find them all guilty, or the executor not guilty, and the others guilty, the judgment will be erroneous; because an action of trover does not survive against an executor for a conversion by his testator, and the defendants are improperly joined, inasmuch as the judgment against them is different: But the

(*x*) See also Gorton *v.* Dyson, 1 Brod. & Bing. 219. Moert *v.* Moessard, 1 Moore & P. 8. Rose *v.* Savory, 2 Bing. N. S. 145. Wasney *v.* Earnshaw, 4 Tyrwh. 806. Roper *v.* Holland, 3 A. & E. 99. S. C. 4 Nev. & M. 868. Edwards *v.* Bates, 7 M. & Gr. 590. Bartlett *v.* Dimond, 14 M. & W. 49, 56.

(*y*) *Ante*, p. 1588.

(*z*) Hilbert *v.* Lewis, 1 Freem. 268.

(*a*) Bro. Exors. 20, 88. Wentw. Off. Ex. 205, 14th edit. Swallow *v.* Emberson, 1 Lev. 161. Com. Dig. Abatement, (F. 10.) Alexander *v.* Mawman, Willes, 42. 1 Saund. 291, *m.* note.

(*b*) Com. Dig. Admon. (D).

(*c*) Aylworth *v.* Fenn, 1 Freem. 351.

(*d*) Com. Dig. Abatement, (F. 20.)

plaintiff may cure this defect by entering a *nolle prosequi* against the executor, and taking his judgment against the others (*e*).

If one of two executors dies, an action cannot be brought against the surviving executor and the executor of the deceased executor, but must be against the survivor alone (*f*).

Process.

A defendant may be declared against as executor or administrator, although the process only describes him generally (*g*).

If a writ issues against two executors, which as to one is returned *non est inventus*, but the other appears, it is said that the plaintiff shall proceed against him that appears, and shall have judgment against both (*h*).

Service on one of two co-executors, who were in possession of the premises, is sufficient for judgment against the casual ejector (*i*).

Arrest.

Executors or administrators are privileged from arrest, where they merely act *en auter droit*, and have duly administered the effects of the deceased (*k*). But where an

(*e*) Dale *v.* Eyre, 1 Wils. 306. 1 Saund. 207, *a.* note to Salmon *v.* Smith. But the misjoinder could not be so cured in an action on a contract: 1 Saund. 207, *a.* note.

(*f*) 1 Roll. Abr. 928, tit. Exors. (Z). But if the executor of the executor administer with the other, an action lies against both as executors: *Ibid.*

(*g*) Watson *v.* Pilling, 3 Brod. & Bingh. 4. S. C. 6 Moore, 66. It has been doubted, however, whether the service of a writ of summons, in which an executor is not described in his representative character, is notice to him of the commencement of an action against him in that character, so as to render him liable to a *devastavit*, if he pay debts of an equal degree with that sued for, between the service of the writ and filing the declaration: Rees *v.* Morgan, 5 B. & Adol. 1035. S. C. 3 Nev. & M. 205. Tidd's New Pr. 68. *Ante*, p. 888, note (*y*).

(*h*) Rouse *v.* Etherington, 1 Salk. 312. S. C. 2 Lord Raym. 870. However, in another case, where process was sued against two defendants, executors, and only one was served, the Court, on motion, stayed the proceedings till the other should be served or outlawed: Worley *v.* Bull, Pract. Reg. C. B. 351. Vin. Abr. Suppl. Executors, (A. b. 4).

(*i*) Doe dem. Strickland *v.* Roe, 4 D. & L. 431.

(*k*) St. George's case, Yelv. 53. Anon. 2 Brownl. 293. Smale *v.* Warne, 3 Bulstr. 316. Tidd, 193, 9th edit. By a rule of Court, 15 Car. ii., no attorney shall make any precept or writ, with a clause

executor or administrator has personally promised to pay a debt, he may be arrested on such promise (*l*). So an executor or administrator may be arrested in an action of debt on a judgment, suggesting a *devastavit* (*m*). Before the stat. 1 & 2 Vict. c. 110, s. 3, if the sheriff returned a *devastavit*, the executor, in an action of debt, might have been held to bail by a Judge's order without any affidavit of the debt; though if the action were brought on the judgment *upon a suggestion* only of a *devastavit*, an affidavit was necessary to hold the executor to bail as in ordinary cases (*n*).

Declaration: how defendant to be charged as executor:

In an action against an executor, as such, he must be named executor (*o*); but if, upon the whole matter, the plaintiff has declared against the defendant as executor, the judgment may well be *de bonis testatoris*, although the defendant is not named executor at the beginning of the declaration (*p*): Thus it is enough in an action of covenant on a demise to the testator, to state that he made his Will and appointed the defendant *his executor*, who entered and was possessed *as executor;* for this averment may be traversed by the defendant (*q*).

of *ac etiam*, against any executor or administrator: Tidd, 150, 9th edit.

(*l*) Mackenzie *v.* Mackenzie, 1 T. R. 716.

(*m*) Boothsby *v.* Buller, 1 Sid. 63. Anon. 1 Lev. 39. Page *v.* Price, 1 Salk. 98. As to the nature of this action, see *infra*, p. 1697, *et seq.*

(*n*) Dupratt *v.* Testard, Carth. 264. 1 Saund. 218, note (6), to Wheatley *v.* Lane.

(*o*) Com. Dig. Pleader, (2 D. 2.)

(*p*) Dean of Bristol *v.* Guyse, 1 Saund. 112, *a.* Rann *v.* Hughes, 4 Bro. P. C. 27, Toml. edition. Com. Dig. Abatement, (F. 20). *Ibid.* Pleader, (2 D. 2.)

(*q*) Holliday *v.* Fletcher, 2 Lord Raym. 1510. S. C. 2 Stra. 781. So where the declaration stated that on the death of the lessee, all his estate and interest in the lands came to and vested in L. and one M., since deceased, which said L. and M. were executrixes of the last Will and testament of the lessee, by reason whereof L. and M., as executrixes as aforesaid, became and were possessed, &c.; it was objected, that this was not a sufficient allegation that the term vested in L. and M. as executrixes; but the Court of Common Pleas held that there was no good ground of objection to this averment, which was in effect, a conclusion of law, the term vesting *by law* in the personal representative, and the lessor having the right to sue the personal representative on the covenant of the testator: Ackland *v.* Pring, 2 M. & Gr. 937. If the plaintiff declares in the *debet* and

Venue:

In an action by a lessor against the executor of the lessee, for rent incurred in the testator's time, whether the action be in debt or covenant, the venue is transitory; and so it is in actions where the executor is sued, *as executor*, for rent incurred in his own time: But where he is sued in debt in the *debet* and *detinet*, or in covenant, as assignee, for rent incurred in his own time, the venue is local (*r*).

Joinder of counts.

A plaintiff cannot have an action against a defendant to charge him as executor, and also in his own right; for the judgment in the one case is *de bonis propriis*, and in the other *de bonis testatoris* (*s*). And such misjoinder of action, as well against an executor, as by him (*t*), is a defect in substance, and, consequently, bad on a general demurrer, or arrest of judgment, or on error (*u*). Therefore, a count for money *had and received* by the defendant, as executor, for the plaintiff's use (*v*), or for *money lent* to the executor, *as such* (*w*), cannot be joined to a count on a promise made by the testator (*x*). So a count upon a promise by the defendant, as executor, for *use and occupation* after the death of the testator, cannot be joined in the same declaration with a count upon promises by the testator to pay rent; inasmuch as the former count makes the defendant personally liable,

detinet against an executor or administrator, in cases where he ought to sue in the *detinet* only, the declaration is bad on demurrer; though it is aided by verdict: Fruen *v.* Porter, 1 Sid. 379. But no objection can be made to a declaration in the *detinet*, which might, and strictly ought to be laid in the *debet* and *detinet*: for a party may abridge his demand, though he cannot extend it: Wilson *v.* Hobday, 4 M. & S. 120.

(*r*) Hellier *v.* Casbard, 1 Sid. 266. Cormel *v.* Lisset, 2 Lev. 80. 1 Saund. 241, note to Thursby *v.* Plant.

(*s*) Herrenden *v.* Palmer, Hob. 88. Hall *v.* Huffam, 2 Lev. 228.

(*t*) See *ante*, p. 1592.

(*u*) Jennings *v.* Newman, 4 T. R. 347. Rose *v.* Bowler, 1 H. Black. 108. Brigden *v.* Parkes, 2 Bos. & Pull. 424. 2 Saund. 117, *h.* note. *Ibid.* 210, *b.* note to Foxwist *v.* Tremaine. And the Court cannot award a *venire de novo*: Corner *v.* Shew, 4 M. & W. 163. If separate damages have been assessed on each count, the objection may be cured by entering a *nolle prosequi* as to the count which constitutes the misjoinder: See Hayter *v.* Moat, 5 Dowl. 298.

(*v*) *Ante*, p. 1509. See also Parker *v.* Baylis, 2 Bos. & Pull. 73.

(*w*) *Ante*, p. 1509.

(*x*) 2 Saund. 117, *h.* note.

whereas the latter makes him liable only to the extent of assets (*y*). Again, a count for *goods sold* to, or *work done* for the defendant, as executor, cannot be joined with a count for a debt due from the defendant in his representative capacity; for since no goods can be sold to, or work performed for another in his representative character, the claim in respect thereof is necessarily from the defendant in his own right (*z*). If, in fact, the goods, or work, had been contracted for by the testator, and the contract completed by the plaintiff in the time of the executor, the declaration, instead of containing the common counts for goods sold to, and work done for the executor, should state the contract to have been made with the testator, and that at the time of his death the work was incomplete, but was finished afterwards, and that the defendant, as executor, then promised to pay (*a*).

But a count on an *account stated* with the defendant, as executor, whether the account be averred to have been stated of money *due from the testator* to the plaintiff (*b*), or of money *due from the defendant, as executor,* to the plaintiff (*c*), may be joined to counts on promises made by the testator: And so may a count for *money paid* by the plaintiff to the use of the defendant, *as executor* (*d*): For these counts do not charge the defendant personally; but he may plead *plene administravit*, and the judgment is *de bonis testatoris* (*e*). It must be observed, that whenever an executor

(*y*) Wigley *v.* Ashton, 3 B. & A. 101. See, however, Atkins *v.* Humphrey, 2 C. B. 654. S. C. 3 D. & L. 312, where the plaintiff declared against A. and B. as executors, alleging that they as executors were indebted to him for the use and occupation of certain messuages *held* of him by them as executors under a demise to the testator, and, that, in consideration of the premises, they as executors promised to pay; and it was held that this declaration disclosed a sufficient cause of action against them, under the stat. 11 Geo. II. c. 19, s. 14, in their representative character.

(*z*) Corner *v.* Shew, 3 M. & W. 350. *Ante*, p. 1511.

(*a*) See Werner *v.* Humphreys, 2 M. & Gr. 857, note (*a*).

(*b*) *Ante*, p. 1508.

(*c*) *Ante*, p. 1508.

(*d*) *Ante*, p. 1509.

(*e*) *Ante*, p. 1509.

or administrator is sued, upon promises by him in that character, the words, "*as* executor" must be inserted in each count in stating the promise, and also in stating the debt, or cause of action, if it be laid to have accrued after the death of the testator or intestate (*f*).

when a count for money had and received *by the deceased* can be employed.

In a case (*g*) where an intestate had granted an annuity to the plaintiff, and after his death, his administratrix procured it to be set aside for a defect in the memorial; and the plaintiff thereupon, in order to recover back the consideration money, brought *indebitatus assumpsit*, and declared against the administratrix in counts for money had and received *by the intestate* to the plaintiff's use, it was held, in accordance with *Cowper* v. *Godmond* (*h*), that the money paid to the grantor of a defective annuity is not money had and received to the use of the grantee till the grantor has elected to vacate the annuity, and that then such election does not make the money had and received to the use of the grantee from the time of the grant by relation; and consequently that, in the present case, as the money could not be money had and received to the plaintiff's use until after the death of the intestate, it could not be money had and received *by him*, and that, therefore, the counts employed were not applicable.

in what cases the words "as executor" in the declaration may be rejected.

Where the nature of the whole claim set forth in the declaration is such as necessarily to make the defendant liable personally, and nevertheless he is charged *as executor*, those words may be struck out as surplusage (*i*): But it should seem that this cannot be done in a case in which the defendant could, on any supposition, be liable in his representative character in respect of the contract declared on (*k*).

Pleas:

In an action against an executor or administrator, the defendant may plead any matter which the testator or intestate might have pleaded (*l*); and in addition thereto he may

(*f*) Brigden *v.* Parkes, 2 Bos. & Pull. 424. 1 Chitt. Pl. 236, 5th edit.: but see *ante*, p. 1594.

(*g*) Churchill *v.* Bertrand, 3 Q. B. 568.

(*h*) 9 Bing. 748.

(*i*) Wigley *v.* Ashton, 3 B. & A. 101.

(*k*) 3 M. & Wels. 356.

(*l*) Com. Dig. Pleader, (2 D. 8.)

deny the character in which he is sued, by pleading *ne unques executor or administrator;* or admitting it, he may plead that he has no assets in his hands, and that either generally, or specially, with the exception of assets to a certain amount, which are not sufficient to satisfy the plaintiff; or he may plead a retainer to pay his own debt of equal or superior degree, or debts of a superior degree due to third persons, on bonds or judgments, &c. (*m*).

In debt on simple contract, against executors or administrators, *non detinet* was formerly a good plea, in all cases where nothing was due to the plaintiff at the time of commencing the action (*n*). But now by *Reg. Gen.* Hil. T. 4 Wm. IV. (Pleading) No. I., in every species of *assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded: And by *Reg. Gen.* No. II., in actions of debt on simple contract, all matters in confession and avoidance shall be pleaded specially, as above directed in actions of *assumpsit.*

In debt on bond, if the executor pleads *non est factum suum*, it is good after verdict; for *suum* refers to the testator (*o*). So, in an action of *assumpsit, non assumpsit* generally is a good plea, at least, after verdict; for it shall be referred to the testator (*p*).

Plea of executor's bankruptcy

Unless a *devastavit* is suggested, a plea by an executor or administrator of his own bankruptcy is not pleadable; as the commission would not bind any effects, upon which, if the plaintiff obtained judgment and execution, the sheriff would have a right to levy under a *fi. fa.* (*q*). In *Serle* v. *Bradshaw* (*r*), a defendant, in an action against him as administrator, being under terms to plead issuably, pleaded *plene*

(*m*) Tidd, 644, 9th edit.

(*n*) *Ibid.* 648. Com. Dig. Pleader, (2 W. 17.)

(*o*) Baker's case, Latch. 125. Com. Dig. Pleader, (2 D. 8.)

(*p*) Browning *v.* Litton, 1 Lev. 184. S. C. 1 Sid. 292.

(*q*) See *ante*, p. 533.

(*r*) 2 Crompt. & Mees. 148. S. C. 4 Tyrwh. 69. 2 Dowl. 289.

administravit and his own bankruptcy: And the Barons of the Exchequer held, that the plaintiff might sign judgment as for want of a plea, on the ground that the plea of bankruptcy could not possibly be good, if the plea of *plene administravit* were true.

pleas by several executors:

If there are several executors, they may plead different pleas; and that which is most to the testator's advantage shall be received. Therefore, in an action of *assumpsit* against four executors, upon a promise made by the testator, if one executor acknowledges the action, and the other three plead *non assumpsit*, their plea shall be received (*s*). Hence, if a warrant of attorney be given by one of several executors to confess judgment against them all, the Courts will order it to be delivered up (*t*). So where one executor pleaded a good plea, and the other a bad one, on demurrer, judgment was given in C. B. for both the defendants; but it was reversed on error, and a new judgment given for the plaintiff against one executor only (*u*).

Where several executors plead a release to the testator or to themselves, and one of them afterwards makes default, this shall not be a total default in the defendants, so as to induce a judgment against them (*v*).

plea of *ne unques executor*, &c.:

If the defendant intends to deny his being executor or administrator, he must plead such denial specially; otherwise he will admit his representative character. The plea of *ne unques executor* or *ne unques administrator* is a plea in bar (*w*): But a plea, to an action brought against the defendant as executor, that he is administrator and not executor, is a plea in abatement only (*x*). So, in an action against the

(*s*) Chaffe *v.* Kelland, 1 Roll. Abr. 929, tit. Exors. (A.) pl. 1. Wentw. Off. Ex. 212, 14th edit. Elwell *v.* Quash, 1 Stra. 20. So if two executors have judgment, and the one prays a *capias*, and the other a *fieri facias*, the *capias* shall be awarded, as best for the testator: Foster *v.* Jackson, Hob. 61, cited as the opinion of Cotismore in 7 H. 6, 6.

(*t*) Elwell *v.* Quash, 1 Stra. 20. Tidd, 548, 9th edit.

(*u*) Baldwin *v.* Church, cited 1 Stra. 20.

(*v*) Wentw. Off. Ex. 213, 14th edit.

(*w*) Com. Dig. Pleader, (2 D. 7.)

(*x*) Pyne *v.* Wolland, 2 Vent. 178. Harding *v.* Salkill, 1 Salk.

defendant as administrator, a plea that he is not administrator but executor, can only be in abatement (*y*). So, if he be sued as administrator generally, he must plead in abatement that he is administrator only *durante minoritate* (*z*).

The plea of *ne unques administrator*, as well as that of *ne unques executor*, may either conclude with a verification (*a*) or to the country (*b*), and the plea of *ne unques executor* may conclude to the country, notwithstanding it's form is, that the defendant never was executor *nor ever administered any of the goods or chattels* of the deceased (*c*).

296. Granwell *v.* Sibly, 2 Lev. 190. Com. Dig. Pleader, (2 D. 3). (2 D. 7). In such a plea, he must shew that the administration is well granted to him: Com. Dig. Pleader, (2 D. 4). But he need not traverse *absque hoc* that he administered as executor; for this is more proper for the other side: nor that he was made executor: nor need he make *profert* of the letters of administration: Com. Dig. Pleader, (2 D. 4).

(*y*) Com. Dig. Abatement, (F. 20.) Pleader, (2 D. 12). In this plea the defendant must traverse *absque hoc*, that the deceased died intestate: Com. Dig. Pleader, (2 D. 4).

(*z*) Little *v.* Plant, 1 Lutw. 20. Com. Dig. Pleader, (2 D. 12).

(*a*) Scott *v.* Wedlake, 7 Q. B. 766. A reason for this has been suggested, that the conclusion to the Court is not open to the objection of necessarily leading to the same issue as if it concluded to the country, but leaves it open to the plaintiff, in the replication to the plea of *ne unques executor*, to shew that the defendant is chargeable as executor in a particular manner, (see *post*, 1666, note (*e*),) or in the replication to the plea of *ne unques administrator*, to shew a particular grant of administration. 7 Q. B. 779.

(*b*) Wood *v.* Kerry, 2 Q. B. 515.

(*c*) *Ibid.* It was contended in Scott *v.* Wedlake, *ubi supra*, that the case of a defendant charged as an administrator differs from that of one charged as an executor, because the plea of *ne unques executor*, by denying that the defendant is executor, *or administered as executor*, denies more than the declaration alleges, which only charges the defendant as executor of the last Will, and that the denial of the defendant ever having administered was therefore new matter, and the plea ought, consequently, to conclude to the Court; whereas the plea of *ne unques administrator* does no more than traverse the allegation in the declaration. But Tindal, C. J., in delivering the judgment of the Court of Exchequer Chamber, laid down that the declaration charging a defendant as executor of the last Will comprehends an executor who, though not executor of the last Will, became liable as executor *de son tort* by administering as such, (see *ante*, p. 217, 218), and consequently that a plea denying the administering does no more than deny what this allegation in the declaration is to be understood to mean, and is not therefore, introductory of any new

On the trial of an issue joined on a plea of *ne unques executor* or *administrator*, the *onus* of proof is on the plaintiff, who has to prove the affirmative of the proposition.

Proof that the defendant has intermeddled with the property, so as to make himself executor *de son tort* (*d*), is sufficient proof of his being executor (*e*).

It is said, that it seems to be now settled, that the plaintiff would fail on an issue joined on the plea of *ne unques executor*, unless he could prove not only the appointment of the defendant as executor, but also that he has taken upon himself to act as such, or has proved the Will (*f*). But it is laid down, in a book of authority, that an executor, who proves the Will, though he does not otherwise administer, cannot plead *ne unques executor:* And that, if there be two executors, and one proves it in the name of both, even against the Will of the other, yet he cannot plead *ne unques executor* nor administered as executor (*g*).

matter. 7 Q. B. 780, 781. But see Wentw. Off. Ex. c. 13, p. 339, 14th edit., cited *infra*, note (*e*).

(*d*) As to the acts by which a person will make himself executor *de son tort*, see *ante*, p. 210.

(*e*) See *ante*, p. 218. Besides, the plea of *ne unques executor* must go on to allege that the defendant never administered as executor; so that, in the case put, this latter part of the plea is found untrue: Wentw. Off. Ex. c. 15, p. 339, 14th edition. (But see *supra*, note (*c*).) So to a plea *ne unques executor*, the plaintiff may reply that the defendant has administered: Keble *v.* Keble, Hob. 49. Com. Dig. Pleader, (2 D. 7): or that goods of the testator to a certain value came to the defendant's hands before administration granted: Kellow *v.* Westcombe, 1 Freem. 122. S. C. 3 Keb. 202. As to the proper plea by an executor, who has administered under a Will, which has been afterwards disproved, see *ante*, p. 211, note (*k*).

(*f*) 2 Phill. Ev. 363, 7th edit. citing Douglas *v.* Forrest, 4 Bing. 704. Cottle *v.* Aldrich, 1 Stark. N. P. C. 38. S. C. 4 M. & S. 175. Atkins *v.* Tredgold, 2 B. & C. 30.

(*g*) Com. Dig. Pleader, (2 D. 7). See also Wentw. Off. Ex. c. 15, p. 339, 14th edit. The author of the latter work expresses his opinion, that even in the case of a sole executor, who has refused before the Ordinary, he cannot safely plead *ne unques executor;* since he so was executor before his refusal, that he might have released all debts due to the testator, and given away all his goods; and therefore he must plead specially, shewing his refusal, and not generally deny his being executor. But where the plaintiff declares on promises by the defendants *as executors*, the mere naming of one of them in the Will is not enough to prove him exe-

For the purpose of introducing formal and documentary evidence of the defendant being executor or administrator, it is always prudent, and in some cases absolutely necessary, to give notice to the defendant to produce at the trial the probate of the Will, or the letters of administration (*h*). But it is not also necessary, in order to let in secondary evidence, to prove that the probate or letters are in the defendant's possession; for if he has been duly appointed executor or administrator, they must necessarily be presumed to be in his possession (*i*). Some evidence of the identity of the party, namely, that the person, described in the documentary evidence as executor or administrator, is the party sued, will be indispensably necessary (*k*).

The plea of *ne unques executor* or *administrator* does not deny the cause of action, but only that the defendant is one of the representatives of the testator or intestate (*l*). Therefore, where in *assumpsit* against two defendants as executors, there was a plea by both of *ne unques executors*, and it appeared in evidence that one of the defendants was executor, and the other was not, it was held, that the plaintiff might, upon counts laying promises by the testator, take a verdict against the former defendant alone, and the latter defendant must be discharged; although as to the counts which laid the promises by the defendants as executors, the plaintiff must fail altogether (*m*). So if, in an action against several executors, one of the defendants pleads severally *ne unques executor*, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others (*n*).

Hence it follows that a plea by one of two persons charged as executors that the other is not executor, is bad (*o*).

cutor; See the judgment of Holroyd, J., in Atkins *v.* Tredgold, 2 B. & C. 30.

(*h*) 2 Phill. Ev. 346, 6th edit.

(*i*) 2 Phill. Ev. 347, 6th edit.

(*k*) *Ibid.*

(*l*) 1 Saund. 207, *a.* note to Salmon *v.* Smith.

(*m*) Griffith *v.* Franklin, Mood. & M. 146. See also Atkins *v.* Tredgold, 2 B. & C. 30, by Holroyd, J.

(*n*) 1 Saund. 207, *a.* note.

(*o*) Atkins *v.* Humphrey, 2 C. B. 654. S. C. 2 D. & L. 312.

plea by administrator whose letters have been revoked:

If the defendant, being sued as administrator, pleads, that before the date of the writ, his administration was revoked and granted to another, he ought to allege that he has fully administered all the goods in his hands, or else that he has delivered them over to the new administrator (*p*). Accordingly, if an administrator wastes the goods, and afterwards administration is committed to another, yet any creditor may charge him in debt, and if he pleads the last administration committed to another, the other may reply, that before the second administration committed, he had wasted the goods (*q*).

plea of the Statute of Limitations:

If an action be brought on a debt, which the testator or intestate contracted more than six years before the commencement of the suit, and the plaintiff means to rely upon a promise by the executor or administrator, to take the case out of the Statute of Limitations, the declaration should contain a count or counts upon promises by the executor or administrator, as such (*r*). And accordingly, if an action is brought against an executor or administrator on a bill or note given by the testator or intestate, and the declaration alleges a promise by the defendant to pay the bill or note, such promise may be denied by a plea of *non-assumpsit*, notwithstanding the new rule abolishing the plea of *non-assumpsit* to a declaration on a bill or note (*s*). However, it is said to have been held (*t*), that if the declaration charge the defendant, executor, on a promise made by his testator, and the defendant plead the Statute of Limitations, to which the plaintiff replies, that the testator did promise within six years; proof on the part of the plaintiff, that the executor

(*p*) Garter *v.* Dee, 1 Freem. 13. *Ante*, p. 494. Those goods, as in the case of goods possessed by an executor *de son tort*, shall not be assets in the hands of the new administrator, until they come to his possession: *Ibid.* Keble *v.* Keble, Hob. 49.

(*q*) Packman's case, 6 Co. 18, *b*.

(*r*) See Browning *v.* Paris, 5 Mees. & W. 120, *per* Parke, B.

(*s*) Rolleston *v.* Dixon, 2 Dowl. & L. 892. *Ante*, p. 1601.

(*t*) Poile *v.* ——, Exor. Sitt. after Tr. T. 1823, *coram* Abbott, C. J. 2 Phill. Ev. 351, 6th edit. But this case is omitted in the seventh edition.

promised within six years, and that the testator's death was within this period, will support the count in the declaration; for that the executor's promise shows a liability to pay, existing before the time of the testator's death, and the law will imply a promise by the testator to pay what he was liable to pay.

But it must be observed, that the mere existence of a debt owing by the testator or intestate, is not evidence of a promise to pay *by the executor* or administrator, as executor or administrator (*u*). Hence, as against an executor or administrator, an acknowledgment merely by him of the debt's existence is not sufficient to take the case out of the statute; there must be an express promise (*v*). Accordingly, in *Tullock* v. *Dunn* (*w*), which was an action of *assumpsit* against several executors, who pleaded the general issue, and the Statute of Limitations, Abbott, C. J., held, that neither an acknowledgment of the debt by all the executors, nor an express promise by one of them, took the case out of the statute; there ought to have been an express promise by all (*x*).

And now by stat. 9 Geo. IV. c. 14, s. 1, after reciting the Statute of Limitations, 21 Jac. I. c. 16, and the Irish Act, 10 Car. I., it is enacted, that "in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors,

(*u*) Atkins *v.* Tredgold, 2 B. & C. 28, by Abbott, C. J.

(*v*) Tullock *v.* Dunn, Ryan & M. 417.

(*w*) Ryan & M. 416.

(*x*) See also 12 M. & W. 514, *per* Parke, B. *Accord.* At all events the promise or payment of the executor, in order to bind his co-executor, must appear to have been made by him in his character of executor: Scholey *v.* Walton, 12 M. & W. 510.

or executors or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them; provided that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever" (*y*).

But it is also provided, by the same section, that "in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by either of the said recited Acts, or this Act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants, against whom he shall recover, and for the other defendant or defendants against the plaintiff."

With regard to the payment of principal or interest, it has been held, that a payment by one of the makers of a joint and several promissory note takes the case out of the statute, in the same manner as before the statute 9 Geo. iv. (*z*).

(*y*) In an action by an administratrix, to which the Statute of Limitations was pleaded, it appeared that the cause of action arose more than six years before, but that within six years the defendant and the agent of the plaintiff had gone over the items of the account, and struck a balance, which the defendant promised verbally to pay: it was objected that this was within the 9 Geo. iv. c. 14: But Vaughan, B., said, "I think the plaintiff has shown a good cause of action upon the count on an account stated. She does not go upon the original debt at all. I take the statute to apply to cases where you go for the original debt, and then give some evidence of an acknowledgment to rebut the presumption raised by the Statute of Limitations, that the debt has been satisfied:" Smith *v.* Forty, 4 Carr. & P. 126. See also Ashby *v.* James, 11 M. & W. 542. *Accord.*

(*z*) By Parke, J., in Chippindale *v.* Thurston, Mood. & M. 411. Wyatt *v.* Hodson, 8 Bingh. 309. This is by reason of the proviso that the Act shall not lessen the effect of any payment, &c.

Therefore, the authority of the case of *Burleigh* v. *Stott* (*a*), though decided before the Act began to operate, appears to be unaffected by the statute: In that case, an action upon a joint and several promissory note of A. and B., the latter being a mere surety, was brought by the payee against the administrator of B., and the defendant pleaded, that the cause of action did not accrue within six years, upon which the plaintiff took issue: The plaintiff proved, that within six years, and during the lifetime of B., A. made a payment on account of the note: B. afterwards died: And it was held, that such payment operated as a new promise by B., to pay, according to the nature of the instrument, and that his administrator was liable on the note. Accordingly, it was held in *Channel* v. *Ditchburn* (*b*), that payment of interest by one of the makers of a joint and several promissory note, though made more than six years after it became due, is sufficient to take the case out of the Statute of Limitations as against the other maker (*c*).

But where an action is brought against the executor of a deceased contractor, a payment by a surviving joint contractor, made *after the death of the testator*, will not take the case out of the statute: Thus, in *Atkins* v. *Tredgold* (*d*), A. and B. made a joint and several promissory note: A. died, and ten years after his death, B. paid interest upon the note: In an action brought upon the note against the executors of A., it was held, that the payment of interest by B. did not take the case out of the Statute of Limitations, so as to make A.'s executor's liable. Nor will it make any difference that the surviving joint contractor is the executor of the deceased: for it is clear that acts done by a surviving partner, who is executor of the deceased partner, and which the surviving partner was in that character bound to do, cannot, *primâ facie*, be considered to have been done in the character of

(*a*) 8 B. & C. 36. S. C. 2 Mann. & Ryl. 93.

(*b*) 5 Mees. & W. 494.

(*c*) See also Goddard *v.* Ingram, 3 Q. B. 839. S. C. 3 G. & D. 46.

(*d*) 2 B. & C. 23.

executor (*e*). Again, where a joint contract is severed by the death of one of the contractors, nothing can be done by the personal representative of the deceased to take the case out of the statute as against the survivor (*f*). Therefore, in *Slater* v. *Lawson* (*g*), it was holden, that after the death of one maker of a joint and several promissory note, signed by two, a payment upon it by the executor of the deceased party will not take the debt out of the Statute of Limitations as against the survivor.

In *Douglas* v. *Forest* (*h*), an action was brought against an executor on a Scotch judgment recovered against his testator: The defendant, after pleading the general issue, pleaded, that the plaintiff's cause of action did not accrue within six years before the commencement of the suit: To this there was a replication, that the deceased, at the time the action accrued, was beyond seas, and remained there till he died, and that the plaintiff sued out his writ against the defendant within six years after he first took on himself the burthen and execution of the Will: And it was holden, that this replication was a good answer to the plea, the Court being of opinion, that although the injury of which the plaintiff complained had existed more than six years, yet he had no "cause of action," until there was some person within the realm against whom the action could be brought; and that, as the deceased never was in England after the cause of action accrued against him, there was no person in England against whom the plaintiff could proceed, until the defendant took upon him the execution of the Will (*i*).

(*e*) Way *v.* Bassett, 5 Hare, 55. But see Braithwaite *v.* Britain, 1 Keen, 206. Griffin *v.* Ashley, 2 Carr. & Kirw. 139.

(*f*) 1 Barn. & Adolph. 398.

(*g*) 1 Barn. & Adolph. 396.

(*h*) 4 Bingh. 686. S. C. 1 M. & P. 663.

(*i*) See also Story *v.* Fry, 1 Y. & Coll. Ch. C. 603. *Accord.* It must be observed, that it seems to have been the better opinion, that the exception in the statute 21 Jac. I. c. 16, in favour of persons being beyond sea, extends only to the case where the *creditors* or *plaintiffs* were so absent, and not where the *debtors* or *defendants* were; because

But it is no answer to a plea of the Statute of Limitations, that, after the cause of action accrued, and after the statute had begun to run, the debtor, within the six years, died, and that (by reason of litigation as to the right to probate) an executor of his Will was not appointed, until after the expiration of the six years, and that the plaintiff sued such executor within a reasonable time after probate granted: For, as soon as there is a cause of action, a plaintiff that can sue and a defendant that can be sued in England, from that time the date of six years begins to run; and when the statute once begins to run, it must continue to run (*l*).

Although, where the plaintiff dies, a writ by journey's accounts cannot be brought by his executor (*m*): yet if a *defendant* dies, the plaintiff may pursue this writ against the personal representative, provided the action be of a nature such as will survive against an executor or administrator (*n*); and in such case, if the defendant pleads the Statute of Limitations, the plaintiff may reply a writ newly brought by journey's accounts (*o*); and the executor of an executor must

creditors are only mentioned in the statute: Hall *v.* Wyborn, 1 Show. 99. 2 Saund. 121, *b.* note (4). But now by the statute 4 Ann. c. 16, s. 19, it is enacted, that if any person *against whom* any action lies for seamens' wages, trespass, detinue, trover, replevin, action of account, or upon the case, (or other actions mentioned in 21 Jac. I. c. 16, s. 3,) was beyond sea at the time that such action accrued, the *plaintiff* shall be at liberty to bring his action against him within the same time after his return, as is limited for such action by the statute of 21 Jac. I. c. 16, and 4 Ann. c. 16. The latter statute, however, does not appear to have relied on either by the counsel or Court, in the above case of Douglas *v.* Forrest. But the decision is stated by Lord Denman, in delivering the judgment of the Court of Exchequer Chamber, in Rhodes *v.* Smethurst, 6 M. & W. 353, to have proceeded on the equity of that statute.

(*l*) Rhodes *v.* Smethurst, 4 Mees. & W. 42, affirmed in the Excheq. Chamber, 6 Mees. & W. 351. S. P. in Equity, Freake *v.* Cranefeldt, 3 Mylne & Cr. 499.

(*m*) See *ante*, p. 1601, note (*h*), for an account of this writ.

(*n*) Kinsey *v.* Heyward, 1 Lord Raym. 432. But there is some conflict between the authorities on this point. See the judgment of Lord Lyndhurst, in Davies *v.* Lowndes, 6 M. & Gr. 534. 1 Phill. 340.

(*o*) 1 Lord Raym. 432. Com. Dig. Abatement, (P.)

plead that he had fully administered on the day of the first writ purchased (*p*).

plea of set-off: A defendant, sued as executor or administrator, cannot set-off a debt due to himself personally; nor, if sued for his own debt, can he set-off what is due to him as executor or administrator: because debts sued for, and intended to be set-off, must be mutual, and due in the same right (*q*). But to a declaration in debt or assumpsit against an executor, on an account stated by him *as executor*, a set-off for debts due from the plaintiff to the testator may well be pleaded; for such a declaration is founded on the liability of the defendant *as executor* (*r*).

plea of tender: Whenever a tender, with *tout temp prist*, is pleaded by an executor or administrator, he must allege that his testator or intestate was at all times, from the time of making the promise to the time of his death, ready to pay, and that he, the defendant, has, at all times since the death of his testator or intestate, been ready to pay (*s*).

plea of *plene administravit*: If the executor or administrator has not assets to satisfy the debt, upon which an action is brought against him, he must take care to plead *plene administravit*, or *plene administravit præter*, &c.: For a judgment against an executor or administrator, whether by default or on demurrer (*t*), or upon verdict upon any plea pleaded by the executor or administrator, except *plene administravit*, or admitting assets to such a sum and *riens ultra* (*u*), is conclusive upon him that he has assets to satisfy such judgment (*v*). But if the

(*p*) Spencer's case, 6 Co. 10, *b*. Doct. Plac. Exors. 2., p. 170, edit. 1677.

(*q*) Bishop *v*. Church, 3 Atk. 691. Gale *v*. Luttrell, 1 Younge & Jerv. 180. See *ante*, p. 1596.

(*r*) Blakesley *v*. Smallwood, 8 Q. B. 538.

(*s*) Clemens *v*. Reynolds, Sayer, 18.

(*t*) Rock *v*. Leighton, 1 Salk. 310. S. P. admitted 3 T. R. 686. Leonard *v*. Simpson, 2 Bing. N. C. 176. S. C. 2 Scott, 355.

(*u*) Ramsden *v*. Jackson, 1 Atk. 292. Erving *v*. Peters, 3 T. R. 685. A plea of *non est factum testatoris*, or of a release to the testator, or of payment by him, or *non assumpsit*, admits assets: 1 Saund. 335, note (10).

(*v*) 1 Saund. 219, *b*. note to Wheatley *v*. Lane.

executor plead either a general or special *plene administravit*; it is now held that he is liable only to the amount of assets proved to be in his hands; though the case was formerly taken to be, that if *any* assets, however small, were proved to be unadministered, the plaintiff was entitled to recover his whole demand from the executor: So that now a judgment against an executor, on a verdict upon *plene administravit*, is only an admission of assets to the extent of assets proved to be in his hands (*w*).

The essential part of the plea of *plene administravit* is, that "the said defendant has no goods, which were of the said A. B. (the testator), at the time of his death in the hands of the said defendant, as executor, to be administered, *or had, at the time of the commencement of the suit* (*x*), *or ever since*:" and the omission of any of the above averments will be fatal on demurrer, as well in a general as a special *plene administravit*. As where, in *assumpsit*, the defendant pleaded several outstanding bonds of the testator, "and that he had fully administered all the goods which were of the testator at the time of his death, or ever since, except goods and chattels to the value of 10*l*., which are not sufficient to satisfy the debts due on the said bonds, and which are charged therewith;" on demurrer, the plea was adjudged bad by the whole Court, for want of the intervening clause, "and that he has not any goods or chattels of the testator, or had on the day of the suing out of the writ, or ever since:" For the *plene administravit*, as there pleaded, refers to the time of the plea pleaded, and the defendant may have paid debts on contract without suit after the writ purchased and before the plea, which he may give in evidence on the trial, if issue be joined on the *plene administravit* as there pleaded; and therefore the plaintiff has no other remedy but to demur (*y*). So the omission of the words

(*w*) 1 Saund. 219, *b*. note. Cousins *v*. Paddon, 2 Crompt. M. & R. 558, *per* Parke, B.

(*x*) See Rees *v*. Morgan, *post*, p. 1684, as to the effect of using the words "on the day of exhibiting the bill of the plaintiff."

(*y*) Hewlet *v*. Framingham, 3 Lev. 28.

"or ever since," is held to be an incurable fault; for perhaps the executor had assets after the commencement of the action, with which he would be chargeable; and all the books and precedents direct that those words should be inserted in the pleas (z). And the defect is not aided, unless it be found by verdict that he had no assets on the day of the plea pleaded; for that aids the fault in the bar, and makes it not material; but it is not so upon demurrer (a). So the words, "on the day of exhibiting the bill," where the action was in the Common Pleas, or in the King's Bench by original, instead of "on the day of suing out of the said writ," were adjudged to be a fatal defect (b).

A plea of *plene administravit* does not require to be signed by counsel (c).

In this plea, it is usual to state that the defendant "has fully administered all the goods and chattels, &c. which were of the deceased at the time of his death, and which have ever come to the hands of the defendant as executor," &c.; but it is said that these words are superfluous, and that the more formal and correct way of pleading is to omit them, and to state merely that the defendant "has no goods or chattels," &c. (d).

But in an action brought against the executor of an executor it is not sufficient to plead that the defendant has not any goods or chattels of the original testator in his hands to be administered; but he must also plead, either that the first executor fully administered, or that he the said defendant has no assets of the first executor out of which he can satisfy any *devastavit* committed by the first executor (e).

(z) 2 Saund. 216, note (1). However, if assets have come to hand since the suing out of the writ, the plaintiff must reply that fact specially, and will not be allowed to give it in evidence under the general replication to *plene administravit*: Mara v. Quin, 6 T. R. 10.

(a) Gewen v. Roll, Cro. Jac. 132.

(b) Covel v. Deval, 2 Lutw. 1637, 1638. 2 Saund. 216, note (1). See Rees v. Morgan, *post*, p. 1684.

(c) Reed v. Spurr, 2 Mees. & W. 76. S. C. 5 Dowl. 330.

(d) 2 Saund. 220, *a*. note (3) to Noell v. Nelson. See Reeves v. Ward, 2 Bingh. N. C. 235. S. C. 2 Scott, 396.

(e) Wells v. Fydell, 10 East, 315.

plene administravit præter.

Again, an executor is *bound* to plead a debt of a higher nature, of which he has notice, in bar of an action brought against him for a debt of an inferior nature, and *riens ultra*, if he has not assets for both: otherwise it will be an admission of assets to satisfy both debts (*f*). Thus the executor is bound to plead a judgment recovered against the testator, in bar of an action on a bond; otherwise he will admit that he has assets to satisfy the judgment (*g*).

In strictness, it is necessary, in this plea, to state some certain sum, or at least to say, to "the value of the debts aforesaid;" for to plead generally "except goods and chattels which do not amount to, or which are not sufficient to satisfy the debts aforesaid, or not *ultra* what will satisfy," or to the like effect, is held to be insufficient for the uncertainty (*h*). But the omission of stating a certain sum is mere form, neither material or traversable (*i*): for if the executor plead a judgment obtained against him for 100*l.*, and that he has not goods except to the value of 5*l.*, and the plaintiff proves that he has 100*l.*, yet he gains nothing: for the substance of the plea is, that the executor has not *above* what will satisfy the judgment: And consequently, the omission is but form, and cannot be taken advantage of upon a general demurrer (*k*).

(*f*) Rock *v.* Leighton, 1 Salk. 310: *Ante*, p. 884. The law is the same, though the debt was not payable until after the death of the testator, as in the case of a bond conditioned to pay a sum of money on a day which did not happen until after his death: Britton *v.* Bathurst, 3 Lev. 114. Lemun *v.* Fooke, *ibid.* 57. *Ante*, p. 876.

(*g*) Earle *v.* Hinton, 2 Stra. 732.

(*h*) Tresham's case, 9 Co. 109, 110. Edgcomb *v.* Dee, Vaugh. 104. Davage *v.* Davage, 1 Sid. 210. 1 Saund. 333, n. (7). In an action against an administrator, the defendant, after obtaining time to plead on the usual terms, pleaded a judgment recovered since the commencement of the action, but did not aver that there were no assets *ultra*: And the Court of Exchequer gave leave to the plaintiff to sign judgment as for want of a plea; the defendant having, since the commencement of the action, admitted by letter the possession of assets sufficient to cover the judgment, and also the plaintiff's demand: Roberts *v.* Wood, 3 Dowl. 797.

(*i*) Parker *v.* Atfield, 1 Salk. 312.

(*k*) Moon *v.* Andrewes, Hob. 133. If the truth be, that the executor

In pleading an unsatisfied judgment recovered against the testator, the plea is bad, unless it states on what day and year of the reign, and in what Court the judgment was recovered (*l*). If the judgment pleaded was recovered against the testator and another, the plea must aver the survivorship of the testator (*m*).

In pleading a judgment against the executor himself, whether on bond or otherwise, it was formerly the practice to set out the debt, which is the consideration of the judgment, in the plea: But this statement is unnecessary (*n*): Nor is it requisite to aver that the debt, for which the judgment has been obtained, was a true and just debt, although it is usual to make such an allegation; for if the debt was not a just one, the other side may show it in the replication (*o*). The present form of pleading a judgment obtained against an executor, is to omit stating the nature of the debt, the suing out of the writ, and the plea; but instead thereof to allege that A. B. on such a day and year of the reign in the Court, &c. impleaded the defendant as executor in a certain plea, &c. then declaring (so setting out the whole declaration); and such proceedings were thereupon had in the said Court, that the said A. B. recovered judgment, &c. (*p*).

has not sufficient to satisfy the debts of record pleaded by him, he ought to state truly what goods he has, namely, to the value of, a certain sum which is not sufficient to satisfy these debts: 1 Saund. 333, *a*. n. (7).

(*l*) Jordan *v*. Fawcett, 1 Mod. 50. S. C. 1 Sid. 449. 1 Ventr. 76. 2 Keb. 632. 1 Saund. 328, *a*. note (1). Where an executor pleads a judgment not merely erroneous, but void, as a recovery in an impossible term, the plea is bad: Drake *v*. Randall, 1 Freem. 255: but a judgment merely erroneous, if not fraudulent, is, as it should seem, pleadable by an executor: Williams *v*. Fowler, 1 Stra. 407, 410.

(*m*) Trethewy *v*. Ackland, 2 Saund. 50. *Ante*, p. 869.

(*n*) 1 Saund. 329, n. (3).

(*o*) 1 Saund. 329, note (4). 2 Saund. 50, note (3).

(*p*) 1 Saund. 330, *a*. note (5). The Reg. Gen. H. T. 4 Wm. iv. No. 8, which requires that in a plea of judgment recovered the defendant shall state the number of the roll, &c. in the margin, does not apply to such a plea: Power *v*. Fry, 3 Dowl. 140. Power *v*. Izod, 1 Bing. N. C. 304. S. C. 1 Scott, 119.

An averment that the judgment remains in force, though usually made, seems unnecessary; for the same reason as that mentioned above, respecting the allegation that the debt was not a true and just one (*q*). But where the action is on a specialty, it is necessary to show, either that the judgment pleaded was recovered against the executor on a specialty, or that it was obtained before the executor had notice of the specialty debt on which the action was brought (*r*).

A recovery against one of several executors or administrators, and no assets *ultra*, may be pleaded in an action against all the executors or administrators for another debt of the testator or intestate (*s*).

It may be observed, that a plea of judgment recovered against the executor himself, and no assets *ultra*, is a plea in bar of the action generally, and not with an *ulterius manutenere non debet*, even where the judgment has been confessed after action brought (*t*), and pleaded puis *darrein continuance;* contrary, apparently, to the general rule, that a matter of defence, arising after action brought, cannot be properly pleaded in bar of the action generally, but must be pleaded in bar of the further maintenance of the suit (*u*). But this arises from the peculiar nature of the action, which is brought against the executor, not only on the foundation of a debt due from the testator to the plaintiff, but in respect also of assets, supposed to be in his, the executor's hands, liable to it's satisfaction; and the executor has by law a power of confessing a judgment to another creditor, in preference to the plaintiff, in the suit first brought, and thereby, to the extent of the assets then in hand, to create a perpetual bar to the plaintiff's suit, the same being pleaded in the

(*q*) 1 Saund. 329, note (4). It was once the practice to aver the identity of the defendant and the person named in the record; but this averment is now omitted: 1 Saund. 333, *a*. note (8).

(*r*) See *ante*, p. 884.

(*s*) Further *v*. Further, Cro. Eliz. 471. S. C. *semble*, cited by Wyndham, J., in Palmer *v*. Lawson, 1 Sid. 334.

(*t*) See *ante*, p. 888.

(*u*) Le Bret *v*. Papillon, 4 East, 502.

usual way, *viz.*, that he has not assets except so much, which are not sufficient to satisfy that judgment. But the plaintiff may, and consequently does, avoid the effect of the plea as an absolute bar, and protect himself from costs at the same time, on the ground of his original right of suit, by praying judgment of such assets as should come to the executor's hands, after satisfying the judgment so confessed. So that the plea of judgment recovered against the defendant as executor, pending the writ, enures in point of effect, if the judgment itself be not questioned by the replication, as only a plea in bar of the further maintenance of the suit against the executor in respect of his present assets (*v*).

With respect to pleading bonds due from the testator, it has been decided that, at law, the *penalties* are the debts as to those bonds where the days of payment are past, and the bonds of course forfeited; Therefore, an executor may either plead the penalty as the debt, or the sum really due (*w*): But with regard to those bonds where the days of payment are not yet come, the sums in the conditions are the debts, and the assets can only be covered for them (*x*); for the executor may save the penalty by payment of the less sums at the times specified in the conditions, and if he does not, it will be a *devastavit* in him, if he have assets (*y*).

plea of retainer:

for debt due from testator to executor:

The nature and extent of the right of an executor or administrator to retain a debt due to him from the deceased, have been investigated in a previous part of this Treatise (*z*). It is held to be optional in the executor or administrator

(*v*) 4 East, 508.

(*w*) Bank of England *v.* Morice, 2 Stra. 1028. S. C. Cas. temp. Hardw. 219. Cox *v.* Joseph, 5 T. R. 307. So on an issue of what is due, such bonds will cover as much assets as the penalties amount to: *Ibid.* 1 Saund. 333, *a.* note (7).

(*x*) 2 Stra. 1028. Cas. temp. Hardw. 219. 5 T. R. 307.

(*y*) 1 Saund. 333, *a.* note (7). The Court, however, always recommends that executors who plead judgments and other debts, with penalties, should show honestly how much is really due on them, and set out the conditions; which would save many suits in Chancery; for if the penalties only are pleaded, the creditor cannot learn the nature of the bond, but by filing a bill for a discovery: 5 T. R. 309. 1 Saund. 333, *a.* note (7).

(*z*) *Ante*, p. 894, *et seq.*

either to *plead* a retainer for such a debt, or to give it *in evidence* under a plea of *plene administravit* (*a*). So he may either plead, or show in evidence under that plea, that he retains assets to a certain amount, for the expenses of the funeral (*b*), or of taking out administration (*c*), or to reimburse himself for payments, made out of his own pocket, in discharge of debts not inferior in their kind to the debt of the plaintiff, before the commencement of the suit (*d*). But a retainer for unsatisfied debts of the testator or intestate, of a higher degree than that on which the action is brought, must be pleaded (*e*).

for disbursements by executor:

for debts outstanding:

In a plea of retainer by an *administrator*, he need not set out the letters of administration; for the plaintiff by his declaration admits him to be a lawful administrator; since he sues him as administrator, which he cannot be in his own wrong (*f*). But where the action is brought against the defendant as executor, which is the case as well as where the defendant is charged as rightful executor, as where he is charged as executor *de son tort* who has no right to retain (*g*), it seems that, regularly, he ought to entitle himself as executor in his plea, by stating the making of the Will and his appointment as executor therein, in order that it may appear that he is such a person as may retain (*h*). So where the action was brought against the defendant, *as executor*, and he claimed to retain *as administrator*, it was held that it was necessary for him to show the letters of administration in his plea (*i*).

form of plea of retainer:

Where an executor pleads that he has no assets *ultra* a judgment, which, in truth, was recovered against him upon

Replication to a plea of *plene administravit præter.*

(*a*) 1 Saund. 333, note (6). See Jones *v.* Harry, 4 Price, 89, as to the form of pleading a retainer for a specialty debt.

(*b*) See R. *v.* Wade, 5 Price, 621, as to the form of such a plea.

(*c*) Gillies *v.* Smither, 2 Stark. N. P. C. 528.

(*d*) Co. Lit. 283, *a*. Bull. N. P. 140.

(*e*) *Ante*, p. 884. Bull. N. P. 141.

(*f*) Picard *v.* Brown, 6 T. R. 550. *Ante*, p. 218, note (*r*).

(*g*) See *ante*, p. 220.

(*h*) Prince *v.* Rowson, 1 Mod. 208. 2 Mod. 51.

(*i*) Caverley *v.* Ellison, T. Jones, 23.

an unjust or fictitious debt, the plaintiff may reply, that the judgment was had and obtained by fraud and covin between the executor and the creditor (*k*). But the plaintiff cannot traverse the averment that the debt, for which the judgment was had, was a just and true debt (*l*).

So the plaintiff may reply, that the judgment is kept on foot by covin to defraud the creditors, *viz.* "that the said defendant defers procuring acknowledgment of satisfaction to be entered of the said debt and damages, so recovered, &c. with intent to defraud him the said plaintiff:" As where the executor compounds for a less sum and does not procure the judgment to be discharged, but pleads it to an action brought against him by another creditor, he may reply the composition, and that the judgment is kept on foot by covin: for nothing shall be allowed to the executor but what he actually pays (*m*).

The executor, in his rejoinder to replications of this description, is bound to traverse the fraud (*n*). And the plaintiff may, upon this issue, give in evidence, either that the debt is not a just one, or that less is due than the sum for which judgment has been given (*o*).

(*k*) Williams *v.* Fowler, 1 Stra. 410. 2 Saund. 50, note (3).

(*l*) Robinson *v.* Corbett, 1 Lutw. 662, by Powell, J. 2 Saund. 50, note (3). Indeed, it is not necessary for an executor who pleads an outstanding judgment, to aver that the debt, upon which the judgment was obtained, was a just and true debt: *Ante*, p. 1668. See, however, Green *v.* Wilcocks, Cro. Eliz. 462. Trethewy *v.* Ackland, 2 Saund. 48, *a.* Com. Dig. Pleader, (2 D. 9).

(*m*) 1 Saund. 334, note (9). *Ante*, p. 1566, 1567.

(*n*) Veale *v.* Gatesdon, W. Jones, 92. Parker *v.* Atfield, 1 Lord Raym. 678. 1 Saund. 334, n. (9). 2 Saund. 50, n. (3). The other averments in the replication, such as the allegation of the payment of the money in satisfaction of the judgment, are only inducement, and not traversable: Veale *v.* Gatesdon, W. Jones, 92, 5th Resolution. Beaumont's case, Latch. 111. 1 Saund. 334, note (9). Jones *v.* Roberts, 2 Crompt. & Mees. 219. S. C. 4 Tyrwh. 48. But the executor is at liberty, where several judgments have been pleaded by him, either to traverse that each particular judgment was kept up by fraud, or to include all the judgments pleaded in one general traverse: Beake *v.* Kent, Carth. 195. S. C. 4 Mod. 64. 1 Saund. 334, note (9).

(*o*) 2 Saund. 50, note (3).

In answer to the latter evidence, which is *primâ facie* proof of fraud, the defendant may shew that the judgment was entered for more than was due, by mistake (*p*). If a judgment is pleaded, and *per fraudem* replied, upon which issue is taken, and it appears in evidence that the creditor was willing to take less than is recovered, it is proof of fraud; but if it be shewn that the administrator had not assets to pay that sum, it is no fraud (*q*). It should be observed, that where a judgment is obtained against an executor by covin, but for a just debt, the creditor cannot avoid the judgment by alleging that it was obtained by covin to defraud him (*r*).

When the judgments or debts pleaded by the executor are upon *penalties*, it seems the right way of replying is, to say that the creditor would have accepted the less sums, but the defendant either would not pay or had paid them, but *kept the judgments or bonds on foot by fraud and covin:* And the plaintiff, on issue joined thereon, may give in evidence such matter as will serve to avoid the penalties: For if he replies generally that the judgments were for less sums, and the defendant has assets above what will satisfy them, on the issue that he has not, the defendant has a right to insist on the *penalties* as the debts (*s*). The replication should conclude with a verification (*t*).

If the defendant pleads several outstanding debts on judgments and bonds, and that he has no assets beyond what will satisfy those debts, the plaintiff is allowed to reply to every judgment or other debt or payment pleaded, or some or one of them, omitting the rest, without being considered guilty of duplicity in pleading (*u*). This is an anomalous case; for

(*p*) Pease *v.* Naylor, 5 T. R. 80.

(*q*) *Per curiam* in Parker *v.* Atfield, 1 Salk. 312.

(*r*) Veale *v.* Gatesdon, W. Jones, 92, 3rd Resolution. Williams *v.* Fowler, 1 Stra. 410. 1 Saund. 334, note (9). See *ante*, p. 888, 889.

(*s*) Thompson *v.* Hunt, 3 Lev. 368. Bell *v.* Bolton, 1 Lutw. 450. 1 Saund. 334, n. (9).

(*t*) 1 Saund. 334, n. (9).

(*u*) Turnor's case, 8 Co. 132. Trethewy *v.* Ackland, 2 Saund. 49, 50. Jefferies *v.* Dee, 1 Lev. 281. Ashton *v.* Sherman, 1 Lord Raym. 263. S. C. 1 Salk. 298. Carth. 431.

according to the general rules of pleading, the replication would be considered double, if it be true that by avoiding *any one* of the judgments in the plea, the plaintiff will be entitled to recover judgment *de bonis testatoris*, and by replying to each he tenders several issues, where one is sufficient to defeat the defendant's plea (*v*). The plaintiff may either conclude the replication with one averment to the whole, or conclude the answer to each separate judgment, &c., with one (*w*); but the former seems the better mode (*x*). And if the plaintiff, after replying to the judgments pleaded, alleges that the defendant has assets *ultra*, the replication ought to conclude with an averment, and not to the country (*y*).

With respect to the question whether the plaintiff, by avoiding any one of the judgments stated in the plea, will be entitled to recover judgment in the action, it must be observed, that if an executor pleads several judgments recovered *against himself*, and one of them is ill pleaded, or upon issue joined, is found against the executor, the plaintiff is entitled to judgment: and the reason is, that if one or twenty judgments be recovered against an executor himself, whether by default, or by verdict finding them on *plene administravit*, it is an admission of assets to satisfy them all (*z*): And, therefore, as the judgments pleaded admit assets so far, if any one of them be falsified, the executor does of course admit by his plea, that he has more assets than will satisfy the other judgments, by as much as the judgment so falsified amounts to (*a*). And in such case the plaintiff will be equally entitled,

1 Saund. 337, *b*. note (2). But the better way is to answer only such judgment as the plaintiff knows to have been obtained by fraud: 1 Saund. 337, *b*. note (2).

(*v*) 1 Saund. 337, *a*. *b*. note (2).

(*w*) Ashton *v*. Sherman, 1 Salk. 298. S. C. Carth. 431.

(*x*) 1 Saund. 337, *c*. note (5).

(*y*) Ashton *v*. Sherman, 1 Lord Raym. 263. S. C. Carth 431. See Ward *v*. Ward, Cunningham's Rep. 74.

(*z*) Rock *v*. Leighton, 1 Salk. 310.

(*a*) 1 Saund. 337, note (1). According to the case of Harrison *v*. Beecles, cited in Irving *v*. Peters, 3 T. R. 688, judgment shall not be entered up for the whole debt, but only for the sum to which the assets thus admitted shall amount: See *infra*, p. 1688, and 1 Saund. 336, note to Hancocke *v*. Prowd.

though the plea alleges that the defendant has but a small sum not sufficient to satisfy all the judgments; for the allegation is not material (*b*).

But the reason above stated does not apply to a plea in which the executor pleads several outstanding judgments obtained *against his testator:* for a judgment obtained against the testator is no admission of assets by the executor; and, therefore, there seems no ground upon which an executor ought to be subjected to a general judgment for the whole, because one of the judgments averred to have been recovered against the testator is ill pleaded, or found to be false. Where, indeed, the executor pleads several judgments, and that he ~~has~~ *has only assets sufficient to satisfy them*, if the plaintiff can falsify any one of the judgments, as by shewing it satisfied, or the like, he will be entitled to judgment; for the plea was false, and the falsehood detrimental to the plaintiff, and beneficial to the defendant. For as one of the judgments was falsified, the executor has confessed that he has more assets than will satisfy other judgments, by as much as the judgment so satisfied amounts to (*c*). But the cases have gone further than this: for there are several authorities to shew that where the executor pleads several judgments recovered against the testator, and *avers that he has assets to a small amount named in the plea*, yet the rule is, that if the plea be false or bad in part, it shall be wholly set aside (*d*). Thus, in *Norton* v. *Harvey* (*e*), which was adjudged in K. B. and affirmed in the Exchequer Chamber,

(*b*) Parker *v.* Atfield, 1 Salk. 312.

(*c*) 1 Saund. 337, note (1). So in Campion *v.* Bentley, 1 Esp. 344, an administrator pleaded a retainer for a debt due to himself, and a judgment obtained by another creditor, and *nil assets ultra:* The replication denied that the sum sought to be retained was justly due, and, as to the judgment, alleged that it was obtained and kept on foot by fraud: Upon issue joined on these two points, Eyre, C. J., told the jury, that they were to inquire whether the defendant had pleaded a false plea or not; and if they believed either of the demands set up against the intestate's estate to be unfounded, they ought to find a verdict for the plaintiff.

(*d*) Trethewy *v.* Ackland, 2 Saund. 48.

(*e*) Cited in 2 Saund. 50.

where the defendant pleaded several judgments obtained against the testator, and among others, a judgment against the testator and one A. B., but did not aver that A. B. died before the testator, so that it did not appear that the defendant was liable to that judgment; *although he averred that he had assets to a small sum,* yet for this defect, the plea was adjudged insufficient and bad in the whole, and judgment given against the defendant *de bonis testatoris* generally, and all the judgments which were well pleaded set aside (*f*).

Yet, notwithstanding these cases, it seems to be contrary to common sense and justice, that there should be a judgment against an executor who has no assets to satisfy the debt in demand, merely because his plea is mispleaded, or one of the judgments is false (*g*). Accordingly Lord Vaughan, in his judgment in *Edgcombe* v. *Dee* (*h*), finds fault with this rule, and says, that the entirety of the plea, which is the only foundation of it, is a *spungy* reason, and not sense: for if the falsehood or badness of the plea be neither hurtful to the plaintiff nor beneficial to the defendant, why should the plaintiff *have* what he ought not, or the defendant *pay* what he ought not (*i*)? Besides, the usual pleading is, that the plaintiff must avoid all payments pleaded in bar, until some assets appear remaining in the executor's hands, and then the plaintiff is to have judgment (*k*).

Perhaps, therefore, the rule may be understood thus: that if the executor plead judgments obtained against *his testator,* and that he has not sufficient to satisfy them, or any of them, if any one or more of the judgments be avoided, still there ought not to be a general judgment against the executor, or

(*f*) See also S. P. Parker *v.* Atfield, 1 Salk. 312. S. C. 1 Lord Raym. 678. R. *v.* Dickinson, Parker's Rep. 263. 1 Saund. 337, n. (1).

(*g*) 1 Saund. 337, n. (1). It is certain that the executor must ultimately pay out of his own pocket the debt and costs so recovered: for he may be compelled so to do by *scire fieri* on the judgment, or action of debt suggesting a *devastavit:* See *infra*, p. 1694, *et seq.*

(*h*) Vaugh. 104, 105.

(*i*) 1 Saund. 337, note (1).

(*k*) Vaugh. 105. 1 Saund. 337, note (1).

at least, not until so many are avoided as to leave assets in the executor's hands: But if he pleads judgments obtained *against himself*, and any more of them be avoided, in that case there ought to be a general judgment for the plaintiff (*l*).

Evidence for plaintiff upon issue joined on plea of *plene administravit*:

If an executor or administrator pleads *plene administravit*, and the plaintiff replies that the defendant had assets at the commencement of the suit, whereupon issue is joined, the burthen of proof lies upon the plaintiff, who must prove that assets existed, or ought to have existed, in the hands of the defendant at the time of the writ sued out (*m*). The question, as to what shall be considered assets come to the hands of the executor or administrator, has been already discussed (*n*).

The plaintiff cannot prove, under this issue, that assets have been received subsequently to the commencement of the suit; to be admitted to such proof, he should have replied this matter specially (*o*).

If, upon the issue of *plene administravit*, it shall appear that the executor or administrator has been guilty of a *devastavit*, which has caused a failure of assets, the jury must find that the defendant has assets to that amount, and not find a *devastavit* (*p*).

(*l*) 1 Saund. 337, *a.* note (1). See Cousins *v.* Paddon, 2 Crompt. M. & R. 558, *per* Parke, B. *Acc.*

(*m*) Mara *v.* Quin, 6 T. R. 10.

(*n*) *Ante*, p. 1419, *et seq.* In Britton *v.* Jones, 3 Bing. N. C. 676, upon a plea of *plene administravit* and replication of assets in hand at the time of the commencement of the suit, it appeared at the trial, that the testator, twelve months before his decease, purchased twelve mahogany chairs, which were seen in the house where he lived shortly before his death: The defendant proved that the deceased died poor, that he lodged in the same house with his mother and his sister, the defendant; and that money was borrowed to bury him: It was contended that, as it had not been proved that the furniture in question ever came to the hands of the defendant, there was no evidence to charge her with it as assets: But the Court of C. P. held that there was a *primâ facie* case for that purpose. See also Stroud *v.* Dandridge, 1 Carr. & K. 445.

(*o*) 6 T. R. 11. 2 Phill. Ev. 347, 6th edit. Roscoe Ev. 59, 4th edit.

(*p*) Wentw. Off. Ex. c. 13, p. 312, 14th edit. This finding by the jury of assets in the hands of the executor is not against truth, though they be wasted, and so not to be had in kind; for the executor had them in right, since he has not rightfully

In order to prove assets, the plaintiff may give in evidence the Inventory exhibited by the defendant in the Ecclesiastical Court: And after the Inventory is put in, it is for the defendant to discharge himself of the items (*q*).

In *Shelly's case* (*r*), Lord Holt said, that all sperate debts mentioned in the inventory shall be counted assets in the executor's hands; for that is as much as to say that they may be had for demanding, unless the demand or refusal be proved. Again, in *Smith* v. *Davies* (*s*), Lord Hardwicke held, that if in the inventory produced the article concerning debts does not distinguish between sperate and desperate, it will be sufficient to charge the executor with the whole *primâ facie* as assets, and put upon him to prove any of them desperate; as if the article were, "Item, for debts due and owing, which I admit myself to be charged with when recovered or received" (*t*). And the authority of these cases appears to have been recognized and acted upon in the Common Pleas, in a case in the time of Dallas, C. J. (*u*). But in *Gyles* v. *Dyson* (*v*), where on the trial of an issue joined on a plea of *plene administravit*, it was contended, on the authority of *Smith* v. *Davies*, that certain debts which the defendant had, in an inventory exhibited in the Ecclesiastical Court, allowed to be due to the estate and which he did not represent to be desperate, were to be considered as actual assets in his hands, Lord Ellenborough said, "you must

parted from them; according to the rule, *pro possessore habetur qui dolo aut injuriâ desiit possidere: Ibid.* See Reeves *v.* Ward, 2 Bing. N. C. 235. S. C. 2 Scott, 296.

(*q*) Giles *v.* Dyson, 1 Stark. N. P. C. 32. It is said in Bull. N. P. 140, that the plaintiff cannot give in evidence a copy of an inventory delivered by the defendant to the Spiritual Court, unless it be signed by him, though it be signed by the appraisers. But it should seem that any clear recognition of the instrument as an inventory would be tantamount in effect to signature.

(*r*) 1 Salk. 296.

(*s*) Bull. N. P. 140. S. C. Selwyn's N. P. 779, note, 6th edit.

(*t*) The defendant proved, by a witness, who went to demand several of them, that he could not recover them, and accordingly they were allowed as desperate: Selw. *ubi supra.*

(*u*) Young *v.* Cawdrey, 8 Taunt. 734. S. C. *nomine* Young *v.* Cordery, 3 B. Moore, 69.

(*v*) 1 Stark. N. P. C. 32.

prove, presumptively at least, that these debts have been paid; that presumption may depend on the time and a number of other circumstances; but upon the plea of *plene administravit*, it is necessary to prove that effects came into the hands of the defendant; this is the universal practice" (*w*).

With reference to the effect of an inventory, as an admission of assets, there seems to be a material difference between the inventory, which according to old practice of the Prerogative Court of Canterbury, and the present practice of some country jurisdictions, is exhibited *before probate* (*x*), and the deliberate inventory which is exhibited by an executor or administrator on the citation of a party interested in the estate (*y*), or spontaneously before a final settlement (*z*). In *Stearn* v. *Mills* and *Wright* (*a*), which was an action of debt against executors on a testator's bond, the defendant Mills pleaded *plene administravit*, and there was judgment by default against the defendant Mrs. Wright: At the trial at the Suffolk Lent Assizes, 1832, it appeared that the testator died in 1816, and that the Will was proved by both defendants, *on which occasion* an inventory of the effects was exhibited in the Ecclesiastical Court: Mrs. Wright produced it, but Mills was present and acquiesced, though without saying anything, and neither signed it: The inventory comprised only the stock upon the farm occupied by the testator at the time of his death, amounting in value to 1,105*l.*; there were other effects, and likewise debts and monies of the testator, which were not included: No other inventory appeared ever to have been exhibited: Mrs. Wright continued in the occupation and management of the farm (according to the desire of the testator) till 1830: Mills knew of her doing so, and was himself occasionally at the farm; but it was not shewn that any of the effects actually came into his hands: Upon these facts, the Court of King's Bench was of opinion that there

(*w*) See *ante*, p. 1421.

(*x*) See *ante*, p. 836.

(*y*) See *ante*, p. 835, *et seq*. *Post*, Ch. III.

(*z*) See *ante*, p. 836, note (*z*).

(*a*) 4 B. & Adol. 657. S. C. 1 Nev. & M. 434.

was no proof of assets received as against Mills, and that he was entitled to a verdict: And Lord Denman, C. J., in giving judgment said, "I am of opinion that the inventory, *delivered by an executor on proving the Will,* is not, in itself, evidence of assets having come to his hands; and the fact, in this case, of Mills having occasionally gone to the farm, is not sufficient to affect him with liability as an executor having had possession of the property." Littledale, J., said, "It is not necessary here to consider whether an inventory, in some cases, may or may not be evidence of assets received: it was not so under the circumstances of this case. It was, indeed, stated here, that nothing came to the hands of Mills; but I do not agree in the general proposition, that an executor, who has exhibited an inventory, is bound to shew that he received no assets; because, even if that did not appear, I think an inventory, exhibited as this was, would be no evidence against him. An executor is not obliged, before proving the Will, to go into any distant county, where effects of the testator may be, to ascertain their real value; it is sufficient if he receives such information as he is able to obtain, and then exhibits an inventory to shew as far as possible the amount of the property to be administered: one object of which is, to ascertain the fees to be taken on the probate, pursuant to the statute 21 Hen. VIII. c. 5. There may be goods in the hands of a factor, who may prove insolvent; it cannot be said that an executor, by including them in the inventory, charges himself with them as assets." Parke, J.: "Assuming that the inventory here was exhibited by both defendants, of which I have some doubt, it could be only *primâ facie* evidence. I will not say whether such an inventory as this would not be *primâ facie* evidence, since it related wholly to effects which were upon the farm, and did not include any debts. But if so, the evidence was clearly rebutted, by proof that *Mills* never did, in fact, take possession. To say generally, that the mere circumstance of having joined in an inventory for the purpose of obtaining probate,

renders an executor liable, would be going further than is warranted by any authority."

The amount of the probate stamp is *admissible* in evidence, on the issue joined on a plea of *plene administravit* (*b*). And the Court of King's Bench, in *Foster* v. *Blakelock* (*c*), held that the probate stamp was *primâ facie* evidence that the executor had assets to the amount covered by the stamp (*d*). But this decision, it should seem, must now be considered as overruled. In the above-mentioned case of *Stearn* v. *Mills*, Littledale, J., and Parke, J., expressed their dissent from it: And in the subsequent cases of *Mann* v. *Lang* (*e*), Littledale, J., said, that he could not say that the stamp on the probate was not admissible; but it was not *primâ facie* evidence of the amount of assets: In the same case Lord Denman expressed his opinion, that if there be evidence of a long acquiescence by the executor, without re-demanding any of the duty, it is *primâ facie* evidence of such amount; though it is not of itself evidence of such amount: But Patteson, J., was of opinion, that it is not such *primâ facie* evidence, even if a long acquiescence is shewn.

An admission by the defendant, that a debt is a just debt, or a promise to pay it as soon as he can, is not evidence to charge him with assets: for such an admission must be understood with a reasonable intendment, and the executor could not mean to pledge himself to commit a *devastavit*, by paying this debt before others of a higher nature (*f*). But if an executor compound with the creditors, and afterwards, at the suit of any of them, plead *plene administravit*, proof

(*b*) Mann *v.* Lang, 3 Adol. & Ell. 699. S. C. 5 Nev. & Mann. 202.

(*c*) 5 B. & C. 328. S. C. 6 D. & R. 46.

(*d*) See also Curtis *v.* Hunt, 1 C. & P. 180, where Lord Tenterden ruled to the same effect.

(*e*) 3 Adol. & Ell. 699. 5 Nev. & M. 20.

(*f*) Hindsley *v.* Russell, 12 East, 232. 2 Phill. Ev. 348, 6th edit. If the executor refers a party to a third person for information respecting the effects of the testator, it should seem that an admission of assets by such third person will bind the executor: Williams *v.* Innes, 1 Camp. 364.

of the composition would be conclusive proof of assets, and the Court would not suffer him to give evidence of no assets (*g*). However, an executor will not admit assets by paying interest on a bond due from the testator (*h*); for it would be unreasonable that he should be liable for the whole debt, by paying a part out of his own funds, or that, because he has enough in his hands to pay the interest, he should be thereby concluded from disputing assets for the principal.

In addition to the proof of assets, it will be necessary for the plaintiff, in an action of *assumpsit*, to prove the amount of the debt, otherwise he shall recover but 1*d*. damages: for the plea only admits a debt, but not the amount (*i*). But the rule is different in an action of debt, where a specific debt is demanded; as, in an action of debt, if the defendant plead *plene administravit*, without pleading also *nunquam indebitatus*, there the debt is admitted by the plea, and need not be proved (*k*).

Evidence for executor that the assets have been exhausted.

In answer to the proof of assets, the executor or administrator may shew, under the issue joined on *plene administravit* (*l*), that he has exhausted the assets, by discharging other demands on the estate, not inferior in their nature to that of the plaintiff (*m*), or even by the payment of debts of inferior degree, without notice of the plaintiff's demand (*n*). Again, the executor may shew that he has disbursed the assets in the expenses of the funeral, or of probate (*o*) or

(*g*) Bull. N. P. 145.

(*h*) Cleverley *v.* Brett, cited by Buller, J., 5 T. R. 8. 2 Phill. Ev. 348, 6th edit.

(*i*) Shelly's case, 1 Salk. 296.

(*k*) 2 Phill. Ev. 348, 6th edition. Saunderson *v.* Nicholle, 1 Show. 81. Bull. N. P. 140.

(*l*) Or on a plea of want of assets, without any averment of *plene administravit*: Reeves *v.* Ward, 2 Bingh. N. C. 235. S. C. 2 Scott, 396. *Ante*, p. 1666.

(*m*) See *ante*, p. 887, *et seq*.

(*n*) Chelsea Water Works Company *v.* Cowper, 1 Esp. N. P. C. 277. *Ante*, p. 884. But according to the judgment of Lawrence, J., in Hickey *v.* Hayter, 6 T. R. 388, these payments without notice must be pleaded.

(*o*) It is a question for the jury, whether the executor has committed a *devastavit* by swearing the property above its value without reasonable ground, and so incurring a greater stamp duty than was requisite, seeing that the executor is bound to act promptly and therefore is not to be held to too

administration, or as it should seem, in the reasonable charges of collecting the debts of the deceased (*p*). So he may shew that he has retained money in his hands to pay for the expenses of administration, to which he has made himself liable, without proving that he has paid them (*q*).

Where the executor shews payments made by him to the extent of the assets proved by the plaintiff to have come to his hands, the plaintiff may shew, in answer, that the funds so applied did not come to the defendant as executor, but were handed to him in trust to pay the testator's debts, and were not part of the assets at first proved to have come to his hands (*r*).

The defendant cannot, under a plea of *plene administravit*, give evidence of the existence of outstanding debts of a higher nature: such defence must be pleaded (*s*).

Again, the defendant cannot shew, in answer to proof of assets, that he has applied them in the payment of debts since the commencement of the suit: for, under *plene administravit*, no payments, made after the action commenced, can be given in evidence (*t*). If, therefore, the executor has paid other creditors of superior degree after action commenced, he must plead that matter specially, and if he has paid other creditors of equal degree, since the writ issued, without having had notice of the suit, he ought to plead specially *plene administravit* before notice (*u*).

close a search for the testator's property: Jackson *v.* Bowley, Carr. & M. 97.

(*p*) Giles *v.* Dyson, 1 Stark. N. P. C. 32. But he cannot be allowed for disbursements in the schooling, feeding, and clothing, of the children of the testator, subsequently to his decease: *Ibid.*

(*q*) See *ante*, p. 1671. Gillies *v.* Smither, 2 Stark. N. P. C. 528.

(*r*) Marston *v.* Downes, 1 Adol. & Ell. 31. 6 Carr. & P. 381.

(*s*) Bull. N. P. 141. 1 Saund. 333, *a*. note (8). *Ante*, p. 884. It is said in 2 Phill. Ev. 350, 6th edit. that the defendant may prove, under *plene administravit*, subsisting judgment debts, and retain assets to the full amount: but this seems not to be correct; and the authority cited, Bond *v.* Green, 1 Brownl. 75, it should appear, applies merely to a retainer of a debt due to the defendant himself.

(*t*) Dyer, 32, *a. in margine.* Com. Dig. Admon. (C. 2.) Nightingale *v.* Lee, 1 Freem. 110.

(*u*) *Ante*, p. 888, note (*y*).

In *Rees* v. *Morgan* (*v*), after the passing of the Act for the uniformity of Process, 2 Wm. iv. c. 39, which directs, that all personal actions, where it is not intended to hold the defendant to bail, &c., shall be commenced by writ of summons, an executrix pleaded, to an action of assumpsit, *plene administravit*, and no assets *on the day of exhibiting the bill* of the plaintiff: The plaintiff, in his replication, tendered issue in the words of the plea: And the Court of King's Bench held, that the words *exhibiting the bill*, upon these pleadings, meant the commencement of the suit by writ of summons, and not the filing of the declaration; and, therefore, that evidence of payments made by the executrix between the times of suing out the writ and filing the declaration, was inadmissible.

With respect to proving the commencement of the suit, in order to ascertain whether the payments set up by the executor were made before or after that period, the following distinction has been taken: "If an executor plead *plene administravit*, and the plaintiff reply that he sued out his original such a day, and that the defendant had assets then; and the defendant in his rejoinder takes issue, that he had not assets then; the plaintiff need not give in evidence a copy of the original to prove the time of its being taken out, because the defendant admits it by his rejoinder. But if the plaintiff reply assets at the time of exhibiting his bill, *viz.*, such a day, and conclude his replication to the country, (which in such case he may), though the plaintiff lay his bill to be exhibited on the first day of the term, if, in fact, it were exhibited afterwards, the defendant shall have advantage thereof on the evidence, so that he shall not be bound for what he paid before. The difference between those two cases depends solely on the manner of the plaintiff's replying; for in the first case, the plaintiff alleged the time of suing out the original as a distinct positive fact, and concluded with an averment; and so the defendant was at liberty to take issue

(*v*) 5 B. & Adol. 1034.

in his rejoinder, on the time of the original's issuing, or on his having assets: but in the last case, the defendant had no opportunity of putting the time of exhibiting the bill in issue; but was obliged to join in the issue taken by the plaintiff, that the defendant had assets at the day the plaintiff exhibited his bill, and the day mentioned in the replication, being alleged under a *videlicet*, is totally immaterial" (*w*). But now, it should be observed, it is required by ***Reg.*** *Gen.* 4 Wm. IV., Form No. 1, that the day of issuing the writ shall be stated on the *nisi prius* Record.

In order to prove the existence and payment of the debts set up by the executor or administrator, he may call the creditor, who is a competent witness to establish both these facts (*x*). But where the defendant relies upon the payment of a bond of the deceased, the execution of such bond must be proved by calling the attesting witness in the usual manner, even though the bond has been destroyed (*y*). Where, however, the defendant is sued in *assumpsit* on a simple contract, it will be sufficient, it is said, to prove the payment (*z*); for, though no bond, it is yet a good administration.

It should seem (as there has already been occasion to point out) (*a*), that if, in the distribution of assets, a creditor misleads an executor, either by laches or express authority, so as thereby to induce him to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of an insufficiency of assets (*b*). So where

(*w*) Bull. N. P. 144.

(*x*) Bull. N. P. 143. See *ante*, p. 1612, 1613, as to the general doctrine of the competency of witnesses in actions by and against executors and administrators, and the effect of Lord Denman's Act (6 & 7 Vict. c. 85).

(*y*) Gillies *v.* Smither, 2 Stark. 530. Roscoe, Ev. 95, 5th edit. But it is observed in the latter book, that it is difficult to conceive the use of calling a witness to prove his own signature to an instrument not produced to him, and of the contents of which he is usually ignorant.

(*z*) Bull. N. P. 143.

(*a*) *Ante*, p. 1159—1162.

(*b*) Richards *v.* Browne, 3 Bing. N. C. 499, by Tindal, C. J. *Ante*, p. 1162.

a party entitled to a legacy under a Will has a claim against the testator, which he conceals from the executors till after he has received his legacy, he cannot afterwards, in an action against the executors, object that the amount of the legacy was not paid in a due course of administration (*c*).

Judgment against an executor:

Whenever the action against an executor or administrator can only be supported against him in that character, and he pleads any plea which admits that he has acted as such, (except a release to himself) the judgment against him must be, that the plaintiff do recover the debt and costs to be levied *out of the assets of the testator,* if the defendant have so much, but if not, then *the costs* out of the defendant's *own goods:* otherwise, the judgment will be erroneous (*d*): As where the defendant pleads *non est factum testatoris,* or a release *to the testator,* or payment by him, or *non assumpsit;* though these pleas admit assets (*e*). So where the executor pleads *plene administravit,* and it is found against him, the judgment is *de bonis testatoris, et si non, &c.,* then the costs *de bonis propriis* (*f*).

(*c*) Stroud *v.* Stroud, 7 M. & Gr. 417.

(*d*) 1 Saund. 335, note (10), to Hancocke *v.* Prowd. But if the judgment be entered *de bonis propriis,* instead of *bonis testatoris si, &c.,* it is considered as a mere clerical mistake, which the Court below will amend on motion, even after the record has been removed by error, and argument in the Court of Error: Short *v.* Coffin, 5 Burr. 2730. However, where a plaintiff who was entitled to judgment against a defendant executor *de bonis testatoris et si non, &c.,* took judgment and issued execution for debt and costs *de bonis propriis,* the Court set aside the judgment and execution on motion: Ward *v.* Thomas, 1 Crompt. & M. 532. S. C. 2 Dowl. 87. And the Court will not, after a lapse of six years, allow a judgment for the debt *de bonis testatoris,* and for the costs *de bonis testatoris et si non de bonis propriis,* to be altered to a judgment generally *de bonis testatoris et si non de bonis propriis,* even if the latter be clearly the judgment to which the plaintiff was entitled: the distinction being between an alteration to *discharge,* and one to *fix,* the personal liability of the executor: Burroughs *v.* Stevens, 5 Taunt. 556.

(*e*) Wentw. Off. Ex. 341—346, 14th edit. Rock *v.* Leighton, 1 Salk. 310. Ramsden *v.* Jackson, 1 Atk. 292, 294. Erving *v.* Peters, 3 T. R. 685. 1 Saund. 335, note (10).

(*f*) 1 Roll. Abr. 931, (D), pl. 3. Wentw. Off. Ex. 344, 14th edit.

But where the defendant pleads *ne unques executor* or *administrator*, or a release *to himself*, and it is found against him, the judgment is, that the plaintiff do recover both *the debt and costs*, in the first place, *de bonis testatoris, si, &c.* and *si non, &c., de bonis propriis* (*g*). The reason alleged is, because the executor cannot but know these to be false pleas: But the same reason seems equally to apply to other pleas where the judgment is different (*h*).

It may here be observed, that the difference, *in effect*, between these two kinds of judgments against an executor or administrator, is not so great as it may appear at first sight. For, although the judgment is only *de bonis testatoris*, yet the executor, upon a deficiency of assets, must ultimately pay the debt, as well as costs recovered, out of his own pocket; because the judgment is in law a proof that he has assets to satisfy it (*i*): and, therefore, to a *scire facias* on the judgment, or action of debt suggesting a *devastavit*, the executor cannot plead *plene administravit*, but only controvert the *devastavit;* of which fact the judgment, and the sheriff's return of *nulla bona testatoris*, are almost conclusive evidence, and judgment will be against the defendant *de bonis propriis* (*k*).

for what amount judgment shall be upon a plea of plene administravit:

With respect to the *amount* for which judgment should be entered against the executor upon a plea of *plene administravit*, it is now held, that if the executor plead either a general or special *plene administravit*, he is liable only to the amount of the assets proved to be in his hands (*l*). The case, however, was formerly taken to be, that if *any* assets, however small, were proved to be unadministered, the plain-

(*g*) Bro. Exors. 34. 1 Roll. Abr. p. 930, (C.) pl. 2, 8, p. 933, pl. 15. Bull *v.* Wheeler, Cro. Jac. 648. Wentw. Off. Ex. 338, 340, 14th edit. 1 Saund. 336, *b.* note (10). Hooper *v.* Summersett, Wightw. 20, *per curiam.*

(*h*) 1 Saund. 336, *b.* note (10).

(*i*) *Ante*, p. 1664.

(*k*) 1 Saund. 337, note (1). See *infra*, p. 1695, 1696, *et seq.*

(*l*) 1 Saund. 219, *b.* note to Wheatley *v.* Lane. Jackson *v.* Lyon, Carr. & M. 97.

tiff was entitled to recover his whole demand from the executor: Indeed it appears that, anciently, if it was found by verdict that the executor had assets sufficient to satisfy but *part* of the debt, the usual practice of the K. B. was to enter up judgment for the *whole* debt, but to take out *execution* only for the sum found by the verdict; and if the executor was afterwards possessed of more assets, to sue out a *scire facias* on the judgment (*m*). But, in Easter Term, 36 Eliz., the prothonotaries of the Common Pleas certified, that their course was not to enter judgment of the *whole* debt, but only of so much as was found to be in the executor's hands (*n*). And the same point was determined by Lord Mansfield, in *Harrison* v. *Beecles* (*o*), where the plaintiff, having proved a debt of 80*l.*, took a verdict on the *non assumpsit* for the sum, and having proved 25*l.* assets unadministered, he took a verdict on the *plene administravit* for that sum, and judgment *quando*, &c. for the residue (*p*). It may, perhaps, appear questionable whether there is any real difference between the two modes of practice: For, in the former case, the executor was only bound to pay the assets found by the jury (*q*).

(*m*) 1 Saund. 336, note.

(*n*) Hargthorpe *v.* Milforth, Cro. Eliz. 319.

(*o*) Cited 3 T. R. 688.

(*p*) Hancock *v.* Podmore, 1 B. & Ad. 265, *per* Bayley, J. *Accord.*

(*q*) 1 Saund. 336, note. The following appears to be the proper form of entering up judgment on the two issues of *non assumpsit* by the testator, and of *plene administravit* by the defendant, to which the plaintiff replied that the defendant had assets since the commencement of the suit, where the jury find the first issue for the plaintiff, and, on the second issue, that the defendant has assets to satisfy only *part* of the debt: "As to the first issue between the said parties within joined, upon their oath say, that the within named William Clarke (the testator) in his lifetime did undertake and promise in manner and form as the said Francis hath above thereof complained against her the said defendant Mary, (the executrix) and they assess the damages of the said Francis by reason of the not performing of the said promises and undertakings, over and above his costs and charges by him about his suit in this behalf expended to 80*l.* and for those costs and charges to 40*s.* And as to the last issue between the said parties within joined, the jurors aforesaid upon their oath

When several executors plead *plene administravit severally* by several attornies, and the jury find that one of them only has assets, judgment shall be given against him only, and the rest shall go quit (*r*). But where the executors *join* in the plea, it was formerly established, that judgment should be given against them all, although the jury found assets in the hands of one only (*s*). But it has been considered, that the principle of the above mentioned case of *Harrison* v. *Beecles* will be held to moderate this rule (*t*). And, accordingly, in a modern case at N. P. (*u*), where, in an action against several executors, they all pleaded that they had fully adminis-

judgment upon *plene administravit*, when one only of several executors is found to have assets:

aforesaid say, that the said Mary, at the time of the commencement of the suit of the said Francis in this behalf, and since, had goods and chattels which were of the said William at the time of his death in her hands to be administered to the value of 40*l.*, parcel of the said damages above assessed, wherewith she the said Mary might have satisfied the said Francis 40*l.*, parcel of the said damages; and as to 40*l.*, residue of the said damages, that the said Mary, at the time of the commencement of the suit of the said Francis in this behalf, or ever since, had not any other goods and chattels which were of the said William at the time of his death in the hands of the said Mary to be administered, wherewith she could have satisfied the said Francis the said 40*l.*, residue of the said damages so assessed as aforesaid: Therefore it is considered that the said Francis do recover against the said Mary the said 40*l.* by the said jury in form aforesaid found, parcel of the said damages of 80*l.* above assessed, together with his costs and charges by the said jury in form aforesaid assessed, and also 35*l.* for his costs and charges of increase by the said Court of our said lord the King here adjudged to the said Francis with his assent, which said damages, costs and charges, in the whole amount to 77*l.*, to be levied of the goods and chattels which were of the said William at the time of his death in the hands of the said Mary to be administered, if she hath so much in her hands to be administered, and if not, then the said costs and charges, parcel of the damages last mentioned, amounting to 37*l.*, to be levied of the proper goods and chattels of the said Mary, and that, &c. &c. and that the said Francis do recover the said 40*l.* residue of the said damages in form aforesaid assessed, to be levied of the goods and chattels which were of the said William at the time of his death, *or which since the pleading of the said second plea* of the said Mary, have come or at any time hereafter shall come, to the hands of the said Mary to be administered. And the said Mary in mercy," &c.

(*r*) Bellew *v.* Juckleden, 1 Roll. Abr. 929, (B.) pl. 5.

(*s*) 1 Roll. Abr. 929, (B.) pl. 4.

(*t*) 1 Saund. 336, note.

(*u*) Parsons *v.* Hancocke, 1 Mood. & Malk. 330.

tered, &c., and the plaintiff proved assets in the hands of some only of the defendants, J. Parke, J., directed the jury to find a verdict for the plaintiff against the latter, and, as to the other executors, to find a verdict for the defendants (*v*).

costs for executor defendant:

If there be a verdict for the defendant, he is entitled to costs as in ordinary cases. It has been held, that the statutes 7 Hen. viii. c. 4, s. 3, and 21 Hen. viii. c. 19, s. 3, by which costs are recoverable by the defendant in an action of replevin, extend to avowries made by an executor (*w*).

executor's liability to costs as defendant.

It will appear, on referring to the description above given of the proper mode of entering judgment against executors and administrators (*x*), that, when defendants, they have no privilege as to costs; but on the contrary, are liable to pay them *de bonis propriis*, if there are no assets (*y*). Therefore, an executor or administrator ought not to plead *non assumpsit*, or other general issues, without a good reason; for if the plaintiff succeeds, the executor will be liable to pay the costs out of his own pocket, although the plea were not false to his knowledge (*z*). Thus, if the executor or administrator pleads *non assumpsit* and *plene administravit*, if the plaintiff take judgment of assets *in futuro*, upon the latter plea, and goes to trial upon the plea of *non assumpsit*, he will be entitled to costs, if he obtains a verdict; and such costs to be levied *de bonis propriis* of the executor or administrator, if there are not assets of the testator or intestate sufficient to satisfy them (*a*). The reason is, that if the defendant had pleaded a plea of *plene administravit* only, the plaintiff might have taken judgment of assets *quando*, without incurring the costs of a trial; but the defendant, by pleading that the testator never promised, compelled the plain-

(*v*) See also the remarks of the same learned judge in Cousins *v.* Paddon, 2 Crompt. M. & R. 558.

(*w*) Tidd, 887, 976, 9th edit.

(*x*) *Ante*, p. 1686.

(*y*) See 9 B. & C. 658.

(*z*) Dearne *v.* Grimp, 2 W. Black. 1275. 1 Saund. 336, *b*. And a bankrupt executor so pleading after commission sued, is liable to execution for the costs, notwithstanding he has obtained his certificate: Howard *v.* Jemmet, 3 Burr. 1368. S. C. 1 W. Black. 400.

(*a*) Marshall *v.* Willder, 9 B. & C. 655.

tiff to incur those costs; because, in order to avail himself of the judgment of assets *quando acciderint*, he was obliged to go down to trial on the other issue (*b*). And, therefore, in such cases, unless the executor or administrator has a good ground of defence upon *non assumpsit*, it is usual for him to move to withdraw his plea, which the Court will permit him to do upon payment of costs (*c*). So where an executor pleaded *non assumpsit* and *plene administravit*, on which the plaintiff took issue, and a bond and mortgage outstanding, and *plene administravit præter*, on which latter plea the defendant took judgment of assets *quando acciderint*, and there was a verdict for the plaintiff on the plea of *non assumpsit*, and for the defendant on the issue of *plene administravit*; the Court held, that the plaintiff, being, at all events, entitled to judgment of assets *quando*, and having been compelled, by the defendant's pleading *non assumpsit*, to go down to trial, was entitled to retain the *postea*, and to have the general costs of the trial, though the issue of *plene administravit* was found against him (*d*).

But the rule is now established, as in ordinary cases, that the executor or administrator, defendant, will be entitled to the general costs, although he may have pleaded the general issue and failed on it, provided he has pleaded any one plea which goes to the whole cause of action and succeeded on it: Thus if the defendant pleads *non assumpsit* and *plene administravit*, and the plaintiff, instead of taking judgment of assets *quando* on the latter, traverses both the pleas, and issues are joined thereon, and that on *plene administravit* is found for the defendant, he will be entitled to a general judgment, and the general costs of the action, although the general issue is found against him (*e*). The law is the same

(*b*) 9 B. & C. 657.

(*c*) 2 W. Black. 1275. Tidd, 980, 9th edit.

(*d*) Hindsley *v.* Russell, 12 East, 232. Tidd, 980, 9th edit.

(*e*) Cockson *v.* Drinkwater, 3 Dougl. 239. Hogg *v.* Graham, 4 Taunt. 135. Marshall *v.* Willder, 9 B. & C. 657, Iggulden *v.* Terson, 2 Dowl. 277. In Lucas *v.* Jenner, 1 Crompt. & M. 597. S. C. 2 Dowl. 64, an executrix pleaded the general issue, and *plene administravit*, and afterwards moved for judgment

where the pleas are the general issue, *ne unques executor,* and *plene administravit,* and the last issue only is found for the defendant (*f*).

judgment of assets *in futuro:*

In an action against an executor or administrator, if the defendant pleads *plene administravit,* and it cannot be proved that he has assets in hand, the plaintiff may confess the plea, and take judgment immediately of assets *quando acciderint,* or as it is sometimes called, judgment of assets *in futuro* (*g*). This is an interlocutory or final judgment, according to the nature of the action: and if it be only interlocutory, there must be writ of inquiry to complete it (*h*). But if the plaintiff *take issue* on the general or special plea of *plene administravit,* and it be found against him, he cannot have judgment of assets *quando, &c.* (*i*).

By taking judgment of assets *quando,* the plaintiff admits that the defendant has fully administered to that time (*k*): And accordingly, the terms of the judgment are that the plaintiff do recover his debt to be levied of the goods of the testator which shall *thereafter* come to the hands of the executor (*l*). And in debt or *scire facias,* on this judgment, proof of the executor's receiving assets is always at the trial confined to a period subsequent to the judgment (*m*). And it is right that such be the rule at law; for if a creditor was permitted to litigate a second time that which has been once

as in case of a nonsuit: The Court discharged that rule upon a peremptory undertaking to try the first issue, and allowed the plaintiff to withdraw his replication to the second plea, and take judgment of *assets quando, &c.*

(*f*) Ragg *v.* Wells, 8 Taunt. 129. Edwards *v.* Bethel, 1 B. & A. 254.

(*g*) Mary Shipley's case, 8 Co. 134, *a.* Noell *v.* Nelson, 2 Saund. 226. Parker *v.* Dee, 3 Swanst. 532, note to Drewry *v.* Thacker. See the form of such judgment, 2 Saund. 216, 217.

(*h*) Tidd, 683, 9th edit.

(*i*) 1 Roll. Abr. 929, (B.) pl. 2. S. C. Bro. Exor. 18. 2 Saund. 217, note (1) to Noell *v.* Nelson. Lucas *v.* Jenner, 2 Dowl. 64, *per* Bayley, B. But see Hindsley *v.* Russell, 12 East, 232, *ante,* p. 1691. The same consequence does not seem to follow where *plene administravit* is ill pleaded: 2 M. & Gr. 414, 415, *per* Tindal, C. J.

(*k*) 2 Saund. 219, note (2). Parker *v.* Dee, 3 Swanst. 532, note to Drewry *v.* Thacker.

(*l*) 2 Saund. 219, note (2).

(*m*) Taylor *v.* Holman, Bull. N. P. 169. 2 Saund. 219, *a.* note (2).

settled between the parties, either by verdict or admission, an executor would be harassed and involved in infinite expense and litigation (*n*).

It was observed by Lord Kenyon, in *Mara* v. *Quin* (*o*), that it had occurred to him on looking into the precedents, that the ordinary mode of entering up a judgment of assets *quando acciderint*, was not correct; for as on the issue of *plene administravit*, no evidence could be given of assets after the writ sued out, if the judgment were only to affect assets received after the judgment, there was an interval between the commencement of the action and the judgment, in which, if the executors received any assets, they could not be taken at all: His Lordship, therefore, thought that the judgment in such a case ought to be entered up in such a manner as to reach all assets received by the executor after the time of suing out the writ: Upon which Mr. Justice Ashhurst observed, that as the plea of *plene administravit* was, that the executor hath not, nor had at the time of suing out the writ, "*nor at any time since, any assets*," &c. he saw no objection to the plaintiff's replying to the latter part of the plea, "*that the executor had assets since*," &c. if the facts were so (*p*).

When an executor or administrator pleads *plene administravit*, or judgments, &c. outstanding, and *plene administravit præter*, and the plaintiff, admitting the truth of the plea, takes judgment of assets *quando*, &c., the executor or administrator is not liable to costs *de bonis propriis* (*q*); nor does he seem liable thereto, when he pleads *plene administravit præter*, and the plaintiff takes judgment of the assets admitted in part, and, for the residue, of assets *quando*, &c. (*r*). It seems that it was formerly the practice not to allow the plaintiff his costs, even out of the future assets (*s*).

costs on judgment of assets *in futuro.*

(*n*) Mara *v.* Quin, 6 T. R. 1. 2 Saund. 219, *a.* note (2).

(*o*) 6 T. R. 10.

(*p*) See the form, *ante*, p. 1688, note (*q*).

(*q*) 1 Saund. 336, *b.* note. Tidd, 980, 9th edit.

(*r*) Tidd, 980, 9th edit.

(*s*) Butt *v.* Deschamps, Tidd, 980, note (*d*), 9th edit.

But it appears to be now settled, that though an executor or administrator, in such case, is not personally liable to pay costs, yet that judgment may be well entered for them, to be recovered *de bonis testatoris, quando acciderint* (*t*).

Proceedings on judgment against executor *de bonis testatoris:*

After the plaintiff has obtained a judgment against an executor *de bonis testatoris*, there are two modes of enforcing it: 1st, by *fieri facias*, or *scire fieri* inquiry; 2nd, by an action of debt on the judgment, suggesting a *devastavit.*

by *fieri facias:*

First, as to proceeding by *fieri facias*, or *scire fieri* inquiry: If the sheriff returns, as he may do if he pleases, not only *nulla bona*, but also a *devastavit*, to a *fieri facias de bonis testatoris* sued out on a judgment obtained against an executor, the plaintiff, according to the ancient practice, sued out execution immediately against the defendant by *capias ad satisf.*, or *fieri facias de bonis propriis* (*u*); and so he may, it should appear, at this day (*v*). And it seems, that the sheriff runs no great risk by returning a *devastavit;* for the judgment, and no assets to be found, will be sufficient evidence of a *devastavit*, in an action against him for a false return (*w*).

by *scire fieri* inquiry:

But if the sheriff returns *nulla bona* generally, without also returning a *devastavit*, the ancient course was to issue a special writ, for the sheriff to inquire by a jury whether the defendant had wasted any of the goods of the deceased: And if a *devastavit* were found, and returned by the sheriff, a *scire facias* issued for the defendant to shew cause why the plaintiff should not have execution *de bonis propriis*, to which *scire facias* the defendant might appear, and plead. But now, for the sake of expedition, the inquiry and *scire facias* are made out in one writ, which is called a *scire fieri* inquiry; reciting the judgment, *fieri facias*, and return of *nulla bona*, and, after suggesting a *devastavit*, commanding

(*t*) De Tastet *v.* Andrade, 1 Chitt. Rep. 629, 630, *in notis.* Cox *v.* Peacock, 4 Dowl. 134.

(*u*) 1 Saund. 219, note (8), to Wheatley *v.* Lane.

(*v*) Tidd, 1025, 1113, 9th edit. The *fieri* inquiry is only for the security of the sheriff; Rock *v.* Leighton, 1 Salk. 310. S. C. 1 Lord Raym. 590. Com. Rep. 87.

(*w*) Rock *v.* Leighton, cited 3 T. R. 692. S. C. 1 Salk. 310.

the sheriff to cause the debt or damages and costs to be made of the goods of the testator or intestate, if, &c.; and if not, then, if it shall appear by inquisition that the defendant hath wasted the goods of the deceased, to give notice to the defendant to appear in Court at the return of the writ, to shew cause why the plaintiff ought not to have execution *de bonis propriis:* And there must be the same notice of executing such writ, as of a common writ of inquiry (*x*).

The most usual mode of proceeding has been by action of debt on the judgment suggesting a *devastavit;* because, in the proceeding by *scire fieri* inquiry, the plaintiff was not, until the passing of the Act for the further amendment of the law, entitled to costs, unless the executor appeared and pleaded to the *scire facias:* For the statute 8 & 9 Wm. III. c. 11, s. 3, which gives costs to plaintiffs in suits upon *scire facias*, limits them to those cases only where the plaintiff obtains judgment, or award of execution, *upon a plea pleaded, or demurrer joined thereon* (*y*). But now by statute 3 & 4 Wm. IV. c. 42, s. 34, it is enacted, that in all writs of *scire facias*, the plaintiff obtaining judgment on an award of execution shall recover his costs of suit upon a judgment by default as well as upon a judgment after plea pleaded, or demurrer joined.

The executor cannot plead *plene administravit* to the *scire fieri* inquiry; because the judgment against him is conclusive that he had assets to satisfy it (*z*). Neither can he, upon the taking of the inquisition, give in evidence the want of assets (*a*): And it should, therefore, seem, that the jury are bound, upon the judgment being put in evidence, together

(*x*) Tidd, 1113, 1114, 9th edit. See the account of the establishment of this practice, 1 Saund. 219, *a.* note to Wheatley *v.* Lane.

(*y*) 1 Saund. 219, *a.* And it must be observed, that by sect. 5, of this statute, it is provided that nothing therein contained shall extend to executors and administrators. (See *post*, p. 1703, 1704.) Consequently, it should seem, that even after plea pleaded or demurrer joined, costs in *scire facias* were not recoverable against them under the stat. of Wm. III.

(*z*) See *ante*, p. 1664.

(*a*) 1 Saund. 219, *d.*

with the *fi. fa.* and the return, to find a *devastavit*, as suggested in the writ, unless the executor can shew that there were goods of the testator, which might have been taken in execution, and that he shewed them to the sheriff (*b*). Accordingly, in a case where the undersheriff, on taking the inquest, directed the jury that the plaintiff was bound to give evidence of the executor's having property of the testator in his hands, and subsequently returned *nulla bona testatoris*, the Court quashed the return and awarded a new *scire fieri* inquiry (*c*). However, the return of a *devastavit* is not conclusive, whether found by the inquisition, or returned by the sheriff; and therefore the executor may traverse it, by denying the *devastavit*, and taking issue on it (*d*). And upon the trial of such an issue he may shew that he had not wasted the goods of the testator, but was ready to give them to the sheriff, so that it was the sheriff's fault that he did not make the debt out of them (*e*).

In *Blackmor* v. *Mercer* (*f*), in an inquisition returned by the sheriff on a *scire fieri* inquiry, it was found that the executors *had sold, eloigned, converted, and disposed to their own use* divers goods of the testator: The defendants came in and traversed that they sold, eloigned, &c., and the plaintiff maintained the inquisition that they had sold, eloigned, &c., as it was found by the inquisition, and tendered an issue on it, to which the defendants demurred: And it was objected that here neither the inquisition, nor the plaintiff's replication were sufficient to charge the defendants *de bonis propriis;* for no *devastavit* was found by the inquisition, or alleged by the plaintiff; and the defendants might have well sold, eloigned, and disposed of the testator's goods, because they had paid the testator's debt to the value of the goods with their own money, and therefore, although it was a sale,

(*b*) *Ibid.* Leonard v. Simpson, 2 Bingh. N. C. 179, 180.

(*c*) Palmer v. Waller, 1 Mees. & Wel. 689. S. C. 5 Dowl. 315.

(*d*) 1 Saund. 219, *c.* Merchant v. Driver, *ibid.* 306. Blackmor v. Mercer, 2 Saund. 402.

(*e*) See 1 Saund. 219, *c.* 2 Bingh. N. C. 180, 181.

(*f*) 2 Saund. 402.

eloignment, or conversion, yet it was no *devastavit;* wherefore there ought to have been a *devastavit* found or alleged, otherwise the defendants were not chargeable of their own goods: *Sed non allocatur;* for, by Hale, Chief Justice, perhaps the defendants had not actually wasted the goods of the testator, but had them in their hands in *specie*, and kept them so secretly that the sheriff could not find them to levy the plaintiff's debt upon them; therefore it is reasonable that the defendants should be charged *de bonis propriis*, although there is no *devastavit* in the case: And for this reason, it was adjudged for the plaintiff (*g*).

by action of debt suggesting a *devastavit.*

The action of debt on the judgment suggesting a *devastavit* was substituted in lieu of the proceeding by *scire fieri* inquiry (*h*). The foundation of this action is the judgment obtained against the executor: which, as there has been already occasion to shew (*i*), is conclusive upon him to shew that he has assets to satisfy such judgment. If, therefore, upon a *fieri facias de bonis testatoris*, on a judgment obtained against an executor, either no goods can be found which were the testator's, or not sufficient to satisfy the demand, (or, which is the same thing, if the executor will not expose them to the execution), that is evidence of a *devastavit;* and, therefore, it is very reasonable that the executor should become personally liable and chargeable *de bonis propriis* (*k*). And the mode of proceeding is immaterial, because the executor is entitled to the same defence in debt upon the judgment suggesting a *devastavit*, as in the proceeding by a *scire fieri* inquiry (*l*).

This action may be brought upon the judgment against the executor, upon a bare suggestion of a *devastavit*, without any writ of *fi.fa.* first taken out upon the judgment (*m*). But

(*g*) See also S. P. Merchant *v.* Driver, 1 Saund. 307.

(*h*) Berwick *v.* Andrews, 2 Lord Raym. 974. 1 Saund. 219, *a.* note.

(*i*) *Ante*, p. 1664.

(*k*) 1 Saund. 219, *b.* note (8), to Wheatley *v.* Lane. Blackmor *v.* Mercer, 2 Saund. 403. Erving *v.* Peters, 3 T. R. 686. Farr *v.* Newman, 4 T. R. 637.

(*l*) 1 Saund. 219, *b* note.

(*m*) Wheatley *v.* Lane, 1 Sid. 397. 1 Saund. 219, *c.* note.

the usual course is, first, to sue out a *fieri facias* upon the judgment, and, upon the sheriff's return of *nulla bona,* to bring the action, and state the judgment, the writ, and return, in the declaration; and, on the trial, the record of the judgment, the *fieri facias,* and the return, will be sufficient evidence to prove the case (*n*).

The action is, in form, an action of debt in the *debet* and *detinet,* and the judgment is *de bonis propriis* (*o*). The executor or administrator may plead that he did not waste, &c. in manner and form, &c., and under this plea he may give in evidence, that there were goods of the testator, which might have been taken in execution, and that he showed them to the sheriff (*p*). But the executor or administrator cannot plead *plene administravit,* or any other plea which puts his defence upon want of assets: For such plea would be contrary to what is admitted by the judgment: And if the truth were, that he had no assets, he should have set it up as a defence to the original action, and having neglected to do so, he shall not be permitted to say so afterward (*q*). Again, if he has pleaded *plene administravit* to the original action, and the judgment was had upon a verdict finding that *he had* assets, he is, of course, equally concluded from saying that he had no assets (*r*). And, for the same reason, he cannot

(*n*) Challoner *v.* Challoner, cited in Skelton *v.* Hawling, 1 Wils. 259. Erving *v.* Peters, 3 T. R. 685. 1 Saund. 219, *c.* S. P. where an irregular *testatum fi. fa.* had been issued and returned *nulla bona:* Leonard *v.* Simpson, 2 Bing. N. C. 176. S. C. 2 Scott, 335.

(*o*) Warren *v.* Consett, 2 Lord Raym. 1502. But a declaration in the *detinet* is at any rate cured by verdict; and it seems that, independent of the verdict, the plaintiff, on such a declaration, may take judgment *de bonis testatoris:* Hope *v.* Bague, 3 East, 2.

(*p*) 1 Saund. 219, *c.* note. *Ante,* p. 1695, 1696. The same defence might formerly have been set up under a plea of *nil debet:* Coppin *v.* Carter, 1 T. R. 462. But now by Reg. Gen. H. T. 4 W. iv. (Pleading No. II.), the plea of *nil debet* shall not be allowed in any action: And in actions of debt, other than on specialty or covenant or simple contract, in which the plea of *nil debet* has been hitherto allowed, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.

(*q*) 1 Saund. 219, *c.* note.

(*r*) 1 T. R. 693.

give in evidence the want of assets on the trial of the *devastavit* (*s*). Accordingly in a late case (*t*), in assumpsit against an executrix and two executors for a debt due from the testator, the executors severally pleaded *plene administravit* and the executrix pleaded *plene administravit* except as to 383*l.* 6*s.* 7*d.*, and also, except as to certain goods, of the value of 481*l.* 13*s.* 6*d.*: whereupon the plaintiff signed judgment for 1280*l.* 13*s.* 0*d.* to be levied, as to 865*l.* 0*s.* 1*d.* out of the assets confessed, and as to the residue, of assets *in futuro:* Under a *fi. fa.* thereon the goods produced 400*l.* 9*s.* 5*d.*, and the executrix gave a checque on the bankers with whom the 383*l.* 6*s.* 7*d.* had been deposited, which was dishonoured on the ground that her co-executors had not signed it: Afterwards the plaintiff brought an action of debt suggesting a *devastavit* against the executrix, to which she pleaded that she did not waste, &c.: And it was held that she was bound by her admission that the money was in her hands, and that, although there had been no return of *nulla bona testatoris* to the writ of *fi. fa.*, there was sufficient evidence of a *devastavit* to the amount of 383*l.* 6*s.* 7*d.*

If a man obtains judgment against an executor, and dies, his executor may, without first suing out a *scire facias*, bring an action of debt, upon the judgment against the executor, suggesting a *devastavit;* for the action is brought against the same person against whom the judgment was had, and by that judgment assets were admitted (*u*). So, on the other hand, if a judgment be had against an executor, who after-

(*s*) 1 Salk. 310: Nor upon a writ of inquiry after judgment by default in the original action: Treil *v.* Edwards, 6 Mod. 308. Wharton *v.* Richardson, 2 Stra. 1075. S. C. cited 1 Wils. 258. 1 Saund. 219, c. note. The rule is the same where the executor has pleaded, in the action of debt suggesting a *devastavit*, that he had fully administered, without this, that he eloigned or wasted, whereupon issue has been joined; for the averment in such a plea that the defendant had fully administered is immaterial, and the issue is on the *devastavit* only: Dawson *v.* Gregory, 7 Q. B. 756.

(*t*) Cooper *v.* Taylor, 6 Mann. & Gr. 989. S. C. 7 Scott, N. R. 951.

(*u*) Berwick *v.* Andrews, 2 Lord Raym. 971. S. C. 6 Mod. 125. 1 Salk. 314. *Ante*, p. 670.

wards dies, an action may, since the stat. 30 Car. ii. c. 7 (*v*), be brought against his executor or administrator, upon the judgment, suggesting a *devastavit* by the first executor, and the judgment is as conclusive upon the representative of the executor, as it is upon the executor himself. Therefore, if an action of debt, suggesting a *devastavit* by the first executor in his lifetime, be brought against *his* executor or administrator, he cannot plead that the first executor fully administered the goods of the first testator, or any other plea, purporting that he (that is, the first executor) had no assets to satisfy the judgment, any more than the executor himself could have done (*w*). For whatever act of the executor would have made him personally liable and chargeable with the payment of the demand *de bonis propriis*, will now, by virtue of the statute, make his *personal estate* liable in the hands of his executor or administrator (*x*). But the executor or administrator of the executor may plead, that he, the defendant, has fully administered all the estate of his own testator or intestate (*y*). Moreover the action, when brought against the executor or administrator of the executor, against whom the judgment was obtained, must be in the *detinet* only, and the judgment is *de bonis testatoris* or *intestati* (*z*).

Remedy on judgment obtained against the testator.

But no action of debt suggesting a *devastavit* by the executor lies against him upon a judgment obtained *against his testator:* because that is no admission of assets by the executor: and, therefore, in such cases, it is necessary to sue out a writ of *scire facias* against the executor, to make him a party to the judgment (*a*).

In some cases, a creditor may take the testator's goods in execution in the hands of the executor. For if there be a judgment against the testator at the time of his death, the creditor may take his goods in execution in the hands of the

(*v*) See *ante*, p. 1471.

(*w*) Skelton *v.* Hawling, 1 Wils. 258.

(*x*) 1 Saund. 219, *d.* note.

(*y*) 1 Saund. 219, *e.* note. See *infra*, p. 1710, 1711.

(*z*) 1 Saund. 219, *f.* note.

(*a*) Crosby *v.* Geering, cited in Berwick *v.* Andrews, 2 Lord Raym. 972.

executor, if the judgment was recovered within a year before his death (*b*). For the judgment and execution will bind the goods from the day of the signing of the judgment, and the teste of the writ of the execution, against the party himself, and all other persons but purchasers, notwithstanding the Statute of Frauds, 29 Car. II. c. 3, which statute has been construed to extend only to protect purchasers (*c*). And it seems that the execution creditor may avail himself of this common law right of issuing the *fi. fa.* after the death, but tested in the lifetime of the defendant, notwithstanding the late statute of the 3 & 4 Wm. IV. c. 67, s. 2; for this statute is not obligatory (*d*). But in all the cases above mentioned, care must be taken that the writ of execution be tested on a day previous to the testator's death; for if it be tested on a subsequent day, it will be an irregularity (*e*); and that

Odes *v.* Woodward, 2 Lord Raym. 850. 1 Saund. 219, *f.* note. So, formerly, if the testator died in term time, or in the subsequent vacation, *before* judgment was signed, it might be signed after, and execution taken out against his goods in the hands of his executor, tested the first day of term; for they related to, and were considered as a judgment and execution of the first day of term, at which time the testator was alive: Bragner *v.* Langmead, 7 T. R. 20. Waghorne *v.* Langmead, 1 Bos. & Pull. 571. Calvert *v.* Tomlin, 5 Bing. 1. S. C. 2 Moore & P. 1. See Fann *v.* Atkinson, Willes, 427. So if the testator gave a warrant of attorney to confess judgment, and died within a year after, so that judgment could be entered up without leave of the Court, it might be entered up after his death, and would relate to the first day of the term when he was living, and an execution might be levied on his goods in the hands of his executor: 2 Lord Raym. 766. 7 Mod. 2, 93. 1 Salk. 87. Robinson *v.* Tonge, 3 P. Wms. 398. Finch *v.* Winchelsea, *ibid.* note (E). Heapy *v.* Parris, 6 T. R. 369. 1 Saund. 219, *f.* note. Calvert *v.* Tomlin, 5 Bing. 1. But now by rule of all the Courts, Hil. 4 Wm. IV. (Pleading, No. 3,) "all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day: provided that it shall be competent for the Court or a Judge to order a judgment to be entered *nunc pro tunc.*" See *ante*, p. 763.

(*c*) 1 Saund. 219, *f*, 219, *g*.

(*d*) Brocher *v.* Pond, 2 Dowl. 472. Harmer *v.* Johnson, 14 M. & W. 342, *per* Parke, B.

(*e*) 6 T. R. 369. Where a defendant died between eleven and twelve o'clock in the morning, and a writ of *fi. fa.* was sued out against his goods between two and three o'clock in the afternoon of the same day, the writ was set aside as irregular: Chick *v.* Smith, 8 Dowl. 337, *coram* Patteson, J.

it is not taken out tested *before* the judgment is actually signed (*f*).

However, except in the cases above mentioned, if a defendant dies after final judgment against him, and before execution, the plaintiff cannot have execution without a *scire facias* against the personal representative of the defendant (*g*). If, indeed, there are two or more defendants, and one of them dies after judgment, but before execution, the plaintiff is not put to his *scire facias* against the personal representative of the deceased, but execution may be had against the survivors, within a year, without a *scire facias* (*h*). But the execution in such case should be taken out in the joint names of all the defendants, otherwise it will not be warranted by the judgment (*i*).

The writ of *scire facias* states, that the testator died, having made the defendant his executor, or, in the case of an administrator, the death of the intestate, and the grant of administration; and it is for the defendant to shew why the plaintiff should not have execution of the debt or damages, to be levied of the goods and chattels which were of the testator or intestate at the time of his death, in the defendant's hands to be administered, &c. (*k*).

With respect to the pleas which an executor or administrator may plead in his defence to a *scire facias*, upon a final judgment obtained against his testator or intestate, it is said, that if an executor or administrator pleads *plene administravit*,

(*f*) Parsons *v.* Gell, 7 T. R. 21, note (*c*).

(*g*) 2 Saund. 6, note (1) to Jeffreson *v.* Morton. If there are several executors, a rule *nisi* to revive a judgment against the testator must be served on all who have proved the Will: Panter *v.* Seaman, 5 Nev. & M. 679. If the original executor is dead, the *scire facias* may be against his executor: but if the representative of the deceased executor is an administrator, or if the original representative of him against whom judgment is recovered was an administrator, then the *scire facias* must be against the administrator *de bonis non*: See *ante*, p. 388, 390.

(*h*) Tidd, 1120, 9th edit.

(*i*) *Ibid.*

(*k*) Tidd, 1119, 9th edit. In a *scire facias* on a judgment recovered by an executor, the death of the testator need not be expressly averred: Moorfoot *v.* Chivers, 1 Stra. 631. S. C. 2 Lord Raym. 1395. Tidd, *ubi supra.*

it is bad on a special, though good on a general demurrer; but he ought to plead, that he had nothing in his hands at the time of the death of his testator or intestate, or that no goods came to his hands except so much, if any did, and shew how he administered them (*l*). But this seems questionable, and, indeed, Lord Holt said, in the case of *Newton* v. *Richards* (*m*), that precedents prevailed with him more than the reason of the thing. And the plea was pleaded in *Hickey* v. *Hayter* (*n*), without any objection (*o*). If the judgment, on which the *scire facias* was brought, was not docketed pursuant to the stat. 4 & 5 Wm. and M. c. 20 (*p*), the executor or administrator may give in evidence, under a plea of *plene administravit*, the payment of other debts before action brought, which exhausted all the assets (*q*): And it is not necessary for the defendant to allege in his plea that there was no docket (*r*).

A plea by the executor to the *scire facias* that a writ of error is pending on the judgment is bad; for the object of the *scire facias* is to make the executor party to the judgment; and the Court, in awarding the execution as prayed, does not say that it shall immediately be enforced (*s*).

No damages for delay of execution can be given in a *scire facias;* nor could costs in any case, until the statute 8 and 9 Wm. III. c. 11, s. 3: And the fifth section provides, " that

(*l*) Harecourt *v.* Wrenham, Moor. 858. Ordwey *v.* Godfrey, Cro. Eliz. 575. Petchet *v.* Woolston, Aleyn. 47, 48. Newton *v.* Richards, 1 Salk. 296. S. C. Comberb. 298. Skinn. 565. 4 Mod. 296. 1 Lord Raym. 3, 4. 2 Saund. 72, *dd.* note (4).

(*m*) *Ubi supra.*

(*n*) 6 T. R. 384.

(*o*) See also Hall *v.* Tapper, 3 B. & Adol. 655. *Ante*, p. 859.

(*p*) See *ante*, p. 859.

(*q*) Hickey *v.* Hayter, 6 T. R. 384. But see stat. 2 Vict. c. 11; and *ante*, p. 861.

(*r*) Hall *v.* Tapper, 3 B. & Adol. 655. In a case where judgment was set aside on payment of costs, which were tendered after the death of the defendant, and the plaintiff proceeded to set aside the rule, before any administrator was appointed, and commenced a *sci. fa.* on the judgment, the Court, on terms, permitted the administrator to come in and defend, and set aside all the proceedings subsequent to the declaration: Cash *v.* Cock, 2 Dowl. 3.

(*s*) Snook *v.* Mattock, 5 Adol. & Ell. 239.

nothing herein contained shall be construed to alter the laws in being as to executors or administrators, in such cases where they are not at present liable to the payment of costs of suit." But now by stat. 3 & 4 Wm. iv. c. 42, s. 34, it is enacted, "that in all writs of *scire facias*, the plaintiff obtaining judgment on an award of execution shall recover his costs of suit upon a judgment by default, as well as upon a judgment after plea pleaded, or demurrer joined" (*t*). In a case where there was a judgment for costs in a *scire facias* against an executor, it was held that the judgment was only erroneous in that part, and, therefore, might be reversed as to the costs, and affirmed as to the residue (*u*).

After the plaintiff has obtained judgment of execution against the executor in *scire facias*, he may bring an action of debt in the *debet* and *detinet* on the latter judgment against the executor, suggesting a *devastavit:* And in such action the judgment in *scire facias* is conclusive against the defendant, that he has assets: Therefore he cannot plead *plene administravit;* and the judgment shall be *de bonis propriis* (*v*). However, if the plaintiff pleases, he may bring the action in the *detinet*, and take judgment *de bonis testatoris* (*w*).

If a person taken on a *ca. sa.* died in execution, it was formerly holden that the plaintiff had no further remedy: But now, by stat. 21 Jac. i. c. 24, he may sue out new execution against the lands and tenements, goods and chattels, of the deceased, in the same manner as if such person had never been taken in execution. It has been held, that if a defendant dies in execution, a *fi. fa.* tested and returnable when he was alive and in execution, will support a *testatum fi. fa.* issued under this statute into a foreign county (*x*).

Proceedings on judgment of assets *in futuro.*

If a judgment of assets *quando acciderint* has been entered against an executor or administrator, the plaintiff cannot have execution until some assets come into the hands of the de-

(*t*) See *ante*, p. 1695.

(*u*) Bellew *v.* Aylmer, 1 Stra. 188.

(*v*) Hope *v.* Bague, 3 East, 2.

(*w*) *Ibid.*

(*x*) Farncombe *v.* Kent, 2 Dowl. 464.

fendant, when the plaintiff may bring an action of debt upon the judgment, or sue out a *scire facias* (*y*). Indeed, where the executor or administrator pleads several judgments outstanding, and the plaintiff takes judgment of assets *in futuro*, the future assets shall be in the first place applied to those judgments (*z*). Hence there is a difference as to the future assets, between a plea of *plene administravit* generally, and a special plea of *plene administravit præter* judgments (*a*).

It seems necessary to state, in the writ of *scire facias*, that the assets came to the executor's hands *after* the judgment; for the *scire facias* must pursue the terms of the judgment, which, in this case, are, that the plaintiff do recover his debt to be levied of the goods of the testator which shall *thereafter* come to the hands of the executor: Therefore, where a *scire facias*, on such a judgment as this, of assets *quando acciderint*, stated that divers goods, &c. of the testator, sufficient to pay, &c. had come to, and were in the hands of the defendant to be administered, &c. without stating that those goods had come to the defendant's hands *since the judgment*, and prayed execution against the defendant to be levied of those goods, according to the form and effect of his said recovery, &c., the defendant pleaded, that *after the plaintiff's judgment*, no goods, &c. of the testator had come to the defendant's hands to be administered, &c.; to which the plaintiff replied, that divers goods, &c. had come to the defendant's hands, without adding *since the judgment;* and on demurrer it was adjudged, that the *scire facias* was wrong, for want of the words "*after the judgment:*" For when an executor pleads *plene administravit*, the plaintiff may either deny, or admit that allegation; if he admits it, he takes judgment and prays that his debt may be levied of such assets as may *afterwards* come to the hands of the executor

(*y*) See the form of the *scire facias*, Noell *v.* Nelson, 2 Saund. 219. Mara *v.* Quin, 6 T. R. 1. See also Poulett *v.* Wightman, 1 Bligh. N. S. 138.

(*z*) Parker *v.* Atfield, 1 Salk. 312.

(*a*) 1 Saund. 336, *b.* note.

to be administered; the praying of judgment is an admission that there are no assets in the executor's hands at that time (*b*).

Where, upon a suggestion of assets, a *scire facias* was taken out, and assets were found for part, judgment was given to recover so much immediately, and the residue of assets *in futuro* (*c*).

Scire facias against executor, when defendant dies between verdict and judgment:

At common law, the death of a sole plaintiff or defendant, at any time before final judgment, would have abated the suit (*d*). But now, by the stat. 17 Car. ii. c. 8, s. 1, the death of either party, between verdict and judgment, shall not be alleged as error, so as such judgment be entered within two terms after such verdict. The construction which this statute has received, and the proper mode of taking the benefit of it, have been already considered in a previous part of this Treatise (*e*).

when defendant dies after interlocutory and before final judgment:

If either the plaintiff or defendant happens to die after interlocutory, and before final judgment, it is provided by the stat. 8 and 9 Wm. iii. c. 11, s. 6, that the action shall not abate, if it might have been originally maintained by or against the executors or administrators of the party dying; but the plaintiff, or if he be dead after such interlocutory judgment, his executors or administrators, shall have a *scire facias* against the defendant, if living after such interlocutory judgment, or if he died after, against his executors or administrators, &c. This statute, also, and its construction and operation, have been discussed in an earlier stage of this work (*f*).

In a case (*g*), where the plaintiff brought an action against two defendants, and proceeded to outlawry against one, and went on with the action against the other, who died after interlocutory and before final judgment, it was held, that he

(*b*) Taylor *v.* Holman, Bull. N. P. 169. 2 Saund. 219, *a.* note.

(*c*) Perryman *v.* Westwood, cited in 1 Ventr. 95, and 1 Sid. 448.

(*d*) *Ante*, p. 761.

(*e*) *Ante*, p. 761, 762.

(*f*) *Ante*, p. 764—766.

(*g*) Fort *v.* Oliver, 1 M. & S. 242

could not have a *scire facias* against his administrator; for notwithstanding the outlawry, the action remained jóint, and therefore survived against the other defendant (*h*).

Where the death of the defendant happens after interlocutory judgment, and before the execution of the writ of inquiry, the form of the *scire facias* ought to be for the executors or administrators to shew cause why the damages should not be *assessed* and recovered against them (*i*). And where the defendant dies after the execution of the writ of inquiry, but before the return of it, the *scire facias* must be to shew cause why the damages assessed by the jury should not be *adjudged* to the plaintiff (*k*).

The final judgment upon the writ of inquiry, after interlocutory judgment revived by *scire facias* under the statute 8 & 9 Wm. III., must be against the *executor or administrator*, and not against the *testator or intestate himself*, as it is upon the statute 17 Car. II.; and therefore, it cannot be pleaded as a judgment against the testator or intestate (*l*).

It must be also mentioned in this place, that where the defendant dies, after interlocutory and before final judgment, the plaintiff must sue out two writs of *scire facias* to entitle himself to take out execution; one before final judgment, to make the executors or administrators parties to the record (*m*); the other after final judgment, to give them the opportunity of pleading the want of assets, or any other matter that an executor may plead in his defence to a *scire facias* brought upon a final judgment obtained against his testator; for it would be unreasonable that the executors or administrators should be in a worse situation, where their testator or intestate died before final judgment, than they would have been in, if he had died after (*n*).

(*h*) See *ante*, p. 769.

(*i*) Smith *v.* Harmon, 1 Salk. 315. 2 Saund. 72, *q.* note.

(*k*) Goldsworthy *v.* Southcott, 1 Wils. 243. 2 Saund. 72, *r.* note.

(*l*) Weston *v.* Jámes, 1 Salk. 42. 2 Saund. 72, *r.* note. *Ante*, p. 766.

(*m*) As to whether the rule for a *scire facias* should be a rule *nisi* or absolute in the first instance, see Brown *v.* Evans, 2 Tyrwh. 389.

(*n*) Tomkins *v.* Gratton, Say. Rep. 266. 2 Saund. 72, *r.*

So in a modern case before the House of Lords (*o*), the defendant died intestate after interlocutory judgment, and a writ of inquest of damages executed; but before it was returned, the plaintiff declared in *scire facias* against the administrator, who pleaded *plene administravit*, and set forth in his pleas divers specialties due and owing from the intestate, and charging the estate: The plaintiff having replied, admitting the truth of the pleas, and praying judgment and execution of the goods of the intestate *quando acciderint*, entered up final judgment "to have execution against the defendant, as administrator, according to the force, form, and effect *of the said recovery*;" no recovery having been before stated in any part of the proceedings on the record, and no final judgment having been given in the original action, and no provision being made by the judgment for the payment of the specialty debts: And it was held, that the judgment was erroneous, and it was reversed with costs.

To the *scire facias* upon the interlocutory judgment, the defendant's executor cannot plead a judgment obtained against him on a bond due to the testator, and no assets *ultra*, or any plea of a similar nature; for the statute did not intend that the executor should be in a better situation, as to the assessing of damages upon the inquiry, than his testator, who could have pleaded nothing but a release, or other matter in bar arising *puis darrein continuance* (*p*). But to the *scire facias* after final judgment, the executor or administrator may plead *plene administravit* (*q*).

Costs in ejectment after death of lessor of plaintiff.

If the lessor of the plaintiff in ejectment dies after issue joined, and before trial, or even after trial, and before payment of costs, the defendant cannot recover his costs against

(*o*) Poulett *v.* Wightman, 1 Bligh. N. S. 138.

(*p*) Smith *v.* Harmon, 1 Salk. 315. S. C. 6 Mod. 142: There seems to be a mistake in the report in stating that the intestate sued the *executor*, and obtained interlocutory judgment against him: From the reasons on which the decision appears to be founded, the fact seems to have been, that the intestate obtained interlocutory judgment against the *testator*, and a *scire facias* was sued out against his *executor*: 2 Saund. 72, *ee*.

(*q*) See *ante*, p. 1707.

the lessor's executor or administrator: for the consent rule was merely personal, to make the party liable to an attachment if he refused to pay the costs (*r*). For the same reason, if the lessor of the plaintiff dies before the commission day of the assizes, and the plaintiff is nonsuited on account of the defendant's not confessing, &c., the executor or administrator of the lessor cannot recover any costs (*s*). But in *Goodright* v. *Holton* (*t*), costs, taxed upon the common rule by consent, were ordered to be paid by the defendant to the representative of the lessor of the plaintiff, who died after the trial.

Writ of error against executor:

On a writ of error brought against two executors, one only appeared, and sued out a *scire facias quare executionem non,* upon which the judgment was affirmed for both executors; and upon a second writ of error, the Court held, that a *scire facias quare executionem non* was only to bring in the plaintiff in error to assign his errors; and as he came in upon it, and assigned his errors, he waived any objection, and admitted the one executor to be sufficient to call upon him to assign them, and the Court were not to presume that the other executor was alive: And though a writ of error by one alone, upon a judgment against two, be not good, yet that is on account of the inconvenience that would arise from a perpetual delay of execution, if every defendant might bring a writ of error by himself; but that reason did not hold in this case, where the executors were defendants in error, and not plaintiffs (*u*).

If a plaintiff in error dies before errors assigned, the writ abates, and the defendant in error must thereupon sue out a *scire facias quare executionem non* to revive the judgment against the executors or administrators of the plaintiff in error (*v*). If the plaintiff in error dies, after errors assigned,

(*r*) Doe *v.* Grundy, 1 B. & C. 284. S. C. 2 D. & R. 437. Thrustout *v.* Bedwell, 2 Wils. 7. Doe *v.* Ford, 2 Smith, 407. Roscoe on Real Actions, 607. Adams' Eject. 335, 3d edit. It has been suggested that a *scire facias* will lie, (since stat. 1 & 2 Vict. c. 110, s. 18) to have execution on this rule as on a judgment against the testator. 2 Chitt. Archb. 1521, 8th edit.

(*s*) Thrustout *v.* Bedwell, 2 Wils. 7.

(*t*) Barnes, 119.

(*u*) Knox *v.* Costello, 3 Burr. 1789. Tidd, 1136, 9th edit. See as to writs of error by executors, *ante*, p. 769, *et seq.*

(*v*) Tidd, 1163, 9th edit. 2 Saund. 101, *t*.

it does not abate the writ. In such case, the defendant, having joined in error, may proceed to get the judgment affirmed, if not erroneous: but must then revive it, against the executors or administrators of the plaintiff in error (*w*). And a writ of error does in no case abate by the death of the *defendant* in error, whether it happens before or after errors assigned: If it happen before, and the plaintiff will not assign errors, the executors or administrators of the defendant in error may in proper course proceed to judgment of *non pros* (*x*); or if it happen after, they must proceed as if the defendant in error were living, till judgment be affirmed, and then revive by *scire facias*, but cannot take out execution pending the writ of error (*y*): And in order to compel the executors or administrators to join in error, the plaintiff may sue out a *scire facias ad audiendum errores*, either generally or naming them (*z*).

Remedies against executor of executor.

For those causes of action which are sustainable against an executor in respect of the acts of the deceased, the plaintiff, on the death of a *sole* executor, may maintain the action against his executor: for the executor of such executor is, to all intents and purposes, the executor and representative of the first testator (*a*). But, on the death of an executor, without appointing an executor of his own, or on the death of an administrator, the actions above mentioned must be brought against the administrator *de bonis non* (*b*).

With respect to the remedies for the *devastavit* of an executor or administrator, in the event of his death, it has already appeared (*c*), that, at common law, no executor or administrator was answerable for a *devastavit* by his testator or intestate: But, by the statute 30 Car. ii. c. 7, and 4 & 5 Wm. & M. c. 24, s. 12, this defect has been remedied (*d*).

(*w*) Tidd, 1163, 9th edit. 2 Saund. 101, *u*.

(*x*) See Reg. Gen. H. T. 4 Wm. iv. r. 11.

(*y*) Tidd, *ubi supra*, 2 Saund. 101, *u*.

(*z*) Tidd, 1163, 9th edit. 2 Saund. 101, *u*.

(*a*) See *ante*, p. 207.

(*b*) See *ante*, p. 388, 389.

(*c*) *Ante*, p. 1471.

(*d*) *Ante*, p. 1471.

So that, since these statutes, if a judgment be recovered against an executor, who afterwards dies, an action may now be brought against his executor or administrator, suggesting a *devastavit* by the first executor (*e*). And, in every case where the executor in his lifetime was in any way guilty of any act which amounts in law to a *devastavit*, such as exhausting the assets by payment of debts of an inferior degree before those of a superior, and the like, an action may be brought against the executor, or administrator of such executor, suggesting a *devastavit*, by the former executor (*f*). Such actions must obviously be brought in the *detinet* only, and the judgment must be *de bonis testatoris* (*g*).

Executor, defendant, not within the Court of Requests' Act.

It has already been mentioned, that in one case, the Court permitted a suggestion to be entered on the roll, under the Court of Requests' Act, in an action brought by an administrator (*h*). But, in an action brought *against* an executor, they refused it, saying, that it could not be meant to give the Court of Conscience a jurisdiction over executors: and that, if there was no express exception, there was one implied from the nature and reason of the thing (*i*). By the 66th section of the Small Debts' Act (9 & 10 Vict. c. 95), an executor or administrator may be sued in the County Court as if he were a party in his own right (*k*).

is within the Small Debts' Act.

Executor within the custom of foreign attachment.

Executors and administrators are within the custom of Foreign Attachment; and, therefore, if a plaint be entered in the court of the mayor or sheriff of London against an executor or administrator, the plaintiff may attach money or goods belonging to the deceased in the hands of another within the city (*l*). But a debt due to the deceased cannot

(*e*) See *ante*, p. 1699, 1700.

(*f*) 1 Saund. 219, *e. f.* note (8) to Wheatley *v.* Lane.

(*g*) *Ibid.*

(*h*) Wase *v.* Wyburd, Dougl. 246. *Ante*, p. 1621.

(*i*) Ailway *v.* Burrows, Dougl. 263.

(*k*) See *ante*, p. 1621, 1622.

(*l*) Masters *v.* Lewis, 1 Lord Raym. 57. S. C. 3 Salk. 49. Com. Dig. Attachment, (B.) Fisher *v.* Lane, 3 Wils. 297. S. C. 2 Wm. Black. 834. (See, however, *contrà*,

be attached on a plaint against his personal representative, although he be sued under that description, unless he be sued for a debt due from the deceased (*m*). Nor shall there be an attachment, for the debt of a testator, of goods or money in the hands of the executor, unless they were due or belonging to the testator at the time of his death, although they be assets; as, if an executor sell the goods of the testator, the money cannot be attached in his hands (*n*). Nor, if he take a bond for a debt due to the testator, can the money payable on the bond be attached (*o*). Nor if an executor recover damages in trespass for the testator's goods, or on a covenant made with him, can there be an attachment of the damages (*p*). Nor, if money be awarded to an executor on a submission by him of controversies between his testator and another person, can the money due by the award be attached (*q*). Nor can there be an attachment of a legacy; for creditors have an interest in it, and they are incapable of being warned (*r*).

Remedy against executor by distress:

Where the lessee of lands dies before the expiration of the term, and his executor or administrator continues in possession during the remainder, a distress may be taken for rent due for the whole term (*s*). And the executor or administrator cannot plead *plene administravit* in bar to the avowry (*t*). So the distress may be taken by virtue of the stat. 8 Ann. c. 14, ss. 6 and 7, within six months after the determination

Barrymore *v.* Taylor, 1 Esp. 326, *per* Lord Kenyon.) But the creditor of an intestate cannot, under the custom of London, attach any of his debts by levying a plaint against the Ordinary: 1 Ld. Raym. 57. 3 Salk. 49.

(*m*) Com. Dig. Attachment, (D.) Hodges *v.* Cox, Cro. Eliz. 843. Toller, 478.

(*n*) Horsam *v.* Target, 1 Vent. 113. S. C. 1 Lev. 306. Com. Dig. Attachment, (D.)

(*o*) *Ibid.*

(*p*) *Ibid.*

(*q*) 1 Vent. 112. 1 Lev. 306.

(*r*) Scurra *v.* Merciall, 1 Roll. Abr. 551, tit. Customs de London, (E.) pl. 2. Wood *v.* Smith, Noy, 115. Chamberlain *v.* Chamberlain, 1 Chan. Cas. 257. Com. Dig. Attachment, (D.)

(*s*) Wentw. Off. Ex. 291, 14th edit. Braithwaite *v.* Cooksey, 1 H. Black. 465.

(*t*) Wentw. *ubi supra.*

of the tenancy, if the executor or administrator continues in possession (*u*).

When judgment may be entered on warrant of attorney given by testator:

The death of either party is a countermand of a warrant of attorney to confess judgment (*v*); and, therefore, upon a motion to enter up judgment, if it appear that the defendant is dead, the Court will not grant the motion (*w*). However, formerly, if the defendant died in vacation, within a year after giving the warrant of attorney, judgment might be entered up, of course, at any time after, in that vacation (*x*). But now by Rule of all the Courts, H. T. 4 Wm. IV. (Pleading No. 3) "all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day: Provided that it shall be competent for the Court or a Judge to order a judgment to be entered *nunc pro tunc*" (*y*).

on cognovit.

A cognovit *actionem* is revoked by the death of the party: But in *Calvert* v. *Tomlin* (*z*), where a *cognovit* was given on the 8th of February in Hilary Term, with a condition that judgment should not be entered, unless default should be made in payment on the ensuing 1st of April, and the defendant died in Hilary Vacation before the 1st of April, judgment entered up on the 10th of April in Hilary Vacation, after the defendant's death, was held regular, as relating to the first day of Hilary Term, as also execution tested of a day in that term anterior to the defendant's death. However, since the above mentioned rule of Court came into operation, such a course seems impracticable; because the judgment would have no relation: And the proviso in the rule for

(*u*) 1 H. Black. 465.

(*v*) See *ante*, p. 773. Tidd, 551, 9th edit.

(*w*) Tidd, 551, 9th edit. Harden *v.* Forsyth, 1 Q. B. 177. It will make no difference, that the defendant, by the memorandum on the warrant, agreed for himself and his executors that it should be lawful to enter up judgment at any time, notwithstanding he should be dead: Heath *v.* Brindley, 2 Ad. & Ell. 365.

(*x*) *Ibid. Ante*, p. 774, 1701, n. (*b*).

(*y*) See, as the construction of this proviso, *ante*, p. 763, 764.

(*z*) 5 Bingh. 1. S. C. 2 M. & P. 1.

entering up judgment *nunc pro tunc* applies only, as formerly, to cases, where it is delayed by the act of the Court (*a*).

Proceeding against executor on reference to arbitration by testator.

There has already been occasion to consider, in cases of arbitration, the effect of the death of either party, before or after the making of the award (*b*). It may here be observed, that the Court will not grant an attachment against an executor for the non-performance of an award, which was made under a reference by rule of Court entered into by the testator (*c*).

Liability of executor to pay an attorney's bill after taxation.

If an attorney's or solicitor's bill against the testator should be referred to taxation after his death, questions of difficulty may arise as to the effect of the order for payment by the executor or administrator of the sum found due. In cases where justice requires that the order for taxation should be made, and it, nevertheless, appears probable that, by reason of deficiency of assets, or the like, payment of the amount found to be due ought not to be made without further investigation, the Court or Judge, by whom the order for taxation is made, ought, it should seem, to abstain from adding the usual order for payment or the delivery up of deeds (*d*).

Proceedings against executors of parties to bills of exchange.

If, when a bill of exchange becomes due, and is dishonoured, the drawer or indorser is dead, notice of the dishonour ought to be given to his personal representative (*e*). Where the drawee, acceptor, or maker, is dead, the bill or note must be

(*a*) Lanman *v.* Lord Audley, 2 Mees. & Wel. 535. *Ante*, p. 764.

(*b*) *Ante*, p. 774—776.

(*c*) Newton *v.* Walker, Willes, 315.

(*d*) See *In re* Dalby, 8 Beav. 469.

(*e*) Chitty on Bills, 369, 8th edit. Roscoe on Bills, 199. Byles on Bills, 216, 5th edit. In America it has been held, that where the indorser of a note is dead at the time it becomes due, and there are executors or administrators at that time known to the holder, notice must be given to them: but that if there are no personal representatives at the time, a notice sent to the residence of his family is sufficient, and that it is not necessary afterwards to give notice to executors or administrators, subsequently becoming such: Merchant's Bank *v.* Birch, 17 Johns. R. 25. Bayley, 418. Amer. edit. Roscoe on Bills, note (44).

presented to his executors or administrators (*f*), unless where the bill is made payable and is presented at a particular place, in which case it is not necessary to present it also at the house of the executor or administrator (*g*). In case there is no representative, the holder should demand payment at the house of the deceased (*h*). If the holder of a bill makes the acceptor his executor, and dies, this discharge of the debt by making the debtor executor (*i*) will operate as a discharge of the drawer and prior indorsers (*k*).

Effect of injunction.

Where an injunction had issued against the defendants in an equity suit, restraining them from disposing of the estate of their testator, the Court of Exchequer refused to stay proceedings against them in an action in which the debt was not admitted, observing that the injunction might be a ground for applying to stay execution (*l*).

Competency of executor, as witness.

It may be observed, in concluding this subject, that an executor may be a witness in support of the Will, where an action is brought by or against a devisee of real property, even in a case where the executor takes a beneficial interest in the personalty under the Will: Thus, in *Doe* v. *Teage* (*m*), which was an ejectment against a devisee of land, the question turned upon the sanity of the testator at the time of making the Will: And it was holden, that an executor, who took a pecuniary interest under the Will, was a competent witness for the defendant to support it: The principle is, that the verdict in such case would only have the effect of establishing the Will as to the real property, and it would not be any evidence in the Ecclesiastical Court upon a question whether it were a good Will as to the personalty (*n*). And now by stat. 1 Vict. c. 26, s. 17, it is

(*f*) Roscoe on Bills, 147.
(*g*) Philpott *v.* Bryant, 3 Carr. & P. 244.
(*h*) Roscoe on Bills, 147.
(*i*) See *ante*, p. 1126.
(*k*) Chitty on Bills, 569, 8th edit. Roscoe on Bills, 81.
(*l*) Davis *v.* Salter, 2 Crompt. & Jerv. 466.
(*m*) 5 Barn. & Cres. 335.
(*n*) 5 B. & C. 336. See further, on the subject of the competency

enacted, "that no person shall, on account of his being an executor of a Will, be incompetent to be admitted a witness to prove the execution of such Will, or a witness to prove the validity or invalidity thereof."

Verdict against testator evidence against executor.

A verdict against a testator or intestate may be produced in evidence against his executor or administrator, and binds him (*o*).

What is good secondary evidence of the contents of the Will.

In an action against executors for money had and received by their testator, the plaintiff relied on an admission of the testator contained in his Will: Notice had been given to the defendants to produce the probate, but no evidence was given to prove that the probate was in their possession: An officer of the Spiritual Court produced a document purporting to be the original Will of the deceased, bearing the seal of the Court, and also an indorsement, made by the officer of the Spiritual Court, purporting that probate had been granted to the defendants on that instrument as of the Will of the deceased, and that they had made oath of the value of the effects accordingly: It was objected, on the part of the defendants, that the Will should have been proved by one of the subscribing witnesses, and further, that probate not being produced, the next best evidence was the act of the Spiritual Court, which was not produced: But it was held that the document produced must be taken as proving that the defendants had obtained probate of the paper, and had therefore treated it as the Will of their testator, and consequently that it ought to be received against them, at all events, as secondary, if not as original evidence (*p*).

of an executor as a witness, Lowe *v.* Johns, 1 W. Black. 365. Goodtitle *v.* Bedford, 1 Dougl. 139. Bettison *v.* Bromley, 12 East, 250. Phipps *v.* Pitcher, 6 Taunt. 220. S. C. 2 Marsh. 20. Tomlinson *v.* Wilkes, 2 Brod. & B. 398. Hall *v.* Laver, 3 Y. & Coll. 197. As to the admissibility of entries made by a deceased executor against his interest, see Spiers *v.* Morris, 9 Bingh. 687.

(*o*) R. *v.* Hebden, Andr. 389. Rosc. Ev. 100, 2d edit. See Smith *v.* Smith, 3 Bing. N. C. 29, as to the admissibility of the declarations of the deceased, as evidence against the executor or administrator.

(*p*) Gorton *v.* Dyson, 1 Brod. & Bingh. 219. See *ante*, p. 1657, 1608.

CHAPTER THE SECOND.

OF REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS IN EQUITY.

What suits in equity may be brought against executors, &c.

A executor or administrator is liable, in his representative character, to all equitable demands, with regard to personal property, which existed against the deceased at the time of his death (*a*).

Again, executors and administrators are, in almost every respect, considered, in Courts of Equity, as trustees: Upon this principle, those courts exercise a jurisdiction over them, in the administration of assets, by compelling them, in the due execution of their trust, to apply the property to the payment of debts and legacies, and the surplus, according to the Will, or, in case of intestacy, according to the Statute of Distributions (*b*).

Hence, a Court of Equity will entertain a bill for a personal legacy; or for the distribution of an intestate's personal estate (*c*): and will compel an executor or administrator, in the same manner as it does an express trustee, to discover and set forth an account of the assets, and of his application of them (*d*): And, even in a case where the testator directed that the executor should not be compelled by law to declare the amount of a residue bequeathed to him, the Court

(*a*) Toller, 479.

(*b*) Adair *v.* Shaw, 1 Scho. & L. 262. Other auxiliary grounds of jurisdiction also exist; such as the necessity of taking accounts and compelling a discovery, and the consideration that the remedy at law, when it exists, is not plain, adequate, and complete. See Story's Equity Jurisp. ch. ix. s. 534.

(*c*) Com. Dig. Chancery (3 D. 1). Howard *v.* Howard, 1 Vern. 134.

(*d*) In Brooks *v.* Oliver, Ambl. 406, the acting executor, to whom the produce of an estate in Antigua, belonging to an infant, was consigned, was directed to account annually by affidavit.

directed an account against him (*e*). So an account has been decreed of an intestate's personal estate, notwithstanding an account before taken, and a distribution decreed, in the Spiritual Court (*f*). And a bill may be brought for the discovery of assets, before the Will is proved, or during the litigation thereof in the Spiritual Court (*g*).

Again, a bill lies for the discovery of assets merely for the purpose of enabling the plaintiff to maintain an action at law against an executor (*h*); but not till he has denied assets, by his plea to the action (*i*).

A single creditor may sue in equity for his demand out of the personal assets, and may, as at law, gain a preference, by the judgment in his favour, over other creditors in the same degree, who may not have used equal diligence (*j*). But a person entitled to a share of a sum of money, which is due as a debt from the testator, cannot maintain a bill for his own share, unless he sues on behalf of himself and all other parties interested in the debt, or makes those other persons parties to the suit (*k*).

But the usual course is for one or more creditors to file a bill (commonly called a Creditors' Bill) by and on behalf of him or themselves and all other creditors who shall come in under the decree, for an account of the assets and a due settlement of the estate. For in order to prevent inconvenient preference in the administration of assets, as well as to avoid the burden which several suits by several creditors must bring on the fund to be administered, a Court of Equity allows a creditor to sue on behalf of himself and the other creditors of the deceased, and will thereupon direct a general account of the estate and debts to be taken against the executor or administrator (*l*). And the decree being in that case applied

(*e*) Gibbons *v.* Dawley, 2 Chanc. Cas. 198.

(*f*) Bissell *v.* Axtell, 2 Vern. 47.

(*g*) Dulwich College *v.* Johnson, 2 Vern. 49. Phipps *v.* Steward, 1 Atk. 285. *Ante*, p. 246.

(*h*) Com. Dig. Chan. (2 G. 3.)

(*i*) *Ibid.* (3 B. 2.)

(*j*) See *ante*, p. 890. Mitf. Pl. 166, 167, 4th edit. See Atty. Gen. *v.* Cornthwaite, 2 Cox, 44.

(*k*) Alexander *v.* Mullins, 2 Russ. & M. 568.

(*l*) Mitf. Pl. 166, 4th edit. A

to all the creditors, the other creditors may come in under it, and obtain satisfaction of their demands equally with the plaintiff in the suit; and if they decline to do so, they will be excluded the benefit of the decree, and will yet be considered as bound by acts done under its authority (*m*). After a decree in the suit, the executor cannot do any act to affect the relative rights of creditors (*n*).

The usual decree in a suit of this kind against the executor or administrator, where there is no admission of assets, is (as it is commonly phrased) *quod computet:* that is to say, it directs the Master to take the accounts between the deceased and all his creditors; to cause the creditors, upon due public notice, to come before him to prove their debts, at a certain place and within a limited period; and also directs the Master to take an account of all the personal estate of the deceased in the hands of the executor or administrator; and the same to be applied in payment of the debts and other charges in a due course of administration (*o*). But where the executor or administrator by his answer admits assets sufficient to pay the amount of the plaintiff's debt and all other debts of the deceased, the plaintiff, if his debt be admitted or proved, is entitled, at the hearing, to an immediate decree for payment, and not to a mere decree for an account (*p*).

Again, though after the usual decree *quoad computet*, every creditor has an interest in the suit (*q*), and is, in a

creditor having *debitum in præsenti solvendum in futuro* may maintain such a suit: Whitmore *v.* Oxborrow, 2 Y. & Coll. Ch. C. 13: And so may a claimant under a voluntary covenant: Watson *v.* Parker, 6 Beav. 283.

(*m*) Mitf. Plead. 166, 4th edit. But the Court will let in creditors at any time, while the fund is in Court: *Ante*, p. 1162. Lashley *v.* Hogg, 11 Ves. 602. Angell *v.* Haddon, 1 Madd. 529. Good *v.* Blewitt, 19 Ves. 336. *In re* Wheeler, 1 Scho. & Lef. 242. Gillespie *v.* Alexander, 3 Russ. Chanc. Cas. 136. Greig *v.* Somerville, 1 Russ. & M. 338. David *v.* Frowd, 1 M. & K. 200. March *v.* Russell, 3 Mylne & Cr. 41. Brown *v.* Lake, 1 De Gex & Sm. 144. But see Cattell *v.* Simons, 8 Beav. 143.

(*n*) By Sir John Leach, M. R., in Shewen *v.* Vandenhorst, 2 Russ. & M. 75.

(*o*) Story on Equity, ch. ix. s. 548.

(*p*) Woodgate *v.* Field, 2 Hare, 211. See *post*, p. 1759.

(*q*) See Sterndale *v.* Hankinson,

sense, deemed to be before the Court, yet, until decree, the plaintiff, it should seem, is *dominus litis*, so that he may deal with the suit as he pleases; and he may settle the matter with the executor, by the latter paying the debt and costs of the suit, and compromise the suit and dismiss the bill (*r*). And indeed the Court will compel the creditor to accept payment of his debt, when the executor offers to pay it with the costs of suit (*s*).

It may be further remarked, that there is nothing to prevent other creditors from filing bills for the like purpose; and as it is possible that, before the decree, the litigating creditor may stop his suit, the Court permits them to go on together until a decree in one of them is obtained (*t*).

It must be observed, that, although an executor has a year allowed him in equity to pay legacies, yet that does not extend to debts, but he is liable to be sued the moment after the testator's death (*u*).

By analogy to the case of creditors, a legatee is permitted to sue on behalf of himself and other legatees, and as he might sue for his own legacy only, a suit by one on behalf of all the legatees has the same tendency to prevent inconvenience and expense, as a suit by one creditor on behalf of all creditors of the same fund. But in a suit by a single legatee for his own legacy, unless the personal representative of the testator, by admitting assets for payment of the legacy, warrants an immediate personal decree against himself, by which he alone will be bound, the Court will direct a general account of all the legacies of the same testator, and payment

1 Sim. 399, 400. Cook *v.* Bolton, 5 Russ. 282. Brown *v.* Lake, 2 Coll. 620. Smith *v.* Guy, 2 Phill. Ch. C. 159.

(*r*) 2 Hare, 213. Wood *v.* Westall, 1 Younge, 305.

(*s*) 2 Hare, 213. Pemberton *v.* Topham, 1 Beav. 316. Holden *v.* Kynaston, 2 Beav. 204.

(*t*) 2 Hare, 214. As to staying proceedings in the other suits, see Hawkes *v.* Barrett, 5 Madd. 17. Turner *v.* Dorgan, 12 Sim. 504. Reid *v.* Territt, 1 Coll. 1. Dryden *v.* Foster, 6 Beav. 146. Frowd *v.* Baker, 4 Beav. 76. See also the cases cited, *post*, p. 1721, notes (*y*) and (*z*).

(*u*) Nicholls *v.* Judson, 2 Atk. 301.

of the legacy claimed rateably only with the other legacies, no preference being allowed amongst legatees in the administration of assets (*v*).

Again, for the application of personal estate amongst next of kin, or amongst persons claiming under a general description, as the relations of a testator or other person, where it may be uncertain who are all the persons answering that description, a bill has been admitted, by one claimant on behalf of himself and the other persons equally entitled (*w*).

It may occur that several claimants of this sort file several bills for the purpose of having the estate administered; and, (as in the instance of creditors' bills) (*x*), they may go on together, till a decree in one of them is obtained.—When the usual decree has been obtained in one of such suits, if another suit is instituted praying no further relief than might be had in the former suit, the parties to such former suit ought to apply to have the proceedings in the latter suit stayed; otherwise the costs of it may be dealt with as costs in their suit (*y*). On the application to stay the proceedings, the question is, whether the suit which is sought to be stayed asks something more than could be obtained under the existing decree (*z*).

(*v*) Mitf. Plead. 167, 168, 4th edit. In Tollner *v.* Marriott, 4 Sim. 19, a testator gave 100*l.* to each of the children of his sisters, provided they claimed the same within five years after his decease, by writing under their hands delivered to his executors: No claim was made by the children in the manner prescribed; but within the five years a bill was filed by the residuary legatees, to have the testator's estate administered: And it was held, that the filing of the bill was equivalent to a claim, though the legatees were not parties to the suit. See Berrington *v.* Evans, *post*, p. 1737.

(*w*) Mitf. Plead. 169, 4th edit.

(*x*) *Ante*, p. 1720.

(*y*) Therry *v.* Henderson, 1 Y. & Coll. Ch. C. 481.

(*z*) Rigby *v.* Strangways, 2 Phill. Ch. C. 175. Where two decrees had been made for the administration of the estate of the deceased, one in a creditors' suit, and the other in a legatees' suit, Shadwell, V. C. refused a motion by the plaintiff in the former to stay the prosecution of the decree in the latter, so far as it directed an account of the deceased's estate and of his debts, there being no suggestion of a deficiency of assets: Plunkett *v.* Lewis, 11 Sim. 379. See also Suisse *v.* Lord Lowther, 2 Hare, 424. See further, as to stay-

But although the Court will, in cases of this kind, entertain suits by creditors, legatees, and parties entitled in distribution, on behalf of themselves and all others, and will exonerate the executor or administrator for payment of the assets pursuant to its decree, yet it is not to be understood that such a decree absolutely binds the absent creditors, legatees, or distributees, who have had no opportunity of proving and presenting their claims, so that they are entitled to no redress, but are to be deemed concluded. On the contrary, although they have no remedy against the executor or administrator, yet they have a right to assert their claim against the creditors, legatees, or distributees who have received it (*a*).

Accordingly, where an intestate's estate has been distributed, under a decree in an administration suit, among persons found by the report to be his next of kin, a person claiming to be the sole next of kin of the intestate is not precluded from filing a bill against the persons alleged to have been erroneously found to be the next of kin, for the purpose of retaining restitution of the fund so distributed: And if the right of the plaintiff so claiming shall be established, the persons among whom the fund has been distributed will be compelled to repay it to the plaintiff, but the plaintiff will be bound by the accounts taken in the administration suit (*b*).

But though the distribution of an intestate's estate under a decree of the Court among persons found to be the next of kin does not conclude the rights of persons who may have an equal or paramount title, yet the Court will not assist other next of kin who, with full notice of the proceedings in the suit wherein the fund was distributed, have neglected to prosecute their claims (*c*).

A debtor to a testator cannot maintain a bill against the

ing proceedings in suits of this kind, the cases cited, *ante*, p. 1720, note (*t*).

(*a*) Story on Equity Plead. ch. iv. s. 106. *Ante*, p. 1162, 1163.

(*b*) David *v.* Frowd, 1 Mylne & K. 200. See Anon. 9 Price, 210.

(*c*) Sawyer *v.* Birchmore, 1 Keen, 391. 2 M. & Cr. 211. See also Cattel *v.* Simons, 8 Beav. 143.

personal representative, to obtain the directions of the Court as to the disposal of the money due by him, and to restrain an action, brought by the personal representative to recover the debt, on the ground that the debt has been appropriated by the testator for a particular purpose, and that the personal representative intends to apply it for purposes not warranted by the Will (*c*).

If letters of administration be granted to an infant, under which he receives and disposes of assets of the intestate, an account cannot be directed in respect of his receipts during his infancy (*d*).

Bill of revivor.

If, pending a suit, the defendant dies, it shall be continued by bill of revivor against his executor or administrator (*e*): In this case, if the defendant admits assets, the cause may proceed against him upon an order of revivor merely; but if he does not make that admission, the cause must be heard for the purpose of obtaining the necessary accounts of the estate of the deceased party to answer the demands made against it by the suit; and the prayer of the bill, therefore, usually is, not only that the suit may be revived, but also, that in case the defendant shall not admit assets to answer the purposes of the suit, those accounts may be taken (*f*).

If a decree be obtained against an executor for payment of a debt of his testator, and costs, out of the assets, and the executor dies, and his representative does not become the representative of the testator, the suit may be revived against the representative of the testator (*g*), and the assets of the testator may be pursued in his hands, without reviving against the representative of the original defendant (*h*).

The bill of revivor ought to state so much of the pleadings

(*c*) Darthez *v.* Winter, 2 Sim. & Stu. 536.

(*d*) Hindmarsh *v.* Southgate, 3 Russ. Chanc. Cas. 324.

(*e*) Where a person named as a defendant dies before appearance, an original bill, and not a bill of revivor, ought to be filed against his personal representative: Crowfoot *v.* Mander, 9 Sim. 396. Ashbee *v.* Shipley, 6 Madd. 296. Hardy *v.* Hull, 14 Sim. 21.

(*f*) Mitf. Pl. 76, 4th edit.

(*g*) Mitf. Pl. 78, 4th edit.

(*h*) Adair *v.* Shaw, 1 Scho. & Lef. 262.

in the original suit as is sufficient to shew the title of the plaintiff, as against the defendant, to revive the suit (*i*). And the 49th Order of August, 1841, does not dispense with this (*k*).

Where the testator pleads to a bill, and dies before plea is argued, the executor may plead *de novo* (*l*). The reason seems to be, that the executor may have a plea to defend him without denying the merits: But the answer of the testator will bind the executor who has assets (*m*).

Parties:

The general rule is, that if there are several executors or administrators, they must all be sued, though some of them be infants (*n*): Therefore, a person cannot, either as creditor or residuary legatee, bring a bill in equity against one co-executor only (*o*). But it is only necessary to sue so many of the executors or administrators as have acted: for this is sufficient in law (*p*), and much more in a Court of Equity (*q*). Where an executor in trust was outlawed, and a witness proved that he had inquired after, and could not find him, it was held that it was not necessary to make him a party (*r*).

If a bill is filed against a married woman, executrix or administratrix, her husband must also be a party, unless he is an exile, or has abjured the realm (*s*). Hence, in *Taylor* v. *Allen* (*t*), Lord Hardwicke granted an injunction to re-

(*i*) Phelps *v.* Sproule, 4 Sim. 318.

(*k*) Griffith *v.* Ricketts, 3 Hare, 476.

(*l*) Micklethwaite *v.* Calverly, Cas. temp. Talb. 3.

(*m*) *Ibid.*

(*n*) 16 Vin. Abr. 251, tit. Party, (B.) pl. 20.

(*o*) Scurry *v.* Morse, 9 Mod. 89. In a case where a bill had been filed for an account of the testator's estate, and it was objected that one of the executors was not a party, he was ordered to be introduced into the decree then made, as a party, and ordered to account before the Master, without putting off the cause to add parties: Pitt *v.* Brewster, Dick. 37.

(*p*) See *ante*, p. 1647.

(*q*) Brown *v.* Pittman, Gilb. Eq. Rep. 75. Strickland *v.* Strickland, 12 Sim. 463. Dyson *v.* Morris, 1 Hare, 413.

(*r*) Heath *v.* Percival, 1 P. Wms. 684. An administrator, though insolvent, must be made a party to a bill for a discovery of assets: Ashurst *v.* Eyre, 2 Atk. 51. So although he actually releases, he must be a party to the suit: Smithby *v.* Hinton, 1 Vern. 31.

(*s*) Mitf. Pl. 30, 4th edit.

(*t*) 2 Atk. 213.

strain a wife, executrix, from getting in the assets, her husband being in the West Indies, and not amenable to the process of the Court, on the ground, that if she wasted the assets, or refused to pay, a creditor could have no remedy, inasmuch as her husband must be joined as a party to the suit against her.

If a bill is brought against an executor, during whose infancy the Will appointed an executor *durante minore ætate*, the latter must be made a party, unless the former has received all the testator's personal estate from the hands of the temporary executor, upon an account between them (*t*).

In what cases it is necessary to make the executor, &c. a party:

It seems to be now established, that in a suit for an account of the assets of a deceased person, the personal representative of his former representative is properly joined as a co-defendant with his continuing or present personal representative: Accordingly, in *Holland* v. *Prior* (*u*), it was held, by Lord Brougham, overruling the decision of Sir L. Shadwell, V. C., that the executor of an administratrix, who had received assets of her intestate, might and ought to be made a defendant in a suit instituted by a creditor of the intestate (*v*). But in *Masters* v. *Barnes* (*w*), Knight Bruce, V. C., held, that it was not, in all cases, *necessary*, in an administration suit against a surviving executor, to bring before the Court the representative of the deceased executor. However,

(*t*) Glass *v.* Oxenham, 2 Atk. 121.

(*u*) 1 Mylne & K. 237.

(*v*) In Phelps *v.* Sproule, 4 Sim. 321, A. died, having made B. his executor, who, without proving A.'s Will, possessed part of his assets: B. died and made C. his executrix, who proved his Will and took out administration to A.: A bill was filed against C. for an account of A.'s assets possessed by her and by B.: Afterwards C. died, having made D. her executor; and E. took out administration to A.: The plaintiff filed a bill of revivor and supplement against D. and E. to which D. demurred: And the demurrer was allowed by Shadwell, V. C., on the ground that there was not that continued chain of representation which could justify a bill of revivor against D.: But this case was questioned by Lord Brougham in Holland *v.* Prior, and by Knight Bruce, V. C. in Masters *v.* Barnes.

(*w*) 2 Y. & Coll. Ch. C. 616

subsequently, in *Hall* v. *Austin* (*x*), his Honor appears to have ultimately acceded to the proposition that, as a general rule, where there are several executors who have acted and one of them dies before any suit is instituted, a person interested in the administration of the estate cannot file a bill for the general administration of the estate, making the surviving executors alone parties.

The law, in this respect, has not been altered by the 32nd Order of August, 1841: For it has been held that this order does not apply to the case of a general administration suit (*y*).

There has already been occasion (*z*) to point out the necessity of making the personal representative a party to a suit by a claimant on the real estate, or other fund of a deceased debtor entitled to exoneration by the personal assets. And it may be stated as a general rule, that wherever the personal assets of a deceased person may be affected by

(*x*) 2 Coll. 570.

(*y*) Biggs *v.* Penn, 4 Hare, 469. Hall *v.* Austin, 2 Coll. 570. By the 32nd Order, in all cases in which the plaintiff has a joint and several demand against several persons, either as principal or sureties, it shall not be necessary to bring before the Court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable. Lord Langdale has several times decided that this order applies to a breach of trust, and consequently, that if several executors or trustees have committed a breach of trust, they may be sued severally: Perry *v.* Knott, 5 Beav. 293. Kellaway *v.* Johnson, 5 Beav. 319: And Knight Bruce, V. C. seems to have felt himself bound by these decisions: 2 Coll. 574. But Wigram, V. C., in Shipton *v.* Rawlins, 4 Hare, 619, 623, said he thought Lord Langdale did not intend to lay it down as a universal proposition that wherever a state of circumstances existed which might constitute a breach of trust, if a loss were incurred, the *cestui que trust* can arbitrarily select any one trustee and charge him as for a breach of trust, whatever the nature of his complaint might be: And his Honor proceeded to observe that the case of Walker *v.* Symonds, 3 Swanst. 75, as explained in Munch *v.* Cockerell, 8 Sim. 231, shews that all trustees are *primâ facie* necessary parties to a suit complaining of a breach of trust, although execution might be taken out against one only.

(*z*) *Ante*, p. 433.

the decree, his personal representative must be a party to the suit (*b*).

Likewise, it is clearly established, that an estate cannot be administered in a Court of Equity in the absence of a personal representative (*c*). And, consequently, if the statements of the bill demonstrate that the Court cannot give the plaintiff the relief which he asks without an administration of the estate, there must be a personal representative of it before the Court (*d*). Accordingly, on a demurrer to a bill seeking payment of a legacy out of assets come to the hands of the defendant, who was the husband of the sole executrix deceased, it was held by Lord Cottenham, C., that an allegation that all the testator's debts and the other legacies bequeathed by his Will had been paid, and that there were assets *ultra* in the hands of the defendant to satisfy the plaintiff's demand, was not sufficient to dispense with the presence of a personal representative of the testator, the allegation being one, which, even if admitted by the defendant, the Court would not take his word for (*e*).

If the estate is to be administered, the executor *de son tort* being before the Court will not dispense with the presence of a regular representative: He is only treated as executor for the purpose of being charged, not for any other purpose (*f*).

If, indeed, an executor or administrator has so dealt with a fund, that by reason of such dealing it has ceased to bear the character of a legacy or share of residue, and has assumed the character of a trust-fund, in a sense different from that in which the executor or administrator held it,—if it has been taken out of the estate of the testator, and appropriated to, or made the property, of the *cestui que trust*,—it may not be necessary that the *cestui que trust* should bring before the Court the personal representative of the testator, in a suit to recover that part of the estate (*g*).

(*b*) *Ante*, p. 433.
(*c*) Lowry *v*. Fulton, 9 Sim. 104.
(*d*) 2 Phill. Ch. C. 153.
(*e*) Penny *v*. Watts, 2 Phill. Ch. C. 149.
(*f*) 2 Phill. Ch. C. 152.
(*g*) Bond *v*. Graham, 1 Hare, 482, 484. See also Arthur *v*. Hughes,

An allegation that the defendant, being the person entitled to take out representation to the deceased, refuses to apply for it, and impedes the plaintiff in procuring a grant of it to any other person, is not a sufficient answer to a demurrer founded on the absence of such representative (*h*), though it might be otherwise, if the bill alleged a *lis pendens* in the Ecclesiastical Court (*i*).

In cases where the executor or administrator is required to be made a party, it is not sufficient that he is such by the appointment and authority of a foreign government: He must obtain his right to represent the estate from the Ecclesiastical Courts in this country: for the Courts here look only to the judgments of the Ecclesiastical Courts in this country, in granting probate or letters of administration, to ascertain who are authorized to represent the personal estate (*k*): and it is immaterial what Ecclesiastical Court in this country has granted probate or letters of administration, provided the state of the property was such as to give it jurisdiction (*l*). Accordingly it was held, by Lord Cottenham, in *Tyler* v. *Bell* (*m*), that to a bill which seeks an account of the assets of an intestate who died in India, possessed by a personal representative there, a personal representative of the intestate, constituted in England, is a necessary party, although it does not appear that the intestate at the time of his death had any assets in England: And that it is not sufficient, in order to avoid a demurrer for want of parties in such a case, that the personal representative constituted in India, who is out of the jurisdiction, is made a party, and that process is prayed against him when within the jurisdiction; although the bill alleges that the Indian Court was the proper Court for granting administration, and that the administrator constituted by it is the sole legal personal representative of the intestate (*n*).

4 Beav. 506, and Lord Cottenham's judgment, in Penny *v.* Watts, 2 Phill. Ch. C. 153, 154.

(*h*) Penny *v.* Watts, 2 Phill. Ch. C. 149.

(*i*) *Ibid.* *Ante*, p. 412, *et seq.*

(*k*) *Ante*, p. 302. See also p. 1641.

(*l*) 2 Mylne & Cr. 109.

(*m*) 2 Mylne & Cr. 89.

(*n*) In Anderson *v.* Caunter, 2

It appears to be now settled, after some contrariety of decision on the subject (*o*), that where there is no general personal representative, but a special representative limited to the subject of the suit has been appointed by the proper Ecclesiastical Court, and the limited administrator is made a party to the cause, the estate of the deceased is properly represented in the suit.

Who may be made co-defendants with executors, &c.

The general rule is that, inasmuch as the executor or administrator is the trustee and proper representative of all persons interested in the personal estate, and has the duty cast on him of protecting it against improper demands, it is not necessary or proper to join either a pecuniary or a residuary legatee, or the next of kin, as a party to a bill against the executor or administrator for an account of the personal estate, however interested such persons may be to contest the demand which has occasioned the suit (*p*). Where, however, a question directly occurred between the residuary legatee and a pecuniary legatee, which it was found impossible to determine in a general administration suit, and a suit was afterwards instituted by the residuary legatee against the pecuniary legatee and the executor to determine it, a demurrer by the pecuniary legatee, on the ground that he has improperly been made a party, was, under the special circumstances, overruled by Lord Langdale, M. R. (*q*)

Again, the established rule is, that, in ordinary cases, persons who have possessed themselves of the property of the

M. & K. 763, A., one of the executors of the Will of B., who died in India, proved the Will, and possessed the testator's assets in India: The widow and executrix of A. proved her husband's Will, and possessed his assets in India, and having afterwards come to England, she was made a party to a suit for the administration of B.'s estate: And Sir J. Leach, M. R. held, that it was not necessary that an administrator of A.'s estate in England should be also a party to this suit. But see the observations of Lord Cottenham on this decision, 2 Mylne & Cr. 110. See also Story's Confl. of Laws, ch. xiii. s. 513, note (1), where it said that Anderson *v.* Caunter seems not a sound authority.

(*o*) See *ante*, p. 435, 436.

(*p*) Brown *v.* Dowthwaite, 1 Madd. 446. 9 Beav. 15.

(*q*) Lord Hertford *v.* Zichi, 9 Beav. 11.

deceased, or debtors to the estate generally, cannot be made parties to a bill against the executor: For regularly there can be no suit against the debtor but by the executor, who has the right both in law and in equity: If he even releases, and is solvent, neither a creditor nor a residuary legatee can bring any bill against that debtor: There must be collusion or insolvency, or some special case: The Court will interfere, if there is such special case: as collusion or insolvency; and then the bill may be brought against both the debtor and the executor (*r*). And the general principle on which a debtor to the estate cannot be made a defendant to a bill by a creditor or residuary legatee against the executor, unless collusion, insolvency, or some special case be shewn, applies equally to the case of a creditor over-paid by the executor: that is, if there is no collusion or special case, if the executor is not insolvent, he stands the middle man, responsible for the property misapplied by paying a man as a creditor who was not a creditor, as in the other case for the property outstanding in a debtor (*s*).

But this rule has been relaxed in the case of surviving partners of the deceased: whom it is allowable to make parties with the executor: in order, it is said, that the plaintiff may have an account of the personal estate entire (*t*). Accordingly, in *Bowsher* v. *Watkins* (*u*), it was held, by Sir John Leach, M. R., that residuary legatees might maintain a bill for an account against the executor and the sur-

(*r*) Newland *v.* Champion, 1 Ves. Sen. 105. Utterson *v.* Mair, 2 Ves. Jun. 95. Doran *v.* Simpson, 4 Ves. 651. Troughton *v.* Binkes, 6 Ves. 573. Alsager *v.* Rowley, 6 Ves. 748. Beckley *v.* Dorrington, cited by Lord Eldon, *ibid.* 749. Benfield *v.* Solomons, 9 Ves. 86. Burroughs *v.* Elton, 11 Ves. 29. Consett *v.* Bell, 1 Y. & Coll. Ch. C. 569. Lancaster *v.* Evors, 4 Beav. 158. Baddeley *v.* Curwen, 2 Coll. 151. Barker *v.* Birch, 1 De Gex & Sm. 376. As to whether a refusal by the executor to sue the debtor is sufficient, see the case last cited. The special circumstances which will authorize making the debtor a party are not confined to collusion or insolvency: 1 Y. & Coll. Ch. C. 569. 1 De Gex & Sm. 376.

(*s*) 6 Ves. 748.

(*t*) 1 Ves. Sen. 106, by Lord Hardwicke.

(*u*) 1 Russ. & M. 277.

viving partner of the testator, although collusion between the executor and the surviving partner was neither charged nor proved (*v*).

Multifariousness.

But a debtor cannot be made a party to the bill against the executor, although it alleges collusion between the co-defendants, unless the bill is confined to the recovery of the debt (*w*).

In *Pearse* v. *Hewitt* (*x*), devisees and legatees filed a bill against the trustees and executors of the Will and a mortgagee in possession of part of the estates, alleging that the trustees and executors, colluding with the mortgagee, refused to make him account for the rents which he had received or to redeem the mortgage, and praying for an account of the testator's assets, and that the mortgage might be redeemed: And a demurrer, by the mortgagee, for multifariousness, was allowed.

In *Lewis* v. *Edmund* (*y*), A. died intestate leaving a widow, and infant children his next of kin: The widow, without taking out administration, possessed his assets, paid his debts, and died, having bequeathed her personal estate to the children, and appointed B. and C. her executors: D. then took out administration to the intestate and brought an action, as trustee for the children, against B. and C., for monies alleged to be due from the testatrix to the intestate's estate: B. and C., together with the children, filed a bill against D., praying for all proper accounts of the assets of the intestate and testatrix, possessed by B. and C., and by D.,

(*v*) His Honor, in the previous case of Gedge *v*. Traill, 1 Russ. & M. 281, note, overruled a demurrer to a creditor's bill, which had made the co-partners of the deceased testator co-defendants with his executor, upon the ground that the retaining of assets by a stranger, with consent of the executor, amounted to collusion. In Davies *v*. Davies, 2 Keen, 534, Lord Langdale, M. R., said, that the decision of Bowsher *v*. Watkins is far from establishing the general proposition, that in every case a bill may be filed against an executor and a surviving partner of the testator, without charging and proving fraud or collusion. See also Law *v*. Law, 2 Coll. 41. Cropper *v*. Knapman, 2 Younge & Coll. 338.

(*w*) 7 Sim. 471.

(*x*) 7 Sim. 471.

(*y*) 6 Sim. 251.

and of what, if anything, was due from the testatrix's estate to the intestate's estate, and for an injunction to restrain the action: And it was held, that the bill was not multifarious (z).

Form of bill.

If a bill is filed against an executor for an account of the personal estate of the testator, upon the single charge that he has proved the Will, may be founded every inquiry which may be necessary to ascertain the amount of the estate, it's value, the disposition made of it, the situation of any part remaining undisposed of, the debts of the testator, and any other circumstance leading to the account required (a).

If the Will of the testator is alleged to have been proved by A., his executor, in the Prerogative Court of Canterbury, and the Will of A. to have been proved by B., his executor, *in the proper Ecclesiastical Court*, this has been held to be an insufficient allegation that B. is the personal representative of the original testator (b).

Where the writ of *ne exeat regno* is required, to restrain the executor or administrator from avoiding the plaintiff's demands, by quitting the kingdom, it is usual to insert, before the prayer of process, a prayer for that writ (c).

Writ of *ne exeat regno.*

The writ of *ne exeat regno* has been considered in the nature of equitable bail (d), and it has been understood, that a Court of Equity proceeds, in respect to it, by analogy to the proceedings at law in cases of legal bail (e).

It has been said, that the object of this writ is to obtain security from a person intending to leave the country, when the other party has not a legal remedy, and cannot hold him to bail (f). But it is settled, that, though a plaintiff, swearing to the balance of an account, may have bail at law, yet the Court of Chancery holding a concurrent jurisdiction upon the head of account, the plaintiff may also have the

(z) See also Campbell *v.* Mackay, 1 Mylne & Cr. 603.

(a) Mitf. Pl. 45, 4th edit.

(b) Jossaume *v.* Abbot, 15 Sim. 127. See *ante*, p. 260, *et seq.*

(c) Mitf. Pl. 46, 47, 4th edit.

(d) Haffey *v.* Haffey, 14 Ves. 261.

(e) Pannell *v.* Taylor, 1 Turn. & Russ. 103. See Jenkins *v.* Parkinson, 2 M. & K. 5. *Ante*, p. 760.

(f) Swift *v.* Swift, 1 Ball & B. 227.

writ of *ne exeat regno:* And where a creditor files a bill for an account and administration of the assets, if there is a *clear* affidavit of assets received, the Court of Chancery will grant the writ (*g*).

Generally speaking, the affidavit on which the application for a *ne exeat regno* is grounded, must be as positive as to the equitable debt, as an affidavit of a legal debt, to hold to bail (*h*): but in the case of partners and executors, information and belief is held sufficient (*i*). The affidavit ought to swear, or aver to the best of the knowledge and belief of the deponent, that assets have come to the hands of the executor or administrator (*k*); and it should appear distinctly that he has a present intention to leave the country (*l*).

In *Moore* v. *Meynell* (*m*), Lord Cowper ordered a writ of *ne exeat regno* to issue against a married woman, the administratrix of a former husband, who had come to England to get in his property: And Lord Macclesfield afterwards refused to discharge this order (*n*). And, upon the authority of this case, Lord Hardwicke, in *Jerningham* v. *Glass* (*o*), where a wife was executrix of a former husband, and her second husband was gone out of the kingdom, granted the writ against her alone. Again, in *Moore* v. *Hudson* (*p*), (July, 1821), Sir John Leach, V. C., granted writs of *ne exeat regno* against husband and wife, executrix, the plaintiff undertaking not to serve more than one of the writs. But in *Pannell* v. *Tayler* (*q*), (Feb. 1823) Lord Eldon, after great consideration, decided, that a writ of *ne exeat regno*, against a *feme*

(*g*) Jones *v.* Alephsin, 16 Ves. 471. But a residuary legatee cannot have a writ of *ne exeat regno* against a debtor of the testator, on the ground that he colludes with the executor: Graves *v.* Griffith, 1 Jac. & Walk. 646.

(*h*) 10 Ves. 164. Amsinck *v.* Barklay, 8 Ves. 597.

(*i*) Jackson *v.* Petrie, 10 Ves. 164. Rico *v.* Gualtier, 3 Atk. 501.

(*k*) Anon. 2 Ves. Sen. 489.

(*l*) Darley *v.* Nicholson, 1 Dr. & W. 66.

(*m*) 1 Dick. 30.

(*n*) 3 Atk. 409, 410.

(*o*) 3 Atk. 409. S. C. *nomine* Ternegan *v.* Glass, Ambl. 62. S. C. *nomine* Jernegan *v.* Glass, 1 Dick. 107.

(*p*) Madd. & Geld. 218.

(*q*) 1 Turn. & Russ. 96.

covert executrix or administratrix, cannot be sustained: and the preceding cases must, therefore, it should appear, be regarded as overruled (*r*).

Attachment against wife executrix.

In *Bunyan* v. *Mortimer* (*s*), a bill was filed against a husband and wife in respect of a demand against the wife as executrix: The husband, who was a bankrupt, had appeared for himself and his wife, and had gone abroad, and an attachment had issued against him for want of an answer: And it was held by Sir J. Leach, V. C., that such an attachment could not be granted against the wife, until an order had been obtained that she should answer separately, and that she must have notice of the motion for that order.

Answer.

If a bill is filed against an executor by a creditor of the testator, the executor must admit assets, or set forth an account, though he denies the debt (*t*). But where the defendant sets up a title in himself, apparently good, and which the plaintiff must remove to found his own title, the defendant is not generally compelled to make any discovery not material to the trial of the question of title: Thus, where a testator devised his real estate to his nephew for life, with remainder to his first and other sons in tail, with reversion to his right heirs, and made his nephew executor and residuary legatee of his Will, and, on the death of the nephew, his son entered as tenant in tail under the Will; upon a bill filed by the heir-at-law of the testator, insisting that the son was illegitimate, that the limitations of the Will were, therefore, spent, and the plaintiff became entitled, as heir to the real estate, and praying an account of the personal estate, and application in discharge of debts and incumbrances on the real estate,

(*r*) It appears, from the decree in Moore *v.* Meynel, that the *feme covert* in that case had large separate property, and had executed bonds, &c.: And Lord Eldon observed thereupon, that there may be a very great difference between the case of a married woman who has separate property and the case of a married woman who is administratrix, and as administratrix can have no separate property at all: 1 Turn. & Russ. 103.

(*s*) Madd. & Geld. 278.

(*t*) Randal *v.* Head, Hard. 188. Sweet *v.* Young, Ambl. 353. Shaw *v.* Ching, 11 Ves. 304. Mitf. Pl. 311, 4th edit.

the defendants, against whom the account was sought, insisted on the title of the son as tenant in tail under the Will, and that they were not bound to discover the personal estate until the plaintiff had established his title: Exceptions having been taken to the answer, and allowed by the Master, on exception to his report, the exceptions to the answer were overruled; the Court distinguishing this case, which showed a *primâ facie* title in the defendant, the son of the nephew, from a mere denial of the plaintiff's title (*u*).

An executor shall not protect himself against an account sought by creditors and legatees, on the ground that the transactions were such that no action could have been maintained against the testator: Therefore, in a case where a person, who was executor to a smuggler, on being called on to account for the estate of the testator, endeavoured to avoid a considerable part of the account, by saying that they were smuggling transactions, on which the Courts would not allow any action to be maintained, the answer was, all that died with the smuggler; he could not have been sued himself, but his executor shall not set that up as a defence against his creditors and legatees (*v*).

The Court will not permit an executor or administrator to set up the title of the heir-at-law as between him and the personal representatives: And, therefore, that the executor is uncertain whether part of the property is real or personal, and (if real) who are the persons entitled to it, does not afford him any ground for declining to set forth, in answer to a bill by the personal representatives, what he has done with the property (*w*).

An executor, having paid legacies, stands in a situation in which (at least for the security of the fund) it is not competent to him to allege that debts are unpaid (*x*).

(*u*) Gethin *v.* Gale, cited in Sweet *v.* Young, Ambl. 354. Mitf. Pl. 311, 312, 4th edit. But see, *contrà*, Dott *v.* Hoyes, 15 Sim. 372.

(*v*) Joy *v.* Campbell, 1 Scho. & Lef. 339.

(*w*) Freeman *v.* Fairlie, 3 Meriv. 35, 36, 37.

(*x*) 3 Meriv. 38.

If a suit be commenced for the administration of the estate, it is the duty of executors and administrators, by putting in their answer speedily, to facilitate the obtaining a decree, under which the estate may be protected from actions (*y*).

Pleas:

Statute of Limitations:

Although suits in equity are not within the words of the Statute of Limitations, 21 Jac. i. c. 16, yet they are within the spirit and meaning of it; and, therefore, upon all *legal* demands, the Courts of Equity are *bound* to yield obedience to its provisions (*z*). But if an executor or administrator means to insist on the statute as a bar to the plaintiff's demand, he must claim the benefit of the Act, by plea or answer (*a*).

In *Webster* v. *Webster* (*b*), the testator died in 1786, but the Will was not proved by the executor until 1802: Nevertheless, on a bill filed by the creditor against the executor in 1803, a plea of the Statute of Limitations was allowed, because the bill alleged that the defendant had possessed himself of the personal estate previously to 1792, and might, therefore, have been sued as an executor *de son tort.*

And it appears to be now settled, that if time has once begun to run against a debt in the debtor's lifetime, it does not afterwards cease to run during the period which may elapse between his death and the time at which a personal

(*y*) Clarke *v.* Ormonde, Jacob, 108. See *ante*, p. 1628, *et seq.*

(*z*) Hovenden *v.* Annesley, 2 Scho. & Lef. 630, 631. Foley *v.* Hill, 1 Phill. Ch. C. 399. As to whether a Court of Equity will, after six years acquiescence, decree an account between a surviving partner and the estate of a deceased partner, see Barber *v.* Barber, 18 Ves. 286, the authority of which, however, is much shaken by the judgment of Lord Brougham, in Robinson *v.* Alexander, 8 Bligh, N. S. 375. In Tatam *v.* Williams, 3 Hare, 347, a bill by surviving partners against the executors of a partner, who died thirteen years before the institution of the suit, for an account of his partnership dealings and transactions, charging that the deceased partner was indebted to the firm at the time of his death, was dismissed by Wigram, V. C., with costs, on the ground of lapse of time.

(*a*) Mitf. Pl. 273, 4th edit. But where it appears, on the face of the bill, that the cause of suit accrued more than six years before the filing of the bill, the defendant need not plead the statute, but may demur: Hoare *v.* Peck, 6 Sim. 51. Fyson *v.* Pole, 3 Younge & C. 266, 275, note (*a*).

(*b*) 10 Ves. 93.

representative is constituted to him: The rule in this respect appears to be the same in equity (*c*) as at law (*d*).

In cases of fraud, or mistake, Courts of Equity hold that the statute runs from the discovery; because the laches of the plaintiff commences from that date (*e*).

It was held by Sir Anthony Hart, V.C., in *Sterndale* v. *Hankinson* (*f*), that a bill, which had been filed by one creditor on behalf of himself and all other creditors, prevented the Statute of Limitations (21 Jac. I.) from being a bar to the claim of another creditor, who had come in under the decree: And his Honor stated that he entertained no doubt that every creditor had, after the filing of the bill, an inchoate interest in the suit to the extent of it's being considered as a demand, and to prevent it's being shut out because the plaintiff had not obtained a decree within the six years (*g*). But in *Berrington* v. *Evans* (*h*), (a case which arose after the statute, 3 & 4 Wm. IV. c. 27, s. 40, hereafter mentioned, came into operation) where Berrington, a judgment creditor, had allowed twenty years to elapse without taking steps to recover his debt, and then ascertained that during the twenty years a suit had been instituted by a creditor named Kemp, for the benefit of the specialty creditors of his debtor, and that under a decree in the suit they had received part payment of their debts, and that there was money in Court available for the payment of the remainder; Lord Abinger, C. B., held, that such creditor was barred by the statute from proving his debt before the Master, and receiving payment rateably with the other creditors: And his Lordship observed, that if he were obliged to consider the effect of the decision of *Sterndale* v. *Hankinson* as establishing a general rule, under all circumstances, that the filing a bill by one creditor of A. on behalf of himself and all others, lets in the claims of all the other

(*c*) Freake *v.* Cranefeldt, 3 Mylne & Cr. 499.

(*d*) *Ante*, p. 1663.

(*e*) Brooksbank *v.* Smith, 2 Younge & Coll. 58.

(*f*) 1 Sim. 393.

(*g*) See also Tollner *v.* Marriott, *ante*, p. 1721, note (*v*).

(*h*) 1 Younge & Coll. 434.

creditors, it was clear that the new statute would have no application to the present case, because this would then be the suit of Kemp as well as Berrington, and the bill having been filed within the twenty years, Kemp's interest could not be affected by the new statute; but the learned Judge added, that he could not conceive that the case went the length of deciding that time could, under no circumstances, be a bar in such a suit, either on the statute analogy, or any other (*i*).

It seems to have been held, that notice in a newspaper by a personal representative, that he will pay all debts justly due from his testator, will prevent a debt from being barred by the Statute of Limitations (*k*). But a debt is not taken out of the statute by an advertisement published by the administrator, requesting all persons, having claims on the estate, to send in statements of their demand, prior to their being laid before A. B., by whom the persons claiming to be creditors are to submit to be examined touching the same, if he shall see occasion, in order to their being approved and paid, or rejected, if such latter course be deemed expedient (*l*).

In *Williamson* v. *Naylor* (*m*), a testator by his Will declared that one-fifth of the residue of his personal estate should be divided amongst certain of his creditors named in a schedule to his Will: The schedule contained both the names of the creditors, and the debts due to them respectively: And Alderson, B. held, that the direction so given for payment of these debts prevented the operation of the Statute of Limitations; and that where a testator revives debts which have been barred by the statute, he may appropriate a specific fund for their payment, and, if the fund is not sufficient, the creditors must take rateably.

In *Barton* v. *Tattersall* (*n*), it was held by Sir John Leach,

(*i*) See also Tatam *v.* Williams, 3 Hare, 347.

(*k*) Scott *v.* Jones, 1 Russ. & M. 255. But see stat. 9 Geo. iv. c. 14. *Ante*, p. 1659.

(*l*) 1 Russ. & M. 255. 4 Clark & F. 382.

(*m*) 3 Younge & C. 208.

(*n*) 1 Russ. & M. 237. *Ante*, p. 855, recognized by Lord Cottenham in Ward *v.* Painter, 5 M. & Cr. 298.

on a bill filed to administer the assets of a person who had taken the benefit of the Insolvent Acts, that the rights of his creditors, as to debts scheduled under the Insolvency, were not affected by the Statute of Limitations; on the ground that the liability arose in respect, not of a promise, but of a lien created by the Acts.

After the death of one of two partners, the survivor cannot set up the statute as a bar to a demand against the assets of the deceased (*o*).

The question as to the parties who have a right to insist on the statute, in bar of the demand, in case the executor declines so to do, has been already discussed (*p*).

In *Sirdefield* v. *Price* (*q*), on a bill by a creditor against an executor, for payment of his demand, and an account of the testator's estate, the Court, in consequence of some doubt respecting the validity of the debt, retained the bill for a year, with liberty for the plaintiff to bring an action: And the Statute of Limitations having taken effect between the filing of the bill and the decree, the Court restrained the defendant from insisting at law on the benefit of that statute.

It must be observed that, generally speaking, the Statute of Limitations (21 Jac. I. c. 16) does not run against a trust (*r*). Accordingly, a trust or charge created by Will upon the *real* estate for the payment of debts, prevents the statute from running against such debts as were not barred in the

(*o*) Winter *v.* Innes, 4 Mylne & Cr. 101. It may be questioned whether the representatives of the deceased partner can set up the statute against a claim by a creditor of the firm, whilst the surviving partner continues liable, and the estate of the deceased partner continues liable to contribution at the suit of the surviving partner: *Ibid.* Braithwaite *v.* Britain, 1 Keen, 206. The mere circumstance that the partnership accounts are unsettled does not disentitle the representatives of the deceased partner from the protection of the statute: Way *v.* Bassett, 5 Hare, 68.

(*p*) *Ante*, p. 1535.

(*q*) 2 Younge & Jerv. 73.

(*r*) Hollis's case, 2 Ventr. 345. Hargreaves *v.* Michell, 6 Madd. 326. Barker *v.* Martin, 5 Sim. 380. Wedderburn *v.* Wedderburn, 2 Keen, 722. 4 M. & Cr. 41. Dickenson *v.* Lord Holland, 2 Beav. 130.

testator's lifetime (*s*), though such a trust does not revive a debt on which the statute had taken effect before the Will came into operation, *viz.*, before the testator's death (*t*). But a trust or charge by Will upon the *personal* estate does not at all prevent the operation of the statute: For the law vests the personal estate of the deceased in his executors or administrators, as a fund for the payment of his debts, and he cannot, by his Will, create a special trust for that purpose: Consequently such a trust has no legal operation (*u*). Where a testator directed his debts to be paid out of his real and personal estate, and he afterwards provided that if his personal estate should fall short in paying his debts, then he empowered his executors to enter into the receipts of the rents of his freehold, until the same should be wholly paid off; it was held that, notwithstanding the personal estate was sufficient for payment of the debts, a trust had been created for payment of the debts out of his realty, so as to prevent the operation of the statute; and that the real estate remained liable to pay a simple contract debt which had been left unpaid after distribution of the residuary personal estate (*v*).

In a case where the statute was pleaded in bar to a legacy demanded, due twenty years before, Lord Nottingham held, that a legacy was not barred by the statute, nor ever had been so (*w*). But though before the statute of 3 & 4 Wm. iv. c. 27 (hereafter mentioned) no statute could be pleaded to a legacy, yet presumption of payment, from permitting the assets to be distributed without claiming the legacy, was a good ground of defence by way of answer (*x*). It must,

(*s*) Burke *v.* Jones, 2 V. & B. 275. Hughes *v.* Wynne, 1 Turn. & R. 307. Hargreaves *v.* Michell, 6 Madd. 326.

(*t*) 2 V. & B. 275. 6 Madd. 326.

(*u*) Scott *v.* Jones, 4 Cl. & F. 382, in which case the House of Lords affirmed the judgment of Sir John Leach, and reversed that of Lord Brougham, 1 Russ. & M. 255. See also *Accord.* Freake *v.* Cranefeldt, 3 M. & Cr. 499. Evans *v.* Tweedy, 1 Beav. 55.

(*v*) Crallan *v.* Oulton, 3 Beav. 1.

(*w*) Anon. 2 Freem. 22, pl. 20. See also Parker *v.* Ash, 1 Vern. 257.

(*x*) Higgins *v.* Crawford, 2 Ves. Jun. 572. Pickering *v.* Stamford, *ibid.* 582. Jones *v.* Turberville,

however, be borne in mind, that although, generally speaking, a long lapse of time might lead to the presumption of payment of legacies, yet that presumption, as the like presumption in the case of specialty debts, was liable to be rebutted by circumstances (*y*).

By stat. 3 & 4 Wm. IV. c. 27, s. 40, it is enacted, that "after the 31st of December, 1833, no action, or suit, or *other proceeding* shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, *or any legacy* (*z*), but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment (*a*) of the right thereto shall have been

ibid. 11. Brown *v.* Claxton, 3 Sim. 225. Campbell *v.* Graham, 1 Russ. & M. 453. S. C. in Dom. Proc. 8 Bligh, 622. Baldwin *v.* Peach, 1 Younge & Coll. 453. See Prior *v.* Horniblow, 2 Younge & Coll. 200. Grenfell *v.* Girdlestone, *ibid.* 662.

(*y*) Ravenscroft *v.* Frisby, 1 Coll. 16, 23.

(*z*) This statute applies to legacies payable out of personal estate as well as to legacies charged on real estate: Sheppard *v.* Duke, 9 Sim. 567. A residue bequeathed by Will is clearly within the statute: Prior *v.* Horniblow, 2 Younge & Coll. 200. Christian *v.* Devereux, 12 Sim. 264. Portlock *v.* Gardner, 1 Hare, 594, 604. Adams *v.* Barry, 2 Coll. 285, 290, 293. But where more than twenty years after the death of the testator, the representative of one of his executors, and the residuary legatee under his Will, filed a bill against the representative of the co-executor, to recover residuary assets of the testator, alleged to have been possessed by the co-executor; it was held that the plaintiffs, though barred by the statute as to assets possessed by the executor more than twenty years before the filing of the bill, were not so barred as to assets possessed by him since that time: Adams *v.* Barry, 2 Coll. 290. Where the right to sue for the legacy as such was barred by the statute, but the executor, who had possessed assets to pay it, died leaving it unpaid and having charged his estate with his debts, it was held that the legacy could not be claimed under the charge of debts: Piggott *v.* Jefferson, 12 Sim. 26.

(*a*) See Holland *v.* Clark, 1 Y. & Coll. Ch. C. 151, as to what is a sufficient acknowledgment. See also St. John *v.* Boughton, 9 Sim. 219.

given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action, or suit, or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one was given."

By sect. 42, "After the said 31st of December, 1833, no arrears of rent or of interest, in respect of any sum of money charged upon or payable out of any land or rent, *or in respect of any legacy*, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment (*b*) of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years."

In the construction of this statute, it has been held, that a suit to make an executor account for a sum of money which had been bequeathed to him by his testator upon certain trusts, and which had been severed by the executor from the testator's personal estate, and the interest of which had, for a time, been applied upon the trusts of the Will, so that the fund had ceased to bear the character of a legacy, and had assumed that of a trust fund, must be considered not as a

(*b*) See note (*a*), *supra*, p. 1741.

suit for a legacy, but as a suit to compel a party to account for a breach of trust; and therefore that is not within the terms of the Act (*c*).

Where the defendants by their answer claim the benefit of the " Statute " of Limitations, this is tantamount to claiming the benefit of the Statute Law of Limitations, and entitles them to the benefit of any Statute of Limitations that is applicable to their case (*d*).

Set-off.

There has already been occasion to state, under what circumstances an executor may retain a legacy, by way of set-off against a debt due from the legatee to the testator (*e*). But the executor cannot set off, against a demand upon him as executor, a debt due to him individually (*f*).

Executors cannot account on motion.

There is no regular mode of calling an executor to account, but by bill: Therefore executors cannot be allowed, on motion, to account before the Master for property which the

(*c*) Phillipo *v.* Munnings, 2 Mylne & Cr. 309. See also *Accord.* Dinsdale *v.* Dudding, 1 Y. & Coll. Ch. C. 265. Commissioners of Charitable Donations *v.* Wybrants, 2 Jones & L. 182, 196, *per* Sugden, C. of Ireland. See further as to the statute running against trusts, Ravenscroft *v.* Frisby, 1 Coll. 16. St. John *v.* Boughton, 9 Sim. 219. Where upwards of twenty years had elapsed after an executor had settled the accounts of his testator's estate with the residuary legatee, and had given up all interference in the trust, it was held that the *onus* was on the residuary legatee to prove that the conduct of the executor, which might have been a breach of trust, was so in fact; and that the *onus* was not shifted by an admission that the account was settled on a misunderstanding of the rights of the parties, by which the residuary legatee was prejudiced: Portlock *v.* Gardner, 1 Hare, 594. In the same case it was held that a Court of Equity will not, after a great lapse of time (as of more than twenty years), and where no actual fraud is proved, enter into inquiries for the purpose of raising an implied trust against a defendant, although the same lapse of time would be no bar to a claim founded on an express trust.

(*d*) Adams *v.* Barry, 2 Coll. 290.

(*e*) *Ante*, p. 1119, *et seq.* See also Richards *v.* Richards, 9 Price, 219.

(*f*) Whitaker *v.* Rush, Ambl. 407. Medlicot *v.* Bowes, 1 Ves. Sen. 208. Gale *v.* Luttrell, 1 Younge & Jerv. 180. *Ante*, p. 1596. But in —— *v.* Wood, 2 P. Wms. 131, money lent and goods delivered by the executor to the legatee, were held to be in part payment, and the Court said that the executor, if sued in equity for the legacy, might have insisted that the legatee had received so much of it by money and goods.

testator had bequeathed to minors; as an account so taken will not be binding on the minors, no suit depending in Court, to which they are parties (*f*).

When a receiver shall be appointed:

There has already been occasion to show under what circumstances the Court of Chancery will restrain an *insolvent* or *bankrupt* executor, and appoint a receiver (*g*). And it is now proposed to consider further, in what other cases the Court will exercise this jurisdiction over executors and administrators.

If, in the case of an executor or administrator, any misconduct, waste, or improper disposition of the assets is shewn, the Court will instantly interfere and appoint a receiver (*h*). But the administration is not to be taken from the executor upon slight grounds (*i*).

In *Faith* v. *Dunbar* (*k*), the executor being out of the jurisdiction, a receiver was appointed under stat. 36 Geo. III. c. 90, and administration was afterwards taken out: Under these circumstances Lord Eldon referred it to the Master to reconsider the appointment of receiver, regard being had to the administration granted.

The subject of the appointment of a receiver, during a litigation in the Ecclesiastical Court for probate or administration, has been already considered (*l*).

executors of receiver.

The Court has no jurisdiction to order, in a summary way, the executor of a deceased receiver to bring in and pass his testator's accounts, and pay the balance to be found due, out of the assets (*m*).

(*f*) *In re* Burke, 1 Ball & B. 74.

(*g*) *Ante*, p. 193.

(*h*) Anon. 12 Ves. 5, by Sir Wm. Grant. Middleton *v.* Dodswell, 13 Ves. 268. See also Havers *v.* Havers, Barnard. Chanc. 24. Richards *v.* Perkins, 3 Younge & Coll. 299.

(*i*) 13 Ves. 268. See Smith *v.* Smith, 2 Younge & Coll. 353.

(*k*) Cooper, 200.

(*l*) *Ante*, p. 412—414.

(*m*) Jenkins *v.* Briant, 7 Sim. 171. The proper course, in such a case, if the balance is not ascertained so that the recognizances may be put in suit, is to file a bill against the executor for an account: But this course may be avoided, if the executor will consent to an order to pass the Receiver's accounts and to pay the balance: 2 Dan. Pr. 1624, 2nd edit.

Costs.

In a suit against an executor or administrator, other than a suit for a general administration of the assets, the liability to costs will, generally speaking, be governed by the ordinary rule, which throws them on the unsuccessful party: Accordingly, if an executor or administrator is sued in equity by a creditor for a debt of the deceased, and the creditor succeeds in establishing his demand, the Court will direct the payment of the amount due to the creditor, together with his costs, out of the assets (*m*). The executor, however, will not be decreed to pay the costs, if the assets are insufficient to pay both debt and costs (*n*).

The Court makes no order, in a suit of this kind, with regard to the payment of the costs of the personal representative, it being supposed that he may reimburse himself out of the assets; so that if there be no further fund out of which he may reimburse himself, the costs must come out of his own pocket: And even if it should appear, from the Master's report in the cause, that there is no such fund, still the Court will not give any directions with regard to his costs (*o*).

Costs in an administration suit:

But where a suit is instituted, either by creditors or residuary legatees, for a general administration of assets, so that the whole estate of the deceased is necessarily taken from the hands of the personal representative, and distributed under the direction of the Court, his costs of suit, as between attorney and client, are, generally speaking, provided for; and even where the assets are insufficient to pay the cre-

of the executor, &c. out of the fund:

(*m*) 2 Dan. Pract. 1297. 2nd edit. Lyse *v.* Kingdon, 1 Coll. 184.

(*n*) 2 Dan. Pract. 1297, note (*c*), 2nd edit. Lyse *v.* Kingdon, 1 Coll. 184. The rule at law is different; for whenever an action is brought against an executor for a debt of the testator and he makes an unsuccessful defence, there shall be a judgment against him for the costs of the plaintiff, *de bonis testatoris, et si non, de bonis propriis.* See *ante*, p. 1686.

(*o*) 2 Dan. Pract. 1297. "It is a settled rule," said Lord Redesdale, in Adair *v.* Shaw, 1 Scho. & Lef. 280, "that the executors of an insolvent shall not have costs: To allow them would be productive of the worst consequences: They need not have administered." But this observation does not apply to the costs of executors who are the defendants in administration suits. See *infra* and *post*, p. 1746.

ditors of the deceased, these costs constitute the first charge on the estate (*p*).

But this rule is by no means invariable. For if the suit was occasioned by the ignorance or unreasonable caution (*q*), or by the misbehaviour or the negligence (*r*) of the executor or administrator, his costs of the suit will not be allowed (*s*). But it must be observed, that mere neglect of duty in an executor or administrator, as, for instance, the omission to invest balances pursuant to a direction in the Will, if unaccompanied with fraud, is not such misconduct as to disentitle him to the general costs of the suit, although it may subject him to the costs of so much of the suit as was occasioned by such neglect (*t*). So in a case where a trustee was declared liable for a breach of trust, and was ordered to pay the costs up to the hearing, and complied with the decree; it was held that he was entitled to his costs of the subsequent proceedings for clearing and distributing the fund (*u*). And since the only way in which executors can obtain complete

(*p*) Tipping *v.* Power, 1 Hare, 405, 411. Gaunt *v.* Taylor, 2 Hare, 413. *Ante*, p. 849. Jackson *v.* Woolley, 12 Sim. 12. Ottley *v.* Gilby, 8 Beav. 602. Tanner *v.* Dancey, 9 Beav. 339. So where, on a bill filed by a simple contract creditor, the only specialty creditor was restrained by injunction from proceeding in his action at law, and the assets proved insufficient to pay him, the executor was allowed his costs out of them: Young *v.* Everest, 1 Russ. & M. 426. So the representative of a defaulting executor, fairly accounting, is entitled to deduct his costs of suit out of the assets, though they be insufficient to repair the breach of trust: Haldenby *v.* Spofforth, 9 Beav. 195. If after the suit is instituted, the executor or administrator becomes bankrupt or insolvent, and is indebted to the estate of the deceased, the costs of the executor or administrator incurred before his bankruptcy or insolvency will be set-off against his debt, but his subsequent costs, if properly incurred, will be allowed out of the estate: Samuel *v.* Jones, 2 Hare, 246.

(*q*) Knight *v.* Martin, 1 Russ. & M. 70. Lyse *v.* Kingdon, 1 Coll. 184.

(*r*) O'Callaghan *v.* Cooper, 5 Ves. 117.

(*s*) Nor will the costs of his assignees, if he has become bankrupt, and they are made defendants: Massey *v.* Moss, 1 Hare, 319.

(*t*) Heighington *v.* Grant, 1 Phill. Ch. C. 600. See also Bailey *v.* Gould, 4 Y. & Coll. 221.

(*u*) Hewett *v.* Foster, 7 Beav. 348.

exoneration is by passing their accounts in a Court of Equity, the Court is anxious not to deter them from so doing by visiting them with costs (*v*).

of the plaintiff in the suit, out of the fund.

After the costs of the executor or administrator are satisfied, the next claim on the fund arising from the personal estate is that of the plaintiff in the suit for his costs incurred in it (*w*). Where, indeed, the plaintiff is a simple contract creditor, and it turns out that the estate is not sufficient for the payment of specialty debts, it seems to have been once considered, that the plaintiff ought not to be allowed his costs out of the estate (*x*). But in a subsequent case (*y*), Lord Cottenham ruled otherwise, and observed that it was contrary to reason and to the uniform practice of the Court, that specialty creditors, who came in to take the benefit of the suit instituted by a simple contract creditor, should throw the burthen of the costs of the suit upon the simple contract creditor, where the assets proved insufficient for the full satisfaction of their claims. And in a still later case (*z*), his Lordship directed costs as between solicitor and client to be given out of the fund to a simple contract creditor, who was plaintiff in a suit to administer his deceased debtor's estate, although the assets had proved insufficient to satisfy the specialty creditors. But the insufficiency of the fund to pay the debts is the only case in which the plaintiff in a creditor's suit is entitled to his costs as between solicitor and client (*a*).

(*v*) Low *v*. Carter, 1 Beav. 426.

(*w*) Hearn *v*. Wells, 1 Coll. 323. But the plaintiff shall not be allowed the costs where the litigation was useless: Ottley *v*. Gilby, 8 Beav. 602.

(*x*) Young *v*. Everest, 1 Russ. & M. 426. Rowlands *v*. Tucker, *ibid.* 635, *coram* Sir J. Leach, M. R.

(*y*) Larkins *v*. Paxton, 2 M. & K. 320.

(*z*) Barker *v*. Wardle, 2 M. & K. 818.

(*a*) Brodie *v*. Bolton, 3 M. & K. 168. Tootle *v*. Spicer, 4 Sim. 510. However, in Sutton *v*. Doggett, 3 Beav. 9, where, in a creditors' suit, the assets were sufficient to pay the debts, but insufficient to pay the debts and the costs of suit taxed as between party and party, Lord Langdale, M. R., ordered the plaintiff's extra costs as between solicitor and client to be paid out of the fund. In Wroughton *v*. Colquhoun, 1 De Gex & Sm. 357, where the suit had been instituted by a residuary legatee, and the assets proved insufficient for the payment of the expenses and the

In a case (*b*), where in a creditor's suit a fund had been realized by the diligence of the plaintiff, and the assets were more than sufficient for payment of the debts, the costs of the plaintiff, as between party and party, were ordered to be paid out of the general fund, and the extra costs of the plaintiff were, under the circumstances, directed to be paid *pro ratâ* by all the creditors who partook of the benefit of the suit.

The decree in a creditors' suit usually contains a direction that the creditors shall, before they are admitted, contribute their proportion to the expenses of the suit. If the suit be anything more than a mere creditors' suit, this direction ought to be limited to the costs of that part of the suit in which all the creditors have a common interest with the plaintiff (*c*). The principle is, that where such a suit is properly instituted, and the fund to be administered is insufficient to pay the plaintiff his costs, those who have come in and received a benefit under the decree must contribute to make good that loss which the plaintiff has borne on behalf of all the creditors: Therefore, creditors have been held liable to contribute, notwithstanding they obtained payment by reason of being associated with the defendant in the suit, who, as executor or administrator, had a right of retainer against the estate (*d*). The usual direction in the decree above mentioned does not prevent the Court, on further directions, from ordering, if the case warrants it, that the plaintiff shall pay all the costs of the suit (*e*).

The Court, where it has a fund to administer, and the case

general legacies, it was held by Knight Bruce, V. C., that the plaintiff was not entitled to his costs, as between solicitor and client, except so far as the general estate had been increased by the proceeding: And his Honor, upon the case of Burkitt *v.* Ransom, 2 Coll. 536, being cited as a contrary decision of his own, observed, that he must have proceeded, in that case, on the absence of opposition. See also Hearn *v.* Wells, 1 Coll. 323.

(*b*) Stanton *v.* Hatfield, 1 Keen, 358.

(*c*) Dunning *v.* Hards, 2 Phill. Ch. C. 294.

(*d*) Thompson *v.* Cooper, 2 Coll. 87.

(*e*) 2 Phill. Ch. C. 294.

is one in which the opinion of the Court on the question in the cause is necessary to be taken before the executor or administrator can properly administer the estate, has jurisdiction to give the plaintiff his costs, notwithstanding the bill is dismissed (*f*). And even in a case where a person filling the double character of executor and trustee, makes claim for his own benefit and fails, yet if it is by way of submission of the point to the opinion of the Court, he shall be allowed his costs (*g*).

One consequence of this right of the plaintiff to his costs of the suit appears to be, that if the executor or administrator, after the decree, makes payment of a debt, with a view to be reimbursed out of the fund in Court, his right to be so reimbursed must be postponed to the payment of the plaintiff's costs; that is, he must run the risk of the fund not being sufficient to pay the costs and also to reimburse him (*h*). Again, if the suit has been properly instituted and there are either assets in Court or outstanding assets to be administered, it seems to have been held that the plaintiff's costs of suit must be paid out of those assets, whatever may be the hardship on the executor or administrator as to his demand on them in respect of having, before suit, paid other creditors of the estate with his own money (*i*).

But the personal representative's right of retainer for

(*f*) Thomason *v.* Moses, 5 Beav. 77. Westcott *v.* Culliford, 3 Hare, 274. Cooper *v.* Pitcher, 4 Hare, 485. Johnston *v.* Todd, 8 Beav. 489. Turner *v.* Frampton, 2 Coll. 331. In Hay *v.* Bowen, 5 Beav. 610, where the bill had been filed by one who was entitled to a contingent reversionary interest, and a decree for an account obtained, but before the report, the plaintiff's interest wholly failed, it was held that he was not entitled to his costs, either as against the defendants or the fund.

(*g*) Rashleigh *v.* Master, 1 Ves. Jun. 205.

(*h*) Jackson *v.* Woolley, 12 Sim. 16, 17.

(*i*) Hearn *v.* Wells, 1 Coll. 323, 332, 333. In this case, Knight Bruce, V. C., denied the proposition that an executor has a right, *in equity*, (whatever may be the rule at law, as to which, see *ante*, p. 542), to acquire, as a purchaser, an absolute title to specific chattels, by intending so to deal with them, and by paying the testator's debts to an amount exceeding the value of those chattels. But see Vernon *v.* Thelluson, 1 Phill. Ch. C. 466, 470. *Ante*, p. 1637.

his own debt will prevail, as there has already been occasion to shew (*k*) against the plaintiff's right to his costs.

of creditors coming in under the decree:

It was an established rule that creditors were not to be allowed any of the costs which they were put to, either in the first instance, or in any stage of the proof of their claims before the Master under the decree (*l*). But now by the 47th Order of August, 1841, (as amended by the Orders of April and October, 1842), it is directed, that "a creditor who has come in and established his debt before the Master under a decree or order in a suit, shall be entitled to the costs of so establishing his debt, and the sum to be allowed for such costs shall be fixed by the Master without taxation, at the time the Master allows the debt of such creditors, unless the Master shall think that such costs ought to be taxed in the regular mode; in which case the same shall be so taxed by the Master, [or he shall request the Taxing Master in rotation, or the Taxing Master to whom any taxation in the same cause, or matter, may have been previously preferred, to assist him in taxing the same], and the amount of such costs, or the sum allowed in respect thereof, shall be added to the debt so established" (*m*).

of next of kin coming in under the decree:

It has likewise been laid down as a general rule, that next of kin are not to be allowed the costs of establishing their claims before the Master (*n*). But if next of kin, after having established their claims, are permitted to mix in the

(*k*) *Ante*, p. 895.

(*l*) Nor was a creditor entitled to costs, whose debts had been disallowed by the Master, and allowed by the Court on petition: Watkins *v.* Maule, Jacob, 105. But if his proof was beneficial to the estate, as where he saved by it the expense of a suit, and there were extraordinary costs, the Court would give them on petition: Harvey *v.* Harvey, 6 Madd. 91.

(*m*) In Morgan *v.* Elstob, 4 Hare, 477, a creditor claimed, in an administration suit, to prove the penalty of a bond, as damages for the non-performance of a contract: The Master reported the claim: On the exceptions, the Court gave the creditor liberty to bring an action: The action was brought, and the jury found a verdict for the plaintiff (the creditor), but with nominal damages: The Court, upon this result, refused the creditor the costs of making the claim before the Master, and the costs of the action, but gave him the costs of the exceptions.

(*n*) Waite *v.* Waite, 6 Madd. 110.

cause as if they had been parties, then in respect of such proceedings they may be entitled to their costs (*o*). And in a case (*p*), where in a suit for the distribution of an intestate's estate, certain persons, not parties to the suit, proved themselves to be next of kin before the Master, it was held, that they were entitled to be paid the costs of so doing out of the intestate's estate (*q*). The principle lately laid down by Lord Cottenham on this head is, that next of kin, who are not parties, shall be allowed the same costs as if the plaintiffs had brought them regularly before the Court as parties; and consequently, that if they would, as parties, have been entitled to their costs of proceedings in the Master's office for the purpose of making out their claim and their costs of appearing on further directions, but not otherwise, they shall also be allowed those costs on taxation (*r*).

(*o*) 6 Madd. 110.

(*p*) Bennett *v.* Wood, 7 Sim. 522.

(*q*) See also *Acc.*, Bakewell *v.* Tagart, 3 Y. & Coll. 173, *coram* Alderson, B.

(*r*) Hutchinson *v.* Freeman, 4 Mylne & Cr. 490. Shuttleworth *v.* Howarth, *ibid.* 492. 1 Cr. & Ph. 228. These costs do not include costs incurred out of doors in collecting information as to the pedigree—not the costs of private inquiry; but all the costs incurred in the Master's office—the costs of proceedings in the suit: And where next of kin, or other persons claiming as a class under the Will, succeed in establishing their title, their costs, thus defined, incurred in so doing, are not to be paid exclusively out of the portions attributable to such classes respectively, but out of the general estate before any apportionment of it takes place. 1 Cr. & Ph. 228. So where a legacy is claimed, in an administration suit, by two legatees adversely to each other, the costs must be borne by the testator's estate (inasmuch as the question arises on his Will) and not by the legacy: Wilson *v.* Squire, 13 Sim. 212. See also Ripley *v.* Moysey, 1 Keen, 578. Eyre *v.* Marsden, 4 M. & Cr. 231. But where a residuary estate was divisible amongst several persons, and an account was made up, and the adults received their shares; and the infants filed a bill for an account against the executors and the other residuary legatees, who being satisfied, deprecated the proceedings, and the accounts turned out to be substantially correct; it was held, that the costs of the suit were payable out of the plaintiff's share alone: Mackenzie *v.* Taylor, 7 Beav. 467. Where there are no other assets, the costs must be paid out of the specific legacies *pari passu*: Bristow *v.* Bristow, 5 Beav. 289. Where the decision of the Court in the suit will benefit the real estate, (as well as the personal), by removing difficulties as to the title of the parties claiming it, the Court will direct the costs

in what cases the executor, &c. shall pay costs :

In certain cases the Court will not merely refuse to allow the executor or administrator his costs out of the assets, but will order him to pay the costs of the suit, or, at least, the costs of so much of the suit as was occasioned by a breach of duty on his part (*s*). Thus in *Hide* v. *Haywood* (*t*), a sum of money was offered for the goodwill of a house, part of the testator's estate, which the executors refused to take, unless the person making the offer would promise to employ them in the way of their trade, as wine-merchants: On the ground, that this was "a plain fraud in the executors," which the testator never could mean to protect them in committing, and was, "a diminishing of the estate," Mr. Justice Parker decreed costs against them, notwithstanding the testator had directed, that the executors, for any expenses they should be at, should be allowed their costs out of his estate (*u*) : In another case (*v*), the answer of the executrix was falsified by proof, and as she appeared to have acted fraudulently, and had been very litigious, she was fixed with costs.

Again, in *Seers* v. *Hind* (*w*), Lord Thurlow said, " When I am obliged to give interest against executors, as a remedy for a breach of trust, costs against them must follow of course." And in a case (*x*), where an executor, a trustee for infants, had unnecessarily called in the property which was out on good securities, and had kept large balances in his hands, using the property as his own, Lord Eldon, observed, " where such general dereliction of duty obliges the Court to charge interest upon balances in the hands of an executor, as a specific demand, the same principle calls

to be paid rateably out of the realty and personalty according to their value : Bunnett *v.* Foster, 7 Beav. 540, 544. Johnston *v.* Todd, 8 Beav. 489.

(*s*) See Heighington *v.* Grant, 1 Phill. Ch. C. 600. *Ante*, p. 1746. Hewett *v.* Foster, 7 Beav. 348. *Ante*, p. 1746.

(*t*) 2 Atk. 126.

(*u*) See also Fell *v.* Lutwidge, Barnard. Chanc. 322. Avery *v.* Osborne, *ibid.* 352. Brown *v.* How, *ibid.* 358. Beames on Costs, 91.

(*v*) Vaughan *v.* Thurston, Colles. 175. Beames on Costs, 91.

(*w*) 1 Ves. Jun. 294.

(*x*) Mosley *v.* Ward, 11 Ves. 581.

upon the Court to compel him to make it good to the infants, in point of costs." This rule, however has not been invariably acted upon (*y*); and Sir William Grant, adverting to the doctrine of *Seers* v. *Hind*, that where interest is given against executors for a breach of trust, costs should follow of course, observed, that this was "a proposition, to which he was not quite prepared to accede, as there may be many cases in which executors must pay interest, which would not be cases for costs" (*z*). So in *Tebbs* v. *Carpenter* (*a*), Sir Thomas Plumer, after adverting to the two last mentioned cases, and also to *Newton* v. *Bennet* (*b*), and *Raphael* v. *Boehm* (*c*), says, "It does not, therefore, follow, that in all cases where an executor is directed to pay interest, he must also pay costs. If a suit would have been proper, and the executor a necessary party, though the executor had not misconducted himself, he ought not to pay *all* the costs of such suit, though in the course of the suit it appears he has misconducted himself: but if the misconduct of the executor was the *sole* occasion of the suit, he ought then to pay the costs" (*d*).

However, it is obvious, that in all such cases, the *cestui que trust*, though he receives his interest, must, to the extent of his costs, sustain a loss, unless he likewise receives his costs (*e*).

In *Toner* v. *Thompson* (*f*), where in taking the account of an intestate's estate, the plaintiffs, in consequence of the evasive and fraudulent conduct of the administrator, had been under the necessity of employing an accountant, the administrator was ordered, before the hearing for further directions, to pay the costs of employing the accountant. In *Westover* v. *Chapman* (*g*), the executors were decreed to pay the costs of an unnecessary inquiry, which had been

(*y*) Beames on Costs, 153.
(*z*) Ashburnham *v.* Thompson, 13 Ves. 402.
(*a*) 1 Madd. 308.
(*b*) 1 Bro. C. C. 362.
(*c*) 11 Ves. 92. 13 Ves. 407, 590.
(*d*) See Bennett *v.* Attkins, 1 Younge & Coll. 247. Baker *v.* Carter, *ibid.* 250.
(*e*) Beames on Costs, 154.
(*f*) 7 Sim. 145.
(*g*) 1 Coll. 181.

directed, upon their requisition, before the Master, as to the state of the testator's family.

in what cases the plaintiff shall pay the executor costs.

It remains to consider in what cases the executor or administrator is entitled to receive his costs from the plaintiff. In a creditor's suit, if it turns out that there are no assets applicable to the payment of the plaintiff's debt, the plaintiff will be ordered to pay the costs (*h*). But in *Robinson* v. *Elliot* (*i*), a creditor filed a bill against an executrix, and she stated, by her answer, that there were no assets for the payment of his debt; he, however, persisted in the suit; and the result of the account in the Master's office was, that there were no assets unadministered, though the executrix was charged with more than she had admitted: And it was held, that the bill should be dismissed without costs as against the executrix. In another case (*k*), on further directions, the case appeared to be, that application had been made to an executor for an account, but that he gave no account: The bill was then filed; and by his answer, the defendant stated the accounts; but the plaintiff took a decree for an account: It turned out, on the Master's report, that the account given by the answer was correct; and the question then was, as to costs: The Vice Chancellor gave the plaintiff the costs of the suit up to the decree; and the defendant the costs of the subsequent proceedings.

Motion for payment of money into Court.

According to the present practice, the Court will, immediately upon coming in of the answer of an executor or administrator, order so much as he admits to have in his hands of the property of the deceased, to be paid into Court (*l*): though it was formerly thought necessary for the plaintiff to shew that the executor or administrator had abused his trust, or that the fund was in danger from his insolvent circumstances (*m*). The same order may be ob-

(*h*) Bluett *v.* Jessop, Jacob, 240.

(*i*) 1 Russ. Chanc. Cas. 599.

(*k*) Anon. 4 Madd. 373.

(*l*) Strange *v.* Harris, 3 Bro. C. C. 365. Blake *v.* Blake, 2 Scho. & Lef. 26. Rutherford *v.* Dawson, 2 Ball & B. 17.

(*m*) 3 Bro. C. C. 365. 2 Scho. & Lef. 26.

tained, where the executor or administrator admits a balance in his hands, in his examination (*n*) or on the Master's report (*o*).

The rule appears to have been limited by Lord Redesdale (*p*) to cases in which there are no debts, or the debts are all paid, and there is no purpose for which the money is to be left outstanding. But the rule appears to be much more extensive, and any balance which is admitted to be in the executor's hands will be ordered into Court, notwithstanding there are demands on it to which the executor is liable (*q*). Thus, in *Yare* v. *Harrison* (*r*), an executor having admitted a large balance of the personal estate to be in his hands, was ordered to pay the whole into Court, although he stated that an action at law was depending against him for a debt to a considerable amount due from the testator; but with liberty, in case the plaintiff in the action should recover, to apply to the Court to have a sufficient sum paid out again: The plaintiff in the action did recover, and the Court ordered the amount to be paid out to *the plaintiff in the action*, and not to the executor (*s*).

Where an executor admits himself to have been a debtor to the testator at the time of his death, this has always been held a clear admission of assets in his hands to the amount of the debt, and he is compellable to pay it into Court accordingly (*t*). In this case, the person to pay and the

(*n*) Curvengen *v.* Peters, 3 Anst. 751. Hinde *v.* Blake, 4 Beav. 597.

(*o*) Gordon *v.* Rothley, 3 Ves. 572.

(*p*) 2 Scho. & Lef. 26.

(*q*) 2 Dan. Pract. 1636, 1637, 2nd edit. If an executor admits that all the testator's debts, &c. have been paid, the Court will, on motion, order the income of a balance, paid in by the executor, to be paid to the person entitled to the residue: Dando *v.* Dando, 1 Sim. 510.

(*r*) 2 Cox, 377.

(*s*) It having been suggested, in this case, that the executor had incurred unnecessary costs, by defending the action, the question whether he should personally answer to the estate for the amount of such costs was reserved to the hearing.

(*t*) Mortlock *v.* Leathes, 2 Meriv. 491. Rothwell *v.* Rothwell, 2 Sim. & Stu. 218. Costeker *v.* Horrox, 3 Younge & Coll. 530. Toulmin *v.* Copland, *ibid.* 625.

person to receive being the same, the Court assumes that what ought to have been done has been done, and orders the payment, not as of a debt by a debtor, but as of moneys realised in the hands of the executor (*u*).

The Court, in making an order of this kind, adheres strictly to the rule of acting on the executor's admission only; and will refuse to proceed upon it's knowledge derived from any other source (*v*). And the admission in the answer must be made in reference to an equity raised by the bill, and not in reference to an independent equity stated only in the answer (*w*).

Money admitted by the executor to be in the hands of his partner, is in his own hands for the purpose of being ordered to be paid into Court (*x*).

Where the executor admits that a certain amount of assets has come to his possession, he may discharge himself from the payment of it into Court, wholly or partially, by taking credit for sums which he shews a right to retain for his own debt, due from the testator (*y*), or to have allowed him on any just ground, or which are undisputed (*z*). Where an executor admits that he has received a certain sum belonging to the testator's estate, but adds that he has made payments, the amount of which he does not specify, the Court will allow him to verify the amount of his payments, by affidavit, and order him, on motion, to pay the balance into Court (*a*).

But where there is a sufficient admission by the executor of assets once come to his hands, he cannot relieve himself from paying them into Court by shewing any unauthorized

(*u*) Richardson *v.* Bank of England, 4 M. & Cr. 174, 175, by Lord Cottenham.

(*v*) 4 M. & Cr. 176, 177. Meyer *v.* Montriou, 4 Beav. 343.

(*w*) Proudfoot *v.* Hume, 4 Beav. 476.

(*x*) Johnston *v.* Aston, 1 Sim. & Stu. 73.

(*y*) Middleton *v.* Poole, 2 Coll. 246.

(*z*) Roy *v.* Gibbon, 4 Hare, 65. Nokes *v.* Seppings, 2 Phill. 19.

(*a*) Anon. 4 Sim. 359. See also Proudfoot *v.* Hume, 4 Beav. 477, *per* Lord Langdale.

application of them, or any investment or disposition of them which in substance amounts to a breach of his duty as executor (*a*).

In *Freeman* v. *Fairlie* (*b*), it was held that an admission by an executor that the whole amount of the property was near 40,000*l.*, and that the whole was invested in India on public securities, either in his name, or in the name of the house in which he was a partner, but subject to his disposal, unless some part was in the hands of the said house at interest, which he believed might be the case, was not a sufficient admission of money in his hands to order the payment into Court of any part of it; for that though an executor dealing with money in his hands was bound to ear-mark it, yet if he did not, and could not answer as to the state of it, the Court had no power to act as upon an admission. But in *Roy* v. *Gibbon* (*c*), it was said by Wigram, V. C., that the rule was, perhaps, less strict at the present day than it was stated in *Freeman* v. *Fairlie;* and that the practice now was, that where a party charged himself with the receipt of a fund, he was bound by that charge till he had relieved himself from it by shewing a proper application of the money; and that it was not enough for him whose duty it was to know the truth and be ready with information, to leave the application in doubt, by merely expressing ignorance with regard to the charges to which the fund was liable (*d*).

If there is no danger of the property being lost, from the executor being an insolvent or otherwise, a reasonable time will be allowed for bringing the fund into Court; and a longer time will be allowed when the money is in a foreign country (*e*). And if the assets appear to have been invested on an improper security, time will be allowed (which may, in a proper case, be extended from time to time) to enable the

(*a*) Wyatt *v.* Sharratt, 3 Beav. 498. Hinde *v.* Blake, 4 Beav. 597. Score *v.* Ford, 7 Beav. 333. Roy *v.* Gibbon, 4 Hare, 65.

(*b*) 3 Meriv. 39.

(*c*) 4 Hare, 65.

(*d*) See also Hinde *v.* Blake, 4 Beav. 597.

(*e*) Roy *v.* Gibbon, 4 Hare, 65.

executor to realize the security (*e*). And in fixing the day for payment time will be allowed for the trustee, if he desires it, to shew that no reason exists for calling the money into Court (*f*).

The relief on a motion of this kind will be confined to the payment of money into Court, and the Court will not direct any permanent relief, such as the repurchase of stock which had been sold by the executor; for that can be done only at the hearing of the cause (*g*).

Though a receiver may have been appointed during a litigation in the Ecclesiastical Court respecting the validity of a Will, the Court of Equity will not, on that account alone, order the person named as executor to pay into Court money in his hands belonging to the testator's estate received previously to the appointment of the receiver (*h*).

The general rule as to payment of money into Court, is, that the plaintiffs must be solely entitled, or have such an interest jointly with others as to entitle them, on behalf of themselves and of those others, to have the fund secured (*i*).

An executor, having been ordered to pay money into Court, is not thereby deprived of his right of retainer (*k*), nor of his lien on the fund of his costs (*l*).

Motion for production of papers, &c.

The general rule, as to papers and writings, is, that an executor representing an estate should deposit them, for the benefit of the parties interested, in the Master's office, unless there are other purposes, which require that he should retain them in his own hands (*m*). With respect to motions for the

(*e*) Score *v.* Ford, 7 Beav. 333. 3 Beav. 498. 4 Beav. 599.

(*f*) Hill on Trustees, 571. Hinde *v.* Blake, 4 Beav. 599.

(*g*) Futter *v.* Jackson, 6 Beav. 424. Hill on Trustees, 570.

(*h*) Reed *v.* Harris, 7 Sim. 639.

(*i*) 3 Meriv. 29. Where part of a residuary estate has been invested on an improper security, and the defendant has an interest therein, the Court, on being satisfied that there is no existing claim on the estate, sometimes confines the amount to be paid into Court to the share of the plaintiff: Score *v.* Ford, 7 Beav. 333.

(*k*) *Ante*, p. 895.

(*l*) Blenkinsop *v.* Foster, 3 Younge & Coll. 207, *coram* Alderson, B.

(*m*) Freeman *v.* Fairlie, 3 Meriv. 30.

production of books, papers, or the like, it may be observed, that it is the bounden duty of an executor to keep clear and distinct accounts of the property which he is bound to administer: If, therefore, he chooses to mix the accounts with those of his own trading concerns, he cannot thereby protect himself from producing the original books, in which any part of those accounts may be inserted: It is a more difficult question, as between an executor, bound to produce, and his partner in trade; but, if the partners have *permitted* him to mix the accounts, it seems they cannot afterwards object to the production: Clearly so, in a case where the executor has admitted the having lent to the house part of the trust property, and that they have been dealing with it (*n*).

Accordingly, in *Freeman* v. *Fairlie* (*o*), an executor in India, coming to England, and after twenty-one years, being called upon to account, alleging that he had left his books, &c. behind him in India, was ordered to produce copies of all entries in such books, &c. within six months, though it was impossible he should do so, in order that the Court might have an opportunity from time to time of seeing that he had used proper diligence.

When the Court will decree payment of the plaintiff's demand without first decreeing an account:

If the plaintiff's demand be uncontested or proved, and the executor admits assets, the plaintiff is entitled at the hearing to an immediate decree for payment without taking the accounts (*p*). And it may be further observed, that the same doctrine prevails though the executor denies assets in hand

(*n*) 3 Meriv. 43, 44. The Court, however, will not order a defendant, who has a joint possession of a document with some one else not before the Court, to produce the document itself: Taylor *v.* Rundell, Cr. & Ph. 111.

(*o*) *Ibid.* 44.

(*p*) Woodgate *v.* Field, 2 Hare, 211. *Ante*, p. 1719. Where the answer admitted assets, but insisted that, under the circumstances stated, the legacy sought to be recovered had been paid, it was held that the plaintiff had a right to read the passage admitting the assets, without reading that as to the payment of the legacy: Connop *v.* Hayward, 1 Y. & Coll. Ch. C. 33. An admission of assets by the executor's answer is waived by the plaintiff's going on to an account of assets, and procuring a receiver to be appointed: Wall *v.* Bushby, 1 Bro. C. C. 484.

at the time of filing his answer, if he also discloses that he had, at one time, sufficient assets, but that he has since misapplied them (*q*). An admission of assets for the payment of a legacy, is an admission of assets for the purposes of the suit, and extends to costs, if the Court think fit to give them (*r*).

where the executor has made himself personally liable by admitting assets, &c.:

Again, if the bill charges that the executor has rendered himself personally liable to pay the plaintiff's debt or legacy by an admission of assets made before suit, or by any other means, and the plaintiff can sustain this allegation, he will entitle himself to a decree for payment at once (*s*). And the general rule is, that an admission of assets by an executor or administrator can never be retracted in a Court of Equity, unless a case of mistake be most clearly established (*t*). If, however, a strong case be made out, this may enable the Court to relieve him from the admission (*u*); as if the money were in a banker's hands, who fails: But the executor or administrator must clearly prove the mistake, and shew that the circumstance, on which he built his admission, failed (*v*).

The admission of assets by an executor will not preclude creditors from coming on a fund specifically appropriated for their benefit, although that fund may have been disposed of to a purchaser (*w*).

what is an admission of assets.

With respect to what shall amount to an admission of assets, it was held, in a case (*x*) where the deceased gave

(*q*) Rogers *v.* Soutten, 2 Keen, 598.

(*r*) Philanthropic Society *v.* Hobson, 2 M. & K. 357. If there are several executors and some admit assets, yet an account may be decreed against the rest: Norton *v.* Turvil, 2 P. Wms. 145. Where in an examination put in by two executors, it was stated that their receipts had been joint, but it appeared, by affidavit, that that statement was made through mistake and inadvertence, and that one of the executors had, in fact, received nothing, liberty was given to him to put in a supplemental affidavit, to correct the mistake: Hewes *v.* Hewes, 4 Sim. 1.

(*s*) Barnard *v.* Pumfrett, 5 M. & Cr. 63. Dinsdale *v.* Dudding, 1 Y. & Coll. Ch. C. 265.

(*t*) Drewry *v.* Thacker, 3 Swanst. 548. Roberts *v.* Roberts, cited 1 Bro. C. C. 487. S. C. 2 Dick. 573.

(*u*) See Foster *v.* Foster, 2 Bro. C. C. 619. Young *v.* Walter, 9 Ves. 365.

(*v*) Horsely *v.* Chaloner, 2 Ves. Sen. 85.

(*w*) Curtis *v.* Blow, 2 Barn. & Adol. 426.

(*x*) Campbell *v.* Lord Radnor, 1 Bro. C. C. 271. 5 M. & Cr. 70.

money upon mortgage to a charity in Ireland, that his executrix, by her own Will attempting to provide other means for payment of that legacy, and stating as a reason that his personal estate was out on mortgage, thereby admitted assets of her testator (*y*). Payment of interest for a legacy by the executor, from time to time, will be evidence of assets, though a single instance of payment of interest will not (*z*). So where executors, from time to time, had made some payments on account of principal and interest on a legacy, and about nine years after the testator's death, passed their accounts at the Legacy Duty Office, shewing a considerable residue; Lord Langdale held, that the legatee was entitled to an immediate decree for payment of the legacy, without first taking an account of the testator's estate (*a*).

But in *Postlethwaite* v. *Mounsey* (*b*), it was held by Wigram, V. C., that payment by the executor of the interest of a legacy to the tenant for life under the Will was not conclusive as an admission of assets by the executor; but that such payment might be explained as having been made by mistake, or for other reasons or causes; and that in that case the usual account of assets might be directed: And his Honor observed, that it would be difficult to hold that the payment of one legacy would, of itself, bind the executor to pay all the legacies given by the Will: Suppose a case in which small legacies were given to servants, and the executor chose, on his own responsibility, to pay those legacies at once, without reference to the state of the assets, it would be hard to say that he had thereby conclusively bound himself to pay all the legacies given by the Will. In the subsequent case of *Savage* v. *Lane* (*c*), the same learned Judge held, that, at all events, where the bill in a creditor's suit does not specifically charge the executor with having made himself

(*y*) See also Elliott *v.* Holwell, 1 Cas. temp. Lee, 574.

(*z*) Corporation of Clergymens' Sons *v.* Swainson, 1 Ves. Sen. 75. 5 M. & Cr. 70, by Lord Cottenham. Atty. Gen. *v.* Chapman, 3 Beav. 255. Atty. Gen. *v.* Higham, 2 Y. & Coll. Ch. C. 634.

(*a*) Whittle *v.* Henning, 2 Beav. 396.

(*b*) 6 Hare, 33, note (*a*).

(*c*) 6 Hare, 32.

personally liable, but prays that an account may be taken and the estate administered, the executor's admission in his answer that he has paid certain legacies, is not such an admission of assets as to entitle the plaintiff to a decree without taking the account.

The general rule, however, is that an admission of assets by the executor to one claimant on them is an admission to all (*d*).

In *Holland* v. *Clark* (*e*), Sarah Clark bequeathed a legacy of 150*l.* to Susannah C., when she should attain 21: The testatrix died in 1811, and the legatee did not attain 21 till several years afterwards, and she then married: In 1825, the executors signed and gave to her husband this memorandum: "We separately and jointly acknowledge to owe to George Holland the sum of 150*l.*, being a legacy left to his wife by the late Sarah Clark, and 50*l.* interest thereon:" And it was held by K. Bruce, V. C., that, under the circumstances, this memorandum amounted to an admission of assets by the executors.

A most important statute has recently been passed, as well with respect to the facilitating of remedies against executors and administrators, as also for their relief in the discharge of their duties.

10 & 11 Vict. c. 96.

By stat. 10 & 11 Vict. c. 96, entitled, *An Act for better securing Trust Funds, and for the Relief of Trustees*, after reciting that "it is expedient to provide means for better securing trust funds, and for relieving trustees from the responsibility of administering trust funds in cases where they are desirous of being so relieved," it is enacted, "That all trustees, executors, administrators, or other persons, having in their hands any monies belonging to any trust whatsoever, or the major part of them, shall be at liberty, on filing an affidavit shortly describing the instrument creating the trust, according to the best of their knowledge and belief,

Trustees may pay trust monies or transfer stocks, and securities into the Court of Chancery.

(*d*) Cook *v.* Martyn, 2 Atk. 2. 5 M. & Cr. 70, by Lord Cottenham.

(*e*) 2 Y. & Coll. Ch. C. 319.

to pay the same, with the privity of the Accountant General of the High Court of Chancery, into the Bank of England, to the account of such Accountant General in the matter of the particular trust (describing the same by the names of the parties, as accurately as may be, for the purpose of distinguishing it), in trust to attend the orders of the said Court; and that all trustees or other persons having any annuities or stocks standing in their name (*f*) in the books of the governor and company of the Bank of England or of the East India Company, or South Sea Company, or any government or parliamentary securities standing in their names, or in the names of any deceased persons of whom they shall be personal representatives, upon any trusts whatsoever, or the major part of them, shall be at liberty to transfer or deposit such stocks or securities into or in the name of the said Accountant General, with his privity, in the matter of the particular trust, (describing the same as aforesaid), in trust to attend the orders of the said Court; and in every such case the receipt of one of the cashiers of the said Bank for the money so paid, or, in the case of stocks or securities, the certificate of the proper officer, of the transfer or deposit of such stocks or securities, shall be a sufficient discharge to such trustees or other persons for the money so paid, or the stocks or securities so transferred or deposited."

10 & 11 Vict. c. 96.

Receipt of bank cashier, or certificate of proper officer, to be sufficient discharge.

II. "Such orders as shall seem fit shall be from time to time made by the High Court of Chancery in respect of the trust monies, stocks, or securities so paid in, transferred, and deposited as aforesaid, and for the investment and payment of any such monies, or of any dividends or interest on any such stocks or securities, and for the transfer and delivery out of any such stocks and securities, and for the administration of any such trusts generally, upon a petition to be presented in a summary way to the Lord Chancellor or the Master of the Rolls, without bill, by such party or parties, as to the Court

Court of Chancery to make orders on petition, without bill, for application of trust monies and administration of trust.

(*f*) The case of stock standing in the joint names of surviving and deceased trustees is within the Act: *In re* Parry, 6 Hare, 306.

10 & 11 Vict. c. 96.

shall appear to be competent and necessary in that behalf, and service of such petition shall be made upon such person or persons as the Court shall see fit and direct; and every order made upon any such petition shall have the same authority and effect, and shall be enforced and subject to re-hearing and appeal, in the same manner as if the same had been made in a suit regularly instituted in the Court; and if it shall appear that any such trust funds cannot be safely distributed without the institution of one or more suit or suits, the Lord Chancellor or Master of the Rolls may direct any such suit or suits to be instituted."

Lord Chancellor, with Master of the Rolls, &c. may make general orders.

IV. "The Lord Chancellor with the assistance of the Master of the Rolls or of one of the Vice Chancellors, shall have power and is hereby authorized to make such orders as from time to time shall seem necessary for better carrying the provisions of this Act into effect" (*g*).

(*g*) In pursuance of this section, the following Order was made on the 10th of June, 1848:—" I. Any trustee desiring to pay money, or transfer stock or securities, into the name of the accountant-general of the Court of Chancery, under the said Act, is to file an affidavit, entitled in the matter of the Act and of the trust, and setting forth, 1. His own name and address. 2. The place where he is to be served with any petition or any notice of any proceeding or order of the Court relating to the trust fund. 3. The amount of stock, securities, or money which he proposes to deposit, or to transfer, or to pay into Court to the credit of the trust. 4. A short description of the trust and of the instrument creating it. 5. The names of the parties interested in or entitled to the fund to the best of the knowledge and belief of the trustee. 6. The submission of the trustee to answer all such inquiries relating to the application of the stocks, securities, or money transferred, deposited, or paid in under the Act as the Court may think proper to make or direct. II. The accountant-general on production of an office copy of the affidavit, is to give the necessary directions for transfer, deposit, or payment, and to place the stock, securities, or money to the account of the particular trust, and such transfer, deposit, or payment is to be certified in the usual manner. III. The trustee having made the payment, transfer, or deposit, is forthwith to give notice thereof to the several persons named in his affidavit, as interested in or entitled to the fund. IV. Such persons or any of them, or the trustee, may apply by petition as occasion may require, respecting the investment, payment out, or distribution of the fund, or of the dividends or interest thereof. V. The trustee is to be served with notice of any appli-

Remedy for *devastavit*:

If an executor changes the nature of the testator's estate, the general rule is, that this is a conversion; and as money has no ear-mark, it cannot be followed: but the executor by such transactions has made himself liable to a *devastavit* (*b*), for which the party injured must seek satisfaction out of the executor's own effects (*c*). If an executor purchases estates with the assets, and takes the conveyance in his own name, without the trust appearing on the face of the deeds, the estate will not be liable to the trusts, although he die insolvent, unless the application of the purchase money can be clearly proved (*d*).

But if an executor, for the benefit of the testator's estate, should invest part of it in the funds, or transfer money from one stock to another, this is not a conversion, but it may still be followed, as much as if it had continued in the same condition as at the testator's death (*e*).

The general question, as to the right of creditors and legatees to follow the assets into the hands of the person to whom the executor has aliened them, has been investigated in a former part of this Work (*f*).

In *Skinner* v. *Sweet* (*g*), it appeared that an executrix, in respect of her receipt as such, was considerably indebted to

cation made to the Court respecting the fund or the dividends, or interest thereof, by any party interested therein, or entitled thereto. VI. The parties interested in or entitled to the fund, are to be served with notice of any application made to the Court by the trustee, respecting the fund in Court, or the interest or dividends thereof. VII. No petition is to be set down to be heard until the petitioner has first named a place where he may be served with any petition or notice of any proceeding or order of the Court relating to the trust fund. VIII. Petitions presented, and affidavits filed under the said Act, are to be entitled in the matter of the said Act (10 & 11 Vict. c. 96), and in the matter of the particular trust."

(*b*) Waite *v.* Whorwood, 2 Atk. 159.

(*c*) Charlton *v.* Low, 3 P. Wms. 330.

(*d*) 2 Sugd. Vend. & Purch. 148, 9th edit. See Kendar *v.* Milward, 2 Vern. 440. Kirk *v.* Webb, Prec. Chanc. 84. Deg *v.* Deg, 2 P. Wms. 414, 415. Ryall *v.* Ryall, 1 Atk. 59. Wilkins *v.* Stevens, 1 Y. & Coll. 431.

(*e*) 2 Atk. 159.

(*f*) *Ante*, p. 801, *et seq*. See also Downes *v.* Power, 2 Ball & B. 491.

(*g*) 3 Madd. 244.

the estate, and that she had an annuity of 250*l.* given to her by the Will: Sir John Leach, V. C., directed, that her annuity, as it became due, should be applied in payment of the debt due to the estate, with liberty to apply to the Court when the debt due to the estate should be discharged. So where an executor assigns his reversionary legacy, the assignee takes it subject to the equities which attached to the executor; and therefore if the executor, though subsequently to the assignment, wastes the testator's assets, the assignee cannot receive the legacy till satisfaction has been made for the breach of trust (*h*).

The party injured by a *devastavit* is but a simple contract creditor of the executor (*i*).

bankrupt or insolvent executor.

In *Geary* v. *Beaumont* (*k*), a specific legacy was given to an executor, who afterwards became bankrupt, and committed a *devastavit:* The subject of the specific bequest was sold by his assignees: And Sir W. Grant held that the produce in their hands was not specifically liable to make good the *devastavit*, in favour of the parties beneficially entitled under the Will, but that such parties were only entitled to prove to the amount of the *devastavit.*

If an executor becomes bankrupt, having wasted the assets, the *devastavit* may be proved under the commission (*l*). In *Ex party Moody* (*m*), it was holden that an executor and trustee, having committed a *devastavit*, was precluded from proving under his own bankruptcy: And liberty to do so was given (in the first instance, and without previous application to the commissioners) to a legatee, on behalf of himself and others, with a direction that the dividends should be paid into the Bank, in trust in the matter (*n*).

In the case of an executor committing a *devastavit*, and a decree for payment of the amount, the debt is considered as

(*h*) Morris *v.* Livie, 1 Y. & Coll. Ch. C. 380.

(*i*) Charlton *v.* Low, 3 P. Wms. 331.

(*k*) 3 Meriv. 431.

(*l*) Toller, 429.

(*m*) 2 Rose, 413.

(*n*) See *Ex parte* Colman, 2 D. & Ch. 584. *Ante*, p. 751, 752.

due from the time of the *devastavit*, and not from the date of the decree; and therefore, where a person was committed under an attachment for breach of a writ of execution of a decree for payment of money on account of a *devastavit*, it was held that as he had, between the time of the *devastavit* and the date of the decree, taken the benefit of the Insolvent Debtors' Act, and had been ordered to be discharged by the Court of Quarter Sessions, he might be brought up on a *habeas corpus* before the Chancellor, and discharged (*o*). Again, the certificate of a bankrupt executor discharges an attachment against him for breach of an order to pay a sum of money, part of the personal estate, found to be in his hands (*p*).

Competency of executor as a witness:

A defendant, who is an executor, although an executor in trust, and a mere formal party, has been held not to be a competent witness for a co-executor, in a suit respecting the property (*q*). So in *Dines* v. *Scott* (*r*), where a sum of money came to the hands of one of two executors, who paid it over to the other executor, it was held that the executor who first received it could not, under the usual decree for an account, examine the other executor, as a witness, to prove that the money paid over was duly applied on account of the affairs of the testator; and an order obtained for that purpose was discharged.

But now by Lord Denman's Act, (6 & 7 Vict. c. 85), in Courts of Equity, any defendant may be examined as a witness on behalf of the plaintiff or any co-defendant, saving just exceptions, and any interest which such defendant may have in the matters in question shall not be deemed a just exception, but shall only be considered as affecting, or tending to affect,

(*o*) Wheldale *v.* Wheldale, 16 Ves. 376. 3 Madd. Pract. 458, 2d edit.

(*p*) Wall *v.* Atkinson, Cooper, 198. S. C. 2 Rose, 196. See also Walcott *v.* Hall, 2 Bro. C. C. 305. *Ex parte* Holt, 2 Mont. & A. 562, that an executor cannot be called on to account for money which might have been proved under his commission.

(*q*) Bellew *v.* Russell, 1 Ball & B. 96.

(*r*) 1 Turn. & Russ. 358.

the credit of the witness. In the construction of this enactment, it has been held, by Wigram, V. C. (*s*), that a defendant may be examined as a witness on behalf of another defendant, who has exactly the same interest. But K. Bruce, V. C., has held the contrary (*t*). And it is plain that if there are several defendants, and one only is interested, he cannot be examined, though his examination be, nominally, on behalf of his co-defendants (*u*).

of co-plaintiff in a creditor's suit.

Although the plaintiffs, in a creditors' suit, have no common interest, yet the Court will not, even after decree, allow one of them to examine the other, as a witness in the Master's office, in support of his debt (*v*).

11 Geo. iv. & 1 W. iv. c. 60. Lord Chancellor, &c. may direct the committee or other person to transfer stocks or funds standing in the name of a lunatic trustee or executor, and to receive the dividends.

By stat. 11 Geo. iv. & 1 Wm. iv. c. 60, s. 4, it is enacted, that "where any stock shall be standing in the name of any person who shall be a lunatic, as a trustee or executor, alone, or jointly with any other person, or shall continue to be standing in the name of a deceased person whose executor shall be lunatic, or shall be otherwise vested in or transferable by any person who shall be a lunatic, for the benefit of some other person, it shall be lawful for the Lord Chancellor, entrusted as aforesaid, to direct the committee of the estate of any such lunatic to transfer or join in transferring such stock to or into the name of such person and in such manner as the said Lord Chancellor shall think proper; and also to order such person appointed as aforesaid to receive and pay over, or join in receiving and paying over the dividends of such stock in such manner as the said Lord Chancellor shall direct; and every such transfer, receipt and payment, shall be as effectual as if the person being

(*s*) Wood *v.* Rowcliff, 6 Hare, 183.

(*t*) Monday *v.* Guyer, 1 De Gex & Sm. 182.

(*u*) Clarke *v.* Wyburn, June, 1848, *coram* Lord Cottenham.

(*v*) Edwards *v.* Goodwin, 10 Sim. 123. The reason assigned by the Court in this case was that the party proposed to be examined had an interest in maintaining the suit, to the costs of which he would be liable, in case the bill should be ultimately dismissed. But his exclusion as a witness appears to be founded on an absolute rule of practice, not depending on the question of liability to costs: See Fisher *v.* Fisher, 2 Phill. Ch. C. 236.

lunatic had been of sane mind, memory, and understanding, and had transferred, received, and paid, or joined in transferring, receiving, and paying such stock or dividends."

11 Geo. IV. & 1 W. IV. c. 60.

Lord Chancellor, before inquisition, may appoint a person to convey or transfer.

By sect. 5, "Where any such person as aforesaid, being lunatic, shall not have been found such by inquisition, it shall be lawful for the Lord Chancellor, entrusted as aforesaid, to direct any person whom the said Lord Chancellor may think proper to appoint for that purpose, in the place of such last-mentioned lunatic, to convey or join in conveying such land, or to transfer or join in transferring such stock, and receive and pay over the dividends thereof, as herein-before is mentioned; and every such conveyance, transfer, receipt, or payment, shall be as effectual as if the said person, being lunatic, had been of sane mind, memory, and understanding, and had made, done, or executed the same; but where any sum of money shall be payable to such lunatic, no such last-mentioned order shall be made, if such sum of money shall exceed seven hundred pounds; and where any sum not exceeding seven hundred pounds shall be payable to such lunatic, and any such order shall be made, the Lord Chancellor, entrusted as aforesaid, shall direct to whom and in what manner the money so payable shall be paid; and every payment made in pursuance of such direction, shall effectually discharge the person paying the same from the money which he shall so pay."

Infant trustees or mortgagees empowered to convey by the direction of the Court of Chancery.

Sect. 6, "Where any person seised or possessed of any land (*w*) upon any trust or by way of mortgage shall be under the age of twenty-one years, it shall be lawful for such infant, by the direction of the Court of Chancery, to convey the same to such person, and in such manner as the said Court shall think proper; and every such conveyance shall be as effectual as if the infant, trustee, or mortgagee had been, at the time of making or executing the same, of the age of twenty-one years" (*x*).

(*w*) It was not requisite to extend this section to *personal* estate; because a rémedy already existed by taking out administration *durante minoritate.*

(*x*) The executors of a mortgagee

11 Geo. iv. & 1 W. iv. c. 60. When trustees of leasehold estate are out of the jurisdiction, &c.

By sect. 9, "Where any person possessed of any land for any term of years, upon any trust, shall be out of the jurisdiction of, or not amenable to the process of the Court of Chancery, or it shall be uncertain whether the trustee last known to have been possessed as aforesaid, be living or dead; or if any trustee possessed as aforesaid, or the executor of any such trustee, shall neglect or refuse to assign or surrender such land for the space of twenty-eight days next after a proper deed for making such assignment or surrender, shall have been tendered for his execution by, or by an agent duly authorized by any person entitled to require the same; then and in every or any such case, it shall be lawful for the said Court of Chancery to direct any person whom such Court may think proper to appoint for that purpose, in the place of the trustee or executor, to assign or surrender such land to such person, and in such manner as the Court shall think proper; and every such assignment or surrender shall be as effectual as if the trustee possessed as aforesaid, or his executor, had made and executed the same."

When trustees or executors are out of the jurisdiction of the Court, or it is uncertain whether they are alive, or they refuse to transfer stocks or funds, the Court of Chancery may appoint a person to transfer them.

By sect. 10, "Where any person in whose name as a trustee or executor (y), (either alone, or together with the name of any other person), or in the name of whose testator (whether as a trustee or beneficially) any stock shall be standing, *or any other person* who shall *otherwise have power to transfer or join with any other person in transferring any stock to which some other person* shall be beneficially *entitled*, shall be out of the jurisdiction of, or not amenable to the

in fee, who had died intestate, leaving an infant heir, having, in exercise of a power in the mortgage deed, agreed to sell the estate, the heir was ordered by Sir L. Shadwell, V. C., on a petition presented by the executors under this section, to convey the estate to the purchaser: *In re* Kent, 9 Sim. 501. *Ex parte* Ommaney, 10 Sim. 298.

(y) In *Ex parte* Dover, 5 Sim. 500, a testator gave an annuity to his widow, and the residue of his estate to his children: The executors paid the testator's debts and legacies, and purchased stock, in their names, to answer the annuity, and paid the dividends to the widow: One of the executors went to reside abroad, and the other died: And it was held that they were trustees of the stock within this statute. See *Ex parte* Merry, 1 Mylne & K. 677.

process of the Court of Chancery, or it shall be uncertain whether such person be living or dead, or if any such trustee or executor or other person shall neglect or refuse (*z*) to transfer such stock, or receive and pay over the dividends thereof to the person entitled thereto or to any part thereof respectively, or as he shall direct, *for the* space of *thirty-one days next after a request in writing* for that purpose shall have been *made to any such trustee or executor* or other person, by the person entitled as aforesaid, then and in every or any such case, it shall be lawful for the Court of Chancery to direct such person as the said Court shall think proper to appoint for that purpose in the place of such trustee *or executor or other person,* to transfer or join in transferring such stock to or into the name of such person, and in such manner as such Court shall direct; and also to order any person appointed as aforesaid to receive and pay over, or join in receiving and paying over the dividends of such stock, in such mannér as the said Court shall direct; and every such transfer, receipt, and payment, shall be as effectual as if the said trustee or executor or other person had transferred or joined in transferring such stock, or had received and paid, or joined in receiving and paying the said dividends" (*a*).

11 Geo. IV. & 1 W. IV. c. 60.

(*z*) In the construction of the repealed statute of 6 Geo. IV. c. 74, (for the amendment of which the existing Act was passed) it was decided, that where the executor of a surviving trustee appointed three executors, who, in an adverse litigation, procured probate of his Will to be decreed to them, but afterwards refused to take out probate, they were legal personal representatives of the surviving trustee, within the meaning of that statute, and that an order ought to be made under that Act for the transfer of stock standing in the trustee's name: It was further held, that an affidavit that they refused to take probate of the testator's Will was not sufficient to ground the order; it should state that they refuse to take the steps necessary for enabling them to transfer: *Ex parte* Winter, 5 Russ. 284. Accordingly, in *Ex parte* Hagger, *re* Merry's Trust, 1 Beav. 98, where the executor of the survivor of three trustees declined to prove his Will, Lord Langdale, M. R., held, that the case was within the 1 Wm. IV. c. 60, and said that he considered the case of *Ex parte* Winter in point. So the executor of a surviving trustee who declined to state whether he would or would not prove the Will was held a trustee within that Act: Cockell *v.* Pugh, 6 Beav. 293.

(*a*) One of two executors appearing, from the proceedings in the

New trustees cannot be appointed under this statute in the room of trustees who have died, where the trust property consisted both of stock and real estate, no administration having been taken out to the survivor of the said trustees, (who died intestate) and his heir at law being out of the jurisdiction.

The effect of these sections is fully considered in the following judgment by Sir Edward Sugden, when Lord Chancellor of Ireland (*b*): "In this case there was a settlement of personal estate, which was vested in two trustees upon trust to lay it out in the purchase of land, and to permit the petitioner to receive the interest of the money, as well as the rents and profits of the land during his life, but in case of his death, bankruptcy, or insolvency, during the life of his wife, then to her for life; and in case there should be a child or children living at the time of the death of the survivor, or of the bankruptcy or insolvency of the petitioner, then the stock or land was to be conveyed by the trustees to such child or children. The children, therefore, had a contingent interest. Part of the stock was invested in real estate. The two trustees have both died; the survivor abroad, intestate it is said, but no administration has been taken out to him; and it is stated, that it is not likely that any will be. There is no power in the settlement to appoint new trustees; and the heir-at-law of the surviving trustee being abroad, in the East Indies, the petitioner desires the Court to appoint new trustees. If we look at the Act, we shall find that it gives jurisdiction only where there is a disability in the trustee to convey. Certain cases are provided for by the 8th section, of persons being out of the jurisdiction, or the like. The early sections show *by whom* the conveyance is to be made. The eleventh section points out *to whom* it is to be made,

cause, to be a trustee, within the meaning of the above statute, of a fund standing in the testator's name, and it being proved by affidavit that he was living out of the jurisdiction, the Court, without a reference to the Master, made an order under this Act for the transfer of the fund by his co-executor: Parker *v.* Burney, 1 Beav. 492. A testatrix directed funds to be transferred in the Bank books, into the names of A. B. and wife, and their children who were infants, for the benefit of A. B. and wife for life, with remainder to their children: This was done, and a suit being instituted for the performance of the trust, Lord Langdale, M. R., held, that the Court had no jurisdiction under this statute to order the infants to transfer the fund into Court: Watts *v.* Scrivens, 1 Beav. 223.

(*b*) In the matter of Anderson, 1 Lloyd & Goold, 27.

either to the person beneficially entitled, or to trustees appointed by virtue of a power in the instrument creating the trust, or by the Court of Chancery, that is in a suit regularly instituted; but then, sect. 22 enables the Court, in certain cases, summarily to appoint new trustees, although there is no power in the instrument, and no bill has been filed for the purpose. Sect. 8 enacts, "that when any person, seised of any land upon any trust, shall be out of the jurisdiction, &c.," the Court may direct a conveyance to such person as the Court shall think proper. The difficulty I have in this case is, that stock as well as land is sought to be conveyed. Sect. 8 refers to land generally; sect. 9 to land held for terms of years, which clause was purposely altered, to make a distinction between the case of a real and personal representative; as it was not intended to render administration unnecessary, by supplying a personal representative, but to provide only for the want of a real representative. The 9th section, therefore, does not supply the want of a personal representative of a trustee of a chattel interest, and sect. 10 is just the same. Now, this is a case where a trustee of stock has died, and no personal representative has been obtained. There is no clause in the Act to provide for such a case. You must go to the Ecclesiastical Court, and even when you have a personal representative, you cannot come here to have a new trustee appointed under this Act, because the trustee will be under no disability. It will be necessary, therefore, to file a bill to supply the defect in the settlement, and as you must file a bill to appoint new trustees of the personal estate, and of course the same persons must be trustees of both the properties, I shall make no order appointing a new trustee of the realty. I will not appoint a trustee in an irregular manner, when I know that there must be trustees appointed in a regular way, who, when properly appointed, will be entitled to ask for a conveyance."

It was not intended by the 9th and 10th sections to supply the want of a personal representative of a trustee of a chattel interest, or stock.

By sect. 19, of the same statute, it is further enacted, that where "any *feme covert* would be a trustee, mortgagee, heir, or executor, within the provisons of this Act, if she were an

11 Geo. IV. & 1 W. IV. c. 60.

Husbands of female trustees

11 Geo. iv. & 1 W. iv. c. 60. and executrixes to be deemed trustees within the Act.

infant or lunatic, or out of the jurisdiction, or not amenable to the process of the Court of Chancery or Exchequer, or had refused or neglected as aforesaid to execute or make such conveyance, transfer, receipt, or payment, as hereinbefore is mentioned, and the concurrence of her husband shall be necessary in any conveyance, transfer, receipt, or payment, which ought to be made or executed by her as such trustee, mortgagee, heir, or executor, then and in any such case, such husband, whether under any disability or not, shall be and be deemed to be a trustee within the meaning of this Act."

CHAPTER THE THIRD.

OF REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS IN THE ECCLESIASTICAL COURTS.

Of compelling the executor, &c. to account.

IT has been shewn, in an earlier stage of this Treatise, that an executor, upon taking probate, as well as administrator on taking out letters of administration, makes oath that he will (amongst other things) exhibit into the registry of the Ordinary a just and true account of the goods, &c. of the deceased, "when lawfully called thereunto (*a*):" and that an administrator, by stat. 22 and 23 Car. II. s. 10, shall give bond conditioned (*inter alia*) to "make a true and just account of his administration" at a day in such bond expressed (*b*).

However, it is said, that neither an executor or administrator can be cited by the Ordinary *ex officio* to account (*c*): though the executor or administrator may be compelled to exhibit an Inventory, and render an account of his administration of the personal estate of his testator or intestate, at the instance of a legatee or next of kin, or of a creditor: Accordingly, it was held in *Wainford* v. *Barker* (*d*), that a debt, on which the Statute of Limitations has attached, will enable a creditor to compel the administrator to account before the ordinary; for it is a debt, though barrable by

(*a*) *Ante*, p. 276, 372.

(*b*) *Ante*, p. 439.

(*c*) Toller, 491. Archbishop of Canterbury *v.* Wills, 1 Salk. 315, 316. Stat. 1 Jac. II. c. 17. The Ordinary, said Lord Hardwicke, after an administrator has exhibited an inventory, cannot compel the administrator to account, but it must be *ad instantiam partis*, and, therefore, the inventory, and account are, as to the Ordinary, the same thing: Greenside *v.* Benson, 3 Atk. 253.

(*d*) 1 Lord Raym. 232.

pleading the Statute of Limitations (*e*). And there has already been occasion, in treating of the subject of Inventories, to adduce several instances, which prove that an executor or administrator is compellable to render an account before the Ordinary at the prayer of any person having an interest, or even the *appearance* of an interest (*f*). In the same part of this Work may be found collected some authorities upon other questions connected with this subject, *viz.*, after what lapse of time an account may be sued (*g*), and also what persons are compellable to render an account (*h*).

The creditors and legatees, and all other parties having an interest, must be cited to be present at the making of the account: otherwise the account made in their absence will not bind them (*i*). Therefore the executor or administrator, when called upon by any one party to render an account, ought to cite the next of kin in special, and all others in general, having or pretending to have an interest in the goods of the deceased, to be present, if they think fit, at the rendering and passing of the account: and then, on their appearance, or contumacy in not appearing, the Judge shall proceed, and the account thus determined will be final (*k*).

If a party having an interest call upon the executor or administrator to exhibit an Inventory of the effects, and to render an account of his administration thereof, the executor or administrator is bound personally to exhibit such Inventory and account, and (if the adverse party demand it) to take a corporal oath of the truth thereof: notwithstanding that, at

(*e*) See also Philipson *v.* Harvey, 2 Cas. temp. Lee, 344.

(*f*) *Ante*, p. 836. A party having an interest, who prays an account, shall not be condemned in costs, unless he makes objections to it, which he fails to substantiate: 4 Burn. E. L. 429, 8th edit. Toller, 494. In Penvill *v.* Luscombe, 2 Jac. & Walk. 201, (Appendix to Cholmondely *v.* Clinton,) a plea, by an administrator *durante minore ætate*, to a bill for an account, of a suit by the executor for the same purpose in the Spiritual Court, and sentence, was allowed as a stated account, with liberty to except as to subsequent receipts, and an issue directed as to the payment of a particular sum.

(*g*) *Ante*, p. 839.

(*h*) *Ante*, p. 840.

(*i*) 4 Burn. E. L. 487, 8th edit.

(*k*) 4 Burn. E. L. 487, 8th edit.

another time, perhaps, an Inventory has been exhibited *ex officio mero* of the Judge, in the absence of the party, and an account given upon oath (*l*).

And this Inventory is not to be exhibited under protestation, as when an Inventory is exhibited in common form, and not at the instance of the party, but absolutely, and directly, for a full, true, and perfect Inventory of all and every the goods of the deceased, which have come to the said accountant's hands since the death of the deceased: And if he shall exhibit a false or imperfect Inventory, or account, upon his said oath, he shall be guilty of perjury (*m*).

Where the citation to account is by a legatee or next of kin, the latter may disprove or object against the account (*n*): and the executor shall make due proof of every payment (*o*). Where the sum is under 40*s*., the payment shall be proved by his oath, if there appear no fraud by dividing greater sums into less (*p*). But of the payment of sums to a higher amount, vouchers must also be exhibited (*q*). And after the death of the executor or administrator, sums under 40*s*. shall not be allowed on the oath of his representative: for such payments can be substantiated only by him who made them (*r*).

Where the citation to account is by a creditor, he is not permitted to contest the payments of the executor or administrator; but with respect to him the oath of the party is in this matter conclusive (*s*).

Whether the Ecclesiastical Court can entertain objections made by a legatee or creditor against the *Inventory* exhibited by the accountant, is a question on which the decisions of the Court of Queen's Bench, and the practice of the Prerogative Court of Canterbury, are at variance: The principal autho-

(*l*) 4 Burn. E. L. 487, 8th edit.
(*m*) 4 Burn. E. L. 488, 8th edit.
(*n*) *Ibid.*
(*o*) *Ibid.*
(*p*) *Ibid.*
(*q*) *Ibid.*
(*r*) *Ibid.* Toller, 492.
(*s*) Bellamy *v.* Alden, Noy, 78. Brown *v.* Atkins, 2 Cas. temp. Lee, 1. Telford *v.* Morison, 2 Add. 330. Toller, 495.

rities on the point have been collected in an earlier part of this Treatise (*t*).

The executor or administrator shall be allowed, in the Ecclesiastical Court, all his reasonable expenses, as well in law-suits as for other honest purposes; and this reasonableness of expenses is to be such, that he may receive thereby neither profit nor loss (*u*). And therefore he shall be allowed his expenses in secular courts over and above such costs as were allowed there (*v*). It should seem, that the decisions which have been elsewhere pointed out (*w*), respecting the accounts and allowances of executors or administrators in Equity, would be regarded as authorities in those matters in the Ecclesiastical Courts also.

After the investigation of the account, if the Ordinary find it true and perfect, he shall pronounce for its validity; and in case all parties interested have been cited, such sentence shall be final, and the executor or administrator shall be subject to no further suit (*x*).

However, the Ecclesiastical Court has no authority to award the payment of a debt; and therefore the object of a creditor in suing for an account in a Spiritual Court is to gain some insight into the state of the fund, previous to his proceeding in an action at common law; but a bill in equity for the discovery of assets is the more usual course adopted for that purpose (*y*).

Although one creditor may have proceeded against the executor or administrator in the Court of Chancery, another creditor, who is no party to the Chancery cause, may call on the executor to give in an Inventory in the Ecclesiastical Court (*z*). But where a creditor, or next of kin, or legatee files a bill in Chancery, and also prays an Inventory in the Ecclesiastical Court, the latter will oblige him to make his option which Court he will proceed in; because it is unjust

(*t*) *Ante*, p. 842, *et seq.*
(*u*) 4 Burn. E. L. 489, 8th edit.
(*v*) *Ibid.*
(*w*) *Ante*, p. 1566, *et seq.*
(*x*) 4 Burn. E. L. 487, 8th edit.
(*y*) Toller, 495.
(*z*) Lloyd *v.* Beatniffe, 2 Cas. temp. Lee, 561.

that the executor or administrator should be harassed in both Courts by the same person for the same thing (*a*). Accordingly, where a creditor filed a bill in Chancery for the discovery of the assets of a deceased, and then cited his executor to give an Inventory in the Prerogative Court, having also, previously to filing the bill, cited the executor to bring in an Inventory and to take probate; Sir George Lee held, that the creditor must be considered as having deserted the Prerogative Court where he had originally begun, and made his option to proceed in Chancery; so that he could not revert to the Prerogative while the suit in equity was depending: And this petition was rejected with costs (*b*).

Suit for a legacy:

With respect to legatees and next of kin, they may proceed against the executor or administrator in the Ecclesiastical Court to recover their legacies, or distributive shares under the statute. And if one of several executors be also a joint residuary legatee, he may cite his co-executors, and maintain a suit for his share of the residue (*c*).

Indeed, in respect of legacies, the cognizance of them in former times belonging exclusively to the Ecclesiastical jurisdiction: the Court of Chancery, till Lord Nottingham extended the system of equitable jurisprudence, administered no relief to legatees (*d*).

Causes of subtraction of legacy have always been entertained in the Spiritual Court: The executor receives his authority from the ecclesiastical jurisdiction, and a part of his functions (which he is expressly sworn to perform) is to pay the legacies; and if he omits to discharge this duty, the jurisdiction, from which his authority emanates, is naturally resorted to, in order to compel him to proceed (*e*).

The jurisdiction in personal legacies is exercised by the Arches Court in cases of all Wills proved in the Prerogative

(*a*) By Sir George Lee, in Brotherton *v.* Hellyer, 2 Cas. temp. Lee, 134.

(*b*) Pearson *v.* Gamon, 2 Cas. temp. Lee, 268.

(*c*) Glen *v.* Webster, 2 Cas. temp. Lee, 31.

(*d*) Deeks *v.* Strutt, 5 T. R. 692.

(*e*) 1 Hagg. 536, 537.

Court, and by the Official Principals of each Diocese, in cases of Wills proved in the Diocesan Courts (*f*).

The course of proceeding in the Arches Court is usually as follows: The executor being cited to answer the legatee in a suit of subtraction of a legacy, a short libel is brought in, pleading that A. B. made a Will, that he thereof appointed C. D. executor, and is since dead, leaving *bona notabilia*, and without revoking or altering his Will: that, since his death, C. D. has proved his Will in the Prerogative Court of Canterbury, that by his Will A. B. left a legacy to E. F. in the following terms, (the clause of the Will containing the legacy is here recited), that this legacy remains unsatisfied; and that C. D. is possessed of, and has admitted assets; has been applied to and refuses payment; and further pleads the identity of E. F. and the legatee, and that he is of age; and the libel concludes with a prayer that the executor may be compelled to pay the legacy, and be condemned in costs. The records of the Prerogative Court prove all the facts, except the assets, age, and identity of the legatee, and the executor is, upon the libel being admitted, assigned to give in his answers. Should he, in his answers, deny assets, or the legatee's identity or age, witnesses may be examined. Sometimes, there may be some especial circumstances stated in the libel, and the executor also may plead responsively; but in a great majority of cases, the legacy is paid either as soon as the citation is taken out, or as soon as the libel is admitted (*g*). Sometimes, as a preliminary proceeding an Inventory and account is called for in the Prerogative Court (*h*).

(*f*) 3 Hagg. 161, note (*a*). Machin *v.* Molton, 1 Lord Raym. 453, by Holt, C. J. Smelridge *v.* Edgworth, 2 Cas. temp. Lee, 577.

(*g*) 3 Hagg. 161, 162, note to Capel *v.* Robarts. From the early stage in which these suits usually terminate, they pass, in a great degree, *sub silentio*, and are thus generally supposed more rare than is really the case: Of late they have, it is believed, become more frequent than they were a few years since; and it is said to be an extremely cheap and expeditious mode of recovery: 3 Hagg. 162, note.

(*h*) 3 Hagg. 162, note.

But it is not the duty of a legatee to call for an Inventory and account, in order to see whether there are assets, before he commences his suit in the Arches for the legacy; for that would be obliging a man to go through a suit in one Court before he could apply for justice in another (*i*). And on this ground, where a legatee brought a suit for his legacy, and the executor admitted the legacy, but pleaded *plene administravit*, and exhibited an Inventory and account, and the legatee proceeded no further; Sir George Lee held, that the executor ought to be dismissed, but that he was not entitled to costs: And the learned Judge having desired the opinion of the advocates and proctors as to the point, all the advocates present unanimously, and most of the proctors, agreed with him that the executor was not in this case entitled to costs (*k*).

The Courts of Equity exercise a concurrent jurisdiction in these matters, upon the principle, as it has already appeared (*l*), that all executors are in the nature of trustees. Generally speaking, where the Spiritual Court is first possessed of a cause for the subtraction of a legacy, the Court of Chancery will not intermeddle (*m*).

But where the case is such, that the Ecclesiastical Courts cannot do complete justice in the cause, Courts of Equity have not merely a concurrent, but an exclusive jurisdiction; and if such a suit be commenced in the Ecclesiastical Court, the Court of Chancery will grant an injunction. Thus, where a husband sues in the Spiritual Court for a legacy bequeathed to the wife, the Court of Chancery will grant an injunction to stay the proceedings; since the Ecclesiastical Judge has no authority to compel a settlement (*n*). So in the case of legacies given to infants, equity will interfere in

(*i*) 1 Cas. temp. Lee, 537.

(*k*) Rumsey *v.* Tizard, 1 Cas. temp. Lee, 537.

(*l*) *Ante*, p. 1717.

(*m*) Nicholas *v.* Nicholas, Prec. Chanc. 546. However, where there are already proceedings in the Court of Chancery for an account to ascertain assets, the Spiritual Court cannot entertain the suit: Smith *v.* Kempson, 2 Dick. 769. 1 Hagg. 541.

(*n*) Hill *v.* Turner, 1 Atk. 516. Meals *v.* Meals, 1 Dick. 373.

their behalf to protect their interests, and to give proper directions for securing and improving the fund for their benefit; which cannot be effected in the Ecclesiastical Court (*o*).

Again, where there is anything in the nature of a trust *to be executed,* an injunction or prohibition will go; for the Ecclesiastical Court has no jurisdiction over trusts: Thus the Court of Chancery will grant an injunction to stay the proceedings in the Spiritual Court, where a sum of money is given to a trustee upon trust for a legatee, and he sues for payment into his own hands (*p*). So if a sum of money is left to an executor in trust, the Spiritual Court cannot entertain a suit against him at the instance of the *cestui que trust* (*q*). But where there is the bare duty of an executor to be performed, and there is no trust but what belongs to all executorships, in such a case, it should seem, no injunction can be obtained, to restrain proceedings in the Ecclesiastical Court against the executor to enforce the performance of that trust. Thus in *Grignion* v. *Grignion* (*r*), a sum of money was left to executors, in trust to invest and pay the interest to A. for life, and after A.'s death, to divide the principal among his issue on their respectively attaining the age of twenty-one with benefit of survivorship till that age: A. died; his only three children attained their majority, and the shares of two of them were paid over: And Sir John Nicholl held, that the Prerogative Court ought to proceed against the executor, to enforce payment of the share of the third,—the learned Judge considering that the character of trustee was at an end, and that of executor alone was subsisting.

(*o*) Horrell *v.* Waldron, 1 Vern. 26. 2 Rop. Leg. 694, 3d edit. On the same principle, while it was the practice of the Court of Chancery to oblige legatees to give security to refund their legacies upon a deficiency of assets, an injunction might be obtained on the ground that the Spiritual Court would compel the executor to pay without that security: Anon. 1 Atk. 491. See *ante*, p. 1155.

(*p*) Hill *v.* Turner, 1 Atk. 516, by Lord Hardwicke.

(*q*) *Ex parte* Jenkins, 1 Barn. & Cress. 655.

(*r*) 1 Hagg. 535.

The spiritual jurisdiction extends to legacies of personal property only; therefore if lands be devised to be sold for the payment of legacies, or if the legacies in any way arise out of the freehold, they can be sued for only in a Court of Equity (*s*). But the jurisdiction of the Ecclesiastical Courts extends to interests arising out of real property, when such interests are less than freehold, as bequests of terms *for years*, or of rents payable out of them (*t*).

If a legatee takes a bond from the executor for the payment of his legacy, he cannot afterwards sue him in the Spiritual Court: for by taking the obligation the nature of the demand is changed, and it becomes a debt recoverable in the Temporal Courts (*u*).

A legacy may be recovered in the Spiritual Court against an executor of his own wrong (*v*).

Suit by next of kin for a distribution:

According to the Statute of Distributions, the Ecclesiastical Court has authority to enforce the distribution of an intestate's effects: And as the Act of Parliament contains no negative words, equity has, in this matter also, a concurrent jurisdiction with the Ordinary (*w*).

But equity has an exclusive cognizance of those cases in which there is an executor, and the residue is undisposed of: for then the executor is a trustee for the residue (*x*), and the Ordinary cannot compel a distribution of it, because he cannot enforce the execution of a trust (*y*).

The Ordinary has no power to compel a debtor of the intestate to pay his debt into Court, although such debtor be the person applying for the distribution; for that would be to hold a plea of debt: But in that case, it should seem,

(*s*) Barker *v.* May, 9 Barn. & Cress. 489.

(*t*) Rumney *v.* Rosse, 2 Keb. 8, pl. 22. Love *v.* Naplesden, Cro. Jac. 279.

(*u*) Goodwyn *v.* Goodwyn, Yelv. 39. Luke *v.* Alderne, 2 Vern. 31.

(*v*) Philpott's case, 1 Roll. Abr. 919, (F.) pl. 1.

(*w*) Matthews *v.* Newby, 1 Vern. 133. Fonbl. Treat. Eq. B. 4, Pt. 2, Ch. 3, s. 2, note (*d*).

(*x*) See *ante*, p. 1263, *et seq.*

(*y*) Petit *v.* Smith, 1 P. Wms. 7. Hatton *v.* Hatton, 2 Stra. 865. See Burgess *v.* Marriott, 3 Curt. 424.

he may refuse to proceed to a distribution till the party shall bring in the debt (z).

If an administrator has an equitable demand against the personal estate of his intestate, the Court of Chancery will enjoin the next of kin from proceeding in the Spiritual Court to compel a distribution: but they may proceed to compel the administrator to exhibit an Inventory (a).

If an Inventory and account are called for by a party in distribution who means to proceed to enforce distribution, objections may be taken to the Inventory and to the account: In that case the objections must be stated in an allegation, and proof be given thereof; or the party may proceed by petition and affidavit, till the Court decides that the Inventory and account are sufficient and allows them: But if the Inventory and account are not objected to, the administrator prays they may be admitted and allowed, which prayer the Court accordingly grants (b). The Inventory and account not being objected to, or being allowed after objection, the next step is to refer them to the Registrar to examine and report what is the residue or balance remaining to be distributed according to the statute, and to allot portions; that is, to report what is the share of each person in distribution, previously deducting all necessary costs and expenses which ought to be first paid. The Registrar's report is open to objections; but when confirmed by the Court, the next step is to assign the administrator to pay to each person, reported to be entitled, the share which has been thus limited and appointed, and to enforce that payment by the compulsory process of the Court, unless sufficient cause be shewn against enforcing it's order (c). Special circumstances may arise at each of these stages: The Inventory may be objected to, on the ground that property has not been entered: The account

(z) Clerke v. Clerke, 1 Lord Raym. 585. See Morris v. Darling, 2 Cas. temp. Lee, 175.

(a) Backhouse v. Hunter, 1 Cox, 342.

(b) 3 Hagg. 783, 784.

(c) 3 Hagg. 784.

may be objected to, on the ground that payments have been made or debts entered which are not properly to be charged against the estate: The right of the party as being in distribution may be denied: The Registrar's report may be objected to: The liability of the administrator may be denied: But whatever circumstances of that kind may occur, the objection should be taken at the proper stage (*d*).

In ordinary cases, the Ecclesiastical Court will not compel the parties entitled in distribution to give security to repay the proportions they have received, in the event of a Will hereafter being found (*e*).

Proctor's fees.

The Ecclesiastical Court cannot entertain a suit for proctor's fees; since they are a temporal duty, for which an action may be maintained in the Temporal Courts (*f*).

Limitation of suits in Spiritual Courts.

By stat. 3 & 4 Wm. IV. c. 27, s. 43, "no person claiming any tithes, legacy, or other property for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any Spiritual Court to recover the same but within the period during which he might bring such action or suit at law or in equity."

(*d*) 3 Hagg. 785.

(*e*) Cozens *v.* Helyar, 2 Cas. temp. Lee, 556.

(*f*) Pollard *v.* Gerard, 1 Lord Raym. 703. S. C. 1 Salk. 333. Johnson *v.* Oxenden, 4 Mod. 255. Toller, 496.

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