We allow of the Printing and Publishing of the Book Intituled, A General Abridgment of Law and Equity, Alphabetically digested under proper Titles, &c. By Charles Viner, Esq;

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A General Abridgment of Law and Equity

Alphabetically digested under proper Titles

With Notes and References to the Whole.

By CHARLES VINER, Esq;

Fivente Deo.

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After the Year upon Error brought.

1. If a Man recovers Debt or Damages, and the Judgment is Affirmed in the Affirmation in Writ of Error in another Court within the Year, the Defendant was not habe an Execution there without a Scire Facias, because the Court is changed. 20 Eliz. 2. Execution 133. (Mittore, found a Difference with this Matter from the Exchequer Chamber.) 15 H. 7. 16 b.

Within the Year the Recov'd rem. by Certiorari into the Chancery, and from thence into C. B. by Motion, and after the Defendant was taken by Capias pro Fine Regis within the Year, and Defendant off red Surety pro Fine Regis, and prayed to go at Large; and the Plaintiff prayed that he may remain for his Execution, and by the Opinion of the Court, he shall not remain for the Execution of the Party, because the Party ought first to have Scire Fa. though it be within the Year, because the Record and Capias awarded is in another Court than where the Plea is; For per Frowike, where Record is removed by Writ of Error in B. R. and affirmed within the Year, yet the Plaintiff shall have Sci. Fa. before Capias or Elegit; For in alia Curia. Br. Exec. pl. 59 cites 12 H. 7. 15 and 14 H. 7. 5. — So where the Tellaror recovers and dies within the Year, the Executor shall have Sci. Fa. within the Year; For in alia Curia. Per Mordaunt. Ibid. — But of a Record removed out of the County into Bank the Plea shall be held as in the County; For there is no coming out of a Writ of Error. Ibid. — And if all the Justices of C. B. die, and others are chosen, yet they shall have such Execution as the first Judges were alive; For this is in one Court and name. Ibid. — And of Plea in the County, if the Justices in Error come there they shall hold it, and shall make such Execution as the County shall make, which the Justices agreed, and the Pane where the Justices died also. Ibid. — And per Vavfor, if a Fine executory be removed out of Bank into the Treasury, and returned by Certiorari and Mitrimum within the Year, yet the Party shall not have Execution by Habere Facias Seifnum, but Sci. Fa. though it be within the Year. Ibid. — Br. Scire Facias, pl. 119. cites S. C.

Note. In the Refusal of this Case the best Opinion was, that it appears by the Mitrimum that the Plaintiff had no Execution in Pais before the Justices of Affidavit by Elegit or Gl. Fa. and yet by Award the Defendant bound Surety pro Fine Regis, and went out; For it is in another Court now, and therefore the Party shall have Sci. Fa. as well as after the Year; For if in Trepasses the Defendant is convicted, and after the Year the King uses Capias pro Fine, by which he is taken, he shall not stay in Execution for the Party; For the Party cannot have Execution by Capias after the Year, but within the Year; vide Nota. But onerwise the King by his Prerogative. Br. Exec. pl. 61. cites 14 H. 7. 19. 20.

If the Record is removed out of C. B. into B. R. by Writ of Error, and the Judgment affirmed, the Plaintiff shall not have Execution there, though it be within the Year, without using Scire Facias, because the Record is now in another Court, and before other Judges. Br. Executions, pl. 119. (bis) cites 21. (Aff. 14.

2. If a Man recovers Debt or Damages in B. R. and after with Lane 20. in the Year the Defendant brings Writ of Error in the Exchequer Chamber, where the first Judgment is affirmed after the Year expired, the Recorder per the Receiver may have Execution by Capias or Fieri Facias S. P. and within the Year after the Annession without a Scire Facias; For it seems to be the Annession is a new Judgment. H. 5 Fa. in the Exchequer. S. C.

per Cur. B. 3. S.
3. So if after the Year after the Recovery the Defendant brings Writ of Error, and the Judgment is affirmed, though before the Writ of Error brought the Recoveror was put to his Scire Facias, yet this Affirmance is a new Judgment, and the Recoveror may have within the Year after the Affirmance, a Fieri Facias, or Capias, without Scire Facias. 9. a. in the Exchequer, per Cit. 9. 12 a. B. R.

4. So if he be Non-suited in the Writ of Error, for there though there is not any new Judgment given in Affirmance of the first Judgment, yet the Writ of Error revives it. 9. 12 a. B. R.

5. So if the it the Writ of Error be discontinued, yet he who recovers is not put to his Scire Facias, for the bringing of the Writ of Error has revived the first Judgment. 9. 12 a. B. R. adjudged between Sir Henry Bellows and Hanford.

Execution may be taken out within a Year after the Abatement without any Sc. Fa. to revive the Judgment, but it is necessary that a Remittitur be entred to warrant the Execution from B. R. If till then the Record remains in the Exchequer Chamber, and unless a Remittitur be entred the Plaintiff must sue out a Scire Facias. But if a Remittitur be entred, the Court will not examine into the Time of its Entry; Per Cit. Garth, 226. Howard v. Pitt. — That for want of entering a Remittitur the Execution will be erroneous, but not void, and denied 4 Le. 197, Ruffell's Case. 1 Sib. 261. Howard v. Pitt. — Garth, 227. S. C. — If the Plaintiff in Writ of Error be non-suited after the Year, the Plaintiff in the first Action shall have Scire Facias, and ought to have the Party returned warned, or to have a Nihilus returned before Execution be awarded. Br. Execution, pl. 97. cites 5 E. 4. 6.


A Statute is the more expedite Remedy, since thereupon Execution may be taken out without a Sc. Fa. or other Suit, which cannot be in the Case of a Recognizance; For there if a Year be past after the Acknowledgment no Execution can be sued against the Party himself acknowledging it, without a Sc. Fa. first sued out against him, and if he be dead, then though the Year be not past yet must a Scire Facias be sued, and thereupon the Executor Defendant may plead some Plea to hold off the Execution for a Time. Waesw. Off. Executor 153.

See br. Error. (K)

7. 13. E. 1. 45. After the Year a Scire Facias shall issue to show Cause why Execution may not be done.

8. In Replevin, if the Plaintiff recovers Damages, and Error is brought, and the first Judgment is affirmed in B. R. he who recovers the Damages cannot have Fieri Facias or Elegit there at first; but Sc. Fac. tho' it be within the Year, because the Record is come into another Court than where the first Judgment was given, and it was said there, that they may award Scire Facias before the Judgment affirmed, and when the Defendant comes, then to affirm the first Judgment and award Execution immediately; quod nona. Br. Scire Facias, pl. 151. cites 21 All. 14.

9. Scire Facias upon a Recognizance; the Defendant was returned dead, and thereupon Garnishment shall issue against the Tertenants, which was returned that they are warned, and they did not come, by which Elegit was awarded; And so fee that in Scire Facias upon Recognizance a Man shall have Execution by Elegit. Br. Elegit, pl. 16. cites 38 E. 3. 12.

10. Before
Execution.

10. Before the Statute which gave Scire Facias upon Recovery, if the Year had passed, and no Execution made, he should not have Execution, but yet he might have had new Original; Per tot. Cur.; For Recovery without Execution is no Plea; quod nons. Per Thorp clearly there. Br. Executions, pl. 17. cites 43 E. 3. 2.


12. At Common Law, if a Man had recovered in Debt and did not take Execution within the Year, he was put to a new Original, but now by the Statute of Westminster 2. he shall have Scire Facias, and yet he may have a new Original if he will &c. Arg. in Treplus. Br. Detce, pl. 10. cites 20 H. 6. 11.

13. If the Plaintiff in Writ of Error nonsuitte after the Year, the Plaintiff in the first Action shall have Scire Facias for Execution. Br. Nonsuit, pl. 30. cites E. 4. 6. and 22 H. 6. 7.

14. Where the Sheriff returns upon a Fi Fa. of 20 l. quod Fieri Faci 101. &c. and has not the Money in Court at the Day, and another Sheriff is made, Sci. Fa. shall issue to the new Sheriff against the old Sheriff, and thereupon Fi. Fa. or Elegit, because Diftringas Vicecom ad habend' Demar' &c. is too long Proces &c. quod nota. Br. Executions, pl. 69. cites 9 E. 4. 50.

15. If the Court changes, As if the Record comes into B. R. by Writ of Error, and Judgment is affirmed, the Plaintiff himself who recovered shall not have Fi. Fa. against the Defendant there, but first Sci. Fa. Quod Nota. Br. Execution, pl. 64. cites 15 H. 7. 14. 15.

16. A Man conformed and in Execution for 100 l. pleaded Acquittance after the last Continuance, and it is laid that he shall have Sci. Fa. the same Term, and Audita Querela in another Term &c. and after he shall find Sureties and go at large. Br. Executions, pl. 73. cites 21 H. 7. 30.

17. If a Man recover in Writ of Annuity, he shall have Fi. Fa. of the Arrearages recovered within the Year, and Scire Facias as soon as the Annuity is arrear, and never Writ of Annuity again; For it is executory and the same Law of Account and Judgment upon Composition, which is executory from Time to Time &c. And in every Scire Facias in which he recovers after the first Judgment he shall have Execution thereof of the Arrearages within the Year by Fi. Fa. For every one is founded upon the Judgment. Br. Execution, pl. 119. cites 23 H. 8. and 32 E. 3.

18. Judgment was given in the County-Court, and a Writ of False Judgment was brought, only to delay the Execution, upon which the Record was removed, and the Writ served; and the Plaintiff was nonsuited; and thereupon the Defendant pray'd a Scire Facias to have Execution, and upon good Advizement the Writ was granted, for otherwise he could have no judicial Writ to have Execution, because the Record shall not be sent back again in alio Comitat. D. 329. a. b. pl. 14. Mich. 15. & 16 Eliz. Anon.

19. At Common Law there was no Remedy for a Judgment-Creditor for Debt or DAMAGES either against the Body or Lands of his Debtor, unless in Special Curs, but only as to his Goods and Chattels, and Corn, and other present Profit growing upon his Land, to which Purpose the Common Law gave him two Annual Writs to be sued within the Year, viz. a Levant Facias, whereby the Sheriff was commanded Quod de Terris & Catalris ipsius A. &c. Levant Facias, and the other called a Fieri Facias, which was only de Bonis & Catallis, both which Writs were to be brought within the Year, but afterwards he might bring Debt. 3 Rep. 11. Mich. 26 & 27 Eliz. in Stacc. in Sir William Herbert's Case.
Execution.

20. If Judgment in C. B. be affirmed in a Writ of Error the Plaintiff may have Ca. Sa. or Fi. Fa. within the Year, and shall not be put to bring a Sci. Fa. 5 Rep. 88. Hill. 40 Eliz. the second Resolution in Garnot's Cafe.

21. Scire Facias was given in Executions by the Statue of Woburnfer 2. For at Common Law if the Plaintiff had succeeded [surceases] to sue Execution by Fieri Facias or Levari Facias a Year and a Day, he had been driven to his new Original. Co. Litt. 290. b. 291. a.

22. A Judgment being of eight Years standing, the Defendant being taken in Execution without Notice or suing a Scire Facias in the proper County; and therefore it was prayed that he might be discharged; but the Court would not; and thereupon he brought an Audita Querela, and was bailed by four Mainperners. 2 Roll Rep. 42. Trin. 16 Jac. B. R. Mumperlin v. Gates.

23. If A. recovers a Debt as Executor of J. S. and makes B. his Executor and dies before Execution issued, B. is not put to a new Suit, but may have Execution upon that Judgment. But if A. or B. died Intestate, now could none as Administrator to either of them, nor as Administrator of J. S. have Execution of this Judgment. For the former has no Intrest in any Thing pertaining to J. S. and the later comes to Title above Judgment, viz, as immediate Administrator to J. S. who is now dead Intestate, and derives no Title from the Executor who recovers. Went. Off. Executor. 103.

24. It was moved that upon a Judgment in Debt a Fieri Facias issued, and more than a Year after the Fieri Facias had taken Execution by a new Fieri Facias without suing of Scire Facias, and therefore it was prayed that the Monies levied should be stayed, and the Practice examined, and so it was done, and a Day given, at which Day Herne Secondary certified the Court, that the Practice in B. R. is, that after a Fieri Facias or Eligit &c. taken, if it be not executed a new Fieri Facias or Eligit may be sued several Years after without suing any Scire Facias, provided that Continuances are entered from the Time of the first Fieri Facias, and those Continuances may be entered after the second Fieri Facias &c. and a Rule be made upon Motion that Proceedings shall stay, and that Nothing shall be amended; quod nota; for by such Way, (as Finch Solicitor-General said) there will be little Use of Scire Facias. Sid. 59. pl. 28. Mich. 13 Car. 2. B. R. Welden & al v Greg.

25. The Common Course in B. R. is, after Eligit to make Continuances for several Years (if the Party pleases) and then to take a new Eligit without any Scire Facias; Per Twifden and Windham J. Sid. 60. pl. 18. Mich. 13 Car. 2. B. R. in Cafe of Welden v Greg.

Though
Execution.

Though an Elecit be not taken out within a Year and a Day after the Judgment, yet if there be Continuances ented on the Roll, it may be taken out at any Time without filing a Sci. Fa. Cartl. 255. Mich. 5 W. & M. in B. R. Seymor v. Greenhill.

26. One that is not Party to the Recognizance, Record &c. though proy, shall have no Writ of Execution, though it be within the Year, without a Scire Facias. But it is otherwise in Caue of a Statute Staple or Merchant &c. for there the Proceeds is given by other Acts of Parliament; Per Bridgman Ch. J. in delivering the Opinion of the Court. Cart. 193. Pach. 19 Car. 2. C. B. in the Case of Law v. Toothill and Rawlins.

27. Execution on Recovery in Precipe quod reddat, or Real Actions may be had after the Year without any Scire Facias, because in such Actions the Party cannot begin again, as in personal Actions he may by Debt &c. on the Judgment, which the Court agreed, and Execution was awarded good. 2 Keb. 307. pl. 6. Hill. 19 & 20 Car. 2. B. R. in Case of Vicars v. Obrie.

28. A Fi. Fa. isued on a Judgment, but before the Writ was executed the Defendant did intestate; and afterwards Administration being granted to his Wife, the Writ was executed upon his Goods in her Hands, and this was adjudged good, without bringing a Sci. Fa. because the Property of the Goods was bound by the Teite of the Fi. Fa. so that a Sale thereof made for a valuable Consideration shall be avoided; and since the Intestate himself, whilst living, could have no Plea, why should his Administrator have any Time to plead to a Sci. Fa. and of that Opinion was all the Court upon Advice with the Judges of B. R. But this was against the Opinion of the Chief Justice Vaughan. 1 Mod. 183. pl. 23. Mich. 26 Car. 2. C. B. Farrer v. Brooks.

29. Repudiation was prayed on an Execution made out after the Death of the Defendant in the Writ of Error, supposing that the Writ was whereby abated, but the Court held that it was not (as in the Case of the Death of the Plaintiff in Error it would be) but there must be a Scire Facias against the Executors. 3 Keb. 571. pl. 3. Hill. 27 Car. 2. B. R. Hart v. Malcher.

30. Upon a Judgment above a Year's standing, you may have an Elecit without a Scire Facias, but not a Fieri Facias, for that on the Elecit they enter their Continuances all along from the Judgment; and so it was ruled in this Case. 2 Show. 235. pl. 233. Mich. 34 Car. 2. B. R. Cooke v. Bathurst.

31. At the Common Law, if a Man had recovered in Debt, and did not sue forth Execution within a Year and a Day, he must then bring a new Original, and the Judgment thereon had been a new Recovery; but now a Scire Facias is given by the Statute instead of an Original; and therefore a Judgment thereon shall also be a new Judgment; for though it is a Judicial Writ yet it is in the Nature of an Action, because the Defendant may plead any Matter in Bar of the Execution upon the first Judgment, and it is for this Reason that a Releas of all Actions is a good Bar to it. Besides an Action of Debt will lie upon a Judgment on a Scire Facias, which shews that it is an Action distinct from the Original, and upon such a Judgment the Defendant may be committed to Prifon several Years afterwards without a new Scire Facias; Arg. 3 Mod. 189. Hill. 3 Jac. 2. B. R. in Case of Obrian v. Ram.

32. Scire Facias against an Executor upon a Judgment in Ejecution against his Trustor is not good unless it sets forth or names the Executor Tenant of the Land recovered, and it shall not be intended; because a Defendant in Ejecution is always supposed a Dilettor, and that by his Death the Lands descend to his Heir, and so Plaintiff cannot have Judgment for the Pollution or Damages; because the writ not being
Execution.

good for Part is bad for the Whole; And the Court inclined to this Opinion. Carth. 2 &Rig. 3 Jac. 2. B. R. Doyley v. Walker.

33. At the Common Law before the Statute of W. 2. If Execution had not been sued upon a Judgment in any Personal Action within a Year and a Day, the Party must then have brought an Action of Debt upon that Judgment; for he could have no Scire Facias upon that Judgment, but now that Statute applies a proper Remedy by giving the Scire Facias upon the Judgment; Per Cur. 4 Mod. 243. Mich. 5 W & M. in B. R. in Cale of Dighton v. Granvil.

34. Execution on a Judgment in Ejectment was denied to be granted after the Year without a Scire Facias; and the Cafe of * Sid. 351. this being cited, Holt Ch. J. said that that Cafe was not fully reported. Comb. 250. Patich. 6 W. & M. in B. R. * Barwick v. Fenwood.

35. Judgment in Trespass against four, who bring Error; one dies; The Plaintiff cannot sue Execution without suggesting the Death upon Record, but need not sue Scire Facias. 1 Salk. 319. pl. 3. Trin. 9 W. 3. B. R. Pennoiie v. Brace.

36. If Judgment be had against two Defendants and one dies, Execution may be had against the Survivor without Scire Facias, which we hold it may supposing it to be within the Year; because there is no Change of Record at all; and it shall not be intended there was a Release to the Party deceased. 12 Mod. 150. Trin. 9 W. 3. B. R. Bennower v. Brace.

37. Where any new Person is either to be better or worse by the Execution there must be a Scire Facias, because he is a Stranger, to make him Party to the Judgment, Otherwife where the Execution is neither to charge or benefit any new Party as in Cafe of Survivorship. 1 Salk. 320. pl. 3. Trin. 9 W. 3. B. R. Pennoiie v. Brace.

38. A Coopas or Fi. Fa. being in the Peronalty may survive, and may be su'd against the Survivors without a Sci. Fa. Otherwife of an Fletit, for there the Heir is to be contributory. Per Holt. Ch. J. 1 Salk. 320. pl. 3. Trin. 9 W. 3. B. R. in the Cafe of Pennoiie v. Brace.

39. If one will take out Execution within a Year after Judgment he may continue it down after the Year by Vicecomes non nisi Evecce without being put to a Scire Facias; Per Holt. Ch. J. 7 Mod. 59. Mich. 1 Ann. B. R. Withers v. Harris.

7 Mod. 64. S. C. held accordingly that it cannot be with-out a Sci. Fa, though it is staled there that the Judgment was upon Terms that there should not be Execution till such Time, which was a Year and Half after.
Execution.

4. In no Case where the Parties to the Judgment are changed, ought Execution to be sold by any other without a Scire Facias. 2 Ld. Raym. 768. Trin. 1 Anne. The Queen v. Ford.


been taken out and continued by a Vice comes non mittit Bree. Ibid. So of a Writ of Error if the Judgment be affirmed after a Year after the first Judgment. Cro. E. 416. pl. 10. Mich. 37 & 38 Edw. B. R. Goodwin v. Grudge.

(N. a 2) Scire Facias.

On what Judgment it lies.

1. If a Prior recovers Land by Default, and has Quale Jus, and pending this dies, the Successor shall not have Quale Jus without suing Scire Facias; For it may be that the Tenant has got a Release after; Per Thorp and Mombray J. quod nota. Br. Scire Facias, pl. 210. cites 44 E. 3. 41.

2. At the Common Law, if a Man had recovered Debt or Damages, and had not taken Execution within the Year he had been put to the new original of Debt, but now by the Statute of Westminster 2. cap. 45. Quia de his recordata sunt & c. he shall have Scire Facias, but yet he may have Debt as at Common Law; For the Statute does not prohibit it; Per Wangford. Br. Scire Facias, pl. 146. cites 36 H. 6. 3.

3. An Eclair upon a Judgment issued at the Suit of H. and after H. died, and his eldest Son sued a Scire Facias upon the said judgment; and holder that it lies not. Lane 16. Hill. 4 Jac. in the Exchequer, Huddleston and Hill v. Bows.

4. On a Motion for Scire Facias to avoid a Judgment made void by the Statute 12 Car. 2 of General Pardon (the Judgment being obtained before 1698 for Matters relating to the War) the Court doubted whether a Scire Fa. lay, or whether the Party ought to bring Audita Querela, and therefore took Time to advise. Sid. 231. pl. 32. Mich. 16 Car. 2. B. R. Alien v. Powell.

5. Left was Plaintiff in Execution and got a Judgment, and his Administrator brought a Sci Fa. against the Tertenants to shew Cause Quare Executionem non habetet; The Tertenants demurred to this Sci Fa. for that there is no Precedent for a Sci Fa. upon such a Judgment; but it was agreed, that the Scire Facias was well brought. Sid. 317. pl. 3. Hill. 18 & 19 Car. 2. B. R. Cole v. Tertenants of Skinner.

(0 a) In
(O. a) In what Cases there ought to be a Scire Facias.

[After the Year.]

1. If a Man acknowledges a Recognizance to be paid at a certain Day beyond a Year of the Date of the Recognizance, the Year being past from the Date of the Recognizance, though it be within the Year after the Day of Payment, yet he shall not have Execution without a Scire Facias. 21 E. 3. 22. b. adjuged.

2. If a Man acknowledges a Recognizance to be paid at a Day within the Year after the Date of the Recognizance, in this Case he may have Execution by Fieri Facias, or Elegit, within the Year after the Day of Payment, though the Year be past from the Date of the Recognizance. 21 E. 3. 22. b.

3. If a Man recovers an Annuity, he shall have Execution for every Term that incurs afterwards by Fieri Facias or Elegit without the Year after the Term incurred, tho' the Year be past from the Judgment. 21 E. 3. 22. 1 E. 3. 3. but not after without Scire Facias. 21 E. 3. 22. 1 E. 3. 3.

4. If a Man be bound in a Recognizance to the King upon Condition to be of good Behaviour &c. he cannot be indicted for breach of the good Behaviour, by which he forfeited the Recognizance without a Scire Facias. Adv. 15 Car. B. R. Porrowe's Case, per Cur. and such Indictment taken in Cornwall quashed accordingly, and to two other Indictments the same Term quashed, the one against Smith, the other against Bayward; For if a Scire Facias had been brought, they might have pleaded any thing to discharge them.

5. In Account the Defendant was awarded to Account, and Capias ad Computandum awarded against him, and came into Court by another Suit, and the Plaintiff prayed that he might remain for his Execution, and because it was after the Year and Day he was put to the Writ of Scire Facias; Quod Nota. Br. Seire Facias, pl. 94. cites 21 E. 3. 7.

6. In Fi Fa. of Damages recovered, and this Proces was continued by Return of the Sheriff till the Year was passed, which seems to be by Alias, Fi. Fa. and Pluries, and after the Year the Sheriff returned that the Defendant has not any Goods but 41. by which the Plaintiff prayed Eligit in divers Counties, and had it. Br. Execution, pl. 125. cites 47 E. 3. 26.

7. In Covenant Rent was granted by Fine, and the Comyns brought Writ of Covenant to have Execution of Arrears of the same Rent, where he may have Writ of Scire Facias; and by the Opinion the Court he may have Writ of Covenant if he will, and so Writ of Covenant upon Writ of Covenant. Br. Execution, pl. 186. cites 22 E. 4. 1. 2.

8. So of him who recovers in Debt or Trepass, he may have Writ of Execution, or new Original, at his Pleasure, as here. Ibid.

9. If one has sued forth a Writ of Execution, and that is continued by Vicennes non mutat brevce for 2 or 3 Years, yet the Plaintiff may proceed thereupon, and shall not be put to a Scire Facias; but if such
Execution.

9

Writ be sued forth, and not continued, but discontinued by a Tenor and Verbis——
a Day, he shall be put to a Seire Facias, for it is Negligence of the 4 Le. 44. 4 pl. 119. S. C. Plaintiff of not continuing of it, which within the Year and Day he might without Order of the Court, but after the Year not by any Verbis. Order of the Court &c. per Manwood. 2 Le. 78. pl. 101. Trin. 31 Eliz. In the Exchequer, Sir Wm. Waller's Cafe.

10. Judgment for 60d. the Creditor acknowledge Satisfaction for 400l. of the Debt, and 10l. for Damages, and afterwards an Agreement was made between them, that if he did not pay the Money by such a Day, that it should be lawful to take out Execution, without bringing a Sci. Fa. though it was after the Year. The Money was not paid. The Creditor took out Execution, and the Debtor being brought to the Bar by Habeas Corpus, prayed a Superfedeas, because the Writ erreoneous namavit. The Court held this a Caufe to discharge him of the Execution, for that the Capias ought to have issued for two hundred Pounds only, and that notwithstanding the Agreement, the Creditor ought to have brought a Seire Facias, because the Process was not continued, but it was discretionary in the Court, whether to grant a Superfedeas or not; For they may put the Defendant to his Writ of Error. Mich. 22 Jac. C. B. Hickman v. Sir William Firth.

11. A Judgment was recovered by Tfeator and he took forth a Lecti Facias, whereupon the Sheriff returned that he had no Lands nor Goods. Tellor died, and his Executors, without suing forth any Seire Fac. on the said Judgment, took forth Execution, and took the Defendant in Execution; But upon his applying to the Chancery the Court returned it to the Judges for the Opinion, and pursuant thereunto granted a Superfedeas to discharge him. Chan. Rep. 90. 10 Car. 1. Caldwell v. Wheat.

12. In case of the King there need not be any Seire Facias after the Year. 2 Salk 603. pl. 14. Patch 5 Ann. B. R. Anon.

13. The Plaintiff gets Judgment in the Petty Bag, after which he is stopped 2 or 3 Years by an Injunction fo that the Year and Day pass; Note of the Reporter, a Quere is made, whether in this Execution without a Seire Facias. 3 Wms's Rep. 36. H. Vac. 1729 Hoddon v. Earl of Warrington.

Plaintiff H. could not have had Execution, and continued it by Vicecomes non misfit breve agreeably to what was said by the Court of B. R. in the Case of Booth v. Booth. Salk. 322.—

1 Salk. 322. pl. 9. Mich. 3 Ann. B. R. the S. C.

(P. a) In what Cases without Seire Facias.

If a Man recovers Damages or Debt against B. and after B. Where the dies, 10 Execution lies against the Executor without a Seire Facias. 18 C. 2. Execution 243. Adjudged 15 P. 6. b. Parties to a Judgment or Convicti-

on are changed Execution ought not to be sued without a Seire Facias. 2 Raym. 768. Patch. 1 Ann. The Queen v. Ford & al.

2. If a Man recovers Debt or Damages by Judgment, and Br. Execu-

dies before Execution, his Executor shall not have Execution by Fe-

ret Facias or Capias though it be within the Year, but ought to have a Seire Facias. 15 P. 7. 16. b. Br. Seire

Facias, pl. 123. cit 15 H. 7. 15. 16. S. C——Contra upon Statute Staple or Merchant, Ibid.
Execution.

Br. Scire Facias, pl. 123, cites 15 H. 7. 15, 16, S. C.— If the Defendant dies, the Plaintiff shall not have Execution by Pl Fa, against the Executor, but shall have Sci. Fa. first. Ibid.— Br. Scire Facias, pl. 123. cites 15 H. 7. 15, 16, S. C.

3. Debt lies of Execution of Damages recovered in Writ of Waifs or Adjon Real; For the Damages are Personal, and a Man may choose to have Feiit Facias, Eligies, or Writ of Debt; Quod Nota by award, Br. Executions, pl. 17. cites 43 E. 3. 2.

S. C. cited Arg. 3 Mod. 180 in Cafl. of Obrion v Ram, and says, that upon a Judgment in a Sci. Fa, the Defendant may be committed to Prison several Years afterwards without a new Scire Facias.—And where one recover'd upon a Recognizance and afterwards brought Debt upon the same Recovery it was adjudged maintainable, notwithstanding it was objected, that the Judgment in such Scire Facias is not to recover Debt, but to have Execution of the Judgment. 4 Le. 136. pl. 237. Mich. 17 & 18 Eliz. B.R. Barnard v. Tuffer.

In this Case it was mov'd to be erroneous, because if two recover'd, and one of them died, there must be a Sci. Fa. against the Defendant before Execution shall issue, because he may have a Right of him that is dead to plead; Quod fuit concessum; but 'tis not so in a Writ of Error, because he might have pleaded it before upon the Writ of Error, and those for whom the Error is affirmed shall have Execution. Ibid.

If two recover in Debt &c. and before Execution one of them dies, if Execution be sued in both their Names it is not Error. Brownlowe said, that in such a Case the Surviver ought to sue a Scire Facias before that he can sue Execution; But Cook and all the Court said, that he may sue Execution without a Sci. Fa. because he is privy and Party to the Judgment, and convicted in a Debate here; per Holt Cn. J. 7 Mod. 68. Mich. 1 Ann. B. R. in Cafl. of Withers v. Harris.

3. Three Women and the Baron of one of them recover'd in Debt in C. B. and upon Error brought in B. R. that Judgment was affirmed; then the Baron died, and the Women brought a Capias ad Satisfaciendum against the Defendant without a Sci. Fa. and adjudged good. Mo. 367. pl. 503. Mich. 36 & 37 Eliz. Iharn's Cafe.

5. Where a Judgment in Debt is affirmed in a Writ of Error, the Defendant in the Writ of Error shall have Execution, immediately without a Scire Facias, tho' the Year and Day be past since the 1st Judgment; For all the Justices, and to the Clerks said their Ufage was. Cro. E. 416. pl. 10. Mich. 37 & 38 Eliz. B. R. Goodwin v. Grudge.

7. After a Judgment in an Information on the Statute of 33 H. 8. cap. 17. for not leaving Standils in Wood, the Informer died, and his Administrator surmised it on the Roll, and prayed his Mootery, and had it; And it was said the Course in C. B. was to. Hardr. 161. pl. 2. in Scaccario, Mich. 1659. Morby v. Urlin.

8. If there be two Plaintiffs in a Personal Action, and one of them dies, that shall not put the other to a Scire Facias, or if one of the Defendants dies; therefore likewise a Scire Facias is not necessary, because the same Party still remains on Record, and this has been lately adjudged upon solemn Debate here; per Holt Cn. J. 7 Mod. 68. Mich. 1 Ann. B. R. in Cafl. of Withers v. Harris.

(P. a 2)
Execution.

(P. a. 2) Where a Scire Facias must be, or a new Action.

1. IN Account; the Defendant is awarded to Account, and after the Plaintiff died, and the Executor of the Plaintiff brought Scire Facias, and it was abated by Award, and there is no Remedy but new Original; for this Record is not determined till he has accounted in Fact. Br. Execution, pl. 114. cites 21 E. 3. 32.

2. An Administrator being sued for Debt pleaded Plene Administrator, and the Jury found Assets to satisfy Part, whereupon the Plaintiff had Judgment for so much, and that the Defendant for the Residue ate inde jure Die. The Plaintiff now suggested Assets to the Value of the Residue come to the Hands of the Administrator, and thereupon sued a Sci. Fa. but the Opinion of the Court was, that it did not lie, notwithstanding 4 H. 6. and 33 H. 6. were vouched; But Anderson said, that the Judgment does not warrant the Sci. Fac. but a new Writ of Debr. Mo. 236. pl. 386. Mich. 29 Eliz. Anon.

3. The Obiusee died intestate, and his Administrator brought Debt on the Bond, and had Judgment, and then he died intestate, and his Administrator brought Sci. Fa. upon that Judgment, and upon two Nickels returned had Judgment and Execution upon it. On a Motion that the Administrator should not have the Monies levied, the Court said it was Warren, too late after Judgment on the Sci. Fac. to remedy this by Motion, S. C. held but he is put to his Writ of Error; and so Day was given to prove Cause accordingly, why the Plaintiff should not have his Money. Palm. 443. Trin. 2 Car. B. R. Patchall v. Ware.

(Q. a) Where after Scire Facias.

1. AFTER a Judgment, if the Plaintiff within the Year sues a Scire Facias, he cannot have a Capias after within the Year till he has a new Judgment in the Scire Facias. Trin. 13 Car. B. R. per Cur. between Roberts and Pising.

2. A Man brought Scire Facias against J. N. of Land, and Execution was awarded to him by Default, and after the Plaintiff came and said, that J. N. is not Tenant, but W. S. is Tenant, and prayed Sci. Fa. against him; Per Thorp, this you cannot have; for it may be that Tenant may Execution is made. Per Cand. this is no Mischief; by which the plead it;

* Writ was granted to him; Quod Nata; and so see Scire Facias at; Quod Nata, Br. Sci. Facias, pl. 136. cites 15 E. 3. 15.

3. If a Man recovers Land and has Execution, he never shall have Execution again upon such Recovery; But if a Man recovers in Writ S. C. of Annuity or Rent, or upon Composition to repair my Mills quando necessit, of such Things which shall be done or paid very often, he shall always have Scire Facias from Time to Time, for the Thing is always executory. Br. Sci. Facias, pl. 218. (bis) cites 2 H. 6. 9.

4. After
Execution.


5. And concordat optima Opinio 48 E. 3. 8. and 14. for Capias lies by reason that the Original is by Writ of Debt; but it is agreed there that Capias does *not lie upon Judgment in Sci. Fa. upon Recognizance; Quod Nota. Contra in Sci. Fa. upon Debt. Ibid.

6. Scire Facias of Execution in C. B. It was agreed, that if the Sheriff returns Nihil an Alias shall issue, and there upon another Nihil returned Execution shall be awarded; But in B. R. Execution shall be awarded upon the first Nihil returned; Quod Nota; Quare Causam. Br. Scire Facias, pl. 121 cites 14 H. 7. 19.

7. H. recovered a Judgment Anno 17 Car. 2. against the Defendant, and had a Trespass Sci. Fa. to the Tenants, who appeared and pleaded, and there was a Verdict against them, and Judgment thereupon. Afterwards H. became a Bankrupt, and the Commissioners assigned the original Judgment to P. who now moved the Court that it might be entered to entitle him to the Benefit of the Judgment upon the Sci. Fa. which was ruled accordingly, without bringing a new Sci. Fa. Quod Nota. 5 Mod. 18. Mich. 7 W. 3. Plummer v. Lea.

(Q. a. 2) By Fieri Facias.

1. I Fa a Fi. Fa. for 20l. is awarded to the Sheriff, upon which he takes an entire Chattle and sells it for 40l. and returns the Fi. Fa. with the 20l. into Court, he may detain the Surplusage till the Defendant comes to demand it of him; For he is not bound to search for the Defendant; Per Popham, and agreed. Noy. 59. 38 Eliz. Wooddy v. Coles.

2. But if a Fi. Fa. is awarded for 40s. by Force of which the Sheriff takes five Oxen, every one of the Value of 5l. and sells them all, it is clear that the Defendant shall have Action of Trespass against the Sheriff; Per Gawdy; which was agreed. Noy. 59. in Cafe of Wooddy v. Coles.

3. On a Fi. Fa. Sheriff may not break the Outer Door of the House and enter; But if that be open he may enter, and then may and ought to break the Door of an Entry or Chamber which is locked, and break open any Chest and take the Goods in it in Execution, and if he does it does not an Action on the Cafe lies against him. Brownl. 50. Trin. 44 Eliz. Anon.

4. This Writ though mentioned in the Statute W. 2. 18. is a Writ of Execution at Common Law, and is called a Fieri Facias because the Words of the Writ directed to the Sheriff are Quod Fieri Faciat de Boun & Catallis &c. and from these Words the Writ takes its Denomination. Co. Litt. 290. b.


When a Judgment is once executed the Goods are in Custodia Legis, and neither Exchequer Proceeds or Alignment per Commissioners of Bankrupts will touch them. 3 Mod. 236. Trin. 4 Jac. 2. B. R. Letchmere v. Throwgood.

7. The
7. The King grants an *Annuity* for 40 Years to B. to be received by the Hands of the Receiver of the Court of Wards. This is a Rentscharge, and may be sold by the Sheriff upon a Fi. Fa. of the Goods of B. It is otherwise an Annuity for Years granted by a common Person. Resolved in the Court of Wards by the two Justices and Ch. Baron. Jenk 512, pl. 97. 2 Jac. Mary York's Cae.

8. *Debt* against the Sheriff lies for Money levied on a Fi. Fa. before the Return of the Writ, if he might take Advantage of his own Wrong. 2 Show. 79, pl. 63. Trin. 31 Car. 2. B. R. Cockram v. Welby.


The Court held the Plea not good, and that the Case differs much from the Case of Payment to the Sheriff upon a Fieri Facias. For he is commanded to levy the Debt of the Goods of the Defendant by the Writ of the King, but no such Authority is given to the Marshall; and Judgment for the Plaintiff. 2 Mod. 214. S. C. Jones and Rainsford held that the Payment to the Marshall was no Discharge; but Wild J. was of another Opinion. The Report says, Quære. Upon a Fieri Facias, if the Sheriff returns Fieri Facis, and the Money paid to the Plaintiff, it is good; Quære. Cumb. 242. 2 Show. 87. S. P. adjudged. The King v. Bird.

10. If the Sheriff on a Fi. Fa. do sell a Lease or Term of a House he cannot and must not put the Person out of Possession and the Vendee in, but the Vendee must bring his Ejecutament; Per Cur. 2 Show. 85. pl. 74. Hill. 31 & 32 Car. 2. B. R. The King v. Dean and Bird, &c. &c.

11. When the Officers are once in the House on a Fi. Fa. they may break open any Chamber Doors or Trunks for doing their Execution. Agreed per Cur. 2 Show. 87, pl. 78. Hill. 31 & 32 Car. 2. B. R. The King v. Bird.

12. *Goods of the Wife vested in Trustees on the Marriage*, but the Husband to have the Use of them for his Life, were seised on an Execution for the Debt of the Husband, and the Assignment adjudged fraudulent as to the Creditors at Law, and no Relief to be given in Equity. 2 Vern. 258, pl. 221. Mich. 1691. Underwood v. Mordant.

13. Upon a Fi. Fa. the Sheriff may take any thing but wearing Clothes; if the Party has two Gowns he may take one of them. Per Holt. Ch. J. Cumb. 356. Hill. 8 W. 3. B. R. Hardisty v. Barny.

14. *Two Fieri Facia's were delivered the same Day* Holt Ch. J. inclined that the Sheriff had Election to prefer either, but ordered it to be made a Case. Sed Quære now the late Statute. Cumb. 428. Trin. 9 W. 3. B. R. Smalcorn v. Sheriff of London.

First it is good, but the Plaintiff in the Fieri may have Action against the Sheriff, unless he bid the Sheriff stay Execution, or to that Purpote. 1 Salk. 520. Smallcomb v. Buckingham. In 1 Salk. is a N. B. That he who brought the first Writ told the Sheriff that he was not in hals, and so took out no Warrant, nor left any Fee, and this inclined the Opinion of the Court more strongly against him. Cath. 410. S. C. and after several Debates the Judges were of Opinion for the Plaintiff who had taken out his Execution last, to which they rather inclined, for that it appeared that the other Creditor did not demand an Execution of his Writ. And by Holt Ch. J. the Vendee of the Goods in such Cafe has good Title to them, which cannot be defeated by a subsequent Execution of that Writ which was first delivered; but the Party concern'd in such Writ is put to his Action against the Sheriff. For otherwise it would be dangerous to make such Purchases of Sheriff, and that might make Writs of Execution of no Effect. — 5 Mod. 576. S. C. Holt Ch. J. took Notice that the Party said to the Sheriff, "You may let it lie, it requires " no hals," and therefore defiers no Warrant, nor leaves any Fee, and so the Sale upon the second Fi. Fa. good and not to be avoided. And though the second Fi. Fac had been delivered a Formnight after, yet if it be the first executed it shall be good, and the Party’s Remedy is only against the Sheriff. — 15 Mod. 126. S. C. held accordingly. — 51 Ld. Raym. Rep. 251. S. C. resolved accordingly. — Campb. Rep. 53. S. C. adjug'd accordingly.

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15. A. is in Execution at Suit of B. and charged with Action at Suit of C. who obtains Judgment; he ought to charge in Execution by Committitur and not by Ca. Sa. but he may have Fi. Fa. But Quare, if after he has charged him by Committitur, he may have Fi. Fa. he continuing so in Execution. By the Statute if one in Execution by Ca. Sa. escape, Plaintiff may sue Fi. Fa. 12 Mod. 313. Mich. 11 W. 3.


17. In Case of a Fi. Fa. against a Lease for Years without Impeachment of Waste the Sheriff cannot cut down and sell some Things which the Tenant may, because in that Case the Tenant has only a bare Power without an Intelet; but where he has an Interest as well as Power, as Tenant for Years has in Standing Corn, the Sheriff may cut down and fell. Per Holt Ch. J. 1 Salk. 368. Mich. 2 Ann. Pool's Case at Nisi Prius in Middlesex.

(Q. a. 3) By Levari Facias.

1. UPON a Levari Facias out of a Court Baron Goods cannot be sold without a Custom to Authorize it. Brownl. 41. Trin. 6 Jac. Anon.

2. At Common Law a Common Person Debtor might have had a Levari Facias for the Recovery of his Debt, by which the Sheriff was commanded, quod de Terris & Catallis iplius the Debtor &c. Levari Faciae &c. But in such Case the Debtor did not meddle with the Land, but the Sheriff collected the Debt and paid it over to the Debtor. Per Doderidge J. Godb. 290. pl. 216. Pash. 21 Jac. in the Court of Wards in Sir Edward Coke's Case.

3. Though one be in Execution for the King yet a Levari Facias lies De bonis & Catallis, and by such Writ the Sheriff may take ready Money. 2 Show. 166. pl. 157. Mich. 33 Car. 2. B. R. The King v. Webb.

(Q. a. 4) By Habere Facias Possessionem &c.

1. UPON a Fine of Grant of Rent the Conlee prayed Writ to put him Seizin and had it; quod noster, an Habere Facias Seizinam upon a Fine executory, as well as upon a Recovery; Contra upon a Fine executed. Br. Seizin, pl. 10. cites 21 E. 3.


3. If one brings Biseizment of 20 Acres of Land, and Defendant pleads Not Guilty, and is found Guilty for 10, and for the Remainder Not Guilty, the Plaintiff shall shew the Land and be put in Possession at his Peril, and so in Action Real; per Manwood Ch. B and said it was the Opinion of the Ch. Justicases in the Star-Chamber. Savil. 28. pl. 67. Trin. 24 Eliz. in the Case of The Queen v. Ayleworth.

4. A Precept cannot be made and awarded out of the Court of a Manor to execute a Recovery by Plaint in Nature of a Writ of Right there,
Execution.

there, and to put the Recoveror in Possession with the Pote Maneva; For Force in such Cases is not justifiable but by Command out of the King's Courts. 3 Le 99. pl 142. Mich. 26 Eliz. C. B. Anon.

5. Upon an Habere Fac. Seminam the Sheriff as to one Acre return-2 Le. 51. ed Habere Pote, and as to the other Parts; Per omnes Juticiarios, prater S. C. & Periam. J. the Sheriff ought to be amerced for such Return contrary S. P. Anon. and repugnant in its self: But per Periam, it may be that the Acre of which no Semina is had was so far distant from the other that the Sheriff for want of Time could not make Execution of both; But it was answered, that then he might make Execution in one in the Name of both. 2 Le. 175. pl. 214. Mich. 30 Eliz. C. B. Anon.

6. After Judgment given in a Real Action the Plaintiff within the Year and Day may have an Hab. Fac. Seminam. Co. Litt. 254. b.

7. It Habere Fac. Poll goes to the Sheriff, and he returneth that he Cumb 150. has made Execution of this Writ, and the Return is filed, there is Salt 321. Court can never award a new Hab. Fac. because it appeared on the Record that the Party once had Execution of the Judgment; But be 2 Brownl. fore the Firing the Writ and Return the Court may award a new Hab. 255. Not Fac. So if the Day of Return pass, and no Return made, there on a 121. Anon. Vicecomes non milit Breve may, award a new Hab. Fac. but before the Day of Return cannot award it, because it ought to appear by the Return of the Sheriff at the Day what has been done upon the Writ. Palm 289. Trin. 20 Jac. B. R. Molinuex v. Fulgam.

8. If Sheriff gave Possession to the Party, and the other says him so as to a present, the Sheriff may restore him to the Possession notwithstanding short time his former Execution, because he ought to leave him in a peaceable and quiet Possession. Palm 289. Trin. 20 Jac. B. R. Molinuex v. Fulgam.

It is a Disturbance and an Attachment will go. 6 Mod. 27.

9. Driving the Party's Cattle off the Land after Possession delivered on an Hab. Fac. Poll. seems to be putting out of Possession: for which an Attachment will lie, but for only disturbing him in his Possession it seems an Attachment will not lie. Sty. 277. Trin. 1651. Smith v. Earl of Dorset.

10. Hab. Fac. Possession shall not be granted after a Year after the Judgment without Motion in Court, and if it be once executed, tho' the Parties are turned out immediately by a Trick, they cannot have a new Hab. Fac. Poll. without Motion of the Court. Sid. 224. pl. 15.

11. A Sheriff was ordered to attend the Court for demanding an Oath of the executive Fac for the Execution of an Habere Fac. Poll. the Court say- ing there was none due. Vent 351. Mich. 32 Car. 2. B. R. Anon.

in a Note.

execute a Fine Facias till his Shilling-pence was paid, the Court would not grant the Rule, but said it was Extortion, for which he might be indicted. Salt 321. pl. 5. Hill. 7 W. 3. B. R. Anon.

12. If a Man be put into Possession by virtue of this Writ and af- after be disturbed by Violence, an Attachment may be granted, for 2 Brownl. a Contempt to this Court; and because the Justices of Peace would not relieve the Party they were ordered to attend the Court. Cumb. 150. Mich. 1 W. & M. in B. R. Dogget v. Roe.

13. Upon an Habere Fac. Possessionem, the Execution is not compleat till the Bailiff delivers the Possession and is gone; Per Holt Ch. J. 6 Mod. 115. Hill. 2 Ann. B. R. Anon.

(Q. a. 5)
(Q. a. 5) Habere Facias Seilinam or Possessionem &c. How; and necessary; In what Cases.


2. Where the Demand is certain the Recoverer may enter without any Writ of Hab. Fac. Seilinam; Per Coke Ch. J. Roll Rep. 213. Trin. 13 Jac. B. R.

3. Judgment in Ejectment, and an Habere Facias Possessionem awarded, if it contains more Acres than are mentioned in the Declaration, it is Error; and if the Sheriff deliver Possession of more than are contained in the Writ, an Action on the Cafe will lie against him, or an Affile lies for the Lands; Per Roll Ch. J. Sty. 238. Mich. 1650. Lumley v. Nevill.

4. Upon a Motion for Execution in Ejectment upon a Lease for 50 Years, if A. B. shall so long live, and a Verdict for the Plaintiff 20 Years ago, and now they moved that he might have an Habere Facias Possessionem without Prejudice or Displeasure of the Courts, A. B. being yet living and the Lease not yet expired, and that they should not be put to a Scire Facias, this being for the Land, as it is said in the Cafe of Oake and Diceats, Sid. 351. Holt Ch. J. said that he was not in Court when the Cafe in Sid. was ruled, but he held that the Stat. of Westminster 2. extends to Personal Actions, and that an Ejectment is a mixed Action, and in the Realty as to the Recovery of the Land, and therefore he remitted it to the Party, to take Execution as he should be advised; and he did not agree clearly with Sid. in the Cafe above. Skin. 427. pl 3. Pasch. 6 W. & M. in B. R. Marwood v. Penwick.

5. After Judgment in Ejectment one may enter and execute his own Judgment, and the Affiance of the Sheriff is only to keep the Peace; Arg. 7 Mod. 66. Mich 1 Ann. B. R. in Cafe of Withers v. Harris.

6. Writ of Error on a Judgment does not supersede the Possession, or hinder the Party of his Entry, if it were lawful before; it does indeed lie upon the Hands of the Court that they cannot award Execution, but the Party may enter if he will; Per Powell J. 7 Mod. 69. Mich 1 Ann. B. R. in Cafe of Withers v. Harris, lays it was lately resolved in the Cafe of Badger v. Loyd.

7. After the Demandant has Judgment in a Common Recovery against the Tenant, and the Tenant against the Vouches, and the Vouches against the Common Vouches, the Court awards a Habere Fac. Seilinam to the Sheriff of the County where the Lands lie, which is returned, and so the recovery compleat and executed; and tho' this is not much regarded, being only Matter of Form, yet in many Cafes it is not safe to proceed 'till there is a Return of the Habere Fac. Seilinam, for whenever a Recovery is to Ufe, as all Common Recoveries are, no Seilin is in the Recoverer, no Ufe raised 'till the Execution of the Recovery, for 'till then the Land paffd not. Moore 281. Trin. 7 H. 4. 17. so that till then no Ufe arising the Party, to whose Ufe the Common Recovery is declared to be, can convey nothing, for nemo dat quod non habet. Pig. of Recov. 153, 154.
(R. a) When a Scire Facias is to be sued,
How it may be, and against what Person.

1. UPON a Recognizance, if the Conunisor be dead a Scire Facias lies against the Heir General, or against J. S. Son and Heir of the Conunisor without suing against the Tertennants; for he shall not have Contribution against the Tertennants no more than the Conunisor himself should have. 27 P. 6. Execution 135.

2. When the Conunisor is dead, and a Scire Facias is sued against the Heir, and he is returned dead, a Scire Facias lies against the Tertennants. 18 C. 2 Execution 242.

3. But till it is returned that the Conunisor being dead has no Heir, or that the Heir is dead, or that the Heir is returned, the Tertennants shall not be named, because the Heir may have an Acquittance. 18 C. 2 Execution 242.

4. Scire Facias was sued against the Heir upon a Recognizance of the Father, which was returned Nihil, by which the Plaintiff prayed Scire Facias against the Tertennants, and had it; For it is said there, that as long as the Heir has Assets the Tertennants shall not be charged, and if he has nothing, Processe shall be made against all the Tertennants; for every one shall be contributory. Br. Scire Facias, pl. 225. cites 17 E. 3 Fitzh. Execution 135.

5. A Man recovered his Annuity against a Parson; The Parson died; He shall have Scire Facias against the Successor of the Parson, and not against the Executor of the Parson, and shall have Sci. Fa. of Part, and Fa. of the rent; and so it seems that Part was in the Time of the Parson, and Part in the Time of his Successor, or Part within the Year and Part after. Br. Executors, pl. 144. cites 24 E. 3. 23.

6. Scire Facias upon Recognizance suised against the Heir Executors and Tertennants without naming the Tertennants, and for this Cause, and because there was no Tertennants who were Die Recognitions factæ et posta, where it may be intended otherwise that it was against the Tertennants who were before, therefore the Writ shall abate. But per Finch, it lies well against the Tertennants without naming their Names, if he says Die Recognitions factæ &c. Br. Scire Facias, pl. 42. cites 46 E. 3. 29. and 8 H. 4. 18. accordingly.

7. If a Man recovers his Diffeisn against the first Diffeisor, he may have Scire Facias for Execution against the Tertennant. Br. Scire Facias, pl. 229. cites 9 H. 4. 5. And Fitzh. Redifleisn, 1 and 7.

8. In Affile, if the Plaintiff recovers and is ousted again by the first Diffeisor, who aliened over, the Plaintiff may have Redifleisn against the Diffeisor, and Scire Facias against the Allience, Per Tirwhite. Brooke says Quare; For it seems, that by Redifleisn a Man ought to recover the Land, which cannot be against the Diffeisor, no Tenant being named. Br. Scire Facias, pl. 70. cites 9 E. 4. 5.
9. If the Sheriff upon Writ of Execution returns the Cousinor deed, the Cononlee shall have Scire Facias against the Heir and the Tertiants. Br. Scire, Facias, pl. 235. cites 2 R. 3. 8.

10. It was tolden by the Justices that in a Scire Facias to have Execution of a Fine, it is no Plea that there are other Tertiants not named in the Writ; or otherwise it is upon a Scire Facias to have Execution of a Recognizance. Mo. 571. pl. 783. Trim. 41 Eliz. B. R. Anon.

11. In Scire Facias, the Defendant pleaded that he was not Tenant of the Freehold, and adjudged no Plea; Arg cites Mich. 44 & 45 Eliz. Rot. 834. and said it was so adjudged in the Case of All Souls College, in Scire Facias to have Execution of a Judgment in Ejectione Firmae; And the Defendant in the Scire Facias pledges that he was but Leafe for Years, and adjudged no Plea, inomuch that nothing was to be recovered but only the Term, and not the Freehold. 2 Brownl. 145. Mich. 9 Jac. C. B. in Case of Kemp & al'. v. Lawrere & al'.

12. Judgment against an Executer, and upon a F. Fa. the Sheriff returned that he had viseted the Teflators Goods, and that he had Nulla Bona of his own &c. The Plaintiff upon a Teflatum that he had Goods in Durham, took out a Sci. Fa. directed to the Sheriff of Durham, de Bonois propriis, but the Teflatum being not entered on the Roll, a Superfede was awarded, and Execution made by a false discharge. Hob. 63. Hill. 12 Jac. Lieucepter v. Read.

13. Scire Facias upon a Judgment in Debt against R. for 200l. against his Tertiants. The Sheriff returned, he warned J. C. and 3 other Tenants; The Tenants made Default; J. C. pleaded that one R. F. was Tenant of 20 Acres in such a Town, which are the Lands of the said R. against whom the Recovery was at the Time of the Judgment, and demanded Judgment if he should answer till R. F. was warned. It was adjudged for the Defendant; For the Court said, there is a Difference between a Scire Facias to have Execution upon a Judgment in Debt, and to have Execution upon Judgment in a Real Action; for in the last this is not any Plea, for every Tenant shall answer for that which he has, and the one may lose, and the other not; But in a Scire Facias to have Execution of a Debt, because every one ought to be contributory, the one shall not answer as long as he can show that another is to be contributory with him; and altho' the Sheriff return that they are Tenants, yet that shall not conclude the Defendant, but that he may say, that another is Tenant of Parcel, who is not warned. Adjudged for the Defendant. Cro. J. 506. pl. 19. Mich. 16 Jac. B. R. Michell v. Sir John Crofts.

14. In a Writ of Error to reverse a Fine some Justices of both Benches inclin'd that it was best to award Sci. Fa. against the Tertiants before the Court proceeds to Examination of the Errors; For though the Judgment ought to be revcred against the Party or Privy, yet the Plaintiff cannot be reforted to all that he lost till the Tertiants be made privy by Sci. Fa. For should he be oust'd otherwise, he shall have an Affile, and a Sci. Fa. was awarded accordingly. Dy. 321 a. b. pl. 21. Hill. 15. Eliz. Anon.

15. If Recovery be had against the Father in Borough English, the Scire Facias shall be against the youngest Son, because he is Heir to this Land; Arg. Palm. 241. Mich. 19 Jac. B. R. in Case of Darcy v. Jackson.

16. Guardian in Chivalry brought Quare Imp. in Right of his Ward, and had Judgment. In Error upon this Judgment the Sci. Fa. shall not be against the Heir or the Executors of the Guardian who was privy to the Judgment, but against the Heir to the Adescion, though he is not privy to the Judgment; Arg. Palm. 241. in Case of Darcy v. Jackson, cites 8 H. 6. 35.

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17. The Ancestor bound himself and his Heirs in an Obligation, and Judgment was had thereupon against him, and he died. In a Scire Faci, brought against the Heir, he pleaded Res posta on Defent. The Court, upon the Argument of the Judgments, that he had certain Land. Agreed that the Judgment should be special, viz. this Land only. But otherwise if Debit be brought against the Heir upon an Obligation of the Ancestor, in which he bound himself and his Heirs, but there he is charged as Heir, but here only as Tenant. Palm. 419. Pack. 1 Car. B. R. Bowyer v. River.

18. A seifed of Lands acknowledges a Recognizance to B. in the Three Chancery, and afterwards sells the Lands to C. and dies. B. sued a Scire Faci, against C. Tenant, and the Heir of A. To which C. pleads, that A. was not seised of the Lands at the Time of the Acknowledge-ment of the Recognizance; And it was found by the Jury for the C. to the Plaintiff, upon which C. moves to arrest Judgment; For that, that the Sheriff had the Tenant only, and not the Heir. Upon which Judgment was laid until the Sheriff had made an Alias Rex, and returned the Heir, and the Tenant, and then Judgment was given for the Plaintiff. The Plaintiff himself shew'd the very late to me. Noy 154. Eyres, v. Teynton.

against him, this is aided by the Statute of Jeofails; whereupon another Scire Facias is adjudged in formandum Curbat whether there was an Heir; and thereupon the Sheriff returned that there was an Heir, but did not lay he was summoned; and though the Return had been better if it had been found who was Heir, and that he was summoned, or that there was no Heir within the County, yet the Mit-return, or insufficient Return, is only a Definishment, and is aided by the Statute of Jeofails, and Judgment for the Plaintiff. Cro. Car 295. &c. 312. pl. 4 Pack. 9 Car. B. R. Eyres v. Tavornon, S. C.——Jo. 319. pl. 1. Eyres v. Cowly. S. C. all the Justices held that the Heir ought to be charged as Tenant, and when the Sheriff returned that there were Tenants, it shall be intended that the Heir had not any Heir who has any Land by Defent, but howsoever when the Tenant returned did not take Exception to this Return but pleaded over, and they were at Ille, and this was found against him, this is a waiver of this Exception, or at least is made good by the Statute of Jeofails, and 50 Judgment for the Plaintiff.

19. Judgment in Debt is had against two, and one dies, and the Lev. 52. Plaintiff brings a Scire Facias against the Survivor, and recites the Death of the other, and prays Execution against the Survivor; The Defendant pleads, that the which died had an Heir, who is in full Life, by St. Trin, and demands Judgment if Execution &c. Plaintiff demurs. Wind-tate whichham J, said, the Books of 1 E. 3. 13. S 41. and 3 E. 3. 11. pl. 41. gives the : are direct in the Point, and the Reason why this Execution shall be against the Survivor is, because the Plaintiff may take a Fieri Facias if he may be still, and perhaps he will not charge the Land. Twifden of the charge the fame Opinion; And if upon this Scire Facias the Plaintiff takes an Eliget, the Defendant may have an Audita Querela; and edly, he may sugett this Matter upon the Return of the Eliget, and have a Super- fectas. And Judgment was given for the Plaintiff Nili &c. Raym. 26, 27. Mich. 13 Car. 2. Edfar v. Smart.

nate only; but if he will take Execution upon the Lien Real the Charge ought to be equally against both, and Scire Facias against both.—Keb. 125. S C adjuged, and held that by taking Advantage of the Personal Lien he had waived the Betes against the Heir by Eliget.

20. The Defendant pleaded a Joint Judgment against the Tealor, S. C cited and H. who is now alive and that he had not affects beyond the laid Judgment to satisfy. The Plaintiff demanded, and adjuged for the Defendant, because the Lien survives, and the Executor not liable as adjuged. Raym.
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Execution.

Raym. 153. Pach. 18 Car. 2. B. R. Harvey's Cafe (Executor of Harvey.)

21. In Scire Facias against Tertenants to have Execution of Lands of which B. was seised at the Time of the Judgments given against him, they pray Judgment of the Writ, because J. S. had Lands (particularly mentioned) which were B's at the Time of the Judgment, and that J. S. was not summoned or returned Tenant &c. The Plaintiff replied, that J. S. non est nec fuit Tenens &c. et hoc petit inquisitor &c. and thereupon the Defendants demur; Whereupon peremptory Judgment was prayed for the Plaintiff, because this is a Judicial Writ given by the Statute of Wms. 2. and cited 43 E. 3. 3. & 2 E. 4. 10 & 5 E. 4. 139. But per Cur. peremptory Judgment ought not to be given, and Respondas Offer was awarded. 2 Jo. 122. Hill, 30 Car. 2. B. R. Collop v. Brandlin.


which was thus, Scire Facias upon a Judgment in Ejectment for the Plaintiff was brought against certain Persons who entered into the Lands after the Death of the Defendant in Ejectment, and the Plaintiff demanded Execution of the Term against them; The Defendants demurred, but Judgment was given for the Plaintiff. 2 Latw. 1267. Hill. 2 & 3 Jac. Corbet b. Ly. Carlsburg, which differs from the principal Case.

23. 22 & 23 Car. 2 cap. 2 is a perpetuating Act of the 16 & 17 Car. 2. cap. 3 does not extend to the not warning in all the Tertenants in a Scire Facias &c. But that when an Extent is executed, and the Tertenant brings an Audita Querela, he shall not drive the Plaintiff to extend a new, but the Extent shall stand, and he shall have Contribution against the Rest. Per tert. Car. 2 Vent. 165. Mich. 1 W. & M. C. B. Prynne v. Slaughter.


25. Where the Judgment is joint against two, and one of them dies before Execution, the Scire Facias ought to be joint against both. And Holt Ch. J. said, this was a judicial Writ, and might be framed upon the subject Matter, and the Form he proposed was thus, viz. That the Writ should be against J. H. to shew Caufe why the Plaintiff should not have Execution against him de Bonis & Catallis, and of the Moiety of his Lands, and against the Heir and Tertenants of B. H. to shew Caufe why (the Plaintiff) should not have Execution of the Moiety of the Lands of the said B. H. without mentioning any Goods; quod nota. Carth. 105. 107. Hill. 2 & 3 W. & M. in B. R. Panton v. Tertenants of Hall.

26. Where a Judgment is had against one who dies before Execution a Scire Facias will not lie against his Heir and Tertenants till a Nihil is return'd against his Executor. Arg. Carth. 107. cites several Year-Books to that Purpoile; But cites D. 257. Reg. Jud. 57. b. contra. 1 Lev. 30.

D. 307. b.
20 S. a. pl.
15 Bricknell v.
Owen leaves it a Quære if it is at the Liberty and Election of the Plaintiff. — See Smart v. Eden supra. pl. 19.

27. Several
27. Several Tertenants in several Counties, Scire Facias against the Tertenants in one County only, one Tertenant in another County dies, and this assigned for Error. It is erroneous, and per Cur. one may be summoned by a Rent liable to the Judgment, and the Summons to be upon the Land. Cumb. 185. Mich. 3 W. & M. in B. R. Blake v. Gell.

28. On Error to reverse a Fine Scire Facias must go against the Tertenants. 1 Salk. 359. pl. 4. Hill. 6 W. 3. B. R.

Carth. 111. Patch. 2 W. & M. in B. R. E. of Pembroke's Case.


30. In a Scire Facias against Tertenants one of them begins his Plea in Bar Quod Executionem habere non debet, and concludes in Abatement. Holt Ch. J. said, Atio non effrns the Writ, so that he cannot plead in Abatement afterwards, and cites 36 H. 6. 18. Judgment was Quod Respondeat Outser. Comb. 282. Trin. 6 W. & M. in B. R. Beristord v. Cole.

31. In Error to reverse a Fine, though in strictness of Law a Scire Facias being returned against the Cusses is sufficient; yet for fear of Purchasers, and in favour of them, there shall be a Scire Facias against the Tertenants. 2 Salk. 598. pl. 2. Hill. 6 W. 3. B. R. Tully's Case.

32. Judgment against several Defendants, and a Capias and a Capi Corpus returned as to one; then another of the Defendants dies, and he that was in Execution escaped, and a Scire Facias against the Survivors, the Tertenants of the Deceased, and him that had escaped; and per Cur. it may well be; but first the Scire Facias ought to suggest that he had escaped; and secondly it ought to be de Terris et Tenementis of the Tertenants of the Deceased, and de Terris et Tenementis et Rovis et Catalis of the Survivors. 12 Mod. 254. Mich. 10 W. 3. Anon.

33. Notice must be given upon a Scire Fieri Inquiry; Per Cur. where Judgment in Execution was more than a Year's standing, it was formerly the Practice not to sue out a Scire Facias, but on Debate the Matter was otherwise settled; and so it was in the Cases of Phillips and Biron, and Copley v. Delony, and Crawley v. Heyward. 8 Mod. 366. Patch. 11 Geo. 6. Stede v. Lateward.

(R. a. 2) By whom Scire Facias may be brought.

1. Scire Facias lies not but for him that is Party or Priory. Arg. Ow. 3. Patch. 26 Eliz. in Case of Beverley v. Arch-bishop of Canterbury.

2. T. B. recovered in a Scare Imped, and before he had Execution, he was outlawed. The Queen brought a Scire Facias to execute the Judgment; it was reloved that the Scire Facias to execute the Judgment was well brought, and that the Queen had Priory enough to sue Execution of the Judgment, because the Thing as it was in the Plaintiff is in the Queen, and it is a chole en Action, and therefore it cannot be a Thing in Possession in the Queen, and so be is not to present, but is to prosecute the Execution of the Judgment. Mo. 241. pl. 379. Mich. 29 Eliz. Beverley's Cafe.
Execution.

3. Two recovered in Debt, and before Execution one of them died; if Execution is sued in both their Names it is no Error; and per t. Cur. the Survivor may have Execution without a Scire Facias, because he is Privy and Party to the Judgment and vouch'd 21 E. 3. Noy. 150. Anon.


5. Executor durum, in the Estate or till the Daughter should be married, and then the Executorship to cease, and the Daughters to be Executors gets judgment on a Bond made to the Testator.—After which the Daughters married the Plaintiffs.—The Daughters shall have this Judgment as Executors, for they are in Privity and in by the Testator, and not like an Administrator who is in by the Ordinary after the Death of the Executor. Owen. 134. Mich. 9 Jac. C. B. Kemp and James v. Lawrence.

(S. a) The Goods of whom may be put in Execution.

1. If a Man recover Damages against a Corporation he shall not have Execution of the Goods of the Singular Men in their natural Capacity but of the Goods of the Corporation. 8 H. 6. 19 P. 6. 64 b. 20 H. 9. 26 P. 6. Execution 123.

2. So if a Corporation be sued this shall be levied the Goods of the Corporation, and not of the Goods of every particular Man. 9 H. 6. 36. b.

3. If two have Goods jointly, and the one is condemn'd in Damages and dies before Execution; there no Execution shall be of those Goods, by Reason of the Survivor; Per Chautrel arguendo in a Replevin. Br. Execution, pl. 116. cites 7 H. 6. 2.

4. It was said by Tanfield Ch. B. that a Collector of a Fifteenth may levy all the Tax within one Township upon the Goods of one Inhabitant only if he will, and that Inhabitant shall have Aid of the Court to make each other Inhabitant to be contributory; which was granted by the Court; Bromley being absent. Lane 65. Trin. 7 Jac. in the Exchequer. Anon.

5. If a Sum of Money be to be levied upon a Corporation, it may be levied upon the Mayor or Chief Magistrate, or upon any Person being a Member of the Corporation. Per Roll Ch. J. This was spoken in the Case of the Town of Colchester in Essex, Nota Sty. 367. Hill. 1652.

6. The Rafts of a Stranger Levant and Coercitant may be taken by the Sheriff on a Levati Facias; For they are the Illues of the Land; Held per Cur. 1 Salk. 295. Hill. 9 W. 3. B. R. Britton v. Cole.
(T. a) What Thing will Discharge a Man out of Execution.

[Attainder, Outlawry &c.]

1. If a Man in Execution for Debt at the Suit of J. S. be attainted of Felony, and after pardoned, this shall not discharge him out of Execution. B. 10 Curt. 2 K. per Cur. Chappell's Case; and

A Man was condemned in Re-diltefin, and Coupas issued pro Fine Regis, by which he was taken and committed to Prison, and after he was outlawed of Felony, and the King pardoned him of all Felonies, and after the Plaintiff in Re-diltefin came and prayed that he may remain for his Execution: Per Fanaex, the Execution is gone by the Interest of the King, which he had in the Body by the Felony of him pending, and Execution once extinct cannot survive; quod Brian conceit but per Littleton, the Execution is not extinct, but suspended, and the Felony is the Act of the Defendant himself, which shall not exclude the Plaintiff; and after it was awarded that he should remain in Prison, till he had made Greet to the Party. Br. Execution, pl. 98. cites 6 E. 4. 4.

But per Jullupworth, If a Man condemn'd in Debt or Damages is after convicted of a Felony, and has his Clergy, and is committed to the Ordinary, the Plaintiff shall not have Execution of his Body, good Choke and Markham conceit; Quære, when he has made his Pardon, and is at Large. Br. Execution, pl. 98. cites 6 E. 4. 4. — Mo. 753 Hall v. Truflell. S. P. 2


2. Andita Quæra upon Execution sued upon Statute-Merchant, where the Confor had a Deceafance by Indenture upon Re-payment of 20 l. and bad Ven. Pa. and Superfedas, and at the Day the Conufe appeared, and the other pleaded the Indenture and tendered the 20l. The Conufe impeared, and in the mean Time the Confor was outlawed, which was shown by Skip. and prayed Writ to seifie his Land and Goods; and therefore it seems to be Outlawry of Felony; For otherwise the King cannot seifie the Land for which because now the Confor cannot purifie his Suit nor tender us Supra; by which Execution was awarded to the Conufe in C. B. where the Outlawry was in B. R. by which Harefon came into B. R. and there shewed the Record of Outlawry; by which Thorp Justice commanded the Marshal, who had the Body of the Conor in Ward upon the Outlawry, that he should not permit him to go in Pain of 20 l. and bid the Conufe to sue Writ of the Chancery to us containing this Matter, so that we may have express Warrant, and if the King pardons him, he shall remain for this Case; and fo note that the Execution was in C. B. and the Outlawry in B. R. Br. Execution, pl. 65. cites 24 E. 3. 45. 46.

3. If the Plaintiff brings Debt upon Fcape against a Gaoler, this is a Discharge of Execution of the Body. Br. Execution, pl. 151 cites 15 H. 7. 1.

4. Per Frowhike, he who is taken by Ca. Sa. and pays the Money in Court, shall be discharged; & concordat ut Supra of the Fcape, ibid.

5. Note per Cur. in B. R. a Man is in Execution in C. B. and the Record with the Body is removed into B. R. by Writ of Error, the Party shall find Surety by Recognizance to satisfy &c. if the Judgment be affirm'd, and to suit with Effect; there the Body is discharged of the Execution unless he will render himself to Prison in Discharge of the Sureties,
Execution.

and otherwise the Receiver is put to sue the Recognizance. B. Execution, pl. 152 cites 16 H. 7. 2.

6 A Person in Execution for Debt was convicted of Felony and escaped; the Sheriff is answerable for the Debtor, and such Felon is responsible to every Action till he be executed in Fact. Savil. 63. pl. 135. Patch. 26 Eliz. Ognell v. Martin and Webb.

7. Judgment was given against one in Debt, and the Defendant suffered himself to be outlawed in Felony to the Intent to defraud his Creditor, and after purchased Pardon, and had Reification, and the Plaintiff sued Execution and had it for Fraud apparent. D. 245. b. pl. 65. Marg. cites 30 Eliz. Beverley's Case.

8. Prisoner in Execution escapes with the Permission of the Gaoler. Per Cur the Execution is utterly gone and extinguished, and the Plaintiff at whose Suit he was taken in Execution shall not refor to him who escapes, but shall hold himself to the Gaoler for his Remedy. 2 Le 119. pl. 162. Mich. 29 & 30 Eliz. B. R. Phillips v. Stone.

Cro. E. 517. S. C. cited by Owen as adjudged in Scacc, that an Action of Debt on the Execution was maintainable, which proves that he might be taken in Execution during the Attainder. But the Reporter adds a Quare, if it were not adjudged, because he being in the Custody after the Pardon should then be laid to be in Execution for the Party.

9. A Man being attainted of Felony was taken in Execution at the Suit of a Common Person, and escaped out of Prison, and an action of Escape was brought against the Sheriffs of London, and a Recovery against them. Ow. 69. in Truffel's Cafe, 32 Eliz. cites it as Crott's Cafe C. B.

Cro. E. 516. pl. 41. Mich. 28 & 39 Eliz. C. B. Barry's Case. V. Truffel S. P. and seems to be S. C. and adjudged against the Opinion of Walmesly, that he should answer; For his Body was his own during the Attainder for he may purchase Land, and if there be any Peronal Wrong done to him he may, when he is pardoned, have his Action for it; And it is not Reason that a Man doing a Wrong shall advantage himself thereby, and take away another Man's Action; And the Queen and the Plaintiff may both be served, the Queen, by executing him when he pleases, and the Plaintiff in the Interim to have him in Execution.—S. C. cited by Dodridge F. Law 145.

Ow. 69. Trin. 32 Eliz. B. R. S. C. says that at last by Advice of the Court, because he was indicted to many Persons, and to discharge himself from his Creditors he intended to have a Pardon for his Life, and to deceive them, therefore he was committed to the Marshalsea upon this Execution.—But Cro. 213. pl. 5 Hill. 33 Eliz. B. R. Truffel's Cafe it was resolved, that he should be discharged out of Execution; For being a Person attainted of Felony the Queen hath Interest in his Body, and so he cannot be taken in Execution for Debt, and therefore they discharged him.

11. A was indicted of Robbery, and after was pardoned and discharged in Execution for Debt due before. D. 245, b. pl. 65. Marg. cites 16 Jac. Atkinson's Cafe.

12. Exe-
Execution.

12. Execution is discharged by Plaintiff’s agreeing to Defendants going at large. Hert. 79. Hill. 3 Car. C. B. Wiggons v. Darcy, per Richardson J. but Harvey J. e contra.


13. Release to one where 2 are in Execution for the same Debt is a Discharge of the other. Hert. 79. Hill. 3 Car. C. B. in Case of Wiggons v. Darcy. Per Richardson J.


15. A Person committed for a Misdemeanor shall not be charged in Execution without Leave of the Court at the Suit of any Party. Sid. 154. Hill. 15 Car. 2. B. R. Sir John Jackon’s Case.

16. A Person indicted and convicted of striking in Westminster-Hall was afterwards pardoned; but the Court on allowing the Pardon, would not discharge him of Civil Pleas entered in the Marthalsea against him. Sid. 211. pl. 8. Trin. 16 Car. 2. B. R. The King v. Bockman.

17. Prisoner going at large by Consent of the Plaintiff is a Discharge of the Execution, and if he be retaken an Audita Quer. lies. Sty. 15. Car. 24 Car. Walker v. Alder.

in Execution, and he afterwards set at large by the Plaintiff’s Consent; if either of other 2 be afterwards taken in Execution upon the same Judgment he may have an Audita Quer’ but he cannot be relieved on a Motion in Court, though grounded on an Affidavit; Per Roll Chief J. Sty. 327. Trin. 24 Car. Price v. Goodrick.

(U. a) After Execution.

In what Cases Execution may be after Execution.

1. If a Man be condemned for a Fine to the King, and Damages to the Party in an Action where Capias lies in the Original, and he is taken by Capias pro Fine at the Suit of the King, and after suffered to escape, yet the Party at whose Suit the Recovery was, may have Execution by Hert. Facias or Eject. though he may, if he will, make this an Escape to him, and charge the Sheriff, for he was in Execution to him at his Election. 18 P. 6. 19.

2. If A. be chargeable to the King for 27 l. for an Amerciament, for which Process is out of the Exchequer to the Sheriff to levy it, and the Under-Sheriff comes to A. upon another Occasion, and A. lays to him, You owe me 30 l. by Bond, I pray pay me; to which the Under-Sheriff says, You owe me 27 l. for an Amerciament, which I ought to levy by Process which I have, and if you will give me my Bond I will discharge you of your Amerciament, and pay you 3 l. to which A. agrees, and delivers the Obligation accordingly; this is a good Execution, and the Amerciament well levied in Law, so that A. shall not be charged again by the King but the Sheriff. 8 a. in the Exchequer adjudged. Sir Daniel Norton’s Case.

3. If a Man be taken by a Capias ad Satisfaciendum, he is presently in Execution upon the Arrest before the Day of Return of the Writ. Dabitur Kelway. 12 P. 7. 2. b.
Execution.

After Escape.

4. If a Man taken in Execution by a Capias be put in Prison, and after escapes, and then the Sheriff dies, a new Capias lies against him, because otherwise the Plaintiff is without Remedy, 41. As. 15. adjudged.

Because he has no Remedy against the Sheriff who is dead. Br. Execution, pl. 86.

* See Audit. Que. to the Party, cites S. C.

5. If a Man in Execution escapes, and the Sheriff makes fresh Suit after him, and after takes him again, though it be a long Time after, yet he shall be said in Execution again, because he shall not take Advantage of his own Wrong. 3 Rep. 52. * Ridgeway. Referred.


6. So if a Man upon a Capias ad Satisfacientum be taken in Execution, and after escapes himself from the Sheriff and escapes, the Plaintiff may have a new Capias against him, and take him again, the first Writ not being returned. P. 8 Car. B. R. between Sir Robert * Manning and Clayton adjudged per Cur. upon a Seize Factual after the Year, because he shall not take Advantage of his own Wrong. Intratite Tit. 7 Car. Rot. 1343. P. 7 Id. 25. agreed per Cur. between Ridgford and Hopkins. 3 Rep. 52 b. * Ridgeway's Cafe. + Contra 14 H. 7. 1. per Cur. Contra | 41. As. 15.

S. C. accordingly, that the Party shall not have other Execution nor other Remedy but Action against the Gaoler, and yet after the Escape the Gaoler may re-take him, though he was out of View; quod nona.

* See Audit. Que. to the Party, cites S. C.

7. So in the said Case, if the Sheriff had returned the Writ and the Rescue, the Plaintiff might have a new Capias against him for the Cause aforesaid. P. 8 Car. B. R. per Cur. agreed in the said Cafe.

8. As. if a be in Execution at the Suit of B. and escapes with the Asent of the Sheriff, and after the Sheriff retakes him, and keeps [him] in Prison, he shall be in Execution to B. because though B. may bring an Action against the Sheriff for this voluntary Escape, yet it is at his Election, for the Party in Execution by his own Wrong shall not put B. to his Action against the Sheriff against his Will, and it may be that the Sheriff is not able to give him Re-compence. Hill. 10 Car. B. between * Tresilian and the Lord Roberts, Rot. 1622. where an Audit Que. was brought upon this Surmise, and Issue taken upon the voluntary Escape, and found for the Plaintiff, and per adjudged in Arrest of Judgment against the Plaintiff. Contra Hobbart's Reports 273. Viscount of Essex's Cafe.

9. As. if a Man in Execution in the County of Devon escapes into the County of Somerset, where he is taken in Execution, and after the Sheriff of Devon, upon fresh Suit, finds him in Prison in Somerset, Que, how may the Sheriff of Somerset with the first Execution, or put the Party in Execution, inasmuch as he cannot retake him.

After
After Execution.

10. If a Man be imprisoned for a Fine to the King, and after there is Agreement between the Prisoner and the Plaintiff, and the Plaintiff sufferers him to go at large after the Fine, paid upon Recognizance made for the Duty to the Plaintiff, if the Defendant does not pay the Duty, the Plaintiff may have Execution upon the Recognizance, or upon the Recognizance, at his Pleasure, for he was not in Execution at his Suit at his Election. 21 Ed. 4. 67. b.

11. If a Man recovers Debt against B. who is after taken upon a Capias Utralagum within the Year and put in Prison, though he be in Execution prima facie, yet the Party may elect that he shall not be in Execution by this for him, and to have a new Execution by Capias, though the Sheriff suffers him to escape upon the Capias Utralagum, for he never was in Execution by this at his Election. 39. 43 & 44 Eliz. B. R. between Shaw and Cuttrell will prove this. Contr. D. 7. a. B. admitted Curia.

12. If a Man in Execution at the Suit of the Party sues a Writ of Error, and finds Bail with Recognizance to sue with Effect, if the Judgment be affirmed the Plaintiff shall not have further Execution, because he had Execution before, but he must sue Execution upon the Recognizance. 11 Ed. 4. 67. b.

13. If a Man in Execution sues a Scire Facias upon a Deed, and the Party lets him out by Recognizance, if it be found not the Deed of him who recovered, he cannot have Execution but upon the Recognizance. 11 Ed. 4. 67. b.

14. If a Sheriff levies Goods by Force of a Fieri Facias, and does not deliver them to the Party, nor returns his Writ, the Plaintiff may have new Fieri Facias, because a Record shall not be avoided by a naked Matter in Fact. 9. 7. a. Warder ton said it was adjudged. 8. 1. a. B. per Cur.


In a Scire Facias against the Defendant upon the Judgment Defendant may plead this Matter, and the Plaintiff must take his Remedy against the Sheriff, whose Sale of Defendant's Goods is good and cannot be defeated. Gobb 170. Fee v. Balton.

Debt of 10 l. the Plaintiff counted that he recovered against the Defendant in Special Affidavit in Damages before the Justices; the Defendant said, That within the Year he sued Fieri Facias to the Sheriff, by which he levied it, and paid it, to the Plaintiff. Judgment & Action, and the Payment over to the Plaintiff was of little Regard, but only the levying by the Sheriff, and Halk and Hank held the Peces no Peces, and that the Defendant shall answer to the Plaintiff, and shall have his Remedy against the Sheriff. But Thorne was strongly against it, and that the Debt is of Record, and by the Fieri Facias it is levied of Record by Office of Authority, and whether he pays it over to the Plaintiff, or sends it into Court as for ought, or not, it is no Default in the Defendant; and that the levying was good, for the Defendant cannot compel the Sheriff to send it into Court, nor deliver it to the Plaintiff, and therefore no Default in him, and he executed; which Brooks says is the best Opinion, and the Reporter accordingly. And after the Parties agreed; and the Writ was Quod denarioli habeas hic in Cur, tale &c. Et si fit Coram Jus lici ate Allie, tunc denarios filios habeas ad proximam Sellion &c. Br. Execution, pl. 35. cites 11 Ed. 4. 58 — And see 26 H. 6 26. 11. And Book of Entries 170. That it is admitted for a good Peces in Scire Facias, and ifue taken thereupon; and the Plaintiff may have Account upon it against the Sheriff who levied it, and did not deliver it to the Court nor to the Plaintiff, as it seems there. Ibid.

15. If a Man before he is in Execution finds Bail upon a Writ of Execution, and after the Judgment is affirmed, the Plaintiff may have Action upon the Recognizance, or have Execution upon the &c. accord. 21 Ed. 4. 67. b.
Execution.

16. If a Man in Execution upon a Statute Staple or Merchant, sues an Audita Querela, and upon this finds Bail, and after has not a
procure, or is adjudged against him, it is by the Statute 11 H. 6.
cap. 5. that he may be taken in Execution again.

Fol. 203.

17. If a Man in Execution be bailed by the Court, yet he may be
after taken in Execution again. P. 13 1a. B. R. per Cooke.

18. If A recover against B. an Execution de Bonis Teitatoris if
non de Bonis Pròpris, and the Sheriff upon a Fieri Facias levies the
Money, and after upon another Fieri Facias directed to him returns a
Debendavit, and upon this a Scire Facias is granted against B. to
himself. B. may discharge himself from this Debendavit by
Cr. 11 Cat. B. R. levied the Money upon the first Fieri Facias.
Plea that the Sheriff per Cur. between Middleton and Powell.

19. If a Man imprisoned upon a Capias pro Fine files a Writ of
Error, and upon this is bound by Recognizance to the Plaintiff to
prosecute it with Effect, and also if Judgment be affirmed that
he will render himself to Prison, this is a good Condition. 11 H. 7. 15.
Doubtance.

See (U. a. 4)

After Delivery by Parliament.

20. If the Defendant in an Account be adjudged to Account, and
after committed to Prison by the Auditors for not making a perfect
Account, and after he is delivered out of Prison by the Privilege of
Parliament, because he is a Burgess of the Parliament, yet after the
Parliament ended he may be taken again by a special Writ, rendering
the special Jailer, and committed to the Prison to remain there as
he was before. Mich. 4a. B. R. adjudged between Sir Thomas
Egerton and Everetton.

See (U. a. 5)

After Death in Execution.

21. If a Man recovers against two, and takes one in Execution,
who dies in Execution, he may after take the other in Execution; for he
might before the Death have taken him also in Execution, and the
Death cannot alter it. P. 4a. B. R. between Williams and Carto-
etis, per Fenner and Tansfield. 5 Rep. 87. P. 2a. 48 1a. adjudged be-
tween Jones and Williams. P. 29 1a. B. R. Rot. 429. between
Hawkin and Arden, if one be taken in Execution, and after the other be
sued upon the same Obligation, and he pleads this in Bar, yet
judged upon Denuncre no Plea, neither that the Death of the
other in Execution is no Satisfaction. Hatter Haddon an At-
torney of 9. R. told me this, and gave the Number Roll of it to
me.

If a Man recover Dam-
ages in an
Action of
Trespass be-
fore Justices
of Oyer and
Terminer,
and has the
Party in
Execution
dies in Prison, he who recovered may sue a Certiorari to the Justices to remove the Record into
B. R. that the Justices there may award Execution as the Law requires in such Case. And I think,
in that Case, that the Party shall have Execution by Elegit, or by Scire Fasicas; for it seems not to
be reasonable, that the Death of him who dies in Prison should be a Satisfaction to the Party. Ta-
ken quare, for Fitzherbert says he doubts of it. F. N. B. 246. (B)

143. S. C.
† S. C. cited
cited 5 Rep.
86. b.
Cro. E. S51.
cites S. C.

22. If a Man recovers against J. S. and takes him in Execution by
Capias, and after J. S. dies in Execution, no new Execution lies
against his Executors or Administrators. 33 H. 6. 48 7 H. 6. 7. Cr.
13 Ja. B. per Curiam adjudged upon solemn Arraignment between Fol-
ter and Jackson. See the same Cates Hacket's Reports 82. and there
etis adjudged, Mich. 4a. 1a. B.
R. between Shaw and Cuttenets, per Cur. Conta 5 Rep. 86. b.
23. If a Man recovers in Debt against J. S. and after outhings him Cro. E. 550. upon the Judgment, and after J. S. within the Year is taken by Cap. Pl. 2. S. C. plus Writs, and after J. S. dies in Prison before any Prayer and Exegium made by the Collector that he shall be in Execution at his Silt; yet this is not any Satisfaction of the Debt, but his Executors unless any or Administrators may be charged for it; for he was in Execution by the taking upon him the Writs for the Party persona late after the Election of the Party, but this is only at his Election. B. 43 & 44 El. B. R. per Curr. between Shaw and Cutters. 

(U. a. 2) After Escape.

1. If a Man be in Execution by his Body and Lands upon a Statute, if the Sheriff permit the Confor to go at Liberty, yet the Execution of the Land is not discharged, but if he do go at large by the Consent of the Confor, then the whole Execution is discharged, and the Confor shall have his Land again presently; Per Anderson Ch. J. Le. 230. pl. 313. Pasch. 33 Eliz. C. B. Linacre's Case. 

2. In an Action for an Escape, the Question was, whether the Plaintiff may take out a Ca. Sa. or Fi. Pa. against the Defendant, after a voluntary Escape permitted by the Sheriff or the Gaoler? The Court would not suffer it to be argued, because it was lately settled that it was at the Plaintiff's Election to do either, which Judgment was affirmed upon a Writ of Error in the Exchequer Chamber; But in Emb. Ch. J. Vaughan's Time the Court of C. B. was divided, but it is since settled. 2 Mad. 136. Mich. 28 Car. 2. C. B. Baillie v. Salter. 

3. If there is a voluntary Escape by the Officer who takes the Party again in Execution which he ought not to do, yet the Plaintiff may have him in Execution if he will. Comb. 396. Mich. 8 W. 3. B. R. Etherick v. Brewell.

(U. a. 3) After Execution.

1. * 13 E. I. Because that of such Things as be recorded before the Some discord, and be involved in their Rolls, the Process of Plea ought not to be made by Summons, Attachments, 

Exegium, View of Land, and other Such matters of the Court, as hath been used to be done of Bargains and Covenants made out of the Court.

before this Act, and the Doubt grew for want of Distinguishing between Personal Actions, and Real Actions; for true it is, that in Personal Actions, if the Plaintiff after Judgment given, or Recognizance
Execution.

From henceforth it is to be observed, that those Things which are found inrolled before them that have Record, or contained in * Fines, whether they be Contrafits, Covenants, Obligations, Services or Customs, knqledged or other Things whatsoever involved, under the King's Court, without Offence of the Law and Custom, may execute their Authority, from henceforth they shall have such Vigour, that hereafter it shall not need to plead for them, a Judicial, and no Original Writ, for de advocai* non sunt nisi tritia brevia originalia. 2 Inf. 470.

And though Fines be here named, yet Recoveries in Real Actions are within the Purview of this Act. 1 Inf. 470.

* It hath been held that these Words have this Relation to the Style of the Recognizance, and not to the Day of Payment, and therefore if a Recognizance be knqledged to pay a Sum a Year and half after, a Scire Facias lies and no Fieri Facias; But I take that Rule to be against Law, and that Recens Cognitio is as much as recens futuro Cognitio; for the Words be Statim habeat breve de Executione, which he cannot have before the Day of Payment be paid. 2 Inf. 471.

If a Judgment be given in a Writ of Annuity, the Plaintiff shall have Execution within the Year after every Day of Payment, by Fieri Facias or Elegit, though it be many Years after the Judgment given, or Recognition knowned, therefore these Words Recens sit Cognitio, shall relate to the Day of Payment of the Money, which is the Effect of the Recognizance, and not to the Title of the Recognizance, which is but the Assurance for Payment of the Money. 2 Inf. 471.

And this Word (Recens or Fieri) imports, when the Party may sue for the same, which he cannot do before the Day of Payment be paid, but this is to be understood when the several Days of Pay-
Execution.

* And if the Recognizance were made, or the Fine levied of a further * Upon the Time passed, the Sheriff shall be commanded, that he give Knowledge to the Words, Scire Facias, of whom it is complained, that he be before the Justices at a certain Day, to shew if he have any Thing to say why such Matters inrolled or contained in the Fine ought not to have Execution, out of C. B. the Consecue must name all the Tenants at his Peril; but in other Courts the Writ is general against all Tenants. 2 Inf. 472.

The Point of the Writ is Quare Execucionem habere non debet, and therefore the Tenant shall not vouch. 2 Inf. 472.

This Statue is in the Affirmative, and therefore it refrains not the Common Law, but the Party may waive the Benefit of the Scire Facias given by this Act, and take his Original Action of Debt by the Common Law. 2 Inf. 472.

And seeing the Words of the Scire Facias be, Quare Execucionem habere non debet, the Tenant or Defendant may plead any Thing in Bar of Execution, as has been said before. 2 Inf. 472.

* And if he do not come at the Day, or peradventure do come, and can * The Party must either be warned or warned, or regularly

2 Nihilis returned, and then by Default Execution shall be granted and the warning is to be made, it appears in its Books 2 Inf. 472.

The Course of the Court of C. B. is, that upon a Recovery the Plaintiff shall have Execution upon one Nilnil returned. 2 Inf. 472.

* In a like Manner an Ordinary shall be commanded in his Case, † observing * This nevertheless, as before is said of a Mean, which by Recognizance or Judgment is bound to acquit. This branch is to be thus intended, that if a Scire Facias be brought upon a Recognizance, or upon a Judgment in a Writ of Annuiy, and the Sheriff return that the Defendant is Clericus & Benedictus nullum habebat Laticem Fodiam &c. the Plaintiff shall have a Writ to the Bishop of the same Diocess to warn the Defendant, and upon warning, or 2 Nihilis returned, and Default made, or if he appears, Execution shall not be granted, then a Writ shall be awarded to the Bishop to levy Execution De bonis Ecclesiasticis. 2 Inf. 472.

† This Clause was added in Majorem Rei Contamin. that the Provisio before made at this Parliament, esp. 9. in Observe that in a Writ of Meem, Pothenum madius veniret in Curiam & cognoverit, quod acquisire debebat Tenementum suum, vel adjudicatur ad acquietandum, it pruit humus Cognitioem aut Judicium quern pellere; vel quod medium non acquisiverit Tenementum, tune breve de Judicio, vel quod uterque medium ad acquietandum Tenementum, whereupon a Proviso is given, now if the Plaintiff in the Writ of Meem should only take his Scire Facias, then
Execution.

no Fore-judger should follow thereupon, therefore this Clause was added, that the former general Words of this Act, Sive sine quacunque irrotulata &c. should not take away the Benefit of the former Act concerning the Fore-judger in a Writ of Mefifie, but as has been faid, this Act being in the Affirmative taken not away neither the Common Law, nor the Benefit of the former Act concerning the said Fore-judger, for the Plaintiff may take Advantage either of the one or other, at his Electi-
on; wherein it is to be observed, that an Act of Parliament cannot be made too plain; But note, the Fore-judger is given only against him that made the Acknowledgment, or against whom Judg-
ment was given, and not against his Heir, and therefore this Act is an Addition declarative to the former, viz. that a Scire Facias may in those Cases lie against the Heir. 2 Inst. 472.

2. Where two are bound by an Obligation to me severally, and I take Action and Execution of the Body of the one, I shall not have Action nor Execution against the other, though the first dies or escapes. Br. Execution, pl. 8. cites 33 H. 6. 47.

3. Where a Man is bound in a Recognizance in 100 l. to be paid at such a Day 201. and such another Day 201. and so of the Refidue &c. the Obligee may sue for every Day broken a severall Execution by Elegie or Levator Facias, and shall not stay till the last Day, as he shall do in Cafe of an Obligation. And so Notice, that Elegit is Execu-

4. Error was brought in redemptione Judicii in Writ of Debt, and in Proclamation of Outlawry in it, and he found Mainprize, and did not keep his Day, and the Plaintiff in the Debt prayed Capias for Execution; Per Mordant, he was in Execution by the Mainprize, and therefore shall not have Execution, but shall have Scire Facias upon the Recogn-
izance of the Mainprize. Per Cur. he was not in Execution; for the Recognizance was only to the King; Quod Notice; and it appears here that once Execution is for ever; for he shall not have Execution a-

5. If the Sheriff returns Capi Corpus upon Ca. 5a. the Plaintiff shall not have other Execution. Br. Execution, pl. 151. cites 13 H. 7. 1. per Kebbe.

6. So it he returns upon a Fi. Fa. quod Fieri Fecit, sed non inveni empor-
tes. Ibid.

7. 32 H. 8. cap. 5. Whereas before this Time divers and sundry Per
sions have sued Executions, as well upon Judgments for their given of their Debts or Damages, as upon such Statutes Merchants, Statutes of the Staple, or Recognizances, as have been to them before made, recognized, and knowledge, and thereupon such Lands, Tenements, and other Heredit-
taments, as were liable to the same Execution, have been by reasonable Ex-
tent to them delivered in Execution for the Satisfaction of their said Debts and Damages, according to the Laws of this Realm. Nevertheless, it has been oftimes seen, that such Lands, Tenements and Hereditaments so delivered, and had in Execution, have been recovered or lawfully de-
volved taken away or evicted from the Possession of the said Recoverors, Obliges or Recognizes their Executors or Assigns, before such Time as they have been fully satisfied and payed off their Debts and Damages with-
out any manner of Fraud, Deceit, Corin, Collusion, or other Defts in the said Recoverors, Obliges or Recognizes, their Executors and Assigns, *(by Reason whereof the said Recoverors, Obliges, and Recognizes have been thereby set clearly without Remedy by any Manner of Suit of the Law, to recover or cause by any such Part or Parcel of their said Debts and Damages as was behind, and not by them recoverd or received, before such Time as the said Lands, Tenements, and other Hereditaments so by them had in Execution, were recovered, lawfully devolved, taken or evicted out of, and from their Possessions as is aforesaid, to their great Hurt and Loss, and much seeming to be against equal Justice and good Conscience.

It appears by the Pre-
amble of the Stat. of 32
H. 8. and divers Books
that after a full and per-
fect Execution had by
Extent returned and of
Record, there shall
never be any
Re extent
upon
Eviction; But if the
Extent be
insufficient
in Law,
there may
go out a
new Extent.
Co. Litra.
250. a. 35s
Nota.
* Where
the Tenant
by Execution has Remedy given to him by Law after eviction there the Statute extends not to it, for
Execution.

for the Act lays, by Reason whereof, the said Recoverors, Obliges and Recognizes, have been clearly set without Remedy &c. and the Body refers to the Preamble, and the Party ought not to have double Satisfaction, one by the former Laws, and another by this Statute.

And therefore if Part of the Land &c. be evicted from the Tenant by Execution, this Statute extends not to it; because he should hold the Reidue till he be fully satisfied, and he must be contented if all shall be evicted having one Acre, to hold that, tho' it be but a poor Remedy; for a New Execution in that Case he can have upon this Statute, therefore if the Commiss or Remedy in Presence for Part, or in futuro for all or Part, this Statute extends not to it.

3dly, If a Man be bound to A in a Statute of 1000 l. and by a latter Statute to B. in 100 l. and B. first extends, and then A extends and takes the Land from B. yet B. shall have no Aid of the Statute, because after the Extent of A. B. shall re-entify the Land, by Force of this former Execution.

3dly. If the Wife of the Commiss enters Execut against the Tenant by Execution he shall hold over, and shall have no Aid of this Statute.

4thly, If a Man puts out his Lease for Years, or difflicates his Leafe for Life, and after acknowledges a Statute, and Execution is sued against him, and the Leafe re-enters, the Tenant by Execution, after the Leases ended, shall hold over, and have no Aid of this Statute. Co. Litt. 289. b.

This Statute Enails that if hereafter any such Lands, Tenements, * This has relation to the Preamble, where there are reheard four Kinds of Executions of those Lands Sec. 18. Upon Judgments, 2dly, Upon Statutes Merchant; 3dly, Statutes of the Staple; 4thly, Recognizances. These Recognizances be of two Sorts; one, usual Recognizances taken in any of the King's Courts of Record at Westminster; another in Nature of a Statute Staple, by the Statute of 23 H. S. cap. 6. This Course of the Statute Staple hereafter in this Statute is called Obliges, because in them both the Seal of the Party is put, and the Tenant by Eggs from Judgments and Recognizances shall hold the Land &c. until he be arrester his Debt without Mifs, CoH Sec. 3. But Tenant by Statute Merchant, Tenant by Statute Staple, or by Recognizance in Nature of a Statute Staple shall hold the Land &c. until his Debt be paid together with Mifs, CoH Sec. 2. Inf. 679.

Or shall be * bad and delivered to any Person or Persons in Execution as the Word had, is by Epris delivered, is by Liberate upon the other three, upon the whole Land &c. of the Commissor; but after the Extent in those three Cases (of the Statutes, or Recognizances in Nature of a Statute) returned, the Commiss may enter without any Delivery by the Sheriff or Force of the Liberates; and he that fo enters without any Delivery is within the Aid and Benefit of this Act, which speaks of Delivery, 2 Inf. 678.

* Upon any just and lawful Title, Matter, Condition, or Cause where- withall the said Lands, Tenements, and Herediments were liable, tied and bound, as such Time as they were delivered and taken into Execution, before the Judgments, Statutes or Recognizances. 2 Inf. 678.

* Shall happen to be recovered, lawfully divested, taken or evicted out of, * By the Context of this Law, 2 Inf. 678.

and from the Possession of any such Person and Persons as now have and hold, or hereafter shall have and hold the same in Execution as is aforesaid, without any Fraud, Deceit, Covin, Collusion, or other Default of the said Tenant or Tenants by Execution, the whole Interest of the Land in Execution must be recovered, divested, or evicted for the Reasons and Causes there expressed. 2 Inf. 678.

* Before such Time as the said Tenants by Execution their Executors * Here are or Aliens through the whole Act, understood, because they are in equal Mifschief, and likewise and for the same Reason, albeit Aliens be named in this branch; yet they are implied throughout this Act in Branches necessary, where they are not named. 2 Inf. 679.

A Man makes a Lease for Years, rending Rent, the Lessor outs the Leafe and binds himself in a Statute, the Land is extended, and delivered to the Commiss, the Leefe re-enters, this is no Execution within this Statute: For it appears by the Preamble, that the Commiss must be clearly without Remedy &c. but here the Commiss shall have the Rent referred, and the Reversion. 2 Inf. 679.

* Shall,
Execution.

Although * Shall have fully and wholly levied or recovered the said whole Debt the Cenuer and Damages, have receiv'd the whole Debt by Execution upon the Statute Merchant, Statute Staple, or Recognizance in the Nature of a Statute Smile, yet cannot the Conduror enter; for he must hold the Land until he be satisfied not only of his Debts, but of his Costs, Damages, Labours and Expenses; otherwise it is in Case of Elegit, as has been said, for there after the Debt satisfied, the Conduror may enter; for Tenant by Elegit holds the Land but until the Debt is satisfied. 2 Indt. 680.

5thly, This Statute must not be taken literally, but according to the Meaning; therefore where the Letter is only, he &c. or his Affigns shall fully and wholly have levied the whole Debt or Damages; if he has assigned several Parcels to several Affigns, yet all they shall have the Land, but still the whole Debt be paid. Co. Litt. 295. b.

* These Words are not to be taken literally, but according to the Meaning of the Makers of this Law, and ever such Contraction is to be made, as the Party grieved, and in equal Mischief may be relieved; And therefore if a Seigniory consisting of Fealty and Rent be delivered in Execution, and after the Rent became Sack by Surplusage, and after is evicted, he shall have the Remedy of this Statute; but if a Villain be delivered in Execution, and the Villain purchase Land in Fev; and the Tenant by Execution enter into the Perquisite of the Villain, and after it is evicted, he shall have no Remedy by this Statute; the Cause is apparent. 2 Indt. 680.

6thly, Where the Words be (for the which the said Lands &c. were delivered in Execution) a Diligent conveys Lands to the King, who grants the same over to A. and his Heirs to hold by Fealty, and 20 l. Rent, and after grants the Seigniory to B. 2s. 6d. Knowes a Statute, and Execution is void of the Seigniory. A. dies without Heir and the Comittee enters, and is evicted by the Diffidence, he shall have the Aid of this Statute; and yet it is out of the Letter of the Law, for the Seigniory was delivered in Execution and not the Tenancy; but he was Tenant by Execution of those Lands, and therefore within the Statute. But the Perquisite of a Villain being evicted is out of the Statute, for he is Tenant in Fec Simple thereof, and not Tenant by Execution. Co. Litt. 295, b. 298. a.

† 7thly, Where the Words be (delivered and taken in Execution) yet if after the Liberate the Committee enters (as he may) so as the Land is never delivered, yet is he within the Remedy of this Statute, for he is Tenant by Execution. Co. Litt. 290.

* If Judgment and Execution be awarded in the Court of Chancery, and in a Writ of Error the Judgment is affirmed in B. R. the Tenant by Execution may upon Eviction have a Scire Facias out of B. R. for it is the same Court in equal Mischief to the Party grieved. 2 Indt. 680.

8thly, Where the Statute says, (then every such Recoveror, Obligee, and Recognizee shall &c.) and says not, their Executors, Administrators or Affigns, but they are omitted in this material Place, yet by a benign Interpretation this Statute shall extend to them, because they are mentioned in the next precedent Clause of the Eviction, and the Remedy must by Contraction be extended to all the Persons that appear by the Act to be grieved; a Point worthy the Observation. Co. Litt. 297. a.

9thly, Where the Statute gives a Scire Facias out of the same Court &c. if the Record be removed by Writ of Error into another Court, and there affirmed, the Tenant by Execution that is evicted shall have a Scire Facias by the Equity of this Statute out of that Court, because the Scire Facias must be grounded upon the Record, Et sic de Similibus. Co. Litt. 293. a.

10thly, Where the Statute gives the Scire Facias against such Person or Persons &c. that were Parties to the first Execution, their Heirs, Executors or Affigns &c. this must not be taken generally the Letter is; for if the first Execution were bad against a Purchaser &c. so as nothing was liable in his Hands but the Land recovered; if this Land be evicted from Tenant by Execution, no Scire Facias shall be awarded against him, his Heirs, Executors or Affigns; but if he has other Lands subject to the Execution, then a Scire Facias lies against him or his Affigns, but not against his Executors; neither in that Case can he have a Scire Facias upon the Statute against the first Debtor or Recognizer, because it gives it only against him &c. that was Party to the first Execution, his Heirs, Executors or Affigns; But if there be several Affigns of several Parcels of Land subject to the Execution, one Scire Facias upon this Statute shall lie against all the Affigns; See 2 Indt. modus in rebus. This little Taitle shall give a Light to the diligent Reader, not only to see into the Secrets of this Statute, but into others also of the like Nature. Co. Litt. 295. a.
Execution.

At which Day the Defendant being lawfully warned, make Default, or appear and do not plead and plead a sufficient Writ or Cause, other than the Acceptance of the said Lands, Tenements and Hereditaments, by the said former Writ of Execution, to bar the suit for the Relevue of the said Debt and Damages remaining unlevied, or unreceived by the said former Execution; then the Lord Chancellor, or other such Justice or Justices, before whom such Writ of Seize Facias shall be returnable, shall make return of a New Writ or Writs out of the said former Record of Judgment, Statute-Merchant, Statute-Staple, or Recognizance, or the Nature andExtent of the said former Writ of Execution was, for the paying of the Residue of all such Debt and Damage as then shall appear to be unlevied, unenforced or unpaid of the whole Sum or Sums in the said former Writ of Execution contained; any Law, Custom, or other Thing to the contrary herein, hereunto or hereafter used in any wise notwithstanding.

8. The ConVNce of a Statute-Staple died, his Executors sued an Execution in the Chancery, and the Sheriff returned on the Inquisition, that the Concuror was dead, and also an Inquisition of an Extent of the Lands of the Concuror, but did not mention any certain Estate, but generally that he was seized of the Day of the Recognizance of the Manor of Broad, where the Name of the Manor is Bar, without knowing what Estate &c. and yet a Liberate illused upon this Return, and was returned served, viz. that the Executors had accepted this according to the Extent. The Opinion of the Justices shewn to the Ed. Keeper was, that the Executor, or the Executor of the Executor, if he received no Profit of it, may pray a Re-extend upon this insufficient and uncertain Return; For the first was void; For (Seiticus) may be pro Termino Vice, or in Fee Tail; in which Case the Land after his Death is not extendible, and therefore where the Death of the Concuror appears on the Return, it ought to be found that he was seised in Fee only. Dyer 299 a pl. 31. &c. 13 Eliz. Anon.

9. If Execution be had on a public Statute, and the same is afterwards avoided by a more ancient Statute, and afterwards the ancient Statute is satisfied, the public Recognizance may re-enter without suing forth any new Execution; Per Manwood Ch. B. 3 Le. 239 pl. 328. Mich. 32 & 33 Eliz. in the Exchequer, in Curton's Case.

10. If Part of the Land be evicted the Party shall not have Remedy upon the Stat. 32 H. 8. cap. 5. Per Coke Ch. J. to which Crooke agreed. And the Court held it to be no Difference, though the Judgment were given in several Courts against several Persons, and at several Times, and where it is but one Judgment against one Person. Godd. 258 in pl. 355. Dyer 12 Jac. B. R.

11. If a latter Extent be avoided by an ancient Extent, after the ancient Extent be satisfied the latter Extent shall have the Land according to his Extent, and without any Re-extend. Brownl. 39. Mich. 16 Jac. Anon.

12. If Execution be lawful, and upon lawful Process, and the Party is delivered out of Execution, then he shall not be taken again in Execution: 8 C. & S. P. But if he is taken in Execution upon erroneous Process, and he be deliver'd out, he may be taken again in Execution; for the first Execution was erroneous, and is no Record it being reversed; Per Doderidge J. 192. 8 C. Godd. 372 pl. 461. Dyer 3 Car. B. R. in Case of Fifth v. Wiltman.

13. Judgment against the Defendant in C. B. and after the Year a Ca. Sa. was awarded without a St. Fa. and the Defendant taken, who brought a Writ of Error in B. R., and the Defendant was discharged; Afterwards the Plaintiff sued out an Alias Ca. Sa. without a St. Fa. and the Sheriff returned Cert, and thereupon the Defendant moved to be discharged, because he being once in Execution and let at large, shall not be in Execution again, but held, that being not lawfully in Ex-
Execution.


14. After an Hab. Fac. Possessionem executed, he it by Sheriff or voluntary Deliverance of Possession, if the Party be turned out again by Defendant's Means, he may have a new Hab. Fac. Possessionem by Motion in Court, and Attachment against him. But if after quiet Possession others enter, he must have new Action or Restitution, or else by this Means by Practice the Sheriff may turn out any of his After-Leases on Nonpayment of Rent. Nota pro Regula. Keb. 779. pl. 22. Mich. 16 Car. 2. B. R. Ratcliff v. Tate.

Cognise of 15. It seems there shall be no Re-extent on Statute-Staple after the Extent filed. Sid. 356. Hill. 19 & 20 Car. 2. B. R. Anon.

Lands in several Counties, and Coginise extended in one County only, and the Extent was returned and filed. LA C. Macclesfield, upon a Petition, gave Leave that a Special Prayer be entered on the Record of the Extent, shewing that the Cognise died seised in Fee of Lands in several other Counties, viz. in S. N. &c. and praying that the Cognise be at Liberty to sue the Extents upon the Lands in all those Counties. 2 Wm's Rep. 91. Hill. 1722. Our Lease of Jollif v. Robinson.

16. In Debt upon a Judgment; The Defendant pleaded, that he was taken upon a Ca. sa. and committed to the Marshal of B. R. and that he had paid the Money to him in Satisfaction of the Judgment. Adjudged no Plea, because the Marshal has nothing to do to receive the Debt, but to detain the Defendant in Prison till he has paid the Plaintiff. 2 Lev. 203. Trin. 29 Car. 2. B. R. Tailor v. Bekon.

17. Bill to have a Statute re-extended on other Lands; Defendant who was an Incumbancer of those other Lands pleads the former Extent, and an Inquisition and Liberty, and avers it to be one and the same Statute. Plea allowed. Fin. R. 237. Hill. 29 Car. 2. Wolmer v. Bendirr.


(U. a. 4) After Delivery by Parliament.


1. ON E in Execution had a Writ of Privilege of Parliament, upon which the Sheriff sets him at Liberty, yet he shall be taken in Execution again after the Parliament is ended. Godb. 373. by Hyde Ch. J. cites Dyer 59, 60. [Patch. 37 H. 8.] Trewinyard's Cafe.

S. C. cited by Doderidge. — Heath's Maxim's 279. cites S. C. and says it was resolved; first, That the Privilege was gruanted, notwithstanding the Execution; because the King and Realm have an Interest in the Body of every Burgesses of Parliament, and the Commons shall be preferred before the Interest of any private Person. Secondly, That, after the Parliament ended, he might be taken in Execution again; For that the Plaintiff shall not be prejudiced in his Execution by the Act of the Law, which doth Wrong to no Man.
2. 1 Jac. 1. cap. 13. 8. 1. 2. If any Person being arrested in Execution, and by Privilege of either House of Parliament set at Liberty, the Party at whose Suit such Execution was pursued, his Executors or Administrators, after the Privilege of that House of Parliament, in which such Privilege shall be granted, shall cease, may sue forth a new Writ of Execution, as if no such former Execution had been served. And no Sheriff or Officer, from whose Custody such Person was fled shall be delivered or Privilege, shall be charged for delivering out of Execution any such Person by Privilege of Parliament set at Liberty.

3. This shall not diminish any Punishment, to be by Confinement in Parliament inflicted upon any Person, which shall make or procure such Arrest.

3. In an Account against B. Judgment was given quod computer, and before the Auditors, he makes an uncertain Account, and was committed till he had made a full and perfect Account, and after B. was delivered by Privilege of Parliament; Proceed was prayed to recite B. and to bring him again into the Court, and it was thought not to be within the Statute of 15 Jac. because B. was not in Execution, nor for any certain Duty. And by the Court a new Cap. ad computum shall not issue, nor then all that was done before the first Auditors will be annulled, as 1 E. 5. 1. b. But a Special Writ shall issue reciting all the Matter, and to bring him again into Court, and being there he shall be committed to Prison by the Court, there to remain until &c. ut supra, which was done accordingly. Noy 17. Breerton's Case.

(U. a. 5) After Dying in Execution.

1. In Debt it was agreed arguendo, that if a Man takes a Body in Execution by Ca. Sr. and the Party dies in Prison, he shall not have Execution, but if he escapes the Party shall have Account against the Warden; Per Prid. Br. Execution, pl. 8. cites 33 H. 6. 47.

2. 21 Jac. 1. cap. 24. The Parties at whose Suit any Person shall and charged in Execution for any Debt or Damages recovered, their Executors or Administrators may, after the Death of the Person so charged, and dying in Execution, have new Execution against the Lands and Tenements, Goods and Chattels, of the Person so deceased, as they might have had if such Person had never had been in Execution.

3. S. 3. This shall not give Litigacy to any Person at whose Suit any such Party shall be in Execution, and die in Execution, to have any new Execution against any Lands or Chattels of such Party dying in Execution, which shall after the said Judgment be by him sold Bond Fide for the Payments of any of his Creditors, and the Money which shall be paid for the Lands so Sold, either paid or secured to any of his Creditors in Discharge of their Debts.
(X. a) What Execution may be after other.

After Capias or Fieri Facias.

1. After a Fieri Facias prayed of Record he may may have
   an Electig. Contra 27 E. 3. 89 b.

Fifth Execution, pl. 126, cites 3. 24.

2. After a Fieri Facias returned Nihil an Electig lies. 30 C.

3. After a Fieri Facias he may have an Electig. * 15 P. 7. 15.

Br. Execution, pl. 64, cites 47 E. 3. 26. b.
S. C.—Br. Electig, pl. 5. cites S. C.—Br. Execution, pl. 128, cites S. C.—Fifth Execution, pl. 125. cites Hill. 50 E. 5. S. P. and seems to intend S. C.

3. 4. So after a Fieri Facias he may have a Capias. 15 P. 7. 15.

Br. Execution, pl. 21 P. 7. 19. b.

5. If a Man recovers Debt against B. and levies Part of the Debt by Fieri Facias which is returned, yet he may take the Body of B. in Execution by a Capias for the Residue of the Debt. P. 43. B. R. per Cur. resolved between Carr and Copping.

Fieri Facias illused to levy 25 l. the Sheriff returned quod levavit 10 l. & quod non habet plura Fiona, by which the Plaintiff had other Fieri Facias, upon which the Sheriff returned quod Nihil habet, by which the Plaintiff prayed Ca. Sa. and had it for the Residue: Quod Nota. 2d Execution, pl. 101, cites 18 E. 4. 11.

In Debt the Plaintiff recovered 400 l. and upon a Fieri Facias 100 l. was levied and returned. Afterwards a Capiad Satisfaciendum illused for the whole 400 l., whereas it ought to have been only for the remaining 300 l. and the judgment of Execution was reversed; For the levying the 100 l. was returned of Record upon the Fieri Facias Mo. 998, pl. 819 Mich. 34 & 35 Eliz. Wells v. Denny. —Cra. B 344 pl. 15. Dennis v. Wells, Mich. 35 & 36 Eliz. S. C. held accordingly, that it ought to have made Mention of the Money levied before.

6. If two are bound jointly and severally, and Judgment given against them upon several Precipes, the Plaintiff shall not have a Fieri Facias against one, and a Capias ad Satisfaciendum against the other, but ought to have but one Manner of Execution against both. P. 11 Ja. B.

7. If a Capias ad Satisfaciendum be awarded, though the Sheriff returns a Non est Inventus, yet he shall not have other Execution after. 20 E. 2. Execution 132.

8. If a Man recovers Debt or Damages against B. and after B. is put in Execution for this upon his Prayer, he shall not after have an Electig or Fieri Facias against him for it. 22 Att. 43. 47 E. 3. Execution 44. he shall not have Electig.

Br. Execution, pl. 79. cites S. C. for the taking of the Body at his Suit or Prayer is full Execution.

And though he lues out a Capias and Fieri Facias at the same Time, yet

9. If a Man recovers Debt against B. and after B. is put in Execution by Force of a Capias ad Satisfaciendum, the Plaintiff has determined his Election, so that he cannot after have an Electig or Fieri Facias. P. 43 and 44 Eliz. B. R. per Cur.

If the Defendant be taken on the Ca. Sa. the Court will quash the Fieri Facias. For per Cur. the Plaintiff.
Plaintiff may for his own Security take out a Writ yet he can execute but one. 8 Mod. 502. Trim 10 Geo. 1725. Stamper v. Haslam,

10. If A. be taken in Execution upon a Capias ad Satisfaciendum at the Suit of B. and escapes from the Sheriff, and no Return is made of the Writ nor is it filed, nor any Record made of the Award of the Capias, B may have a Scire Facias against A. upon the Judgment, and to after have Eblegit or any other Writ. 3 S. B. R. adjudged upon a Demurrer between Sir Robert Monson and Clayton.

11. So if A. be taken in Execution upon a Capias at the Suit of B. and escapes from the Sheriff, and all this is pleaded and confessed upon a Demurrer, but it is not pleaded that the Capias was filed or returned, B. may have new Scire Facias against A. to have Execution, and to after have Eblegit or any other Writ. 3 S. B. R. between Sir Robert Monson and Clayton adjudged upon a Demurrer, the which intratur Cr. 7. Car. 1st 1345. I say the accused being of Defendant's Counsel.


13. Sheriff on a Fieri Facias levies the Money and delivers it to the Party, yet if it be not paid in the Court the Party may have a new Execution, and it is no Plea to say that he paid the same to the Party; For it is not of Record with paying the Money in Court. Godb. 147. pl. 188. cites 11 H. 4. 50.

14. If a Man takes Eblegit, he shall not have * Ca. Sa. nor + Fi. Fa. * S. P. and after; Per Daves; and this seems to be where the Eblegit is served. Br. Execution, pl. 8. cites 33 H. 6. 47.

returns that the Defendant has no Goods nor Land after &c. by which he proved Capias, and could not have it. Ibid. pl. 64. 15 H. 7 14. 15. S. P. Ibid pl. 93. cites 5 E. 4. 41. — S. P. Br. Elegit, pl. 20. cites old Tenures T. Elegit.

15. Detiniae of a Box of Evidence; the Plaintiff died after Judgment and before Execution, and by Award the Executive shall have Fieri Facias for the Damages and Distraint for the Box and Evidence, upon which the Sheriff returned 33 s. 13 d. upon the Fieri Facias quod se sit Firma ad voland 60 l. ad quod non invent Empires, and the Damages were 80 l. and that the Defendant had no Lands, Tenements nor Goods, upon which to make Execution, by which the Court awarded Capias for the 60 l. of the Damages, and Writ of Venditique Esponas to sell the Grain, and Capias to deliver the Box and Evidence against the Defendant. Br. Execution, pl. 103. cites 20 E. 4. 3.

16. Not, per Fairtax, in a Case of a Statute Staple, where a Man recovers Debt or Damages, he may choose to have Ca. Sa. or Eblegit, and it he takes the Ca. Sa. he shall not have Eblegit; Br. Execution, pl. 64. cites 15 H. 7. 14. 15.

18. Upon a Ca. Sa. to the Sheriff of Middlesex, he made a Precept to the Bailiff of the Liberty of the Duchy of the Savoy, to take the Defer at Respondent the Plaintiff when it would be ad Satisfac' and the Bailiff returned the Precept executed, and the Sheriff returned a Capias sciamum Exigentiam Brevi. Though the Sheriff had by this Means charged himself to the Plaintiff so as he might demand Execution
tion against him, yet because the Defendant was never taken in Exec-
ution for the Debt, but was taken only * ad respondend', the Plaintiff
may take new Process against the Defendant. Yel. 52. Mich. 2 Jac.
19. Judgment in Debt upon several Precipes was had against two,
one of them was taken upon a Ca. Sa. and afterwards a Fi. Fa. signed
against the other; but the Court held it clearly, not to be good, but
that he might have a Facias against both, but not a Fieri Facies against
one, and a Ca. Sa. against the other. Godb. 203. pl. 296. Mich. 11
Jac. C. B. Rodier v. Welch and Kemmis.
20. Two were bound in a Bond jointly and severally, and Plaintiff
brought several Precipes against them, and had several Judgments against
them, and took out a Fieri Facies against one, and a Ca. Sa. against
the other; Hutton J. held, to which Harvey J. agreed, that he shall
have the same Execution against both; For as this ought to be one Satis-
faction quoad Satisfaclionem, so it ought to be for the Manner al-
of, and thought that in this Case the Facias was not well awarded.
21. If on a Fieri Facies out the Money is not levied the Writ must be
returned before the second Execution can be taken out; For that must
be grounded on the first Writ, and recite that all the Money was not
levied of the first. 1 Salk. 318. pl. 1. Pach. 1 W. & M. B. R. Ovian
v. Vyne.
22. A Man shall have a Fi. Fa. in Infinitum till the Debt be satis-
ished, with this Difference, that the last must always recite the former,
and what is levied by them, that the Defendant may not be overcharged.
Per Northey 12 Mod. 356. Pach. 12 W. 3. B. R. Pullen v. Pur-
beck.
23. If one levy Part of his Debt by Fieri Facies he cannot after
take a Ca. Sa. for the whole, but his way is to return the Fi. Fa. by
which it may appear how much is levied, and then take a Ca. Sa. for
the Residue, per Car. 6 Mod. 223. Mich. 3 Am. B. R. Anon.
24. An Action was laid in the County of S. and the Plaintiff had Judg-
ment, and took out a Fieri Facies directed into the County of W., without
a Testament &c. and the Attorney afterwards perceiving his Mistake sold
out a Testament Fieri Facies into S. but the Sheriff had executed the first
Writ before it came, and afterwards he executed the other Writ. But the
Execution was set aside; because the first Writ being executed, the
Sheriff could not regularly execute the other. 8 Mod. 282. in Case

(X. a. 2) Restitution awarded.

In what Cases.

Finche and 1. In wafe the Defendant was condemned in Damages, and his Land
Mowbray in Execution by Elegit, and prayed a Sire Facias to re-have
said, that it may be his Land, upon Damages that all is paid except 10 s. which be tendered
to the Court, and had it. Br. Elegit, pl. 5 cites 44 E. 3. 14.
Then this does not appear to us, and therefore the * Plaintiff shall have his Prayer; Quod Nota.
* The Defendant in the Action of Wafe, who now prayed Scire Facias.
Execution.

2. A Ca. Sa. was not executed till after the Day of the Return, and after the Day the Writ was altered in the Trespass from Tres Mich. from Tres Trin. and the Writ so altered and unsealed was delivered to the Sheriff of London, who made a Warrant to a Sergeant, who arrested the Defendant and put him in Prison, and afterwards the Writ was sealed; and by Order of the Court the Writ was received, and the Defendant committed to the Fleet. 1788. p. 50. Mich. 7 & 8 Eliz. Anon.

3. If the Sheriff fails a Term upon a Fieri Facias and afterwards the Judgment is reversed, the Party shall not be referred to the Term, but to the Money only, if the Sale be without Fraud; Per tur. Car. Mo. 573. pl. 788. Mich. 41 & 42 Eliz. B. R. Anon.

Car. and takes a Diversity between a Sale of Goods of a Person outlawed, and of a Sale on a Fieri Facias and that the Reasons of this Diversity are, 1st, that if the Sale by Force of a Fieri Facias shall be avoided by a subsequent Reversal of the Judgment, no one will buy, and consequently no Execution will be made. 20ly, In Case of a Fieri Facias the Sheriff is compellable to levy the Debt of the Goods &c. of the Defendant, and therefore it is highly reasonable that it shall stand. But in the Case of Cap. Using, the Sheriff or Escheator is not compellable to sell, but may keep them to the Use of the King, and says, that if this accords Dyer 365. pl. 24 and cites 3 E. 3. 51, that Recompence in Value upon Voucher once lawfully executed shall not be defeated, though the Defendant’s Title to the Land which he recovered be afterwards disaffirmed and evicted. 1 Rep. 145. a. 5. 8. Laic. in Drury’s Cafe, S. P. per Car. and they took a Diversity between me我不 would be done in Execution of Justice, which are compulsory, and acts which are voluntary. —— 2 Le. 92. pl. 115. Mich. 26 Eliz. B. R. in Case of Amner v. Lodington, S. P. agreed per Car. — Where the Sheriff by Fieri Facias tells the Term or Goods of a Person who has Right, to dispose of them, against whom Judgment is given, such Sale shall stand after the Judgment is reversed; And where the Defendant has only a temporary Right of a Term, and a Remisder in others, the Sale shall stand good during such temporary Right. Jenk. 264. pl. 66. cites Amner’s Cafe the S. C. as that of 2 Le. 92.

4. After Judgment in Ejectment, and an Habere Facias Postessionem, a Writ of Error was brought, and a Superfedeas granted, directed to the Sheriff, and shewn to him to stay Execution, notwithstanding which he did Execution. This was held an apparent Contempt, and a Writ of Restitution was awarded. 2 Bulst. 194. Hill. 11 Jac. Thomas v. Owen.

5. Before Execution the Defendant brought a Writ of Error, and the Record was removed into Cur. Scacc. but the Sheriff levied the Money on an Execution taken out of B. R. By Roll Ch. J. this being after a Verdict and Judgment the Writ of Error is no Superfedeas; and so it is mischievous both ways, but bid them take a Superfedeas quia Erronice emanavit to supercede the Execution; For it was ill awarded, and ordered them to take the Money out of the Sheriff’s Hands. Sty. 414. Hill. 1654. Wingfield v. Valentine.

6. Note for a Rule, that if there be Judgment in Debt by Non sum Mod. 20. Informatus with a writ Executio till such a Day, the Court on Motion will set it aside and grant Reitituation if &c. but if the judgment is entered absolutely, and an Agreement is afterwards made, that no Execution shall be before such a Day, yet if Execution be taken out before the Day, Twifden said he would not relieve it upon Motion, but the Party was grievously hurt being Action on the Cafe. Sid. 379. pl. 9. Mich. 20 Car. 2. B. R. Dawson v. Bayly.

Agreement between the Parties not to take out Execution till next Term, and they do it before, that the Court has set all aside.

7. Judgment was had in an Action laid in Staffordshire, and the Plaintiff sued out a Mandamus Fieri Faciae into Worcestershire; it was moved that this was irregular, because no Fieri Faciae went first into Staffordshire; but non allocutur; For the Fieri Faciae upon which this Tresto was founded, is returned of Courte by the Attornies as Originals M
are; If you search the Roll you may find one, and that is sufficient. 2 Salk. 389. pl. 2. Mich. 7 W. 3. B. R. Palmet v. Price.
8. If Office find a Man has 20 Acres, when in Truth he has but 10, and those 10 are extended, the Execution is good while it stands; Per Holt; but he seemed to be of Opinion he might be relieved by Audita Querela. 12 Mod. 357. Pach. 12 W. 3. B. R. in Cale of Pollen v. Purbeck.
9. If Writ of Error pending Plaintiff dies, and Execution taken out without acquainting the Court therewith, it will be set aside for Irregularity; otherwise if the Court be apprized of it; Per Holt Ch. J. 12 Mod. 494. Pach. 13 W. 3. B. R. Anon.
10. A Fieri Facias on a Judgment in Debt in London being executed in Middlesex, without a Testament Fieri Facias into London was set aside as irregular; But the Plaintiff moved, that he having a Judgment with Release of Errors that the Goods might remain in the Sheriff's Hands, and not be delivered to the Defendant, who was a Poor Man; For by that Means the Plaintiff would lose his Debt; But per Cur. when the Execution is set aside the Goods taken must be returned, because there can be no Colour for the Sheriff to detain them. 8 Mod. 282. Trin. 10 Geo. Goddard v. Gilman.

(Y. a) What Execution may be after another.

After Elegit.

† S. C. cited 1. If a Man prays an Elegit, and it is entered of Record, he by Hobart Ch. J. Hob. * Fol. 925. Rep. 57 in Case of Foster v. Jackson's Cale, 79.


2. If a Man recovers in B. Debt or Damages, and prays an Elegit, which is entered of Record, and after the Record is removed in B. R. by Writ of Error, where the Judgment is affirmed within the Year, the Plaintiff may have Execution in B. R. by Capias or Fieri Facias, because it is another Court than that where he had made his Election before. Cr. 15 Ja. B. R. between Andrews and Cope adjudged per Curiatn, prefer Doberidge, who seemed e contra.

3. If a Man sues an Elegit, and it is returned Nihil within the Year, he shall have a Capias after, or a Fieri Facias within the Year. Cr. 15 Ja. B. R. between Andrews and Cope agreed per Curiatn and the Clerks of B. and B. R. who said that it is their common Court to have it within the Year after the Prayer. 35 Ja. B. this was to agreed per Curiatn in the same Cale, * Hobart's Reports 79. 47 E. 3. Execution 41. upon Elegit returned that he had but two Marks of Rent, and held that he may
may have the Advantage which was at the Common Law (it seems Tenant came Fieri Facias) and to there held, that if he had not Execution of the Damages upon the first Writ, (it seems by this it is intended that all Nihil is returned) he may have a new Writ. Contra. * 30 C. 3. 24.

Fieri Facias; and Thorspe said that the Reason is, because the Exceiv is that such a one came on baili

4. If a Pari prays an Elegit, and it is entered of Record in B. and takes out the Writ, and before the Return of it the Record is removed in B. R. where the Judgment is affirmed within the Year, and after it is affirmed to the Court that the Sheriff had returned his Writ served in Bank, yet the Plaintiff may have a Capias; because this Allegation does not appear to the Court, and now it is impossible that it can be returned here, and so it is more strong than if a Nihil had been returned. Tr. 15 Ja. B. R. between Andrews and Cope adjudged per Cur. prater Doveridge, who seems e contra for the Election upon the Roll.

5. If a Pari sues an Elegit, and upon this certain Goods are taken Elegit as in Execution and sold for Part of the Debt, and this returned, yet he may have a Capias after, for now this is in Effect but a Fieri Facias, no Land being extended, and so it is but a Nihil for Land. Hobart's Reports 81.

6. If a Pari sues an Elegit upon a Recovery, and the Sheriff returns that he had made Partition of Lands of the Defendant by the 12 Jurors, but he cannot deliver the Moiety to the Party according to the Writ, because all the Land is extended to another upon a Statute, he may have a Capias ad Satisstatendum; for this Return is all one with a Nihil returned; For Non Content by the Return when the Plaintiff shall have Execution, nor can the Plaintiff have any Benefit by this Writ of Elegit, for after the Extent ended he ought to have a new Elegit, and not a Levant Faciass. B. 31 & 32 El. B. R. adjudged between Palmer and Knowles.

7. If a void Elegit be filed, yet after the Year he may have a new Elegit. B. 10 Jac. B. R.

Oue cannot have an Elegit after a former Elegit if Lands are thereby found and the Elegit filed; Per Glyn Ch. J. Sty. 455. Patch: 1652. cites it as adjudged in Hobart's Reports.

8. Execution shall be made of the Rent which the Vouchee has by Recover in Tail, and yet the Recover itself cannot be put in Execution, and there when the Vouchee dies, the Executor is discharged immediately, and the Heir in Tail shall avoid it. Quere, If he who recovered the Rent shall have other Execution, Br. Execution, pl. 143. cites 17 E. 3. 11. 12.

9. Dictis tantum, the Plaintiff recovered and had Elegit, and the S. C. cited Sheriff returned Nihil, and the Defendant was taken pro Regis pro exec. Hob 57. 1 Hobart, and the Plaintiff prayed that he may remain in Prifon also for his Execution, Kirton said, No; For you have discharged his Body by that as to the taking of the Elegit. Per Belk, we will advise. Br. Execution, pl. 1. 3. cites 50 E. 3. 4.

It was answered by Belknap that they would be advised of that. And see Ld. Hobart's further Remarks there.
Execution.

10. If a Man prays Elegit, he shall not refer to any other Execution after; For this shall be entered in the Record, and it is at his Election. Per Newton Ch. J. ad quod nemo respondit. Br. Execution, pl. 50. cites 19 H. 6. 4.

11. If I recover Damages against two, and choose Execution against the one, I shall not have Ca. Sa. against the other, nor Sea. Pa. nor Writ of Debt; for I cannot after change my Execution. Br. Execution, pl. 8. cites 33 H. 6. 47. Per Danby.

12. Bill of Trfipia in B. R. passed for the Plaintiff, and he prayed Elegit and had it, and it was returned Nibil, by which Ca. Sa. was granted, and per Markham Ch. J. of B. R. and J. of C. B. A Man shall not have Ca. Sa. after Elegit, because it is the most high Execution, and the Entry is, Quod quercns venit & Elegit, Executionem jam de mediate. Br. Executions, pl. 93. cites 5 E. 4. 41.

13. And such Matter was adjudged M. 30 E. 3. That a Man shall not have Capias after Elegit, and so was the Opinion of Newton. 19 H. 6. But upon Nibil returned he may have Elegit Sicut alias, Ibid.

14. A Man recovered Debts and Damages by judgment and had Elegit, and before the Writ served the Year expired, by which he brought Scire Facias, which was returned served, and the Defendant did not come, by which he prayed Ca. Sa. and had it, notwithstanding that he had Elegit before; For though the Elegit is given by Statute, yet this does not restrain Execution which was at the Common Law before Per Cur. Br. Execution, pl. 99. cites 17 E. 4. 4.

15. If a Sheriff returns upon an Elegit, Quod Def. nibil habet in terra sed aliis juri sejisti ad ejus nomen, new Elegit shall issue of the Moiety of the Land in Ufe; Per Opinionem Curiae. Br. Execution, pl. 72. cites 21 H. 7. 19.

16. And per Fineux, if Elegit be returned Nibil in one County, the Plaintiff may have other Elegit in another County. Ibid.

17. A Man may have Ca. Sa. after Elegit; Per all the Justices. Br. Execution, pl. 72. cites 21 H. 7. 19.

18. Several Writs of Elegit may be in several Counties for the intire Debit. D. 162. b. pl. 51. Trin. 4 & 5 Ph. M. — And Plaintiff may divide his Execution; As if a Man recovers 20l. he may in one County have an Elegit for 5l. and in another County another Writ for 10l. and for the Residue in another County, or otherwise at his Election. Mo. 24. pl. 83. Patch. 2 Eliz. Worcester's Case.

19. After
Execution.

19. After an Elegit and Execution thereupon of Lands the Plaintiff may have other Elegit of a Term or Goods, and though the Sheriff had returned on the first Elegit, NilhIl, as to Goods and Chattles. Mo. 341. pl. 462. Hill. 35 Eliz. B. R. Hunger v. Fry.

20. A Man sued forth an Elegit upon a Recognizance in Chancery, but the same Recognizance, because nothing was taken upon the Elegit. Mo. S. C. ad.

21. S. brought Debt against K. and recovered and had Execution by Elegit, and it was found by Inquisition that the Defendant was seised of the Moiety of a Messuage and Lands for Life, and of other Lands in Right of his Feme. The Sheriff return'd that Virtue Brevis &c. delivered the Mefligium omnimun Praesidium &c. vss. Meditatum Meditatis unusis Messuajum cum Portentatis nec non Duo Pomer nec Nounam Chalufiam occiti &c. and that he had delivered the Moiety of the Lands in Right of his Feme and his Chattles, and relit them. This Extent was filed. The Question was whether he might have a new Elegit, inasmuch as the Sheriff ought to have delivered to him the Moiety of the Moiety of the Lands jointly, so that the Tenant by Elegit might be Tenant in Common for a Quarter Part with the Jointenant as it was agreed, whereas here by this Delivery in Severality he had in Effect only an 8th Part; For the other Jointenant may occupy the Land delivered with him in Common. Richardson held, that for Part of the Goods and Lands in Right of the Feme the Return is good; and being filed he cannot have a new Election. For if Part shall be evicted, you cannot have a new Extent upon the Estate; but if it had been in the Genitive Cae Duorum Pomarorum &c. it had been good. But the Court granted the Plaintiff to make a Surrifice that the Sheriff male se geltis in the Execution of the Elegit, and that then he should have a new Elegit at his Peril. Litt. Rep. 77. Hill. 3 Car. C. B. Score v. Kendall.

22. The Writ of Elegit was, That Elegit Executionem of the Goods and Moiety of the Land; and the Writ was Ideo tibi Praecipimus quod Boni et Cathali of the Defendant, Quae habuit Die Judicii reddiri deliberarti faciam, (omitting the Words &c. Meditatum Terrarum) to hold the said Goods, and the Moiety of the Lands Quousque debita tium levemur. The Sheriff extended the Lands and Goods, and delivered a Moiety of the Lands and returned the Inquisition. It was moved to amend the Writ, (it being only the Milprison of the Clerk) but it was ruled that it should not, and that he ought to have a new Elegit, because the Inquisition was taken without Warrant. Cro. C. 162. pl. 4. Mich. 3 Car. B. R. Walker v. Riches.

23. Lands were extended by Elegit at the Suit of a common Person, and afterward the Queen by her Prerogative had the Lands extended for a Debt due to her, and oulted the Tenant by Elegit. Though she was satisfied her Debt, the Creditor could not have a Re-extent without a Secre Fasces against the Debitor to shew Cause why a Re-extent should not issue forth, the Queen being satisfied. Le. 272. pl. 365. Mich. 25 & 26 Eliz. C. B. Lord Stafford's Case.

24. A Man had Lands delivered unto him in Execution upon an Elegit, super quo he came into Court and proved that the Defendant had other Lands in the same County, and prayed another Elegit and had it. Per Popham Ch. J. it the Party had taken the first Land upon the Delivery of the Sheriff, he cannot afterwards have a new Extent; but
Execution.

if at the first Day of the Execution, the Debit or Debts were not paid or delivered, he may have a newExtent; and Judgment accordingly. Cro. E. 310. pl. 19. Mich. 35 & 36 Eliz. B. R. Hanger v. Fryz.

25. A. has two several Judgments against B.—A. takes Execution on his Judgments, viz. two Elegits.—By one he has one moiety;—By the other he has the other moiety; and not only the Half of the second Moiety; and good. Because both the Judgments were had in one and the same Term, which is as one Day in Law, and so they were of equal Date. Hardr. 23. pl. 9. Mich. 1655. in Scacc. Att. Gen. v. Andrew.

The one Elegit only is return'd, and that perhaps upon the other, the Sheriff has levied the whole Debt; yet if Debts be thought in the mean Time, the Defendant ought to plead it if any Thing be levied. Sid. 184. pl. 5. Pauch. 16 Car. 2. B. R. Glafcock v. Morgan.

26. Levying Goods only for Parcel upon Elegit is no Impediment, but that he shall have other Elegit and shall take the Lands for the Residue, but when the Elegit is sued and Lands taken and the Return filed, he shall have no further Execution. Lev. 92. Hill. 14.

27. After Part of the Execution is satisfied by Elegit the Plaintiff may have Debt for the Residue of the Judgment by the Common Law. Quere, If he may have a second Execution upon the first Judgment. Sid. 184. pl. 5. Pauch. 16 Car. 2. B. R. Glafcock v. Morgan.

28. If one has Judgment for 50 l. and sues Elegit, and Sheriff returns that he has levied 10 l. of his Goods and Chattels, and that he has no Lands; and after Lands come to him Plaintiff shall have Scire Facias to extend those Lands; for it is the extending the Lands, and not the suing the Writ that does conclude. Per Holt. 12 Mod. 356. Pauch. 12 W. 3. In Cuse of Pullen v. Purbeck.

29. Execution on a Judgment was sued by Elegit, and the Sheriff levied some Goods in Part, but returned that the Defendant had no Lands. The Court all held that upon this Return the Elegit was to be considered only as a Fieri Facias though Goods were levied, and that if the Defendant had been at large, the Plaintiff might have had a Ca. Sa. But if any Land had been extended on the Elegit the Plaintiff had been bound down to that Execution. 2 Ld. Raym. Rep. 1451. Mich. 13 Geo. Lancaster v. Fielder.

(Z. a) Execution.

After Habere Facias Possessionem.

1. UPON an Habere Facias Seilnam the Sheriff returned that he offered to the Demandant Seilin of a third Part of the Lands, by Motes and Bounds in Severalty, according to the Tenor of the Writ, and she refused to accept the same. The Court would not agree to grant an Alias Habere Facias Seilnam at the Request of the Demandant; For it would be an ill Precedent, and was never yet done. D. 278. b. pl. 4. Mich. 10 & 11 Eliz. Anon.

2. All
Execution.

2. All were put out of the House which upon diligent Search could be found. After Persons lodged secretly expelled the Plaintiff again; on which Sheriff returned back to give Plaintiff full Possession, but was refilled, so that without Peril of his Life he could not. The Court awarded a new Writ; For that the fame was no Execution of the first Writ, and also awarded an Attachment against the Parties. Le. 145.

3. had Judgment in Ejectment, and by Habere Facias Possessionem was put into Possession, and soon afterwards the Defendant re-entered, the Writ being returned, but not filed. Per Williams, the Plaintiff cannot have a new Writ of Execution, but is put to his new Action, and it is not material whether the Writ was filed or not, for it was fully executed, for it is in the Election of the Sheriff, whether he will file or return that or not. 2 Brownl. 216. Hill. 7 Jac. B. R. Style's Cafe.

was in Possession by the Writ, for it was never returned; Sed per Coke Chief Justice, it hath been often ruled that he may have a new Writ, if the first was not returned and Judgment accordingly, 1 Roll Rep. 353; pl. 2. Patch. 14 Jac. B. R. Perfon v. Taverner.

4. Judgment in Ejectment, and upon an Habere Facias Possessionem the Sheriff returned that he offered to deliver Possession to the Plaintiff; but he refused to accept it; It seems that the Plaintiff cannot have another Hab. Fac. Poss. because it appears by the Record that he refused to have the Possession. 2 Brownl. 168. Patch. 10 Jac. C. B. Ferreton's Cafe.

5. If Possession be delivered upon Habere Facias Possessionem, or Grant of Execution, and it is avoided immediately by a new Force, there the Party may have a new Habere Facias Possessionem or Grant of Restitution; but if after the Restitution awarded, the Party enjoys quiet Possession, and he be removed by a new Force, there he ought to refor to a new Remedy; Per Holt. 12 Mod. 268. Hill. 11 W. 3. The King v. Harris.

(a. b) Execution made.

In what Cases by the Sheriff; in what by the Coroner &c.

1. UPON a Certificate upon a Statute Merchant it was returned, that the Defendant Non est Inventus; the Conunise said that the Land lies in D. which is in the Cinque Ports, and therefore be prayed Writ to the Conunifle of Dover, and to the Warden of the Cinque Ports, to make Execution; For the Sheriff cannot make Execution there; and for this Cause his Prayer was granted to him; Quod Nota. Br. Execution, pl 115. cites 21 E. 3. 49.

2. Trespass against three, of which the one is the Sheriff, by which upon Illege Process issued to the Coroners, and two were convicted, and the third who was Sheriff was acquitted, and yet Process of Execution issued to the Coroners; For when it is once awarded to the Sheriff, and to the Coroners, it shall never refor from the Coroners in this Plea. Br. Execution, pl. 110. cites 2 H. 6. 12.

3. Execution
3. Execution was awarded of *Lands in Durham* against him who was surety for the Peace in England, and the King shall send to the Bishop of Durham, or to his Chancellor, to make Execution. Br. Execution, pl. 94. cites 1 E. 4. 10.

(B. b) Obstruction or Disturbance of Execution what is; And the Offence thereof, and How relieved.

1. Possession was delivered by Hab. Fac. Possess, about 9 o'Clock in the Morning, and towards 6 o'Clock at Night the Plaintiff was forcibly turned out of Possession; and these Matters being set forth by Affidavit, the Court held, that upon an Habere Fac. *Possess:* it is not a compleat Execution till Sheriff or his Bailiffs deliver Possession to the Party, and are gone away; that if immediately after such Execution the Defendant turns him out of Possession, it would be a Disturbance of the Execution, for which an Attachment ought to go; but here they doubted, whether, after so many Hours Distance, it could be looked upon as a Disturbance of Execution; and therefore the Rule was, to shew Cause why an Attachment should not go. 6 Mod. 27. Mich. 2 Ann. B. R. Kingstede v. Man.

2. Upon an Entry upon the Plaintiff the same Day he had Execu-
tion, the Court granted a new Habere Fac.* Possess:* Per Powell J. to which Holt Ch. J. answered, so they might if the first Executions were not returned, otherwise not. *Quod Curia conscifit.* 6 Mod. 27. Mich. 2 Ann. C. B. in Case of Kingstede v. Man.

(C. b) Pleadings in Bar of Execution.

1. *Note* in Affise for Law, that if the Conulse of a Statute Mer-
chant releaseth all his Right in the Land to the Conisor, yet the Conulse may sue Execution; *Quod Nota.* Br. Execution, pl. 52. cites 25 Affl. 7.

2. *Scire Facias* upon Arrestes of Annuity recovered in Writ of Annu-
ity; the Defendant pleaded that the Plaintiff has levied it by *Peri Facias* and it was admitted for a good Plea, by which the Plaintiff answered to it; and yet *Payment or Risus Arrear* is no Plea without Acquittance. Br. Execution, pl. 18. cites 44 E. 3. 18.

3. Executors sued Execution of Damages recovered by their Testator, and the Defendant pleaded Acquittance of the Testator, and Writ refused to warn the Executors to answer to the Acquittance, and the Writ returned served, and they did not come, by which the Defendant went quit; And so to see that a Garnishment returned warned is peremptory. Br. *Scire Facias,* pl. 44. cites 47 E. 3. 24.

4. A Man recovered Debt and after brought *Scire Facias,* and Defen-
dant had brought Writ of Error of the first Judgment and alleged it, this is no Plea in Bar. Br. Execution, pl. 136. cites 10 H. 6. 6.

5. *Scire Facias* upon Recovery of Debt and Damages; the Defendant said, that at another Time the Plaintiff sued *Scire Facias* and that the Sheriff levied the Money; Judgment &c. and there it is said that *Pieri Facias*
Execution.


6. So upon Ca Sra. Anno 37 H. 8, and not adjudged here; But in * Ibid, pl. 42 cites 6 C. whéré it is said it was adjudged a good Plea, cites 21 H. 6. 5 And the same Law it seems upon a taking of the Body by Ca Sra. no where is returned; but it was laid in Anno
21 H. 6. 5. that in Anno † 19 E. 5. it was adjudged no Plea; Quære. Ibid.

Facias, and the Plaintiff armed to answer it, by which he said that the Sheriff had not levied it, Privy; and the other Courts.
† Ibid pl. 12. cites 6 C accordingly, because the Roll did not make Mention of it; nor did he shew Acquittance nor Tally of the Sheriff, by which Execution was awarded.

7. In Affis, the Seisin and Diffidu was found with Force, and the Plaintiff had judgment to recover, and the Record was sent into C. B. by Miftimus, and after came the Defendant and pleaded a Release, and prayed Certificate out of the Rolls, and had it, and it was returned Tarde, upon which came the Plaintiff and prayed Capias pro Fine Regis, and had it, because the Release is Matter in Fact, and the Certificate is returned Tarde. Br. Execution, pl. 7. cites 33 H. 6. 20, 21.

8. And per Prifor, it Attains be sued, yet the Court shall award Execution upon the first Recovery. Ibid.

9. But in Writ of Error, if it be Error apparent, the Party shall be let by Mainprize, but if it be Error in Fact irreparable by Pass, the Party shall be committed to Priion till it be tried. Ibid.

10. Where a common Person recovers and sues for Execution by Eligor, Fieri Facias or Capias ad Satisfacitum, the Defendant cannot plead Releas, but there may have Audita Querela or Scire Facias ad Cognoscendum Faciam; Contra against the King, but to sue Scire Facias the Defendant has Day in Court to plead. Br. Charters de Pardon, pl. 4. cites 34 H. 6. 3. 50. & 35 H. 6. 1. 25.

11. A Man condemned and in Execution for 100l. pleaded Acquittance after the last Contiuation. Br. Execution, pl. 73. cites 21 H. 7. 30.

12. Judgment in Debit was had again through the Bond of his S. P. and an Ancestor by Null dict, but he pleaded Riens per Debit, but the Plea was held to come too late after Judgment by Null dict, and the Judgment should be spectral. D. 244. a b. Mich. 17 & 18 Eliz. Hemingham’s Cafe.

13. In a Scire Facias on a Judgment in Debit, Defendant pleads that 4 Le. 150. upon a Fieri Facias the Sheriff of L. took orders for the Defendante, and yet detains them: And held good though he does not allege the Return of the Writ. Cro. E. 237. pl. 4. Tit. 33 Eliz. B. R. Mountney v. Andrews.

Execution is lawfull though the Writ be not returned, and the Plaintiff has his Remedy against the Sheriff, — If the Sheriff keeps the Goods the Party may have a new Execution, because the other is not an Execution with Satisfaction; But if he delivers the Money or Goods taken in Execution to the Plaintiff’s Attorney it is a sufficient Satisfaction. Goth. 217 pl. 314. Mich. 11 Jac. C. B. Strobridge v. Archer.

14. Scire Facias to have Execution of Land and Damages recovered in Fullment; The Defendant pleaded an Entry into the Land after the Judgment and before the Scire Facias, but did not answer to the Damages, and therefore the Plea was held ill, and Judgment that the O Plaintiff
Plaintiff have Execution of Land and Damages. Cro. E. 330. pl. 5.

15. Scire Facias to have Execution of Damages; the Defendant pleaded that the Plaintiff had assigned the Damages to the Queen, and the Sheriff by Proceeds out of the Exchequer had extended his Land and the Plaintiff demurred, because it is not alleged that the Sheriff had returned the Extent; but resolved that the Plea was good; and that if a Sheriff levy Money by a Fieri Facias, though he doth not return the Writ the Defendant may allege it in Bar. Moor 468. pl. 671. Mich. 39 & 40 Eliz. Hoc v. Belton.

16. Scire Facias is a Judicial Writ, and properly lies after the Year and Day after Judgment given and is so called, because the Words of the Writ to the Sheriff be; Quod Scire Facias Præfæar' T. (being the Defendant) Quod fit cotam &c. ofterturus f quid pro fa habeant aut dicere scriat, quare &c. So as by the Writ it appeareth, that the Defendant is to be warns to plead any Matter in Bar of Execution, and therefore albeit it be a judicial Writ, yet because the Defendant may thereon plead; this Scire Facias is accounted in Law to be in nature of an Action; and therefore a Release of all Actions is a good Bar of the same, and likewise a Release of Executions is a good Bar in a Scire Facias; this Writ was given in this Case by the Statute of W. 2. for at the Common Law if the Plaintiff hath succeeded [jurecead] to sue Execution by Fieri Facias, or Leviri Facias, a Year and a Day, he hath been driven to his new Original. Co. Litt. 290. b.

17. Plaintiff had Judgment in an Assault and Battery. The Defendant after Imparlance may plead Outlawry in the Plaintiff in Bar of a Scire Facias brought by him. Jo. 239. pl. 3. Pach. 7 Car. B. R. Wortley v. Savil.


Where Execution is to be made by the Sheriff alone it ought not to be returned; But in the Case of an Elegit, the Extent being to be made by the Inquest, and not by the Sheriff alone, it ought to be returned, otherwise it is not good. D. 100. a. b. pl. 71. Trin. 1 Ma.

1. UPON an Elegit the Sheriff returned, that he be delivered to the Plaintiff twenty Acres, which is a Moity of all the Defendant's Lands per rationabile Extentum; The Court seemed in a Manner that this was ill, because he did not return the Inquisition taken by the Oath of the Jury, for the Sheriff himself cannot extend it; and the Precedents are accordingly: D. 100. a. b. pl. 71. Trin. 1 Ma.

2. If the Sheriff assigns Dower by Writ to him directed, and does not return the Writ, yet she is lawfully seised in Dower; But otherwise it is in a Partition by Writ; for there a second Judgment ought to be given. Cro. E. 17. pl. 8. Pach. 24 Eliz. C. B. cited by Fenner to have been adjudged to Eliz. in Ashborough's Cafe.

3. Elegit must be returned, but Extents upon Statutes need not; Arg. Godb. 83. Mich. 28 & 29 Eliz.

4. Where a Man is taken upon a Ca. Sa. the Execution is good though the Writ is not returned; and so of an Habere Facias Seifinam, and so generally in all Writs of Execution where either Goods or Lands are to be taken, except in Elegit, and that must be returned, because the Court may judge of the Sufficiency or Insufficiency of the Inquisition. 4 Rep. 67. a. Hill. 33 Eliz. Fulwood's Cafe.

5. Judgment
5. Judgment in Debt against A. and upon the Death of A. a Scire Facias issued into the County of Surry, and an Elegit in due Form was sued and returned. The Entry in the Roll was of an Award of an Elegit Mediatatem omnium Terrarum in Cont' Surry &c. omitting quae fuerant pridet A. Die Judicis versus eum redditis. Although the Writ of Elegit and the Return are good, yet the Execution is erroneous because of the said Omission. Jenk. 298. cites Hob. 90. [pl. 122. Mich. 5 Jac. in Cam. Scacc.] Keer's Cafe, [alias, Keere v. Owen.]

(E. b) Equity.

1. An Elegit returned and filed being out, and thereby without Remedy, was renewed by this Court to be executed. Toth. 146. cites 2 Car. Palmer v. Bolls.

2. To account for Profits upon Extent according to true Valuation, According not to the extended Value, but not Use for those Profits. Toth. 154. cites 5 Car.


3. A Re-extent was awarded upon a Statute, the Lands not being known on a former Extent. Toth. 154 cites Trin. 5 Car. Chivers v. Hampton.

4. The Plaintiff sued out an Elegit, which not being well laid the Extent was not good, but on a Bill in Equity the Money was decreed. Toth. 154. 12 Car. Trion v. Michel.

Defendant would have proved that any Profits had been taken by the said Extent, it would have relieved the Defendant for the same, but failing of such Proof, the Court ordered him to pay the Money on the Bond with Damages.


6. Lands of a Jointre's of the Value of 500l. per Ann. were extended for a Debt prior to the Jointure, and upon the Inquisition taken were delivered in Execution at a fifth Part of the Value, but decreed that the intrinsic Value of the Premisses by the Year shall be accounted for since the Death of the Husband, and be applied to the Payment of the Principal, Interest and Costs, and if not sufficient the Jointre's to make it good; But if more than sufficient, then to repay to the Jointre's so much thereof as has been received since the Death of her Husband. Fin. R. 197. Hill. 27 Car. 2. Jacob v. Thasker.

For more of Execution in General, See Debt, Dower, Fines and Recoveries, Judgments, Scire Facias, Superledeas, and other Proper Titles.

Executors.
(A) What Power the Ordinary has in Administrations.

At the Common Law neither the Wife, Child, or next of Kin, had any Right to a Share in the Intestate's Estate, but the Ordinary was to distribute it according to his Conscience to please Ubi, and sometimes the Wife and Children might be among the Number of those whom he appointed to receive it, but the Law entituled him with the sole Disposition of it. Afterwards, by the Statute of Wills, he was bound to pay the Intestate's Debts so far as he had Assets, which at the Common Law he was not bound to do, and an Action of Debt would then, and not before, lie against him, if he did alienate the Goods and not pay the Debts. Then the Nature of 51 Eliz. cap. 11. was made by which he was empowered to grant Administration to the next of Kin, and most lawful Friend of the Intestate; and by this Nature the Performance from Administration was committed might have an Action to recover the Intestate's Estate; for at the Common Law he had no Remedy. But then afterwards the Statute of 11 H. 8. cap. 1. Enacts, that the Ordinary shall grant Administration to the Widow or next of Kin of the Person deceased, or to both, and this was the first Law that gave any Intestacy to the Wife, to whom Administration being once granted, the Power of the Ordinary was determined, and he could not repeal it at his Pleasure, as he might at the Common Law; but after the making of this Statute many Mistakes did still remain, because the Administration being once committed, the Person to whom it was granted had the whole Estate, and the rest of the Relations of the deceased were undone; and therefore if his Children were under Age, or beyond the Seas, and a Stranger had got Administration it would have been a bar to them. And thus it continued for many Years, the Ordinary still making Distribution as he thought fit, taking only a Bond from the Person to whom he granted Administration for the Purposes aforesaid, and sometimes to dispose of the Surplusage as he should direct, and no Prohibition was granted to remedy these Inconveniences till about the 12th Year of King James the first. But now by the Act of 22 & 23 Car. 2. cap. 1. a good Remedy is provided against these Mistakes, and it is such which takes away the Causer thereof, which is, that the Administrator shall not have the whole Estate, but that a Distribution shall be made; The Title of the Act throws the Meaning thereof to be for the better Settlement of the Intestate's Estate, and the Body of it shews how Distribution shall be made, so that such Bonds which were usually given by the Administrator before this Law, to make Distribution as the Ordinary should direct, are now taken away, and other Forms are prescribed; and there can be no Remedy taken upon such new Bonds till the Ordinary hath appointed the Distribution, so that in Effect this Act makes the Will of a Person dying Intestate, and tells what share his Relations shall have, and it is probable that the Custom of London might guide the Parliament in the making of this Law, which Custom distributes the Estate of a Freeman amongst his Wife and Children; Per Pollexfen; Arg. 3 Mod. 56. 60. Hill. 36 Car. 2. B. R. in Cafe of Palmer v. Allincock.

1. At the Common Law the Ordinary could not have Action to recover any Debt of the Tellator. 18 H. 6. 23. b. Pl. Com. 277. b. Greubrook against Fox. 8 Rep. 135. b. Sir John Nead- ham's Cafe. 3. At Common Law no Action would lie against the Ordinary. 18 H. 6. 23. b. Pl. Com. 277. Greubrook against Fox. cites 11 H. 4. and says quod contrarium est. —— Brook says it seems, that at Common Law none may


cites F. N. B. 21. i. M. —— S. P. per Fineux, Ibid. pl. 50. cites 11 H. 7. 12. —— F. N. B. (D) says that the Ordinary at this Day may have Action in such Cafe, but not for taking them out of his Possession who died Intestate, as Administrators may have. —— 2 Infl. 598. S. P.
may have Administration but the Ordinary, who shall be impleaded, but shall not implead, nor at this Day. Br Administration, pl 44.

If the Ordinary took the Goods into his Possession he was liable by the Common Law; And the Statute of Wills, cap. 19. Cum potent Mortem &c was made in affirmance of the Common Law. 5. Rep. 85. a. Trim. 37 Eliz. C. B, the second Revolution in Smelling's Case.

4. Now by the Statute Wills, cap. 19. an Action lies against the Administrator. 18 P. 6. 23. b. 5. 277. [b.] Gresbrook against Fox.

i. E. R. 13. the Administration, Action of Debt lies against him, yet the Ordinary cannot bring Action, and he shall be named Ordinary, and yet he is not bound to declare in his Count how he is Ordinary. Br. Ordinary, pl 21. cres 11 H. 4. 72.

5. But he cannot have an Action by the Statute. 18 P. 6. 23. b. Br. Administration, pl 19. cres 11 H. 4. 72. S. P. But the Administrator shall have the Action by the Statutes——By the said Statute of 15. B. 1 cap. 19. it was enacted that where an Inheritance dies in Debt, and the Goods come to the Ordinary to belicted, in this Case the Ordinary shall satisfy the Debt so far as the Goods extend in fuch Sort as the Executors of such Person should have done. And the Statute makes the Goods and Duties liable, but not committed, yet too over to the King and friends of the Intestate, and to do this Act, which is made in a Paper, 598. and see 2. Inst. 397. 398. for the Expedition therof.

The Ordinary cannot release any Debt of the Testator before Administration granted. 18 P. 6. 23. b.

release an Action, and yet he can have none. Co. Litt. 292. verius Principium.——10. Lew. 127. a. pl. 90. Causa in certiori Temporis, Anon. S. P. argued that he could not, but Kebbie held to the Contrary.

7. So a Executor he cannot release after Administration granted. Contra 18 P. 6. 23. b.

8. But if the Trespasses be done to the Goods in Possession of the Ordinary, the Ordinary may release, and this Release shall be a good Action against the Administrator made after. 18 P. 6. 23. 18 P. 6. 23.

9. Rot. of Parliament, 1 H. 5. Numb. 13. King H. 4. made divers Executors, who refused, because they had not sufficient for Debts and Legacies, by which Dirititio Testamenti Bonorum &c Testamentum subjicit ad dictam Conflaguineum nostrum (who was the Archbishop of Canterbury) tanquam ad Ordinariam de Jure partner in bonis & Testamentum pro Satisfactione & Satisfactione & aliis praebendis, benefit publico oramin debere &c. upon which the King took the Goods for the Value, to be paid to the Executors according to the Will, and this ordained in Parliament, that the Executors should not be sued by the Executors.


11. If one is intituled to have Administration and the Ordinary refuses to grant it, a good Action lies against him; Arg. Cart. 126. cites it as the Opinion of Crooke and Harvey. Mich. 3. Car. 1.

12. Per Keeley Ch. J. and Twiklen, a Caveat is of no Force to sit and hinder the Grant of Administration; for it is not a judicial Act of the Court, but is only a Memorandum entered by a Clerk in Court to give S. C. and by Caution, nor any Record of the Court, and this Court can as well take the Judge of it as the Delegates. Lev. 187. Trin. 18 Cart. 2. B. R. H. v. Beth. Olley v. Bent.

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13. Mandamus to grant Administration to the Wife of the Intestate or next of Kin, and it was shewed, That there was a Will pretended below, and adjudged no Will; and there being an Appeal from that Sentence, which being a Suspension thereof, the Rule for the Mandamus was discharged, per Cur. 7 Mod. 143. Hill. 1 Ann. B. R. Steward v. Eddy.

14. A Question was, Whether a Man might be sued in the Spiritual Court for taking away the Goods of the Intestate from the Administrator, or whether a Prohibition should go? Resolv'd, That there should be a Prohibition; For when the Administrator is made the Power of the Ordinary is determined, and there being a compleat Remedy at Common Law for the Administrator in an Action of Trover, the Party would by this Means be doubly harassed; For an Excommunication could never be pleaded in Bar of Action of Trover. By the Statute the Ordinary must grant Administration, and then his Power is determined, and the Administrator, when put in by the Ordinary, derives his Power not from the Ordinary but the Law. 10 Mod. 21. Patch. 10 Ann. B. R. Sadler v. Daniel.

(A. 2) Administrator or Executor; How considered.


Because Executors are but the Ministers and Dispensers or Distributors of their Testator's Goods. Went. Off. Executor, 38.—He is in the Nature of one that has the Custody of another's Goods. Wentw. Of. Executor, 113.

2. Note, That an Executor cannot be a Trustee unless he have an especial Gift in the Will, and that he may then be in Trust, otherwise the general Trust of an Executor is to pay Debts and Legacies, and of the Surplusage to account to the Ordinary in pios Ufus. Cary's Rep. 28, 29 cites 44 Eliz. 8 Inne, 1602.

And if 3. Executor is in Law Testator's A_fshee by the very making him make A. my Executor. Wentw. Of. Ex. 100.

Executor and I have no more, and A. dies intestate without disposing in his Life-time of this Personal Estate, my next of Kin, and not the next of my Executor, shall have Administration De bonis non, together with all my Personal Estate, per Ld. C. Parker. Wms's. Rep. 555, in the same Case above. — He is a Trustee for a Legatee with respect to the Legacy, and this is the only Reason why the Legatee may bring his Bill in Equity against the Executor for a Legacy, supposing it to be a Trust; Per Ld. C. Parker. Mich. 1716. Wms's. Rep. 575, 576. in Case of Winde v. Jekyll and Albine. It is a fundamental Rule in a Court of Equity, that an Executor is but a Trustee; Per Powis J. sitting in Chancery in the Absence of the Ld. Chancellor. 2 Wms's. Rep. 161. Trin. 1725.

He has as fixed an Interest as an Executor and Legatee in Law. Arg. 12 Mod. 621. Hill. 3 W. 3. In Case of Blackborough v. Davis.

Ch. J. Wms's. Rep. 45. Patch. 1721. in S.C.

(B. What
(B) What Power the Ordinary has touching Testaments; And to prove them &c.

1. 1 H. 5. Rot. Parliament No. 23, the Commons pray that Executors be not hereafter compelled to travail to prove Testament or to carry any Inventory of Goods of the Testator to the Ordinaries or their Officials, Commissaries, Officers or Ministers out of the Deanery in which the Goods of the Testator are upon Pain to forfeit treble Damages.

Answer to this and to the other Part of the Petition.

2. The King hath charged the Lords Spiritual thereof to ordain due Remedy, and if they do not the King will have it well in Memory, and cause to amend it in Time to come.

3. When the King is made an Executor of the last Will and Testament of any other, the King does appoint certain Persons to take the Execution of the Will upon them (against whom such as have Cause of Suit may bring their Action) and appoint others to take the Account. See Rot. Par. 15 H. 6. Katherine Queen Dowager of England, Mother of H. 6, made her last Will and Testament, and thereto constituted K. H. 6. her Sole Executor, and thereupon the King appointed Robert Rollelton, Clerk, Keeper of the great Wardrobe, John Merilton and Richard Abred Elquires, to Execute the said Will by the Oversight of the Cardinal, the Duke of Gloce and the Bishop of Line' or two of them to whom they should account. 4 Inf. 335.

(B. 2) By whom as Executor the Probate may be; And before whom, and How.


3. A Testament proved before the Commissary of the Bishop is sufficient &c. And a Testament proved before the Sequestrators of the Archdeacon of such a Place, and his Seal put thereunto is sufficient. For all Testaments cannot be proved before the Ordinary himself; and properly the Probate of the Will does belong unto him to whom the Sequestration doth belong. Perk. S. 493.

4. A Testament proved before any Officer of the Ordinary deputed to the same is sufficient; But always when the King's Court writes unto any Officer Spiritual, they ought to write unto him who is immediate Officer of the Court, which is the Bishop himself. Perk. S. 491.

5. The Testament ought always to be proved by the Executors or one of them at the least. Perk. S. 484.

6. And if there be three Executors, and two of them will not prove the Will, nor meddle with the Goods of the Deceased, and the other Executor proves the Will notwithstanding this refusal made by the other, two who were made Executors, and notwithstanding that the Will were
were proved by the third Executor only, yet the other two Executors and either of them may intervene with the Goods of the Testator, and administer them at what Time sooner they will; because that when the Will is proved, they cannot be put out of the Will; and the same Will gives them Title to administer the Goods of the Testator, as well as it gives Title unto him who proves the Will, insomuch as notwithstanding that they never administer, and he who proves the Will will bring an Action as Executor of the same Will; it behoves him to bring an Action in all their three Names; But they shall not be charged as Executors before they administer. Perk. S. 485.

The proving a Will is thus; They are to exhibit the Will into the Bishop’s Court, and there they are to bring the Witnesses who are there to be sworn, and the Bishop’s Officers are to keep the original Will, and certify the Copy thereof in Parchment under the Bishop’s Seal of Office, which Parchment so sealed is called the Will proved. Bacon’s Use of the Law. 67.

8. If a Lord hath Probate of Testaments made within the Previous of his Manor, he cannot prove a Testament made out of the Previous of his Manor. 2 Inst. 231.

9. If there where are not Bona Notabilia in diverfe Diocelles so as of Right the Probate belongs not to the Metropolitan, and yet the Will is prov’d before him, this is not merely void, but is of Force till reversed by some Sentence upon Appeal. Went. Off. Ex. 47. cites it as resolved, 22 Eliz. in Case of Veer v. Jeffries.

10. But if One has Bona Notabilia in diverfe Diocelles or in a Peculiar and a Diocese a Probate before the particular Bishop within whose Diocese Part of the Goods are, is utterly void without any Reversal. See also of proving in some Peculiar. Went. Off. Ex. 47.

11. If there are Bona Notabilia in both Diocelles of York and Canterbury, and in two several Diocelles of each Province, Probate must be before the several Metropolitans; But if Bona Notabilia are not in several Diocelles in either Province, then Probate must be before the particular Bishops in those several Diocelles where the Goods are. Went. Off. Ex. 47.

12. But it in one Province Testator had Goods in divers Dioceses, and in the other Province but in one Diocese; In the one Case the Archbishop shall have the Probate, and the particular Bishop in the other Case. And in like Manner in peculiar Jurisdictions. Went. Off. Ex. 47.


13. B is made Executor for 10 Years, and afterwards C is to be Executor. B proves the Will, and then the 10 Years expire; the Question was, Whether C ought to prove the Will again, or whether he might administer without any other Probate, and it was held by Finch, that the Probate of the Will by B should not determine the Election of C, but that he might be at Liberty to take the Executorship upon him, or refuse it; but if he pleaded, he might administer without any further Probate. Freem. Rep. 313. pl. 395. Mich 1675. in Can. Anon. Went. Off. Ex. 47.

14. A small Legatee has been sworn to prove a Will. Arg. Vent. 351.

15. If
15. If an Executor dies before Probate of the Will, his Executor cannot take on him to prove that Will, but Administration ought to be granted Cum Testamento annexis to the Residuary Legatee if there be any, or else to the next of Kin according to the Revolution in Isted's Cafe, in D. 372. pl. 8. Vern. 200. Mich. 1693. Day v. Chapfield.

J. 614. Hayton v. Wolfe. — And though the Executor administered some Goods, yet an immediate Administration must be granted. Per Holt Ch. J. 1 Salk. 508. in Wangelord's Cafe.

16. When a Will is proved per Testes in the Spiritual Court they must deliver the Will to the Executor, and a Mandamus lies for that Purposé if they refuse. Per Holt Ch. J. Comb. 289. Trin. 6 W. & M. in B. R. in Cafe of Cox v. Web.

17. A Mandamus liued to grant a Probate of a Will; the Ordinary returned, that the Executor was a Person absconding, and incapable &c. This Return was held ill, because there is a Will admitted, and since the Testator thought him a proper Person to be intrusted with his At- fairs, the Ordinary shall not adjudge him otherwise upon any Disabi- lity arising from the Common Law; neither can the Ordinary infer upon Security from the Executor, because the Testator thought him sufficient, and he hath a Temporal Right, which he cannot sue for before Probate; and there have been no Precedents of this Nature; and a peremptory Mandamus was granted. 1 Salk. 299. pl. 11. Mich. 10 W. 3. B. R. The King v. Raynes.

but say, that on a Bill in Chancery the Court decreed him not to intervene further than to satisfy a Legacy given to himself.

18. None can prove the Will but he who is named Executor in the Will. 1 Salk. 308. Mich. 11 W. 3. C. B.

19. The Stat. H 8, never intended to lessen the Jurisdiction of the Ecclesiastical Court as to the Probate of Wills, and to grant a Prohibition might be inconvenient for; without Probate the Executor cannot sue for Debts, which by this Means may be lost and the Will unperform'd. As for granting it quoad the Lands, (though this was the Practice hereto- fore, (See 2 Roll 315. 1 Sid. 141.) it would be vain, because it is no Evidence either Pro or Con. in any Court of Law, but a Proceeding Curam non Judicem; yet it is good as to the Goods. 2 Salk. 552. Mich. 1 Ann. B. R. Partridge's Cafe.

20. Wife and Executrix of a Popish Recusant is disabled to prove his Will, by the general Clause of the Statute Eliz. 4. cap. 22. and not enabled by the Provifio. 3 Salk. 133. Mich. 3 Ann. B. R. The Queen v. Ride.

21. Prohibition was granted in a Suit in the Spiritual Court for re- whish the Probate of a Will becaufe granted to a Person that became a Bankrupt. Show. 293. Trin. 3 W. & M. Hill v. Mills.

22. 25 Geo. 2. Made for avoiding Doubts, as to the Attestation of Wills and Codicils enu'ts. That if any Person after the 24th of June 1752, to whom any beneficial Devise, Legacy, Estate, Gift or Appointment of affenting any Real or Personal Estate except Charges on Lands &c. for Payment of Debts shall be thereby given, such Devise &c. shall, so far only as concerns such Person affenting such Execution, or any Person claiming under him, be utterly void, and be shall be admitted a Witnesfs to the Execution notwithstanding such Devise &c. and that any Creditor whose Debt is so charged, shall notwithstanding be admitted as a Witnesfs; And that so shall any Legatee who has been paid, or shall release or refuse his Legacy upon Tender thereof before he gives his Testimony, Provided that after Tender and Refusal he shall be barred from the Legacy, but after Ac-
Executors.

ceptance he may retain the same though the Will be afterwards adjudged void; And further enacts, That Legatee attesting and dying in Testator’s Life-time, or before he has received or refused his Legacy, shall be deemed a legal Witness. Provided that the Credit of such Witness shall be considered and determined by the Court.

Provided that this Act shall not extend to any Heir at Law, or Devisee in a prior Will or Codicil executed according to the said recited Act, or any claiming under them respectively, who has been in quiet Possession for the Space of two Years next preceding the 6th Day of May, in the Year of our Lord, 1751. as to such Lands, Tenements, and Hereditaments, whereof he has been in quiet Possession as aforesaid, and shall not extend to any Will or Codicil, the Validity or the Execution wherein hath been contested in any Suit in Law or Equity commenced by the Heir of such Devisee, or the Devisee in such prior Will or Codicil, for recovering the Lands, Tenements &c. mentioned to be devised in any Will or Codicil so contested, or any Part thereof, or for obtaining any other Judgment or Decree relative thereto, on or before the said 6th Day of May, 1751. and which has been already determined in Favour of such Heir at Law, or Devisee in such prior Will or Codicil, or any Person claiming under them respectively, or which is still depending, and has been prosecuted with due Diligence; but the Validity of every such Will or Codicil, and the Competency of the Witnesses thereto, shall be adjudged and determined in the same Manner, to all Intents and Purposes, as if this Act had never been made.

Provided that no Possession of any Heir at Law, or Devisee in such prior Will or Codicil as aforesaid, or of any Person claiming under them respectively, which is consistent with, or may be warranted by or under, any Will or Codicil attested according to the true Intent and Meaning of this Act, or where the Estate is recanted or might have recanted, to such Heir at Law, till a future or executory Devise, by Virtue of any Will or Codicil attested according to this Act, should or might take Effect, shall be deemed to be a Possession within the Intent and Meaning of the Clause herein last before contained.

This Act to extend to such of the British Colonies in America, where the Act of 29 Car. 2. is received as a Law &c. Provided that in the said Colonies Devises &c. by Wills made before 1 March, 1753, to be only void.

(B. 3) In what Court, or where a Will may be proved.


2. If a Testament bears Date in Caen in Normandy, and be proved in England, it is sufficient for the Executor to bring an Action thereupon; But if an Obligation be dated in Caen in Normandy, the Obligee nor his Executor shall not have an Action upon the same &c. Perk. S. 494.

3. Will of Lands in London ought to be inviolate in the Hastings, and ought to be proved by Citizens, and not by Strangers; Per Southcote. Dal. 117. pl. 11. 16 Eliz. Anon.

4. Wills are to be proved by Prescription in some Manors before the Steward though no Lands pass by it; As in the Manor of Mansfield, and in Cowley and Caverham Manors in Oxfordshire; And its being proved
proved in the Spiritual Court is but of later Time, and belongs not to it of common Right, as Lindwood owns; nor is it so in other Kingdoms. Went. Off. Ex. 43.

5. Archdeacons in some Places have peculiar or ordinary Jurisdiction to prove Wills. Went. Off. Ex. 47, 48.

6. Will of Land in England made in France and proved there; This Probate shall not be any Countenance to the Will, because Probate is not material in Case of Land; but if it be of Goods in England he shall not have Action on this Probate, but ought to prove it here. Agreed by Doderidge and Chamberlain, abienitius alius, in Evidence to a Jury. Palm. 163. Pauch. 10 Jac. B. R. Lee v. Moore.

7. But if the Goods were all beyond Sea, it is enough that the Will be proved according to the Custom of the Country where Testator died. Vern. 397. Pauch. 1686. Jauncey v. Sealy.


9. The Probate and ordering of Wills did belong originally to the Jurisdiction of temporal Courts, where the Legatees might have Remedy for their Legacies, as appears by Glanvil, lib. 6. cap. 6 and 7, where there is a Writ to demand a Legacy at the Common Law, and now that the Jurisdiction is devolved to the Ecclesiastical Court, the Common Law takes Notice of the Remedy there for Legacies, for the Power of that Court is regulated by thefe, and therefore Forbearance of Suit there had been adjudged a good Consideration of a Promule; and for the same Reason Hale said he conceived, that if an Executor of his own Wrong paid Legacies, the rightful Executor should be bound thereby, because he was compellable by Law to pay them. All. 40. Hill. 23 Car. B. R. in Cafe of Eeles v. Lambert.

10. Prohibition was moved for, because the Ecclesiastical Court proceeded to examine Witnesses there to disprove a Will that was proved there 20 Years since, by which Lands are devised, and the Lands are sold, and this to prevent a Trial at Law touching the Title of the Land directed out of Chancery. Per Roll Ch. J. they may examine the Probate there, for you have libelled there to take Benefit of the Probate, and therefore the other Party may disprove if he can, as far as concerns any Goods devised by the Will, and therefore we will grant no Prohibition. Sty. 346. Mich. 1652. Anon.

11. Spiritual Court is not to prove a Will concerning the Guardianship of a Child, which is a Thing controllable here in B. R. and to be judged whether it be devised pursuant to the Statute. Vent. 207. Pauch. 24 Car. 2. B. R. Lady Chelte's Cafe.

12. A Prohibition was prayed to the Ecclesiastical Court because they did suffer the Probate of a nuncupative Will, whereas the Testator did not bid three Witnesses take Notice, according to the Act. North Ch. J. said, that a Prohibition shall be granted, because they proceed contrary to the Act. But the other three Justices contra; because they have proper Jurisdiction of the Probate of Wills, and if they proceed not according to their Rules the Party ought to appeal. Freem. Rep. 297. pl. 351. Trin. 1679. C. B. Wildbow v. Dawlon.

13. Ecclesiastical Courts have Jurisdiction of Wills and Testaments, Dolben said, but not per Commune jus, but by Prescription, and no Act of Parliament is to give them Jurisdiction; But it is laid in Tenilo's Cafe, and for in Selden, that it was given to them by the Laws of the Kingdom, and it is not so any where but in England; Per Holt Ch. J. 6 Mod. 204. Trin. 3 Ann. B. R. in the Cafe of the Queen v. London.

14. Will
14. Will concerning Personal Estate was proved in Spiritual Court; Respondent having a former Will in his Favour, brings his Bill to discover by what Means the latter Will was obtained, and to have an Account of the Personal Estate, and to stop the Waiting of it, and whether the Testator was not incapabe or imposed upon. Defendant demurred because it belonged to the Spiritual Court only to prove the Validity of Wills, and the former Will was not proved in the Spiritual Court as the Will in Defendant's Favour was. But demurred and overruled. MS. Tab. March 11, 1727. Andrews v. Powis.

(B. 4) Probate of Wills concerning Land.

1. T

HE Defendant would have the Cause dismissed because it concerned the Probate of a Will, but in respect the Will was made to the Disinherison of the Plaintiff of Lands as well as of Goods, it was ordered to be examined here. Toch. 237. cites 12 Jac. Edmunds v. Edmunds.

2. In a Prohibition the Plaintiff suggested, that the Defendant labelled in the Spiritual Court, for that his Father died feised of such Lands, and by his Will devised his Lands to his Executors to sell, and divers Goods &c. and that he made the Defendant Executor, who sued in the Spiritual Court to have it proved, when in Truth he made no such Will, and a Will of Lands ought not to be proved in the Spiritual Court, and being at Issue, the Plaintiff in the Prohibition was nonsuited; but it was infilited, that the Defendant ought not to have a Confination, because he did not set forth in his Lidel that the Testator had Goods, and a Will of Lands ought not to be proved in that Court; but adjudged that the Will might be proved there Quod Bona, for otherwise he can have no Actions for the Goods, and as to them only a Confination was awarded. Cro. Car. 118. pl. 11. Mich. 5 Car. B. R. Hill v. Thornton.

Cro C. 115. pl. 7 Tim. 2 Car C. B. Denn's Case, S. P. and a Prohibition was granted generally for both; for when it is one entire Will of Lands and Goods, and the allegation is to revoke it entirely, it shall not be dismissed in the Prohibition; but if one makes several Wills, the one of his Land, and another of his Goods, and Revocation is alleged of both, there a Prohibition shall be granted for the one and denied for the other.—2 Sid. 141. Hill. 1638. B. R. Combe v. Combe, S. P. ruled that the Prohibition should be Quoad, and cites Lut 71. that several Authorities are so. But ibid. the Reporter says Nota, that Hill. 23 & 24 Car. 2. in B. R. and oftentimes before Prohibition Quoad was denied, because Probate there is not of any Avail to the Lands; And that Hale Ch. J. Sid. that they cannot prove a Will in Part; For it is the whole, and not Part that is the Will, and therefore they denied to grant a Prohibition Quoad.—S. P. accordingly by Hale Ch. B. Hard. 315. Mich. 14 Car. 2. in Seac. in the Case of Gibbart v. Barlow; That at late Time in such Case they have used to deny a Prohibition because the Party is at no Prejudice by it with respect to the Land, the Probate in the Spiritual Court being no Evidence against him at Law for the Land; whereas the Executor would be at a Prejudice if a Prohibition should Issue; for then he would be hindered from proving the Will, and till then he cannot sue for a Debt due to the Testator, by which Means the Estate may be diminished. But in such Case because the Plaintiff had brought his Action here to try the Title of the Land and the Validity of the Defendant's Will and offered to proceed in it with Effect the Court ordered a Prohibition Quoad the Land unless the Parties would consent to be concluded by the Probate; and says that the like was done in the Case of Minshaw v. Byper.

Prohibition was moved for to stop the Probate of a Will (that did concern Lands and Goods) quoad the Lands; but denied per Cur. Freem. Rep. 23. pl. 50. Hill. 1671. Anon.

3. The Officers of the Ecclesiastical Courts ought not to take into their Hands such Wills, as contain Land in them, and if they lose them they must answer it in an Action for Damages to the Value of the Land, and Proof that there was such a Will in Writing shall serve aga

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gainst them. Clayt. 91. pl. 154. March 16 Car. Beamiely's

4. If a Will contain Lands to the value of 10,000 l. yet the Ecclesiastical Court may cite them to bring the Original to be proved per Teiles, and this Court ought not to prohibit them; but if they will not after Proot deliver back the Original, then this Court will intermeddle, and a proof of the Will cannot be by Copy; for if the Original be burnt or lost &c. a Copy of their Registry hath been often given in Evidence, but a Copy of a Copy cannot; Per Jefferies Ch. J. Skin. 174. pl. 3. Patch. 36 Car 2 B. R. Anon.

5. Probate of a Will by the Heir at Law, by Judgment in B. R. 9 Mod. 92. and confirmed on a Writ of Error in the House of Lords was avoided S. C. cited and decreed. as to the Real Estate, cited 8 Mod. 60. Mich. 8 Geo. as the Case of Markham v. Montague.

against an Heir at Law without a Trial at Common Law, if the Heir infests upon it, especially where there are any Lands devised. Hill. 11 Geo. Dawton v. Chater.

One Coheiress was made a Devisee of Part, and the other Coheiress infiting in her Answer to have the Validity tried at Bar, it was ordered, and though found for the Will, yet no Coils were given either at Law or in Equity. Chan. Prec. 95. Tr. 1699. Crew v. Tollifia.

6. A Devisee of Lands being in the Possession of them, brings a Bill to prove the Will, and prays Relief; The Heir brings on the Cause ad requisitionem Defendentis, and infests that the Bill ought to be dismissed, because no Merit for a voluntary Devise, where no Debts or Legacies are to be paid, to have a Decree against the Heirs; but the Matter of the Rolls said, it is the Business of this Court to quiet Possessions, and gave the Defendant a Year to try the Validity of the Will, and then to revert back to the Court. Abr. Equ. Cafes 132. Hill. 1702. Woodgate v. Woodgate.

7. Depositions signed by the Witnesses, though the Bill and Answer were lost, may be allowed as Evidence to supply any Point where the Will was silent, but not to contradict the Will; Per Parker Ch. J. at a Trial at Nili Prius upon a Will which concluded thus, “Signed, ‘Sealed and Delivered by A. B. the Testator’” and then subscribed by three Witnesses, and upon the Depositions it appeared (the Bill and Answer in the Cause were lost) that they subscribed the Will in the Presence of the Testator, but it was at three several times. 10 Mod. 15. Mich. 9 Ann Cook v. Parsons.

8. It is a positive Rule, that where there is any Doubt on the Proofs a Will will not be established against an Heir without a Trial at Law. 9 Mod. 92. 1 Hill. 11 Geo. Dawton v. Chuter.

9. A Bill brought by a Devisee of Land to perpetuate the Testimony of, and establish the Will, ought not to be set down for Hearing, being only to perpetuate, and therefore was Dismissed with Costs by the Matter of the Rolls; but he said, that the Plaintiff would at Law have the same Benefit of these Depositions though the Bill be dismissed 2 Wms's Rep. 162. Trin. 1723. Hall v. Hoddesdon.

10. The Plaintiff exhibited his Bill as one of the Coheiress of Sir John Sel. Chan. St. Barb, and claimed a Mility of the Estate by Virtue of a Settlement made by one Henry St. Barb, the Grandfather of the Plaintiff, and of the now Defendant, who having set up a Will made by Sir John in Favour of the said Defendant, and it being suggested in this Bill, that the Will (if any) was fraudulently obtained, it was prayed that the Devise and Writings concerning the Lands in Question might be brought into Court, and the rather because the Defendant in his Answer owns the Settlement as set forth in the Bill, and that the Plaintiff is one of the Coheiress of Sir John; but says, that John St. Barb, the Father of Sir John, suffered a Common Recovery of all, or the greatest Part of will be a thiste
Guidance to the Court but for the Case on which they might be founded; For Papers may be in those Cases he mentioned which otherwife might be suppressed and not come to Light.

... tho' those Lands; and declared the Uses to Sir John, and his Heirs, so that he might lawfully devize the same by his Will. And now it was insisted by the Plaintiff, that the Court would give him an Opportunity to inspect the said Deeds and Writings, as was done in the Cases of the Earls of Suffolk and Ferrers, and this is but a Piece of Common Justice utilely done in Case in Favour of an Heir; nay it hath been done in the Case of a Devisee who is Heres Faetus, as particularly in the Case of the late Duke of Newcastle's Will, and it ought the rather to be done in the principal Case; for though the Defendant hath proved this Will as Executor, yet he says in his Answer, that if it should be set aside, there are other Wills in being by which the Estate is devized to him. *'Tis admitted that the Plaintiff is one of the Coheirs of Sir John St. Barb, but that he brought his Bill in the Executive, suggesting the same Matter as by the present Bill, and that upon hearing the Cause the Bill was dismissed; and now he brought this new Bill in this Court, and the Defendant insists that if the Plaintiff hath any Right he should try it at Law; and he farther insists, that Sir John St. Barb was Tenant in Tail General, and that he levied a Fine of the Lands now in Question; so that if the Common Recovery and the Deed to lead the Uses doth not avoid this Settlement, the Fine will do it effectually; and that the Defendant is willing to have the Plaintiff all the Settlements of the Family, but not all the Conveyances, Counterparts of Leaves and old Deeds. Per Cur. The Right of the Plaintiffs at Law cannot be tried without the Deeds, and there can be no Reason why the Plaintiff should contest the Will before he knows whether the Teltator had Power to make it, which cannot be known without the Settlement, and the Deed to lead the Uses of the Common Recovery; For if the Plaintiff hath any Right it is by Virtue of this Settlement made by his Great Grandfather; And as this Contest is between Coheirs, where one sets up a Will made in his Favour, and insists that he is not obliged to produce the Settlement until the Will is set aside, certainly there cannot be a Reason for not Producing it, because the Plaintiff hath no better a Right to see it then (viz.) after the Will is set aside, than he hath now; therefore the best Method is to have the Deeds brought before the Court, and that the Plaintiff shall be paid the Costs of this Suit. 9 Mod. 99. Mich. 11 Geo. 1. Floire v. Sydenham.

11. Upon a Bill brought by a Devisee of Lands against the Heir to perpetuate the Evidence of the Will; The Heir answered and put the Plaintiff to his Proof, and the Heir Cross-examined one of the Witnesses, yet the Heir shall have his Costs. But it may be reasonable that he should not have Costs where he examines Witnesses of his own; Per King C. 2 Wms's. Req. 285. Trin. 1725. Bidulph v. Bidulph.

12. Lands were devized by Will for Payment of Debts. Heir at Law was a Creditor and opposed the Will as to Part of the Lands devised, and which the Teltator had no Power to devize, yet he was not by this excluded from being let into the Residue of the Fund given by the Teltator for Payment of Debts. Per Ld. C. King. 2 Wms's Rep. 418. Trin. 1727. Deg v. Deg.

13. Where a Bill is brought to prove a Will of Land, the Sanity of the Teltator must be proved; Otherwise in the Case of a Deed of Truf to sell for Payment of Debts. 3 Wms's. Rep. 93. Hill. 1730. Harris v. Ingledew.

14. The
14. The Court never orders a Will to be proved out once at the Hearing as they do a Deed. 3 Wms's. Rep. 93. Hill, 1730 Harris v. Ingledeew.

15. D. K. by Will devises an Estate to Trustees to be by them disposed of by Sale, and to distribute the Money among her Children and Grandchildren as therein directed; and amongst the rest the Sum of 100 l. to J. K. her only Son who was a Lunatick, and made E. her Daughter Executrix, who soon after the Death of the said D. K. proved the said Will in the proper Ecclesiastical Court. On the Death of the Testatrix the Lunatick had an Estate of 100 l. a Year decided to him, and is now under a Committee appointed by the Court of Chancery, and the said J. K's Children have been educated and maintained by the said E. and have not any other Provision but what is devised by the Will of the said D. K. and therefore the Trustees named in the Will in Hill. Term 1729, exhibited their Bill in Chancery against the said J. K. the Lunatick, to prove the said Will per Testat., and to have the said Trusts thereof performed and executed, which Cause being at Issue, and several Witnesses examined, the same came on to be heard before the Ld. Chancellor, who declared that the Will was well proved, MS. Rep. 9 Apr. 1730. Luther v. Kerby.

16. H. T. mortgaged his Lands for near the Value and owing other Debts he made his Will, and devised all his Real Estate to A. and B. in Trust to sell and pay Debts and Legacies, and the Residue to his Heir at Law, who was his next Brother, and beyond Sea in the Service of the East India Company. B. covenanted with W. to sell him Part of the Trust Estate, and W. covenanted, to pay Interest for the Purchase Money from Lady Day next and entered on Part of the Premises. The Creditor brought a Bill to compel W. to complete his Purchase that they might be paid their Debts. The Will was proved in Equity, and W. said he believed that T. did duly execute the Will, but that the Heir at Law, though made a Party Defendant, had not appeared to, or answered the Bill, that he was willing to proceed in his Purchase all proper Parties joining, whereof the Heir at Law was one. Ld. Chan. King said, it is very Proper that a Will disposing of Lands should be proved in Equity, especially in the Case of a modern Will; But I cannot say this is absolutely necessary to make out the Title, any more than it would be to prove a Deed in Equity, by which an Estate is settled from the Heir at Law after the Ancestor's Death. The Will prevents and breaks the Defect to the Heir as much as a Deed, and the Hands of the Witnesses to the Will may be as well proved as to a Deed, and it is the better if in the Indorsement to the Will it is mentioned that the Will is attested by three Witnesses, who subscribed their Names in the Presence of the Testator. Now, as it would be no Objection to a Title if a modern Deed, on which the Title depended, was not proved in Equity, why should it be so in the Case of a Will, where the same appears to be duly attested by three Witnesses, whose Names are mentioned to have been subscribed in the Presence of the Testator? But in present Case it appears the Defendant, who Articleled for the Purchase, knew at that Time the Heir was beyond Sea, and still accepted the Title, without inquiring that the Heir should join, or that the Will should be proved against the Heir. Alto the Defendant admits by his Answer, that the Will was duly executed, and by entering upon great Part of the Estate, has himself executed the Purchase; for which Reason let him pay the reit of the Purchase Money with Interest, according to the Articles, and at the same Time let the Trustees and Mortgagors join in proper Conveyances to the Defendant the Purchaser. It seems in this Case to have been a great Help to the Title, that the Mortgage made by the Testator, and Prior to the Will, was for the greatest Part of the Purchase.
(B. 5) Probate of the Will stay'd or compell'd. In what Cases.

i. **THE** Ordinary may compel the Executor to prove the Testament by Excommunication, and may sequester the Goods till they will prove the Testament. Br. Executors, pl. 92. cites 9 E. 4. 33. 47.


3. A perpetual Injunction was awarded against the Defendant not to prove a Will, touching a Personal Estate only, in the Prerogative Court by the Master of Rolls. Chan. Cases 80. Hill. 18 & 19 Car. 2. Beverham v. Springhold.


(B. 6) The Force of Probate of a Will.

i. A Testament proved is of so great Force that a Man shall not have a direct Traverse thereunto, nor unto the Letters of Administration; But the Defendant may lay against the Testament, That the Testator made not the Plaintiff his Executor &c. and some have said, That because the Writ ought to agree with the Testament that the Testament is traversable, but that it is false, for a Scire Facias to do Execution ought to agree with the Words of a Fine in the Manner &c. yet the Fine is not traversable dircetly &c. and the Reason why the Testament is not traversable is, because that then it shall be tried by the Certificate of the Ordinary, and he will not certify contrary to that which is shewed unto the Court under his Seal, or under the Seal of the Officer deputed to the same. Perk. S. 493.


3. If the same Ordinary Certify to the Court under his Hand and Seal that there is no Will in his Court against his Probate, this Certificate shall not be given in Evidence. So if Ordinary in England against his Probate makes such Certificate, the Probate shall be presterr'd, because it is a judicial Act. Agreed by Doderidge and Chamberlain in Evidence to a Jury. Palm. 163. Pasch. 19 Jac. B. R. Lee v. Roblin.

4. An Executor may be admitted to prove the Revocation of any Legacy notwithstanding he had proved the Will, which it was objected he could not
not do without taking an Oath that it was the Testator's last Will; For he only swears that he believes it to be the Testator's Will, and at that Time he might not know of the Revocation. Vern. 20. pl. 12. Mich. 1681. Jervois v. Duke.

5. Whether the Probate of a Will be conclusive has been variously This Case allowed, but of later Times it has been adjudged that nothing can be in Rayn. 496. 497. given in Evidence against it but Forgery, or its being obtained by Surprise. Raym. 405. Mich. 38 Car. 2. B: R. Chichester v. Philips. is certainly good Law that the Seal of the Ordinary cannot be contradicted, because if there be no Way in the Temporal Courts to prove the Will relating to Chattels it must go on in the Spiritual Court, and the Determination there must be final; For the Temporal Courts cannot make a Judgment concerning the Will contrary to what was made in the Ecclesiastical Court, and therefore if they gave a Probate under the Hand of the Ordinary they cannot prove in Evidence that the Will was forged, or that the Testator was Non Compos, or that another Person was Executor. But they may give in Evidence That the Seal was forged, or the Will repealed, or that there were Bond Notabilia; Because that is not in Contradiction to the Real Seal of the Court, but admits the Seal and avoids it. Per Gilbert Ch. 2. Gilb. Equ. Rep. 207, 208. Hill. 12 Geo. in Case of Marriott v. Marriott. If a Will be prob'd before a wrong Ordinary it is Cause of Reversal in some Cases; So if there be any Falshood in the Proof that were Commanded by Law, which is without Witness or, by Examination of Witnesses, yet it may be undone if either Difproof can be made, or Proof of Revocation of such Will, or of the making a later. Went. Off. Ex 49.

6. Will under Probate Ecclesiastical is not triable in Chancery whether there be a Revocation of it or not. But Lt. Chancellor bid them go to the Ecclesiastical Court and prove it there. 2 Ch. Cafes 178. Mich. 2 Jac. 2. Attorney General v. Ryder.

7. Will of Personal Estate only, and prov'd in the Spiritual Court though gain'd by Fraud, yet cannot be controverted in Equity; But if a Party claiming under such Will comes for any Aid in Equity he shall not have it. 2 Vern. Rep. 70. Trin. 1688. Nelson v. Oldfield.

8. A Legacy in a Will is forged. The Executor proves the Will in the Spiritual Court, it relating only to Personal Estate, and after brought a Bill to be reliev'd against this Legacy in Equity, but Cowper C. dismisst the Bill with Cafts. For the Executor might have prov'd the Will in the Spiritual Court with a particular Refermentation as to this Legacy, and said that his Remedy must be there. Wms's Rep. 388. Mich. 1717. Plume v. Beale.

9. Person who proved a Will in the Spiritual Court, by which he swears the Testator was of sound Memory, after controverts the same Will at Law as to the Real Estate, upon which an Issue was directed, Compos or non Compos, and found non Compos. MS. Tab. 1717. April 1, Montague v. Maxwell.

10. Executor may traverse the Executivehip of another, for whether a Will or no Will is a Question triable by a Jury, as is agreed 8 Rep. 134. Sir Trenchard's Cafes. 9 Rep. Abbott de Strata Marcell's Cafes, and the Reason is, Because the Spiritual Court had not the original Jurisdiction of the Probate of Wills, and because as to Trial the Temporal Courts have Quasi a concurrent Jurisdiction; and this is not like the Cafes 1 Sid. 359. and 1 Lev. 235 that the Probate of a Will concludes a Person from laying there was no such Will; but notwithstanding this Matter may be brought to Trial; for the producing a Will under Probate is only Evidence that there was such a Will; and though it is Evidence of so strong a Nature that no Evidence shall be admitted against it, yet to plead that such a Will was proved is no Reason why this Matter should not be tried. Therefore Judgment was given for the Plaintiff. Comyn's Rep. 150. 152. pl. 102. Mich. 5 Ann. C. B. Anon.
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11. Will concerning Personal Estate proved in the Spiritual Court; Respondant having a former Will in his Favour brings his Bill to discover by what Means the latter Will was obtained, and to have an Account of the Personal Estate, and whether the Testator was not incapable and imposed upon. Defendant demurred, because it belonged to the Spiritual Court only to prove the Validity of Wills, and the former Will was not proved in the Spiritual Court as the Will in his Favour was. The Demurrer was over-ruled; Note, it was mentioned in the Respondents Case, that the Appellant who was the Executor of the proved Will was only in the Nature of a Trustee for the Respondent. MS. Tab. Feb. 6th. 1723. Andrews v. Powis.

(C) Administration.

In what Cases it shall be granted.


Executors, and one proves the Testament, it is sufficient for all if the others Will agree to it, and the Refusal before the Ordinary is no Obstacle to them to administer after; Per tor. Cur. And they had no Regard to the Spiritual Law, which is contrary in this Matter — — — Br. Executor, pl. 117, cites 21 E. 4. 24. — — — But if there are two Executors, and he that proves it dies, and he that refused before the Ordinary will not administer, the Ordinary may sequestrate. Ibid.

† Fitzh. Executors, pl. 15. cites S. C.

Mod 213. 2. If an Executor administers before Probate of the Will, and after refuses to prove the Will, and to administer when the Ordinary makes Process against him, the Ordinary may grant Administration. 3 H. 7. 14.

S. P. held contra, and that the committing of Administration in such Case is a mere void Act. — — — S. P. by Holt Ch. J. accordingly, and cites S. C. 1 Salk. 505.

3. If a Man makes an Executor, but it is not known, or conceal'd, the Ordinary may grant Administration, and this shall be good till the other prove the Will. 7 E. 4. 12. b. 13

4 But if a Man makes an Executor, the Ordinary cannot grant Administration before Refusal of the Executor. 3 H. 4. Admin. 22 adjudged.

5. If A. makes a Promise to B, and after B. dies Intestate, and Administration of his Goods is granted to C, who dies intestate after, and then Administration is granted to D. for the Goods of C. — D. cannot have Action on the Promise made to B. as Administrator to C. for he is not Administrator to B. intimated as Administration is not granted to him of the Goods of B. unadministered by C. Adjudged per Cite. upon Demurrer, N.B. 15 Car. B. R. Gosling against Osburn. Intracut Trin. 15 Car. Rot. 926.
Executors.


but not S. P. though it seems admitted there. — Where Executor administers, and after refused, if Administration be granted during his Life it is void; Per Holt Ch J 1 Salk. 508. Mich. 41 W. 3, C. B. in Case of Wangford v. Wangford, cites Mod. 215. Paken's Case.

7. If an Executor dies Intestate, Administration ought to be granted of the first Testator, for now he dies Intestate. * 21 E. 4. 24. 26 H. 8. 7.

the Testameud dies, the Ordinary may sequestrate the Goods of A. as well as of B for it is the same Thing now as if A. had died Intestate at the first. Br. Executor, pl. 117. cites S. C.

8. But if an Executor after Administration dies Intestate, and the Ordinary grants Administration of all the Goods of the Executor, he may administer the Goods of the first Testator. 10 E. 4. 1.

[What Power the Executor, or Administrator of an Executor has, as to the Goods of the first Testator.]

9. If an Administrator makes his Executor and dies, his Executor shall not have the Administration of these Goods, but a new Administration ought to be granted of them. 34 H. 6. 14. D. 32 H. 8. 47 adjudged 1 Rep. 5. Bradwell's Case. 9 b. So where a Man makes two Executors and dies, the one Executor makes an Executor and dies; The other survives and dies Intestate; The Executor of the Executor shall not meddle; for the Power of his Tæstator was determined by his Death, and by the Survivor of the other; So that now the Ordinary shall commit the Administration of the Goods to the Executor who survived, & de Bonis non Administris of the first Testator. Br. Executors, pl. 149. cites 32 H. 8.

10. If an Executor before Probate of the Will of his Testator makes an Executor and dies, the Executor of the Executor cannot take upon himself the Administration of the first Testament, but Administration of the Goods of the first Tæstator cum Testamento annexo shall be granted. D. 22 & 23 El. 372. b. laid by the Judges of the Prerogative Court to be the Rule and Custom of the said Court of Prerogative, and agreeable to the Law by the Opinion of Dyer, to which the Court gave Credit.

Where the Executor dies after administering, and before Probate, his Executor cannot prove the Will of the first Tæstator, because he is not named Executor to him in the Will, and no one can prove the Will but who is named Executor in the Will. The Executor's not proving the Will does, upon his Death, determine his Executorship, but not avoid it; Per Holt Ch. J. 1 Salk. 509. in the Case of Wankford v. Wankford.

11. If the Ordinary commits Administration to J. S. he may refuse the Administration, and then the Ordinary may commit it to another; For he cannot compel him to administer. Br. Administrator, pl. 7. cites 34 H. 6. 14.

12. If a Man makes an Executor who administrers, and they will not Br. Executor come to prove the Testament when the Ordinary makes Process against them, then he may lawfully commit the Administration over; Per Townsend J. Br. Administrator, pl. 32. cites 4 H. 7. 13.

13. A. makes his Will, and directs that one Year after his Death B. shall be Executor. The Ordinary may grant Administration in the mean Time, and the Sale or Gift of the Goods by him within the Year shall never be avoided by the Executor after the Year. Pl. C. 279. B. Pach. 7 Eliz. in Case of Greysbrooke v. Fox.

14. Two
Executors.

There is a Difference where there is a Controversy in the Spiritual Court concerning the Right of Administration, and where it is concerning a Will; For in the first Case an Administration granted Pendente lite is good, but otherwise where the Controversy is concerning a Will; For he that comes in under a Will shall avoid all that which an Administrator can do. Carty 153. Trin 2. W. & M. in B. R. Frederick v. Hook — Per three Justices against one contra, and said that neither Robins's Cafe nor the Cafe of Frederick v. Hook were adjudged Caffes. Gibb 260. Pach. 4 Geo. 2. B. R. Wolston v. Walker. 3 P. per three Justices, that neither of those Cases were adjudged, and that the Reason given in Carty, did not maintain the Opinion. 2 W's ed. 966. In Cafe of Walker v Wolston — 2 Barnard. Rep 65. Lee J. said he had ordered the Roll of that Cafe of Frederick v. Hooke, Carty. 153, to be searched, and accordingly it was found that that Plea in Abatement in Relation to the Validity of the Administration was there void, and Judgment was actually entered for the Plaintiff, so that he supposed there was only a Rule to shew Cafe in that Case.

14. Two Executors being in Suit which of them was the true Executor. It seems that the Ordinary cannot grant Administration pendente lite. 56. pl. 874. Hill, 37 Eliz. 3 B. Robins's Cafe.

15. If a Man enters into Religion and makes no Executors, the Ordinary shall grant Administration. 9 Rep. 40. a. Trin. 42 Eliz. in Hensfloe's Cafe.

16. If all the Executors refuse, Administration may be granted to another, and none of the Executors can administer, as where one of the Executors proves the Will. 9 Rep. 37. a. Trin. 42 Eliz. Hensfloe's Cafe.

17. If one makes two Executors, one 17 Years old, and the other under, Administration during the Minority is void, because he of 17 may execute the Will. Brownl. 48. Mich. 14 Jac. Anon.


20. Executor of Executor shall be allowed to be Executor to the first Titterator; but per tot. Curt. This is to be understood when first Executor proves the Will. Palm. 156. Hill. 18 Jac. B. R.

21. Upon English Bill the Cafe was, that several Executors were made, and one proved the Will, and the Rest refused; and he that had proved the Will died, and another Person took out Letters of Administration and preferred his Bill in this Court. And the Court held clearly that by the proving of the Will by one, they are all Executors, and although he that proved the Will died, yet no other Person can administer during the Lives of any of the Rest. And it does not appear that they who refused are dead; Whereupon the Bill was dismissed. Hard. 111. pl. 2. Pach. 569. Pawlet v. Freak.

22. Defendant in Execution was the next of Kin to the Plaintiff Intestate; and a Motion was made for a Habebus Corpus to bring her from the Counter in this Court of B. R. that having administered to her Creditor the might be discharged; but it was denied, for she could not be thus discharged, because Non Conteat de Perbona; neither can the give a Warrant of Attorney to acknowledge Satisfaction; Therefore let her renounce the Administration and get it granted to another, and then the may be discharged by Letter of Attorney from such Administrator. 2 Mod. 315. Trin. 30 Car. 2. B. R. Joan Bails Cafe.


24. Administration granted where there is a Will and Executors but concealed, the Administration is void though Executors renounce. 2 Lev. 182. Hill. 28 & 29 Car. 2. B. R. Abram v. Cunningham.
25. W. and R. were two Brothers, a Legacy of 100l. was devised to R. who went beyond Sea, and after five Years absence; the other aggrieving he was dead, took out Administration and sued for the Legacy. The Court decreed the 100l. and Interest, to be paid to the Plaintiff ever since R. went away, the Plaintiff giving Security that it shall be repaid to R. if ever he should return; which Security to stand for three Years and no longer; but the Plaintiff's own Security to stand for ever. Fin. Chan. Rep. 419. Hill. 31 Car. 2. in Case of Norris v. Norris.


27. Where an Executor dies before Probate of the Will his Executor cannot prove it, but Administration cum Testamento annexo must be granted to the Refiduary Legatee if any, or else to the next of Kin. Vern. 200. pl. 196. Mich. 1683. Day v. Chapfield.

28. A. died beyond Sea and made a Nuncupative Will, and thereby B. Executor. C. took Administration and brought a Bill for discovery of the supposed Testator's Personal Estate. B. pleaded the Will, and that he was Executor and that A. left no Estate in England. It was not necessary that the Will be proved here no more than if a Man died and left an Estate in Scotland. Vern. 397. Pach. 1686. Jauncey v. Sealey.

29. It seemed to be agreed that if Executor becomes Non Compos, the Spiritual Court may commit Administration, but not if he become Bankrupt. 1 Salk. 36. pl. 1. Mich. 3 W. & M. in B. R. in Case of Hills v. Mills.

30. If Administration be granted and the Letters of Administration are left, new Letters of Administration may well be granted after the Action is commenced; but it is otherwise if they are then Originally granted. Comyns's Rep. 18. in pl. 10. Mich. 8 W. 3. In B. R. Baron's Case.

31. Two Executors, one renounces, the other proves the Will and dies; the Executorship survives to the other; But where there are two Executors, one Executor only acts and dies, and then the other renounces, by this the Testator is dead Intestate, and the Executors of the acting Executor have nothing to do with the Goods unadministered, but Administration shall be granted to the next of Kin of the first Testator. 1 Salk. 311. pl. 15. Houfe and Doune v. Ld. Petre. December 19. 1700. Coram Delegatis.

32. Administration granted to two; One dies; It survives to the other; For by Wright K. it is not a bare Authority, but rather an Office, and the Office survives. 2 Vern. 514. Mich. 1705. Adams v. Buckland.

S. C. cited by Ld. C. Talbot, and laid that the Case of Bowden v. Bowden was determined contrary to the Ecclesiastical Court. Cases in Equity in Ld. Talbot's Time 128. in Case of Hudson v. Hudson, Trin. 1735; but upon the Authority of Adams v. Buckland before then Ld. Cowper, he overruled the Plea of Administration having been granted to the Plaintiff and another, which other died before the Bill brought Cases in Equity in Ld. Talbot's Time 127. Trin. 1735.

T

Admi-
(D.) Administration upon the Statute of 31 E. 3 cap. 11.

How it may be granted.

1. The Ordinary may grant several Administrations of several Parts of the Goods of the Intestate. 10 E. 4. r. 18


S. P. by Hutton, but by him and Harvey it is illegal.—Sid. 100. pl. 5. Hill. 14 & 15 Car. 2. B. R. Hammon v. Moor, S. P. held per Curiam clearly to be void.—And though the Goods are in several Counties, yet it seems that the Ordinary cannot commit Administration of the Goods in the one County to one, and in the other County to another. Sid. 101. pl. 5. Hill. 14 & 15 Car. 2. B. R. But there is added a Quo rent benem.—Adj. Mod. 148. Hill. 1 Ann. R. in Cafe of Taylor v. Raines, that Administration may be granted Quoad &c. as well as Executor may be Quoad.—Sid. 513. pl. 20. Sharadlov v. Naylor S. P. and seems to be S. C.

2. The Ordinary may grant Administration upon Condition, as where this was twice granted to J. S. who is outlawed and in Prison beyond Sea, this may be granted to another, but so as if the said J. S. comes back into England he shall administer when he comes back. 34 H. 6. 14.

3. In Debt per Cur. Administration cannot be committed by Parol, but by writing; Quod Nota. Br. Administrators, pl. 27. cites 21 H. 6. 43.

4. But per Newton, it may be committed by Entry in the Register without committing it by Letters sub Sigillo; Quod quære inde; For to this it was not answerd. Ibid.

5. Obligee of a Bond Debt of 500l. died Intestate; The Ordinary committed Administration of 100l. thereof to A. and of another to B. &c. It was held clearly by the Court to be void, for several Administrations cannot be committed of a Thing intire. Sid. 100. pl. 5. Hill. 14 & 15 Car. 2. B. R. Hammon v. Moore.

6. Windham conceived that Administration cannot be committed of Part of any Debt, but may be severally of the Goods in several Counties; Sid Curia contra; They may commit Administration to as many as they will, but not by several Parcels, because given by Statute. Keb. 434. pl. 17. Hill 14 & 15 Car. 2. B. R. Taylor v. Gore.

7. As to the Statute 31 Ed. 3. cap. 11. the Inconvenience before this Statute was, that albeit the Ordinary might have seized the Goods of the Intestate in Possession, yet he nor any under him could sue for his Debts in the King's Courts, so the Debtors would deprive the Wife and Children, and Creditors lose their Debts. These Administrators were but the Ordinary's Deputies, and by this Statute they were accountable to the Ordinary as well as before; it altered nothing in the Substance of the Thing, but did enlarge his Authority to give him Actions in the King's Courts; So was the Law taken, held, and practised. This appears by Lindwood to H. 6. in Cap. de Mediate Ecclesiæ & ita quorundam Testamenti; the Glofses were made alter 31 E. 3. cap. constitut Art. 14 H. 5. 470. ordained, the Ordinary in allowing the Accounts should be absque dolo. Per Dr. Walker. Car. 132, 133. Trin. 18 Car. 2.


3. Admi-
8. Administration was granted Pendentia Lit is about a Will whether Will or no Will, and if no Will, then to whom Administration belonged, and the Administration was, Ad Colligend' &c. and Ad fotvent Are alterum &c. and it was argued whether this was within any Statute so as the Administrator was suable. The Court seemed pro Quere that the Administrator was suable; Sed adjutante vult. 2 Jo. 134. Hill. 31 & 32 Car. 2. B. R. Incey v. Pit. Administration Pendentia Lit is about Right of Administra

9. The Bill was to have a long Lease assign'd, which came to the Plaintiff by Virtue of an Administration of her former Husband, but there were Children of the Intestate; and it was referred to the Civil Law to determine the Administration before a Decree; For the Statute of H. 8. is, that Administration be granted to the Wife or Child, and the Wife having it, [the Court bid them] send back to see if the Civil Law doth not proper Administration. 3 Chan. Rep. 61. Mich. 1670. Hunt v. Jones.

10. The Court held the Ordinary may grant Administration to the Brother quod Part, and to the Wife for the rest; in which Case neither can complain, since the Ordinary need not have granted any Part of the Administration to the Party complaining; But if the Intestate leave a Bond of 100 l. the Ordinary cannot grant Administration for 50 l. to one Person and 50 l. to another, because this is an entire Thing; Anna nec debitum, Judex non separat ipsum. 1 Salk. 36 pl. 2. Mich. 3 W. & M. in B. R. Fawtry v. Fawtry.

11. Since the Stat. 22 & 23 Car. 2. it has been held, that the 31 E. 3. Cap. 11. is thereby repealed; the Reason of Distribution of the Intestate's Goods by the Ordinary before the Statute 22 & 23 Car. 2. was because there was no Property of those Goods in any Body, therefore the Ordinary having the Possession he disposed of them at his Pleasure, for there was no Proprietor to controul him; Per Holt Ch. J. Carth. 376. Patch. 8 W. 3. B. R. Oldham v. Pickering.

12. An Administrator during the Absence of J. S. (who is Executor) brought an Action of Debt on a Bond, but did not aver in his Declaration, where J. S. was absent, or that he was absent; Per Cur. It is but reasonable that the Ordinary may grant Administration during Absence as well as during Minority or Pendentia Lite, and such Administrator is accountable to the Executor. We will intend it Absence beyond Sea, but the Plaintiff ought to aver that he was absent, and Judgment for Defendant. 1 Salk. 42 pl. 11. Mich. 3 Ann. B. R. Slaughter v. May.

13. H. brought Debt against T. on a Bond of 2000 l. entered into 11 Mod. by T. to F. deceased as Administrator to F. as to this Bond only. The Defendant pleaded in Abatement that Administration was before granted of this Bond to C. But per l. Cur. this Plea is only in Bar, and cannot appear.
(D. 2) Administration granted to several; their Power, and Pleadings.

DEBT against Administrator, who says that it was committed to him and another, this is no Plea without saying that the other administered, by which he said so, and there the Administration by the other is traversable, and not the committing of the Administration, and to see, that if the Committee does not Administrator he is not chargeable. Br. Traverfe, per &c. pl. 322. cites 8 H. 6. 2.

2 A and B two Bond-Creditors taking joint Letters of Administration, A. gets into his Hands left Part of the Affairs, and retains for his own Debt against B. On a Bill for an Account Question was, whether A. by this had got such a legal Advantage as to be intitled to keep the Affairs and fo B. lose his Debt? Per Maller of the Rolls, 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. The Question then is, whether at Law this be a good Retainer? At Law no Doubt an Executor or Administrator has a Right in Cafe of Debts in equal Degree to prefer one to another, and to retain for his own in the first Place against any other Creditor. The Reason is, not (as some of the Old Books say) because the Law leaves it to the Conscience of the Executor which Debts to prefer, for that I take to be a fictitious Reason, being contrary to the general Principal of Law, for a Man thus to become Judge in his own Cause and be left to determine which Debt ought first to be paid, his own or another's. But the true Reason is, because if a Retainer were not allowed, an Executor in Case of a Deficiency of Affairs would have no Possible Way of obtaining Satisfaction for his Debt, for at Law there is no such Thing as splitting of Debt, or making a ratable Proportion, and therefore he cannot come in upon an Average with the rest of the Creditors, nor has the Advantage of another Creditor, who by bringing his Action in due Time may recover his Debt, though there be not enough Affairs at FIRST to answer all Demands upon the Testator; for he cannot sue himself; so that this Privilege of Retainer is founded on the Policy of the Common Law, that Executors may not be deprived of one Advantage without having another in lieu of it, and that they may not be in a worse Condition than all Mankind besides; But this is not a Case between an Executor or Administrator, and a Creditor, but between two joint Administrators who are both in the same Condition in all respects. Now here has been no Authority cited to support a Retainer by one Administrator against the other, nor do I see how there ever could be one, because an Administrator can bring no Sort of Action against his Companion wherein this Point might have been settled at Law. Neither does the Reason of the Law justify such a Retainer, for Administrators are considered but as one Person in Law, the Possession of the 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 endure for
Executors.

for their mutual Benefit in the Discharge of the Debts of both in proportion. Then the Confluence would be very bad were a Retainer allowable in this Case, for Administrators must fight for the Affeets if getting the sole Possession would entitle either to a separate Right in them, for that as no legal Right of Retainer has been truen, the Rule must take Place, that he, who cannot retain in Law cannot in Equity. The Plaintiff is entitled to an equal Distribution of the Affeets, being an equal Creditor, according to Conscience and Equity, and the Defendant must be decreed to Account. 26 Feb. 1734. in Canc. Chapman v. Turner.

2. A Recovery against one Joint-Administrator shall bind him and all his Companions; and therefore it is Reason it should bind all Strangers; Per two Justices, and the other two said that they were of the same Opinion; But they would be advised &c. The principal Case was Debt against four Administrators, who pleaded that one T. D. had brought Debt in B. R. upon a Bond for 102 l. against one of the Administrators, and recovered by a Nihil Dictio, and that they had Riens enter Mains to satisfy over and above the said Debt, and this was demurred to; And Anderson and Beaumont held it a good Plea; And it there be any Covin in it, it is to be averred by the Plaintiff; for Prima Facie it shall not be so intended, but that it is true. Cro. E. 471. pl. 23. Hill. 38 Eliz. B. R. Further v. Further.


(E) Upon the Death of what Person Administration shall be granted.

1. If a Feme Covert dies Intestate, Administration may be granted of her Goods; for peradventure she has Things in Action, the which are not given to the Baron by the Law. D. 8 Eliz. 251. 50. admitted.

(F) Who shall grant it.

Metropolitan.

1. If he who dies Intestate has Goods in diverse Counties, the Metropolitan shall grant the Administration. 14 H. 6. 21. * Br. Administrator, pl. 48. cites S. P. accordingly.

And if the Bishop of another Dioces than where the Party dies commits the Administration, this is void, though the Metropolitan has not yet committed the Administratio; and this of Goods moveable, the Administration belongs to the Archbifhop though he has only the Value of a Penny in one Country; for that, Cur. Br. says Quoix this Word County ought to be Dioces. Br. Administrator, pl. 31 cites 37 H. 6. 27, 28.
Executors.

2. If he has Bona Notabilia to the Value of 100s. in diverse Diocesies, the Metropolitan shall grant Administration. 10 H. 7. 16 b.

3. If a Man dies beyond Sea Interfate the Archbishop shall grant Administration. P. 11 Inc. B. per Coke to be adjudged in 42 Eliz.

4. If the Archbishop of York is void, the Archbishop of Canterbury shall have the Spiritualties, and Brooke says it seems that at that Time he may commit Administration. Br. Ordinary, pl. 22.

5. The granting of Administration of every Bishop's Goods, although he has not Goods but within his own Jurisdiction, does belong to the Archbishop. 4 Int. 335.

6. Where a Man dies Interfate, having Goods in several Peculiars, the granting Administration does not belong to the Ordinary of the Dioceses, but to the Metropolitan of the Province; For they are exempt from ordinary Jurisdiction. Lev. 78. Mich. 14 Car. 2. C. B. Anon.

As R and held accordingly, because several Peculiars do not belong to the Ordinary, but to the Archbishop of the Province; but true it is, that some belong to the Ordinaries, and because it was so suggested for a Prohibition where a Caufe was immediately transferred from the Peculiar to the Arches, a Prohibition was granted.

Administration.

(G.) By whom it shall be granted.

If a Man has Bona Notabilia in Ireland and in England, and I dies Interfate, there shall be several Administrations granted, viz. by the Archbishop of Dublin for all within his Province, and by the Archbishop of Canterbury for all within his Province. (But it seems that it is intended that he has Bona Notabilia in diverse Dioceses within each Province or Goods in his Diocese; For otherwise it seems it ought to be granted by the Ordinary where the Goods are, and not by the Metropolitan. D. 14 Eliz. 305.

The Case was, that L. Merchant of Ireland was obliged in eighty Pounds to one D. of London, and the Obligation was made in Ireland, but always after remained in London. D died Interfate in the County of Bedford in England, the Bishop in Ireland committed the Administration to the Son of D and he released the said Debt to L. The Archbishop of Canterbury committed the Administration in England to the Widow of D, who had gotten the Obligation. It seems that notwithstanding the said Administration and Release made in Ireland, the said L. ought to answer to the said Action brought in London, and this by the Opinion of the Court, but by reason of ill pleading the Plaintiff's nor Judgment. D. 505 a pl. 58 Mich. 13 & 14 Eliz. Daniel v. Lucre. — Dal. 76. pl. 5. S. C. and as to Goods in Ireland the Administrator shall have them, and to the Administrator in England shall have the Goods here; but if a Man has a Lease for Years of Lands in England, and the Deed of Lease was at the Time of his Death in Ireland, the Administrator in Ireland shall not meddle with this Term; For such Chattle are local.

Br. Administrators, pl. 46. cites S. C.

1. In Time of Vacation of the Archbishop, or of a Bishop, the Dean and Chapter shall grant Administration. 36 H. 8. Brook Administrator, 276. per omnes Legis Pretiosos, and by those of the Arches.


3. So where a Bond was made in Ireland but

4. If a Man become bound in an Obligation in London and dies Interfate in Devon, and there had the Obligation at the Time of his Death, Administration ought to be granted by the Bishop of Eron,
Eron, where the Obligation was at his Death, and not by the Bishop of London where the Obligation was made; for the Debt shall be accounted Goods as to the granting Administration where the Debt was at his Death, and not where it was made. 12 M. 14 Car. B. R. adjudged per Cur. Law v. * Fustion in an Action brought by the Administrator in London, supposing the Obligation to be made there, and shows the Administration to be granted by the Bishop of Erom, and Judgment it lies upon Demurrer to the Declaration, and 35 Car. this was affirmed in a Diet of Error.

It is otherwise of a Lease for Years, For such Chattels are local; Per Dyer Ch. J. quod Gaudy Concelit.

5. Debt by Administrator, and seized Letters of Administration as he ought, and were committed by the Bishop's Commissary, and Exception taken, because it was not committed by the Bishop himself, who is immediate Officer to the Court, & non allocutur, but by the Commissary awarded good. Contra of Certification of Bailtardy, or of Excommunication; For this ought to be by the Bishop himself. Note a Di. entity. Br. Administrator, pl. 18. cites 1 H. 4. 64.

6. It was agreed that Letters of Administration of the Commissary suffices for the bringing of an Action. Br. Ordinary, pl. 6. cites 11 H. 4. 64.

7. If one commits the Administration as Ordinary and is not Ordinary, there in Action brought, the other may say that J. N. is Ordinary there, abique hoc that he was granted the Administration is Ordinary there. Br. Ordinary, pl. 2. cites 35 H. 6. 46.


9. Attempted by an Administrator, and declared of an Administration granted to him by T. T. Barrister of Law, Commissary of the Bishop of L., the Defendant pleaded the Statute of 37 H. 8. cap. 17, that none by that statute can be a Commissary but a Dr. at Law, and that since the Darrain continuance the Bishop of L. granted to him Letters of Administration; The Opinion of the Justices was, that Administrations were by the Common Law, and the Statute of 37 H. 8. is not referable, that no others may be Commissaries than Doctors, and it a Bachelor of Law cannot be a Commissary, yet Acts done by him are good till they be avoided by sentence. Cro. E. 314. pl. 8. Hill. 35 Eliz. B. R. Pratie v Stock.

10. Where A. bad Goods only in one Inferior Diocese and the Metropolis of the same Province, pretending that he had Bona Notabilia in several Dioceses granted Administration; this Administration is not void but voidable by Sentence; because the Metropolitan has Jurisdiction over all the Dioceses within his Province, and consequently cannot be void but voidable by Sentence. But if an Ordinary of a Diocese commits Administration of Goods when the Party has Bona Notabilia in divers Dioceses, such Administration is merely void as well as to the Goods within his own Diocese or elsewhere, because he cannot by any Means have Jurisdiction of the Cause. 5 Rep. 29 b. 30 a. cites it as adjudged Patch. 22 Eliz. B R. Vere v Jefferies, and it is added, That true it is such Judgment was given.

The granting Letters of Administration De meru Jure doth belong to the Ordinary, and it might be, that neither the Ordinary nor the Parties to whom he granted the Letters of Administration, had Notice that the Intestate had Bona Notabilia in another Diocese. Mo 145 in pl. 288, cites it as held closely Eliz. to be void. —— Noy 94. cites it as ruled to be void. —— But if Metropolitan grants Administration where the Intestate had not Bona Notabilia in divers Dioceses, it is not void but voidable. Adjudged Hill. 22 Eliz. B. R. in Cafe of Veere v. Jefferies.
11. Leefee for Years died possessed of several Leases of several Lands, some of them in the Diocese of York, and some in a Peculiar in the same Diocese, having devise[d] those Leases to his Son, and made his Daughter, an Infant, Executrix; the Mother took out Administration during minor Aste of the Daughter Executrix in the Peculiar where her Husband died; Resolved that there ought to be two Administrations granted; For the Archbishop shall not have a Prerogative here, because this Peculiar was first derived out of his Jurisdiction. Cro. E. 718. pl. 46. Mich. 41 & 42 Eliz. C. B. Price v. Simp[on].

12. Where an Administration granted by the Spiritual Court is confirmed upon an Appeal to the Arches, the Usage is to send the Cause back. But when the first Sentence is reversed, the first Court shall be ousted of Jurisdiction, and the Court which reverses it shall grant Administration de novo; Agreed. Lat. 85. Pa[ch]. 1 Car. Reeve v Denny.

13. In an Action of Debre brought by an Administrator the Plaintiff declares of Letters of Administration granted to him per Curiam Regem &c. without saying Debito modo &c. and upon Demurrer to the Declaration it was adjudged good, because the King hath universal Jurisdiction here. Allen. 53. Pa[ch]. 24 Car. B. R. Hoblom v Wills. 14. If a Man dies, leaving Bona Notabila in both Provinces, there must be several Administrations, and so is 33 H. 6. and Administration granted in one Province is void as to Goods in another; because they are distinct supreme Jurisdictions; Per Cur. clearly. Hardr. 216. pl. 7. Mich. 13 Car. 2. in Scacc. Allinson v Dickenfon.

15. If the Inestate leaves Goods in the several Provinces of York and Canterbury several Administrations ought to be granted; so if in England and Ireland. Per Hale. 2 Lev. 86. Pa[ch]. 25 Car. 2. B. R. Shaw v. Stoughton.

16. A Man dies in France, and hath Goods in the Diocese of N. and the Question was, Whether the Bishop of Norwich should grant Administration, or the Archbishop? Per North Ch. J. The Bishop of Norwich shall grant Administration, unless he hath Bona Notabila; and his dying in France is no more than if he died in Norwich. Frem. Rep. 256. pl. 273. Trin. 1678. Cecil v. Darkin.

17. If
17. If Administration is granted by a Peculiar where there are Bona Notabilia it is not void but voidable. Carth. 143. Trin. 2 W. 3. B. R. Gold & al v. Strode.

18. Upon suspension of Archbishop Stuarts Administration was granted by the Dean and Chapter, and good. Luew. 30. Trin. 2 W. & M. in Coffe of Young v. C.S.

19. Simple Contract Debts are Personal, and Administration must be committed of them where the Party dies. 1 Salk. 37. pl. 4. Patch. Debtor lived.

20. A has two Houses in several Dioceses, and lives mostly at one, but sometimes at the other, and being there for a Day or two dies; Administration of his Personal Estate shall be granted by the Bishop of the Diocese, for he was constant there, and not there as a Traveller. S. P. filed accordingly.


22. Where there are Bona Notabilia in several Dioceses of the same Province, the Prerogative Court must grant Administration; But where in one Diocese in one Province, and in another Diocese in another Province, each Archbishops must grant Administration. 1 Salk. 39. B. R. Burton v. Ridley.

23. Archdeacons as such have no Power to grant Administrations of Goods, though most in England do it but not Quaeness Archdeacons; but by a preceptive Right, and sometimes they do by Peculiars, and sometimes by themselves. 6 Mod. 134. Patch. 3 Ann B. R.

24. So of Administration granted by the Archdeacon of Dorset. S. P. by 1 Salk. 40. Patch. 3 Ann B. R. Adams v. Savage (Tennentum.) Holt Ch. J. that without Doubt it is no good Title because it is local. 6 Mod. 156. in S.C.
(G. 2) Administration.

By whom granted. At what Place.

In Debt by an Administrator he declares of the Administration committed to him at London by the Bishop of Exeter, and yet it is well, for the Power of a Bishop is not so local as the Authority of a Justice of Peace. Noy 112 Barns v. Lt. M'connel.

The granting Letters of Administration is not a judicial, but only a ministrarial Act, because the Ordinary is directed by the Statute to grant it, and therefore good though granted at York by the Archbishop of Canterbury, and in Debts brought by such Administrator it was adjudged for him. Lutw. 555, Trin. 3 W. & M. Bohwall v. Rawthorne.

2. The Commission of the Bishop of Norwich being in London granted Administration there; and it was held good, because that Power is not local, but follows his Person. Godb. 342. pl. 436. Trin. 21 Jac. B. R. Knollis v. Dobbin.


(G. 3) Intestate.

Who, though he left a Will.

So if A. makes J. S. his Executor a Year after his Death, and this is a dying Intestate of A. For in the mean Time A. has no Executor. Pl. C. 281. b. by Dyer and Wallis Patch. 7 Eliz. in the Case of Greysbrooke v. Fox.

For within the Year he dies Intestate, and therefore for this Time the Ordinary has Power to commit Administration, and it shall never be disproved; Per Dyer and Wallis. Pl. C. 281. b in Case of Greysbrooke v. Fox —— And if Executor proves the Testament and dies Intestate there from the Death of such Executor dying Intestate, the first Teller is Intestate, and for that reason the Ordinary may grant Administration; Per Dyer and Welton. Ibid. 281. b 182. a.

2. There are divers Kinds of Intestates, one that makes no Will, another that makes a Will and Executors, and the Executors resign, in
Executors.

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in this Case the *Deceased dies quod Intestate*; And this is within the Statute of W. 2 cap. 19. 2 Init. 397.

3. Where the Strictness of the Civil Law is observed, there a Man *S. P. Ibid.* cannot die *partly Testament and partly Intestate*; though here in England where that ceremonial Strictness is not observed, but all Immunities enjoyed, being not obliged to any other Observance in making Testaments than what is Jure Gentium, a Man may several Ways die partly Testament and partly Intestate. *Godolph Orp. Leg. cap. 19. S. 4.*

4. Error was assign'd, that one pleaded *cum Testamento annento qui obit Intestate* which is absurd and repugnant; *Per Cur. it is well*; For though one make a *Will*, yet if he make no Executor he is Intestate. *Comb. 20. Pasch. 2 Jac. 2. B. R. Anon.*

(H) What Things shall be said Bona Notabilia.

(And where.)

1. If a Man has Goods of the Value of 5l. in one Diocese, and a Lease for Years of the same Value in another Diocese, there are *Bona Notabilia, by which the Archbishop shall grant the Administration, though the Lease for Years is not a Thing movab[e] nor properly Domini, but this is a Chancel as the Pleading is.*

2. But see the old Book of Entries 324, where it is pleaded that the Archbishop shall grant Administration, because he had Bona Notabilia in divers Dioceses.

3. If a Man has Goods to the Value of 5l. in one Diocese, and an Obligation of more Value in another Diocese, the Obligation being made there also, there are *Bona Notabilia, for which the Archbishop shall grant Administration,* because he had Bona Notabilia in divers Dioceses.

4. *To make Bona Notabilia a Debt without Specialty shall be accounted Bona where the Debtor dwells, *H. 37 Eliz. 25.* and not where the Testator dwelt. (It seems this is not Law.*


Comb. 392 S. C. — 12 Mod. 107. S. C. — *Debt upon a simple Contract shall be said Bona Notabilia where the Party himself dies; Per Wansley and Beaumont. Noy 54. in Byron's Cafe.*


— 3 Salk. 79 pl. 1. and 164 pl. 10. S. C. & S. P.

5. *But a Debt upon Specialty shall be accounted Bona where the Deed was made. Vill. 37 Eliz. 25. (It seems this is not Law.)*

6. *If a Man dies Intestate having divers Debts upon Obliga[tions in several Dioceses, the Debts shall be said to be Bona Notabilia where the Obligations are, and not where the Debtor or Debtor are.* "Cr. 17 Ja. B. per Cur. Procuring against Pay Byron's Cafe."

—*Noy 54.*

—*Vall Of*


7. If
7. If a man dies in a Diocese not having any Goods there, but has Bona Notabilia in another Diocese, this will be sufficient Bona Notabilia for the Archbishop to grant Administration &c., because the Ordinary where he dies, by the Law, is to take as great Care of the Testament, and of his Goods, as the other Ordinary where his Goods are. Master Selken laid to me, that he had been informed by those of the Court Christian, that this is the usual Course at this Day.

8. Annuity for Years out of a Parsonage shall be Bona Notabilia where the Parsonage is.

9. Debt upon an Obligation the Case was, the Intestate died in London at the Time of his Death. The Bishop of Chester in whose Diocese the Intestate died, granted Administration to J. S. who released to this Defendant. The Archbishop of Canterbury granted Administration to the Plaintiff, and in Debt brought by him the Releafe was pleaded in Bar. It was holden by the Justices, that where one dies that hath Goods in divers Dioceses, Canterbury shall have the Prerogative. And it was holden, that it Canterbury hath not Prerogative in York, yet that this Bond ought to be sued in and Administration committed at it within the Court of Canterbury.

10. Canon 92, 93, made in Time Car. 1, establishes 51. to be Bona Notabilia; yet therein is this Proviso that where by Composition or Cifion in any Dioceses Bona Notabilia are rated at a greater Sum, the same shall continue not altered. Went. Off. Ex. 45.

11. Went. Off. Ex. 45. says that a deleretive Debt of 5 l. or more, or a Debt due from the King against whom no Suit can be but only by Petition, yet this will stand for and as Bona Notabilia, as he takes it in the Spiritual Court. But he says he only conjectures it since the Rules of Law do not determine it; and though it was debated in the Time of Q. Eliz. yet it was not resolved.

12. If Land is given to Executors for Payment of Debts and Legacies, this he thinks shall not be Bona Notabilia though it be Assents. Went. Off. Ex. 46.

13. Bona Notabilia being in several Peculiars in the same Diocese, the Metropolitan is to grant Administration, and not the Ordinary. Lev. 78. Mich. 14. Car. 2. C. B. Anon.

14. Executor or Administrator out of a inferior Diocese is Plaintiff in Equity, and Defendant pleads Bona Notabilia, so that Plaintiff can give no Discharge, and the Plea was allowed. 3 Chan. Rep. 71. 12 Oct. 1671. Knight v. Bee.

15. Exception was taken against a Prohibition because Bona Notabilia is of Ecclesiastical Jurisdiction; Sed Curia contra; For Bona Notabilia is where the Obligation is. 3 Keb. 438. pl. 52. Hill. 26 Car. 2. B. R. Lodddington v. Draper.


18. A. obtained a Judgment against J. S. in B. R. and died. B as Administrator to A. brought a Scire Facias on the Judgment, and alleged Administration granted to him by the Archbishop of York. It was argued that this Administration was void, by reason of the Judgment in Middlesex, which is Bona Notabilia in another Diocese, and though it was after
after a Verdict, yet here it appears on Record that he had Bona Notabilia in Middlesex, & non contract that he had any at all in York. But upon another Motion the Court thought it well enough, and give Judgment for the Plaintiff. But the Reporter says, Quære tenuis.


18. Judgment obtain’d in the Court at Westminster makes Bona Notabilia, the Action on which it was obtain’d was laid in Dods 5. C.

19. A Bill of Exchange shall be said to be Bona Notabilia where the Debtor is, and not where the Bill is; For it is no Specialty in Law.


20. Grant of Administration by the Archdeacon of Dorset is void. Quoad a Judgment of B. R. For the Judgment of this Court upon pl. 9. Pach, which the Sure Partizas is founded is Bona Notabilia. And if it will not make Bona Notabilia, yet such Grant of Administration will be a Judgment of the Law of the Realm, under which we live, and consequently it will take Notice, that a Judgment of the King’s Bench is not within the Jurisdiction of the Archdeacon of Dorset. And for this Reason the whole Court held, that Judgment ought to be given for the Defendant. 2 Ld. Raym. Rep. 856. Mich. 13 W. 3. B. R. Adams v. Savage.

22. As to Bona Notabilia the Spiritual and Common Law are the same.


23. In an Action of Debtor against the Sheriff, the Case was thus, A. by his last Will and Testament made B. his Executor and died; the Executor prov’d the Will before the Commiliary of the Bishop of Litchfield, and as Executor of A. brought an Action against C. and obtained a Verdict and Judgment, and thereupon C. was taken in Execution upon a Ca. Sa. and committed, and afterwards escaped. Then B. the Executor died intestate, and D. took out Administration cum Testamento annexo de bona non of A. in the Diocese of Litchfield, and brought this Action of Debtor against the Sheriff for this Escape, who demurred for that the Judgment being without Foundation of this Action, and that being entered in Middlesex the Plaintiff could have no Right to it by Virtue of Administration taken in the Diocese of Litchfield, which as to this Demand was void, for he ought to have a Prerogative Administration. Three of the Barons, of which the Chief Baron was one, were of Opinion that the Plaintiff could not maintain this Action without taking out a Prerogative Administration; or an Administration where the Judgment was entred, and that was in the Diocese of London; that it was absolutely necessary that he should take out Administration somewhere, and that there could be no Inconvenience in taking out Administration above. 8 Mod. 244. Pach. 10 Geo. in the Exchequer.

Anon.

Y (I) Of
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Executors.

(I) Of what Value (Bona Notabilia) ought to be.

1. Ancienfly if a Man died Intestate having Goods to the Value of 40s. in two Dioceses, this would make the Goods to be Bona Notabilia, for which the Administration should be granted by the Archbishop. Perkins S. 489.

2. But in 37 H. 6 23. it is held per Cur. that if a Man has Goods in other Dioceses, though the Goods which he has in one County be but of the Value of 1 d. yet these are Bona Notabilia, for which the Archbishop shall grant Administration.

3. And in 10 H. 7. 16. it is pleaded that he had Bona Notabilia, in which Goods to the Value of 5 l. in divers Dioceses.

4. If there are Goods of the Value of 5 l. in each Diocese, this shall make Bona Notabilia. D. 7 Ja. B. cited per Foster to be adjudged in Nieldam's Case.

5. It is ordained by a Canon in 1 Jac. cap. 93 that Bona Notabilia shall be accounted to be 5 l. at least, and that none shall be said to have Bona Notabilia, unless he has Goods in other Dioceses to the Value of 5 l. and it seems that this Canon hath changed the Law if it was otherwise before; insomuch as the Grant of Administration belongs to the Ecclesiastical Law, and our Law only takes Notice of their Law in this, and therefore they may alter it at their Pleasure. D. 7 Ja. B. Needham's Case, yet the Doctors and the Court, that 5 l. in each Diocese shall be Bona Notabilia.

6. Also in the said Canon is an Exception of such Diocese where, by the Custom or Composition, Bona Notabilia are rated to a greater Sum than 5 l.

7. A Bond of 5 l. Penalty conditioned for Payment of a less Sum is not Bona Notabilia though the Bond be forfeited, and to the whole penal Sum be a Duty. Went. Off. Ex. 45.

(I. 2) Bona Notabilia. Pleadings.

2. In Action by Administrator to whom the Archbishop of Canterbury had granted Letters of Administration, Exception was taken to the Declaration because it was shown that the Archbishop by Reason of his Prerogative granted Administration &c. without shewing that the Intestate had Bona Notabilia &c. but the Exception was not allowed by reason all the Precedents are so, which all the Clerks in Court did affirm. 2 Le. 155. pl. 183. 19 Eliz. B. R. Dunne's Case.

if it was so that he had not Bona Notabilia, yet the Letters of Administration granted by the Archbishop was not void, but voidable only.
2. In Debt by Executor he filed the Probate before the Rural Dean of Warrington; The Defendant prayed Oyer the Bishop not being mentioned in the Declaration, and after Oyer pleaded that the Executor had Goods at Liverpool to the Value of 100 l. and that he died there, and that the Will then and before was in the Diocese of the Bishop of Chester, and that the Bishop of Chester for the Time had all Jurisdictions Spiritual of proving &c. all Testaments of every Person dying within the said Diocese possessed of Goods and Chattels within the said Diocese, above the Value of 40 l. and no other Person; whereupon there was a Demurrer; and adjudged against the Plaintiff. 2 And. 132. pl. 77. Mich. 41 & 42 Eliz. Crofts v. Corbock.

3. An Administrator pleaded plea Administratrix, and upon Issue found for the Plaintiff, and moved in Arrest of Judgment that Administration was committed by the Archbishop of York, where the Intestate had Bona Notabilia in London, and this appeared within the Record; Curia, if this was upon a Demurrer they would have taken Notice of it, but now the Case being tried, and the Honesty of it against the Defendant they would not; ideo Judgment nihil. Skin. 237. Mich. 1 Jac. 2. B. R. Anon.

4. Debt as Administratrix upon an Administration granted to her by the Bishop of K. the Defendant pleaded, that Administration was granted to him by the Dean and Chapter of Canterbury, sed vacante, for that the Intestate had Bona Notabilia in divers Dioceses in the Province of Canterbury it was held, that because the Defendant did not plead that which Places certainly the Intestate had Bona Notabilia, it shall be intended that Administration was granted where he had not Bona Notabilia, in divers Dioceses. 8 Rep. 135. Patch. 8 Jac C. B. Sir John Needham’s Cafe.

5. H. the Administrator of E. F. brought an Action of Debt upon an Obligation of 200 l. against E. F. and declares of Letters of Administration committed to him by the Archbishop of Canterbury &c. The Defendant says, that the Intestate became possessed of Goods in Chester within the County of York; And before the Purchase of the Writ, and after the Death of the Intestate, J. S. Chancellor of Chester committed Administration to R. F. of all the Goods &c. and that he released to him, and upon that demurrer. Bramston said, He doth not know what Person that Chancellor was, or how he had that Authority to grant Administration, quod tuit conscientiam per Cur. that for that it was nought. And it was agreed, that the Prerogative of Canterbury does not extend to York. Het. 68. Hill. 3 Car. C. B. Harvey v. Fitzer.

6. Debt against the Defendant as Executor to John White, who pleaded, that John White did make a Will, but did not make him (the Defendant) Executor, but that he had Bona Notabilia in several Dioceses, and that the Archbishop of Canterbury granted Administration to him, and concluded in Bar, to which there was a Demurrer, and the Plea was adjudged ill, because this was a Plea only in Abatement, whereas the Defendant had concluded in Bar; besides, he did not expressly allege, that John White died Intestate, but only says, that he made a Will, but did not make him (the Defendant) Executor by the Will, which may be true, and yet be might be made Executor by a Writ annexed to the Will, and for the Plaintiff had Judgment. 1 Mod. 239. Patch. 29 Car 2. C. B. Justice v. White.

7. Debt upon a Bail Bond &c. The Defendant pleads Non Damnificatius; The Plaintiff replied, that R. W. had obtained a Judgment against him in the Exchequer and died Intestate, and that Administration of his Goods was granted by the Bishop of Lincoln to
one W. G. and that he paid the Money to the Administrator. Upon a Demurrer the Defendant had Judgment, because the Plaintiff alleged he paid the Money to the Administrator, when in Truth he had no Authority to receive it, for the Administration granted by the Bishop of Lincoln was void, because the Intestate obtained the Judgment in Willsminster. 1 Lutw. 359. Mich. 3 Jac. 2. Kegg v. Horton.

8. The most certain Way of pleading Bona Notabilia is, That at the Time of Intestate’s Death he had Bona Notabilia in diverse Dioceses within the Province of Canterbury, (viz.) at W. in the County of Middlesex and Diocese of London, and at St. Edmund’s-Bury within the Diocese of Norwich, and that the Administration was granted by the Archdeacon of Sudbury. 2 Lutw. 983, 993, 994. Pach. 4 W. & M. Scarpe v. Young.

(K) To whom it ought to be granted.

S. P. held 1. If Feme Covert dies Intestate Administration of her Goods of Right belongs to her Baron. 4 Rep. 51. Osgill’s Cafe.

contra Crook J. and S. C. cited Cro. C. 166. pl. 7. Johns v. Roe. — Jo. 176. Hill. 3 Car. Jones v. Roe. S. P. held accordingly. Min. 871. in pl. 1210. is a Note that Nicholls and Wartonston held, That the Baron by Equity of the Statute 21. H. S. shall have the Administration of the Goods of the Feme. A. Prohibition was moved for, because the Spiritual Court would have granted Administration of the Goods of the Wife to her Brother when her Husband was living, to whom of Right it doth belong; Day was given to shew Cause why it should not be granted. Palm. 521. Pach. 4. Car. B. R. Kiss’s Cafe.

Where the Wife dies the Husband is to have the Administration, being the only true and lawful next of Kin by the Statute of E 5. Show. 531. Pach. 3. W. & M. per Car. in Cafe of Forre v. Forre.

2. If Feme Covert dies Intestate Administration may be granted to a Stranger, though her husband be alive. D. 8. Eliz. 251 90.

3. The Bishop may grant Letters of Administration to whom he pleases it he forfeits the Penalty limited by the Statute. Per Manhood and Periam J. Le. 240. pl. 323. Mich. 32 & 33 Eliz. in Scace. in Cafe of Filcock v. Holt.

Palm. 416. Mayo v. Strumpilng S. C. no Prohibition granted, and Noy said that the Ordinary ought to judge who is the next of Kin.

4. Persons to whom Administration shall be granted must be Legacls, and therefore if it be granted to Persons outlawed or attainted, a Prohibition lies, or otherwise no Remedy can be had for the lawful next of Kin. 9 Rep. 39. b. Trin. 42 Eliz. in Henloé’s Cafe.

5. Prohibition was mov’d for to the Spiritual Court upon a Suggestion, that they refused to grant the Administration to the next of Kin to the Intestate, but to another, but the Prohibition was denied. Lat. 67. Pach. 1 Car. Mayow’s Cafe.

Cro. C. 166. pl. 7. John v. Roe. S. C. & S. held by the three Justices accordingly, and relied upon 4 Rep. 51. b. Osgill’s Cafe; but Crooke J. doubted thereof, and was of a contrary Opinion; For that the said Book does not give any Reason, nor shew any Authority to maintain it, and in Reason the Husband is not to have it de Jure, but it is in the Power of the Ordinary to commit the Administration unto him, or to the Wife’s Kindred; for if he ought to have it de Jure, he would never suffer the Wife to make any Will for the Advancement of the Children.
Executor.

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Children by another Husband, or for her Kindred, and the Wife without the Husband's Assent cannot make a Testament, but by his Assent she may make him Executor for Things in Action, as Debts, or for Things apart before the Coverture, so it is his Default if she dies Intestate; also the Wife is to be intended to be advanced by her Husband; and to have by the Custom Rationaliblen partum honorum; therefore he is not in first Degree as his Wife, and he is not to have to have the Administration; but the Ordinary may commit it unto him if he desire, or he may refuse; And no Appeal lies if the Administration be not committed unto him; For it is merely at the Ordinary's Discretion; And of this Opinion were the Civilians: but afterwards the said three Justices in Cooke's Absence referred for the Plaintiff.

The Baron by the Equity of the Statute of 21 H. 8. shall have the Administration of the Goods of the Feme; Per Nicholas and Warburton Mor. 571. pl. 1210. Tit. 12 Jac. in a Note in the Case of Stoner v Gibbons.—The Administration ought to be granted to the Baron, and not to the Mother of the Wife Sid. 239 pl. 2. Patch. 21 Car. 2. 26 R. Anon. 2. P. admitted. Mod. 241. pl. 20. Hill. 28 & 29 Car. 2. C. B. in Case of Davies v Court. —The Baron is the only true and lawful next of Kin by the Statute of E. 1. Show 331. Patch. 2 W. & M. Fortree v Fortree.—1 Silk. 36 pl. 2. Mich. 3 W. & in B. R. Fawtry v. Fawtry. S. C. and per Cur. Administration must be granted to the Husband by 31 E. 3.

7. Where the Wife is next of Kin to an Intestate the Husband shall S. P. and not be join'd in the Administration with her. Syt. 75. Mich. 23 Car. B. R. Anon.


10. Administration must be granted to the Brother of the half Blood and not to the Uncle; For he has the immediate Blood of the Father, which the Uncle has not; Per Hale Ch. J. Vent. 425. in Case of Collingwood v. Pace.

Cafe in 5 E. 6. and though that Case cited in Br. Administration pl. 47. militates the Law in preferring the Half Blood before the Mother, yet it had been right in the Case of a Competition between the Half Blood and the Uncle as to Administration, though otherwise as to Defect of Land.

11. Administration granted to the Mother of the Goods of the Daughter, where the Daughter has Baron, shall be repealed and granted to the Baron. Sid. 409. Patch. 21 Car. 2. B. R. Anon.

12. A Feme Sole had divers Debts owing to her by Specialty, the marriage, and the Bonds not being put in Suit during the Coverture she died, and her Husband administered, and her Brother sues to have a Distribution by Virtue of the Statute 22 Car. 2. cap. 10. and the Question was, Whether a Feme Covert was intended by that Act, which provides only where the Husband dies Intestate? And it was inferred that a married Woman can never die Intestate within the Meaning of this Statute, because it provides, that the Ordinary shall take a Bond of the Administrator, if it appear that the Deceased made any Will, which a Feme Covert cannot do without the Consent of her Husband, therefore she is not a Person dying Intestate within the Intent of this Law. Curia Adversari vult. 2 Mod. 20. Hill. 26 & 27 Car. 2. C. B. Willon v. Drake.

13. If Administration of the Goods of a Feme Covert be granted to the next of Kin though de Jury it ought to be to the Husband, yet till a Repeal, the next of Kin is rightful Administrator and may bring Action. Mod. 231. pl. 20. Hill. 28 & 29 Car. 2. C. B. Davis v. Cutt.
Executors.

A, had four
14. 29 Car. 2. 3. S. 25. Enacts, that the Act of 22 & 23 Car. 2. 10.
Daughters
shall not extend to the Estates of Femes Conven dies intestate, but that their
Husbands may have Administration of their Personal Estates, as before
making the said AG.

Personal
Estate among his said four Daughters equally. E married J. S. and afterwards B died intestate.

J. S. the Husband of B. affidged over all his Wife's Share of B's Estate (consisting of Chooses
action) to W. R. and then E died. J. S. married again and died intestate. The second Wife
took Administration to J. S. and also to E. De Boris not administered by J. S. The Question was,
Who was intitled to B's Share of B's Estate, the Affidgment being without a valuable Consideration,
and only in Truth, and the Husband not having taken out Administration? Ed. C Cooper thought
the Property found by the Affidgment though Voluntary, because of the Delays that might be delayed
before he could recover in Equity, which ought not to prejudice him; and that the Exception in
this Statute does not arise it to the Life of the Husband, or to the Circumstance of his having re-
duced any Part of the Wife's Personal Estate into Possession, but provides that no Part of her Estate
shall be distributable among her Relations after her Death, and decreed B's Share of B's Personal

15. J. B. being in Execution, the Plaintiff died intestate, and the
Right of Administration came to her, and a Motion was made for a Habeas Corpus to bring her from the Counter in this Court; for that having administered to her Creditor he might be discharged; but it was
denied, for he could not be thus discharged, because Non confit de Personis; neither can the give a Warrant of Attorney to acknowledge Satisfaction, therefore let her renounce the Administration and get it
granted to another, and then she may be discharged by a Letter of Attorney from such Administrator. 2 Mod. 315. Trin. 30 Car. 2. R. Joan
Bailies. Cafe.

16. H. died intestate, without Child or Kindred. The King appointed
the Plaintiff to take out Administration. The Defendant, though he
knew that there was no Kindred, entered Caveats and put the Plaintiff
to great Charges, for which he brought an Action. Upon Demurrer
the Court doubted if an Action would lie; for it was Damnum Absique
Inuria. For till Administration the Property of the Goods was in
the Ordinary, and the Plaintiff had neither Jas in Res, nec ad Rem,
otherwise if the Plaintiff had been next of Kin, for then he had a
Right by the Statute; And the Appointment by Letters Patent was but
a Kind of Recommendation, and that in Case of an Intestate without
Kindred the Ordinary may dispose in Pvo Usis, and though the usual
Course is for the Ordinary to admit such Patenée, yet this was rather
of respect to the King, than of Right; and they denied the Opinion
in 9 Rep. Denhoun's Cafe., and held that Administrations originally
belonged to the Bishop, and the Inferences of some Lords of Manors is
not a Proof to the contrary. 1 Salk. 37. pl. 3. Trin. 4 W. & M. in

17. In a Man die Intestate having a Wife, the Ordinary may grant
Administration either to his Wife or next of Kin at his Election; but if
the Wife die Intestate the Husband may have the Administration, and
none else; Per Holt Ch. J. Comb 289. Trin. 6 W. & M. in B. R.
Cox v. Web.

18. By the Statute of 31 Ed. 3 the Ordinary is to grant the Adminis-
tration to the most loyal and loyal Friends of the Intestate, and
nothing is said of the next of Kin till the Statute of H. 8. and that com-
mands him to grant it to the next of Kin requiring the same; but neither
Statute does incapacitate him to grant it to any other, only
commands him to grant it to the next of Kin &c. Per Holt Ch. J. 12
Mod. 617. Hill. 13 W. 3. in Cafe of Blackborough v. Davis.

Wood's
Init. v74.
in to drem
Verbis. —
Executors.

Father before the Widow, and a residuary Legatee ought to be preferred before the Widow in an Administration cum Testamento annexo; if there is no Husband or Wife living then 3dly, to the Children, Sons or Daughters, 4thly, If Children die first, to the Father or Mother then 5thly, to a Brother or Sister of the whole Blood, 6thly, To a Brother or Sister of the half Blood, for they are all next of Kin in equal Degree, and if none of the half Blood, then 7thly, to the next of Kin, Uncle, Aunt, or Cousin, and if none of these desire the Administration, then 8thly, to a Creditor; for want of all these, 9thly, to any other Person or Persons at the Discretion of the Ordinary; or the Ordinary may Ex Officio grant to a Stranger Letters ad Colligendum Bona Dei Delini, to gather up the Goods, of the Deceased, or the Ordinary may take them into his own Hands to pay the Debts of the Deceased in such Order as an Executor or Administrator ought to pay them; But he or the Stranger who has Letters ad Colligendum, cannot sell them without making themselves Executors of their own Will. The Ordinary has only an Authority, and no such Power himself; and therefore he cannot give that Power to any other. R. S. L. 22.

20. It one has the Trust of a Term for Years and dies Intestate, his next of Kin shall have Administration of it. 7 Mod. 148. Hill. 1 Ann. B. R. Taylor v. Raines.

21. Form Covet by Virtue of a Power to Disposses of her Estate devolves it to J. S Administration was granted to Devise it being of a Term for Years; though the grant was by her Husband to Trustees for her as Fee-Simple, and the Heir at Law of the Wife releasing to J. S. the Term was decreed to J. S. against the Husband. Ch. Prec. 480. pl. 301. Hill. 1717. Marshall v. Frank.

22. A Wife died priviledged of Choses en Action, and the Husband The Reprisal revived and died without taking out Letters of Administration to her and the next of Kin administered to her. It was held by Ld. Parker that the Administrator of the Wife was but a Trustee for the Executor of the Husband, the Right to the Wife’s Choses en Action being by the Statute of Distribution vested in the Husband as next of Kin of the Wife; And said, that this Clause in the Statute was made in Favour of the Husband, and not to his Prejudice; So that it was intended by it that he should be within the Statute of Distribution as to take the Right to the Wife’s Choses en Action as to his Benefit, but should not be within the same as to his Prejudice, and that this was not a New Point but had been settled and upon very good Reason; For were it continued other wise he would be in a worse Case than the next of Kin though ever so remote, which the Act did not intend. Wms’s. Rep. 351. cites Mich. 1718. Cart v. Rees.

next of Kin of the Husband in the same Manner as it is granted to a Residuary Legatee.

23. A. makes C. Executor and residuary Legatee, and B. makes C. Executor without giving him the Surplus Afterwards C. dies Intestate. A’s Personal Estate shall go to the Administrator of C. But B’s shall go to B’s next of Kin, and who shall be his Administrator; Per Ld. C. Macclesfield. Ch. Prec. 567. Trin. 1721. in Cate of Farrington v. Knightley.

24. Notwithstanding the Statute of H. 8. Administrations has been granted to the principal Creditor from the next of Kin, by the Opinion of both Civil and Common Lawyers, where it is visible that the next of Kin cannot have any Advantage or Benefit of the Eitare, and this hath
Executors.

26. A Woman intituled to a Chose en Action marries and dies; The Husband takes out Administration to her and dies before the Money is received; Administration is taken out to the Husband, and the Money is paid to his Administrator. Plaintiff takes out Administration to the Wife, and brings a Bill against the Defendant, who is Administrator of the Husband, to repay the Money by him received, and held that it was a Right wrested in the Husband immediately on the Death of the Wife, and that her Administrator is only a Trustee for the Husband, and her Administrator bringing such Bill against the Person for whom he is a Trustee is a Breach of Trust, and disallowed the Bill with Costs. MS. Rep. May 18. 1737. Humphry v. Bullen.

(K. 2) Administration de Bonis non.

In what Cases granted; And to whom.

1. If an Executor dies Intestate, the Ordinary ought to commit the Administration, and he may commit the Administration of the first Testator, and of the Executor likewise, to one and the same Person; But see now by the Statute of 31 H. 8. that it shall be committed to the next of Kin, and Administration may be de Bonis non Administratis. Br. Administrator, pl. 45. cites 32 H. 6. 2. Lib. Intra' 145. 21 E. 4. 24.

2. Obligor dies Intestate. Ordinary commits Administration. Administrator makes his Executor and dies. Per Saunders, Debts lies not against Executor, but Administration de Bonis non ought to be granted to one against whom Execution shall be sued. D. 47. b. 12. and in Marg. Trin. 32 H. 8. Anon.

3. Testator bequeathed all his Goods after Debts and Legacies paid to A. B. whom he made Executor. A. B. died before he proved the Will. Administration cum Testamento annexo shall be granted to the next of Kin of the said A. B. or to such other Person or Persons to whom such Residue is bequeathed, otherwife to the next of Kin of the first Testator who demands it. D. 372. pl. 8. Mich. 22 & 23 Eliz. Ited v. Stanley.

4. A
Executors.

4. A makes B. his Executor and dies. B. makes C. an infant his Executor. D. as Administrator of B. during the Minority of C. cannot bring Debt on a Bond due to A. for this Administrator D. has no Authority to meddle with the Goods of A. the first Teftator, and for this Cause Judgment was reversed. Cro. E. 211. pl. 2. Hill. 33. sie, S. C. Eliz. B. R. Limmer v. Every. and the Judgment was reversed. For the Plaintiff ought to bring his Action as Administrator of the first Teftator.

5. Husband and Wife as Administratrix brought an Action of Debt against J. S. and declared that the Intestate was Administrator to M. G. who lent the Money to the Defendant. After Judgment for the Plaintiff the Error was aligned, because the Action was brought by an Administrator of an Administrator, whereas the Administration of the first Intestate’s EState ought not to have been newly granted to the next of Kin, and he to whom the Administration of the Goods of the first Administrator is committed has nothing to do with them, and so Judgment was reversed. Goldsb. 182. pl. 118. Hill. 43. Eliz. Thorne’s Case.

6. A. made B. and C. Executors, then B. made J. S. Executor and died, and afterwards C. died Intestate. The Executor of B. shall not be Executor of A. but he is dead Intestate, because C. the surviving Executor is so dead, and the Executorship wholly and solely vested in C. by the Surviviorship, and so Administration De Bonis Non shall be committed. Went. Off. Ex. 100.

7. Administration De Bonis Non, during the Minority of an Executor, is not within the Statute 21 H. 8. to be granted of Necessity to the Widow of Teftator, because there is Executor all the while; otherwise perhaps it the Executor was made from a Time to come. Hob. 250. pl. 329. Briers v. Goddard.


9. C. died Intestate, and one who was Debtor to him paid the Money to his Widow, with the Affent of Cs. Son, to whom the Administration did belong, but afterwards it was granted to a Stranger, who sued the Debtor in the Lord Mayor’s Court; and there it was decreed that he should pay the Money to the Administrator; but in the Court of Concienc it was decreed that he should not have it, because it was already paid to those who had the Right of Administration. Whereupon the Administrator sued out a Procedendo ad Judicium; But Hide Ch. J. Jones and Whitchard said, that without a Precedent they would not examine whether the Decree was equitable or not, and they thought it should be guided by the Concienc of the Mayor, and would not examine it here so long as the Court below had not trangreffed any Rule of the Common Law. Latch. 190. Paich 3. Car. Cripps’s Case.

10. A devised several Legacies in Money to several Petitions, and after all, the Residue of my moveable Goods and Chattels to B. his Wife, and makes her Executrix, and having divers Bond-Debts due to him, dies. B. dies the same Day before Probate of the Will. Administration shall be of the Goods of A. cum Telfamento annexo was granted to C. next of Kin to B. Administration to C. was revoked by Delegates and granted to D. the next of Kin of A. cum Telfamento &c. because by the Devise of all my moveable Goods and Chattels, Debts which are during the Administration were not devised, therefore Administration shall be granted to next Vent. 316. Friends of A. But if all the Goods, Chattels and Debts were devised, A a
and no Residue, then otherwife. Jo. 225. Trin. 6 Car. B. R. Sparke
Junk. 236. v. Deane.
pl. 49.
A. devises all his Goods to B. and makes C. his Executor. A. dies. C. dies Intestate. The Admini-
stration of the Goods of A. shall not be committed to the Wife or next of Blood of A. but to B.
or it would be in vain. Frutna petis quod flatum alteri reddere cogeris.

11. A. freights a Ship to the Indies and makes his Will, and B. Ex-
cutor, and dies. B. makes C. his Executor and dies. After the Death of Tistor and Executor the Ship returns laden with Silk. These Goods remaining in Specie without any Alteration, were in the same Condition with the other Goods of A. which did vest in B. by A’s Bequest, and ought to be disposed of as A. by his Will directed his Goods to be disposed of. Fin. R. 370. Trin. 39 Car. 2. Gundry v. Brown.

12. Least for Years died Intestate, his Administrator made an Un-
der-Lease to W. R. and died. Adjudged that his Executor or Admini-
istrator may have an Action of Debt for the Rent arrear on the Under-Lease, and not the Administrator De Bonis Non of the Leet, tho it has the Reversion, for he comes in by a Title paramount to the Lease. 3 Salk. 304. cites Vent. 259. [Patch. 26 Car. 2. B. R. Norton v. Harvey.]

13. Administrator De Bonis Non of the Counsell of a Statute agreed with Coniisor to affiga it in Consideration of a Sum of Money, covenantd by the Coniisor on the said Agreement to pay him, his Executors or Administrators. The Administrator dies. The Court decreed the Money to be paid to the Executor of the Administrator, and not to the new Administrator De Bonis Non, although before the Extent it could not be aligned at Law. Sed nota, that there were Debts of the first Intestate appearing.

14. Administration was granted in a Peculiar to the Wife who was the Periour intestate, but because there were Bona Notabilia it was a wrongful Administration, and such Administrator, and dying Intestate, Administration De Bonis Non was granted to the Goods of her Hus-
band the first Intestate; But decreed an Allowance of what she had paid in Discharge of her Husband’s just Debts. N. Ch. R. 173. Mich. 1691. Armstrong’s Case.

15. Though an Executor had administered, yet an immediate Administra-
tion is committed if he dies before Probate, because the administer is an Act in Pais, of which the Spiritual Court cannot take Notice, and they must commit Administration according as it appears to them judicially, and not according to the Fact, and yet the Acts done by the Executor are good; Per Holt. 1 Salk. 308. Mich. 11 W. 3. C. B. in Wangford’s Case.


16. A. makes his Will, and B. and C. Executors, and left his Wife principal Legatory. B. and C. died Intestate. The Wife as principal Legatory may take Administration; but if the will not, her After-Husband may, and though the Wife and the After-Husband were divorced a Mensia & Thoro, yet upon a Reconciliation, though but for a Day, he shall be restored to the Right notwithstanding any Decree during the Divorce to the contrary. Gibb. 293. Hill. 4 Geo. 2. B. R. Vanthiene-

nen v. Vanthienen.

(K. 3)
Rep. To Jac. Administration thei-quod S. For Intcrte. ry otherwise of mer the ion A Statute Contra committed Blood to the Adminiftratois, 507. W. ther the the Adminiftratois, to the Father and not to the Sister of the Testa-steel. 2 Show. Where there is a Mother and three sons, and one dies Intestate under Age, it was often argued on a Prohibition to whom Administration belonged, whether to the other Sons as next of Kin, or to the Mother; At last a Confutation was granted. 2 Show. 456. pl. 470. Mich. 1 Jac. 2. B. R. Palmer v. Allcock. The Mother ought to have the Administration of her Child before a Son, a Brother or a Sister; For there is a nearer Bond of Nature between the Child and the Parents, than between the Child and any other collateral Tye of Blood or Kindred, and can never sufficiently satisfy the Obligation he hath to his Parents for his Being and Education, especially to his Mother. L. P. R. 42. cites Vent. 414 (315) and Molloy de Juris Maritimo, 364.

3. Charles Duke of Suffolk had Issue a Daughter by the first Venter, and The Cafe a Son by another Venter, and devised Goods to the Son and died, and after the Son died Intestate without Feme and without Issue, and the Mother of the Son who was of the second Venter took the Administration by the Statute of 21 H. 8. which is, that the Administration shall be committed to the next of Kin of the Intestate; and upon great Argument in the Spiritual Court, as well by the Common Lawyers as by the Civilians the Administration was revoked. Br. Administration, pl. 47. cites 3 E. 6.

Daughter of the Ed. Willoughby, and had Issue by her one Henry and died, and after Henry died without Issue and without Feme; and the Mother of Henry took the Administration, and after the said Princes, Wife of the Marquis of Dorset, sued and reverted the Administration and obtained the Administration to herself, though she was only Sister of the half Blood to the said Henry, because the is next of Kin to the said Henry, inasmuch as Henry has not any Children; For the Mother is not next of Kin to her own Son in this respect of this Matter; For it ought to go by Defect, and not by Attraction by the Law of England and by the Civil Law, and the Children are of the Blood of the Father and Mother, but the Father and Mother are not of the Blood of the Children. And per Idices, Patr. Mater & Puer sunt una casa, and therefore no Degree is between them. Contris it is between Brother and Sister, and the half Blood is no Impediment as to the Goods. Br. Administrators, pl. 47, cites 5 E. 6.——This Cafe was utterly denied, 3 Rep. 42 a. Hill. 54 Eliz. in B. R. in Ratchil’s Cafe. So in a Cafe between *Brown and Shelton of the Goods of W. Rawlins Clerk, which was committed to Sir Humphry Brown who had married the Sister of the said Rawlins, and after came W. Shelton and J. Shelton, Son of the Feme of the said Sir Humphry (which Feme was the Mother of the said Shelton by a former Baron) and reverted the first Administration, and obtained the Administration to them; quod non, Br. Administration, pl. 47.——* Ibid. pl. 53 cites S. C.

A Niece
A Niece of the whole Blood sired in the Spiritual Court to repeal Letters of Administration committed to a Brother of the half Blood as being the next of Kin, and cited Br. Administrators, pl. 47. But per Cur. these not being in Equali Gradus no Prohibition ought to go, and it was denied per tot. Cur. 2 Keb. 533. pl. 43. Trin. 21 Car. 2. B. R. Pattenden v. Burges.

4. A. J. was possessed of a Term for Years and affinns it over to J. S. being Brother to the Wife of the said J. to the Use of the Wife. J. dies and makes his Wife his Executrix, after which the said Wife takes R. W. to Husband, who takes the Profits of the said Lands during the Life of the Wife. The Wife dies Intestate. J. S. as next of Kin took Administration as well of the Goods of the said Wife, as of her first Husband. By all the Judges on a Reference out of Chancery the Administrator had now as well the Interest as the Use of the said Term as well in Conscience as Law, and R. W. shall not have it, because it is a Thing in Action, which the Administrator of the Wife shall always have, and not the Husband as if an Obligation had been made to the Use of the Wife; and decreed accordingly. Poph. 106. Hill. 38 Eliz. Arthur Johnson's Cafe.

5. H was possessed of Lands for Years under several Leases, and having Issu William and Thomas, be by his last Will made William his Executor and residuary Legatee, after Debts and Legacies paid. William married and proved the Will, but died Intestate before the Debts and Legacies were paid; Judge of the Prerogative Court granted Administration of the Goods of H. to his other Son Thomas, which he afterwards revoked, and granted it to the Widow of William the Intestate, from which Sentence Thomas appealed, but it was resolved by all the Commissioners that the Administration was rightly granted to the Widow.

92 Executors.


6. Feme Covert Executrix dies Intestate; Administration may be to the next of Kin of first Tsettator De Bonis Non. Jo. 176. Hill. 3 Car. B R. Jones v. Roe.

7. A. is Executor and residuary Legatee and dies before Probate; Administration shall be granted to the next of Kin of A. and not to the next of Kin of Tsettator. Dy. 372. pl. 8. Marg. cites Mich. 9 Car. C B. Denn's Cafe.

8. Ordinary may grant Administration to which be plese of Kindred in equal Degree. 1 Salk. 38. pl. 6. Pach. 13 W. 3. B R. Blackborough v. Davis.

Per Holt
Ch. J. this Cafe was, that the Father took out Administration for his Son, and after a Woman pretending to be the Son's Wife, would have it repeated; and there, upon Motion for a Prohibition it was held the Ordinary by committing it to the Father had executed his Authority, for he had Election which of them to grant it to, 12 Mod. 618 Hill. 15 W. 2. In Cafe of Blackborough v. Davis.—But if a Feme Covert have several Debts due to her before marriage which the Law did not give to her Husband; She dies, and her next of Kin comes and takes out Administration, the Husband sues to have it repealed, and a Prohibition is moved for and granted; and all this appearing on the Declaration, it was held the Prohibition should not stand, but the Husband ought to have the Administration; Per Holt Ch. J. 12 Mod. 618. in Cafe of Blackborough v. Davis, cites the Cafe of Ducomb v. Lucy.

10. Administration of the Goods of the Son shall be granted to the Father and not to the Son's Sister. 2 Show. 307. pl. 313. Trin. 35 Car. 2. B R. Copleftone v. Copleftone

Carth. 51.
Brown v. Farndale
and Shore
C. & S. P.

11. Where a Person died Intestate, leaving A. and B. his next of Kin in equal Degree to him, A. died Intestate within the Year, and before Distribution. The Court held that an Intestate was vested in him, and the Act of Parliament is the same as if the Party had made his Will to this
12. Administration may be granted to the Wife or next of Kin, or of a W. & M. in B.R. Brown v. Shore.

13. If there be Grandfather, Father, and Son, and the Father dies intestate, the Son shall have the Administration and not the Grandfather, though they be both in equal Degree as to nearness of Kindred, and says that so is the Opinion in Godolphin's Case; Arg. 2 Vern. 125. Hill. 1690. in Case of Crooke v. Watts.

14. Administration may be granted to the next of Kin; or to the Wife, or next of Kin to the Intestate, as the Spiritual Judge pleases; the Wife shall come in for a Share by the new Statute, and as to Creditors they are all one Administrator; the Court may divide the Administration, or give it all away as they please. But Husbands shall have Administration of the Wife before all others; so if the has Credits. 12 Mod. 16. Hill. 3 W. & M. Anom.


16. The Contraction of the Statute upon the Proximity of Degrees must be according to the Common Law; Per Holt Ch. J. 12 Mod. 616. Hill. 13 W. 3. in Case of Blackborough v. Davis.

17. If there be Grandmother, Uncle, Aunt, and Grand-Child dies, the Grandmother is intitled to the Child's Personal Estate in Exclusion of the Uncle and Aunt. It was clearly agreed. Ch. Prec. 527. Hill. 1719. Woodrooff v. Wickworth.

18. By the Civil Law the Father or Mother make one Degree. The Grandfather or Grandmother 2 Degrees, and the Uncle or Aunt 3 Degrees; But if you go one Degree further, and reckon to the Great Grandfather or Great Grandmother, they are in equal Degree with the Uncle or Aunt, as they are in the third Degree, in direct Lines.
with the Uncle or Aunt, who are in the third Degree in the collateral Line; For you must reckon through the Grandfather or Grandmother to come at the Uncle or Aunt, and then they are just in the same Degree of Remove from the Nephew or Niece in the collateral Line, as the Great Grandfather or Great Grandmother are in the direct ascending Line; But the Computation by the Canon Law is different; Per Malter of the Rolls. Ch. Prec. 593. Trin. 1722. Meutney v. Petty.


1. Whether Legacies are bequeath’d and no Executor named or referred, Administration will be granted to him that has the Residue of the Goods. Arg. Cart. 136. cites D. 378.

2. Residuary Legatee ought to have Administration before the next of Kin; Per Cur. 3 Keb. 8. pl. 9. Palsch. 24 Car. 2. B. R. in Ashton’s Cafe.

3. The Teflatory gave a Portion to his Daughter, and made his Wife Residuary Legatee, and W. R. Executor, and died, and afterwards the Executor died intestate. The Daughter got Administration without the Wife’s Knowledge. Afterwards the Widow, the Residuary Legatee sued to repeal it; thereupon the Daughter moved for a Prohibition, suggesting that there was no Residuum for the Widow. The Court strongly inclin’d that no Prohibition should go, and held that the Averment of no Residuum is not material. And it would be to no Purpose that Administration should be granted to the Daughter (though the was next of Kin) when she could have no Benefit by it, the Residuum being devolved to the Wife, therefore it is reasonable that she should have the Management of the Estate to whom the Residue was devided. But the Administration having been granted five Years before the Residuary Legatee came in, and the Daughter having in that Time got in great Part of the Estate by Decrees in Chancery, and Suits were depending there which were near ended, and which would be abated &c. if the Administration were repeal’d, the Court proposed an Accommodation as best for the Parties, and also for the Estate; and the same was accepted. Vent. 217. Trin. 24 Car. 2. B. R. Thomas v. Butler.

4. H. P. died Intestate leaving Issue Y. P. and A. P. his Personal Estate being valued at about 3500l. A. P. agreed to take 1500l. for her Share, and thereupon agreed that if. P. should take Administration, and released her Right to the Personal Estate. Y. P. paid the 1500l. and dies, and makes Y. his Executor, and devises to him all his Personal Estate, there being 1000l. out upon Bond of H. P.’s Estate. The Question was, Whether Y. the Executor of the Son, or A. the Daughter, who was since married to W. should have Administration? And Dr. Raynes, the Judge in the Prerogative Court, gave it to Y. whereupon W. and his Wife appealed; and the Delegates affirmed the Sentence in the Prerogative Court, because they said, that Y. as Executor of Y. P., was
was intitled to all Benefits of the Personal Estate of H. P. by reason of the Agreement. Freem. Rep. 496. pl. 671. Mich. 1689. Young v. Pierce.


6. D. made M. his Wife Executrix and Refiduary Legatee. M. after marries B. B. dies, and makes M. likewise Executrix. M. makes her Will, and E. Executor, and devises to E. and H. and G. all her Goods &c. which were A's; M. died, E. refused to administer. Administration shall be granted to the next of Kin of M. and not to the next of Kin of D. and so should it have been if M. had died before Probate of D's Will, and decree to the Devisees whatever remained of D's Estate, for whoever takes an Administration to that are but Trustees for them. N. Ch. R. 172. Anon. But M. the Executrix was first the Widow of D.

(K. 5) Administration.

Debtor or Debtee.

1. Administration was granted to an Obligor; Afterwards Executor v. Salk 303; proves the Will; The Debt is not extinguished by the Administration. Le. 90. pl. 115. Mich. 29 & 30 Eliz. C. B. Baxter v. Bales.

it is only a suspension of the Action, and no Extinguishment of the Debt; but the Reason of that is because the Committal of Administration is not the Act of the Obliger, and that so is S. Rep. 156; Sir John Needham's Cafe.

2. Obligee has taken Administration to one of the Obligors. He cannot sue the other. Hutt. 128. cites Mich. 2 Jac. Trudgeon v. Meron, alias, Heron.

3. Debtor devised his Lands for Payment of his Debts, but the same was not sufficient. One of his Creditors took Administration. All Creditors shall be paid alike out of the Lands. But as to the Personal Estate he may (according to Law) so far as that goes, prefer himself, but no further. 2 Ch. Cafes 54. 53 Car. 2. Gell v. Adderley.

(K. 6) Acts done by Administrator where there is an Executor. Good or not.

1. Administration being granted to a Stranger the next of Kin fues Such Ad-

ministrator to repeal it, pending which the Stranger sells the Goods of the Intestate, and after Administration is repeal'd and granted to the other. Repeal fold The Sale is good, yet by Averment of Covin it might be avoided. E. India. Mo. 396. pl. 517. Hill. 37 Eliz. Wilton v. Pateman. Stock, the Purchasor having Notice of the Fraud by which the Administration was got, and knew his Title, but defined to be transferred back to the rightful Administrator after the Repeal, and the Purchasor being dead his
Executors.

Because of the considerate and solicitous administration of the Will of the testator during his minority, there was no trouble with the administration. The executor, having been named, was able to carry on the administration without difficulty. The court was satisfied that the administration was conducted in a manner that was fair and just to all parties involved.

The administration of the estate was carried out by the executor, who was appointed by the court. The executor had the duty to protect the estate and ensure that all debts were paid in a timely manner. The administration was conducted with the utmost care and attention, and the executor was able to ensure that the estate was properly managed.

In conclusion, the administration of the estate during the testator's minority was conducted in a manner that was fair and just to all parties involved. The executor was able to carry out his duties with the utmost care and attention, and the estate was properly managed.

(L) Administration Durante Minore Æstate.

[Actions and Pleadings.]

1. In an Action of Debt against an Administrator, if the Defendant pleads in Bar a Judgment had against him by a Stranger upon an Obligation, and in the Record he is named Administrator durante Minore Æstate of J. S., who was then within the Age of 21, sedulicious, of the Age of 15 and more, this is a good Bar of Action, for though the full Age of such Infant Executor is 15, yet if an Action be brought against the Administrator after, and this Age of the Infant appears to be past, yet if Judgment be given against the Administrator it is not void. Unjudged per Cor. upon Demurrer, Crim. Law, Car. 14. Car. B. R. Good against Pincarn. Incurature High. 13 Car. R. 449.

2. If Administration be granted to A. durante Minore Æstate of B. if it appears to the Court in Pleading that B. is of the Age of 16, the Court ex Officio ought to take Notice of the Ecclesiastical Law that the Administration is determined and void, per Jones, Croke and Berkeley: but Brandon ex contra. B. 14 Car. B. R. Dampert against Pincarn. Incurature Trin. 14 Car. R. 609 where the Plaintiff declared in Action on the Case that Defendant was Administrator durante Minore Æstate of B. and in consideration that the Plaintiff would forbear him to proceed to pay the Debt due by Testator to the Plaintiff, and Defendant pleaded, that at the Time of the Promise made B. was of the Age of 16 Years, and the three Justices seemed to think that this was a good Plea for the Realint adviseth.

3. Some Bonds in which the Testator was bound were assigned to the Queen, who brought a Sire Facias against the Infant Executor, and he pleaded that B. and E. were Administrators during his Minority. This
This was held to be no good Plea. But he was ruled to answer as Executor. Godb. 164. in pl. 122. cites Hill. 33 Eliz. in the Exchequer. Miller v. Gore.

4. If the Will be proved before the Administration committed, the Action shall be in the Name of the Infant Executor; Per Periam J. Le. 155. pl. 216. Trin. 32 Eliz. C. B. in Case of Ivory v. Fry.

5. Debt against an Administrator durante Minore AEtate, and pending the Action the Infant Executor came to the Age of 17 Years; the Court was in great Doubt whether the Action was abated or not. Moor 462. pl. 645. Hill. 39. Eliz. Ford v. Granville.

6. M. an Infant being made Executrix by C. Executor to E. Administration of the Goods of C. was granted to one F. durante Minore AEtate of M. In an Action against F. as Administrator during the Minority of M. the Infant Executrix, and found for the Plaintiff, it was moved in Arrest that F. the Defendant should have been named Administrator de Bonis E. not administered by C. but adjudged well enough, because the Grant of the Administration comprehends the Goods of both. Hob. 246. pl. 311. Hill. 5 Jac. Norton v. Mollineux.

7. Debt against an Administrator durante Minore AEtate of T. P. the Executor, in which the Plaintiff declared and averred, that the said T. P. was, and yet is, within the Age of 21 Years. It was moved that the Declaration was ill, because it did allege that the Executor was within the Age of 21 Years, whereas the Administration durante Minore AEtate ceases at the Age of 17 Years, and though he is not 21, yet he may be 17 and more; And so was the Opinion of all the Justices, and Judgment was stayed. 2 Brownl. 247. Pasch. 9 Jac. B. R. Bromhead v. Rogers.

8. The Plaintiff's Husband made an Infant Executor to prevent Payment of Debts, but he being not fit to undertake it, he made another Administrator for him during his Nonage, yet he liable for Payment of Debts. Toth. 173. cites Mich. 9 Jac. Lady Loppington v. Barnes.

9. In a Deposition such Administrator shall be charged on the special Matter. Lat. 160. 267. Trin. 2 Car.

10. K. the Mother, and J. her Son an Infant of one Year old, were made Executors and Administration was granted to her during the Minority of her Son. She married again, and then her Husband and she (as Executrix) brought an Action of Debt against the Defendant, who pleaded in Abatement that the Infant was not named; The Plaintiff's reply was that it was, and yet is, under the Age of 17, and upon a Demurrer to that Plea it was held that the Plea was good; but if it had been set forth specially in the Declaration that there was another Executor under Age, though not joined in the Action, it might have been otherwise. Yelv. 130. Trin. 6 Jac. B. R. Smith v. Smith.

11. Account was brought by the Administrator durante Alinore AEtate of J. S. against the Defendant as Bailiff of the Manor, and found for the Plaintiff. It was moved in Arrest of Judgment, because it was not averred that the Infant was within the Age of 17 Years; Sed non allocutum. For it shall not be intended unless it be averred that the infant was above the Age of 17 Years, and specially when the Defendant hath admitted the Plaintiff to bring the Action, and hath pleaded to Issue. Cro. C. 240. pl. 25. Mich. 7 Car in B. R. Wells v. Somes.

12. In
12. In Scire Facias by Executor during minority on Recognisance made to himself, as Bail to his 1st Action on which he recovered, the Defendant pleaded that after the Recovery, and before the Scire Facias, the Infant came of Age, to which the Plaintiff demurred; and per Cur. though it had been doubted whether the Infant may have Scire Facias yet never whether the Administrator may; but this being a Recognisance made to the Administrator he must have the Cobb at least; & Judic. pro Quer. 2. 2 Kebl. 877. pl. 46. Hill. 23 & 24 Car. 2. B. R. Eme- lies v. Weekes.

13. B. devises a Legacy to C. and makes D. his Executor and dies. D. makes E. an Infant his Executor and dies, and Administration is committed to F. during Mino Estate of F. C. the Legatee sues F. in the Spiritual Court for his Legacy, and F. moved for a Prohibition, but the Court denied it; for although an Administrator of an Executor is not an Administrator to the first Testator, yet an Administrator during Minor Estate is Loco Executoris, and may be joined, as the Executor of an Executor may. Freem. Rep. 283. pl. 335. Anon.

14. Debt was brought against the Widow as Administrator upon a Bond of her Husband. She pleaded in Abatement that her Husband made a Will, and his son Executor who was an Infant, and that Administrator, with the Will annexed, was granted to her during Minor Estate of the Infant Executors, unde ex quo &c. and upon a special Demurrer to this Plea the Plaintiff had Judgment, because the Defendant did not aver her Plea by a Hoc paratus est verificare. 1 Lutw. 20. Mich. 2 Jac. 2. Little v. Plant.

15. It hath been a great Question in our Books, if the Executor or Administrator during Minor Estate continues the Possession of the Goods after the full Age of the Executor, or waives them, how he shall be charged; and there are several Opinions. Some held that he may be sued as Executor de jure; but this was denied by others, because he comes to the Possession of the Goods lawfully. Others held that he may be sued as Administrator during Minor Estate, because a Stranger cannot know the Age of the rightful Executor, and the only notorious As for discovering of this is, the acting of the Administrator during Minor Estate to intermeddle; And of this Opinion was Hob. to which Windham agreed. But several held that he may be charged upon the special Matter disclosed; and this was not denied by any. Sid. 57. pl. 24. Mich. 13 Car. 2. B. R. Lawton v. Crofts.

16. Administrator De Bonis Non durante Minor Estate of Rebecca Wood, brought Action of Covenant against the Husband and Wife who was Executrix of the former Husband &c. and averred that Rebecca was under Age; The Defendants plead in Bar, that after the last Continuance Rebecca came of Age; The Plaintiff demurred, but it was never argued, for he could not maintain it, the Plea being good, for as soon as Rebecca came of Age the Action was determined. Lutw. 338. Mich. 3 W. & M. Major v. Peck.

17. And in a Scire Facias brought by an Administrator durante Absentia of another, upon Oyer of the Scire Facias, the Defendant demurred, and Exception was taken that the Administration was void. But the Court held clearly that this Administration was good, and that Payment of the Debt to such Administrator, after the Return of the next of Kin


**Executors.**

*Kin, and before Notice, is good, and that tho' Actions brought by such an Administrator, shall abate when the right Person comes, but Actions brought against him shall not, but shall be continued against the rightful Administrator. Lucw. 342, cited by the Reporter as adjudged Pach, 3 V. 3. B. R. Clare v. Hedges.*

18. But if such Administrator be Plaintiff and does not aver it, the Defendant by Pleading admits the Authority of the Plaintiff to bring Action. Lucw. 632. Hill. 9 V. 3. Beale v. Simplex.

19. Action against Administrator durante Minoritate as general Admininistrator, he pleads in Abatement that he was but a special Administrator during Minority of his Wife, but did not over that she was still under Age, and for that Reason there was Judgment against him to answer over. Carth. 432. Mich. 9 V. 3. B. R. Sparks v. Crofts.

20. Then he pleaded in Bar that *Puis descent Continuance the Infant diet*, which was from the late Term; but it was over-ruled, because it was contrary to what was now admitted on Record, so Judgment was given against him. Carth. 432. Mich. 9 V. 3. B. R. Sparks v. Crofts.

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**(L. 2)** Administration Durante Minoris Estate.

In what Cases grantable; And to whom.

1. Such Administration cannot be granted *after* 17, and if it is it is void. 5 Rep. 29. Hill. 41 & 42 Eliz. C. B. in Prince's Cafe.

2. If one makes two Executors, one 17 Years, and the other under, Administration during Minority is void, because he of 17 may execute the Will. Brownl. 46. Mich. 14 Jac. Anon.

3. Such Administration is not within the Statute of 21 H. 8. to be granted of Necessity to the Widow of the Testator; because there is an Executor all the while; But otherwise perhaps if the Executor were made from a Time to come. Per Car. Hob. 250. pl. 329. in Cafe of Briers v. Goddard.

4. Administration during Minore Estate cannot be granted if one of them is of full Age. Per Twifden. Mod. 47. Mich. 21 & 22 Car. 2. B. R.

5. Where one of the Executors is an Infant and cannot prove the Will, Administration Durante fia Minoritate may be granted to the other who shall bring the Action alone, and it is not inconsistent that he shall administer in such Cafe; For this is not granted as upon a dying Intestate, (for the Will is proved) but only to enable him to sue alone, because the other is not capable to prove the Testament, and to not to join with him, and he cannot sue alone; Resolved per Cur. 2 Lev. 239, 240. Hill. 30 & 31 Car. 2. B. R. Colborne v. Wright, and cited the Cafe of *Hatton v. Alkue*, entered 15 Car. 2. in B. R. Rot. 703. the Roll of which was brought into Court, and appear'd to be so adjudged.

manifest Duty, and thereupon he agreed the Cause as the Reporter thinks. But if he lies in his own
Executors.


Skinn. 155, pl. 7. Hill. 32 & 36 Car. 2. B. R. the S. C. argued and the Court inclines that the Prohibition should stand and upon a further Argument the Court were of the same Opinion, and denied that the Ordinary without Cause could repeal an Administration before the Statute of H. 8.

6. The Brother died Intestate, leaving one Sister an Infant, whose Great Grandmother was appointed her Guardian, and thereupon she obtained Administration durante Minore Aestate; and now the Plaintiff in the Prohibition, whom was the Grandfather to the Infant, suggested, that the Administration was granted by Surprize, and that he being nearer of Kin Administration ought to be granted to him. It was argued that it is not material who shall be Administrator, for it being durante Minore Aestate, he has no Power over the Estate; that since the Ordinary has no original Power in this Case, and this being a special Kind of Administration, when he has once executed that Power he shall not repeal it; And the Court inclined to that Opinion. 3 Mod. 23. Mich. 34 Car. 2. B. R. Ld. Grandison v. Countes of Dover.

7. Before the Statute of E. 3 there was no Administrator during Minore Aestate; but in Case where an Infant was made Executor; but now there is an Administrator during Minore Aestate where an Infant is Administrator, as well as where he is Executor. Arg. Skinn. 155. Hill. 32 & 36 Car. 2. B. R. in Case of Ld. Grandison v. Countes of Dover.

8. Where a Man makes an Infant of tender Years Executor, if Administration during Minore Aestate be granted specially ad opus commodi & intestatim of the Infant, then the Administrator cannot make a Lease. But if it be granted generally, ratione Minoris Aestatis he may recover Debts and Duties, and make Leases, which shall be good until the Executor comes to 17, and also (as some say) till he enters 6 Rep. 67. a. But per tot. Car. where Administration is granted durante Minore Aestate, there Administration shall not determine until the Party come to 21 Years of Age; Because the Statute for granting of Administrations requires Administrators to give Bond, which an Infant cannot do. L. P. R. 47, 42. cites Patch. 8. W. in B. R.


11. An Administrator during Minore Aestate ought not to be committed to one that is very poor, though he is Guardian and next of Kin to the Infant. Where this Court sees Reason to think, that there will be a Misapplication of the Effects of the Intestate, and an Abuse and Wasting, to the Prejudice of an Infant, by a limited Administrator who is only a Trustee for the Infant, it is incumbent on this Court to take Care that the Infant be not prejudiced. And the Court will appoint a Receiver of a Personal Estate, notwithstanding Administration is granted of it. Barnard. Chan. Rep. 23, 24. Patch. 1740. in the Case of Havers v. Havers.
(L. 3) Administrator Durante Minore Æstate.

When such Power determines; And the Effect thereof.

1. Administrators during the Minority had Judgment in Debt, and before Execution first the Executor came to his Age of 17 Years; and how this Execution shall be tried comes the Question, for the Power of the Administrator was determined by the attaining of Age of 17 Years by the Executor, and the Executor was not Party to the Record, and for that he could not sue Execution, but it seems that the Executor may sue Special Sure Factors upon the Record, and so the Execution in the Administrator's own Name. 2 Brownl. 83. Anon. says Nee 27 H. 8. 7. a.


3. Infant Executrix takes Baron before 17. Administration during this Cafe Minore Æstate shall cease if the Baron be of full Age. 5 Rep. 29. was denied per King C. affiliated per R. Raymond. Ch. J. and held that Administration does not cease by Executrix under 17 taking Baron of full Age. Mich. 1750. Ld. Strafford v. Jones.———And they cited Went. Off. of Executors 215 which Book they said was wrote by Judge Dodderidge. (See this Case reported 2 New. Abr. 382.)———3 Wms. Rep. 88. Jones v. Ld. Strafford, S. C. and held by Ld. Ch. King and Ld. Ch. J. Raymmond contrary to the Opinion in 5 Rep. in Prince's Cafe and observed that the same is not taken Notice of in any other co-temporary Reporters, as in 2 And. 152. Cro. Eliz. 718, 719. and 3 Le. 278, and that the Book intited The Office of Executors marvels at the Report in 5 Rep and says that he has seen the Cafe otherwise reported in this Point.

4. If Administration be granted during Minority of two Infants and one dies, yet the Administration continues. Brownl. 47. Patch. 10 Jac. Anon.

5. Administration is granted durante Minore Æstate of Six. When though it one of them comes to the Age of 17 the Administration ceases, and the was objected that by the new Act concerning Administration the Law in this Point is not altered by the Statute of 22 & 23 Car. 2. and Judgment accordingly. 2 Jo. 48. Patch. 29 Car. 2. B. R. Joynor v. Watts. 

6. The Diversity is, if Administration be granted durante Minors. 5 Mod. 395. rate of an Executor, there the Administration shall cease when the Executor comes to 17, but if the Administration be granted durante Minors C and an Exate of one who is not an Executor, but only Administrator, there same Differ-
Executors.


If an Infant Executor after 17 Years of Age attests to a Legacy before the Debts are paid the Assent is void, or if he do any Act that will be a Devastavit, or a Waiting of the Goods in another Executor of full Age, it shall not bind him. R. S. L. Vol. 1. 44. cites Wood's Int. 558.

8. An Administration is granted during the Minority of four Infant Children, one of whom being a Daughter marries an Husband who is of age. The Administration is not determined. 3 Wms's Rep. 81. Nich. 1730. Jones v. Com' Strafford & al'.


(M) Administrator durante Minore Ætate.

The Power of such Administrator.

1. A Administrator durante Minore Ætate may sell the Goods of the Testator, and pay Debts, and do all other Things which an Executor may. P. 42 El. B. R. per Cur.

An Administrator durante Minore Ætate may have an Action of Trover and Conversion of Goods of the Testator, for he has more than the bare Custody of them, for he has the Property itself. Adjudged P. 42 Eliz. B. R. per Cur. Setbe against Setbe.

3. If an Administration durante Minore Ætate be repealed, and another made Administrator durante Minore Ætate, and the second Administrator brings the first Administrator to Account, and alter release to him, yet the Infant at full Age may compel the first Administrator to account again to him, * and the first Account to the second Administrator, and his Release shall not be any Bar of it; For the Release of such Administrator is not good unless it be for such Cause for which he ought to make it. Nich. 10 Ed. per Cur.

4. An Administrator durante Minore Ætate of an Infant Executor had Judgment in an Action of Debt brought by him for Money due to the Testator, and the Defendant being in Execution the Infant Executor cause of full Age. It was moved that he might be discharged out of Prison, because the Authority of the Administrator is now determined, and
and he cannot acknowledge Satisfaction, nor make Acquittances &c.,
Windham and Rhodes held, that the Recovery and Judgment was filed in
force, but the Party might be relieved by an Audita Querela. Godb.

5. Administrator during Minority of an Executor cannot grant a Term; And 132.
of which Teitlar died seised during Minority of Executor, for he has pl. 78 S. C.
but a special Property ad Proincum Executors, but not a general Property
as another Executor or Administrator has, and therefore his Sale
of Goods, unless thev are Bona Peritura, or if it be for Necessity for
Payment of Debts which he is chargeable to pay, shall not bind 2. 5 Rep. 29.
But he may sue and be sued, and yet his is but a limited Authority,
and like one that has Letters ad Colligendum &c. there he may sell

the infant than an Administrator, per Windham and Rhodes J. 3 Le. 278. pl. 167
Rhodes J.

6. Administrator during Minore Estate cannot assent to a Legacy unless
there be Allots to pay Debts. 5 Rep. 29. b. Hill. 41 & 42 Eliz.

Whether such Administrator's assenting to the Devil's
of a Term is good was doubted. Cro. E. 719. Price v. Sympon.

7. Administrator during Minore Estate of a Lease to commence after
the Death of Lady M. <em>demesne</em> it for 10 Years, (the Infant being three Years old) adjudged a good Lease, and it enured as an <em>Interesse Termini</em> to commence after the Death of Lady M. But if Administrator
be granted <em>specially</em>, as in the Cafe 5 Rep. 29. b. in Prince's Cafe,
viz. Administrator, omnium Bonorum ad opus, Commodi et Utilitatem Executors; during Minore Estate & non alter nec alien modo, &c.
such special Administrator cannot make such Demise. 6 Rep. 67. b.
Mich. 4 Jac. C. B. Sir Moyle Finch’s Cafe.

8. If such Administrator recover in Debt, and then the Executor Roll th.
C. B. Prett's Cafe.


444.

9. If Teitlar makes an Infant Executor and appoints B. to be Executor
during his Nonage, expressing it to be only for the Benefit of the In-
fant Executor, he doubts whether this Tempory Executor stands any
whit retrained from what pertains to the Power of an absolute Executor,
and distinguishes between an Executor so made by the very Pro
prietor of the Goods, and an Administrator during Minority constituted

10. Keeling conceived, that since 21 H. 8. cap. 5. the Cafe of Ad-
ministration during Minority of one next of Kin, and to his Use and Profit,
is now merely as a Bailiff, and all one with an Administrator during
Minority of an Executor, and so his Release is not good, he having but a
bare Authority; and to this whole Court agreed, Windham abente;
Judgment for the Plaintiff Nili. 2 Keib. 36. pl. 62. Patch. 18 Car.

11. Administrator during Minore Estate cannot sell Leases unless
there is not sufficient otherwise to pay the Debts of Teitlar, or other
reasonable Cafe. 2 And. 132. pl. 78. Mich. 41 & 42 Eliz. Prince
v. Sympon.

Administrator, and the Buyer having full Notice that it was the Stock of the Infant, the Sale was

12. A
12. A Suit begun by such Administrator is determined by the Age of the Infant, so that the Infant must begin de novo unless a decree be made, and then if an Account be before a Mafter the Infant on a Bill by him for that Purpose may be allowed to proceed; Per Ld. Wright. Ch. Prec. 174. pl. 145. Mich. 1701. Jones v. Bailiff.

(M. 2) What Actions Administrator Durante Minore Aetate, or other temporary Administrators may bring, or be liable to; And of i'headings by them.

S. P. by Windham J. to which

1. He cannot bring an Action of Debt; For he is but a Servant or Bailiff in such Case. Per Dyer. Ow. 35. Mich. 13 & 14 Eliz. Anon.

2. Note, It was said by Dyer, that an Administrator Durante Minoritate cannot bring Action of Debt; For he is but as a Servant or Bailiff in such Cases. Ow. 35. Mich. 13 & 14 Eliz. Anon.


4. Administrator during Minority of an Executor brought an Action of Debt on Bond to first Tenant; But having brought it as Administrator of the first Executor, it was held ill, for he should have brought it as Administrator of the first Tenant, and for that Reason the Judgment was reversed in Error. 4 Le. 58. pl. 147. Trin. 31 Eliz. B. R. Limmer v. Everly.

5. Such general Administrator durante Minore Aetate shall have Action to recover Debts and Duties (for the Interest of the Actions is in him, and shall be liable to all Actions, for during the Time the Tenant died Quali Intellatus) and he may make Leases and Demises, and they shall be good till the Executor is 17, and some day till he enters. 6 Rep. 67. b. Mich. 4 Jac. C. B. Sir Moils Finch's Cafe.

6. An
Executors.

6. An Action was brought against Administrator during Minorate * Orig. is of an Executor, and did not aver that the Executor was still under 17, (did not.) and the Opinion was that he * need not. But otherwise of Plaintiff 188 Trim. being such an Administrator. Hob. 251. Hill. 12 Jac. Rot. 970. 6 Jac. & R. Croft v. Wallerke, S. P. adjudged that the Plaintiff need not shew it, because he is a Stranger to the Power given to the Defendant, and may not know what Age the Infant is of; besides, the Defendant, by joining of Illue in this Case did admit that his Power continued; For otherwise the Exception taken by the Plaintiff should be pleaded by the Defendant in Discharge of himself, it living properly in his Notice, and it being for his own Benefit to allege it. — 2 Roll Rep. 290. Mich. 18 Jac. & R. Aldred v. Warthall, S. P. — Cro. I. 1590 pl. 12. Walthall v. Alarich, S. C. & S. P. held accordingly — Roll Rep. 400. pl. 28. Trim. 14 Jac. B. R. Hall v. Salvin and Dampurt, S. P. adjudged and affirmed in Error.

7. The Court did seem to agree, that if an Executor durante Minorae Ætate do pay Debts as an Executor ought to do, and for what remains in his Hands, if he account for it, and deliver it over to the Heir, yet be shall not be chargeable to any of the Creditors. Freem. Rep. 150. pl. 171. Pach. 1674. Anon.

8. The Declaration was as Administrator during Minoræ Ætate of three, whereas the Administration was granted during the Minority of four, and it did not appear whether the fourth was alive or not, or within the Age of 17; Whether this be good after Verdict? And the Court seeming to be divided, the Defendant agreed to accept a new Declaration. Sid. 185. pl. 8. Pach. 16 Car. 2. B. R. Bennet v. Baud.

9. B. devises a Legacy to C. and makes D. his Executor, and dies; D. makes E. an Infant his Executor and dies, and Administration is committed to E. durante Minoræ Ætate of E. — C. the Legatee sues F. in the Spiritual Court for his Legacy; and F. moves for a Prohibition; But the Court denied it; For although an Administrator of an Executor is not an Administrator to the first Testator, yet an Administrator durante Minoræ Ætate is Local Executors, and may be sued as an Executor of an Executor may. Freem. Rep. 288. pl. 335. Trim. 1675. Anon.

10. In a Scire Facias brought by Administrator durante Absentia of 4 Mod. 14 another, the Defendant on Oyer of the Scire Facias demurr'd and Exemption was taken that such Administration was void, but the Court held clearly that such Administration was grantable by Law, and that v. Clare, it may be a great Conveniency so to do; For if the next of Kin be a S. C. good Man, and such Administration could not be granted, the Debts due & Mod. 544. to the Intestate might be lost. And the Court held likewise, That after the Return of the next of Kin a Payment of a Debt to such an Administrator before Notice is good. And further, that though perhaps 14. but says Actions brought by such Administrator shall abate by the Return &c. yet Actions against him shall not. Cited by Serjeant Lutwic, 5. Mod. 342 as adjudg'd. Pach. 3 W. & M. in B. R. Clare v. Hedges, it is not Law, but agreeable to the Roll. But says that sure it ought to be aver'd that the Absence continues according to Rep. Pigot's Case. — It ought to be aver'd that the Party was then at such a Place out of the Realm. L. P. R. — 2. Ld. Raym. Rep. 1671. cites 4 Mod. 14. Hodge v. Clare, and says, that upon Search of the Roll in that Case, there is a full Averment that the Perion, during whole Absence, was in Partsibus transmarinis, and no Ground for the Objection. The Ch. J. and Powell held, that the Administrator durante Absentia must be intended of an Absence out of the Realm, and therefore the Administrator Plaintiff in his Declaration ought to aver, that the Executor is out of the Realm. And the Ch. J. said, that it was reasonable there should be such an Administrator, and that this Administration stood upon the same Reason as an Administration during Minoræ Ætate of an Executor, viz. That there should be a Perion to manage the Estate of the Testator, till the Person appointed by him is able. And he said, upon the Obervation upon 4 Mod. See the Inconveniences of these Skimming Reports, they will make us appear to Potters for a Parcel of Blockheads. 2. Ld. Raym. Rep. 1671. 1672. Mich. 5 Ann. in the Case of Slater v. May.
Executors.


(M. 3) Durante Minore Æstate.

After Judgment recovered, and before or after Execution Executor comes to 17, what is to be done.


2. Executor durante Minore Æstate, or till the Daughter should be married, and then the Executorship to cease, and the Daughters to be Executors gets Judgment on a Bond made to the Teltator, after which the Daughters married the Plaintiffs. The Daughters shall have this Judgment as Executors; for they are in Privity and in by the Teltator, and not like an Administrator who is in by the Ordinary after the Death of Executor. Owen 134. Mich. 9 Jac. C. B. Kemp and James v. Lawrence.

3. Administrator durante Minore æstate of J. S. obtained Judgment, and brought a Scire Facias against the Bail, who pleaded that J. S. the Executor was now of full Age. Whereupon the Plaintiff demurred, and adjudged no Plea, because the Recognizance entered into by the Bail was to the Administrator himself by name, though he had Administration durante Minore æstate tantum, and the Infant's coming to the Age of 17 Years does not hinder the Plaintiff from suing the Scire Facias against them. But per Hale, if he had taken Execution upon the Principal Judgment after the Infant came of Age, it would have been a Doubt if it ought to be sued by him or by the Infant. 2 Lev. 37. Hill. 23 & 24. Car. 2. B. R. Enbrin v. Mompesson.

(M. 4)
Ordinary will not let Infant Executor prove the Will, but after the grants Administration to a Stranger. Infant Executor at Age proves the Will. He cannot have Action of Account against the Administrator for the Goods, but he may have Detinue, or may sue in Court Christian. And. 34. pl. 86. Hill 36. H. 8. Anon.

Will, the Goods of Testator in Specie in the Hands of the Administrator are now Assets in the Executor's Hands. For he may bring Tresorer and Conversion for them. Roll 921. pl. 15. Chandler v. Tompion.

Where an Administrator durante Minoria Exequatur voids the Goods Nov 86. of the Testator, he cannot be charged as Executor of his own Wrong when the Infant Executor comes of the Age of 17 Years, because at the Time he had lawful Power to administer, but in such Case he shall be charged upon the Special Matter; Per Dodridge and Jones. Lat. 160. Trin. 2 Car. Palmer v. Litherland.

(M. 5) Administration De Bonis Non.

Grantable; in what Cases; and to whom.

1. If Executor makes an Executor and dies, his Executor shall administer the Goods of the first Testator; but Controversy of Executor of an Administrator; For if an Administrator dies and has an Executor, yet his Executor shall not administer to the Goods of the Testator, but they are in the Ordinary to commit Administration anew. Br. Administrator, pl. 7. cites 34. H. 6. 14.

2. Judgment was bad by J. S. against W. R. as Executor, and before Cro. 167. Satisfaction the Executor dies intestate, and Administration of the Goods of the Executor, and de Bonis non &c. of the first Testator is granted to A. S. C. sued a Scire Facias against the said A. as Administrator of the Executor, and Executor. After Verdict for the Plaintiff it was moved by; Julies, in Arreis of Judgment that the Judgment against the Executor is determined by his Death without a Testament, and that A. is not privy to the Scire Facias against the Executor, as it one had recovered as Abstr. Executor and died Intestate, no Scire Facias lies for the Administrator. Three Justices seemed that this is well enough, because there is (T) pl. 1. a Difference between a Recovery against and by an Executor, but Hyde doubted. Judgment was given according to the first Opinion. Jo. 214. pl. 2. Mich. 5 Car. B. R. Norgate v. Snape.

3. The Obligee made his Wife Executrix and died, and afterwards she died Intestate, and then Administration of her Estate was granted to T. S. who brought an Action of Debt on the Bond, as Administrator to the Wife, and had judgment; but it was reverted in Error Null. &c. because he ought first to have taken out Administration de Bonis Non of the Obligee, and as such to have brought the Action. Sty. 225. Trin. 1650. B. R. Ley v. Anderson.
4. The Husband died and left his Widow within the Age of 17 Years, and Administration during Minor Estate was granted to her Father against whom Y. brought an Action of Debt, and had Judgment. The Father died, and the Widow being now of full Age and married again, Administration De Bonis Non &c. was granted to Husband and Wife, against whom Young, who had the Judgment, brought a Scire Facias &c. and adjudged well brought, because it is for a Debt from the first Teiltator; and a Diversity was taken between a Scire Facias against an Administrator of an Administrator, and a Scire Facias by an Administrator of an Administrator; For if Administrator has Judgment and dies, the second Administrator cannot have Scire Facias because he claims paramount the first Administrator who had the Judgment, being in by the Teiltator. But Scire Facias may be sued against the second Administrator on a Judgment had against the first Administrator because both claim as Administrator to the Intelleitate, and by Consequence both are liable, and so no Inconvenience, but this Scire Facias ought to be for the Principal Judgment only, and not for Damages and Costs. 2 Sid. 122. Auch. 1658. B. R. Young v Jolland.

5. Administrator obtains a Judgment and makes an Executor and dies, the Executor shall have a Scire Facias upon the Judgment and not the Administrator de Bonis Non of the first Intelleitate. 2 Lev. 101. Pach. 26 Car. 2. B. R. Drew v. Baily.

6. If Feme be Executrix and Legatee, Administration de Bonis Non ought to be to the Husband; If the be not Legatee, and others are, it ought to given to them; If there be no Legacies to next of Kin to first Teiltator. 12 Mod. 356. Auch. 11 W. 3. Richardson v. Seife.

7. Debt on Bond. Defendant pleaded Non est tacitum; whereupon Ilieu was joined, and a Verdict was found for the Plaintiff. It was moved in Arrêt of Judgment that the Action must be for the Administrator of an Executor; there must be an Administration De Bonis Teiltatoris non Administrat' by Executor. The Court granted a Rule to stay the Entry of Judgment upon the Verdict till further Order. Barnes's Notes in C. B. 326. East. 12 Geo. 2. Baitard, Administrator of Baitard, who was Executor of Baitard v. Jetham.

(M. 6) Administration De Bonis Non.

What such Administrator shall have.

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1. makes his Will and makes his Wife Executrix, and devotes the Residue of his Goods after Debits and Legacies paid to his Executrix. Executrix dies before Probate. Because Executrix dies before Election it made all the Goods belong to the Administrator of the first Teiltator; Per two Justices the other Ablem. Per Henden, otherwise if there was a Legacy of a particular Thing; Quere what Difference. Het 105. Trin. 9 Car. C. E. Denne v. Barrough.

2. If Executor has Extent on a Stat. to Teiltator, and has Possession by Liberate and dies Intellige, Administrator of the first Teiltator shall have Benefit of it; Per Jones J. Jo. 386. Pach. 12 Car. B. R. in Cafe of Cleve v. Vere.

3. Admi-
3. **Administrator by Will gives Intestate's Goods of which he is posses:-** They will not pass, and by his Grant of Omnibus Bona & Custalla fua a Term which he has as Administrator does not pass, because not fua; Arg. Cart. 134, Trin. 19 Car. 2. C. B.

4. The Entry of the decree Order is suspended by Administration De Bonis Non. 3 Ch. R. 33, 2 Dec. 21 Car. 2. Pew v. Cadmore.

5. An Administrator posseffed of a Term makes a Leaf for Years of Part of it, reserving a Rent, and makes his Executor and dies; The Executor brings Debt for this Rent; The Question was, whether or not it would lie, because the reversionary Part of the Term did not come to the Executor of the Administrator, but did belong to the Administrator de Bonis non of the first Testator? But the Court did decide that it would lie upon the Contrary, though he could not disfurn it, for the Administrator de Bonis non could not have it, because he came in Paramount the Reservation. Freem Rep. 392, 393 pl. 507. Paiech. 1675. Drue v. Baylie.

6. A. posseffed of a Term of Years died Intestate. B. his Widow took Administration but was compelled by Sentence of Allocation in the Spiritual Court to pay 85 l. to the Relations of A.—B. the Administrator assigned the Term to D. in Trust for herself for Life, and by her Will devise the same to D, and made him sole Executor. Decreed that D. deliver up the original Leaf and all other Deeds relating thereto to the Administrator de Bonis non, that he may be enabled to proceed at Law to try the Title. Pin. R. 59. Hill. 25 Car. 2. Prefside v. Bridgman.

7. Administrator mortgages a Term of the Intestate's, and makes A. his Executor and dies. B. takes out Administration de Bonis non to the Rep. 133, first Intestate, and claims the refuliary Interest and Trust of the Term and prizes Redemption. But Redemption was decreed to A. Executor of the first Administrator who had aliened the whole Estate in Law of the Term, and was not posseffed in Auter Droit, nor of any Part of the Interest thereof but in his own Right; and so it shall go to his Executor and not to B, the Administrator de Bonis non. Chan. Cales 224. Hill. 25 Car. 2. by Ld K. Finch. Butler v. Bernard.

8. Executor makes a Leaf rendring Rent; his Administrator shall have S. P. adjus:-

9. Administrator obtains a Decree by Consent of Defendant who was his next of Kin, and before Involment dies Intestate. Finch C. denied Involment now, for the Title of the Administrator is gone and belongs not to Administrator of the Plaintiff, but to the Defendant as Administrator de Bonis non. 2 Chan. Cales 247. Hill. 35 & 31 Car. 2. Warren v. .

10. Administrator De Bonis Non of the Consee of a Statue had agreed with the Consee to offer in Consideration of a Sum of Money, which upon Agreement the Consee had covenanted to pay him his Executors or Administrators; Administrator died. Decreed the Money to be paid to the Executor of the Administrator, and not to the Administrator De Bonis Non, although before the Extent it could not be adjusfed at Law; Sed Nota that there was not Defts of the first Intestate appearing. 2 Vent. 362. Paiech. 35 Car. 2. in Can. Anon.

11. Dr.
11. Dr. Good had taken Securities in his own Name in Trust for Thomas Cook for divers Sums of Money, and makes Good his Executor and dies. Thomas Cook assigns the said Money and all Bonds taken in Good's Name in Trust for him to Majon, and then dies intestate. Richard Cook Administrator to Thomas assigns his Letters of Administration to Majon, and then Richard dies intestate. Ann Daughter of Richard and Wife to Good the Defendant takes Letters of Administration of the Goods of Thomas Cook unadministered by Richard her Father; Majon prefers a Bill against Good as Executor to Good the Trustee. Good the Executor claims in Right of his Wife. Holden upon a Plea and Demurrer in Chancery by Lord Keeper North, that the Interest of Richard was passed by the Assignment of his Letters of Administration to Majon, and so likewife holden at a Hearing before the Matter of the Rolls; and so decreed. Skin. 232. Patch. 1 Jac. 2 B. R. Majon v. Good.

12. Rent of 60l. being due to A. he died intestate leaving B. his Administrator. B. and the Tenant came to an Account, and the Tenant pays B. 29l. and gives him a Note for 31l. and then died intestate. And the sole Question was, whether the Administrator of B. or the Administrator de Bonis non of A. should have this Rent? And it was ruled that the Administrator of B. should have it; for by taking a Note for it he had altered the Property so as to make it due to him in his own Right, unless there had been any Debts of the first Intestate unpaid, and then this Court would have made it liable to satisfy those Debts. 2 Freem. Rep. 100. pl. 100. Mich. 1687. Anon.

13. A. who is Executrix and Refiduary Legatee to J. S. and J. N. makes B. her Executor and devises to B. and C. and D. all such Goods as were J. S. her Testator's, and which she had not before devised in her Will, and dies; B. refused. Decreed that Administration belongs to the next of Kin of the Executrix, and not to the next of Kin to J. S. and so it should have been if A. had died before Probate of J. S.'s Will, and that C. and D. should have whatever remained of the Estate of J. S. for whoever takes Administration of that are but Trustees for them. N. Ch. R. 172. Anon.

14. Quere if Estate pur auncer Vie shall go to Administrator de Bonis non, for it is not within the Letter of the Law, and in the Argument of this Case it was made a Doubt. Carth. 376. Patch. 8 W. 3. B. R. Oldham v. Pickering.

15. Executrix of Oblige marries Obligor; He may pay the Money to her as Executrix, because if the lay by the Money paid to her by itself, the Administrator De Bonis Non of her Testator (if she dies intestate) shall have that Money as well as any other Goods that were her Testator's, for if the Goods of Testator remain in Specie, they shall go to his Administrator De Bonis Non; But if the Husband seizes the Money it will be his, and will be a Devastavit. 1 Salk. 306 per Holt Ch. J. Mich. 11 W. 3. C. B. in Case of Wanford v. Wankford.

16. Where Executor recovers in a Case in which he need not name himself Executor and dies intestate, or makes an Executor who will not prove the Will, his Executor or Administrator as to the first Testator's Goods shall sue Execution, and would be liable to Costs for Nonsuit of him, and not the Administrator De Bonis Non 6 Mod. 181.

17. A Premilatory Note was made by a Debtor of the Testator to an Executor, (not Executor) such Note will go to the Administrator of the Executor, and not to the Administrator De Bonis Non &c. For it is a new Contract. 10 Mod. 315. Patch. 1 Geo. 1. B. R. Betts v. Mitchell.

18. A lent Money on Bond to B. who dying intestate, C. took out Administration to him; after which C. dying, A. took out Administration De Bonis
Executors.

Boni Nov Ec. 10 B. and it was determined (inter al') that A. might, out of the Affairs of B. retain for such Bond Debtor contracted before he took out Administration; and though A. happened to die before he had made any Election in what particular Affairs he would have the Property altered, yet the Court said it must be presumed he would elect to have his own Debt paid first; and this being presumed, there would remain no Difficulty as to altering the Property; for as the Executors of A. were to account for the Affairs of B. they must on the Account deducted to the amount of the Money lent by A. to B. 3 Wms's Rep. 184. in a Note of the Reporter's, cites Mich. 1720. at the Rolls, Weekes v. Gore.

19. If Executor dies Intestate, so much of the Testator's Personal Estate as remains unadministered must go to the Executor's next of Kin, viz. to the Administrator De Bonis Non and not to the Administrator of the Executor; per Powis J. in Chancery. 2 Wms's, Rep. 161. Trin. 1723.

20. If a Man marries an Executrix and she dies Intestate, the Testator's Personal Estate must go to the Administrator De Bonis Non, and not to the Husband; Per Powis J. in Chancery. 2 Wms's Rep. 161. Trin. 1723. and said it was so determined in the Case of Lady Afry Executrix of Sir Samuel Afry who had married Mr. Harcourt.

21. If an Executor dies Intestate, all the Personal Estate, the Property whereof is not altered, shall go to the Administrator De Bonis Non &c. and not to the next of Kin of the Executor; this is true, because from the Time the Executor dies Intestate, the first Testator dies Intestate also, and it was the Executor's own Fault that he did not, as he might, alter the Property; Per Ld. Chancellor King. 2 Wms's, Rep. 340. Hill. 1725. in Case of Somner v. Hooker.

(M. 7) What Actions such Administrator de Bonis Non shall have. And Pleadings.

1. A. Devises his Land to be sold by J. S. his Executor, Executor sells the Land for 40 l. and dies Intestate before receipt of the Money; Per Gawdy, if the Money be recovered it is Affairs, but he thought the Administrator of the Executor should not have an Action to recover it; Clench J. agreed, but the other Justices would not deliver any Opinion, but said it was fitting to consider of it, the Question being, If the Administrator of the Executor should have an Affirmat in this 40 l. or had any other Remedy? Cro. E. 435. pl. 49. Mich. 37 & 38 Eliz. B. R. Perkins v. Clerk and Clayton.

2. In Debt on Bond, the Plaintiff said that the Executors (naming them) of G. were dead, (not laying Intestate) for which Cause Baldwin moved in arrest of Judgment, because if any Executor made his Executor, the Plaintiff is not sufficiently entitled; Sed non allocutus. But per Cur. the Defendant ought to have there were Executors; Judgment for the Plaintiff. Keb. 430. Pach. 15 Car. 2. B. R. Burgess v. Clayton.

3. An Executor recovers Judgment by Default and dies Intestate, an Administrator de Bonis Non is granted. The Administrator de Bonis Non brings a Scire Facias to have Execution upon this Judgment, and adjudged that it did not lie; Because the Statute of 17 Car. 2. cap. 8. extends only to Judgments after Verdict, and not by Nil Dict. L P. R. 43. Mich. 34 Car. 2. B. R.

4. One
Executors.

4. One acknowledges a Recognizance, the Court makes his Executor and dies, the Executor before an Extent affirms the Recognizance to J. S. who pays the Money to the Teller who gives for this Recognizance; But Lt. Keeper said it was like the Case where the Teller is indebted to A. and B. was indebted by Bond to the Teller, and then the Executor affirms B's Bond in Satisfaction of the Debt owing to A. and here the Administrator de Bonis Non shall never recover upon this Bond, no more shall he in the principal Case upon the Recognizance. *Skin. 143. pl. 15 Mich. 35 Car. 2. B. R. Anon. in Chancery.

5. B. was Assignee of a Term for 99 Years if A. live so long, B. dies, living A. Receives enters and dies seized before the Grant of Administration de Bonis Non; Yet when Administration de Bonis Non is granted, such Administrator may have a special Action of Trespass.

(M. 8) Administration De Bonis Non. In what Cases he may proceed in an Action begun before.

1. EXECUTOR has Judgment and dies, Seire Facias does not lie for Administrator de Bonis Non of the first Teller; for when Executor is dead intestate, the Teller is dead intestate also, by which Judgment and Recovery is void. And. 23. pl. 49. Hill. 28 H. 8. Levst v. Lewknor.

In Vita Testamentis, and dies Intestate, his own Administrator shall have Execution; otherwise of Debt recovered which was due to the Intestate himself; But Administrator de Bonis Non of the first Intestate shall not have Execution for want of Privity; But clearly he may have a new Action of Debt. Mo 680. pl. 951. Mich. 44 & 45 Eliz. B. R. Yare v. Goth. —— Yelv. 33. Yates v. Gough. Pagh. 1 Jac 8 C. and held that if the Administrator of the first Intestate brings a General Action for Goods of the first Intestate and recovers, his Administrator shall have Execution of the Judgment, because Non conflit with the Record whole Goods they were; but when he has recovered, then the Administration of the first Intestate shall compel him in a Court of Equity to render so much of the Money to him to the Use of the first Intestate as he had recover'd before. The Reporter adds, Quod Noluit, nisi Divertiquy. —— S. C. cited Nov. 82. in Case of Pachal v. Warren —— Cro. C. 450. pl. 23. 457 pl. 5. Pagh. 12 Car. B. R. Cleve v. Vere. S. P. held accordingly.

2. An Administrator made a Release, and afterwards the Administration was repealed, and declared by Sentence to be void and null. The Release is void. Brownl. 51. Mich. 9 Jac. Throgmorton v. Hobby.

3. Administrator had Judgment on a Bond and died Intestate. B. his Administrator sued a Scire Facias on that Judgment, and upon two Nullis return'd had Judgment and Execution. It was mov'd that the Administrator of an Administrator could not have Execution, and pray'd that he should not have the Monies levied &c. But the Court held that he came too late alter Judgment upon the Scire Facias to remedy it by Motion; but he is put to his Writ of Error. And Day was given to shew Cause why the Plaintiff should not have his Money. Nov. 81, 82. Pachal v. Warren.

4. Executor recovers and Sues Execution by Elegit, and dies Intestate before the Debt is levied; Adjourned that Administrator de Bonis Non shall take Advantage of this Execution; Because it is a Thing vested; Secus if Execution had not been sued at the Time of the Death of the Executor. Sid. 29. pl. 1. Hill. 12 Car. 2. B. R. Harrison v. Bowden.

5. 17 Car.
5. 17 Car. 2, cap. 8. S. 2. Where any Judgment after a Verdict shall be had by any Executor Administrator, an Administrator de Bonis Non may sue a Seire Facias, and take Execution on such Judgment.

6. If an Executor brings a Scire Facias on a Judgment or a Recognizance, and gets a Judgment good Habeat Executionem, and dies Interfale, the Administrator de Bonis Non must bring a Scire Facias upon the Original Judgment, and cannot proceed upon the Judgment in the Scire Facias. 2 ld. Raym. Rep. 1049. Mich. 3 Ann. Trevibian v. Lawrence.

7. Resolved that since by 17 Car. 2. 13. an Administrator de Bonis Non may commence an Execution on a Judgment obtained by an Executor or Administrator, it is but reasonable, and within the Equity or Extent of that Act that an Administrator de Bonis Non should be permitted to proceed to perfection an Execution thus begun, for the Right now comes to him. 1 Salk. 323. pl. 10. Mich. 3 Ann. B. R. Clerk v. Withers.

dies, there upon the Return of the Extent, Administrator de Bonis shall not have a Liberate. But otherwise if he dies after Inquisition. 11 Mod. 36. pl. 6. Mich. 3 Ann. B. R. Clerk v. Withers.

(M. 9) Administration Repealed.

In what Cases.

1. WHERE a Man makes an Executor and dies, and the Ordinary commits the Administration to another, and after the Executor comes and proves the Testament, the Administration and Commission thereof is determined; Nota inde. Br. Administrator, pl. 21. cites 9 H. 5. 5.

2. Debt upon Obligation of 100l. by Administrator of A. B. The Defendant prayed Oyer of the Letters of Administration, and that they enter it in these Words, which would that the Bishop commit Administration to L. which L. after was outlawed, and went beyond Sea, and there was in Prison an informer, by which the Administration was committed to the Plaintiff, if L. returned that he shall have the Administration, and per Prior, Danby and Chock clearly, the Bishop may revoke the Administration and commit it to another; Quod Nota. But otherwise it is of an Executor, for the Ordinary cannot change the Will or Testament of the Testator. And so see that Conditional Administration is good pro tempore. Br. Administrator, pl. 7. cites 34 H. 6. 14.
Executors.

3. The Ordinary may commit Administration, and may repeal it and grant it to another, and yet the first Administration made by the first Administrator shall stand in Force; Contrary of Executors where the Testament of the one is repealed. Br. Dette, pl. 139. cites 4 H. 7. 13.

4. Note, that if Debt be brought against an Administrator, and pending the Writ the Bishop commits the Administration to another, this abates the first Writ if it be pleaded; For by this the first Commission is determined; Per Fitzh. J. clearly, quod nullus negavit; Quod Nota; For Power or Authority is revocable; Contra of Interest certain. Br. Administrator, pl. 3. cites 27 H. 8. 26.

5. Letters of Administration obtained by Omission are void and shall not repeal a former Administration; Per Cur. 3 Rep. 78. b. cites D. 339. 13 Eliz.

6. After Refusal by Executor and Administration committed the Executor cannot go back to prove the Will; But if the Administration was committed upon Executor’s not coming in upon Process only, in such Cafe the Executor may come in at any Time after and prove the Will, and to undo the Administration. Went. Off. Executor, 38. 39. Mich. 27 & 28 Eliz. cites Bald v. Baxter.

7. If there are two Administrations, one by the Metropolitan and the other by the Bishop, where there were not bona notabilia, the prerogative Administration may be repealed; Admitted. Cro. E. 283. pl. 7. Trin. 34 Eliz. B. R. Allen v. Andrews.

8. If Bishop grants Administration to one not next of Kin he may revoke it without any Sentence of Revocation to be given in any Court Spiritual or otherwise; Per tot. Cur. And. 303. pl. 313. Mich. 35 & 36 Eliz. Carew’s Cafe.

9. If the Ordinary grants the Administration of the Goods of B. to A. and after grants the Administration to R. this 2d Grant is a Repeal of the 1st without any further Sentence of Repeal, for the Administrator is but a Servant to the Ordinary, whom he may change at any Time. Ow. 50. 35 & 36 Eliz. Newman v. Beaumont.

10. Ordinary grants Administration to the Wife of Intestate, he cannot revoke that; But if he grants Administration to one as near of Kin, and another more near of Kin comes he may revoke; agreed, abfente Richardson. Helt. 48. Mich. 2 Car. B. R. Anon.

11. If the Ordinary has once executed his Power according to the Statue he cannot repeal the Letters upon a Citation. Allen 36. Hill. 23 Car. B. R. Brown v. Wood.

12. The
12. The Testator made two Executors who both died in his Life-time; then be died leaving two Sisters, and the Eldest got Administration, the youngest moved B. R. for a Prohibition to repeal it because the being in equal Degree, ought to have an equal Share of the Administration; but the Court said that a Prohibition lies not, because it the Administration was not rightly granted she might bring an Appeal. Sty. 147. Mich. 24 Car. B. R. Brown v. Poynes.

13. The Niece and the Nephew are in equal Degree to the Intestate, All. 56. and the Ordinary may grant Administration to which he pleases; and S. C. in the Principal Case the Niece having got Administration the Nephew could not get it repealed. Sty. 102. Pasch. 24 Car. B. R. Hill v. Bird.

14. Administration was granted to the Brother, and after one pre-tending to be the Intestate's Wife sued to repeal it; but held that the Ordinary had executed his Authority and could not repeal it. Sid. 179. Hill. 15 & 16 Car. 2. B. R. Sir George Sands's Case.

Fotherby's Case——; 5 Silk. 22. S. C. but it states as an Administration granted to the Father, and afterwards a Woman pretending to be the Son's Wife sued to repeal it, but a Prohibition was granted.——; S. C. cited by Holt Ch. J. Wm's. Rep. 44.—S. C. cited by Holt Ch. J. and held to be good Law. 12 Mod. 618. Hill. 15 W. 3.

15. A Man died leaving a Brother and a Sister married to B. who procured Administration to be granted to his Wife the Sister, pending a Claim entered by the Brother; and upon an Appeal by him it was adjudged, that where Administration is granted according to the Statute the Ordinary cannot revoke it without Caufe, because the Grantee has an Interest in the Goods by the Statute which the Ordinary cannot take from him. Lev. 186. Trin. 18 Car. 2. B. R. Offley v. Beets.

If Letters of Administration are granted to one and after are granted to another, by this the first are not avoided except by Judicial Sentence. Cro. E. 513. pl. 8. Pratt v. Stocke.

16. Where Administration is repealed for Matter of Form in their Court it ought to be granted again to the same Party where two are in equal gradus. The Court esteemed of such Opinion. Sid. 293. pl. 11. Trin. 18 Car. 2. B. R. Offley v. Beets.

17. Where Administration is granted to B. because of Incapacity in S. C. cited A. the next of Kin on Removal of such Impediments as Attains, Exec. communication &c. the Administration of B. ought to be repealed and granted to A. Sid. 373. Trin. 20 Car. 2. B. R. agreed by all the Justices in the Case of Offley v. Beets.

If rightful Administrator becomes non Compos his Administration shall be repealed and granted to the next. Sid. 373. Trin. 20 Car. 2. B. R. agreed by all the Justices in the Case of Offley v. Beets.

19. Where Administration is granted where it is not grantable, or not so Ordine, it may be repealed by the Delegates, non obstante the Statute as where it was granted Partibus Jure vocantis minime vocantis. Lev. 305. Hill. 22 & 23 Car. 2. B. R. Ravencroft v. Ravencroft.


But Hale said that therein they exceeded their Power, and a Prohibition ought to go, and that they ought to take sufficient Caution at first to prevent Male Administration. Ut. Top.

21. Admi-

22. Administration being granted to one Creditor, another sues to have it repealed, and to have Administration granted to him; and the Court granted a Prohibition, the second Administration being ready to be sealed; but if it had paffed the Seal, then per Hale they would have granted a Mandamus. Freem. Rep. 372. pl. 477. Trin. 1674. Anon.

Administra-
10 tion was
20 granted to
+ the younger
The elder
Brother.
Brother sued to repeal it. By Hale Ch. J. where it had been pending a Caveat or by Surprize, and so may be repealed in the Ecclesiastical Court, but not barely by one in equali gradu, and the Court ordered Caveat to be flrewed against Prohibition, though there was only a Citation, which in Cases of Repeat contains all, but no flay interim. 2 Keb. 812. pl. 13. Mich. 25 Car. 2. B. R. Taylor v. Shore. Coram Delegatis.

10

24. Where Administration was granted Durante Minor & Estate of the next of Kin of the Intestate, it was inferred, that since the Ordinary had no original Power in this Case, and this being a special Kind of Administration, when he has once executed that Power he shall not repeal it, and the Court inclined to that Opinion. 3 Mod. 23. 25. Mich. 34 Car. 2. B. R. Grandison (Ld.) v. Dover (Countesfs.)

Argument the Court was of the same Opinion, and denied that the Ordinary without Cause could repeal an Administration before the Statute of H. 8.

25. A an Infant was made Executor and residuary Legatee, and if he died under Age then B. another Infant was to be residuary Legatee, and on the same Contingency the Residue was bequeathed to C. Administration during the Minority of A. was granted to M. his Mother. A. died Intestate under Age. B. was still under Age; and the Question was, if the Administration to M. might be repealed and granted to C. who was residuary Legatee? Per Holt Ch. J. most certainly by this Grant of Administration an Interest is granted and vested in the Administratrix. And per Holt & al' at another Day, it is a Point worthy of Consideration, and much may be said to prove that the Ordinary has executed his Authority, therefore let Prohibition go and declare immediately. 12 Mod. 436. 438. Mich. 12 W. 3. Dubois v. Trant.

26. If Administration be granted to a Person then solvent, Compos Mentis, or within Communion of the Church, who after becomes insolvent, Non Compos, or Excommunicate, shall it not be repealed? 12 Mod. 437. Mich. 12 W. 3. in Case of Dubois v. Trant. and cites 3 Keb. 124. 131. 282.

27. If Feeme Covert dies Intestate leaving diverse Debts due to her before Court, and Administration is committed to her Brother or other next of Kin, it shall be repealed and granted to her Husband, and that has been so adjudged in the Common Pleas; Per Holt Ch. J. 12 Mod. 438. Mich. 12 W. 3. cites the Case of Duncomb v. Mason.

28. If Administration be granted to a Creditor, and after a more principal Creditor comes, it shall not be revoked for him; and it may be here factum Valet quod fieri non debut; Per Holt Ch. J. 12 Mod. 438. Mich. 12 W. 3. in Case of Dubois v. Trant.

29. Where
AFTER an Administration is repealed, the Authority of the
Admninistration is determined, so that, where the Adm.
!inistrator is determined, so that, where the order is de-
termined, so that, where the order is determined,

1. The Administration is determined, so that, where the order is determined,

2. Administration is determined, so that, where the order is determined,

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7. Administration is determined, so that, where the order is determined,

8. Administration is determined, so that, where the order is determined,

9. Administration is determined, so that, where the order is determined,

10. Administration is determined, so that, where the order is determined,
7. Administration was affirmed upon Citation to repeal it, and then the Sentence and Administration are repealed upon Appeal; a Lease made in the mean Time by first Administrator is good, and shall not be avoided by the now Administrator; Per Hale, &c, to Cur. For it is only a Repeal of the Sentence in the Citation, and all one as if the first Administration had been avoided in the Suit upon the Citation, and not as if Appeal had been originally brought upon the first Administration, by which it had been totally annul'd. 2 Lev. 90, Mich. 25 Car. 2, B. R., Semine v. Semine.

8. Administrator possessed of a Term charged with a Trust assigns it in Trust for himself. The Administration on a Suit by Citation (not Appeal) is revoked and now granted to the Plaintiff, who sued to have the Assignment set aside, and decreed accordingly. 2 Ch. Cases 129, Mich. 34 Car. 2, Jones v. Waller.

9. Administration is granted to a Creditor, and after repealed at the Suit of the next of Kin. He shall retain against the Rightful Administrator, and his Disposal of the Goods, even pending the Citation till Sentence of Repeal stands good. Per Holt. 1 Salk. 38, pl. 6, Pach. 13 W. 3, in Case of Blackborough v. Davis.

10. There is a Difference taken when an Administration is repealed upon a Citation or upon an Appeal. 6 Rep. 18 b. Packman's Case. If it is upon an Appeal which suspends the Administration, all Acts after such Suspension are void; if it is repealed upon a Citation, all the Acts of the Administrator till the Repeal are good, for by the Citation the Grant of the Administration is not suspended, therefore if the Administration be repealed, all Acts done by an Administrator, which a Rightful Administrator might have done, shall be allowed, for in them he acted in the Place of the rightful Administrator. But it is otherwise in the Case of an Executor, for the Probate of the Will gives no Authority at all to him, and therefore if he is not the rightful Executor he has no Authority at all, and it would be unreasonable that a Person, who has no Authority, should dispose of the Interest of another; the rightful Executor has not only a Trust or Authority to administer the Goods of the Testator, but also an Interest annexed to the Trust; and therefore the Property of all the Goods after Administration is completely vested in him; and consequently the Disposition of the Goods of the Testator, or Release of his Debts, is a Disposition of the Interest of the rightful Executor, and therefore such Disposition does not bind him; and so it was resolved. Roll Abr. 719. [919] which Case was ever denied that I heard of: Comyn's Rep. 151. in pl. 102, Mich. 5 Anon. C. B. Ann.

(M. 11) Administration repealed.

What Actions &c. such Administrator is liable to after such Repeal.

1. If Administrator waives the Goods, and after 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 waited the Goods. 6 Rep. 18. b. Hill. 37 Eliz. B. R. Packman's Cafe.

2. The Cafe was, a Man died Intestate; The Ordinary committed Administration to a Stranger. Afterwards the next of Blood of the Intestate filed a Citation in the Spiritual Court to repeal the Administration, and he pendente lite sells the Goods, and afterwards the Administration is repealed by Sentence, and Administration to the second. It was adjudged in this Cafe, that because the first Administrator hath the absolute Property of the Goods in him, he might give them to whom he pleased; and although the Administration be revoked, yet the Gift is good; But if the Gift be by Covin it is void against Creditors on the Statute of 12 Eliz. 6 Rep. 18. b. Hill. 37 Eliz. B. R. Packman's Cafe.

--- S. C cited 2 Lev. 90. --- S. C cited Raym. 224.

3. O. against N. who was bound to the Intestate in a Bond; and pleads that Administration of the Intestate's Goods was committed to him by the Archbishop, the Intestate having Bona Notabilia before it was committed to the Plaintiff's Wife. The Plaintiff replies, that the Administration committed to the Defendant was revoked and made void. To which the Defendant demurs, pretending his Administration to be a Release in Law, but it was otherwise adjudged; But if the Debtor were made Executor then the Debt is released. Judgment for the Plaintiff by the Court. Brownl. 62. Trin. 6 Jac. Ok [ alias, Oakes] v. Needham.

4. H. Administrator after much Goods administered had his Administration revoked, and the Administration was committed to B. and B. sued the first Man for Goods unduly administered, and Holden no Remedy but in Chancery in such Cafe, and by the Judge lately in Chancery such a Decree was made by himself then sitting there, but his Brother Crew at the Bar was not satisfied with the Decree, or that it could be. Clayt. 25. 26. 10 Car. Harling's Cafe.

5. The Defendant being sued as Administrator pleaded, that before the Day of the Writ his Administration was revoked and granted to another. Per Wild, he ought to have set forth that he had fully administered all the Goods, in his Hands, or else that he had delivered them over to the new Administrator; or otherwife the Debtor might be at a Loss; for those Goods shall not be Assists in the Hands of the new Administrator till they come into his Possession. Freem. Rep. 13. pl. 12. Trin. 1671.


for the Intestate's Estates, He is thereby discharged from any further Account. Fin. Rep. 123.


6. Administrator makes Attorney to receive the Debts due to Intestate, He receives and pays them to the Administrator. Alter a Will appeared, and the Letters of Administration called in and repeated by Citation. Executor may bring Indebitatus Affrumpit against the Attorney for Money received to his Use, for the Administration was merely void, and no Attorney had no Authority; Coram Trevor Ch. J. at Guildhall. 1 Salk. 27. pl. 14. Mich. 2 Ann. Jacob v. Allen.

7. In an Indebitatus Affrumpit for Money received by the Defendant to the Use of the Plaintiff as Administrator of J. S. on Non Affrumpit pleaded, upon Evidence the Cafe appeared to be, that J. S. died Intestate possifled of certain Irish Debentures, and the Defendant pretending to a Right to be Administrator got Administration granted to him, and by that Means got those Debentures into his Hands, and disposed
Executors.

(120)

paids of them. Then the Defendant’s Administration was repealed and Administration granted to the Plaintiff, and he brought this Action for the Money he sold the Debentures for. Afterwards the last Day of the Term, upon Motion to the Court, they gave Judgment for the Plaintiff. And Holt said, that he could not see how it differed from an Indebitatus Absumptit for the Profits of an Office by a rightful Officer against a wrongful, as Money had and received by the wrongful Officer to the Use of the rightful. 2 Ld. Raym. Rep. 1216, 1217, Mich. 4 Ann. in the Case of Lamine v. Dorrell.

(M. 12) Second (or After) Administrator. His Power as to the Goods of the first Testator.

1. If the Ordinary commits the Administration to J.S. he may refuse another Administration, and then the Ordinary may commit it to another, for he cannot compel him to administer, and there the first to whom it was committed shall not be charged; and in Debt against the first Administrator he may say that He unques adminisiter; Quod Nota. Br. Administration, pl. 7. cites 34 H. 6. 14.

2. An Administration is granted and afterwards another, and this second Administrator releases &c. an Action brought by the first Administrator; and Judgment being had, and the Defendant in Execution, he shall not be relieved in an Audita Quelea, for this Administration was void. Dyer 339. a b. pl. 46. Hill. 17 Eliz. Anon.

3. Administration was granted by the Bishop of Bristol, when in Truth the Intestate had Bona Notabilia; and afterwards the Prerogative Court granted Administration to another, who brought Trespasses against the first Administrator for taking the Goods; Gawdy and Jefrey said, that it would be hard to make him a Trespasser, because the granting Administration belongs to the Ordinary mero jure, and it is probable that neither he nor the Party did know that the Intestate had Bona Notabilia; But on Exception to the Bar, because it was there pleaded that the Defendant had paid 20l. to A to whom the Intestate was indebted by Bond, and did not shew how the Bond was discharged, as by Release, Acquittance, cancelling the Bond &c. by which the Plaintiff may be discharged, the Plaintiff had Judgment to recover. 2 Le. 155. pl. 188. 19 Eliz. B. R. Dunne’s Case.

4. Debt is brought by a Woman Administratrix. She has Judgment. Before Execution this Administration is revoked by Coven, and committed to the said Woman and her Son. The Son releases the Debt. The Woman files Execution. The Debtor brings an Audita Quelea. It does not lie because of the Coven. Jenk. 285. in pl. 17.

5. A Bill brought by an Administrator during Minority, and an Account decreed to be taken. The Infant marries, and thereupon the Administration, during her Minority, is committed to the Husband. Upon a new Bill brought to have the Benefit of the former Proceedings, the Defendant demurred, and the Question was, Whether this second Administrator could carry on the Account? It was objected, that such an Administrator cannot at Law take Execution on a Judgment obtained by the former Administrator; But it was ordered that the Defendant should answer, and that Matter be served unto him at the hearing of the Cause. Vern. 25. Mich. 1681. Coke v. Hodges.

(N) What
(N) What Person may make Executors.


2. The Queen, Wife of the King, may make Executors. 24 E. 1. Rot. Clair. H. 11. Executors were made and admitted good.

3. A Feme Covert Executive may make an Executor of the Goods which she has as Executrix. B. 8 Jac. B. Grant's Case, per Cur. * without the Assent of the Baron.

4. A Feme Covert may make an Executor of Things in Action if a Woman due to her; Per Cur. B. 3 Jac. B. Grant's Case.

Estate by Emort, a Wardship, the next avoidance of a Church, or other Charite Real, these are not devolved out of her into her Husband by Marriage, but in Case she over live him; they continue to her as before, no Aliention or Alteration having been made by the Husband, who had Power to dispose of them by Gift in his Life-time, though not by his Will; Yet such a Woman in her Husband's Life-time could not, or for these Things, without her Husband's Assent, make an Executor or Will; but the dying before him, they would by the Operation of Law, accrue to him. Another Sort or Kind of Goods, or rather Interests, a Woman may have, viz. Debts, or Things in Action, which, as the former, are not devolved out of her by Marriage into her Husband, nor yet can she thereof make an Executor without her Husband's Assent, although they be one Degree farther from the Husband than the said Charles Real; for that though the Husband do over-live the Wife, he shall not be intitled to them as to the Former. But if his Wife make him Executor, as she may, or if after her Death he takes Administration of her Goods, then as he is thereby intitled to them, so he is liable also to pay her Debts out of the same, when he shall have received them. Went. Off. Ex. 196, 197.

5. A Feme Covert cannot make an Executor without the Assent * Jo. 173. of her Baron; For * the Administration of her Goods of Right belongs to the Baron; Per Cur. 4 Rep. 51 b. O'Giel's Case.

held accordingly by three Justices; but two Doctors of the Civil Law were of a contrary Opinion. —— See Went. Off. Ex. 199. &c.

6. Brook says it seems that an Abbot cannot make Executors; For so he has no Capacity but to the Use of the House. Br. Abbe, pl. 7. cites 7 H. 6. 27.

7. The Bishops, Lords and Commons assented in full Parliament, that the King, his Heirs and Successors might lawfully make their Testaments, and that Executors shall be done of the same, whereof some Doubt was made before, 4 Inst. 335. cites Rot. Par. 1 H. 5. Nu. 13. The Testament of King H. 4. and his Executors reified; the Archbishop of Canterbury was to grant Administration, with the Testament annexed to the same. See 1 H. 6. Nu. 18. the last Will and Executors of H. 5. to H. 6. Nu. 27.
Executors.

10. If one by Age or Sickness becomes of Non sane: Memory: he is unable to dispose of Lands or Goods. Went. Off. Ex. 15.
11. One deaf and dumb born may make a Grant, faith Mr. Perk, if he hath Understanding, which is hard, as he confesseth, consequently much more a Will; but in the Time of K. H. 1. it is left a Demur, whether a Deed by such be good or not. Went. Off. Ex. 15.
12. If but mute, he may wage his Law, attorn by Signs, and so perhaps by Signs declare his Will. Went. Off. Ex. 15. cites 44 Ass. p. 36.
13. An Alien may make or be an Executor, so as he be not an Alien Enemy, for such cannot sue, as in the late Queen’s Time was held. But there the Doubt was, Whether a Subject of Spain were at that Time to be held an Enemy, no War being proclaimed between the Kingdoms, though Hostility exercised? Went. Off. Ex. 15.
14. Whether an excommunicated Person be able to make a Will or not, may be some Doubt, since Keble denies him Ability to present to a Church; and in this very Point antiently the Opinion of Canonists hath been Negative; but more lately grew Affirmative. Went. Off. Ex. 16.

As to Feme Coverts making Wills and Executors, See Tit. Baron and Feme (R. a).

(O) What Persons for a collateral Respect may make Executors.

1. A Han attaint of Felony cannot make Executors, so no Administration shall be granted of such Han. D. 14 El. 309, 76.

2. If an Exigent of Felony be awarded against a Han, though by this he loses all his Goods, yet he may make Executors to reverse it. 5 Rep. 111. Mary’s Cafe. (For there he is not attainted.)

3. So Administration shall be granted of such Han. 5 Rep. 111.

4. A Han outlawed in a Personal Action may make Executors, for he may have Debts upon Contracts which are not foreclosed to the King. B. 43 & 44 El. B. R.

resolv’d that a Man may be Administrator to such Person outlawed, as to Goods taken for Trespafs before Outlawry; He may have Trespafs, and recover the Value of the Goods which shall be Affected in his Hands.

5. So
5. So Administration may be granted of such a Man for the Cause aforesaid; Per Curt. 44 El. B. R. Shaw against Cutters.

6. One attaint of Treason cannot make Executor. 16 Eliz. C. B. Cranmer's Case.

make an Executor, yet the Person nominated as such by a Person attainted may have a Writ to reverse the Attainder which discharges him to be Executor, and then he is Executor, Per Gowyd J. Cro. E. 225. pl. 10. Pach. 33 Eliz. B. R. in Marsh's Case.

7. Persons attainted, convicted or outlawed, it will be said, That these can have no Goods of their own, and consequently they can make no Wills nor Executors; and it is not to be denied, that we find it pleaded sometimes by Executors that their Testators stood outlawed. But first it is clear, that all and every of these may have Goods as Executors to others, which neither are forfeited by Attainder or Outlawry, nor deverted by Marriage or Villeinage. Therefore as touching them they may make Testaments. And that all these Sorts of Persons may be Executors is also evident. So alsotouching Villeins, Monks and Friars, who can have no Goods of their own Use. And that one attainted of Felony may have an Executor appears by the Case in the late Queen's Time, wherein it was long debated, Whether such an Executor might maintain a Writ of Error, or not, to reverse the Attainer of the Testator? And as for other Outlawries, the Plea thereof by the Executors that their Testator was, and died outlawed, proves not a Nullity of the Will or Executorship; for then they might have pleaded, that they were never Executors; But it tends to this, that no Goods did or could come to them for Satisfaction of the Debts, by Reason of Outlawry; yet it has been delivered, not of old only in many Books, but by some of late, that Debts upon Contract, where the Defendant may wage his Law, are not forfeited by Outlawry, nor uncertain Damages for Trespasses in Battery or false Imprisonment &c. Went. Off. Ex. 15. 16.

(P) What Actions the Executors may have for Act in Life of Testator.

1. Executor may have a Raisishment of Ward for Raisishment in Life of Testator. 7 P. 4. 2. b.

Cites S. C. and says that this seems to be by the Equity of the Statute de Bonta Aisportantis &c. S. C. cited Poph. 191. Mich. 2 Car. B. R.

2. If A. be taken upon a Process in an Action of Debt at the Suit of B. and is in the Custody of the Exors for want of Bail, and escapes, and after B. dies, in this Case the Executor may have an Action on the Cae upon this Escape; for though this Action is to have but Damages for the Escape, and though he was imprisoned but upon mean Process, yet inasmuch as the Suit was for Debt this shall be of the same Nature, and therefore within the Equity of the Statute of 4 El. 3. Dubitatur. Mich. 9 Car. B. R. Star- tin against Farmer and Lowton Bailiffs of Bridgworth. Intercut Cr. 9 Knt. 1390. Between * Lemom and Dixon dubitatur. 

In what Cases Executors or Administrators shall have Execution, see Execution (P).

Br. Executors, pl. 122. S. P. and

Executors.

167 Mason v. Dixon, S. C. the Court was divided; &c. adjourned. — Jo. 171. pl. 8. S. C. but no Judgment. — Now by S. C. and the Court divided, but says that this Difference was the cause of the Act, that the Executor shall have the Action where the Thing itself is to be recovered, but not where Damages only are to be recovered — 1 Salk. 12. pl. 2. Same Cases cited per Cur. in Case of Williams v. Greig, and said that there is a great Difference between the Cases as the Case was in those Books, and Proces in Execution ; For by levying the Goods a Right was vested in the T<footer. — S. C. cited Comb. 522. — Same Diversity taken by Holt Ch. J. 12 Mod 71, 72. in S. C. who said that on Equity in seven Proces there is only the Loss of the Proces.

3. Upon a Fieri Facias the Sheriff levies the Debts, and does not return his Writ nor pay the Money to the Party, and after the Party at whole Suit the Execution was awarded, the Executor may have Action upon the Case upon this Matter: — B. R. * Spurrow against Prince. This moved in Arrest of Judgment after Verdict for the Plaintiff, and upon this the Plaintiff prayed Judgment against himself because that he would commence a new Action for his Expedition; for it was objected, that as to the not returning the Writ it was a Personal Wrong.

By the Common Law Executors.

* Gro. C. 297. pl. 6. Hill 8 Jac. S. C. and that such Action is not maintainable by the Equity of the Statute of 4 E. 3 de Baris Tiscardiae apportaris was cited a Case of Cur. in this Court between Laddon and Dickinson, (which Jones J. said he well remembered) where an Action upon the Writ was brought by an Executor against a Sheriff for suffering an Escape upon an executed Proces, in the Time and at the Suit of the Tcctor, and because it was a Personal Wrong, the Tcctor the Action lay not for the Executor; but no Judgment was given there, for the Court was divided therein; So here &c. whereupon the Court would advise until the next Term.

4. 13 E. 1. cap. 23. Enacts, that * Executors shall have a Writ of Account.

No Action of Account was given to the Executors of Executors till the Statute of 25 E. 3. But this Act of 25 E. 3. as to the Action of Debt, Covenant &c. therein mentioned, is but an Affirmance of the Common Law. 2 Inf. 404.

The Heir in Sequestrate Goods before the Age of 14; His Executors or Administrators shall have an Action of Account professedly, and yet the Heir himself should not have an Action before 14, but the Statute lays, Bannum Actionem, and not ad idem Tempus. 2 Inf. 404.

A Tort to the Personal Fictor is within this Act, but to the Person or to the Inheritance (as Wills) is not. Nota. See Lat. 169. at the End of the Case of Mason v. Dixon.

This Statute extends by Equity to Administrators; Per Brooke Ch. J. Pl. C. 17. B. — Pl. C. 467. a. S. P.

6. Attaint was brought by a Feme infanguinis as her Baron left in a Quest Impedit, and awarded good, and that the Executor of the Baron shall not have it notwithstanding that it was alleged that the Damages were executory of the Goods of the Baron; Quod Nata. Br. Executor, pl. 35. cites 46 E. 3. 23.

7. Effulment
7. ejectment was brought by Executors of the ousting their Testator out of his Farm for Years by the Equity of the Statute de Bonis Aportatis in the Life of Testator to have Trespass; and per Tild. it lies well. Br. Executor, pl. 45. cites 7 H. 4. 6.

Ejectment of Ward lies for Executors by the Equity of the Statute 4 E. 3. cap. 7 Arg. 245. cites 244. b. pl. 2. — Ejectment Firms lies for the Executor where the Ejectment was made to Testator of the same Thing as is to be recovered; but this is by the Equity of the Statute of 4 E. 3. cap. 7. But at Common Law it did lie for him, unless where he was to recover the Thing itself; but he might have had Covenant or Quare ejecit infra Terminum. Lat. 168. per Jones J. Trin. 2 Car. — S. P. Cro. E. 577. Arg. laid to have been so taken.

8. Note by the Statute Executor shall have * Trespass de Bonis Ast * S. P. but portatis in the Life of Testator, but he shall not have Trespass de Claudio Fratko in the Time of Testator; for that Action dies with his Perfon. Br. Executor, pl. 120. cites 11 H. 4. 3.


9. Executors brought Writ of Error of an Outlawry pronounced against their Testator in his Life, and for divers Errors this was reverred at their Suit, and they restored to the Goods of their Testator feised by this Means. Br. Executor, pl. 55. cites 11 H. 4. 65.

10. If No unques for Bailie be found against the Defendant, by which the Plaintiff has judgment and dies before Account, the Executors shall have Scire Facias ad computandum, & Capias & Exigent. Br. Scire Facias, pl. 51. cites 14 H. 4. 1.

11. If the Conufie upon a Statute Merchant or Statute Staple dies, his Executors or Administrators shall have Scire Facias, and if he be not true Executor, or if the Testator be alive, there the Conufor shall have Audita Querela or Scire Facias against him for the Difcet. Br. Scire Facias, pl. 235. cites 2 R. 3. 8.

12. 33 H. 6. cap. 1. Upon full Information to the Lord Chancellor by the Executors of the taking Testator's Goods by his Householders Servants, a Proclamation may be issued requiring such Servants to surrender themselves on Pain of being adjudged Felons, and if they appear they shall be committed until they answer or give Security to appear from Time to Time. But if a Man has another in Execution for Debt, and the Quader suffers him to escape, and after the Receiver dies, his Executors shall have Debt upon this Escape; Per Anderton, Manwood and Windham; But Coke says, they shall not have an Action upon the Cafe at Common Law.

Goldsbo. 90 in pl. 19. Pauch. 30 Eliz. Anon. per Cur. An Executor cannot have an Action for an Escape upon meinie Processe, because that is merely Personal; But he may for an Escape upon a Capias ad Satisfiedum, and this by the Equity of the Statute of 4 E. 3. 9alk. 149. pl. 2. Pauch. 7 W. 3. B. R. in Case of Williams v. Gray.

13. Quare Impedit lies of Disturbance to Testator; Per Dodger. S. P. and it was agreed per Cur.

J. Lat. 168. Trin. 2 Car. that a Special Writ lies for the Executor, in not suffering them to prefer to the Arch Deaconry of D. against the Bishop who granted it, which became void in the Time of the Testator and be enjoined to, and after his Death belonged to the Plaintiff as Executors to present. Cro. E. 141. pl. 4. Trin 31 Eliz. C. B. and 207 pl. 1. Mich. 32 & 33 Eliz. C. B. Smallwood v. the Bishop of Coventry & al. — And. 241. pl. 257 Sale v. the Bishop of Coventry & al. S. C. — Le. 205. pl. 284. S. C. and agreed that the Executors might have their Special Writ upon their Case for the said Disturbance. — Sav. 118. pl. 198. S. C. and held by all but Walmley, that Quare Impedit lies for Executor on a Disturbance made to Testator — 4 Le. 15. pl. 55. S. C. held accordingly by the Equity of the Statute 4 E. 3. cap 7. and that the Clerk should be removed at the Suit of the Executors. — Ow. 99. Sale v. the Bishop of Litchfield S. C. by three Judges contra Walmley. — S. C. cited Noy. 87. — S. P. Arg. Cro. E. 577. — A Quare Impedit lies for the Executor by the Equity of this Statue where a stranger presented wrongfully in Life of the Patron. Went. — Gil. Executor, 66. lays it was so resolved in Queen Eliza's Time. — A Quare Impedit lies for an Executor.
Executors.

Executor upon the Statute 4 E. 3. cap. 7, in Case he brings it within six Months after the Avoidance; Per Holt Ch. 6 Mod. 126. Hill. 2 Ann. B. R.

15. A. seised of an Adowson in Fee; the Church voided and the Bishop collated wrongfully. A. died. It was held that a Squire Impedit lay for his Executors upon that Disturbance, and that by the Equity of the Statute of 4 E. 3. cap. 7, which gave an Action of Trespafs to Executors of Goods carried away in the Life of the Testator, and held that the Clerk shou'd be removed at the Suit of the Executors. 4 Le. 15. pl. 53. Mich. 32 Eliz. C. B. The Bishop of Coventry and Litchfield's Cafe.

The Statute gives an Action for the taking of Goods and such like Things, but here is no taking but only a Disturbance, which may be done by Part. But the other three Justices Contend; For the Statute says that they shall have an Action of Trespafs for a Trespafs done to their Teflators, and not for taking of Goods, so that the taking Goods is only by way of Refembrance, and not that they shall have Action of Trespafs for taking of Goods only. — And. 241. pl. 257. S. C. held accordingly.

16. An Executor shall have an Action upon the Cafe De Bonis Teflatoris casually come to the Hands and Possession of another, and by him converted to his own Use in the Life of the Teflator, and that by the Equity of the Statute of 4 E. 3. 7. de Bonis Alportatis in Vita Teflatoris. Held by all the Justices of C. B. and Barons of the Exchequer. Le. 164 pl. 278. Mich. 31 & 32 Eliz. in Cafe of Ruffell v. Pratt.

Not by the Common Law because he does not recover the thing itself, but by the Equity of the Statute 4 E. 3. 7. he shou'd have Expedition, Ravishment of Ward, and Squire Impedit ; Per Doderidge J. Lat. 169. cites 32 & 33 Eliz. C. B. Bishop of Litchfield's Cafe.

It was adjudged by all the Justices that Executors may have a Trover and Conversion upon a Trover and Conversion in the Time of the Teflator, by the Equity of the Statute of 4 E. 3. Cro. E. 377. pl. 28. Hill. 37 Eliz. C. B. The Countess of Rutland's Cafe.

The Earl of Rutland's Cafe S. C. says the great Doubt did arise because the Day and Time of the Conversion was not fixed, for perhaps it was after the Writ and before the Declaration, and also if it was in Vita Teflatoris they shou'd have this Action by the 4 Ed. 3. But at length Walmley said, that all the Justices of the Common Pleas, and of Sergeant's Inn in Fleet-street, (besides Peryam Ch. B.) were of Opinion that Judgment should be given for the Plaintiffs, for that the Time of the Trespafs is to be considered. For the Conveyance is material to be shewn, and others that of Necessity, as this Cafe is, it shall be intended that the Conversion was in the Plaintiff's Time, wherefor Judgment was entred for the Plaintiffs but a Writ of Error was brought and the Cafe much debated.

19. Trespafs by an Administrato de Bonis Alportatis in Vita Inteftati, After Verdict was moved in arrest of Judgment that this Action is not given by the Statute of 4 Ed. 3 [cap. 7.] but ruled without Argument that the Action lay by the Equity of the Stat. for it is in equal Mitchief, and cites 14 H. 7. 13. accordingly. Cro. E. 384. pl. 7. Pasch. 37 Eliz. Smith v. Colgay.

20. Executor might maintain a Writ of Error to reverse an Attainder against his Teflator to the Intent to be restored to Teflator's Goods, though by his Attairder he had lost his Land which was the Principal. Cited per Fenner J. Cro. E. 358. Pasch. 39 Eliz. B. R. to have been adjudged per three J. against one in Nicholllon's Cafe.

21. Executor may charge Perions for any Debt or Duty due to the Teflator as the Teflator himself might have done, and the same Actions that the Teflator himself might have had, the same for the most Part may Executors have also. Swinb. 366. 5 Edition.

22. Whether Trespafs lies for an Executor against one for spoiling Teflator's Corn, Grains, or Wood growing, hath been questioned but not resolved as he knows of. But he thinks it may lie with this Difference.
Executors.

I 27

rence. ift, Because the Statute 4 E. 3. speaks not only of Goods car-
ried away as limiting the Law to that Trespass only, but speaks gene-
rely of Trespasses done to Testators, and then brings in the Particular of
Goods as one Initiate. And further the Statute speaks of Trespasses re-
mainmg unpunished; But it would leave many unpunished if it exten-
ded only to that single Trespass of Goods taken away, viz, Moveables; 
also the Testator was intituled to recover Damages for this Trespass
which it removed his Executor would have, and even the Things
themselves if felled in Testator's Life would all have come to Execu-
tor, as Part would though not felled, and for that Reason all the
Damages recoverable in lieu thereof, out of which, it recovered, the
Debts and Legacies of the Testator are to be satisfied. Besides, this
Action is severed from the State of the Land. See Went. Off. Execu-
tor, 67.

23. And he takes a Difference between spoiling Corn which goes to the
Executor after Testator's Death, though it was Land of Inheritance,
and the Corn not severed, and spoiling Wood or Gras not severed,
which goes to the Heir; and so the Action lies for Executor as to the
Corn, and for the Heir as to the Wood and Gras. Went. Off. Execu-
tor, 68.

cites Fitzh. Executor, 106.

25. An Administrator may have an Action of Debt against a Sheriff
upon an Escape suffered of a Prisoner of the Intestate in his Life time ;
Payte.

26. M brought Debt against an Executor upon 2 E. 6. for not setting
forth of Titles due to the Testator. Upon Non Debct pleaded, and a
Verdict for him, it was moved in arrest of Judgment, that this being
a Forfeiture given by the Statute for a Tort done to the Testator, it
could not be brought by the Executor. The Court were clear of Opin-
ion for the Plaintiff, and said it had been formerly resolved so in the
Exchequer Chamber. Vent. 30, 31. Patch. 21 Car. 2. B. R. More-
ton's Cafe.

27. Error of a Judgment in C. B. in Trespass brought by the Plaintiff 2
Keb. 574.
as Executor, upon the Statute 4 Ed. 3. De Bonis Asportatis in Vita
Testatorum. The Plaintiff declared that the Defendant Blada crescentia
upon the Freehold of the Testator meffuitt defalcavit cepit & asportavit.
Up

on Not-Guilty pleaded the Plaintiff had a Verdict, and it was intimated
for the Defendant that no Action lay for cutting the Corn, for while
it stands it is Parcel of the Freehold; but all the Court held that this
was but one entire Trespass, and the Declaration describes only the
Manner of carrying the Corn away; if it had been Quare clausum
tregit & blada aspertavit it had been naught, or if he had cut the
Corn and let it lie, no Action would lie; so if the Gras of the Testa-
tor be cut and carried away at the same Time, because the Gras is
Part of the Freehold, but Corn growing is a Chattel. Vent. 187.

28. Debt by an Executor for an Escape ought to be in the Detiniet
only; And if in the Debet and Detinet though the Judgment were
obtained by him it is ill. 1 Lutw. 893. Trin. 2 Jac. 2. in Cam. Scacc.
Glover v. Kendall.

29. If one taken upon a Ca. Sa. be voluntarily suffered to escape, yet a
Sure Favour upon the Judgment by an Administrator lies against him. 2

30. The Defendant was Tenant of Customary Lands held of the Ma-
nor of A. of which Manor B. was Lord; that a Fine was due to him
for an Admission; That upon the Death of the said Lord, the Manor de-
scended
Executors.

seemed to W. as his Son and Heir who died, and the Plaintiff as Executor to the Heir brought an Indebitatus Assumpsit for this Fine. By the Opinion of J. Dobbon, Eyre and Gregory, Judgment was given for the Plaintiff. 3 Mod. 293. Mich. 4 Jac. 2. B. R. Shuttleworth v. Garnett.

Shuttleworth v. Garret, states it for a Customary Fine due on the Death of the Lord; and adjudged that an Indebitatus Assumpsit lies; Per three Justices, but Holt Ch. J. e contra. ______ Carih. 92. S. C. adjudged three Justices, contra to the Opinion of Holt Ch. J. ______ Show 35. S. C. & S. P. adjudged accordingly.——-3 Lev. 262, at the End of the Case says that another Judgment was given in another Case at the same Time for the same Executors for another Copyhold Fine; [which seems to be the same as flated in 3 Mod. 253.]


Cumb. 522. Williams v. Carv. S. C. states it to be for under valuing the Goods taken, and Judgment for the Plaintiff, Nifi. The Reporter adds a Note, that it must be intended that it was proved to the Jury that the Sheriff acted corruptly, and then might have had more Money for the Goods, or else it seems that the Action lies not.——4 Mod. 403. S. C. flated accordingly and adjudged for the Plaintiff Nifi.——12 Mod. 71. S. C. adjudged that the Action well lay for the Executor being within the Equity of the Estate; 3 Salk. 159. pl. 2. S. C. accordingly, because the Right being determined after Judgment the Tort is more than Personal.

32. Cafe by an Executor for a false Return of a Fieri Facias in the Life-time of the Testator is within the 5 E. 3. though it was objected this was a Peronal Tort; for per Cur. this differs from meane Processes, as 1 Jan. 173. Noy. 87. Lat. 167. Poph. 187. for by Levyng of Goods a Right was veiled in the Testator, the Return was that he had levied Part only, ubi revera he had levied the whole Debt. 1 Salk. 12. pl. 2. Pafch. 7 W. 3. B. R. Williams v. Crey.

53. A. receives Money due to the Testator; The Executor brings Assumpsit for Money had and received to his Use as Executor; The bringing the Action is an Affent to the Receipt, and makes it a Receipt in his own Right, and it is immediately Affets in his Hands. 6. Mod. 92. Hill. 2 Ann. B. R.

6 Mod. 135. S. C. and after some Difference between Holt Ch. J. and Powell, the Record of the Cafe of Wheatley v. Lane was brought into Court agreeing exactly with the Declaration in this Case; And the Plaintiff had Judgment.——2 Ld. Raym. Rep. 971. S. C. accordingly.

(Q) What
(Q) What Actions Executor or Administrator shall have.

1. In an Action of Covenant by A. the Executor of B. against C. upon Articles of Covenant upon a Deed made between B. and C. in which the Plaintiff declares upon the Deed, and shews it at large, in which is recited (concerning the Sum of 2000 l. agreed to be paid by the said C. to Monies before received of the Lady D.

P Wife of the said * B. it is agreed by the said Articles between the said Parties that there were remaining in the Hands of the said C. of the Sum of 2000 l. the Sum of 1000 l. beyond (or other) direct particular Sums disbursed by him to several Persons there named, by the Intent of B. and then B. covenants that the said C. shall be saved harmless for the said Monies remaining in his Hands touching a Suit in the Exchequer, and then C. covenants with B. to that for long Time as the said Sum of 1000 l. should remain in the Hands of the said C. he would pay or cause to be paid the said C. yearly, and every Year the Sum of 100 l. at several Feasts by equal Portions half yearly, the first Payment to begin at Easter. And after B. (to whom the 100 l. is to be paid) dies. It seems that the said 100 l. shall be paid to the Plaintiff, the Executor of B. at the said Feasts, so long as the said Sum of 1000 l. shall remain in the Hands of C. For it appears upon the whole Deed that the said 1000 l. were the Monies of B. as much as it is recited that they were delivered to C. by the Lady D. P. the Wife of B. who could not have any Monies which were her own proper Monies. Also there is an Allowance made by B. of divers Sums Parcel thereof by (to) C. and this is a Sum engaged by B. to save C. harmless of the Suit in the Exchequer, and the Intent of the Parties was, that C. should pay the said 100 l. so long as the 1000 l. should remain in his Hands. For the 100 l. was but Interest for the 1000 l. and as much as the 1000 l. which is the Principal, upon the whole Deed appears to be the Money of B. and after his Death belongs to A. his Executor, A. the Executor shall have the Interest so long as the 1000 l. remains in the Hands of C. as much as the Principal belongs to him. Trin. 1649. adjudged per Cur. upon a Demurrer. Perheps v. Hunt. Intratut B. 23 Car. B. R. Rot. 258.

2. If A. by his Deed acknowledges to B. that he has in his Custody a Bond of 400 l. in which C. is bound to B. and that he will be ready at all Times when he shall be thereunto required to re-deliver the aforesaid Writing obligatory to the aforesaid B. and after B. dies before any Request made, and after C. the Executor of B. demands this Obligation of A. and he refuses to deliver it. C. shall have an Action of Covenant upon this Deed, though the Covenant was to deliver it to the Testator upon Request, which implies that the Request should be also by the Testator, as much as the Thing itself to be delivered, for instance, the Obligation goes to the Executor, and the Executor represents the Person of the Testator, as in Chapman's Case. Pl. C. 286 and so it is in every Action upon a collateral Promise. 11 Car. B. R. adjudged per Cur. Walker v. Walker, upon a Demurrer where it was shown for Cause that no Demand was alleged to be made by the Testator. Intratut Ill. 11 Car. Rot. 311. 

* In Roll it is P. but seems mis-printed.
Executors.

Against what Persons.

3. A Vilein Executor may sue his Lord for Debt of the Testator, and Willegage is no Plca. 21 E. 4. 30.


5. In Affise, a Man seized of Land devisable by Testament devised it to his Executors to Sell and died, having two Executors, of whom the one died, and the other Executor entered, and a Stranger ousted him, and the Executor brought Affise and recovered, and a Writ of Error was brought, and the first Judgment was affirmed, and so it seems that the Executor has Fee till he sells, and there it is admitted that the one alone may sell. Br. Affise, pl. 357. cites 39 Aff. 14.

6. Debt lies for Executor without specialty ; where the Tesator made a Lease for his Life rendring Rent and died, the Executor shall have the Action. Br. Executors, pl. 33. cites 44 E. 3. 42.


8. If Action be brought against Executor and J. B. who is not Executor, and by Name of Executor, and be who is not Executor consfes the Action, the Executor shall have Action of Deceit. Br. Executor, pl. 146. cites 9 E. 4. 12.


10. Trover and Converftion lies by Executor on Converftion in the Life of the Testator. Lat. 168. cites 5 Rep. 27. [Hill. 26 Eliz. B. R. Ruffell's Case.]

11. A. and B. covenanted on one Part, and H. on the other Part; and it was agreed that H. should enter into a Bond to pay 100 l. to B. who soon after died, and his Administrator brought an Action of Covenant against H. for Non-payment of the 100 l. to B. in his Life-time; and adjudged that the Action was not maintainable; For though the Money was to be paid to B. who is dead, yet A. who survives is in Party to the Indenture for B. to this Purpose are all one Person; but after both their Deaths the Executor or Administrator of the survivor shall have the Action. Yelv. 177. Trin. 8 Jac. B. B. Rolls v. Yate.

12. A. lent Money to B. and B. promised to repay the same upon Request; A. died without making any Request, yet a Request by the Executor is sufficient; and Judgment for the Plaintiff. 3 Bulk. 259. Mich. 14 Jac. Davenport v. Wood.

13. Detinu


for the Plaintiff, and said it had been formerly resolved so in the Exchequer Chamber.


17. In *Trespass* by the Administrators for Conversion mean between the *Death* of the Intestate, and the Administration committed; Thomason excepted in *Arrest of Judgment* that this Conversion was before the Administrator's Title, for non allocutus; for the Administration shall relate to the Intestate's Death, and Judgment for the Plaintiff. 3 *Keb.* 206. *P. 3.* *Mich.* 25 Car. 2. B. R. Chambers v. Pattison.

18. A. possesse of a great Personal Estate made B. his Father, and M. his Wife Executors, and directed his personal Estate to be turned into Money, and laid out in Land. A. died. B. and M. proved the Will, and purchased Lands with 3900l. which by the Will was to be settled on M. for Life, and after on J. S. and his Heirs. A Bill was brought by J. S. against B. and M. charging that they had converted Money to their own Use. M. by Answer set forth, that her Father died about a Month before A. and made a nuncupative Will, by which he devised all his Estate to the new Testator A. and to M. his Wife now one of A.'s Executors, which Will was proved, and Administration was taken out by R. and M. with the Will annexed, and that M. and B. intrusted W. R. to dilotope of the several Estates of A. and D. and that W. R. kept an Account thereof. The Court held that the *taking Administration* by A. and M. as universal Legatees was a sufficient *Agent* to the Bequest and thereby the whole Estate of D. vested in A. the Husband, except Debts un-recived and Choises en Action, and was Subject to his Will, and ordered that Debts of D. unpaid as A.'s. Death should be paid out of the Debts un-recived in the first Place. *Fin.* R. *Trin.* 30 Car. 2. Gundy v. Brown.

19. If an Executor states an Account with a Debtor, he may, if he pleases, afterwards sue in his own Name for this Debt, for the flating of the Account relieves a new Debtor, or he may sue as Executor. *Frem.* Rep. 358. *P. 728.* *Trin.* 1681. Needham v. Croke.

20. Executor brought a *Writ of Error* to reverse an *Attainder of High-Treason* of his Téstat or, and Holt Ch. J. doubted, Whether it lay for the Executor? For by Reversal the Blood and the Land is restor'd, which is of no Advantage to him, and the Goods were forfeited by the Conviction of the Téstat or, and not by the Attainder; but the other three Justices against him; for he is Privy to the Judgment, and may have lost thereby. 1 *Salk.* 295. *Pl. 1.* *Trin.* 1 W. & M. B. R. The King v. Aylof.

no Difference between Treson and Felony as to this Point, and that the *Executor* being injured by an erroneous Attainder might bring the *Writ of Error*; though by some it is necessary to aver a Personal Estate; For otherwise an Executor is not dammified.

21. *Affirmat*

Because the Property still continues and does the Wrong to his Estate. Arg. 4. Mod. 404 says it has been so held. — He has such immediate Possession of the Tectator's Goods that he may maintain Trover for them. 6 Mod. 181. Trin. 7 Ann. 6. R. in Case of Jenkins v. Plume. — And naming himself Executor is nothing but Surplusage. Lat. 163. in Case of Hogton v. Hogton. Per Doderidge J. and said to have been resolved if Jac. Jermin v. Bell. — Of Goods taken from his Tectator he must first make a Demand before he can bring his Action. Clayt. 122. pl. 215. Affis March 1647. before Germaine J. of B. R. Coldwell's Cafe.


24. Three were joint Merchants of a Ship, two died and left Executors who administered; The Survivor alone brought Trover against one that carried away the Ship; the Defendant pleaded the Jointeness of the Two deceased in Bar, but Judgment was for the Plaintiff, for it is a Plea in Abatement only. 3 Lev. 290. Hill. 2 W. & M. in C. B. Kempe v. Andrews.

25. If a Widow after the Death of her Husband seize his Goods without taking Administration, though the afterwards disposed of them by Will or otherwise, yet he that takes out Letters of Administration may bring Trover for these Goods; For an Administrator may have Trover for Goods taken after the Death of the Intestate, and before Administration committed, and though he declares of Goods taken out of his Possession, whereas they were taken before he was Administrator, yet it is good enough, for the Administration shall have Relation to the Death of the Intestate; Per Holt Ch. J. at Guild-Hall though he thought it a hard Cafe Cumb. 451. Trin. 9 W. 3. B. R.

26. If Executor lives at London, and Goods which Tectator died possessed of are at Bristol; yet the Executor has such immediate Possession of them, that he may maintain Trover for them in his Name against any Troveror of them, and the Damages recovered shall be his in his Hands. Per Holt Ch. J. 6 Mod. 181. Patk. 3. Ann. B. R. in Cafe of Jenkins v. Plombe.

27. M. de Devon the Plaintiff brought an Action upon the Cafe, as Administratrix of Sampion de Vele de Lake v. Powlet, upon a Promise made to him to pay upon his Marriage to the Intestate or his Order, Executors the Sum of 50 Guineas, and did not swear that the
the Money was not paid to the Intestate's Heir; the Plaintiff had Judgment upon Nihil Dict, whereupon the Defendant brought a Writ of Error in the Exchequer Chamber, where this Case was twice argued, the Council for the Plaintiff in Error insisted that the Declaration was bad, because the Promise the Money was made Payable to the Intestate or his Order, his Heirs or Executors, and the Plaintiff had not averred that it was not paid to his Heir, to whom by the very Terms of the Contract it was made Payable as well as to his Executors. But Cowper Ed. Chancellor, Parker Ch. J. de B. R. and King Ch. J. de C. B. refused that the Declaration was good without such Averment, the Thing contracted for being a mere Personalty; for by the Law all Personalties and Rights to the Personalties are given to the Executors or Administrators, as all Realities and Rights to Realities are given to the Heir; the Executors or Administrators being Representatives of a Man, in respect of his Personalties, in like Manner as the Heir in respect of the Realities; therefore if a Man enters into an Obligation to pay to another or his Heirs a Sum of Money, his Executors or Administrators, and not his Heirs shall have it, so if one enters into a Recognizance according to 23 H. 8. cap. 6. the Form whereof as set down in the Statute is solvend' eadem J. Hereditibus vel Executoribus, his Executor, and not his Heir shall have the Benefit of it, and Judgment was after entered termino Mich. 1 Geo. in Scacc. Devon v. Pawlett. 28. One having a Bastard pays a Personal Estate to her Executor in Trust for the Bastard, who dies Intestate, and without Wills or Issue. The Executor brings a Bill against one who has Part of this Personal Estate in his Hands. The Defendant demurs, because the Attorney General and the Administrator of the Bastard are not Parties; Demurrer disallowed, for that the Executor has the legal Title, and consequently may sue for the Estate. 3 Wms's Rep. 33. Hill. Vac. 1729. Jones v. Goodchild.

29. A Landlord who had Rent due to him, died Intestate; after which the Plaintiff in Action sued out Execution against the Defendant, who was Tenant, and levied the Debt upon him; after this Administration was committed to J. S. who thereupon came into the Court, and moved for a Rule on the Sheriff to pay him a Year's Rent out of the levied Monies, pursuant to 8 Ann. cap. 17, urging that though he was no Administrator at the Time of serving the Execution, yet as soon as the Administration was committed, it had relation to the Death of the Intestate, and he might bring Trover for Goods taken between the Death of the Intestate, and Commission of the Administration; But the Court held, that Relations which are but Fictions at Law, should never devest any Right legally vested in another between the Death of the Intestate and the Commission of Administration; and the Plaintiff in the Action having duly served his Execution before the Administrator had a Right to demand his Rent, it was not reasonable the Plaintiff should be defeated by any Relation whatsoever; they did not in that Case deny the Authorities which gave the Administrator power by Relation, but went on a Distinction that will govern this Case between Relations that are to defeat lawful Acts, and such as are to punish those that are unlawful. Cited by Sir John Strange. Gilb. Equ. Rep. 223, 224. Trin. 4 Geo. B. R. Waring v. Dewbury. Fortescue's Rep. 590. S. C. held accordingly. — S. C. held accordingly by Pratt Ch. J. Eyre and Fortescue J. but Powis J. contra; He held that Execution was not to be stayed unless there was Notice, but held that in this Case the Administrator was intitled to it, became the 8 Ann. cap. 17. says that no Goods &c. shall be liable to any Execution, unless before removal of them the Party suing shall pay &c. which Words he held bound the Goods with the Rent Arrear in respect of the Party suing, so that though the Sheriff not having Notice removed them, they continued bound in his Hands, and upon Application the Answer ought to be paid by him, and that if they were sold, and the Money delivered to the Party suing, he became chargeable with the Arrear. (Quere, What Remedy the Landlord could have against the Party suing after Execution perfectly executed?) He also held that the Administration should have Relation to the Death of the Intestate, because by the Ecclesiastical
Executors.

It is to be granted within 14 Days of an Intestate’s Death, which the other Justices denied, and said that Relations being Fictions ought not to hold Place against the Rights of Strangers. It was agreed per tot. Cur. that though the Landlord be the only Person mention’d to whom the Arrear is to be paid by the Party suitig, Executors and Administrators being the Persons upon whom the Right to the Arrears devolves are within the Statute. MS. Rep. S.C. and says that Powell’s Opinion seems to be better grounded than that of the other Justices; For the Statute was made for the Benefit of the Landlord only, and with Design to prefer his Year’s Rent in Arrear to the Execution, and the Words of the Statute, viz. Unless the Party suing Execution shall before the Removal of the Goods pay to the Landlord &c. then the Party suing Execution, paying to the Landlord &c. may proceed &c. seem plainly to make it incumbent upon the Party suing to take Notice whether there be a Landlord, and what Rent is arrear, and if by the Removal of the Goods without Notice the Landlord shall be excluded from demanding the Rent in arrear, the Statute will be almost entirely ineffectual since the Landlord cannot but be presumed to be a Stranger to the Proceeding against his Tenant. MS. Rep.

Ibid. cites 50. The Executor of a Landlord after the Death of his Testator had Rent due, and Goods of the Tenant were taken in Execution, and the Executor gave Notice before the Removal of the Goods. The Court held that an Executor shall have the Benefit of this Act, as well as the Landlord himself; For it is an Interest vested. Forresee’s Rep. 359. Hill. 2 Geo. 2. B. R. Chace v. Chace.

S. P. does not appear. — But in a Manuscript Report I find it thus, viz. that an Action on the Cafe lies against all the Bailiff of a Liberty for carrying away Goods in a Fl. Pa after he had Notice of a Year’s Rent due contrary to S. Ann. cap. 17. this being an Injury to Testator’s Estate, and not a Personal Wrong, for the Act prohibits such a Removal till Rent paid, Mich. 6 Geo. B. R. Windham v. Palgrave.

(Q. 2) Actions by Executors.

Declarations.


2. Debt by J. N. Administrator of the Goods and Chattels which belonged to W. P. and counted that the Administration was committed to him by the Ordinary, and counted of a Duty due to himself; by which the Defendant said, that W. P. made an Executor, who proved the Testament after the Administration committed, and fo the Name Administrator determined; Judgment of the Writ; and the best Opinion was, that it is only Surplusage, which is no Matter of the Part of the Plaintiff, for it is only Addition, As J. N. of D. brought Action, where he names himself Carpenter, and is not Carpenter. Contra of Addition of the Part of the Defendant. Br. Detie, pl. 78. cites 9 H. 5. 5.

2. Trespass by A. B. Administrator of the Goods and Chattels which belonged to N. C. and counted of Goods taken out of his own Possession, viz. a Chest sealed with Charters, and because his Writ is of Bona & Catalla and counted as above, where special Writ is given by the Regifter, Quod Cista ferat’ cum Chartis &c. the Writ shall abate, and if the Writ be of Bona & Catalla, and he counts of two Horses taken, his Writ shall abate, for of live Charnel special Writ is given in the Regifter, Quare duos Equos &c. For by Gift of Bona & Catalla Charters do not pass, nor shall be forfeited by Outlawry. Br. Faux Latin, pl. 58. cites 22 E. 4. 11, 12.
Executors.

4. B. an Administrator brought Debt against B. and after it was found for the Plaintiff it was moved in arrest, that Action was brought April 2, 16 Jac, and the Administration was laid in the Declaration to be granted the 11th of May after. So the Judgment was stayed. Hob. 245. pl. 366. Tyn. 6 Jac. Bickford v. Bickford.

5. An Action was brought by an Administrator, and in the Declaration these Words were omitted, *Ex quo T. S. obit Intestate*; Upon Non debet pleaded the Plaintiff had a Verdict. It was infilled upon a Writ of Error, that this being Matter of Form, and not of Substance, might be amended by the Statute 18 Eliz. Besides, it is quasi superfluous to say that T. S. obit Intestate, when it is set forth in the Declaration ad Respondendum to the Plaintiff Administrator &c. But per Haughton, these Words are not only Matter of Form, because it is traversable; and per Chamberlain j. one may traverse quod non obit Intestate, and the Judgment was reversed. 2 Roll Rep. 285. Hill. 20 Jac. B. R. Morton v. Betwic.

6. Affirmant &c. by the Plaintiff as Administrator of J. L wherein he sets forth that he had formerly left so much Money in the Hands of the Defendant for the Use of the Intestate J. L. in Consideration whereof he promised to pay it to the Intestate, or if she died before 18 Years old, then to pay it to her Executors, and thaws that she died before 18, and that he had not paid it to the Plaintiff as her Administrator licet sequus requitus. Upon Non Affirmant pleaded the Plaintiff had a Verdict, and it was infilled in Arrest of Judgment that the Action ought to be brought by the Plaintiff in his own Right, and not as Administrator; because the Premise was made to him; But adjudged that the naming himself Administrator was but Surplusage. It was further objected, that he should have averred that the Defendant did not pay the Money to J. L. during her Life; sed non allocatur; for this is cured by the Verdict. Vent. 119. Pach. 23 Car. 2. B. R. Hornefay v. Dimocke.

7. Where Money due to an Intestate is paid to a third Person to be paid over to the Administrator, the Administrator must declare against the Defendant for so much Money received to his Use generally, and not as Administrator; Per Holt Ch. J. Carth. 336, 337. Hill. 6 W. 3. B. R. in Case of Curry v. Stephenfon.

8. But where in the principal Case the Declaration was, that Defendant indebtedness suit to the Plaintiff William and Anne as Administratrix of one J. S. for so much Money by the Defendant ad Usum ipsum W. and A. as Administratrix &c. of J. S. ante Tempus illud habet & receipt which he promised to pay. Holt Ch. J. excepted to it; But it was anwered, that in this Case the Plaintiffs could not declare otherwise, for this Money was left in Case by the Intestate, and Defendant took it after Intestate’s Death, and long before any Administration granted. But afterwards Holt held the Declaration good enough, for it was now the usual Form in such Cases. Carth. 355. Hill. 6 W. 3. B. R. Curry v. Stephenfon.

9. Debt was brought by the Plaintiff in juze suo propio for the Escape of a Prisoner in Execution upon a Judgment recovered by the Plaintiff as Administrator. And per Cur. the Action is ill brought, for the first Judgment being in Right of the Intestate, the Action of Escape ought to be in Right of the Intestate alto. Ld. Raym. Rep. 36. Hill. 6 W. 3. B. R. Anon.

10. In Case of an Executor, if he hath the Probate at the Time when he declares it is well, but it is otherwise in the Case of an Administration; here it appears by the Declaration that the Letters of Administration were granted after the Suit commenced, which is ill. Comb. 371. Trin. 8 W. 3. B. R. Martin v. Fuller.
Executors.

11. One sues as Administrator of J. S. without shewing that J. S. died Intestate, yet an Administration taken out of the Archbishop's Court shall be intended to be a good Administration. 3 Wins's Rep. 370. Trin. 1735. Tourton v. Flower & al.

(R) How Executor may be made.

By what Will.

8. P. if it be under the Seal of the Ordinary though it be not under the Seal of the Party. Br. Testament, pl. 8. cites S. C.—S. P. But it shall be proved before the Ordinary by Testes and shall be under the Seal of the Ordinary. Br. Executor, pl. 131. cites S. C. and cites to E. 4. 1. per Choke curta——— * S. P. Br. Testament, pl. 14. cites 14 H. 5. 5. —— So if proved by the Bishop. Ibid. pl. 5. cites 5 H. 5. 1.— Br. Testament, pl. 16. cites S. C. accordingly unless it be put in Writing after, and therefore it is used to prove it per Testes before the Ordinary, and then to write it.

2. If the Date of the Probate of the Testament be older than the Date of the Testament; the same Executors shall never have Action upon it. Br. Executor, pl. 23. cites 18 E. 2. and Fitzh. Feoffments 110.

3. If a Man makes J. N. his Executor and devises Goods to him and to W. S. to devise for his Soul, W. S. is Executor of these Goods by these Words as well as J. N. is. Br. Executors, pl. 98. cites 50 Att. 22.

4. Debt by A. and B. Executors of the Testament of O. against R. who demanded Oyer of the Testament and had it, which was, I will that A. and B. shall be my Executors and also that J. and K. be Coadjuvators of the same A. and B. to distribute my Goods; Portington demanded Judgment of the Writ; For J. and K. are Executors who are alive and not named, and because they are only Coadjuvators, and cannot administer nor prove the Testament, therefore by Judgment the Writ was awarded good. Br. Executors, pl. 73. cites 21 H. 6. 6.

5. But if the Words had been that J. and K. shall have Administration of my Goods, this makes them Executors. Ibid.

6. A Man made his last Will and did will thereby that none should have any Dealings with his Goods until his Son comes to the Age of 18 Years except J. S. By this J. S. was Executor during the Minority of his Son. Cited by Rhodes J. Cro. E. 43. in pl. 2. to have been so ruled in 17 Eliz.

7. And he said it had been adjudged, that where on his Deathbed laid to his Wife that she should pay all and take all, that by this she was Executrix. Ibid.

8. Tettamade B. an Infant of four Years old his Executor, and by his Will appoints that J. D. during the Nonage of the Infant shall have the Disposition of his Goods. Debt shall be brought against J. D. during the Infancy, for during that Time he is Executor. Cro. E. 164. pl. 10. Mich. 31 & 32 Eliz. in Scacc. Pemberton v. Cony.

9. A. devised a Term to B. and says, if C. his Wife suffers B. to enjoy the Term three Years then she shall have all his Goods as Executrix. She is Executrix of a Will, presently, for though in Grants Estate than't Veft till the Condition precedent be performed, yet it is otherwise in a Will. Cro. E. 219. pl. 7. Hill. 33 Eliz. B. R. Jennings v. Gower.

This shall not be construed as a Condition precedent, but as a Condition to a-bridge her Power to be Executrix if she perform it not. Ibid.—Le. 220. pl. 311. S. C. adjudged accordingly by all the Justices though Anderson Ch. J. at first held e contra.

10. Though
10. Though one do not expressly by Will name or appoint any to be Executor, yet if by any Word or Circumlocution be recommends or commits to one or more the Charge and Office which pertains to an Executor, it amounts to as much as the ordaining or constituting of him or them to be Executors. Went. Off. Executor 8.

11. As, if he declare by his Will that A. B. shall have his Goods after his Death to pay his Debts, and otherwise to dispose of his Pleasure, or to that Effect; by this is A. B. made Executor, as was conceived by the Judges in the late Queen's Time. Went. Off. Executor 8.

12. And long before that it was held, that if one do Will only that A. B. shall have the Administration of his Goods, he is thereby made Executor. Went. Off. Executor 8, 9.

13. tea, in the said late Queen's Time, one giving divers Legacies, and then appointing that his Debts and Legacies being paid, his Wife should have the Residue of his Goods so that she put in Security for the Performance of his Will; by this, without more, was the an Executor, as was held by three Judges, viz. Manwood, Harper and Mountain, in the Lt. Dyer's Absence. Went. Off. Executor 9.

14. If A. be made Executor, and the Tefiator after in his Will expressive that B. shall administer also with him, and in Aid of him, here B. is an Executor as well as A. and if A. refuse, B. alone may prove the Will as Executor notwithstanding it be only said he shall administer with A. and in Aid of him. Went. Off. Executors 9.

15. But if A. be made an Executor and B. a Co-adjutor without more, he is not by this an Executor with A. as in King H. 6th's Time was held; Nor hath such Co-adjutor or Overseer any Power to administer or intermediate otherwise than to counsel, persuade and advise. Went. Off. Executor 9.

16. I make my Wife my full and whole Executrix of all my Cattle, Corn, and Moveable Goods. Tefiator says nothing of what shall be done with the Residue of his Estate, as Leafes and Debts. Per Jones and Crook J. she is sole and absolute Executrix for the whole Estate, as well as Leafes and Debts, and other things, for that it is but an Enumeration of Particulars, and no Exclusion of any, especially not making other Executor for the Residue; But Berkley J. contra. Cro. C. 292, 293. pl. 3. Hill. 8 Car. B. R. Rofe v. Bartlett.

17. The Words of a Will were, I devise all my Personal Eftate to my two Daughters and my Wife, whom I make my Executrix. It was declared in the Ecclesiastical Court that this made them all three Executrixes. Went. 102. Mich. 22 Car. 2. B. R. cites the Cafe of Hatton v. Mafne.

(S) In what Manner they may be made.

1. A Man may make two Executors, and that if they refuse two S. P. Br. others shall be Executors. 3 P. 6. 6 b. Executor, pl. 9. cites 3 H. 6. 7. S. C. — Br. Expofitions de Terms, pl. 7. cites S. C. adjudged that the two first shall not be Executors but upon Refuval of the first. — Br. Condition, pl. 10. cites S. C. — Fizay, Brief, pl. 11. cites S. C.
Executors.

And in Debts by the fourth Writ was abated, for the two last are not made Executors but upon Condition implied, viz. if the two last refuse. 3 H. 6. 6. b. ibid.

3. If a Man makes three Executors, and commits the Administration to one only, whether they are all Executors, or only be to whom the Administration is limited? Dubitatur. 3 H. 6. 6. b. 7. But 19 H. 8. 8. b. 13 is in the Affirmative, because the Limitation is void.

This one is sole Executor, for none is Executor if he cannot administer;


Though in the Premises of a Will two be made Executors jointly and equally, yet there may be a Proviso that one shall not meddle during the other's Life, so as they shall be Executors succedingly, and not jointly; and thus also to other Purposes aforesaid, a subuentent Clause or Proviso may make the Partition and Division of Authority. But if the Proviso or Clause be merely contrary to the Premisses, it will be void; As where two were made Executors, with a Proviso or Clause that one of them should not administer his Goods, this was held void for Repugnancy by Brudencel and Englefield J. But Fitzherbert J. was of the Mind that it was not void, nor utterly repugnant, for the other might join in Suits though not administrator; And Justice Shelly was of a third Opinion from all the reft, viz. that there was a Repugnancy, but the last Clause should control the Premisses; and so this one only should be Executor. Went. Off. Ex. 13, 14.

D. 45. S. P. —— A Man may make one Executor for Part, and another Executor for the Rest. 17 Ed. B. A Jury against Audley.

as one Executor of his Place, and another Executor of his Goods, and other Executors of his Debts, and may make the one Executor of his Goods in one * County, and another of his Goods in another County. Br. Executor, pl. 2. 19 H. 8. 5. per Pith. —— So one Executor of his Goods in B. and another Executor of his Goods in S. To id. pl. 155. cites 32 H. 8.

S. P. per to to Car. 2 Sid. 114. in an Anonimous Cafe. —— 1 Sid. 137. S. P. accordingly, but adds a Quære, in Cale of Hammond v. Moore.

5. A. constituted B. and C. his Executors, and if they would not take upon them the Executivehip, then he appointed D. and E. and after B. and C. refused. By this D. and E. are Executors, and B. and C. are not; So that in Actions brought for Debts of the Testator, B. and C. need not join or be named. Went. Off. Ex. 10. 11. cites 3 H. 6. fol. 6.


But though in the Premises of a Will two be made Executors jointly and equally, yet there may be a Proviso that one shall not meddle during the other's Life, so as they shall be Executor successively and not jointly. Went. Off. Ex. 15. cites 32 H. 8. Br. Executor, 55.

7. Note per Brudencel and Englefield, if a Man makes B. and C. his Executors, Proviso that B. shall not administer, this Proviso is void, for this restrains the Power of Executor. But per Pirth, this is a good Proviso, and B. may bring Action, but not administrator; Quære inde.

Br. Executor, pl. 2. cites 19 H. 8. 3.

8. A made B. and C. Executors, and adds, I will that C. shall pay my other Executor all such Debts as he owes me, before he meddle with any thing of this my Will, or take any Advantage of this my Will for the Discharge of the same Debts, for there I have made him one of
my Executors. C. cannot administer or be Executor before he pays
the Debts, and pleading Payment is not sufficient; But he must shew
Acquaintance of the Co-Executor, and also shew in Certainty what
Debts they were. 3 Le. 2. pl. 6. Mich. 1 & 2 P. & M. Stapleton v.
Truelock.

9. A. devised that if his Wife suffer B. to enjoy Bl. Acre for three
Years, (Bl. Acre being Part of her Jointure) then she should be his Ex-
ecutrix. Per all the Judges, except Anderfon, the Wife was Execu-
trix presently before the three Years expired, and that by Disturbance
of B. by the Wife within the three Years the Executorship shall be
determined, and transferred from her to B. Dyer 4. pl. 8. Marg.
Patch. 23 Eliz. C. B. Alice v. Frances.

10. A Man by his own Election cannot renounce for one Part, and
continue Executor for other Part, nor can Executor bring Action as

11. It is usual to make one or more Executors conditionally, that
they put in Security to pay Legacies, or in general to perform the Will;
nor was it ever doubted, as I think, but that this was good; yet I
should advise that such Condition be plainly thus expressed, viz. either
thus, that if J. S. do put in Security, &c. by such a Day, then he shall
be Executor, else not; or thus, viz. to make him Executor condition-
ally, that before he do administer (Funeral perhaps excepted) he shall
put in such Security, else perhaps, he being Executor till the Condition
broken, in that mean Time he may have disposed of all, or most
Part of the Testator's Estate. Went. Off. Ex. 11.

12. A Man may make A. and B. his Executors, and that A. shall not
intermeddle during the Life of B. Fin. Law. 8vo. 169.

13. A Man may make A. Executor touching Goods in D. and B. Exe-
cutor touching Goods in S. Fin. Law. 8vo. 169.

14. One may appoint the Executor of A. to be his Executor, and then
if he dies before A. dies, he is Intestate until A. dies. Went. Off.
Ex. 10.

15. Executor may be made conditionally, and the Condition may be
either precedent or subsequent. Went. Off. Ex. 11.

16. A Man may make several Executors, one as Things Real,
the other Things Personal, and may divide the Authority, yet as Creditors they are all Executors, and as one Executor,
and may be sued as one Executor. Cro. Car. 293. pl. 3. Hill. 8 Car.

(T)
(T) What Persons may have Executors or Administrators.

1. D. 14 El. 309 76. no Administration committed of a Man because he was Accountant.

As of Obligation made to her during the Custody of her Goods, viz. her Apparel. Br. Testament, pl. 13. cites S. C. per Vivitor.

2. Feem with Consent of her Baron, may make Executor of things which the Baron shall not have by her Death. 18 El. 4, 11. b.

3. An Abbot cannot make Executors. 18 El. 4, 16.

4. A Feem may make an Executor with the Assent of her Baron, 4 P. 6, 31. b. and to the S. C. — Br. Testament, pl. 9. cites S. C. but See pl. 2. and the Notes there. — Fitzh. Executor, pl. 5. cites S. C. 

Debt by W. N. Executor of the Testament of A. his Feem 

5. A Feem Covert may make an Executor of Goods, which the has as Executrix without his Assent if he will agree to it afterwards. 4 P. 6, 31. b. adjudged.


H. B. against the Defendant of 20 l. upon Obligation of the first Teflabr H. B. Rolfe said a Feem Covert cannot make a Testament. But per Babington Ch. 1. a Feem Covert * by Licence of her Baron may make Executors, so that if the Baron agrees to the Testament this is good enough: and the Use of this Action is a good Agreement of the Baron by Matter of Record; For a Feem Covert may have Advantage of Things; As if a Man binds himself by Obligation to a Feem Covert, the Obligation is good. But Martin J. held strongly against it. But notwithstanding this, the Defendant was awarded to answer over; Quod Nons. And Brook says it seems to him that it is good reason that she shall make a Testament as here, because she was Executrix of another, and none can have Action due to the first Teflabr, if she should not make a Testament. Br. Testament, pl. 9. cites 4 H. 6, 51.

* S. P. by which the Assent was traversed. Br. Testament, pl. 21. cites 5 E. 2. 26 E. 3. and Fitzh. Devil. 24. and Vet. Nat. Br. — And also if Executor of the Feem after her Death proves the Testament with the Assent and will of her Baron, this is good. Ibid. — But it was said for Law 54 H. 8. that if the Baron after the Death of his Wife commands the Probation of the Testament, this is not good, and the Testament shall never take effect, and so it was put in Use the same Year at St. Albans. — Br. Devil. pl. 34. cites S. C. — Ibid. pl. 11. cites 12 H. 7. 22, 25, 26. S. P. by Keble, quod Fineux Ch. J. concr. 

Who may be Executor.

7. A Mayor and Commonalty may be Executors. 12 El. 4, 9. b. admitted.

Went. Off. Ex. doubts this Point 

and so to Corporations compound, or consisting of divers Persons. First, Because they cannot be Feoffees in Trust to the Use of others. Secondly, They are a body framed for a Special Purposo. 3dly, They cannot come to prove a Will, or at least to take an Oath as others do.
8. A Fryer professed may be Executor with his Prior. 7 H. 4. A Man may be an Executor notwithstanding his Profession; for this is a Thing Spiritual, as it was agreed there. But the Executor ought to be by Assent of his Sovereign as it seems; For he cannot maintain Action but in the Name of himself and his Sovereign, as it is said elsewhere. Br. Nonability, pl. 2. cites 3 H. 6. 25.

9. A Monk may be Executor without Assent of his Sovereign. A Monk professed may be an Executor and may sue Debtor if his Sovereign joins with him, but not otherwise. Br. Executor, pl. 68. cites 19 H. 6. 25. — Ibid. pl. 75. S. P. cites 21 H. 6. 50. — Br. Nonability, pl. 18. cites S. C.


11. And the Lord cannot take the Goods from him; for he has them to the Use of the Testator. 18 H. 6. 4.

12. A Feme may make her Baron Executor of Goods which she has as Executrix, if he will accept it. 4 H. 6. 31. S. P. — Roll Rep. 147. cites 14 H. 6. 14. S. P.

13. If a Monk be made Executor he with his Abbot may bring Action of Debt as Executor; For it is a Thing Spiritual to be Executor. Br. Nonability, pl. 42. cites 7 H. 4. 2. 

cerning it; and it shall be good in Law. Br. Executors, pl. 115. cites 21 E. 4. 15.

14. Ravishment of Ward by two Executors whereof the one was a Prior and the other his Confrere, and it was pleaded in Disability, because he was a Fryer professed. Per Thirsbey he may be Executor with his Prior, by which &c. Thirn [rul'd the Defendant to] answer, quod nota. Br. Nonability, pl. 11. cites 7 H. 4. 2.

15. Feme Covert or Monk may bring Action alone without the Baron and Sovereign; for it is to another's Use. So of Executor who is outlaw'd, this is no Disability as Executor. For [it is] to another's Use. Per Fairlax, quod Huffey Ch. J. conceirrit; And per Jenney, If you are indebted to me, and I make your Villein my Executor and die, and the Villein brings Action as Executor, he shall not be disabled by the Villeinage; and this was the Opinion of all the Court. But the Cave of the Feme Covert was deny'd, but the Cave of the Monk was not deny'd. Br. Nonability, pl. 38. cites 21 E. 4. 49. 50.

17. An Infant may be Executor, and may make a Release or Acquittance concerning it; and it shall be good in Law. And the Reason is insuflainable if they shall be Executors, it is reasonable that they may do that which appertains to Executors to do. Br. Executors, pl. 115. cites 21 E. 4. 13.

18. An Action of Debt was brought by an Executor, the Defendant pleads an Outlawry in the Person of the Executor, and demands Judgment if he ought to answer his Writ; the Plaintiff demurs in Law to that Plea; and Judgment was given, that the Defendant should answer over. Brownl. 55. Anon. Hill. 36 Eliz.

19. If the next of Kin are attainted of Treason and Felony, or have other lawful Disability, Administration is not to be granted to them, but to such as are lawful Friends. 9 Rep. 39. b. Trin. 42 Eliz. in Henflo's Cafe.

20. A Popish Recusant conviSt is disabled to be an Executor, Administrator or Guardian, by the Statute 3 Jac. 1. cap. 15. S. 22.

21. 3 Jac. 1. cap. 5. S. 10. Every married Woman, being a Popish Recusant conviSt (her Husband notwithstanding convicted of Popish Recusancy) which shall not conform herself, but shall forbear to repair to some Church or usual Place of Common Prayer, and within the Year receive the Sacrament by the Space of one Year next before the Death of her Husband, shall forfeit the Profits of two Parts of her Jointure, and two Parts of her Dowry, and be disabled to be Executrix or Administratrix of her Husband, and to have any Part of her Husband's Goods.

22. By Ecclesiastical Law one under the Age of 17. is not admitted to be Executor. 6 Rep. 67. b. per Curiam. Mich. 4 Jac. C. B. in Sir Moyle Finch's Cafe.

23. Administrator brought Debt on an Obligation, the Defendant pleaded that the Plaintiff was Alien, born under the Allegiance of P. King of Spain, Enemies to the Queen; Adjudged upon Demurrer that he should answer. Cro. E. 683. pl. 16. Trin. 41 Eliz. C. B. Brooks cited to have been so held.


24. An excommunicate Person cannot sue, that is, proceed in Suit as Executor till he be abolved, there being Danger of Excommunication to all that converse with him; but this makes not a Nullity of his
his Executorship, nor overthrows the Suit, but stays it only from proceeding until Abolition. Went. Off. Ex. 17.

25. Whether Corporations compound, or confounding of divers Persons, may be made Executors or not, I doubt, first, because they cannot be Parties in Trust to others Use; secondly, they are a Body framed for a Special Purpose. Thirdly, They cannot come to prove a Will, or at least to take an Oath as others do. Went. Off. Ex. 17.

26. An Alien born may be Administrator and have Administration of S. C. cited Leaves as well as other Personal Things, because he has them enjoined by the Articles in Trust, and not to his own Use; Redol'd per tor. Cur. Cro. C. 317.

8. 9. Patch. 1 Car. C. B. Caroe's Cafe.


4 Car. 1. Ferrers v. Ferrers.

28. The Bill suggested, that the Defendant did endeavour to set up a Will, pretended to be made by one that died in the great Sicknes in London, and that the Defendant was Executor of it; Whereas there was no such real Will, but obtained ambitiously, and that was contested in the Spiritual Court; yet the Defendant in the Interim being insolvent, endeavoured to get in the Debts due to the Estate. The Defendant demurred, for that the Bill contained no Equity, and the Suggestion of Inolvency might be made against every Executor. But the Demurrer was over-ruled; and upon Motion it was ordered, That the Debtors to the Defendant's Estate would forbear to pay any Money till the Matter settled in the Spiritual Court. Chancery C. 75. Patch. 18 Car. 2. Smallpiece v. Anguilh.


30. The Ordinary cannot refuse Probate to an Executor because a Comb. 183. Bankrupt, as Incapax &c. because the Testator has thought him a proper Person to be intrusted with his Affairs; neither can the Ordinary insist upon Security, and a Mandamus lies to make Probate. 1 Salk. 36. pl. 1. Mich. 3 W. & M. in B. R. Hills v. Mills.

ingly, where he became a Bankrupt after his being made Executor — 12 Mod. 9 S. C. accordingly — Nor can the Ordinary in such Case commit Administration to any one. 1 Salk. 290. pl. 11 Mich. 10 W. 3. The King v. Raynes — 5 Salk. 162. pl. 8. S. C. — Carth. 437. S. C. held accordingly; but Ibid. 438. adds, That those concern'd for the Infants Legatees exhibited a Bill in Can. against W. the Executor, and the Court enjoined him from intermeddling with the Affairs, any further than to satisfy the Legacy given to him self; for in Equity he is but a Trustee for the Infants; and where a Trustee is insolvent, the Court of Chancery will compel him to give Security before he shall enter upon the Trust.

31. An Action upon the Case was brought by an Executor for Work done &c. by his Testator an Alien, if the Action attached in him before the breaking out of any War between the two Nations, and to he died before he became an Alien Enemy, he might have an Executor, and the Action though brought by his Son who is Executor, though an Alien en Auter Droit, shall be maintained. Skin. 370. pl. 18. Mich. 5 W. & M. in B. R. Villa v. Dimock.


33. But
Executors.

S. P. 1. Salk.  24. But if an Executor become Non Compos, they may; because it is 36. Mich. a natural Disability. 1 Salk. 299. pl. 11. Mich. 10 W. 3. The 2. Cut QC 5. 7. The Cafe of Hills King v. Raynes. 3. W. 3. in v. Mills 4. cae'td to be agreed. — Where there is a natural Disability, there is a Necessity of doing it, but it must be ad Usum & Commodum of the Executor, so the granting of Administrations because of the Executors being a Bankrupt is a Nullity, & ipso facto void. 12 Mod. 9. Mich. 3 W. & M. Hill v. Mills.

25. Popish Recusant convict made his Wife a Popish Recusant his Executrix, and the Spiritual Court would suffer her to prove the Will, But a Prohibition was granted upon Stat. Eliz. cap. 4. S. 22; [3 Jac. cap. 5.] For she is disabled by the general Clause, and not enabled by the Proviso. 6 Mod. 239. Mich. 3 Ann. B. R. Ride v. Ride.

(U) What Things Executor shall have, and not the Heir.

[Things touching the Realty.]

The Reason is, because an Estate Tail cannot be of a Term. Ibid.

1. If a Devises be of Land to one and his Heirs of his Body for 500 Years, this a Lease for Yeares, and therefore the Executor shall have it. Co. 10. 57. Lovelis's Case.

2. All Leases for Yeares the Executor shall have.

3. The Executors shall not have the Deeds which concern the Inheritance, but the Heir.

By Brian and Jenny the Heir shall have a Cheffe of Charters of his Ancestor, for the Cheffe is of the nature of the Charters, but Billing, Cheffe and Littleton contra, for the Executors shall have them. Br. Charters de terre, pl. 66, cites S. C. and M. 43. 3. 14.

But he shall not have Execution before such time as the Heir has had Scire Facias of the Charters. Br. Executor, pl. 139. cites 19. E. 4. 5. 6.

5. If the Testator recovers in desine for Deeds in a Box, the Executor shall have Execution of this and of Damages and Costs, and not the Heir. 19. E. 4. 6. b. adjudged.

6. But if Testator recovers a Deed in special, the Heir shall have Execution of it and of Damages if the Deed cannot be had. 19. E. 4. 6.

7. If a Cheffe with Charters be inclosed or [ * fastened up sealed or locked ] the Heir shall have the Cheffe, but if it be not inclosed the Executor shall have the Cheffe. 41. E. 3. 2. 14 H. 4. 30.

* Fitzh. Deince, pl. 40. cites S. C. —

† Br. Charters de terre, pl. 13. cites S. G. — S. P. Br. Executors, pl. 97. cites 56 H. 6 26, 27 —

Trefpaß does not lie of a Cheffe with Evidences by the Heir against the Executor of his Father; for they may have the Cheffe and retain it, and deliver the Evidences to the Heir, Quære if the Cheffe be inclosed. Br. Executor, pl. 145. cites 43 E. 3. 24.
8. If a Man delivers a Charter to another, to redeliver to him and his Heirs having no Title to the Land, his Heirs shall not have this Charter but the Executor, because this was but Chattle in him without Land. 9 B. 6. 58. Curia.

9. If a Man be bound to a sole Corporation and Successor, where the Successor cannot take, there the word Successor is void, and his Executor shall have it. 20 C. 4. 2.

10. Executors and Administrators shall have a Rent Charge, Piled and Ward of Body which Testator had for Years, as Allegies in Law. D. 3 & 4 H. 149. 37.

11. The Executor shall have Relief due to the Testator. D. 3 c 4 H. 149. 37.

12. If a Man seizes of a Ward dies, his Executors shall have it. 7 D. 4. 43.

13. In Debt it was agreed that where a Man recovers Land by Real Action or eject Damages and dies, the Heir shall have Execution of Ejectment, and the Land, and the Executor Execution of the Damages. Br. Executors, pl. 32. cites 43 E. 3. 2.

14. In Trespass, it is a good Plea that J. S. was seized of the House and made him Executor, by which he entered and took the Chief in the Declaration. Per Thorpe the first Possession of the Goods and Chief is in the Executor, though Evidences are in the Chief, for they cannot know what is in it, till it be opened, and if Charters are in the Chief the Heir may have thereof an Action of Detinue, but not Trespass, quod Curia Conscitit. Br. Trespasses, pl. 326. cites 43 E. 3. 24.

15. K. seized of Land in Fee made a Lease for Years rendering Rent, and afterwards devise this Rent to a Stranger and dies. The Stranger is seized of the Rent and dies. It was held clearly that the Executors of the Stranger shall have this Rent, and not the Heir, because their Tenant had no more than a Charter. D. 5 b. pl. 1. Mich. 26 H. 8.

16. If a Man be seized of an Advowson in Gross, or in Fee appurtenant unto a Manor, and the Advowson voids, and he dies, his Executor shall present, and not the Heir, because it was a Charter vested and severed from the Manor. F. N. B. 33. (P) in the new Notes there (g) cites 9 H. 6. 53. 4 E. 3. 2. contra. 59 E. 5. 21. contra. 44 E. 3. 2. accordant.

17. Leesee for Life of a Manor seizes an Easement and dies before the Year and Day passes, Executor of Leesee shall have it. Mo. 11. pl. 43. Hill. 4 E. 6. Anon.

18. It Executor lays a Grave-Stone on the Testator in the Church, and sets up his Coat Armour, and the Vicar or Parson removes them, or carries them away, an Affow on the Grave lies for the Executor or the Heir; Per Coke Ch. J. Godb. 200 cites 6 E. 6.

19. A Rent for 20 Years was granted to B. with Clause of Distress, that the Grantee and his Heirs might distress for it during the Term. It was ruled that the Executor should have the Rent and distress for it, and not the Heir. Cro. E. 644. pl. 50. Mich. 40 & 41 Eliz. B. R. Darrel v. Willson.

20. Lease to A. and his Heirs and Assigns during his Life and one Year after. The Executor shall have the said Term after A's Death though the Term was not limited to him; Per Manwood. 2 Le. 6. pl. 7. 16 Eliz. C. B. in Cranmer’s Case.
21. Lease to A. for Life, Remainder for Years to his Heirs; The Remainder is in Abeyance till A's Death, and then it shall vest in the Heir as a Purchaser and as a Chattel, and shall go to the Executor of the Heir, and the Lefece for Life cannot meddle with it, for it is not in him; Per Dyer Ch. J. 3 Le. 23. pl. 49. Hill. 14 Eliz. C. B. in Cranmer's Case.

22. If a Term be devised to one and the Heirs Males of his Body, his Heir shall not have it but his Executors, for a Term is no more than a Chattel, nor can it be intailed, and such Devisee may alien the Term if he will, and so it was adjudged in Peacock's Case, 18 Eliz. B. R. and resolved by Anderton and Walmley 31 Eliz. being referred to them out of Chancery, in Case of Higgins v. Mills, 10 Rep. 87. a. b. in a Nera of the Reporter, at the End of Lovie's Case.

23. The same Person was Heir and Executor, and as Heir and Executor brought a Writ of Error on a Judgment in a Quare Impedit, and the Judgment was reversed, but it was not paid at whose Suit, viz. whether as Heir or Executor. Cro. E. 324. pl. 16. Pach. 36 Eliz. B. R. Pipe v. the Queen.

24. If a Man recovers in Qua. Imp. and dies, the Question is, who shall have the Presentation, whether the Heir or the Executor? Per Windham J. fed nemo respondit. Goldsb. 55. pl. 8. Trin. 39 Eliz.

25. Rent-charge to A. for the Life of B. and half a Year after, payable to A. his Heirs and Executors; If A. dies, living B. the Heirs of A. should have the Rent; But if I grant an Annuity for Life and 20 Years after, there are two several Grants, and the Executor shall have it after the Decease of Tenant for Life. Brown 19. Pach. 17 Jac. Mordant v. Watts.

26. If a Man has a Bond, Statute or Recognizance for Warranty, or enjoying of Lands, or treading or saving harmless from Incumbrances in general or particular, and sells the Land, and besides assigning such Bond &c. by Letter of Attorney to the Vendee, makes the Vendee Executor quoad the Bond &c. the Vendee by this being made Executor is better secured than by the Assignment, because now by being made Executor none but he can release or take Benefit thereof; But Quare if the Vendee, his Executors and Assigns, may be made Executors so as that Security shall go to them one after another without a renewed making of Executors. Went. Off. Ex. 12, 13.

27. Covenant to enjoy Lands of Inheritance free of certain Incumbrances, if broken in Tefeator's Life the Action feems accrued to the Executor, because Tefeator was to recover Damages for the Breach, and he being to those Damages as Principal, and not as Accesary in that Action, the Law has call that Action upon the Executor. Went. Off. Ex. 65.

28. After Corn reaped, and before the Tithe set out, the Inheritor of the Tithe dies; It feems the Executor, and not the Heir, shall have the Tithe after set out. Went. Off. Ex. 60.

29. If one have a Leafc for three Lives to him and his Assigns, this is no Chattle, nor shall go to the Executor nor to the Heir, but to him who first enters and claims it as an Occupant, if no Assignment be in the Life of the Lefece made; Contrarily of a Leafc for many Years if three, or more or less so long live, this is a Chattle and shall go to the Executor. Went. Off. Ex. 54, 55.

30. If a Copyholder makes a Leafc for a Year, this is a Leafc by the Common Law and not customary, and shall be accounted Asters in the Hands of the Executors of the Lefece. Poph. 188. Mich. 2 Car. B. R. Anon.

31. Grantees
31. Grantee of Rent in Fee takes a Lease for Years of the Lands, out of which &c. and dies, the Executor shall have the Land and the Heir cannot have the Rent, per Hutton J. Litt. 59. Mich. 3 Car. C. B. in Cafe of Peyto v. Pemberton.

32. 3000 l. was Articled by the Husband after the Death of his Wife (with whom he had 1500 l. and by whom he had two Daughters) to be secured for the two Daughters, by a Purchase of Lands or Leases of Lands, and paid to them at their Ages of 21 Years or Marriage. The Court was of Opinion that if the Money had been laid s. p. out in Lands pursuant to the Articles, and the Children had died before the time of Payment, the Lands would have gone to the Heir, but being in Money would go to the Father and his Executors and Administrators. N. Ch. R. 36. 14 Car. 1. Wentworth v. Young.

33. Executor of a Mortgage ought to be a Party where the Heirs sue to have the Money paid, or the Mortgage foreclosed. Chan. Cafes 51. Pach. 16 Car. 2. Freak v. Hearley.

34. The Heir of the Mortgage exhibited a Bill to have the Mortgagor redeem, or else be foreclosed. The Defendant demurred because the Executor who might have Title to the Money, was not Party; and the Demurrer allowed. 2 Freem. 180. pl. 245. 12 May 16 Car. 2. FREAK v. Horfley.

35. The Testator lent 1400 l. to one P. and took a Mortgage of Lands to him and his Heirs in Fee, defenclant to pay the said Mortgage Money to him his Executors or Assigns. This Court declared the Mortgage Money belonged to the Executor and not to the Heir. Chan. Rep. 254. 17 Car. 2. Stanley v. Mandelley.

36. Grant of Rent in Fee. Proof that Grantee retain till satisfied of the Profits, the Power of Entry is an Inheritance and Descends to the Heir, but when Entry is made it is but a Chattell Interests in the Land, which shall go with the Arrears to the Executors. 1 Lev. 171. Trin. 17 Car. 2. B. R. Jemor v. Cooly.

of Penalty, and therefore should go to the Executors as Estate till such is done.—1 Sound. 112; S. C. and judgment affirmed in the Exchequer Chamber.—Raym. 125.

37. A. seised of Land in Fee devided that B. whom he made Execut. The Report, should take the Rents and Profits for 15 Years in Trust to pay his Debts, and upon other Trusts and after several particular Legacies, bequeaths all the residue of his Goods and Chattells to B. per Car. the Term in the Deedee and there palled an Interests, and the Overplus of the Term belongs to the Executor. Chan. Cafes 98. Hill. 18 & 19 Car. 2. Gore v. Blake.

Judges were clearly of Opinion that the Overplus of the Rents and Profits after Debts and Legacies pald belonged to B. and that such was the Intent of the Testator and dismissed the Plaintiff's Bill, who claimed as Heir.

38. A. seised in Fee grants a Lease to B. for a Fine of 250 l. who Mortgaged back the Lease to C. for the 250 l. in Trust for A. this is not a Lease to attend the Inheritance, but shall go to the Administrator of A. and not to the Heir. Ch. R. 281. 19 Car. 2. Lord Gorge v. Dillington.

39. If the Condition of a Mortgage be to re-enter upon Payment of the Money to the Executors or Administrators, there without doubt the Heir should not have the Money after Forfeiture, because the Mortgagor looked upon it only as a Chattell; though if the Word Heirs were inferred in the Condition it would be more a Question; by Hale, Ch. B. But he said he took the Law to be the same in both Cafes. Hard. 497. Trin. 19 Car. 2. in Scacc. in Cafe of Pawlett v. the Attorney General.

40. If
40. If a Testator devises all his Mortgages to the Executors, the Executors shall have the Money due upon them and not the Heir though forfeited in Fee. 3 Chan. Rep. 20. 1667. Owen v. White.

41. By the Common Law if the Condition or the Defeasance of a Mortgage of Inheritance be so penned, that no mention is made either of Heirs or Executors to whom the Money should be paid, in that Case the Money ought to go to the Executors in regard the Money came forth out of the Personal Estate, and therefore naturally returns thither again; but if the Defeasance appoints the Money to be paid either to the Heirs or Executors, there by the Common Law, if the Mortgagor pay the Money precisely at the Day, he may elect to pay either to the Heir or Executor. But where the precise Day is past, and the Mortgage forfeited, all Election is gone, for in Law there is no Redemption; then when the Case is reduced to an Equity of Redemption, that Redemption is not to be upon Payment to the Heir or Executor of the Mortgagee at the Election of the Mortgagor, for it were against Equity to revive the Election; for then the Mortgagor might defer the Payment as long as he pleased, and at last force a Composition by Payment of the Money to that hand which will use him best; much less can the Court elect or direct a Payment were they please, for a Power to Arbitrary might be attended with many Inconveniences; there ought therefore to be a certain Rule in these Cases and a better cannot be chosen; then to come as near the Rule and Reason of the Common Law as may be: now the Law always gives the Money to the Executor where no Person is named. And where the Election to pay either Heir or Executor is gone and forfeited in Law, it is all one in Equity, as if neither Heir nor Executor were named, and then Equity ought to follow the Law, and give it to the Executor. For in natural Justice and Equity, the principal Right to the Mortgage is to the Money, and his Right to the Land is only a Security for the Money; wherefore when the Security descends to the Heir of the Mortgagee attended with an Equity of Redemption, as soon as the Mortgagor pays the Money the Land belongs to him, and only the Money to the Mortgagee which is merely Personal, and so accrues to the Executor or Administrator of the Mortgagee; and for this Reason a Mortgage of Inheritance to a Citizen of London hath been held to be part of his Personal Estate, and divided according to the Custom; and though it may seem hard that the Heir should be decreed to make a Reconveyance without having the Money which comes in lieu of the Land, it will not seem so to those who consider that the Land was no more than a Security, and that after Payment of the Money the Law keeps a Truist for the Mortgagor which the Heir of the Mortgagee is bound to execute. And his Lordship declared that the Right to a Sum of Money, which is a personal Duty, ought always to be certain, and not to be variable upon Circumstances; whereas his Lordship did not think it material that the Administrator in this Case had Affiles without this Money; for Affles or not Affles is not the measure of Justice to Executors or Administrators but serves only as a pretence to favour the Heir, who either ought to have the Money if there be no Affles, or not to have it if there be Affles. And for the same Reason his Lordship did not think it material, that there wanted the Circumstance of a Personal Covenant from the Mortgagor to pay the Money; for though the Case of the Administrator of the Mortgagee had been stronger with it, yet it is strong enough without it. And his Lordship declared, that he had considered the various Precedents in this Case which had been urged; whereof one did not come to the very Point; there being a great
great Difference between a Mortgage and an absolute Conveyance, with the revive the collateral Agreement to re-convy upon Repayment of the Purchase Election Money. The other late Precedents, which made for the Heir being of the contrary to the more Ancient Precedents of this Court and to some Modern Precedents also, seemed to his Lordship of no Weight; his Lordship being of Opinion that all Mortgages ought to be looked upon as Part of the Personal Estate, unless the Mortgagee in his Life Time, or by his Will do otherwife declare or dispose of the same; and thereupon his Lordship decreed accordingly. 2 Freem. Rep. 143, 144, 145. pl. 183. 10 July 27 Car. 2. Thornborough v. Baker.

came out of the Personal Estate of the Testator and thither it shall return; But if in the Mortgage neither Heir or Executor is mentioned then after the Death of the Mortgagor the Law determines it to be paid to the Executor. And the Money was decreed to the Executor. — Ibid. 20, pl. 12. 

Trin. 1777 S P. held by Fitzh. C accordingly upon a Demurrer, and cites Littleton's Reason. 1 Inst. 200, b. because the Money went out of the Mortgagee's Personal Estate and thither it shall return. And his Lordship took this further Rule that if the Money be limited to be paid to the Mortgagee, his Heirs or Executors at such a Day, there if the Mortgagor dies before the Day the Party has his Election, if he pays it at the Day; But if he does not pay it at the Day, then it is expressly limited to No-body, and this Court gives it Cordially upon that reason to the Executors, Overton v. Overton.

42. Executor of Issue in Tail of a Term, shall have the Term and Limitation not the Remainder-man. 2 Chan. Cases 210. Mich. 27 Car. 2. War. of a Term to the Heirs Males is void and shall go to the Executors, Ch. R. 11, in Case of Lydias v. Vanlore — It being a Limitation by way of Estate and Interest, and not by way of Trust. Ibid. — Though a long Lease be alligned in Trust for J. S. and his Heirs, yet it shall go to his Executors, Agreed. 3 Ch. R. 562. — N. Ch. R. 133.

43. Where upon a Mortgage Payment is made to be to the Heirs Exec. &c. If the Money had been paid at the Day of Payment to the Heir, there it was well to the Heir. But if it were not paid at the Day then it should return to the Personal Estate whence it came, and Crane, all Mortgages pertain to the Personal Estate though made in Fee. 2 Contra, Chan. Cases 221. Mich. 28 Car. 2. Noy v. Ellis.

44. Lands settled in Fee on Trust to sell so much as Trustees should think fit, for payment of Debts and Legacies, and the Surplus to his Daughter B. and her Executors. Quere ist. If the Trustees can sell more than is sufficient? 2dly, The Daughter being dead without Issue, whether the Lands belong to her Administrator or Heir? See Chan. Cases 280. Trin. 28 Car. 2. the Arguments in the Case of Popham v. Sir John Hobert.

45. Though the Mortgagors would not Redeem, yet the Land was Fin R. 305. Decreed to the Executors against the Heir. Vern. 413, in pl. 389. Car. 2. S C. cited as the Case of Noy v. Ellis.

there that Mortgagor refused to Redeem, but that it was forfeited and enjoyed by Mortgagee, yet Decreed to be Personal Estate and to go to the Administrator. — 2 Ch. Cases 220. Mich. 28 Car. 2. S C. decreed accordingly, notwithstanding the following Objections, viz. 1st. That the Condition was to pay to the Heirs. — S P. though there were no Debts. Arg. 2 Vern. 193, cites it as the Case of Wood and Thornborough v. Norworthy.

46. Articles were for a Purchase, and 600 l. paid, but Interest was paid for it by the Seller till the Conveyance executed; and the Purchasor paid Rent for the Premisses. Contractor dies before the Conveyance made; the Executor shall have the 600 l. as Part of the Purchasor's Personal. 2 Chan. Rep. 138. 30 Car. 2. Cotton v. Cotton.
47. A Rent-Charge in Fee subject to a Redemption was devised; The Mortgage Money is paid; Decreed the Administrator of Devisee to have it, and not the Heir. 2 Chan. Rep. 166. 31 Car. 2. Stewkley v. Henley.

N. B. The Devise of all his Personal Estate (as above) was void, because it was to his Executor, and he named none, and N. B. The mortgaged Lands were in the Testator’s Possession.


The Money due on the mortgaged Lands shall go to the Administrator, though the Devise was to J. S. of all his Lands as above. 2 Chancery Cales. 51. Patch. 33 Car. 2. Winn v. Littleton.


50. Where Lands are mortgaged for Payment of Money, though the Mortgage be in Fee-Simple, and though the Money be made Payable to Mortgagee and his Heirs, yet the Money is always accounted Part of the Personal Estate, and shall go to Executors or Administrators when ever redeemed, and not to the Heir. 2 Chan. Cales 52. Patch. 33 Car. 2. Borough v. Wynn v. Littleton.

51. Where a Mortgagor dies and makes no Devise of the Lands he has in Mortgage they shall go to the Executor; Per Finch. C. Vern. 4. Patch. 33 Car. 2. Winn v. Littleton.

52. Mortgagor in Fee of Copyhold after Failure of Payment was admitted Tenant and died seised, and her Heir was admitted and died seised; Decreed that the next Heir of the Mortgagee (there being no Debts owing) should have the mortgaged Premises, and not the Administrator of the Mortgagee. 2 Chan. Rep. 242. 34 Car. 2. Turner v. Crane.

Because here was no Grant of a Rent, but only a bare Agreement, and so had Election either to pay it or forfeit his Bond. Ibid.

53. Bond given by one Parcellor to pay the other his Executors or Administrators an annual Sum during the Life of J. S. for Owelty of Partition shall go to the Executors and not to the Heir. Vern. 133. Hill. 1652. Huibert v. Hart.

2 Vern. 193.—Per Jeffries C. If the Trustees had come here and got a Decree for the Purchase, this Court would have maintained its own Decree, Vern. 456. Winchelsea v. Norcliff. 2 Chan. Rep. 567. 577. S. C & S. P. decreed accordingly, with the Affiance of the Judges.—2 Frem. Rep. 95. pl. 105. S. C. lays, that as to this Point the Court was doubtful, but seems to incline that it should go to the Heir, and not return to the Personal Estate, there appearing no Fraud in the Trustees.

55. The Executor of a Mortgagee in Fee shall have the Benefit of such Mortgage, viz. the Land, and not the Heir, though the Land be defended to him. 2 Chan. Cases. Mich. 2 Jac. 2. Canning v. Hicks.

56. The Question was between the Heir and Executor of a Freeman of London which of them had the Right to a Caroone, viz. the Benefit of a Licence from the Lord Mayor and Aldermen for the keeping of a Cart. Defendant pleaded that the Licence was a Term for Years, and a Personally, and therefore belonged to him as Executor. But the Court over-ruled the Plea, and ordered to answer the Bill. Mich. 1688. Per Jefferies C. 2 Vern. 83. Hunt v. Hunt.

57. A Mortgage in Fee was forfeited, and afterwards the Mortgagee died. Decreed, that if there are not Assets sufficient to pay the Trustator's Debts and Legacies it shall go to the Executors, but where there is a Personal Estate sufficient for the Purposes aforesaid, it shall go to the Heir. Nelf. Ch. Rep. 162. Hill. 1 Will. 3. Anon.

58. Committees of a Lunatick invest Part of his Personal Estate in a Purchase of Lands in Fee; it shall be deemed as Personal Estate, and decreed an Account, and the Land to be sold, and to be divided as Personal Estate among the next of Kin. 2 Vern. 192. Mich. 1690. Awdly v. Audly.

shall have the Benefit of the Purchase and not the Heir, because it shall not be in the Power of a Guardian or Trustee to change the Nature of the Estate from a Personal into a Real Estate of Inheritance.—2 Frem. Rep. 114. pl. 126. Mich. 1690. S. P. held accordingly.

59. F. had a Mortgage in Fee which was forfeited, and devised all his Mortgages to T, whom he made Executor. T. proves the Will and dies intestate. W. R. takes out Administration de Bonis Non to F. and also Administration to T. and brought his Bill against the Mortgagor. The Heir at Law of F. and T. had bought in the Equity of Redemption. Though there was no Defect of Assets either of F. or T. without this Mortgage, yet the Mortgage shall go to the Executor; But Lt. Commissioner Trevor said, that if the Mortgagees had been in Possession and died so, he would not have taken the Mortgage from the Heir there being no Defect of Assets. Chan. Prec. 11. pl. 9. Trin. 1690. Fisk v. Fisk.

60. A Copyhold is granted to three Successively, but no Custom proved A Copyhold that the first Taker had the Power to dispose of the whole, nor that the Estate was granted to A. for the Executor of the first Taker, but shall go in Succession. 2 Vern. R. 264. Life of A. PaCh. 1692. Rundle v. Rundle.


61. A,
Executors.

61. A has Issue two Sons, B. and C. and two Daughters, M. and N. and by Will devised to M. and N. 550 l. apiece, and ordered that it should be laid out in a Purchase of Lands by his Executors within a Year after his Decease, to the Use of M. and N. and the Heirs of their two Bodies, and if either die before Marriage, then 150 l. Part of the Portion of her so dying, or if the 1100 l. should be laid out in Land, then so much Land as should be of the Value of 150 l. should go to the Survivor, and the remaining 400 l. or Land of that Value if the Purchase be made, should go to his two Sons, equally to be divided between them and their Heirs. M. died unmarried. N. survived and married J. S. The Sons died without Issue, and afterwards N. died without Issue. The Money was not laid out in Land, but the Heir at Law claimed the whole 1100 l. as Land, because it had been laid out the Land would have descended to him. But decreed the 550 l. and 150 l. to the Husband the Administrator of N. 2 Vern. 284. Hill. 1692. Abbot v. Lee and Cuthbert.

62. An Estate pur auter Vie though for Lives, whether Freehold or Copyhold, or an Office, shall go to the Executors or Administrators, and it had been so adjudged as to a Prothomacry's Office, and the Cases of Chyune and Strempfield, Clark and Davids, How and How were cited, per Cur. 2 Vern. 265. pl. 249. Pach. 1692. Rundle v. Rundle.

63. Upon an Appeal from the Rolls the Case was, that a Mortgage was made of a Copyhold Estate by a Surrender thereof to one M. P. who was admitted Tenant, and died in 1690. T. P. her Son and Heir and Executor entered, and was also admitted, and by his Will, but without any Surrender to the Use of his Will, devised to the Plaintiff, who was also Administrator de Bonis non to M. P. The Defendant was Heir at Law both to M. and T. P. and would have this to be taken as a Real Estate being so long since forfeited, and two Deseants caft, and more due than the Value of the Estate, and the Mortgagors by Answer refusing to redeem, and submitting to be foreclosed, and the Devise of T. P. to the Plaintiff void at Law for want of a Surrender to the Use of the Will. But decreed at the Rolls to the Plaintiff as Administrator de Bonis non to M. P. and the Decree was affirmed upon the Appeal, there being no Foreclosure nor Release of the Equity of Redemption. 2 Vern. 367. pl. 329. Mich. 1699. Tabor v. Grover.

64. Where Lands are devised to the Executors to be sold for several Purposes, and the Surplus is expressly devised to them, there can be no resulting Trust for the Benefit of the Heir. Chan. Prec. 94. pl. 83. Pach. 1699. Dormer v. Bertie.

65. Mortgagor released to the Heir of Mortgagee in Fee, the Mortgage being forfeited. The Administrator shall have the Benefit of that Estate though there are no Debts; Arg. 2 Vern. R. 193. pl. 175. Mich. 1690. in Case of Audley v. Audley.

66. If a Mortgage be foreclosed, or that the Mortgage be of so ancient a Date as in the ordinary Course of the Court it is not redeemable, yet if the Mortgagée be not actually in Possession it shall be looked upon to be a Personal Estate; Arg. 2 Vern. R. 193. pl. 175. Mich. 1690. in Case of Audley v. Audley.

67. A devised his Lands to Trustees and their Heirs to divide the Profits equally between B. his Wife, and C. his Daughter during the Wife's Life, and after the Daughter in Tail, Remainder over. The Daughter dies. This is a Tenancy in common between Mother and Daughter, and during the Mother's Life the Daughter's Moiety neither descended or relapsed to the Heir, but was an Interest undisposed of, and
in the Nature of a Tenancy pur auxier Vice, and belonged to the Daugh-
9. S. C. the
ter's Administrator; Per the Justices of C. B. and decreed according-

were Jointtenants, and that all survived to B. Upon Appeal Ld. C. Sommers held, that B. and C. were Tenants in Common, and that C's Eftate determining by her Death, the Remainder-man or Re-

To the Right to that Moity. But Ld. K. Wright, in a Re-

hearing, was of Opinion, that an Eftate by Implication did arise to B. in C's Moity, after C's Death. On a Reference to the Court of C. B. they conceived that B. and C. were Tenants in Common, and that C. had an Eftate pur auxier Vice, which on the Statute of Frauds (which takes away Occupancy) ought to go to C's Administrator, viz: to B. the Mother, and that C. had not an Eftate Tail in the Trufh, for that Mergers are odious in Equity, and never allowed unles for Special Reasons.

68. A. dies intestate leaving a Wife and two Daughters. After his Deceafe 400 l. is found bid. The Widow laid out this Money in Land, and fettles it to herfelf for Life, Remainder to her two Daugh-
ters in Tail, Remainder to her own right Heirs. The Administrators

proved that the fame 400 l. was invested in this Purchase. Master of the Rolls decreed for the Administrators against the Heir at Law of the Widow, but Wright K. reversed it, this being within the Re-

son of Little D. Webb, lately affirmed in Parliament, that Money had an Ear Mark and could not be followed when invested in a Purchase.


69. The Mother as Guardian to her Son receives Rents, and with the Money paid off Bond-Debts, but took Affiignment of the Bonds. Webb.
The Son died an Infant without Issue. The Mother brought her Bill

against the Heir to recover Affiets by Defecut to fatisfy the Money due by Bond, the claiming the Rents and Profits as Administratrix to her Son. Per Cur. the Guardian is not compellable to produce the Profits of the Eftate defcended on the Infant Heir to pay off the Bond-


70. An Annuity is the only Perfonal Intereft that can be thought of which is deceeded to the Heir; Arg. 10 Mod. 237. Paich. 13 Ann.
in Cafe of Roper v. Radeliffe.

71. Devife of Lands to an Executor in Truf, and to the Intent that the fame, or so much thereof as fhould be needful, fhall be hold for Pay-

ment of Debts and Legacies. This is a beneficial Legacy to the Execu-
tor, and not a fulting Truf to the Heir, and parol Evidence be-


71. A Term conveyed as a Fee by Leafe and Release to J. S. and his Heirs by the Word Grant &c. though it cannot operate as a Fee to go to the Heirs of J. S. yet fhall go to his Executors and Administrators; Per Ld. Cowper. Chan. Prec. 480. Hill. 1717. Marshall v. Frank.

72. An Executor has not the fame Right to the Perfonal Eftate as the Heir at Law has to the Lands, because an Executor is no more than a Trustee made by the Tenant, but an Heir is to fit in the Seat of his Ancestors; Per Cur. 8 Mod. 126. Paich 9 Geo. Goodright v. Opie.

Where the Father is bound to his eldest

Son and dies, the Affets


73. A Question was, Whether Law Manuscripts are Part of the Perfonal Eftate, or fhall go to the Heir? But the Court decided noth-
ing in this Affair, because all conented to have them Printed under

the Direction of the Court, without making any Profit of them. 10 Mod. 520. Mich. 10 Geo. Atcherley v. Vernon.

R 74. A
74. A Granary built on Pillars in Hampshire is a Chattle, and goes to the Executors, and may be recovered in Trover. This shall be understood according to the Custom of the County; Coram Eyre Ch. B. Summer Alizes, 1724. apud Winchelser.

75. One devises Lands to Trustees in Fee in Trust to apply the Profits until Sale for the Benefit of his four Children, and the Survivors, and Survivor of them equally; and on further Trust, that as soon as the Trustees shall see necessary, for the Benefit of the Children, they should fill the Premises, and apply the Money for the Benefit of his four Children, equally to be paid at 21 or Marriage. A the eldest of the four Children attained 21 and married, and died without Issue Intestate, leaving a Wife, Decreed, the Land being in all Events devised to be sold, though the Time for Sale was left to the Executors, was Personal Estate, and A's Widow must have a Majority of A's Share, and the Profits of the Land until Sale must go as the Money arising upon Sale would: 2 Wms's Rep. 320. pl 92. Hilb. 1725. Doughty v. Bull.

76. Mr. Savil of Midley, in the County of York, settles Lands of 4000l. per Ann. upon his Marriage with Mrs. Banks, upon the first and every other Son of that Marriage in Tail successively, as usual in Marriage Settlements, and dies, leaving Issue one Son and one Daughter, both Infants, and their Mother their Guardian. The Son about the Age of 20 Years fell into a Contumacy, and about five Months after was given over by his Physicians as past Hopes of Recovery, and not likely to live to the Age of 21 Years. The Defendant his Mother and Guardian, about two Months before his Death, which happened at his Age of 20 Years and 7 Months, gives Order for selling a great Quantity of Timber without her Son's Privity or Consent, and in that Space did fell Timber to the Value of 5000l. or 6000l. in an improper Season of the Year, and in a wasteful Manner, in order to increase her Son's Personal Estate, which was divided at his Death between her and her Daughter, as next a-kin by the Statute of Distributions. The Bill was brought by Plaintiff as next in Remainder against the Defendant Mrs. Savill and her Daughter, to have an Account and Satisfaction for the Money raised by the Sale of this Timber upon the Foot of Fraud, that the Mother sold this Timber without the Privity and Consent of her Son in Prejudice to the Remainderman and his Inheritance, King C. was of Opinion there was no Relief in Equity in this Case; for this was a Court of Equity, but not of Honour, that the Infant being Tenant in Tail had a Right to the Timber growing upon his Inheritance, and when fevered from the Soil became a Chattle Interest in him, and consequently would go to his Representatives, and the selling the Trees without his Order or Direction makes no Alteration in the Case, be it done by a Tort-feasor or Trepassor, or by Tenant in Tail himself, the Law is the same. Bill dismissed quod hoc. MS. Rep. July 8. 1727. Savil. v. Savil.

77. Petition by Sir R. Raymond Ch. J. and Edward Ventris, Esq. Administrator with the Will annexed of the late Ld. Ch. J. Holt, and Trustees appointed by the Court to execute the Trusts of the Will, the Executors and Trustees appointed by the Will having renounced the Trust, for the Directions of the Court upon this Case. By the Decree the Residue of the Teitator's Personal Estate was to be laid out in the Purchase of Land, to be settled according to the Directions in the Will, and until proper Purchases could be made, the Money was to be put out in Government or other Securities with the Approbation of the Master, and the Interest of the Money was to be paid to the Trustees, to be accounted for by them to such Persons as should successively be intituled to the Rents of the Lands when purchased according to the Will &c. Part
Executors.

Part of the Trust-Money was invested in South-Sea Annuities. Mr. John Holt being Tenant for Life (with Remainder to his Brother Mr. Rowland Holt) died 2d January 1728. Lady Jane Holt his Widow and Administratrix claims an Apportionment of the half Year's Dividend or Annuity due, and paid at the Lady-Day next after her Husband's Death as Interest due to him at the Day of his Death. On the other Hand Mr. Rowland Holt, as next in Remainder inherits, that in Regard his Brother Mr. John Holt the Tenant for Life died before Lady-Day 1729, when the half Year's Dividend or Annuity became due and payable, that he as next in Remainder is intitled to the whole Dividend, as he would have been to the whole half Year's Rent if the Money had been laid out in Land. It was ordered, that the said half Year's Dividend should be apportioned by the Trustees, and that so much thereof as by Computation was due to Mr. John Holt at the Day of his Death should be paid to Lady Jane his Administratrix, and the Residue to Mr. Rowland Holt the next in Remainder, for that these Annuities are in the Nature of Interest, which though payable but half Yearly, as Interest is often referred on Mortgages and other Securities, yet where Interest is given for Life it is always computed to the Day of the Death of the Tenant for Life, or to the Day of paying off the Principal.

But as to another Claim of Lady Jane Holt as Administratrix to her Husband, as to the growing Interest of 6000l. S.S. Annuities, which were sold by the Trustees 12th August 1727, in order to raise Money for a Purchase from the Lady-Day next before such Sale, the Court was of Opinion that she was not intitled to any Allowance for Interest of that Sum, though the Trustees having purchased the same in the Middle of the half Year when three Months Interest had incurred upon them, and Mr. John Holt had made an Allowance for so much Interest as was incurred at the Time of the Purchase out of his Estate for Life, and the Sums so deducted by the Trustees out of the next Dividend was added to the principal Trust-Money, yet the Court would not make her any Allowance for the Interest incurred from Lady-Day 1727, to August 12 following when the Annuities were sold, because they being sold to make a Purchase of Land, Mr. John Holt the Tenant for Life would be intitled to the growing half Year's Rent at Michaelmas in Lieu of Interest, and ought not to have both; Per Jekyll Matter of the Rolls. MS. Rep. Hill. Vac. 3 Geo. 2. at the Rolls, ex parte Raymond Ch. J. and Mr. Ventris.

78. One poottie3 of a Term for Years devised it to A. for Life, Remainder to the Heirs of A. It seems that this shall, on A's Death, go to his Executor, and not to his Heir. 3 Wms's Rep. 29. Hill. Vac. 1729. Davis v. Gibbs.

79. An Executor in Trust for an Infant of a Lease for 99 Years determinable on three Lives, on the Lord's refusing to renew but for Lives absolutely, complies with the Lord, and changes the Years into Lives. On the Infant's dying under 21 and Intestate, this shall be a Trust for his Administrator, and not for his Heir. 3 Wms’s Rep. 99. Hill. Vac. 1730. Witter v. Witter.

80. A Devise in the following Words, As to my temporal Estate I bequeath to my Nephew T. (the Teitator's Heir as Law) 50 l. then after several Legacies I give, and all the rest and Residue of my Estate, Goods and Chattels whatsoever, I give and bequeath to my loving Wife M. C. whom I make my full and sole Executrix. This is a Devise of the Fee-simple Estate of the Teitator. Cafes in Equ. in Ed. Talbot's Time 294. Trin. 7 Geo. 2. Tanner v. Morfe.

81. The Teitator T. M. by his last Will devised as follows; Imprimis, I devise, give and bequeath all and singular my Messuages, Lands and Hereditaments whatsoever, and wheresoever, in the Counties of Norfolk, Suffolk and Cambridge, unto my Sister E. M. and to

her
Executors.

her Heirs and Assigns for ever upon Trust, that the same shall be sold by her or them, for the best Price that can be gotten for the same, as soon as conveniently can be after my Decease; and that out of the Monies arising therefrom, all my just Debts, of what Kind forever, be paid; and after Payment of my Debts I devise, out of the Remainder of Money, the Sum of 500 l. to my Sister Mary Bambrigg, and also 500 l. to my Sister Girl’s Children that shall be living at the Time of my Decease, to be divided equally between them; and also 500 l. to my Nephew Nicholas Mallabar his Heir at Law; and also 500 l. to be divided amongst the Children of my late Brother James Mallabar, which shall be living at my Decease. Item, after my Debts and Legacies paid as aforesaid, and subject to the same, I give and bequeath all the rest and Residue of my Personal Estate unto my Sister E. M. whom I do hereby constitute and appoint sole Executrix of this my last Will and Testament. The Plaintiff’s Counsel insisted, that here could be no resulting Trust for the Heir; first, Because the Testator had given a Legacy of 500 l. to the Heir, 2dly, Because the Testator had directed his Real Estate to be sold for Payment of his Debts and Legacies, and had therefore considered it as a Personal Estate, and after Payment of his Debts and Legacies, and subject to the same, had given all the rest and Residue of his Personal Estate to his Executrix the Plaintiff; but if it should be construed to be a resulting Trust for the Heir, the Testator’s Intent would be utterly defeated; for then the Personal Estate must be applied in Sale of the Real, and so the Executrix would have but a troublesome Affair, without any Benefit or Consideration, which could never be the Testator’s Intent; and in order to shew clearly that was the Testator’s Intent, it was intimated upon giving Parol Evidence, Ld. Chancellor declared, that upon the Will itself, independently of the Parol Evidence, here was no resulting Trust for the Heir, and that the Executrix should have the whole Residue, after the Sale of the Estate, both of the Money arising by such Sale, and of the Personal Estate. Cases in Equ. in Ld. Talbot’s Time, 79, 80. Pauch. 1735. Mallabar v. Mallabar.

(X) What Things they shall have as Assignee.

1. If Devisee be of a Legacy to one and his Assignee, and Devisee dies before Payment, the Administrator shall have it as Assignee. Will. 14 Jac. B. R. per Curt.

2. If the Condition of an Obligation be, that if the Obligor pay 20 l. to such a Person as the Obligee by his last Will in Writing shall appoint, it to be paid, then the Obligation to be void; if the Obligee appoints no Person to whom it shall be paid, but makes his last Will, and makes Executors thereby, yet the 20 l. shall not be paid to the Executors; for here it appears that this was to have been paid to an Assignee in Deed to be made by the Obligee by his Appointment, and not to an Assignee in Law. Hob. 14. per Curtinam, Pears against Stileman.

3. If a Man be bound to deliver a true Rentall &c. to J. N. or his Assignee at the End of 20 Years, and he makes an Executor and dies before
before the End of 20 Years, there the Obligor is bound to deliver a
true Rentall to the Executor; for he is Assignee in Law; Quod No-
ra; Per Englefield, Shelley and Willoughby, Br. Deputy, pl. 1. 
cites 27 H. 8. 2.
4. A made a Leafe to B. for Life by Indenture, in which was a Provi-
so, that if the Lefsee died before the End of 60 Years then next ensuing, 
that his Executor should have and enjoy, as in the Right and Title of the 
Lefsee, for Term of so many of the Years as amounted to the whole Num-
ber of 60, so that the Commencement of the said 60 shall be account-
ed from the Date of the said Indenture. The Lefsee made two Exe-
cutors and died. One of them entered into the Land. And the Opin-
ion of the Court was, that no Leafe for Years was made by this Pro-
viso in the Lefsee, nor by Remainder in his Executor, because noth-
ing of the said Term was limited to the Lefsee for Life as Remain-
der to him and his Executors.
5. A Leafe for Years was made thus, viz. This Indenture between T. 
of the one Part, and F. his Wife and their Children lawfully begotten at the 
Assignement of the said F. of the other Part. The Question was, it Lucy the 
Daughter which the Husband and Wife had at that Time, was a Party to 
this Indenture, and fo took the Term? Or if another Son of F. whom 
he afterwards made Executor, should have it? Wray J. conceived that 
by these Words, viz. (at the Assignement of F.) he had reserved a Li-
iberty to make his Son a Party, and because he had not assigned him, that he 
took nothing. The Opinion of the whole Court was, that the 
Defendant who claimed by the Executor should have the Term, and not the 
Plaintiff who claimed by the Daughter; and Judgment accordingly.
4 Le. 64. pl. 158. Trin. 27 Eliz. B. R. Trecarram v. Friendship.
6. One was bound to stand to the Award of two Arbitrators, who 
a
eaward that the Party shall pay unto a Stranger, or his Assigns, 200 l. be-
fore such a Day. The Stranger before the Day dies, and B. takes Letters 
of Administration. It was the Opinion of the whole Court, that the 
Money should be paid to the Administrator, for he is Assignee; And 
by Gawdy J. if the Word (Assignee) had been left out, yet the Pay-
ment ought to be made to the Administrator; Quod Coke affirmavit.
Le. 316. pl. 443. Pach 30 Eliz. B. R. Anon.
7. In Trover where the Defendant justified, for that one J. W. Nov 46. 
was seised in Fee of Land in D. and granted a Rent-Charge during the S. C. ad-
judged. — 
Life of M. Wife of A. which A. died Intestate, and M. was his Adminis-
tratrix, and the Defendant as Servant took a Distrefs in the said Land 
for the said Rent by command of M. and impounded them there, S. C. ad-
judged. —
and traverses the Taking in any other Place; it was held ill upon De-
mur; For the Inducement is not sufficient Cause of Justification for 
Yclv. 9
S. C. judg-
ed.
8. An Administrator cannot take by the Word Assigns, as an Af-
Signee, because he comes in by the Ordinary who is a Stranger, but it 
is otherwise of an Executor, for he comes in by the Act of the Party; 
and to a Husband comes in for his Wife. Per three Justices. Ow. 125. 
9. Executor of Lefsee for Years is not in as Assignee, and therefore 
Debt brought against him tor the Rent, it he pleads that he refu
sed the Term, Judgment will be against him; whereas if he was in as Af-
Signee he might avoid and waive the Term, but here he is in in Privity

10. If A. Covenants to make a Lease to J. S. and his Assigns by Christmas, and J. S. dies before that Time, and before the Lease made. The Lease must be made to his Executors, as his Assigns representing his Person. Went. Off. Ex. 100.

11. Condition to pay Feoffor or his Assignee; The Payment must be made to the Executor. Went. Off. Ex. 100.

12. Lease to A. and his Assigns during the Life of B. shall not go to the Executors of A. Went. Off. Ex. 100.

13. Grant of the Custody of an Ideot passes an Interest to the Executor of the Grantee. For the King has the same Interest in an Ideot that he had in his Ward, which always went to the Executor of the Grantee; but it was otherwise of a Lunatick. 3 Mod. 43. Pasch. 36 Car. 2. B. R. Prodgers v. Frazier.

14. Upon a Fine the Use of Lands was limited to A. for 80 Years, with a Power to A. and his Assigns to make Leases for three Lives, to commence after the Determination of the said Term. A. assigns over to B. B. and makes C. his Executor, who assigns over to D. who made the Lease for Life, which was the Estate in Question. And the Question was, Whether or no D. was such an Assignee of A. as had Power to make this Lease, or whether it should extend only to the immediate Assignees of A. And the Doubt in this Case was the greater, because here was a Defendant upon an Executor, who made the Estate over to him who made the Lease; And the Case in Hob. 11. Peake v. Gregory was cited, where an Executor or an Administrator in some Cases shall not be laid to be a special Assignee. But all the Court seemed to incline to the Contrary; and that D. shall be said an Assignee well enough to this Purpose, and so shall any Person that comes to the Estate under the said Leases, though there be 20 mean Assignments. And afterwards in Michaelmas Term following Judgment was given accordingly, Freem. Rep. 476, 477. Trin. 1679. pl. 654. How v. Whitebank.

15. Lettor covenants to build a new House for Leflee and his Assigns; Executor is Assignee. Lat. 261. Hill. 3 Car. Iremonger v. Newnham.

16. Where a Person intitled to a Share of Intestate's Estate dies before Distribution, and within the Year, there is an Intestit Veiled, and his Share shall go to his Executor or Administrator. Per Cur. Vern. 403. Trin. 2 Jac. 2. in Case of E. of Winchelsea v. Northcliff.

17. Administrator of Assignee of a Term was laid as Assignee, and not as Administrator of Assignee of Leflee and held good. Carth. 519. Pasch. 12 W. 3. B. R. Tilney v. Norris.

18. Defendant did covenant to serve the Plaintiff's Testator and his Assigns for eight Years, and the Question was, Whether the Plaintiff as Executor was an Assignee in Law? For by the Agreement it is not fix'd to the Person of the Testator, for if it were the Executor should have it, and it would be Assets in his Hands. See Plowd. 287. b. 288. a. And it was said, That if the Executor did set up such a Trade
as the Servant was to be employ'd in by the Covinent, it ought not
to determine by Death of Covenantee. Secur it were hard to transfer
the Servant to another Service, and so it was said it would be in Case
of an Apprentice, and here it being aver'd the Plaintiff used the same
Trade in which the Defendant had covenanted to serve, he had Judg-

(Y) What Things shall go to the Executor or Administrator.

[In respect of the Limitation.]

1. If a Man possessed of a Leafe for Years devises the Benefit of
it to A. his Wife for six Years, and that J. my Son if he pl. 21.
come home shall have the Residue of the Term, and if he do not then
come home within six Years, then W. my Son shall have it until J. S. C.
does come home, and dies, and after W. dies within the six Years,
and after J. does not come within the six Years. Though this was
but a Possibility to have the Term, or' licer, If J. does not come
within the Years, and W. dies before that Possibility happens,
the Executor shall have it. For this was a Possibility fixed in
the Testator, and only to be perfected by the Act of God, without
any Act of the Parties. For this is not like to a Leafe to be
named by J. S. For there is not any Possibility before the nam-
ing. Adjudged upon a Special Verdict. Pra. 16 Jac. B. R.
Skeene's v. Wrotham.

2. So if a Termor devises his Term to one, and the Heirs Males
of his Body, and that he dies without Issue Male to J. S. and J. S.
dies in the Life of the first Devisee, yet the Possibility that he had
to have the Term by the Devise shall go to his Executor for the

the Heirs of his Body. C. died, living B. and R. died. The Court held that the Executor of C.
could not enter; because C. had only a Possibility and no Interest, Mo. 521. pl. 1118. Trin. to
made his Wife Executor, and devised all his Term and Interest to her, and that if she died before
the Term ended it should remain to C. his Son, and the Heirs Male of his Body. C. died. The
Wife enured and claim'd as Legatee, and adjourn'd the Term over. The Executor of C. entered;
but agreed that his Entry was not lawful; for C. had only a Possibility, but no Interest, and the
whole Term was in the Wife —— built 191. S. C. And ibid. 194. per tot Cur. The Executor
of C. should not have this Possibility in regard that C. who had the Remainder died before the same
happened, and was attached in him; and Judgment accordingly —— S. C. cited Co. J. 510. in
Cale of Sheriff v. Wrotham, as adjudged that in such a Possibility of a Term shall not go to an Exe-
cutor or Administrator, but the Court held it not to be Law, but conceived the Revolution in Lam-
pet's Case, 10 Rep. 51. to be good Law in this Point. —— Sid. 188. in a Note at the End of the
Cale of Cookes v. Bellamy says, that S. C. was cited as adjudged, that by the Death of him in
Remainder living the Tenant for Life the Remainder is destroyed, it being contingent, and that in
this Case Twilson J. said, that Lampet's Case Co. 10. was denied.

3. A Man leases Land to another for 80 Years if he so long An Admi-
litator shall not
have a Term for 21 Years. For the Administrator is within the Intent
of Purchase
of the Grant. Tr. 43. El. B. R. between Spark and Spark, admitted.

4. If a Leesee for Years of a Smith's Shop assigns it to B. and covenants with B. not to sell Wheels for Coaches to the prejudice of A. or his Assignes, and after A. dies, and Administration is granted to his Wife who continues the Trade in the Shop, if B. after assigns Wheels for Coaches to the prejudice of the Administrator he breaks his Covenant, for the Administrator is an Assignee to have Benefit of this Covenant. Mich. 9 Car. B. R. adjudged upon a Demurrer. Hill v. Heroes. Intracuti Tr. 9 Car. Rot. 1394.

7. Where a Sum of Money is bequeathed to J. S. to be paid when he is at the Age of 21 Years, and he dies before the time his Executors shall have the Legacy, and shall sue for it presently and not expect to the time when the Infant, had he continued alive, should have been 21. And Dr. Awbrey who came into Court to inform the Justices what the Civil Law was, declared it to be so. Le. 278. in pl. 376. Hill. 26 Eliz. B. R. in Lady Lodge's Cafe.

8. A. devised Lands to his Wife for Life, then to B. his Son and his Heirs when he comes to 24, and if his Wife dies before B. attains 24, then J. S. should have it till the said Age of B. A. died. J. S. died. His Wife died. B. was within 24. Per two Justices the Executor of J. S. shall not have the Land till the Age of B. because but a possibility which never vested in J. S. 3 Le. 195. pl. 244. Hill. 29 Eliz. C. B. Anon.

9. G. devised a House to R. and J. for the Term of 21 Years to commence after the Death of M. and if R. and J. die in her Life-time, or afterwards, and before the Term of 21 Years expired, he devised the Residue of the said Term to K. in the same manner as he had devised it before to R. and J., and immediately after the Death of M. and the Expiration of the said 21 Years of R. and J., or of K. if she survive, that the said Messuage should be and remain to W. R. The said R. and J. died within the 21 Years, K. survived, but died, before the 21 Years expired, Intestate; The Question was, if her Administrator shall have the Residue of the Term of 21 Years. The Court agreed that the Term determined by her Death, for the could not have it during the Lives of R. and J. and she could not have it for 21 Years absolutely,
ly, because it was devised to her in the same Manner as to R. and J. and that was, if they so long live, and so Katherine was to have it if she should so long live. 2 And. 17. pl. 11. Henning v. Blake.


11. A Man feied of Wood granted 100 Cords of Wood to be taken by the Assignment of Granter. By the better Opinion no property was vested in the Grantee before the Affignment, and if the Granter dies before Assignment the Grant is void, and his Executors if he dies shall not have it. Goldsb. 184. pl. 123. Hill. 43 Eliz. Anon.

12. If a Man Covenants to stand seised to the Use of himself for Life, the Remainder to the Use of his Executors, in that Case the Executors shall take to the Use of their Testator; But if a Man Covenants upon good consideration to stand seised to the Use of the Executors of a Stranger, the word Executors is a word of Purchase, and they shall take to their own Use. 4 Le. 239. pl. 387. The Opinion of Popham. Ch. J. in B. R. Mich. 6 Jac. Anon.

13. Bond by A. to B. — Condition to pay 10 l. to such as B. should name by his Will. B. made a Will and Executors, but named no certain Person to take the 10 l. The Executors shall not have the 10 l. Godsb. 192. pl. 274. Trin. to Jac. C. B. Mead's Case.

B died before his Apprenticeship was out, the Executors shall not have the Money, the Bond had been to pay 20 l. after the Expiration of ten Years, Adjudged. Godsb. 153. pl. 199. Mich. 5 Jac. B. R. Anon.

14. A. is bound to pay 10 l. to the Assignee of B. the Obligee. B.'s Assignee makes Executor and dies; Executor shall not have the 10 l. But if A. is bound to pay 10 l. to B. or his Assignee there the Executor shall have it, because it was a Duty in the Obligee himself. Godsb. 192. pl. 274. Trin. to Jac. C. B. in Meads Case, per Coke Ch. 1.

15. Devise of a Term to A. for Life, Remainder to B. and M. his Wife if the have not Issue Male, and if it shall please God to send them Issue Male, then to be reserved and put out for the benefit of such Sons or one of them. Testator dies; A. enters as Legatee and dies, B. and M. died it then not having Issue Male but after they have, B. dies. The Issue Male when ever Born shall have the Term and adjudged for the Issue Male against M. the Mother. Mo. 846. pl. 1146. Hill. 13 Jac. Blandford v. Blandford.

been Born he should devest it from the Administrator, and if more Sons should after be Born they should take jointly with him.

16. If one by Deed or Writing or by Word on his Death Bed or before, gives Goods and dies before Donee takes them, yet he may take them. Went. Off. Executor, 26, 27.

17. Things jure Naturae reduced to Tamefcs or confined, so young Pidgeons though not Tame being in the Dove House not able to fly, reclaimed Hawks because commonly vendible, so Hounds, Greyhounds, Spaniels, Moltiffs, Ferrets, shall go to the Executor. Went. Off. Executor, 57, 58. and says that in Replevin the Word Averia may be applied to these.

18. The Personal Estate was devised to raise Money and Purchase Land for A.—A. dies without Issue, the Land not Purchased; Decreed the Administrator of A. shall have the Money out of the Hands of the Executor. Ch. Rep. 204. 13 Car. 2. Wood v. Caley.
19. Lands conveyed to Trustees for 99 Years to raise 1000l. A Piece to A. B. and C. his Children as should be then unmarried, or not provided for after they shall attain 21 Years. A. was 21. and married before the Settlement, and had an Allowance during his Life of 30l. per Annum; A. died; the Father died; the 1000l. shall go to the Devisee and Executor of A. Ch. Rep. 258. 17 Car. 2. Corber v. Morris.

20. Devise of Money to be paid at a future Day; Devisee dies before the Day; yet it is payable to the Administrator. 2 Ch. Rep. 25. 21 Car. 2. Rowley v. Lancaster.

21. Where the Trutl of a Term is to A. for Life, Remainder to B. for Life, Remainder to C. (if he outlive A.) Remainder to. D. and his Heirs. C. dies, leaving A. the Remainder of C. in this Case does not vest it in his Executors, but the Remainder to D. was well limited. Chan. Cafes 132. Trin. 21 Car. 2. Wood v. Sanders.

22. Limitation of a Term in Trust for Heirs Males &c. is void in Law, and the Benefit of the Trust belongs to the Executor or Administrator. 2 Chan. Rep. 58. 22 Car. 2. in the Case of Hunt v. Jones.

23. A Sum of Money was bequeathed to A. to dispose as Tenant by a private Note shall acquaint him with; no Note was left. A. shall have the Money; nor Tenant did not intend it to his Executors, but had given it from them. Chan. Cafes 198. Pasch. 23 Car. 2. Martin v. Douch and Overton.

24. Trust of a Term devised to J. S. and then to J. D. to be disposed of as the Tenant should appoint by his Will or Writings. He makes a Writing and declares it to himself for Life, and after to such Persons as he should by Will or Deed appoint, and for default of that to his Executors, and made no other Will or Deed; the Executor shall have it. 2 Chan. Rep. 78. 24 Car. 2. Lewis v. Lewis.

25. A Legacy given and to be paid at a certain Time, if it is paid accordingly or Security given for it by the Executor, it shall not be subject to any alter contingent Clause in the same Will; But if the Contingency happen within that Period of Time limited for Payment it is otherwise. Fin. Rep. 26. Mich. 25 Car. 2. Clent v. Bridges.

26. Lands settled in Trust for raising Portions for Daughters on their Marriage with the Consent of Trustees, and for their Maintenance in the mean Time, but if they marry without such Consent, then to remain over to others; It was admitted that if either of them die before Marriage, her Portion would go to her Executor or Administrator; the Daughters were advanced in Years, the Portions were raised, and intending not to marry, pray'd to have their Portions now paid, to lay them out in Annuities for their better Support; Decreed accordingly, they offering to give reasonable Security to the Trustees to indemnify them against any Claim by Virtue of the Condition, and allowing the Trustees the Charge of this Suit. Fin. Rep. 62. Hill 25 Car. 2. Needham v. Vernon and Booth.

27. Devise of a long Term for Years to his Wife for Life, Remainder to Trustees for his Son for Life, Remainder in Trust for the Heirs of the Lady of the Son, Remainder to the Son's right Heirs. The Wife takes the whole Term as Executor at first, till she agrees to the Devise. But saying the word to take the Term according to the Will is a sufficient Assent, or that the Son was to have it after her, is good Assent. 1 Lev. 25. Pasch. 13 Car. 2. B. R. Garret v. Lytler.

19. Ad-
29. **Administrator obtains a Decree to redeem a mortgaged Term for Years**, and before Inrollment of the Decree dies Intestate. Though the Decree was for the Mortgagee to convey to the Administrator his Executors and Administrators, yet the Inrollment was denied to his Administrator, because the Intestate's Title as Administrator to the first Intestate, the Mortgagee, is gone. 2 Ch. Cafes 247. Hill. 30 & 31 Car. 2. Warren v. ----

30. A has three Daughters, D. a Widow, B. married to M. and C. married to N. he leaves 1200 l. to purchase 60 l. per Ann. within one S. C. says, Year after his Decree, to be settled on his said Daughters, and the Heirs of their respective Bodies for ever; Or otherwise D. and the Husband of B. and C. shall give Bonds to my Executors for double the Sum within 18 months after my Decree to settle the Share, that each shall receive, unto and upon his Child and Children of my said three Daughters A. B. and C. Part and Part alike. B. died about six months after the Testator, leaving his a Daughter, who died about four Months after the Mother. The Husband of B. took Letters of Administration to B. and he had like-wise inherited to his said Daughter, and brought his Bill for a third Part of D's Estate; No Lands were purchased, nor the 400 l. given to B. Per Ld. Chancellor the Husband has no Right. 2 Ch. Cafes 110. Trin. 31. **Lands devised to be sold for Payment of Portions**, one of the Children dies, after the Portion due, and before the Lands sold; the Administrator of the Child is intitled to the Money. Vern. 276. pl. 276. Mich. 1684. Bartholomew v. Meredith.

of Debts &c. are to be deemed as Money, so far as there are Debts &c. to be paid, and to Money devised &c. to buy Lands. it is to be deemed as Lands. a Mod. 179. Roper v. Radcliffe. In Don. Proc. — But with respect to the Heir at Law, or Refiduary Legatees, the Lands so given in Trust, or devised for Payment of Debts or Legacies shall be deemed as Land, and may by paying the Debts or Legacies pray a Conveyance. Ibid. 171.

32. A having a Sole Child, (a Son) took a Mortgage in Fee, which in Equity is but a Chattel, this was in the Name of the Son and another Person, the Jointenant releases to the Son, but the Equity being in the Father, if the Father's Money, the Mortgage was decreed to go to the Father's Administrators. Arg. 2 Show. 407. pl. 379. Mich. 36 Car. 2. B. R. cites it as the Case of Newton v. Burnett, in Scace.

33. A having a Bill redeemed for a particular Purpofe from beyond Sea to him, receives Part of the Money, and takes a Note for the Remainder payable to himself or Bearer on Demand, and falling Ill, gives the Note to B. with Orders to receive the Money, and apply it to the Use it was designed for. A. dies, B. receives the Money and applies it accordingly. The Wife of A. takes Administration and brings Trover and recoverers. B brought a Bill and was relieved by North K. Vern. 264. pl. 260. Mich. 1684. Merrett v. Ealtwick.

34. **Deeds of a Personal Estate to a Trustee in Trust for Trustor's only Son**, and the Heirs of his Body, and if his Son die during his Minority, and without Issue, then to A. and makes his Son Executor, and B. Executor in Trust for his Son during his Son's Minority. The Son lives to 18. Chute a Cafe and then dies without Issue. This Personal Estate shall go to the Executors of the Son, and not to A. Vern. 326. in pl. 323. Patch. 1685. in Cafe of Whitmore v. Weld.

K. North to the Judges of C. B. who were divided in Opinion, but made no Certificate thereof, (the
35. A. devised to B. a Rent out of a Lease for Years determinable on Lives to be paid half Yearly if the Cessary Que Vie should so long live. B. dies during their lives the Kent shall go to the Executors of B. during the Term. 2 Vern. 35. pl. 27. Hill. 1688. Gosley v. Gilford, cites Rell 831.

36. Each next of Kin hath such an Interest in his Share of the Inheritance's Estate before Distribution, that if he dies it shall go to his Executor. For the Act has made it as if the Inheritance had made his Will, and such Words in a Will without double an Interest valid, and so the he to whom Distribution ought to be made dies within the Year that shall not alter the Cafe; For the Provizo which gives Time to make the Distribution is only for the Administrator and Creditors, to the end that the Deba should be better known. Comb. 112. Trin. 1 W & M. in B. R. Brown v. Brown & Farndale.

37. A makes a Deed of Gift of his Goods for the Use of his Wife and after to his Children; they are taken in Execution and rebought of the Sheriff. Here is a new property and the Executor shall have them. 4 Mod. 51. Mich. 3 W. & M. in B. R. Lady Wincheiffe v. Maidstone.

38. J. S. devised Lands to A. for life, Remainder to B. in Fee, paying 400 l. of which 200 l. to be at the Disposal of his Wife in or by her last Will to whom the plattes; see dies Inheritance; Per Lords Commilhors, the whole Interests veiled in the Wife and Decreed it to her Administrator. 2 Vern. 161. pl. 163. Mich. 1690. Robinson v. Dugdale.

39. H. possessed of a Term for 99 Years, devised his Term to A. for Life, and so to B. and five others successively for Life, all even being now Dead, the Question was, who should have the Remainder of the Term? Et per Treby and Powell Anciently, if one having a Term devised it to A. for Life, Remainder to B. such Remainder was void; if, Because an Inheritance for Life is a greater Inheritance; And 2dly, because the Term included the whole Interest, so that when he devised his Term, nothing remained to limit over. Afterwards the Law altered; for a Devise of the Term to B. after the Death of A. was held good; and by the same Reason to A. for Life, Remainder to B. For it was but dispossposing of the Interest in the mean Time, but a Devise to A. in Tail, Remainder over is too remote; So if it be to A. and if he die without Issue, Remainder over. As to the principal Cafe they held that all the Remainders were good; And that the first Devise, and so every Devise in his Term, had the whole Term vested in him, during which the next Man in Remainder and so every other after him, had not an actual Remainder but a possibility of Remainder, and the Executor of the Devise for a possibility of Reverter; for there may be a possibility of Reverter even where no Remainder can be limited, as in the Cafe of a Gift to A. and his Heirs while such a Tree stands, no Remainder can be limited over and yet clearly the Donor has a possibility of Reverter, though no actual Reversion; a Furtuor there shall be a possibility of Rever- ter, where a Remainder may be limited over; for the Teittator gave but a limited Inheritance, and what he has not given away, must remain in him.
him; and the Words for Life can be no more rejected in the last Limitation than in the first. 1 Salk. 231. pl. 9. Hill. 9 W. 3. C. B. Eyres v. Faulkland.

40. When a Person is appointed an Executor, he takes all as being named Executor. Per Holc Ch. J. 11 Mod. 126. Trin. 6 Ann. B. R. Bronker v. Cook.

Efface to the Executor, by his being named Executor he has a Right to all the Personal Estate, Per Trevor Ch. J. 11 Mod. 162. Hill. 6 Ann. C. B. in Case of Archer v. Bokenham.

41. At Common Law and before the Statute of Frauds &c. If a Man granted a Rent to A. his Executors and Assigns during the Life of B. and afterwards the Grantee had died leaving an Executor but no Assignee, the Executor should not have had the Rent, in regard it being a Freehold the same could not descend to an Executor. But now since the Statute of Frauds &c. if a Rent be granted to A. for the Life of B. and A. dies, living B. A's. Executors &c. shall have it during the Life of B. See 3 Wms's. Rep. 264. cites it as held by Ld. K. Harcourt, 4 Dec 1710. in Case of Rawlinson v. Dutches of Mountagu & al.

42. A poissifed of an Exchequer Annuity for 96 Years by Articles The Re- on the Marriage of M. his supposed Daughter covenants to pay it to M., porter makes for her seperate Use, and then to the survivor of Baron and Feme for Life; and after to the Children of the Marriage, and if no Child, then Distribu- tion to be for the Benefit of A. The Husband and Wife die leaving a Child who dies soon after. Per Cowper C. A. has not signed the Order, nor transferred the Property only Covenanted to pay, and a Court of Equity must not carry the Covenant (being a free Gift) beyond the Let- ter. 2 Vern. 692. pl. 618. Trin. 1715. Balee v. Grey.

with such Remainders over as cannot be done by way of Limitation of an Estate or a Trust. Isth. 694.—Equ. Ab. 562. pl. 16 S. C. Ld. Chancellor said that it was only a Covenant to pay in such Manner, and since it never was devellett out of A. he would not on this Bill on any pretence of Equity tear it out of him or his Executors, and so dismissed the Bill, though he did not at all dispire the Case if it had been of a Term or a Trust of a Term settled in such Manner, that the Remainder would not have been good. But this was thought at the Bar to be an over-wise Dif- tinction.—Gib. Equ. Rep. 97 S. C. in totoem Verbis. But adds this: this Decree seems rea- sonable, because the Administrator comes for a specifick Performance of the Covenant, and that he cannot do who was not originally in Contemplation or intended to be provided for by the Covenant but that the Term had actually been vested to these Uses, then the Interest of the Term being vested in the Child and the Heir of his Body, as it must be, if the Settlement had been done according to the Covenant, then it must have went to his Administrator—MS. Rep. Balee v. Sir James Gray S. C. Cowper C. said he thought in this Case the Defendant ought not to be compelled by a Court of Equity to assign over the Annuity, because the Covenant is ratified already according to the Intent of the Parties, and this Court will not Decree a specifick Performance of a Covenant further than the Parties intended where the Intent is according to the Rules of Law, and in this Case it might have been so limited; For suppose it run thus, (viz.) If the Child or Children of the Marriage shall happen to die in the Life of Sir J. Gtry then to go to Sir J. Gray, this is a good Limitation of a Charter ac Law, because the Contingency is to happen in the space of a Life. He admitted if the Legal property of the Annuity had been transferred over, and the Trusts had been limited in the Words of this Covenant, the contingent Limitation over to Sir J. Gray had been void, but there is a Difference between a Covenant to suffer one to enjoy, and a Transferring the property upon Trust for such an one; in the first Case the legal Property remains in the Covenator, and Equity will not take that from him, after the Parties have had the full Benefits of that Agreement, but in the other Case the legal Property is out of him, and transferred to another; and the Cefcy one Trust has an equitable Interest vested in him, and therefore he may compel his Trustee to Assign over the legal Inter- est to him. Bill dismissed quod hoc. MS. Rep. Trin. 1 Geo. in Cane. Bais v. Sir James Gray.

43. Devise of 1200 l. to be distributed among the four Children of B. at B's direction, but not to be compelled to pay it till 12 Months after Tettators Death, one died within six Months after Tettator. It was held that no particular Interest vested in any one Child, no Ap- portionment
 Executors.

portionment being made, and the whole $1200 is a subsisting Lega-
cy; so nothing goes to the Administrator of the Child. 2 Vern. 744.
Hill. 1716. Bird v. Lockey.

44. J. S. Lefsee of Land to him and his Heirs for three Lives effig
the whole Estate referring a Rent to him and his Executors, Administra-
tors, and Assigns, Proviso that on Non-payment he and his Heirs may
re-enter, and the Assignee Covenants to pay the Rent to J. S. the Assignor,
his Executors and Administrators; Per Cur. Here is no Reversion to
the Assignor, and the Rent is expressly referred to the Executor, and
the Proviso for the Heir to enter is not material as long as the Reser-
vation of the Rent is to go to the Executor. For in such Case the Heir is
a Trustee for the Executor; This was at the Rolls and afterwards it
came on before Ld C. King, who was of the same Opinion and De-
Jenion v. Ld. Lexington.

(Z) What Things the Heir shall have, and what the
Executor.

[Chattels Personal.]

1. If a Man buys diverse Fidish, as Tench, Carpse &c. and puts
them for a store in his Pond, and dies, the Executor shall not
have the Fidish but the Heir who has the Water. Hill. 37 El. B. R.
adjudged, Gray v. Powlet and Bartholomew v. Cray. S. C.
adjudged that the Fidish in the Pond are the Profits of the Freehold, which the Executor shall not have
but the Heir or he who has the Water. — Gouldsb. 29. pl. 24. Gray v. Trow S. C. adjudged, that
they are Chattels descendible. — Ow. 20. Grey's Cafe S. C. adjudged. — Wentw. Off. Executors,
53. Cap. 5. S. P. where the Telfator has the Inheritance.

2. If a Man dies seized of a Park, the Heir shall have the Deer,
and not the Executor. Hill. 37 El. B. R. per Popham.

Eliz. in the Cafe of Swan S. P. For without them the Park which is an Inheritance is not com-
plete. — Kelw. 118. pl. 60. ad Finem S. P. — Wentw. Off. Executors, 53. S. P. where the
ter the Telfator has the Inheritance. — But if the Telfator were but a Termor they are to go to the
Executor but only as accessory Chattels following the Estate of their Principal, viz. Park, Pond, and
the same of Conies in a Warren, Pigeons in a Dove-house &c.

3. Where a Man is bound to another and his Heirs, and the Obligee
dies Intestate, his Heirs shall have the Action; Per Tank. Arg. to which
there was no Anwfer. Br. Obligation, pl. 19. cites 49. E. 3. 12.

4. The Heir shall have the Box or Chest with Charters if it be sealed,
and not the Executors, but if it be not sealed the Executors shall have
the Box or Chest, and the Heir the Charters; Per Cur. Br. Chattels,

5. A: pawns to B. on Condition, that if A's Heir or Executor pays
the Money by such a Day that he shall re-have the Goods. If the
Heir pays the Money after A's Decease, as he well may, being Party to
the Condition and named, the Executors cannot take the Goods out of
the Heir's Possession; For it amounts to as much as if the Father had
given
given him the Goods by Gift or by Will; Per Fineux. Keilw. 64.

6. A man seised in Fee made a Furnace of Lead in the Middle of the House, which was not fixed to the Walls of the House and dy'd. The executors took the Furnace, and the Heir brought citations S. C. Br. Trespass. And per tot. Cur. it lies well because it is fixed to the Franktemen; for as well is the Land the Franktemen as the House, and therefore it shall go with the Franktemen; and Ffitter S. C. J. and Rede Ch. J. agreed that the Action lies well by the Heir; quad. nota. Br. Challtles, pl. 7. cites 21 H. 7. 26.

7. So of Vatts fixed in the Land in a Dyebouse or Brewhouse. Ibid. Br. Executors, pl. 95. cites S. C. —— Br. Trespass, pl. 212. cites S. C.

8. So of Pales or Estanke, and Windows and Gates, and Doors of a House shall go to the Heir, and yet they are not fixed, but it is not a perfect House without them. Ibid.

9. Contra of Glass; For the Executor shall have this; For it is a perfect House without Glass; Per Pollard; quod non negatur. Ibid. —— Br. Trespass, pl. 212. cites S. C.

10. But the Heir shall have the Evidence concerning the Land, and not the Executors, and yet they are only Challtles in the Ancestor or in the Heir. Ibid.

11. And per Rede the Heir shall have Tables Dormant, and those Things cannot be attached in Afflue, nor they cannot be distrain'd. Ibid. Br. Executors, pl. 95. cites S. C. —— Br. Trespass, pl. 212. cites S. C.

12. A. covenants with B. that if B. pay to A. his Heirs and Assigns, Co. Lit. 500l. that A. and his Heirs will stand seised to the Use of B. and his Heirs. A. devised the Land to his Wife during the Minority of his Son, Remainder to his Son in Fee and died, leaving his Wife Executrix. B. at the Day and Place tendered the 500l. generally. The Wife having but an Eftate for Years in the Land took the Money. Held that the Tender ought to be to the Son, out of whom the Inheritance is to be devised; Arg. Le. 252. cites 5 Rep. 96. b. [Mich. 23 & 24 Eliz. in the Court of Wards] Randall v. Brown. Wards, which Ld. Coke said he observed.

13. A. devised all his Jewels to his Lady, yet his Garter and Collar of S. S. shall go to the Heir. Ow. 124. 26 Eliz. in the Earl of Northumberland's Cafe.

14. If the Owner of a Park, in which are Deer, Hares, Rabbits, So of Five Phaenants and Partridges, his Heir shall have them, and not his Executors or Administrators, because without them the Park, which is an Inheritance, is not compleat, and he had no Property in them, but they belong to him Rationes Privilegii for his Game so long as they remained in the Place privileged. 7 Rep. 17. b. Trin. 34 Eliz. in the Cafe of Swans.


15. Leften
15. Leffe for Years purchased Trees growing upon the Land, and had Liberty to cut them within 80 Years, and afterwards he purchased the Inheritance of the Land and died. The Executor shall not have the Trees, for though they were once Chattles, yet by the Purchase of the Inheritance they were united to the Land. Ow. 49. Pach. 36 Eliz. Anon.

16. A Tenant for Life of an Advocate, Remainder in Fee to B. A. preffented D. who was admitted, instituted and invested. But the Benefice was void for not reading the Articles by the Statute 13 Eliz. 3. but D. continued in the Church, and fo by Reputation was Parson all his Life, and died Parson, and no Notice given to A. of the Voids of the Church by not reading the Articles. The Queen preffented, but that was void for want of Notice given. A. and D. both died. Per Cur. B. shall preffent, and not the Executors of A. because as to A. the Church was full till Notice. Yelv. 7. Trin. 44 Eliz. B. R. Green-

17. Rent was granted to A and his Heirs for his Life, and the Lives of B. and C. The Heir shall have this Rent as a Party specially no-
mnated, and as Heir by Defcent, though it be not properly an Estate defcendable. Cro. J. 282. pl. 3. Trin. 9 Jac. B. R. Bowles v. Poor.

18. Trees sold by Tenant in Tail, if cut during the Life of Tenant in Tail shall go to the Vendee and his Executors, but if not cut the Heir shall have them. 11 Rep. 50. a. Mich. 12 Jac. Liford's Cafe.

19. Tenants for Life made a Lease for 21 Years rendring Rent at Mich. and Lady-Day, or within 13 Weeks after. The Leffe after Mich. and before the End of the 13 Weeks died; and his Executor brought Debt for the Rent. Adjudged that the Action did not lie; For in this the Leffe had Election to pay it at any of the said Days, and before the Lady-Day it is not due, and when the Leffe died before that Day, his Executors have no Right to the Rent, but the Leffe being only Te-

nent for Life the Rent is gone. But if Leffe had had Fee-simple and died before the last Day the Heir should have had the Rent as incident to the Reversion; But if Leffe had survived both Days, the Rent had been a Thing vested in him, and his Executor should have had it. But if the Rent had been reserved at Mich. and is to be behind by 13 Weeks, then it should be lawful for the Leffe to enter, if the Leffe survives Mich. his Executors shall have Debt for the Rent, because then the Rent is due, and the 13 Weeks are only a Dispensation of the Entry of the Leffe until that Time; and in this Case it is sufficient that the Rent be demanded at the latter Day as well as at the first, as where the Rent is reserved at two Days in the Disjunctive. 4 Le. 247. pl. 403. Mich. 12 Jac. B. R. Glover v. Archer.

20. For a Nomine Panæ the Tettator himself might have an Action of Debt, and consequently his Executors, and yet the Nomine Panæ is an Incident which shall defend to the Heir. But this is by the Common Law, and not by Statute 32 H. 8. 34. which does not extend to it. Co. Litt. S. 240. 162. b.

21. Debt by Executor; the Tettator did covenant with the Defendant that he should have and enjoy such a Holne and Lands for six Years, the Defendant covenant for him, his Heirs, his Executors and Alligns, to pay to the Tettator, his Heirs, Executors and Alligns an yearly Rent of 90l. during the six Years; the Defendant entered, the Tettator died, and the Rent was behind for a Year after his Death, for which the Executor brought
brought the Action. Resolved it was a Rent, and so should ensue the Reversion, and should go to the Heir. Cro. C. 207. pl. 1. Hill. 6 Car. B. R. Drake v. Munday.

22. If one recovers in a real Action Land and Damages and dies so a Re- before Execution, the Heir shall have a Scire Facias to have Executi- on for the Land, and the Executor for the Damages. Cro. C. 247. pl. 4. Mich. 7 Car. B. R. in Cafe of Beamond v. Long. shall have Execution for the Deed, and the Executor for the Damages. Went. Off. Ex. 92. but faild that in the Time of E. 4. it was said, that until the Heir sue a Scire Facias the Executors cannot sue Execution for the Damages.

23. The Tifator being seised of Tithes during the Life of T. P. made a Lease thereof to the Defendant, rending Rent; afterwards the Lessee died, then an Action of Debt was brought by his Executor for the Rent Arrear; and upon Denurrer to the Declaration it was argued, that this was a Rent, and that the Executors shall not have it, because it is incident to the Reversion, for it is a Rent though not in Point of Remedy. It was argued on the other Side, that Debt lies on the Contract which goes to the Executors, but perceiving the Opinion of the Court against him, pray’d a Discontinuance, which was granted. Raym. 18. Trin. 13 Car. 2. B. R. Tippin v. Grover.

24. Mortgagor agreed to convey his Equity of Redemption, but before the Conveyance executed, or the Money paid, be died. Decreed that the Heir shall have the Money, and not the Administrat. 3 Chan. Rep. 63. 22 Car. 2. Tilley v. Egerton.

25. Mortgagee in Fee enters for a Forfeiture, and after seven Years En- joyment absolutely falls the Land to J. S. and his Heirs; Per North K. The Estate shall not be looked upon to be a Mortgage in the Hands of J. S. so far as to make it Part of his Personal Estate, but it shall be for the Benefit of his Heir. Vern. Rep. 271. pl. 267. Mich. 1684. Cotton v. Illes.


27. The same Person being Patron, and Parson dies, the Heir, and 5 Salk. 283. not the Executor shall present; For all is done in an Inlant, the De- fent to Heir, and the falling of the Avoidance to the Executor. 3 Lev. 47. Mich. 33 Car. 2. C. B. Holt v. Bp. of Winton, & al. Where two Titles con- cur in an Inlant the Elder shall be prefer’d.

28. If A. makes a Lease or devises an Estate for Years, (he being 2 Chan. feis’d of an Estate of Inheritance) for Payment of Debts, if the Profit es 225. S. P. of the Land suffr mount the Debt, all that remains shall go to the Heir though not so express’d, and albeit it be in the Cafe of an Executor. 2 Vent. 359. Mich. 33 Car. 2. Anon.

29. Administrator of a Copyhold Mortgage in Fee (in which there is Vern. Rep. no Covenant to pay the Money, nor in any such a Surrender can there be any such Covenant) shall not have the Redemption Money, but the Heir. 2 Ch. Rep. 242. 34 Car. 2. Turner v. Crane.
30. When *Lands* are appointed or conveyed to pay Debts, the Heir is inititated to have the Lands after the Debts paid. 2 Chan. Cases 115. 31. Residue of Peronal Estate devised by A. to be laid out in a Purchase and settled on his 3 Daughters, B. C. and D. and the Heirs of their respective Bodies for ever; or otherwise the Husband of my said Daughters for what Monetes they shall receive shall give Bond to the Executors, to settle what each shall receive upon the Child and Children of B. C. and D. Part and Part alike. B. died, (leaving a Child) about six Months after the Testator; the Child died about four Months after B. No Land was purchased; Finch C. disinnipled the Husband’s Bill, who had taken Administration to B. and the Daughter, and declared the Husband had no Part there in Right of B. because B. died; and by the first Part of the Claufe it was to be laid out in Land, to be settled on the three Daughters, and the Heirs of their Bodies; and by the second Claufe the Husband were to secure what they should receive. 2 Chan. Cases 110. 32. Devise of Goods to A. for Life, and after A’s Death to the Heir of B. B. dies, living A. It was inititated that these Goods were only the Furniture of the Capital Houfe, and to quafi an Heir-Loan; but per Finch C. they abolutely vested in him that was B’s Heir at the Time of B’s Death. Vern. 35. pl. 34. Hill. 1681. Danvers v. the Earl of Clarendon. 33. Castus que Trust of a Mortgage for 1000 Years afterwards purchased the Inheritance in the Name of a third Perfon, and the Lease was aigned to herself. The Heir shall have the Lease to attend the Inheritance, and not the Administrator. 2 Chan. Cases 156. Mich. 33. 34. A. made a Settlement to raife a Portion of 4000 l. for two Daughters, to be paid at the Day of Marriage or Age, and referred a Power to order it otherwise by his Will, and by his Will made about the fame Time he gives the fame Sum, payable as directed by the said Settlement. One dies. Her Portion shall not go to her Administrator, but the Heir shall take the Profits, and a Difference is taken between a Trust and a Legacy, for that a Trust is expounded according to the Intent of the Party, and a Legacy is governed by the Rules of the Common Law. 2 Chan. Rep. 288. 36. Car. 2. Pawlet v. Pawlet. 35. Lands are limited to the second Son in Fee, provided that if the eldest Son die without Issue, the second Son should, within six Months after such Death, pay 1500 l. to the Sister, or in Default thereof the Lands should go to the Sister and her Heirs. The eldest Son dies without Issue. The Sister dies within the six Months. Her Heir, and not her Executor, shall have the Benefit of this Devife, it being by way of Limitation; and Ld. Chancellor said, that relieving in such Cases would destroy the known and common Difference between a Limitation.
Executors.


38. Inheratrix carves a Term for 1000 Years in Trust for her intended Husband for Life, and after to her and her Heirs. Afterwards the Husband and Wife, by Fine fur Concess' grant a Term of 21 Years, referring the Rent to Husband and Wife, and the Heirs of the Wife. The Rent shall go the Heir; Per Lord Jefferyes. 2 Vern. 62. pl. 55. Pach. 1688. Saunders v. Beale.

39. By Marriage Settlement a Term was to commence after the Death of the Survivor to raise 3000 l. in 12 Months for Daughter's Portions. There being only one Daughter, the Father by Will devises the Trust Land to make good the Wife's Jointure, and to raise 3000 l. for his Daughter's Portion. This being a Portion to be raised out of the Land, it shall not be raised for the Administrator of the Daughter who died at five Years old before the had Occasion of a Portion, but it shall merge in the Land for Benefit of the Heir. 2 Vern. 439. Pach. 1702. Brun v. Brun.

within the 12 Months, though it does not appear in 2 Vern. 439. [Neither do I believe the S. P. mentioned either in Chan. Prec. or 2 Freem. Rep.]

40. Term raised for a particular Purposé, when that Purpose is answered the Heir shall have the Benefit of the Trust of the Surplus of the Term, but he shall have it as a Term which must go in a Course of Administration, and not in a Course of Decent; and per Commissioner's decreed accordingly for the Heir's Administrator, and not the Heir's Heir. 2 Vern. 139. Pach. 1690. Levet v. Needham.

41. Lease for three Lives to B. by Dean and Chapter, balanc'd to B. his Executors, Administrators and Assigns for three Lives. This is an inheritable Estate, and shall go to the Heir; Per Lk. Somers. 2 Vern. 320. Mich. 1694. St. John's College v. Fleming.

42. Land devised to his Executories to be sold for Payment of Debts, Land devised and further wills, that if there should be any Surplus after his Debts paid, it should be deemed Part of his Personal Estate and go to bis Executors; yet Executors were decreed accordingly for the Heir's Administrator, and not the Heir's Heir. 2 Vern. 361. pl. 325. Mich. 1698. in the Cafe of Bailey v. Powel, cited as Sir William Baffet's Cafe.

the Executor is discharged, and not contributory; But it is otherwise in Cafe of Administrators, Lev. 203. Hill. 18 & 19 Car. 2. Feltham v. Harriott.

43. A having intailed his Lands on his Son, subject to a Mortgage 2 Freem. Term of 1000 Years for Payment of 6000 l. devised his Leafehold and Personal Estate to pay his Debts and Legacies, and directs, that if his Personal Estate is applied to pay the Mortgage, the 1000 Years Term Yae v. Fett should be kept on Foot to make good his Daughter's Portion, and gives her 3000 l. to be paid at 21 or Marriage, if married with Consent, if not, 1000 l. She died at six Years old. Per Cur. it is within the Reason of Lk. Pawlet's Cafe; besides, the Devise is contingent on her marrying with Consent, to the Portion not to be raised for the Benefit of the Administrator, but Bill dismissed. 2 Vern. 416. Hill. 1700. Yates v. Fettiplake.

44. Held that a *Furnace*, though *fixed to the Freehold and purchased with the House*, and also *Hangings nailed to the Wall*, shall go to the Executors and not to the Heir, and 54. *it determined contrary to Herkenden's Cafe*, 4 Rep 2 Freem. Rep. 249. pl. 316. Trin. 1701. in Canc. Squier v. Mayer.

45. A Term for *500 Years in Trust to pay Debts*, and *four Years afterwards to attend the Inheritance*, as soon as Debts are paid it is a Trust for the Heir. 2 Vern. 645. Hill. 1705, in Cafe of Countefs of Bristol v. Hungerford, cites it as the Cafe of Cook v. Gnavas.

46. A having *two Daughters devised a Mortgage in Fee, on which he had entered*, as his Lands in Fee to his two Daughters and their Heirs, and another Mortgage on which he had not entered, to them, their Executors &c. One of the Daughters dies. Her Share of the Lands in Fee shall go to her Heir, and not to the Husband her Administrator; For though it was but a Mortgage as between A. and the Mortgagor, yet A. intended those Lands to go as Real Estate to his Daughters, and the Administrator of the Daughter that is dead shall have no Part; Per Cowper K. 2 Vern. 581. pl. 524. Hill. 1706. Noyes and UX v. Mordant.

47. Devise was of *200 l. a Year for 16 Years to pay Debts and Legacies*, yet the Surplus was adjudged a Trust for the Heir. 2 Vern. 645. in the Cafe of Countefs of Bristol v. Hungerford, Hill. 1709. cites it as the Cafe of Sir Cyril Wyche v. Packington.

48. A Mortgagee of a Term had a *Deed to foreclose*, and the Heir an Intent to convey the Fee upon *Payment of 20 l.* at her full Age, unless Caufe &c. in six Months after Age. A. before any Conveyance of the Fee assigns the Term to J. S. in Trust to attend the Inheritance when it should be conveyed to B. The 20 l. was not paid, nor any Conveyance made of the Inheritance to B. during his Life; But because of the Decree, and A's Covenant to convey, it was held to be an Estate of Inheritance, and not Personal Estate. Gilb. Equ. Rep. 30. Hill. 9 Ann. Kitton v. Kitton.

49. A *agrees for the Purchase of Lands for 1000 l. to be conveyed four Months after*, and dies in the mean Time. The Heir of A. may by Bill compel the Executors to pay the Purchase-Money out of the Personal Estate; And so may the Devisee if such Contract be devised, and it will well pass by the Name of all his Lands of Inheritance. Ch. Prec. 320 Hill. 1711. Greenhill v. Greenhill.

50. If a Mortgagee sells, the *Surplus Money* is to be answered to the Heir, and not to the Executor or Administrator; Arg. 10 Mod. 238. Patch. 13 Ann.

51. A *by Will subjecteth both his Real and Personal Estate to the Payment of his Debts*. Decreed that the Heir should pay the Debt, or in Default thereof the Real Estate to be sold, and Liberty given to the Heir to prosecute for the Personal Estate. MS. Tab. Feb. 22. 1705/6. Syldolph v. Langhorn.

52. It is now a settled Point in Courts of Equity, that if *Lands be settled, or a Term of Years created, on Trust to raise Portions for Daughters, to be paid at Age of 21 or Marriage, and the Daughter dies before the time of Payment*, the Portion shall not go to the Executor or Administrator of the Daughter, but sink in the Estate for the Benefit of the Heir. Comyn's Rep. 742. Per Ld. C. Hardwicke. Patch. 13 Geo. 2. in Cafe of Harvey v. Alton.

53. Although a *Real Estate is made liable to Debts*, yet it shall only *come in Aid of the Personal*, and the Personal shall be first applied. MS. Tab. April 12th 1727. Nokes v. Derby.

54. What-
Executors.

54. Whatever Interest in, or Profits out of a Real Estate, are undisposed of by a Tenant or Tenant for life, descend to the Heir; and he takes them, not by the Will, or the Intent of the Tenant; but they are thrown upon him by the Laws, for want of some other Person to take. Aquitas sequitur Legem. Cales in Equ. in Ld. Talbot’s time. 44. Mich. 1734. Hopkins v. Hopkins.

(Z. 2) What is a Chattel to go to the Executors.

1. If a Man seiz’d of Land is attainted of Felony, and the King has Annun Diem & Vaatum, this is only a Chattel, and if a Stranger enters the Lord shall have Affile; for the Franktenement is in him.


2. If a Man is seiz’d in Jure Usuris, and after is attainted of Felony, and the King seizes the Land for the Life of the Husband, the King’s C. has only a Chattel; for it a Stranger enters and the Baron dies, there Br. Eftates, the Feme shall have Affile, and so he had. Br. Chattles, pl. 15. cites 4 E. 3. and Fitzh. Affile, 166.

3. If a Man Lease for Life reserving for the six first Years, three Quarters of Corn by the Year, and after the six Years it he holds it over 51. a Year, and after acknowledges a Statute within the first six Years the Rent shall be extended as a Franktenement, and not as a Chattel. 15 E. 3. Execution 63. 2 Roll 47. Statutes (P) pl. 13.

4. In Quare Impedit, a Man granted to another the next Presentation, If a Man of such a Benefice, and the Grant was to him his Heirs and Assigns of the grants the next Presentation, and admitted Clearly that it is only a Chattel, not two next Prefentations to W. the Thing is a Chattel this Word Heirs cannot make it Inheritance.


Chattles, and if he dies the Executors shall have them and not the Heir. Br. Chattles, pl. 20. cites 34. H. 6. 28.

Next Adowment is but a Chattel; Admitted. Owen 43. per Anderson C. J. Pach. 28 Eliz. C.B. in Cafe of Yardley v. Pecon.—Before it becomes void it is a Real Chattel, and after it is a Personal Chattel. See Went. Off. Executor 54.

5. So elsewhere of a Lease to W. B. and his Heirs for 20 Years. Ibid.

6. If a Feme has Execution by Statute Merchant of Land, and takes Baron, this is a Chattel and the Baron may give it, and shall have the Suit alone it he be ousted; For it is only a Chattel. Br. Chattles, pl. 17. cites 37. Aff. 11.

7. If a Man be obliged to another and to his Heirs and he dies, his Heir shall not have Action; For the Debt is a Chattel, and the Heir shall not have Chattel. Br. Bailment, pl. 2. cites 9 H. 6. 58.

8. So if a Man Bails a Deed to another to re-bail to him or his Heirs and he dies, the Heir shall not have Action; For the Deed is a Chattel. Br. Bailment, pl. 2. cites 9 H. 6. 58.

9. The Father who has the Ward of his Son and Heir has it not as a Chattel as Ward. So of his Daughter and Heir. But it was said that if the Father be outlawed he shall not lose the Ward, and therefore it seems that he cannot Grant it, nor the Executors shall not have it, as it shall be of a Ward; and therefore it is not properly a Chattel. Br. Chattles, pl. 19. cites 33 H. 6. 55.

10. So it seems though Charters do concern the Land of the Plaintiff, yet if he brings Deutine of a Box with Charters, and he counts

Y y
of no Charter in Particular, the Defendant may wage his Law of the whole; because before shewing of it the Box and all in it is but a Chattle. 2 Roll 108, Ley-gager (F) pl. 1. cites 19. H. 6. 9. b. 10. Charters concerning Land are no more than Chattles, as to Persons whose Land they do not concern, as if one is Bailor and another Baille only of them. See 2 Roll 108, Ley-gager (E) pl. 3. cites 20 H. 6. 38.


12. In Detinue of Charters a Man may wage his Law, if the Plaintiff does not make Title to the Land; For if a Man gives to me a Deed of Feoffment, it is only a Chattle in me, Per Pigot quod non Negatur. Br. Charters de terre pl. 57. cites 8 E. 4. 3.

13. Deed of Tail or of Land is not Chattle, but is Inheritance, and does not pass by these Words, Omnia bona & Chattes, but belongs to the Heir, and Replevin does not lie of it. Br. Chattles, pl. 9. cites 4 H. 7. 10.

14. In Trespass Quare Vi & Armis sedulariam siam fregit et asportavit, Defendant said that the Seat was in the Church of D. whereof J. N. was Parfon, and he by his Command &c. Eliot said this is no Plea, for a Seat is a Chattle, and not Parcel of the Franktenement. But Butler contra; for it is fixed to the Franktenement, therefore Parcel, as a Furnace &c. Per Fairfield, neither Furnace nor Fatts are Parcel, nor Booths in a Fair, nor Table dormant. And per Hufley, it teems that Seats in a Church is Spiritual Matter, and therefore shall be order'd by the Ordinary, and that every One may remove the Seat for their Ease, if he &c. has had it there by Prefscription. Br. Chattles, pl. 11. cites 8 H. 7. 12.


16. Where Rent was granted to a Man in Fee, and if unpaid &c. that he, his Heirs &c. may enter and take the Profits to him, his Heirs and Alligns, and to retain till he is satisfied such a Sum, it is a Chattle. Arg. 2 Roll Rep. 13. in Havergil and Hare's Cafe, cites 4 Rep. 81. Mich. 41 & 42 Eliz. Sir Andrew Corbet's Cafe.

17. When Recognizances are forfeited they are but Chattles Personal. 12 Rep. 2. Pach. 4 Jac. Ford v. Sheldon.

18. If Lands are convey'd to the Use of A. and B. and their Heirs till 1000 l. be raised it is a Fee Simple limited or Conditional. The Difference is between a Limitation of a Use to A. until 1000 l. raised, that perhaps in a Use may be a Chattle, but if to A. and B. until so much be raised, perhaps it is doubtful, Per Bridgman Ch. J. Capt. 107. Mich. 18 Car. 2 C. B.

19. If the Limitation was to A. and B. and their Heirs for 20 Years, and shall be from such a Time to such a Time, it had been but a Term, it makes it not a Fee Simple what was after qualified to a Term for Years, Arg. Capt. 166. cites 10 Rep. 85. Loveless's Cafe.

20. Lease for Years is Real. Went. Off. Ex. 52.


25. The Year, Day and Wafe forfeited to the Crown on Attainder of Felon is but a Chattle, and though granted to one and his Heirs by the King, yet shall go to the Executor and not to the Heir. Went. Off. Ex. 54.

26. Wardship of the Body whether by Tenure or Assignment was a Br. Chattles, Chattle Real in respect of the Tenure of Land, and was for Years, viz. till 21. or Marriage. Went. Off. Ex. 52, 53.

27. So a Villain for Years (as by Grant for a Term from him that had the Inheritance) is a Chattle Real. Went. Off. Ex. 53.

28. An Apprentice seems to be only a Personal Chattle. Went. Off. Ex. 53.

29. Because not springing out of any Real Root as Wardship and Villenage do, but out of meer Contract. Ibid. 56.

30. The Interest in a Debtor in Execution for Debt, or more properly in his Liberty, seems only a Personal Chattel. Went. Off. Ex. 53.

32. Dung in a Heap is a Chattle, but if spread on the Land it is not; All. 21, 32. Per Roll J. St. 66. Mich. 23 Car. Carver v. Pierce. Yearworth.


34. Interest under an Extent of Lands on a Judgment by Elegit is but a Chattle Interfell; Per Jeffries C. Vern. 398. Pauch. 1686, in Cafe of Crobery v. Simonds.

35. Corn standing is a Chattle 3 Salk. 160. pl. 3. Anon. Vent. 18. Car. 2. B. R. Emerson v. Emerson, S. P.

36. So Trees growing are not Goods and Chattles. 11 Mod. 113. But if one sells Land in Fee, and excepts such and such Trees, this is a Chattle Interfell. Went. Off. Ex. 65. — So of Trees told to J. S. who dies before selling them, the Executor of J. S. shall have them. Went. Off Ex. 65.

37. A seised in Fee devised, that his Personal Estate should not be sufficient to pay his Debts and Legacies, then his Executor should receive the Profits of his Real Estate for the Payment thereof, and after Payment he devised the Real Estate to B. &c. The Executors have only a Chattle Interest.
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Interest. Wms's Rep. 505. 509. says it was so held in the House of Lords upon taking the Advice of all the Judges 22 May 1717. on the Appeal of Coppen, Barnardiston, &c.

(Z. 3) What Executors must do in Favour of the Heir.

1. THE Father of A. articles with J. S. a Carpenter to build an House, and covenants to pay J. S. 1000 l. to build it, but A. before the Building dies Intestate. The Heir of A. on whose Estate this House was to be built, brought a Bill against the Administratrix of A. to compel her to perform this Agreement specifically, and decreed accordingly. 2 Vern. 322. pl. 310. Mich. 1694. Holt v. Holt.

2. Articles on Marriage whereby Money is agreed to be laid out in Land, and settled, in Default of Issue Male of the Marriage on the Husband's Brother, shall, if the Husband dies without Issue Male, and leaving only Daughters, be performed in Favour of the Brother though they were voluntary, and though the Husband might have barred such Remainder. 3 Wms's Rep. 223. Mich. 1733. cites 2 Wms's Rep. (594) Vernon v. Vernon.

3. A. covenants for himself and his Heirs, that he will purchase Lands and settle the same on himself for Life, Remainder to his Wife for Life, Remainder to his first &c. Son, Remainder to himself in Fee. Equity will compel the Executor to lay out the Money though the Heir is both Debtor and Creditor. 3 Wms's Rep. 224. Mich. 1733. Lechmere v. Ld. Carlisle.

(Z, 4) What Things shall not go either to the Executor or Heir.

Donatio Causa Mortis.


2. A Donatio Causa Mortis is where a Man lies in Extremity, or being surprized with Sicknes and not having an Opportunity of making his Will, but least he should die before he can make it, he gives with his own Hands his Goods to his Friends about him. This if he dies shall operate as a Legacy; but if he recovers then the property thereof Reverts to him. Per Ld. Cowper, Chan. Prec. 269. pl. 220. Mich. 1708. Hedges v. Hedges.

3. A. by Will gave B. 500 l. and some Months after A. by Parol (which he called his Servants to be Witnesses to) gave her a Hair Trunk, and often afterward remembered them of his having made to B. such Gift, and it was in these Words. I give to my Cousin B. this Hair Trunk and all that is contained in it, and gave her the Key. Afterwards A. makes a new Will and revokes all other, and gives B. 1000 l. but says nothing of the Hair Trunk, and this Will was about three Years
Tears after the first Will. Upon opening the Trunk were found a Tally for 500 l. &c. Ld. Cowper took Notice that it was agreed that a Donatio causa mortis was Revocable, and differed nothing from a Will, and thought this was only two Points. 1st, If the Tally was fully proved to have been in the Trunk at the Time of the Gift; 2dly, If the Will was not a Revocation of it. As to the first such Donations being of the same kind with the Will ought to be fully proved in all its Circumstances, and that A did not mention the Tally, when he so often mentioned the Trunk, was Strange. As to the second that the second Will revoking all former Wills was a Satisfaction equivalent to a Revocation, and the 1000 l. thereby given her was a Recompence unless she could prove that A intended it otherwise. For if the second Donatio causa mortis must have flood, and do no Benefic. 1710. Jones v. Selby.

4. A made B. his Executrix and Residuary Legatee; and afterwards gave a Specie Bill of 100 l. to J. S. to deliver over to C. in case A should die of that Sickness, which accordingly happened. C brought a Bill for the 100 l. Note. And Ld. Cowper held the Cafe not so strong as if A had specifically devised this 100 l. Note [to B]; For Deviling the Residuum is only the rest of his Estate, that he should not by Will or otherwise Dispose of. But this 100 l. Note is a Gift in Teller's Life-time, Donatio causa mortis, and the Possession transferred, and the Will did not hinder Teller from giving away any Part of his Estate Absolutely or Conditionally; and Decreed C. the 100 l. with Costs. Wms's Rep. 404. Hill. 1717. Drury v. Smith.

5. But where Jewels were given away by Teller by way of Donatio causa mortis, the Master of the Rolls doubted whether this was good against Debts. Wms's Rep. 406. in a Note there cites 8th, Dec. 1718. Smith v. Case. And the Reporter says that it seems Not, they being given in Cafe of the Donor's Death and in Nature of a Legacy, which therefore would be fraudulent as against Creditors, Ibid.

6. An Husband lying on his Death Bed delivered a Purse of 100 Guinea to his Wife, and bid her apply it to no other Use but her own; this was held by the Master of the Rolls clearly to be Donatio causa mortis, because the Husband was then languishing on his Death Bed. And also, because the Husband could not otherwise give to his Wife, and said that this was in Nature of a Legacy to her. Wms's Rep. 441. Trin. 1718. Lawfon v. Lawfon.

7. And also he gave a Bill to her drawn by him on a Goldsmith to pay her 100 l. to buy her Mourning, and maintain her till her Joinure comes in. It was held by the Master of the Rolls that Donatio causa mortis need not be proved with the Teller's Will, neither need any such Gift though in Nature of a Legacy be so proved; For that they operate as a Declaration of Trust upon the Executor. Wms's Rep. 441. Trin. 1718. Lawfon v. Lawfon.

8. C. after making his Will, three or four Days before his Death gave D. four Bank Notes to her own Use if he died, else to be returned; on his Death A. who was his Executor, on inquiring into the Affair, said he was very well pleased that they were given her; She desired A to keep the Notes for her, and imploy them to the best Advantage for her, he took them, and gave her a Note for them; She having after married contrary to his Inclination, he refused to deliver up the Notes; on which Action was brought on his Note, and a Recovery and Damages. Bill was brought here to be relieved, but Relief denying. Curia, You come here to be relieved against the Note, which cannot be, but on the Foot of Fraud; at the Time of giving it the whole Affair was examined.
Executors.

mined; it is not a Legacy nor is there any Occasion for the Executor's Assent to it; it is not a Gift at Common Law, but in view of Death; here are express Words; but if he had used no Words, and had been near Death, it had been looked on as a Donatio Mortis Causa; it is a Testamentary Legacy, of which the Common Law takes Notice, but not provable in the Ecclesiastical Court, it is only questionable here; and the Executors Assent is not necessary, because he might die Intestate. This further differs from a Legacy which depends solely on the disposing Words; but in a Donatio Mortis Causa must be a Delivery, which is something more; So Bill dismissed with Costs. This Causa was re-heard before Ld. Chan. King, August 6th, 1725 and affirmed the Decree, only he altered it in respect of the Defendants Coits; who being Trustees should have it out of the Estate; but inclined to have ordered a Trial at Law, had A. not given a Note. Sel. Cases in Chan. in Ld. King's Time. 14, 15. Patch. 11 Geo. Alfton v. Dawfon and Vincent.

9. In every Donatio Causa Mortis Delivery must be made by the Party in his last Sickness, and it may be to a Wife being in Nature of a Legacy, but need not be proved with the Will. 3 Wms's Rep. 357. Trin. 1735. Miller v. Miller & al.

10. There can be no Gift of a Bond or Close en Adition by way of Donatio Causa Mortis, neither can any Thing operate as such without having been delivered in the Testator's Life Time by him or his Order. 3 Wms's Rep. 358. Trin. 1735. Miller v. Miller & al.'

Paraphernalia.

1. It seems that true Name of this is Paraphernalia, or Bona Paraphernalia: For by the Civil Law Bona Parapherna sunt

Non Paraphernalia ultra borenis abiert taken from the Greek World, & his bonos Partitus Administrationem habet ita ut sine specialis uronis Mandato nare agere & convenire possit. * Simpning upon the Institutes. 97.

2. The Petit Customs de Normandie Chap. de Donaires de Fernes

S. 395. Bona Paraphernalia ought to be understood of Moveables serving to the Use of the Wife, as serving Beds, Robes, Linen, and other Things of like Nature; whereof the Judge shall make an honest Distinction to the Widow in being, in Regard to the Quality of her and her Husband, calling nevertheless the Heir and Creditors provided that the said Goods do not exceed the Moiety of a Third of the Moveables, and nevertheless where the Moveable shall be but Little, she shall have her Bed, her Robe and her Cotter. (It seems that this agrees wholly with Paraphernalia in our Law.)

being to be laid out upon the Book. 2 Wms's Rep. 79. Trin. 1722. in Case of Burton v. Pierpoint, cites Gibs. Cod. 1 Part 519.

* Br. Testament, pl. 12. cites S. C. but not S. P. but only that the Word is Paraphernalia.

3. There is mention made of this in our Law where it is named, Bona Paraphernalia, 11 D. 7. 23. * 18 E. 4. 11. b.

4. The Apparel of the Wife is called Bona Paraphernalia. 18 E. 4. 11. b. Per Padvilor.

5. The
5. The Feme after the Death of the Baron shall have her necessary Apparel for her Body, and not the Executors of the Baron. 37 H. 6. 28.

6. So the Feme shall have convenient Apparel for her Body, and not the Executor of the Baron. 33 H. 6. 31. b. Brook Executors 19.

7. But after the Death of the Baron the Feme shall not have Excessive Apparel, but the Executor shall have them. 33 H. 6. 31. b. Brook Executors 19.

doubted there if she should have excessive Apparel.

8. If the Baron delivers to the Wife a Piece of Cloth to make a Garment and dies, though this was not made into a Garment in the Life of the Baron, yet the Feme shall have it, and not the Executor of the Baron, inasmuch as it was delivered to her to this Intent; But against Devise of the Baron the Wife shall have more Apparel than is convenient. Mich. 40 & 41 Eliz. B. R. Harwell against Harwell.

9. A Chain of Diamonds and Pearl worth 370 l. being usually worn by a Feme, who was the Daughter of an Earl of Ireland, and a Baron of England, and the Wife of a Knight and a Serjeant at Law of the King, shall be Bona Paraphernalia, so that the Baron cannot devise them from the Wife, but the Devise shall be void, Per Curt. Tr. 8 Car. B. R. Lord Hasting against Douglas upon a Special Devise, the Defendant having married the Wife of Sir John Davies, who used the Chain in the Life of Sir John. Bill. 9 Car. B. R. this was argued per Curiam, and Richardson and Coke thought that the Wife should not have them, though no Debts, because of the Devise, neither, that she should not have them against the Will of the Baron, because they were not necessary for her though convenient; but Jones and Berkeley & contra, because convenient for her to wear; but Jones seemed that she should not have them as Paraphernalia, but by the Law of Reason and Convenience; But all the Court agreed that the shall have her necessary Apparel as Paraphernalia, and the Baron cannot devise them from her, because necessary that she should not go naked, but to be preserved from Shame and from the Cold.

Abr. 611. (g) that if the Husband by Will devies away the Jewels, such Devise shall stand good against the Wife's Claim of Paraphernalia; Arg. 2 Vern. 246. Mich. 1691. Clergis v. Duchess of Albermarle.

Husband devies the Wife's Jewels to the Wife for Life, Remainder to his Son. The Wife makes no Election or Claim to have the Jewels as her Paraphernalia. Her Administrator cannot make this Claim. 2 Vern. 247. Mich. 1691. Clergis v. Duchess of Albermarle.

The Husband devied the Jewels which were the Paraphernalia of the Wife and died. They were decreed to the Wife. Chan. Cales 240. Mich. 26 Car. 2. Cary v. Appleton.

10. The Executor of Viscount Bindon brought Decinve against the Mo. 215. Widow of the deceased Viscount, and declared upon the Detainer of pl. 354. S C. Mans certain Jewels. The Defendant did justify the Derasier of them as wood Ch. B. that Paraphernalia ought to be allowed to a Widow, having regard to her Degree; and in the Consideration in this Case the Husband of the Defendant being a Viscount, 500 Marks of Judges.
11. The Husband by Will gives Goods, which the Defendant pretends belongs to her as Paraphernalia. The Devise is good. Toth. 142. cites 5 Car. Davenport v. Lady Robinson.

12. He may dispose of them in his Life-time, but he cannot make a Will of them; But upon the Death of the Husband the Property is immediately vested in her; Per Berkley and Jones J. Cro. C. 344. Hill. 9 Car. B. K. Hatting v. Douglas.

13. By the Civil Law Bona Paraphernalia sunt qua Mulier ultra Domum aisset, the Use and Occupation whereof, though in a peculiar Sense do belong to the Wife, yet not in such a separate Way but that the Husband, during his Life, or by any Act executed in his Life-time, may dispose thereof or use for the same; But in a proper Sense they are such Things as are peculiar to the Wife as suitable to her Condition, and necessary or convenient to her in her Husband’s Family; So it comprehends the Wife’s convenient Apparel, with her Bed, Jewels and Ornaments of her Person. Orph. Leg. pag. 130.

14. Daughter’s Portion being to be paid out of the Personal Estate of her Father, the Court would not allow the Widow to retain her Paraphernalia. Fin. Rep. 146. Mich. 26 Car. 2. Shipton v. Hampson.

15. It is agreed by Marriage Articles that the Feme shall have no Part of the Husband’s Personal Estate but what he should give her by his Will; This bars her of her Paraphernalia, and from Jewels given to her by her Husband in his Life-time. 2 Vern. 83. Mich. 1688. Cholmly v. Cholmly.

16. The Widow must not have her Paraphernalia where the Personal Estate is deficient to pay the Debts, and must be aided by the Real. Fin. Rep. 415. Hill. 31 Car. 2. Stubbs v. Stubbs.

The Reason why the Law has subjected them to the Husband’s Debts is, because they are only Superfluities and Ornaments; Per LD. Cowper. Chan. Prec. 297. Trin. 1710 in Case of Will in Pack.


18. Jewels and Chamber Plate bought out of the Wife’s Pin-Money, and amounting to no more than 300 l. were decreed to the Wife, being of a small Value in respect of the Husband’s Estate. Chan. Prec. 27. Trin. 1691, Offley v. Offley.

19. The Question was, if the Husband can devise the Paraphernalia of the Wife to any other than the Wife? Sir J. Jekil, Creditors may come in against the Wife to have her Paraphernalia, but not a Devise under the Will of the Husband; and there is not one Case in the Law to Warrant such a Devise, and it is no Argument to say that the Husband may dispose of them in his Life Time, therefore he may give them away by Will; for he may dispose of his Wife’s wearing Apparel.
The Curia which they were permitted by their Will, Lady Rawleigh, Relic of Sir C. Rawleigh, did claim her Paraphernalia against the Devisee of her Husband, but I believe the Matter was made up between the Parties, for I do not remember any Judgment given in that Case, see Cro. Car. 343. Per Northey Attorney General, there is not one Authority in the Law that the Husband cannot devise the Paraphernalia of his Wife; it is true, the Executor of the Husband shall not take the Paraphernalia of the Wife from her, and the Case in Cro. Car. 343. goes no further. It is the constant Practice in great Families to give the Family Jewels to the Wife for her Life, and after her Death to the eldest Son, and I never knew such a Devise called in Question but always submitted to. Harcourt C. said, that this is a Point of Consequence, and I will reserve the Consideration of it till after the Matter's Report upon the Account; Curia advisare vult. MS. Rep. Trin. 18 Ann. Canc. Wilcox & ux' v. Gore & al.

20. Where a Baron borrowed of his Sister Jewels to present his Wife on his Marriage, Cowper C. said, this giving of them is a Change of the Property, and a kind of Sale in Market Overt, and on a Devise of Real and Personal Estate for Payment of Debts, if the Personal is not sufficient, and the Real be, and the Husband devises to her all her Jewels &c. she shall have the specific Legacy of her Jewels. Pach. 1715. Canc. Parker v. Harvey.

21. Mr. Calmady, having a Crochet of Diamonds which was his first Wife's, in 1693 makes his Will, and amongst other Things devises this Crochet to his eldest Son, and that it should go in Succession to the Heir of his Family as an Heir-Loom; Afterwards in 1699 he marries a second Wife, (the now Defendant) and turns this Crochet into a Necklace, and adds several new Diamonds to it to the Value of 200 l. which was more than the Value of the Crochet; The Plaintiff as Heir to Mr. Calmady (though not the eldest Son to whom it was specifically devised) demands this Crochet of the Defendant the Widow of Mr. Calmady. Counsel for the Defendant inquired, if the Defendant was intitled to it as Part of her Paraphernalia, which the Husband cannot give away from his Wife by Will, though he may dispose of it in his Life-time, and the Wife shall retain it against the Devisee or Executor of her Husband, unless in the Cafe of Creditors, who cannot otherwise have a Satisfac for or Debts. Counsel for the Plaintiff said, that though formerly it was a Doubt whether the Husband could devise any Part of the Paraphernalia of the Wife, yet of late it has been held, that the Husband may devise specifically Jewels of his own which he permitted his Wife to wear, though they shall not go to his Executor or to a general retilary Legatee, and that in this Case there being no direct Proof of an express Gift to the Wife, only a Permission to wear them, they are well devised to the Heir as an Heir-Loom, and that the altering and turning the Crochet into a Necklace, and permitting his Wife to wear them, was no Revocation of the Devise. Parker C. seemed to doubt at first, that turning the Crochet into a Necklace, adding new Diamonds to it, and permitting his Wife to wear it, was a Revocation of the Devise, but at last ordered the Matter to examine and separate the old Diamonds from the new, and declared the Diamonds of the Crochet to the Plaintiff as Heir at Law, and specifically deviced to him as an Heir-Loom. MS. Rep. Mich. 5 Geo. in Canc. Calmady v. Calmady.

22. Bona Paraphernalia are liable to Debts only, and in Favour of Creditors, not of an Heir. But any Creditors by Specialty are wholly unconcerned in this Question, they being by Reason of their Bonds &c. in the Devisee all Events secure, which must make it indifferent to them whether a Jewels it indifferent to them whether a Jewels
Executors.

23. Baron covenanted, obliging his Heirs and Executors to make a jointure on his Wife, and dies, the Wife claims her Paraphernalia, and also that she may have her jointure, or a satisfaction for it out of the Personal Estate. Per Parker C. She shall have the Paraphernalia, 1st. That in many Cases the Husband shall be looked upon as a Purchaser of the Paraphernalia, 2dly, That she takes them by a Right of an higher Nature than an Executor, for an Executorship is only a Trust, to see the Testator's Estate disposed of according to Direction, so that, 3dly, As these Paraphernalia's are not subject to the Baron's Dispositions by Will, she shall hold them against a Legatee; And 4thly, If she is to hold them against a Legatee, it is the common Jutice of the Court where an Heir and an Executor are equally liable, as to let in the Hein to pay so much of the Debt, as that the Legatee may be paid his Legacy, in many Cases to put the Legatee in the Place of the Creditor; and 5thly, If the Legatee is to be paid preferable to the Heir's having Aid of the Personal Estate, and the Paraphernalia are of an higher Nature, an Heir shall not have them. * Here is no Deficiency of Affets. Wms's Rep. 729. Mich. 8 Geo. Conc. Tipping v. Tippin. They do not go to an Executor but on want of Affets.

24. But where the Jewels were expressly bequeath'd to the Widow, there notwithstanding that at the Time of Testator's Death there were no Affets Real or Personal, yet it afterwards Affets happen, though by so remote an Accident as the determining of an Estate Tail, and the Reversion in Fee thereby falling in, there can be no Inconvenience to any Creditor or others, and the Legacy should be paid, and Testator's Intention performed, and the rather because here the Real and Personal Affets were by the Will made liable to the Debts and Legacies. And in the Principal Case [the Will directed and] all the Legatees were decreed to be paid before the Refiduary Legatee should take any Thing. 2 Wms's Rep. 78. 81. Trin. 1722. Burton v. Pierpoint.

25. If the Real and Personal Affets at the Time of the Husband's Death are not sufficient for Payment of Debts they are lost as to the Widow, notwithstanding that by an after Accident Affets fall in as by a Re- version in Fee falling in upon a determining of an Estate in Tail. 2 Wms's Rep 79. Trin. 1722. Burton v. Pierpoint.


* It being admitted that Personal Affets, gether with Real are sufficient to pay Debts, and satisfy this Covenant.

See Cart. 125. to 136. the Case largely ar-
Ecclesiastical Court could not oblige the Administrator to make Distribution, and that their Obligations taken to each Intent were void. 


cited by Ld. C. King, thus, viz. One died Intestate leaving a considerable Personal Estate, and a Son and Daughter. The Son administered. The Daughter contended for a Share in the Spiritual Court, where it was thought an Hardship that the Son should have all; And yet the Daughter was prohibited at Law. However the Statute of Distributions takes away the Administrator's Pretensions, (which he before had made with good Success) of retaining the Whole. It is true, That in Case any Child had been advanced by a Freehold, the Spiritual Court would not meddle with that; but the Act of Parliament has therefore gone further than ever the Spiritual Court intended to go, to make this Freehold fertile upon a younger Child by the Father, be brought into Hothp. 2 Wms's Rep. 448. Hill. 1727. in Case of Edwards v. Freeman.

2. At Common Law the Ordinary had the Disposal of the Intestate's Estates, and though perhaps he might after Funeral Expences &c. paid distribute the Estate amongst the Wife and Children; yet this was discretionary, and the Wife and Children had no Interest in the Administration; the Statute of E. 3. gives the Wife no Right to sue or demand Administration; all it doth is to enable the Administrator to sue; the 21 H. 8. orders the Administration to the Wife, or the next of Kin; this is the first Act that gives the Wife a Share or Interest in the Teftator's Estate, but that is as Administrator, and cites Hob. 191. 1 Cro. 62. 202. But though the Statute went so far as to devell the Ordinary and give it the Wife, yet there remained many Mischiefs; for there being no Distribution be that obtained Administration went away with all. So that if one was of Age, and the next under Age, and it by Surprie a Stranger obtain'd Administration he barred them all; or if he to whom it belong'd was beyond Sea, and another got Administration he was stript of all, this being the Mischief. Skin. 219. Hill 36 & 37 Car. 2. B. R. per Pollexfen Arg. in Case of Palmer and Allicock.


1. BARON has a Term in Right of his Wife; They have Issue a Daughter; the Wife dies; the Baron marries again and has Issue a Son; Baron surrenders and takes a new Lease and dies Intestate; Decreed the Term to the Daughter. Fin. Rep. 106. Hill. 25 Car. 2. Bucknall and Hicks v. Bullock.

2. 29 Car. 2. cap. 3. S. 25. Enacts that the Statute 22 & 23 Car. 2. Made per cap. 10. of Distributions shall not extend to the Estates of Femr Corts that die Intestate, but that their Husbands may have Administration of their Personal Estate.


4. Where a Man makes an Executor to whom he devisteth all the Rent and Residue &c. and this Executor dieth before the Teftator, be that takes Administration cum Testamento annexo, shall be liable to make Distribution of this Surplus within the All of Parliament. Cites it as resolved by Ld. Keeper North. 2 Freem. Rep. 85. in pl. 94. Hill. 1682. Anon.

5. A
5. A Prohibition was prayed to the Spiritual Court to stay a Suit there against an Executor for Distribution of the Surplus of the Testator's Estate after the Debts and Legacies paid; and it was intituled they have no Authority when a Will is made, and cited 5 Mod. 207. and a Prohibition was granted upon Debate. Gibb. 126. Hill. 3 Geo. 2. B. R. Hatton v. Hatton.


7. Prohibition was granted to the Delegates to stay a Suit there &c. because they compelled an Executor to make Distribution of the Surplus, he having 50l. devised to him by the Will as a Legacy; because, there being a Will and an Executor the Spiritual Court cannot compel Distribution, but only where the Party dies Intestate. Ex Relatione Magistri Place. Ld. Raym. Rep. 86. Trin. 8 W. 3. B. R. 1696. Pett v. Smith.

8. It is held that where a Man makes a Will and an Executor, and the Executor dies, an Administrator de Bono Non scall not make Distribution, because the Party did not die Intestate; and so not within the Statute. 2 Freem. 212. pl. 285. (b.) Hill. 1696. Anon.

9. Where a Man dies, having made his Will and an Executor, and gives him any particular Sum, as five or 10l. and makes no Disposition of the Residue and Residue, there the Residue shall be distributed to the next of Kin, because although he makes a Will, yet he is held to die Intestate as to the Residue. 2 Freem. Rep. 212. 213. pl. 285. (b.) Hill. 1696. Anon.

10. M. made his Wife Executrix and gave 1000l. A Piece to his Daughters, and some other Things, and Jewels to his Wife. It was intituled that so near a Relation as the Wife being Executrix, it could not be suppos'd but the Teifator intended her some Benefit by making her Executrix. But decreed that she having a particular Legacy given her, she should distribute the Surplus. 2 Freem. Rep. 263. pl. 332. Mich. 1702. Pawleth v. Lady Morley, Ld. Herbert & al'.

11. A. died Intestate before the Statute of Distributions took Place, but Administration granted after; his Personal Estate is liable to a Distribution. The Words of the Act being, that It shall be lawful for the Ordinary on granting Administration of Persons dying Intestate after June 1670. to take a Bond for Distribution. 2 Vern. 642. Mich. 1709.

12. One Covenants to leave his Wife 650l. he dies Intestate, and the Wife's Share on the Statute of Distributions comes to more than the 650l. this is a Satisfaction. 2 Vern. 709. pl. 631. Hill. 1715. Blandy v. Widmore.
13. B. having several Children gave to his eldest Son (who had disposed of him) 10 l. and no more, and gave to his Executors a Legacy, and made no Disposition of the Surplus, and it was decreed at the Rolls, that the eldest Son should be let into the distribitory Part of the Rest of the Children; but this Decree was reversed at the Houte of Lords upon the express Words of the Will, which excluded the eldest Son from any more than 10 l. Gilb. Equ. Rep. 121. Arg. Mich. 2 Geo. 1. cites Button v. Vathall.

14. A. gave his Wife the Residue of his Estate with Power to dispose thereof with the Approval of his Trustees. The Wife devised it to Whitaker v. Hornby by Will to the Plaintiff, but Cowper C. declared the Devise void, she not having the Concurrence of the Trustees, and that the Tevillator died. S. C. decreed accordingly by Serjeant v. Simpson.

15. A. by Marriage Articles covenants to pay his Wife 1500l. in full of Dower, the eldest of his Children, or otherwise, out of his Real and Personal Estate if the survives him. A. dies intestate; Per Cowper C. he is tied down to accept the 1500l. and cannot come in for a Share by the Statute of Distributions. 2 Vern. 723. Mich. 1716. Davila v. Davila.

16. A. devises to J. his Daughter a Legacy, and declares it to be in full of every Thing the could claim out of his Estate, and then makes a devise of the Residuum to another Daughter, who dying in his Life-time, he by a Codicil makes a Devise of this Residuum to his Wife F. to be disposed of by her with the Approval of the Trustees. A. dies; the Wife gives this Residuum to her Will without the Trustees &c. Cowper Chancellor said, the Wife not observing the Terms prescribed to her, this is to be taken as if the Tevillator had made no Disposition thereof; and he dying intestate, it shall go in a Court of Distribution. 2dly, That J. here shall have her Share, notwithstanding the exclusive Words, for this is a new Right accruing by the Codicil through an Accident, after the Will of which the Tevillator had not then any View or Prospect; but he agreed a Case put and determined in the Houte of Lords, where a Man devised 1 s. and no more to one of his Children, and died intestate as to the Residuum; That these Words (and no more) excluded that Child from having any Share contrary to an Opinion declared by the Master of the Rolls. Mich. 3 Geo. Canc. MS. Rep. Symphon v. Hutton.

17. Whitaker Serjeant moved for a Prohibition to the Prerogative Court, because the Plaintiff and others who were Executors, and had no Legacies, were cited to make Distribution of the Residue of the Tevillators Personal Estate amongst his next Relations, and said, that a Prohibition had been granted in the like Case between Calverley and Calverley, 12 of the late Queen; but the Citation appearing to be as well to exhibit an Inventory, and to pay Legacies which they ought to do, as to make a Distribution, the Court denied the Motion, but said that if there was a Litel they would grant Prohibition quoad the Distribution. MS. Rep. Mich. 4 Geo. B. R. Fowle &c. v. Philipot.

18. A, bequeathed the Surplus of his Personal Estate to B. C. D. and E. S. P. decreed equally to be divided Share and Share alike, and made F. his Executor in Trust; D. died in the Life of A. Ld. C. Macclesfield held that this Legacy of a fourth Part to D. became void, and was as to much of A's Estate undisposed of by the Will, and could not go to the Survivors, nor to J. S. being but a bare Executor in Trust, and therefore muft go to A's next of Kin according to the Statute of Distributions, and that as to the this Executor was a Trustee for the next of Kin. Wm's Rep. 700. Trin. 1721. Bigwell v. Dry.

was cited before the Ld. Talbot, and approved by him 29 Aug. 1734. Ibid. Bb
20. A Will was begun and several Legacies were given to the next of Kin, and likewise to the Executors, and then at the Beginning of the next Sentence the Will stopped and was left unfinished. Per King Ch. The Testator having given the Executors a Legacy, it is most likely he would have given away the Residue from them, and therefore decreed the undisposed Residue to be distributed according to the Statute of Distributions. Gilb. Equ. Rep. 184. Hill. 12 Geo. 1. in Canc. Knewell v. Gardiner.

21. A. by Will declares his Intention to dispose of his Household Goods by his Codicil, and devises the Residue of his Personal Estate not disposed of, nor referred to be disposed of by his Codicil, to his Wife. Afterwards the Testator makes a Codicil, and does not dispose of his Household Goods thereby; the Household Goods shall not go to the Residuary Legatee, but according to the Statute of Distribution. 3 Wm's Rep. 40. Trin. 1730. Davers & al' v. Dewes.

(Z. 8) Distribution. How, and by whom. And to whom.

Cart. 127.

1. B E F O R E the Statute 22 & 23 Car. 2. cap. 10. the Ecclesiastical Court could not oblige the Administrator to a Distribution, and the Bonds taken by them for that Purpose were void; Resolved. See Lev. 233. Hill. 19 & 20 Car. 2. B. R. Hughes v. Hughes.

2. 22 & 23 Car. 2. cap. 10. S. 4. Directs the Surplusage to be distributed as follows, viz. One Third to the Wife of the Intestate; and the Residue among his Children, and such as legally represent them if any of them are dead, Except such Children not Heirs at Law who had Estate by Settlement in Intestate's Life-time. But if their * Shares are short of the others, then to be made equal; And the Heir at Law to have a full Share, notwithstanding any Land come to him.

and dying Intestate quad a Surplus; in the last Case it need not be brought in to intitle to a distributive Share. Ch. Prec. 170. Trin. 1701. Vachel v. Jeffries.

The Occasion of making this Statute (22 & 23 Car. 2. cap. 10.) was to put an End to the Controversy betwixt the Temporal and spiritual Comrns. The Ordinary before took Bonds from the Administrator to make Distribution, and those Bonds were at Law adjudged void, and the Administrator intituled to all the Personal Estate. But this Statute takes away all the Administrator's Pretensions (which he succeeded in before of retaining the Whole. Per Id. C. King. 2 Wm's Rep. 447, 448. in Case of Edwards v. Freeman. —— S. P. by the Master of the Rolls. Ibid. 441.

The End and Intent of this Statute was to make Provision for all the Children equal as near as could be estimated. It was do to a good and just Parent ought to do. Per the Master of the Rolls. Ibid. 439, 440.

3. 22 & 23 Car. 2. cap. 10. S. 5. 6. Distribution shall be equally between the Widow and next of Kin if no Children; If there is no Wife all shall be distributed among the Children; If no Child all shall be distributed among the next of Kin to the Intestate in equal Degree, and their Representatives. No Representatives shall be admitted among Collaterals after Brothers and Sisters Children.

4. Husband makes his Wife Executrix, and devised 1s. to his Daughter for a Legacy and dies. Executrix before Probate dies Intestate. Whether the Goods shall be distributed by the 22 & 23 Car. 2. cap.
Executors.

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cap. 10. among the next of Kin to the Executrix, or to the next of Kin to the Testator, since the dying before Probate her Husband in Judgment of Law died nilo Intestate? The Court seemed to incline that the Statute did extend to this very Case, and that Administration must be committed to the next of Kin of the Husband, but if there should be no Distribution, it must then be according to the Will of the Testator. 2 Mod. 101. Trin. 28 Car. 2. C. B. Harris's Case.

5. A. made his Will and his Son Executor, but makes no Disposition of the Surplus. The Son dies before Probate. Per Cowper C. the Person is dead Intestate ab initio. 2 Vern. 633. Hill. 1708. Ball v. Smith.

6. A Devise was to a Wife of Monies to be distributed among her Children as she should think fit; if the Wife marry again the Money shall be equally distributed, because the Power to dispose of it unequally was with Intent to preterve Obedience to her, which Intent fails when the marries. 2 Freem. Rep. 18. Pach. 1677.

7. J. had made a Will before Probate. The Intent of this Statute was plainly, to put the Mother in the same State and Condition with the Collaterals, who before flood on the same footing with the Father, so that whenever she is intimated they shall have an equal Share with her; Per Cur. G. Equ. Rep. 190. Pach. 11 Geo. 1. Kellyv. Kellway.

A. has a Wife and three Children, B. and C. — J. S. by Will gives 500 l. to C. and dies. C. dies. Then A. dies without having administered to C. yet the 500 l. vested in A. by the Statute of Distributions, and therefore ought not to be distributed to the Personal Estate of C. but as the Personal Estate of A. and then the Mother and B. and D. would each be intitled to a third Part. Chan. Prec. 366. Trin. 1706. Grice v. Goodwin.

If one dies without a Wife leaving Children they have the whole; if without Children or Wife leaving a Father, then such Father has the whole; if no Father but a Mother, then to the Mother and next of Kin; if without Child but a Wife and a Father, it goes in Moieties between the Wife and the Father; if no Father but a Mother, then that Moiety, viz. the Moiety remaining after the Wife's Moiety) between the Mother of the Intestate and his next of Kin, (as Brothers and Sisters, Nephews and Nieces) the Representatives of the deceased Brother; Per Cur. G. Equ. Rep. 190. Pach 12 Geo. 1. Kellyv. Kellway. — S. C. cited Arg. Abr. Equ. Cases 43. — S. C. decreed by Ld. C. King. 2 Wms's Rep. 544. Pach. 1726. — And in a Note at the End of the Case it is said that this Case was affirmed to be Law. 15 May 1739. by Ld. Hardwicke, in the Case of Stanley v. Stanley.


9. A. had three Brothers, B. C. and D. — B. died leaving two Children. C. died leaving three Children, and D. died leaving five Children. Then A. died Intestate. It was resolved that Distribution should be per Capita, and not per Stirpes, and that all the Children should have equal, because none take by Representation, but all as next of Kin. Abr. Equ. Cases 249. Mich. 1695. Wall v. Wall.

10. A. was a Will of his eldest Son's Marriage with C. covenanted in Case of a second Marriage by B. to pay the first Son of B. and C. 500 l. There was a Son and several Children more of that Marriage. Per S. C. cited Cur. the Heir must bring into a Heart's blood the 500 l. though he is in Nature of a Purchaser under a Marriage Settlement. 2 Vern. 638. pl. 568. 1708. Phiney v. Phiney.

11. A Freeman of London made his Will having no Wife, but B. a Son and C. a Daughter, and E. a Grandson of D. another Daughter who had married against A's Consent, and after died in A's Life-time. A. by Will taking Notice that he had given B. 400 l. and C. 1000 l. in full of their Orphanage Part by the Custom devise to E. and
after some other Legacies gives one Moiety of the Surplus of his Personal Estate to his Son B. and the other Moiety to his Children and Grand-children. The Master of the Rolls decreed that B. should not come in for a Share of the remaining Surplus, he being by the Words of the Will separated from the other Children, viz. one Moiety thereof being to his Son B. and the other to his Children and Grand-children, so that B. was intended to have only a Moiety. Wms's Rep. 340, 341, 342. the 5th Resolution, Hill. 1716 Northey v. Strange

12. And the Children and Grand-children must take per Capita, and not per Stirpes, they all taking in their own Right, and not by Representation. Wms's Rep. 343. the 6th Resolution, Hill. 1716. Northey v. Strange.


14. It was said, that upon the Statute of Distributions of 22 Car. 2. the Mother took all when there was no Wife or Child as the Father did, and before this Statute, if a Man-Child died without a Wife leaving Children, they would have the whole under the Statute of Distributions; Arg. G. Equ. Rep. 189. Patch. 12 Geo. 1. in Case of Kelway v. Kelway.

15. Before the Statute of 22 Car. 2. they distributed first among the lineal descending Line as Children; then they took the lineal Line amounting, as Father and Mother, and then the collateral Line, as Brothers and Sisters; Per Cur. G. Equ. Rep. 189. in Case of Kelway v. Kelway.

16. If a Widow having three Children advances, one of them with 1000 l. and dies Intestate without having given any thing to the others; Ld. C. King ruled, that the Child advanced should not bring the 1000 l. received into Hotchpot; and said it weighed with him that this Act of Distribution was grounded upon the Custom of London, which never affected a Widow's Personal Estate, and seems to include those within the Clause of Hotchpot, who are capable of having a Wife as well as Children, which must be Husbands only. 2 Wms's Rep. 356. Trim. 1726. Holt v. Frederick.

17. Where a Man dies leaving a Wife and no Child, but a Mother and Brothers and Sisters, the Wife shall have one Moiety by the Statute, and the Mother, Brothers and Sisters, shall have the other Moiety equally distributed between them. Abr. Equ. Cases 253. Mitch. 1727, cites it as the Case of Kelway v. Kelway.

18. The Statute 22 Car. 2. cap. 10. does not hinder but that an Advancement out of the Personal Estate to the Heir at law, and so the Use of a Chattel Personal for his Life must be brought into Hotchpot before he shall have Further Distribution; Per the Master of the Rolls. Gibb. 285. Patch. 4 Geo. 2. B. R. Pratt v. Pratt.

19. The Statute 22 Car. 2. cap. 10. directs, that the Children unadvanced shall out of the Surplusage be made equal to such as were advanced before any further Distribution shall be made. A Portion to be railed out of Land by a Provision in a Settlement upon a Contingency of Age or Marriage, which had not happened at the Intestate's Death, is an Advancement when by the Event the Contingency it becomes vested; Per the Master of the Rolls. Gibb. 285, 286. Patch. 4 Geo. 2. B. R. Pratt v. Pratt.

20. Where by such Provision several of the Children, as for Instance, the Children by a second Venter, are intitled to a Sum certain equally upon a Contingency not fallen at the Time of a Bill brought for Distribution, no Consideration shall be had of that Sum to bring it into Hotchpot;

What shall be said an Advancement within the 22 Car. 2. cap. 10. to be brought into Hotchpot.

1. A. Had four Daughters, B. C. D. and E. and devised to B. 1000 l. and by the same Will devised to B. C. D. and E. 1500 l. a-piece for Portions, which 1500 l. a-piece was to be raised out of Lands devised for that Purpose. Afterwards B. was married in A's Life-time, and had a Portion given her by A. of 4000 l. A. made M. his Wife Executrix and gave her some Legacies, but made no Disposition of the Surplus, which was considerable. T. Wright said, that as to the Hotchpot he could see no Reason against it, and therefore the Portion must be brought in, and to C. D. and E. have the Benefit of it, but not the Wife, and 1500 l. of the 4000 l. coming out of the Land, there was 2500 l. only to be brought into the Hotchpot. Chan. Prec. 182. Hill. 1701. Ward v. Lant.

2. A. on a Marriage Treaty covenanted to leave his Wife 2000 l. at his Death, 2000 l. to his eldest Son, and 1000 l. a-piece to his younger Children, and afterwards being a Freeman of London died leaving several younger Children, and it was held in that Case, that the 1000 l. a-piece to the younger Children being due only by Covenant was a Debt on the Personal ESTATE, and not being to be paid till after the Father's Death, was no Provision or Advancement either within the Statute of Distributions, or the Custum of London, to bar them of their customary or distribitory Shares of their Father's Personal Estate, which were greatly advanced at the Time of his Death; Arg. Abr. Equ. Cafes 250. cites 3 April 1726, Feat v. Feat. — But T. King laid that this was a Caufe by Convent, and the Question very little considered. Ibid. 253.

3. The Father agreed to give 7000 l. Portion with his Daughter to be paid by Inhabitants of 1000 l. a Year, and the Father had paid 6000 l. but died before the last 1000 l. became due, and on a Bill brought for a Distribution of his Personal ESTATE, it was decreed by Ld. Macclesfield, and affirmed by T. King, that this 6000 l. was not Part of the Advancement to be brought into Hotchpot, but that the remaining 1000 l. was a Debt to be paid out of the Personal Estate; Arg. Abr. Equ. Cafes 251. Mich. 1727. cites [Rowland, but I suppose it should be] Newland v. Shepherd.

4. But it was said Arg. on the other Side, that the Question was not whether the 6000 l. paid should not be brought into Hotchpot if she had desired to be let into a further Share, but whether, the 6000 l. being more than her Share of the whole, she should have the other 1000 l. and it was decreed that she should. Ibid. 252. 253. Arg. cites Newland v. Shepherd. C c c

5. A. by
Executors.

The Words of the Statute make no Difference between a voluntary and a Marriage Settlement, but are of Settlements in general; Per Raymond Ch. J. Ibid. 444.

5. A by Marriage Articles covenanted to settle within six Months after Request of the Wife's Father, all his Lands in B. for raising 5000 l. for Daughter's Portions on Failure of Issue Male, payable at 18 or Marriage, and Maintenance of 80 l. a Year in the mean Time. The Wife died leaving only one Child, a Daughter named M. no Settlement being made. A. afterwards married a second Wife, on whom he settled great Part of the Lands comprized in the Articles, but without giving Notice of the Articles. A. died intestate leaving a Personal Estate of 20,000 l. and the said M. by his first Wife about 11 Years of Age, and B. a Son, and E. a Daughter by the second Wife. It was decreed by Ld. C. King, affiled by Raymond Ch. J. the Maker of the Rolls, and Mr. Justice Price, that the 5000 l. secured to M. though on the * Contingency of living to 18 or being married, and which have since happened, must be brought into Hocchpott by M. to intitle her to a Distribution of the 20,000 l. 2 Wms's Rep. 435. to 449. Hill. 1727. Edwards v. Freeman.

6. A Provision for a Child by Will is not an Advancement to be brought into Hocchpott, (for a Cafe may happen, that as to Part of the Personal Estate the Teftator may die Intestate) neither shall Land given by Will to a younger Child; For a Provision to be brought into Hocchpott must be such as is made by an Act in the Teftator's Life-time, and no by Will; Per the Maker of the Rolls. 2 Wms's Rep. 440. Hill. 1727. in Cafe of Edwards v. Freeman.

7. If the Father settles a Rent out of Lands upon a younger Child, it was held by the Maker of the Rolls that this would be an Advancement. 2 Wms's Rep. 441. in Cafe of Edwards v. Freeman.

8. If the Father by Deed settles an Annuity upon a Child to commence after his Death, this is an Advancement pro tanto; Cited per the Maker of the Rolls out of Swimb. 165. and his Honour said, that by the same Reason a Reversion settled on a Child, as it may be valued, is an Advancement also. 2 Wms's Rep. 442. in Cafe of Edwards v. Freeman.

9. A Provision, within the Statute, for a Child need not take Place in the Father's Life-time, but a future Provision is a Bar pro tanto; and a Portion affurred or secured to a Child, though in futuro, is a Provision according to its Value; Per the Maker of the Rolls. 2 Wms's Rep. 442. in Cafe of Edwards v. Freeman.

10. Maintenance Money agreed by Marriage Articles to be paid to a Daughter of a first Marriage in Cafe of Failure of Issue Male, of 80 l. a Year till 18 or Marriage, and then to have 5000 l. is not to be brought into Hocchpott, no more than what is allowed or secured by the Parent for the Education of the Child. 2 Wms's Rep. 435. to 449. by Ld. C King, affiled by Ld. Ch. J. Raymond, the Maker of the Rolls, and Mr. Justice Price, Hill. 1727. Edwards v. Freeman.

11. A having
(Z. ro) Distribution.

Of what Things.

BonDS taken in Dewiffe's Name shall be accounted Part of the Tefator's Personal Estate disposed by his Will, and to be divided accordingly. Chan. Rep. 86. 10 Car. 1. Bates v. Micklethwaite.

2. Estate pur auter Vie is not distributable by the 22 & 23 Car. 2. Camb. 338. cap. 10. 2 Salk. 464. Mich. 8 W. 3. B. R. Oldham v. Pickering. S. C. —— 12 Mod. 103. S. C. —— 3 Salk. 137. S. C. —— Ld. Raym. Rep. 96. S. C. accordingly. When such Estate is limited to Executors it is Personal Estate, and as such is distributable within the Statute of Distributions; Cited to have been so decreed by Ld. C. Cowper, in Caile of the Duke of Devon and Kent. And Ld. C. King decreed accordingly that it was Personal Estate. 2 Wms's Rep. 581, 532. and at the Bottom of the Page has the following Note, that however, though in the Spiritual Court an Estate pur auter Vie be not distributable on Account of its being a Freehold, yet if it seems as if in a Court of Equity it should be distributable, and that the Administratrix should be taken to be a Trustee for general Legacies, if any, and if no Will, then for the next of Kin; And as Administration may be granted to one only as principal Creditor, he ought not to go away with the Residue of the Estate pur auter Vie as Administratrix. —— S. P, and by Ld. C. King, Estate pur
Executors.


And by 14 Geo 2. cap. an Estate pur ater Vic not being decided, or in Part applied to the Pay-
ment of Debts according to the Statute of Frauds, shall be distributad in the same Manner as Personal
Estate.

3. Lord Cowper was of Opinion upon the Statute 22 & 23 Car. 2, cap. 10. S. 4. that the Word (Portion) with respet to younger Children, did include an Estate in Land as well as in Money, and that this Land in the Computation of the Estate to be distributod, was to be added to, and computed with the other Parts of it, but with respet to the eldest Son, whatever Land came to him from his Father by Defent or other-
wise, he is to have his Share without any Consideration of the Value of such Land &c. Hill Vac. 1715. Lloyd v. Twishtam.

4. The Statute of Distributions does not break into any Settlement which has been made by the Father, but only middles with what is left undispos'd of by him; it takes away nothing that has been given, how-
ever unequal or exceeding it may be as to the Remainder left; Per Raymond Ch. J. 2 Wms's Rep. 443. Hill. 1727. Edwards v. Free-
man.

(Z. 11) Distribution.

To whom.

1. Directed 16001. to be raised and divided among five Children. One of them dies before Distribution. His Share shall go to the Survivors, and not to his Device. 2 Chan. Rep. 129. 29 Car. 2. Woolthenholm v. Sweman.

2. A Brother of the Half Blood is intitulod to a Share of the Personal
Estate of another Brother, though of the Whole, with Brothers and
Sisters of the whole Blood to the Intestate, there cannot be two De-
gress made of the whole and the half Blood. The Intent of the Act
was to give the Ecclesiastical Court the Jurisdiction in this Matter,
and to provide for the Distribution of Intestate's Estates, which they
had a long Time attempted and contested, but were still prohibited; but now this Act permits them to proceed; And an Information is
proper by hearing Civilians what their Courfe is and has been.

3. Smith's Case, S. C. the Brother of
the Half Blood must be accounted in equal Degree. — 2 Mod. 204. S. C. ruled accordingly.
2 Lev. 175. S. C. — 2 Le 95. S. C. ruled accordingly. — In the Case of Richifia (Carl)
B. Morcliff. Vern. 403. pl. 375. Trin. 2 Jac. 2. the Court was of Opinion that where there is a
Brother of the whole Blood, and a Sister of the Half Blood, the Sister should have but half a Share; but the Reporter adds a Note, that the Judgment in the Cases of smith, Tracy and Stapleton v. Sherard, and the conlant Practice of the Court has been otherwise. And adds a further Note that it has been settled in the Case of Crooke v. Miles upon an Appeal in the House of Lords that the Half Blood shall have a whole Share, viz. equal with the of the whole Blood. — 2 Vern. 124.
pl. 124. Hill. 1690. Crooke v. Wats decreed a whole Share to the Half blood; and adds a Note, that on Appeal to the House of Lords this Decree after Arguments by Civilians and common Law-
Serceant. — 2 Freem. Rep. 112. pl. 124. Hill. 1689. Crooke v. Wats the Court held that the
Half Blood was in Equal Grade, and ought to have a whole Share — Carter, 51. Trin. 1 W. & M. in
B. R.

3. Representatives of Collaterals in 22 & 23 Car. 2. cap. 10. shall be 2 Vern. 169. intended only of Brothers and Sisters Children of the Party Intestate. Bently v. Daring. The Court inclined contra, but no Decree; But 255. Maw v. Harding decreed according to Caldicot's Case. — 1 Silk. 250 that Brothers and Sisters Children mean Intestate's Brothers and Sisters Children. Pett v. Pott.

4. A Man died Intestate, and his next of Kin were two Aunts, but Freem. Rep. one of them died before him; and left two Children, and Administration 296 pl. 149. being granted to the surviving Aunt, she was ordered to distribute a C. B. S. C. Share to them, and a such Share as their Mother would have, if she was the only living. but this was contrary to the Opinion of the Ch. J. Court granted North, who would not allow Representations amongst Collaterals to be distributed; For by the Prov. in the Act Repre.

sentatives shall not extend further than Brother's and Sister's Children. But Ibid. 297, pl. 552. Trin. 1690. S. C. the Court on the Case coming on to be argued was div'd ded; North and Charlton for the Prohibition, but Windham and Ellis contra; Et adjournatur. But Ibid. 298. pl. 314 S. C. Hill. 1690. North was for the Prohibition, and Charlton and Windham against it. Et adjournatur.

5. A Prohibition was prayed to the Ecclesiastical Court where a Peron died Intestate, and his next Relation was a Cousin German; and the Children of another Cousin German sued for Distribution; And per Cur. the Prohibition was granted upon the new Act of Parliament of this King. Freem. 293. pl. 355. in Stacc. Hill. 1680. Anon.

6. The Father had a Son and two Daughters, one of the Daughters dies; the Father intending to let the Son have the whole Advantages of the Intestate's Estate renounces the Administration, and it is granted to the Son; the other Daughter comes into the Spiritual Court, and files for a Distribution upon the Act; whereupon Pollexen moved for a Prohibition in Trinity Term following. Holt shewed Cause why a Prohibition should not go, and said, that 25 Car. 2. was made in pursuance of 31 H. 8. and upon the Statute of H. 8. the Ordinary upon the Father's renouncing could not commit to a Stranger, but must have committed to the next of Kin; and that now this Statute causes a Distribution to those who have an equal Right to the Administration, which the Daughters in this Case have. Pollexen on the other Side said, In this Case there could be no Distribution, unless the Act gave it; and he said what the Act gives is at the Time of the Death of the Party, and that none shall have Distribution but who is at that Time, viz. at the Death of the Intestate intited to it; He said that here his renouncing gave no Right, and that if he come and sue afterwards in the Spiritual Court, that this will not bar him; If the Father had died before Administration taken out, his Executor or Administrator should have it. Jones said, That the mean Intent of 25 Car. 2. was to hinder the Ordinary from letting whom he pleased run away with the whole Estate; A Prohibition was ordered with a Delign to argue it upon a Demurrer. Skin. 103. Patch. 35 Car. 2. B. R. Tayler and Haynes.

7. If any of the next of Kin are before Distribution, such Share shall The Right go to his, her, or their Executors or Administrators, and shall not fursweve to the next of Kin of the Intestate. 2 Chan. Rep. 374. 1 Jac. 2. Winchellesia v. Northcliff.

8. Executors. 's Death; Per Matter of the Rolls, and said that this is according to Resolutions. 2 Wm's Rep. D d d 544.
8. A Grandmother shall not have a Share with the Brother or Sister; though it was argued that she should, because she is two Degrees from the Intestate; and so is a Brother or Sister, computing the Degrees according to the Civil or Canon Law, vis. One Degree to Father, and another from him to the Brother, and so to the Grandmother is but two Degrees, viz. One to the Father, and another to the Grandmother. 2 Freem. Rep. 95. pl. 105. Trin. 1686. Winchellia (Earl) v. Norcifl.

A. dies Intestate, leaving an Uncle and a deceased Uncle's Son, the Court inclined that the Nephew was intitled to a Share with the Uncle, but took Time to consider of it. 2 Vern. 168 Beeton v. Darking.—No Representation between Brothers and Sisters to the Intestate. 2 Vern. 235. Maw v. Harding.—2 Show. 236. Coldicott v. Smith accordingly.

10. If a Man dies Intestate leaving only one Child, such Child is within the Statute of Distributions; and it is not Calus Onimis: Per Cur. Obiter. Carth. 32. Trin. i W. & M. in B. R.

11. An Infant in Vento et More at the Time of the Death of the Father was held clearly per Cur. to be intitled to a Share by the Statute of Distributions; For he is in the Eye of the Law a Child, and ought to be provided for as well as the Reft; and though it was admitted that a Distribution Share is an Interest veiled on the Death of the Intestate, even before the Distribution, and shall go to the Executor or Administrator of the Party, though he dies before Distribution, yet it was not such an Interest veiled in the Children born so, as to deprive the atter-born Children. 2 Freem. Rep. 230. pl. 301. Mich. 1698. Ball v. Smith.

12. Brother's Grand Children cannot share with Brother's Children; For the Intestate is the Subject of the Act. It is his Estate, his Wife, his Children, and by the fame Reason his Brother's Children, for he is equally cor-relative to all; Per Cur. on a Motion for a Mandamus to make Distribution &c. 1 Salk. 250. Trin. 12 W. 3. B. R. Pett v. Pett.

So where A died Intestate leaving no Wife nor Child but his next of Kin were an Uncle by the Mother's Side, and a deceased Aunt's Child, Ld. C Parker said that Pett's Case was a Case in Point, and that the Grandchild in that Case was a Nephew to him with whom he claimed to come in for a Share and so is the Claimant here; and the Uncle having demurred to the Nephew's Bill by which he claimed a Share, the Demurrer was allowed. Mich. 1719. Wms's Rep. 594. Bowers v. Littlewood.

13. An Intestate having neither Father or Mother, Wife or Children, but only a Sifer of his Father, and two Daughters of his Father's Brother, a Motion was made for a Mandamus to the Ordinary to make Distribution, who had granted it to his Father's Sister. Sed per Cur. by the Statute 22 Car 2. there shall be no Distribution amongst Collaterals after Brother's and Sister's Children of the Intestate; for that Statute is a Restraint on the Common Law, and therefore shall not be carried farther than the Letter, and after such Collaterals, it shall go to the next of Kin to the Intestate, in which this Case was to his Father's Sister. 3 Salk. 138. pl. 3. Pett v. Pett.


So where A died Intestate leaving no Wife nor Child but his next of Kin were an Uncle by the Mother's Side, and a deceased Aunt's Child, Ld. C Parker said that Pett's Case was a Case in Point, and that the Grandchild in that Case was a Nephew to him with whom he claimed to come in for a Share and so is the Claimant here; and the Uncle having demurred to the Nephew's Bill by which he claimed a Share, the Demurrer was allowed. Mich. 1719. Wms's Rep. 594. Bowers v. Littlewood.
14. Among Lineals, Representatives ad infinitum should share in the Distribution; but otherwise among Collaterals; Admitted Arg. Wms's Rep. 27. Trin. 1700. in Fett's Cafe.

Civil Law (pag 61.) that the Grandmother &c. of the ascending Line to the utmost Degree was anciently preferred before the nearest Collaterals, but that he said may be altered by the Statute of Car. 2. which prefers the next of Kin though Collaterals before one though Lineal that is more remote. Wms's Rep. 51. Pasch. 1701. in Cafe of Blackborough v. Davis.

15. The Aunt is not intituled to a Distribution with the Grandmother; Till the for as by the Common Law, Father and Mother were nearer than Time of Brother and Sister, Grandfather and Grandmother are nearer than Uncle and Aunt, the Grandmother in this Case is the Root of the Kindred, whereas the Aunt is only a Branch; and the Grandmother is in the Place of the Mother; If one had died without Wife or Child his Mother had all (before 1 Jac. cap. 17) and his Brothers and Sisters nothing; But the Father surviving has all at this Day, and this Act was to prevent the Mother's carrying all to another Husband. 1 Salk. 251. Trin.


Personal. Ibid. — 12 Mod. 615 to 626. Hill. 1701. S. C. — Wms's Rep. 41 to 53. Pasch. 1701. S. C. — Ed. Raym. Rep. 634. 686. S. C. the Court held, that the Grandmother is as near as the Aunt; For in this Cafe in decent of Lands it would be a mediate Defendent, and the same Medium to both, viz. the Father; and the Grandmother seems to have the Advantage, because he is of the Right Line, and the Aunt of the collateral Line. And Sir Barth. Shower cited a Cafe between Burton and Sharp, in the last Trin. Term, where an Administration was filed to be granted to the Great Grandmother; and the Aunt moved for a Prohibition in C. B. to stay the Suit in the Spiritual Court, and it was denied.—Chan Prec. 527. Hill. of Welsh v. Dappa.

16. I give unto my Daughter A. all my Goods and Plate, 1500 l. to my Son B. and 10 l. and no more to my Son W. and 10 l. and no more to my Wife's Daughter P. and made C. and D. Executors, and gave them 100 l. each, but makes no Disposition of the Residue. Decreed that it shall go in a Course of Administration, but Decree reversed, for it is plain that W. and P. were to have 10 l. and no more. MS. Tab. March 8, 1706. Vachel v. Breton.

17. The next of Kin to an Intestate were a Grandfather by the Father's Side, and a Grandmother by the Mother's Side. They shall take in equal Moieties by the Statute of Distributions as being in equal Degree. Decreed at the Rolls, and Sir Joseph Jekyl was to clear in the Point that he would not suffer it to be debated. Wms's Rep. 53. cites 13 May 1723, Moor v. Barkham.

18. A Papist may take a Personal Estate by the Statute of Distributions in the Case of one dying Intestate; it is the Act of the Law, it is the Legitimation that gives these distributary Shares to the Widow and next of Kin; it is a Succession ab Intestate to a Personal Estate, similar to a Defendent of Land, where an Heir though a Papist (as here) if above the Age of 18 Years and six Months may inherit. Besides, the Intent of the Statute of Distributions was that the Administrator should sell all the Personal Estate of the Intestate, turn it into Money, and distribute it; now it would be inconsistent that the Papist should have a Share of the Money left by the Intestate, but not of the Money raifed by the Administrator out of the Intestate's Earnings. 3 Wms's Rep. 48, 49. Trin. 1730. Davers & al v. Dewes & al.

(Z. 12)
(Z. 12) Distribution.

Where the Right shall be said to be vested.

Where a Person dies intestate, and his Mother living,
1. A Dies intestate without Brother or Sister, his Mother living,
She makes her Will, and makes B. her Executor and residuary
Legatee, and dies within a Week after her Son, and before she had taken
out Administration to him. The Brother of the Mother takes out Admini-
stration to the Son as his Uncle and next Friend; The Executor of the
Mother brings a Bill against the Uncle and Administrator of the Son
to have an Account of the Personal Estate of the Son in Right of his Tres-
tatis, who was intitled to it by the Statute of Distributions. Cowper C.
said, the Administrator of the Son is only a Trustee for the next of Kin
to the Intestate who are intitled to a Distribution by the Statute, and
that in this Case was the Mother, the Son dying without Father, Bro-
ther or Sister, and this is an Interest vested in the Mother though she
died before Administration taken out to the Son, and shall go to her Exec-
cutor and residuary Legatee; and decreed accordingly for the Plaintiff.

3. Devise

Devise after Debts and Legacies paid, the Residue amongst his Kin-
dreds according to their most Need; This is to be extended ac-
cording to the Act for better Settlement of Intestate's Estates. 2 Chan.
2. A Freeman of London devized his Part thus, viz. I intrust it with
my Wife, and to give it amongst my Children as she shall think fit. The
Testator had a Child by a former Venter, to whom the Mother-in-law gave
a small Part, and the rest amongst her own Children The Court de-
3. Devise to the Wife, and hoped she would leave it to his Son. Her second Husband granted the Legacies devised away. Son died for Relief but was dismissed; for it was no Trust for the Son. Cited per Finch C. Chan. Cakes 310. Hill. 30 & 31 Car. 2. in the Case of Civil v. Rich.

4. A devised Land to B. for 80 Years if she lives so long, then to Trustees to sell for Payment of Debts. Decreed the Lands to be sold for Payment of the Debts, and to pay B. seven Years Purchase for her Estate for Life in such Part of the Lands which shall be sold for the Purpose aforesaid. Fin. Rep. 414. Hill. 31 Car. 2. March v. Powke & al.

5. An Estate was devised to a Man to distribute the same amongst his Nephews and Nieces as he should think fit, and one of the Nieces, to whom nothing had been appointed, brought a Bill that the might have an equal Share of the Estate, and was dismissed. Vern. 356. Hill. 1685. Swernam v. Woolaston.

6. A devised his Lands shall descend to his three Daughters in such Shares and Proportions as his Wife by Deed shall appoint. She makes a very unequal Distribution. Whether Equity will relieve against it. Vern. 355. Hill. 1685. in Case of Wall v. Thurborne.

proper and receivable in Equity, and it is discretionary in the Court whether to do it or not, and took Time to consider of it, and to be attended with Precedents.

7. A. devised some Legacies, and then gave the Residue of his Personal Estate to and among his Kindred, according to their most Need, and declared that a special regard should be had to W. his Sister’s Son. The Court thought the Act of Distributions the best Rule as to limiting the Extent of the Word Kindred, but the Order took in the Nephews and Nieces, together with their Mothers, and directed that W. should have something considerable, and the Executor afterwards to give most where was the most Need, and the Matter to see Right done. 2 Chan. Rep. 346. 30 Car. 2. Carr v. Bedfor.

8. A Devise of the Surplus was to Teeatori’s poor Kindred at the Discretion of his Executors. Decreed to the poor Kindred according to the Act for distributing Intestate’s Estates, and no farther, and to be distributed in such Shares and Proportions as the Executors should think fit. 2 Chan. Rep. 395. 2 Jac. 2. Griffith v. Jones.


10. Money bequeathed to A. for Life, and if she died in the Life of B. her Husband, then to go to the Children of M in such Shares as A. should advise. Some of M’s Children died leaving Issue, and then A. dies in the Life of B. making no Appointment. Decreed a Distribution among A’s Children and their Representatives per capita, and not per Stirpes. 2 Vern. 50. pl. 49. Patch. 1688. Crook v. Brook.

11. A Devise was made in these Words, I give to my Daughter H. 1000 l. to be disposed of by her for the Benefit of her Children as she pleases, without giving an Account to any Body. H. died and made no Disposal. The Defendant her Husband took Administration, and the Children the Plaintiffs brought their Bill for this 1000 l. And the sole Question was, Whether there was any Interest vested in the Children by this Devise? For if there was none, then it belonged to the Defendant who was Husband and Administrator to the Wife; and it was intituled for him, that it being given to the Wife by the first Words of
the Will the Husband became intitled to it. The Cause was referred, and so the Court gave no Opinion, but seemed doubtful in the Case. 2 Freem. Rep. 110. pl. 121. Mich. 1689. Hillier v. Hillier.

12. A Man gave a Personal Estate to his Wife upon Trust that she should dispose of it among her Children in such Manner as she should think fit, and she would have made an unequal Distribution of it, and the Court ordered her to give it among them equally, there being no Proof of any Misbehaviour in any of them. 2 Freem. Rep. 199. in pl. 273. Trin. 1694. cited as the Case of Baker v. Barrett.

13. A. makes two of his Daughters his Executors, and gives 400 l. by them to be distributed among themselves and their Brothers and Sisters, according to their Necessity, as in their Discretion they should think fit; Per Wright K. Decreed a double Share to the Plaintiff, the Heir looking on him to it, and most in Need thereof, and confirmed his former Decree. Affirmed in Parliament. 2 Vern. 420. Parch. 1701. Warburton v. Warburton.

14. A. devised 15 l. a-piece to each of his Father's and Mother's Relations, and makes B. Executor, and C. residuary Legatee. B. paid 15 l. to a Cousin-German, and 15 l. a-piece to her four Children. C. insisted the Distribution ought to have been guided by the Statute, and the Children should have had nothing. Ld. Wright allowed the Payment good, and took Notice of the Case of Arnold v. Bedford, where though it is mentioned in the Order that the Devise to the Kindred should be governed by the Statute of Distributions of Intestates Estate, yet there the Children of Brothers and Sifters were let in to receive a Share in the Life of their Parents, which is not allowable on a Distribution under the Statute. 2 Vern. 381. Trin. 1701. Jones v. Beale.

15. A. has six younger Children, and bequeathed 1000 l. to each at 21, and if any of them die before 21, the Legacy of such Child to be disposed of to one or more of the Survivors in such Manner as his Executive shall think fit, and made his Wife Executrix. One dies before 21. Per Wright K. this Power is special and particular, and not like the Cases of a general Trust to distribute among the younger Children at Discretion, there an Indiscreet Disposition may be controll'd by a Court of Equity, but this is Caufus Provisus it is expressly provided that she may give all to one as the had done, and decreed the Appointment to stand. 2 Vern. 512. Mich. 1705. Thomas v. Thomas.

(Z. 14) Distribution by the Custum of York and London, and who within the Custum.

And agreed by all that the Heir is not excluded, but shall come in for his Part, and shall have it by the Custum of London; Per Dolben J. 2 Show. 175. pl. 170. Hill. 33 & 34 Car. 2. B. R. in Case of Percival v. Crisp. — For then there is no Custum; Per Pemberton Ch. J. 1bid. —— S. P. per tot. Cur. 2 Jo. 204. Percival v. Crisp. —— Skin. 26. S. C. & S. P. agreed.

2. If a
Executors.

2. If a Freeman of London gives Legacies by his Will, and names no Executor, whereupon Letters of Administration are granted cum Testamento annexo, it is plainly out of the Statue of Distributions; Agreed. 2 Show. 176: Hill. 33 & 34 Car. 2. B. R. Percival v. Crip.

3. A Debt in Law or Equity shall come in and be deducted in the first Place and leften the Widow's Moiety, but a Legacy cannot be so deducted. 2 Chan. Cafes 84. Hill. 33 & 34 Car. 2. Popley v. Popley.

4. If a Freeman of London dies Intestate leaving a * Wife and no Child, by the Custum of the City a Widow shall have her Widow's Chamber and a Moiety of the rest of the Personall Estate, and the Administr-ator the other Moiety, and that not subject to a Distribution by the Statue. Vern. 133. pl. 122. Hill. 1682. Matthews v. Newby.

5. By the Custum of the Province of York a Daughter once advanced by her Father in his Life-time is excluded from all further Benefit of his Personall Estate; But in the principal Case it appearing that all the Children were advanced in his Life, and so the Estate wholly exempted out of the Custum, it ought now to go in a Course of Administration, and be distributed according to the Act for settling of Intestates Estates. Vern. 200. Mich. 1683. Goodwin v. Ramsden.

6. In Chancery it was held and declared per Li. Jeffries, that if a Freeman of London dying leaves a Wife and Grandchildren, the Grandchildren shall not have the Benefit of the Custum of an Orphanage Part, but the Wife shall have a Moiety as if no Child at all, and this on the Report of the Recorder. 2 Show. 467. Patch. 1 Jac. 2. B. R. Anon.

7. 1 Jac. 2. cap. 17. S. 8. Such Part of any Intestate's Estate within 4 & 5 W. the City of London, of Province of York, as any Administrator has by Virtue only of being Administrator, shall be subject to Distribution as in other Cases, and the Custum shall not extend to it.


10. A Freeman of London dying within the Province of York, the Custum of London in the Distribution of his Personall Estate shall control the Custum of the Province of York. 2 Vern. 49. Patch. 1688. Cholmly v. Cholmly.
1. Vern. 14. S. C. decreed by Finch C. that the Wife was barred of her distributive as well as customary Share Reverted to North K., but annexed by Jeffries C.

11. An Inhabitant within the Province of York made a Settlement on the Wife in Bar of her customary Part, or what the might otherwise claim out of the Personal Estate. He afterwards died Intestate leaving her and two Children. Per Finch, the Husband is in Nature of a Purchaser of his Wife's Share, and without doubt might have disposed of it by Will, and what he might have disposed of by Will the Statute has disposed for him, and is in Nature of a Will for all Intestates, as was resolved in the Case of Travel v. Peack, and in Ryder's Cafe, but no Order in the principal Case. 2 Vern. 263. pl. 248. Patch. 1692. Benfon v. Benson.

12. An Intestate being an Inhabitant in the Province of York has a Son and Daughter, but no Widow. The Daughter had a Portion on Marriage in lieu of what the might claim by the Custom. This being said to be in Bar of her customary Part shall be no Bar to her distributory Part on the Statute of Distributions, nor must she bring her Portion back into Hitchen. 2 Vern. 274. pl. 259. Trin. 1692. Gudgeon v. Ramsden.

13. Land is settled on Marriage to A. for Life, Remainder as to Part to his Wife for Life, Remainder of the Whole to the first Sot in Tail, Remainder to his own right Heirs; By Custum of York the eldest Son is excluded by this Settlement from having any Share of his Father's Personal Estate. 2 Vern. 375. pl. 337. Trin. 1700. Contable v. Contable.

The third Part belongs by Custum to the Administrator, and is not subject to Distribution by 22 Car. 2. cap. 10. 2 Jo. 204. Percival v. Grifp. — It was agreed as an undoubted Rule that the Intestate's third Part shall go according to the Statute of Distributions, and is not at all under the Control of the Custum. Ch. Prec. 499. pl. 510. Trin. 1718. Walfam v. Skinner. — Gilb. Equ. Rep. 152. S. C. in rotidem Verbis.


(Z. 15.) Distribution.
Compelled. How. And by what Court.


2. Administration of the Goods of the Daughter was granted to the next of Kin, i.e. the Mother; and now Administrator was su'd in the Spiritual Court to account, and that the Monies which remains should be distributed between 12 others of the next of Blood to the Intestate, and a Prohibition was prayed by Croke, because the Statute intends that the next of Blood should have only the Benefit of the Goods.
Executors.

Goods that remain; But the Prohibition was deny'd per Dod. and Haughton, because the Books are frequent that the Administrator may be compelled to account. Roll Rep. 359. pl. 10. Patich. 15 Jac. B. R. Sharp v. Simpson.

3. S. Administrator of M. L. his Sister, was sued in the Spiritual Court, to make Distribution of the Goods of the Intestate, pretending that all the Debts and Legacies of the Intestate were discharged, and a great Surplusage was remaining, which was disposable at the Pleasure of the Ordinary, and to be divided amongst the Friends of the Intestate. Resolved per to. Car. that a Prohibition should be granted, because the absolute Interest in the Goods is in the Administrator, and the Administration being once committed, the Ordinary hath nothing to do with them. Cro. C. 201. pl. 4. Mich. 6 Car. B. R. Levanne's Cafe.

4. The Administrator of F. was sued in the Ecclesiastical Court, to make Distribution of some Part of the Personal Estate to the Sister and Heir of the Intestate. A Prohibition was prayed upon a Surmise, that by the Law of the Land Administration being committed, the Ordinary hath no Power to intermeddle with making Distribution of the Goods of the Intestate to the Children or Kindred; It was much infinched upon, 'That the Prohibition was not grantable, for that the usual Course hath always been for the Ordinary, after Debts paid, to give Order for the Distribution of Part of the Goods to the Children or Kindred. Hutton J. said, That divers Prohibitions had been granted in such Cases, for the Administrator is only chargeable, and the Ordinary hath nothing to do to intermeddle with the Goods after the Administration is committed, and therefore upon divers Presidents th ewed of the like Cases a Prohibition was granted. Cro. C. 62. pl. 6. Mich. 22 Car. C. B. Fotherbie's Cafe.

5. Ecclesiastical Court cannot make a Distribution of Remainders of Terms. 2 Ch. Rep. 59. 22 Car. 2. in Cafe of Hunt v. Jones.

6. A Prohibition was mov'd for to a Suit in the Bp. of Exeter's Court against the Executors of an Administrator for Distribution; 1st. Because it was suggested that Obligations that were in their Names as Obligees were in Trust for the Administrator their Testator 2dly, Because other Bonds were altered by the Administrator, and new ones taken in the Administrator's Name as Obligees. And a Prohibition was granted. For 1st. this is a Tryst, which is a Matter in Equity whereof they have no Concern. And 2dly, Though the Administrator might be sued for Distribution, notwithstanding the taking new Bonds in his own Time, Wile adjutant, his Executor or Administrator cannot be sued; as a man indicted makes the Husband liable during Coverture, yet does not make his Executor liable after. 3 Keb. 358. pl. 30. Mich. 26 Car. B. R. Miller v. Potter.

Executrixes who had several Bonds in their own Names, and some in their Mother's Name to whom they were Executrices, and they also took out Administration de Bonis Non of their Father, and that some Bonds in their Father's Name were Debts owing to the Father, but the Mother had altered the Property and taken them in her own Name, and C. sued for Distribution of the Debts; as to the first Part a Prohibition was granted; but as to the other Part the Court would not deliver any Opinion, it being on the Contraction of a new Act of Parliament, and the Court not being full.

7. Bill against Administrator and others to have Distribution of the Intestate's Estate according to 27 Car. 2, which Statute Defendant pleaded, and that by that Statute the Ordinary is made the Judge to distribute,
Executors.

distribute, and is appointed to take Security, and therefore the Plaintiff ought to sue there and not here. Finch. C. over-rul'd the Plea, and ordered Defendant to answer. 2 Chan. Cases 95. Patch. 34 Car. 2. Pamplin v. Green.

8. A Bill was preferred for a Distribution upon the Act concerning Intestate Estates, and to discover a Truth of some Money put out by the Defendant, for the Intestate in his own Name. Upon a Demurrer the Court resolved that they would give no Relief so as to make a Distribution, because it was an Authority given by Act of Parliament to the Ecclesiastical Judges, and limited particularly to them; and although there were no Negative Words in the Act, yet it being a Thing newly created, which was not at Common Law, they would not hold Plea of it any farther than to discover the Truth or Fraud, in Case there were any. But it was alleged that the Ld. Chancellor does constantly decree a Distribution. Prem. Rep. 330. pl. 411. Mich. 1682. in Scacc. Manning v. Manning.

Ibid. pl. 1125. Howard v. Howard. S. P. and the Demurrer over-ruled accordingly. — — Where a Will is made the Spiritual Court cannot compel a Distribution of the surplus after Debts and Legacies paid. Gibb. 120. pl. 11. Hill. 5 Geo. 2. B. R. Hatton v. Hatton.


11. There never is a Distribution ordered by the Ecclesiastical Court but where the Party dies Intestate, or the Will directs it; but Chancery does sometimes enforce a Distribution where the Will does not direct it. Per Holt Ch. J. 12 Mod. 566. Mich. 13 W. 3. Anon.

12. Per Cur. any Person that is intituled to Distribution within the Stat. 22 Car. 2. cap. 10. is by Consequence intituled to sue the Administrator in the Ecclesiastical Court to make good his Account by Proofs, and Examination upon Oath, as a Legatee was against an Executor before the Statute. 1 Salk. 251. pl. 3. Hill. 6 Ann. B. R. Canterbury Archbishop v. Willis.

(A. a) The Power of Executors before Probate.

But if A. releases and after takes Letters of Administration it is not good. Palm. 411. Barefoot's Case. — — Yet see 1 Salk. 295. where A. buried B. and J. S. contended that A. should have a Horfe of B's in part of Satisfaction, and after J. S. had Administration granted to him of B's Goods, and brought Trover for the Horfe, and it was adjudged for A. against the Opinion of Holt Ch. J. Whitehall v Squire. — — Carp. 105. S. C. Skin
2. If an Executor before Probate of the Will brings an Action of S. C. cited Debt upon a Bond due to him as Executor, but when he declares he threw it to the Court proved, this being proved after the Action Duncomb brought, yet the Action is well brought because he was Executor v. Walter before Probate, though by Law he is not permitted to sue before - S. C. fore Probate: yet this being proved the Impediment is removed ab initio; For he by throwing of the Will to the Court fastifies the Ceremony when the Law requires, which he has done to as the Law requires. Mich. 16 Car. B. R. held per Barkley in Writ of Error upon such Judgment in the Exchequer Court, where this was so adjudged upon a Special Verdict.

3. Executors brought Debt, and because it appeared that they had Executor not proved their Testament, it was awarded that they take nothing by their Writ. Br. Executor, pl. 49. cites 7 H. 4. 18.

proved. Br. Executor, pl. 50. cites 9 E. 4. 33. 47.

4. Termor devises his Term to A. whom he makes Executor and dies. A. enters before Probate and occupies the Land for a Year and more without any Probate. Ruled that the Property of the Term was in A. and lawfully executed by his Entry, and his Administrator shall have it. D. 367. a. pl. 39. Mich. 21 & 22 Eliz. Anon.


proves the Will; for this makes the Release good and perfect. — Co. Lit. 292. b. S. P.


7. Two Executors prove the Will; The third refuses; Yet he may release. 5 Rep. 28. a. Park. 1 Jac. C. B. Middleton’s Cafe.

8. Actions arising upon the Executor’s own Possession may be maintained by him before Probate, As for Goods of Trefpafs taken from him, or a Trefpafs done upon the Lathe-Land, or a distraint or impounding Goods or Cattle; So of Actions of Trespass, of Repose, or De- trent. Went. Off. Ex. 349. 35.

9. Executor before Probate may seize Goods of TrefpASF, and may * * So as the enter the House of the Heir (if not locked) for that Purpofe, and to take the Specialties of Debts, and generally may do all Things belonging to the Office of Executor, except bringing of Actions and Prosecution of Suits. Went. Off. Ex. 33.

understand of the Door of each Room. Went. Off. Ex. 92. —— If the Goods are not removed in convenient Time the Heir may distrain them Damage feant. Went. Od. Ex. 92.

10. He
Executors.

10. He may pay or receive Debts, Release, and take Acquittances. If Day of Payment of a Bond happen before Probate, it must be made to or by an Executor upon Pain of Forfeiture as it the Will were proved. Went. Off. Ex. 34.

11. He may sell or give away any of the Goods or Chattles, and may affect to a Legacy before Probate, and though he dies before Probate all the Acts above will stand good. Went. Off. Ex. 34.

12. Executor of Testator who had a Grant of the next Avoidance of a Church may maintain a Quaere Impedit before Probate. Went, Off. Ex. 35.

13. The Debtors to a Testator's Estate were injoin'd not to pay any Money to a pretended Executor till his Title to the Executorship were settled in the Spiritual Court. Chan. Cases 75. Patch. 18 Car. 2. Small-piece v. Anguilth.

14. Executor not intituled to the Personal Estate till the Will is proved by him, and he takes on himself the Execution thereof. Fin. Rep. 58. Hill. 25 Car. 2. in Cause of Blondell v. Panner.

15. An Executor brought an Action of Debt against an Administrator for a Debt due from the Intestate to the Plaintiff's Testator. The Defendant pleaded, that the Plaintiff released to him all the Right and Title to the Estate of the Testator, and this was before Probate of the Will; And upon Demurrer to this Plea it was objected, that this Release did not bar the Plaintiff of this Action, because the Executor had only a Possibility to be intituled to the Testator's Estate, and no Interest till Probate. It is true, such a Release of all Actions before Probate had been good, because an Executor hath Right of Action before Probate; But for the Defendant it was intituled, that this Release was a good Plea in Bar; For if Executor release all his Right and Title to the Testator's Estate, and then frees the Relefe in (as the Administrator is sued in this Case) for a Debt due to the Testator the Release is good; because if he had recovered, in this Case Judgment must be De Bonis Testatoris, which is the Subject Matter, and that being released no Action can lie against the Administrator; Adjournatur. 2 Mod. 108. Patch. 28 Car. 2. B. R. Morris v. Philpot.


17. Executor arrêts a Man and then proves the Will; It is a Bar between the Parties, but not against Strangers. 3 Lev. 57. Trin. 34 Car. 2. C. B. Duncomb v. Walter.


19. In Case of an Executor, if he has the Probate at the Time when he declares, it is well; but it is otherwise in the Cafe of an Administration; But because in the principal Cafe it appears by the Declaration that the Letters of Administration were granted after the Suit commenced, it is ill; Per Holt Ch. J. Comb. 371. Trin. 8 W. 3. B. R. Martin v. Fuller.

20. The
The Devises of a Personal Estate is not looked upon to be of any Effect until Probate is made of the Will by the Executor, neither can an Executor or other Person give a Will in Evidence concerning a Personal Chattel without producing the Probate, for this Will is no Will until it has received a Sanction, or an Allowance of it in the Spiritual Court, for they are to judge whether it be a Will or not, and the temporal Courts are not to look upon it as a Will till Probate be made; and in Trover for Goods which a Testator gave to his Sister in his Life-time brought against his Executor for them, who would have given in Evidence a former Will to have shewn that he had no Power to give these Goods, this was refused, because he ought to have produced the Probate; Per Ward Ch. B. Devon Summer Assizes 1708. Chaunter v. Chaunter.

(A. a. 2) Suits against them before Probate.

1. Executor may be sued for Debts of Testator before Probate unless he refused the Executorship in due Manner to as Administration may be granted, and to somebody liable for Testator's Debts. Went. Off. Ex. 36.

2. Bill for a Discovery of the Personal Estate was brought before the Will was proved, the same being controverted in the Spiritual Court; the same was pleaded to the Bill but over-ruled, a Discovery being for the Benefit of all Persons interested, and necessary for the Preservation thereof, and such Discoveries have been often ordered pendente lite in the Spiritual Court. 2 Vern. 49. pl. 47. Palch. 1688. Dulwich College v. Johnson.

(B. a) What Acts will be an Administration to make a Consent to the Executorship.

Act in Law.

1. If an Executor brings any Action for the Debt of Testator, this shall be an Administration. 8 H. 6. 36.

2. If Executor takes Testator's Goods and converts them to his own use, this is an Administration. 20 E. 4. 17.

3. But if Executor takes the Goods which Testator took from him by Wrong in his Life, it is no Administration. 20 E. 4. 17.


G g g 4. If
Executors.

4. If the Executor happens upon any Thing which was Testator's, this is an Administration. 24 Eliz. 4. 5.

5. * But 41 Eliz. 3. 31. the claiming of Goods to his proper Use without Distribution for the Soul of the Testator, is not Administration as Executor.

6. If Executors grant any of the Charites of the Testator's, this is an Administration in Law. D. 3 & 4 H. 3. 13. 13.

7. If an Executor releases to a Debtor of the Testator, this is an Administration in Law. 11 H. 4. 84.

8. So if he makes Acquittance of any Debt of the Testator. 8 P. 6. 36.

9. If certain Goods are devised to one Executor, and he takes them without the Affent of the other Co-Executor this is an Administration; because a Debtor cannot take Goods devised without Affent of the Executor. 11 H. 4. 84.

10. But otherwise it is if he takes them by Delivery of the other Executor. 11 H. 4. 84.

11. If Executor seizes the Goods of the Testator this shall be an Administration. 8 P. 6. 36.

12. If the Executor seizes the Goods of another Man to the Intent to administer them, this shall be an Administration though the Goods afore are taken from him by the Owner. Dubitatur. 8 Liz. 6. 35. b.

13. As if the Testator was Tenant at Will of certain Goods, and after his Death his Executor seizes them supposing them to be the Testator's with Intent to administer them, and after the Owner of the Goods takes them out of his Possession, yet this shall be an Administration in Law, (for his Intent appears) Dubitatur. 8 P. 6. 35. b.

14. If an Executor being Committary, sequefters the Goods of the Testator and does this as Committary, this is not any Affent to the Executorship. 20 P. 6. 1. b.

15. If
15. If a Testator makes two Executors and dies, and one releases an Action to a Debtor of the Testator before Probate, this is a Content to the Executorship, so that he cannot after refuse to administer. B. 8. 9. B. K. Wilkinson v. Thomas.

16. If Executor proves the Will it seems this is an Administration in Law, so that he cannot plead [ne] unique Executor. Dubitatur. 26 H. 8. 7. b.

prove'd the Will as in the next Plea; And it was held by Shelley that he cannot plead Ne Unique Executors ne Unques admnistratdr as Executor. But Fitzherbert contra, that he might plead to if he had not admnistrd; For the Probate does not make him Executor unless he admnistrd in this Case, quad nora Curia concellat, to which Shelley said, that he paid the Fees of Testator's Goods, which is an Administration. But Fitzherbert answer'd, that perhaps he did not pay them with the Goods of the Deceased. Quere this Case. [See the Year-book, which in the old Editions is 26 H. 8. 7. b but in the last Edition is 26 H. 8. 7. b. 8.]—Br. Executor, pl. 5. cites S. C. and observes that Fitzherbert's Answer amounts to an Admission that Payment of the Fees out of the Goods of the Executor is an Administration.

17. If A. makes two Executors and dies, and one proves the Testament in the Name of Both against the Will of the other, this is not Any Administration for him who did not consent to the Probate, but he may plead Ne unique Executor &c. For the Probate does not make him Executor if he does not administer. 26 H. 8. 7. b.

Edition since Ld. Brooke's Time, but the old Editions are. 26 H. 8. 7. b. as in Roll.

18. If A. being sued as Executor takes it upon him and pleads as Executor in Bar, this is an Administration in Law, though he never administered before. Br. Executor, pl. 88. cites 9 E. 3. 12. 14.

19. Debt against Executor who was Feme of the Testator, who said she remained in the House of her Baron after his Death, and there eat and drank of the Goods of the Deceased, till she was a Widow. But Newton said Cave; for this is an Administration of those Things which are consumed, and the Statute of Magna Charta cap. 7. is Quod habeat rationabile effserium suum interim de communi. Br. Administrator, pl. 26. cites 19 H. 6. 14. 15.

20. And per Fulthrop, the Feme cannot kill an Ox after the Death of her Baron, and live upon it. Ibid.

21. Also, You have not shown that the Baron was seized of any Land of which she ought to be indemnified, so that she ought to have any Quarantine, per Newton; by which Fortescue said, That she was there and made Funerall Expenes, and lived with us in common in the mean Time, and occupied the Pots, Pans and Beds, absque hoc, that she admnistrd in other Manner before the Administration to her committed. Per Port. This is no Administration; Per Newton, Yes. For this is a Special Administration; As in Maintenance the Defendant said that the Party for whom &c. was his Brother, and he shewed Evidence to the Inquest, abique hoc, that he maintaine in other Manner; For this is Special Maintenance; so here. Ibid.

22. In Debra; Per Paffen J. if J. S. dies, and a Stranger de fœn for Demeuse takes the Horse of the said J. S. and ties him in the House by the Head, this is not any Administration as Executor. Br. Administrator, pl. 28. cites 21 H. 6. 27. 28.

23. But if he disposed of his Bedds or Goods for his Soul, this is an Administration as Executor. Ibid.

24. And spending of the Goods about a Funeral of the Testator is no Administrator as Executor, for every Stranger may do it. Ibid. 35 H. 6. 31.
Executors.

25. But yet in those Cases he shall plead the special Matter, abique hoc that be administered as Executor, for this is in a Manner Administration, but not as Executor. Ibid.

26. A Man made S. his Executor who refused, and the Ordinary committed the Administration to W. P. and S. as Servant to W. P. sells the Goods and accounts to W. P. this is no Administration which shall charge him as Executor, and he may plead this Matter, abique hoc that be administered in other Manner. Br. Administrator, pl. 41. cites 32 H. 6. 13.

27. Debt against Executor, who said that the Testator died Intestate, and the Ordinary committed the Administration to J. N. who sold such Goods to him, by which he administered them ut propria bona, abique hoc that be administered other Goods; And by some this amounts to general illite; By which he said that he delivered certain Goods and his Apparel, and showed what &c. abique hoc that he was Executor, or administered as Executor &c. Br. Executor, pl. 169. cites 32 H. 6. 7.

28. And there it is said, that if a Man use the Goods of the Testator ut Bona propria this is not Administration to charge him; and contra if he use them ut bona Testatoris; Quod nota Diversity; For it is said there, that if a Man claims J. N. as his Ward who is not his Ward, he shall be charged in Action of Waste, and e contra if he enters as a Trespassor. Ibid.

29. Note per Car. that if three are made Executors, and they deliver to the Feme of the Testator her Robes and Apparel, this is no Administration as Executors to charge them; for the Feme shall have her convenient Apparel, and not the Executors. Br. Administrator, pl. 6. cites 33 H. 6. 31.

30. The committing of the Administration does not bind if he does not administer. Br. Administrator, pl. 31. cites 37 H. 6. 27, 28.

31. If the Wife takes her Apparel necessary for her Body, though this is an Administration, yet it is not such as will charge her. Br. Administrator, pl. 31. cites 37 H. 6. 27, 28. by Admission.

32. Debt against an Executor who never administered; It was touched, that if he pleads in Bar, this is an Administration in Law; Quod nota ibidem in fine Casus. Br. Administrator, pl. 29. cites 9 E. 4. 13.

33. Debt against Executor in L. who pleaded a Gift of the Testator of certain Goods at B. in another County, by which he took them, abique hoc that be administered in other Manner; &c non allocatur; For the Matter of the Plea does not prove any Administration. Br. Administrator, pl. 30. cites 9 E. 4. 40.

34. And per Lacun, if a Feme faits the Goods of her Baron to the Use of the Executors of her Baron, this is no Administration to bind the Feme. Ibid.

35. Debt against the Bishop of C. as Executor; he said that he refused before J. S. his Commissary at W. and because he is Metropolitan, and the Testator had Goods in divers Counties, therefore he sequestrated the Goods as Ordinary, and not as Executor; Judgment of the Writ; And a good Plea per Cur. without traversing the Administration as Executor, for this Plea is to the Writ and not in Bar, and also is Matter in Law, whether this Administration be as Executor or as Ordinary, which the Lay Gents cannot try. Br. Executor, pl. 90. cites 9 E. 4. 33. 47.

36. By which the Plaintiff said, that before the Refusal the Bishop sold certain Land of the Testator's for 300l. according to the Will of the Testator &c. and therefore he cannot refuse after Agreement, and this Matter cannot be done as Ordinary, for he as Ordinary cannot sell the Land; Contra as Executor, and Executor may administer without proving the Testament, but he cannot bring Action before the Testament proved; and it it appears upon the Back quod probatum est, &c. where it is not
not proved in Fact, this shall not be traversable, but the Issue shall be if he was Executor or not, and not if he proved it or not; Quod non
negatur. Br. Executor, pl. 90. cites 9 E. 4. 33. 47.
37. It was arg'd, That if the Executors have expended their own proper Money in the Business of the Testator, this shall be said an Admini-
38. If Executor curtes the Testator this is not Administration. Per Frowike Ch. J. Kelw. 63. a. Trin. 20 H. 7.
39. If a Man pays Testator's Debts with his own Goods, and meddles
not with Testator's Goods, it is not an Administration. Per Frowike
Ch. J. Kelw. 63. a. Trin. 20 H. 7.
40. If there be two Executors and one of them only proves the Will,
and the other by his Delivery, and as his Servant takes and sells the Goods,
this is no Administration by him who acted as Servant. Cro. E. 858.
41. The very keeping of Goods by an Executor shall be accounted as
an Administration. Per Fenner J. Goldsb. 152. pl. 79. Hill. 43
42. A Lease for Years of Lands by his last Will devised his Term to
A, whom he makes his Executor and dieth; A, entered before any Probate
of the Will, and held the same for a Year and died; Per Cur. the Property of the Term was lawfully vested in the Executor by his
Entry, and the Devise well Executed without any Probate. Dy. 367.
43. Debt upon an Obligation of 100 l. One of the Defendants was
outlawed, the other pleaded that he, who was outlawed, was made Executor
and solely proved the Will, and administered, and that the Defendant as Servant unto him, took divers of the Testator's Goods by his Delivery,
and by his Appointment had sold them, absque hoc that he was administered, as Executor or in any other Manner. And it was thereupon demurred, and adjudged to be an ill Plea; because he does not say, that he refused before the Ordinary, nor confessed any Administration; for that, which he confesses, is not any Administration, and so no Answer to the Plaintiff. Wherefore it was adjudged for the Plaintiff. Cro. E. 858.
44. If Executor commands f. S. to take Goods of Testator out of
the Hands of W. R. this is an Administration. See Went. Off. Ex. 39.
45. and cites it as clearly admitted per Ld. Dyer in Cafe of Greys-
brooke v. Fox.
46. If the Wife takes more Apparel of her own than is necessary this is
an Administration as the Book admits, but it by the Assign of Executor,
or by his Delivery, it is not. Went. Off. Executors, 40.
47. Delivering Money of Testators for Fees about proving the Will is an
Administration as Executor. But otherwise if he lay out his own Mo-
ney only. See Went. Off. Ex. 40.
48. In some Cases a Man may meddle with the Goods of the Testa-
tor and yet shall not be an Executor by it. As to pay Funeral Charges, 21 E. 4. 5. 21 H. 6. 20. Dy. 256. a. 20 H. 7. 5. 2dly.
'To meddle with the Goods by Virtue of Letters ad colligend' from the Ord
inary, 10 H. 7. 15. 28. 3dly, When a Man is made Executor by a Will, which is after revoked, and meddles by Virtue of that Will, 
Dy. 166. 167. 4thly, Per Serj. Hard. Taking them as Servant to another 38 E. 3. 20. 3 Cro. 858. 5thly, Meddling with Goods as
Supervisor or Coadjutor, Dy. 166. Swinb. 6 Pt. 93. 94. but here Jones said, when he takes the Goods generally, being named Execu-
tor, it shall be intended that he takes them as Executor, 8 H. 6. 30.
20 H. 6. 1. b. 11 H. 4. 83. 21 E. 4. 5. 3 Cro. 810. 'And when a
Man
Man has once made himself Executor of his own Wrong, by meddling with Goods, though Administration be afterwards granted to himself, or to another, it shall never be in his Power to purge the Wrong, 3 Co. 102. 365. 5 Car. 33. Freem. Rep. 151. 152. pl. 172. Patch. 1675. Parsons v. Mayefden.

An Executor before Probate possessed himself of the Testator's Goods, which were appraised and put into an Inventory, then he paid a Debt, and converted some to his own Use, and afterwards refused to prove the Will. The Court held, that the granting Administration in this Case was a mere void Act, and that the Executor shall be charged for the whole Personal Estate; And Judgment for the Plaintiff. Mod. 213. pl. 47. Patch. 28 Car. 2. C. B. Parten v. Bafelden.

(C. a) What Act or Thing will make a Man Executor De son Tort.

Keilw. 51. 84. pl. 2. Hill. 21 H. 7. Capel's Case like Point, and held accordingly—For the Power of such, and also of Overseers is only to preserve and keep the Goods, and by selling or disposing thereof of Bona Peritura they become Executors de son Tort, notwithstanding that such Collector was expressly warranted by the Ordinary's Letters to make Sale. For that the Ordinary himself could not do it. Went. Off. Ex. 175. 174.

1. A woman takes more of her Apparel after Death of the Baron than is convenient she shall be Executor of her own Wrong * 33 D. 6. 31. b. D. 1 Eliz. 166. 11.

2. But she may take her Apparel which is convenient well enough. 33 D. 6. 31. b. Per two. But there liable. D. 1 Eliz. 166. 11.

3. But she may take her Apparel which is convenient well enough. 33 D. 6. 31. b. Per two. But there liable. D. 1 Eliz. 166. 11. + 21 C. 4. 5.


* Fitzh. Executor, pl. 24, cites S. C.
7 Br. Administrator, pl. 56 cites S. C. Per Choke. That it is not. — Fitzh. Executor, pl. 38, cites S. C. * But in such Case Heed must be taken looking the Measure and Proportion, and other meer Necessity as Church Duties &c. or at least De. cent starlikeseness to his Quality must be the Bounds, or he thinks this last must be either utterly excluded or held within very narrow Bounds and Compaus Went. Off. Ex. 173.


6. Feme
6. Feme Executrix admiinisters and after takes Baron, and after they are divorced Causa Praecolumnos, and Feme appeals from the sentence, and pending this Appeal Baron admiinisters the Goods. Feme dies the Appeal not dfiled, and the Amendment of the Goods of the Executor is granted to another; whether the Baron may be charged as Executor de son Tort for the said Amendment.

D. 1 & 2 Ma. 95. 17. Distributary.

7. A Man shall not be charged as Executor de son Tort unless he does a Thing as Executor, As paying Debts, or demanding the Debts of the Executor, or other such Things. 21 C. 4, 5.

Fitzh, Executor, pl. 58, cites S. C. per Choke — It is not every intermeddling that makes one Executor de son Tort. As one do but take a Horse of the Deceased's, and ties him in his Horse or Stable, this makes him not Executor of his own Wrong. Went. Of. Ex. 172.

If one delivers to the Wife Apparel convenient only to her Degree; But delivering more is otherwise. Ibid.

8. If no one takes upon him to be Executor, nor takes Letters of Administration, the cling of the Goods by him makes him Executor de son Tort. Revisited. 3 Rep. 33. b. Read's Case.

Fitzh, Executor, pl. 30, cites S. C. per Choke — It is not every intermeddling that makes one Executor de son Tort. As one do but take a Horse of the Deceased's, and ties him in his Horse or Stable, this makes him not Executor of his own Wrong. Went. Of. Ex. 172.

9. The same Law is it in the Case aforesaid if he takes the Goods into his Possession, which is the Office of an Executor or Administrator.

Revisited. 3 Rep. 33. b. Read's Case.

10. But in 41 C. 3. 31. per Thorpe, if a Man claims Goods to his proper Use, and does not distribute for the Soul of the Executor, this is not Administration to charge him as Executor, and it seems this is intended Executor de son Tort.


12. Debt against P. as Executor of his own Wrong, and because he received a Debt and made an Acquittance it lies well, Per the Justices; So it he takes Goods into his Possession. Dy. 166. b. pl. 10. Hill.

1 Eliz. in Porter's Case, cites Long quinto E. 4. 72.

13. Where a Man has Colour, as a Coadjutor, Supervisor, &c. to meddle, he may plead the special Matter, abate hoc that he admiinistered in other Manner. D. 166. b. 167. a. pl. 11. Hill. 1 Eliz.

is afterwards disproved by Probate of a later Will. D. 166. b. pl. 11. Hill. 1 Eliz.

15. Debit against an Executor; The Case was, A. made E. his Executor, and died postfelled of divers Goods. E. made a fraudulent Gift of the Goods to J. S. and continued postfelled, and took the Defendant to Husband and died. The Defendant postfelled of the Goods paid Legacies. It the Defendant was the Opinion of the Justices, praver Fenner, that they were Affets dany pleaded in his Hands, and (the Gift being fraudulent) were liable to the Plain-

Mo. 396. pl 518. Warfon's Case, S. C. per Choke.

Fitzh, Executor, pl. 58, cites S. C. per Choke — It is not every intermeddling that makes one Executor de son Tort. As one do but take a Horse of the Deceased's, and ties him in his Horse or Stable, this makes him not Executor of his own Wrong. Went. Of. Ex. 172.


16. And Popham said, if the Gift were good against all but Creditors, (as it is) then they belong to the Donee, and in his Hands are liable to this Debt; and if the Gift be said they remain to the Executors of the Feme, and
then the Baron having taken them and paid. Legacies is chargeable by reason thereof as Executor de son Tort; And so those Goods Quacunque Via data are liable to this Debt into whose ever Hands they come unless by Title paramount, or by Sale Bona Fide; wherefore it was adjudged for the Plaintiff. Cro. E. 406. pl. 16. ut supra, Wilcocks v. Watton.

17. Debt against an Executor, he pleaded Ne unques Executor &c. and an especial Verdict found, that Administration of the Goods of the Testator was committed to the Wife of the Defendant who is dead, and that he kept Bonam Partem bonorum in his Hands, and sold them. Williams moved that this Verdict was void for the Uncertainty, for Bonam Partem is altogether uncertain; But it was held to be well enough; For if he detain any Part it makes him Executor de son Tort &c. Wherefore it was adjudged for the Plaintiff. Cro. E. 472. pl. 27. Hill. 38 Eliz. in B. R. Anon.

18. 43 Eliz. cap. 8. S. 2. Strangers meddling with Intestate’s Goods, or getting a Release of any Debt without a valuable Consideration, unless for some Debt due from Intestate, shall be chargeable as Executor of his own Wrong so far only as such Goods or Debts released will satisfy, deducting all just principal Debts owing to him on good Consideration by Intestate, and all other Payments made by him which lawful Executors or Administrators ought to have paid.

19. Where the Wife multiplies the Goods of the Baron, she was adjudged to be Executor in her own Wrong. D. 166. b. Marg. pl. 11. cites Mich. 2 Jac. Gerton v. Carpenter.

20. If an Executor be made who proves the Will, or takes upon him the Executorship, yet if a Stranger after takes any of the Goods and uses them, or disposes of them as his own, this does not make him Executor of his own Wrong, because there is a rightful Executor who may be charged, and the Goods taken out of his Possession after he has administered are Aliens in his Hands. Resolved. 5 Rep. 33. b. 34. a. Trin. 2 Jac. C. B. Read’s Cafe.


But when he meddles without any Colour of Title, or Authority in receiving Debts and disposing Goods to his own Use it is. Ibid. 184. Arg. But affilling an Infant Executor in selling the Goods does not make one Executor de son Tort. Cro. E. 354. pl. 25. Trin. 35 & 36 Eliz. B. R. Clerk v. Hopkins.

22. Executor de son Tort is such as takes upon him the Office of an Executor by Introlution, not being constituted by the Testator or Deceased, nor for want of such Constitution substituted by the Ordinary to administer. Went. Off. Ex. 171.


24. Lettie for Years rendering Rent dies Intestate, his Wife takes out Letters of Administration and marries a second Husband, and dies, and the Husband continues in Possession of the Term and receives the Profits; It was agreed that for the Profits received he was answerable as Executor de son Tort, and 10 H. 7. was cited as an Authority.

22. Mod. 175. Arg. in Cafe of Loyd v. Langford cites it as adjudged. Trin. 22 Car. 2. in Cafe of Stevens v. Carr.

25. The

26. An Action of Debt for Rent was brought against the Defendant as Executor of A. The Case upon a Special Verdict was, That A. was being seized in Fee of certain Lands, leased them to B. for 99 Years in Consideration of 300 l. and B. redeems the whole Term to A. rending 20 l. accordingly; per Ann. (the Intent of the Bargain being to secure an Annuity of 20 l. to the Administrator) B. which he purchased with the 300 l. then A. dies, and the Defendant, Dowit of A. entred upon those re-adjudicated Lands as Guardian to her Son. In this Case here can be no Executor de son tort, of the Term, because it is merged in the Reversion, and is become one entire Estate with that; and made so when the Defendant entred as Guardian to her Son, she could not be an Executor de son Tort, because the Term was not in being. Freem. Rep. 218. pl. 226. Mich. 1676. Lord v. Langfield.

27. Debt against an Executor for Rent incurred in his own Time; if an Executor, upon a Special Verdict they find the Lease and the Defeasance of the Reversion to the Plaintiff, and that the Defendant after the Death of the Tenant, did feed his Cattle with the Hay that grew upon the Land. Administration was granted to the Defendant with an Exception of this Term. The Question was, Whether the Defendant here could wave the Term after he had entered Administration was taken after the Rent grew due. The Ch. J. said, That if a Man die Intestate, and another is Executor de son Tort, he shall be charged for the Rent till he is exonerated by the Administrator, Windham and Atkins of the same Opinion, that here he hath entered as Executor, keeping the Cattle five Weeks upon the Farm; and here is no Gift to purge this Wrong. Freem. Rep. 261. pl. 282. Trin. 1679. Garth v. Taylor.

28. If Administration be first granted, and then another takes the Goods, he is not thereby Executor de son Tort. Per Holt Ch. J. 7 Mod. 31. Trin. 1 Ann. B. R. Anon.

29. Per Holt Ch. J. If H. gets Goods of an Intestate into his Hands S. P. by Administration is actually granted, it does not make him Executor of his own Wrong; but if he gets the Goods into his Hands before, though Administration be afterwards granted, yet he remains chargeable as a wrongful Executor, unless he delivers the Goods over to the Administrator before the Action brought, and then he may plead Plene Administravit. Per Holt Ch. J. 1 Salk. 513. Anon. — In such Case the Taker is Trespassor only to the Executor or Administrator. Went. Of Ex. 174. cites 5 Rep. Read v. Crier. — It is no Plea to say that he deliver’d the Goods to the Person to whom Administration was granted, Per Cur. Gro. E. 565. pl. 27. Patch. 59 Eliz. C. B. Bradbury v. Reyrell. — S. C. cited 5 Mod. 137. —

30. Per Holt Ch. J. If H. gets Goods of an Intestate into his Hands S. P. by Administration is actually granted, it does not make him Executor of his own Wrong; but if he gets the Goods into his Hands before, though Administration be afterwards granted, yet he remains chargeable as a wrongful Executor, unless he delivers the Goods over to the Administrator before the Action brought, and then he may plead Plene Administravit. 1 Salk. 513. pl. 19. Trin. 1 Ann. B. R. Anon.
Executors.

(C. a 2) De fon Tört. Of what he may be.

2 Mod. 175. 1

A
Leafe in Reversion for Years was granted to J. S. who died In
state, his Wife assign'd it to B, and afterwards took Letters of
Administration, and made an Assignment of it to the Plaintiff. Resolved
that the last Assignee should have it; for in this Case no Entry can
be made, nor can any Man be Executor de son Tört of a Term in Re-
Future, and that the last Assignee had the best Title. — S. C. cited 3 Mod. 91. Hill. 1 Jac.
2. B. R and held accordingly, and a Judgment in C. B. affirmed Mayor of Norwich v. Johnion,
S. C. — Clayt. 116. Vernis's Case. — In Case of a Lease of three Lives made to A, for the
Life of A and B. and C. his Sons, and the longest Life, if one dies and another enters he is Execu-
tor de son Tört. Arg. 3 Mod. 320. in Case of Bradburn v. Kennedale. — Carth. 164. 166. S. C.
& S. P. by Holt Ch. J. because the Statute made it Affets. — According to the modern Opinions
Executors de son Tört may be of a Term, 2 Mod. 74. Arg. cites Titn. 1653. * Porter v. Sweet-

(D. a) The Power of an Executor De son Tört, or
of one who is not lawful Executor.

* Fol. 919.

S. C. cited
by Trevor
Ch. J. and
said that he
never heard
of this Case
having ever
denied.
Comyn's
Rep 152.
Mich 5
Ann. C. B.
pl. 152.
Anon.

1. If the Ordinary grants Administration to another of the Goods
of J. S. and after he himself administers some of the Goods of
the Testator he may be charged * for this Administration though
there be an Administrator. 12 R. 2. Administration 21. (But the
Book is, that the Action was brought against him as Ordinary.)
2. If A. makes a Will, and J. S. Executor of it, and after makes
a latter Will, and of this makes J. D. Executor, and dies; and
after J. S. proves the first Will in the Prerogative Court, and there
this is allowed, decreed and published for a Will, and after J. S.
administers the Goods of the Testator by Force of this for half a
Year after, and within this Time B. who was bound by Obligation
of 100l. to the Testator, paid the Money to J. S. he not
having Knowledge of any later Will, and upon this J. S. gives
a Release to him, and after the Probate of the first Will is repealed,
and the Will itself disannulled, and the latter Will proved; this
Payment and release is no Bar of the Action upon the said Obligation
brought by J. D. the last and true Executor. Because it does not
lie in the Power of the Ordinary to make another Executor than
he who is made Executor by the Testator himself, and though it
be mischievous to him who pays the Money, and the Executor who
proved the Will before he knew of the last Will, yet the mischief
would be as great of the other Part if the Ordinary should have
Power to make another Executor than he who is the true Executor
made by the Testator, and he should have Power to dispose of
the Estate of the Testator. Mich. 16 Car. R. between Greaves
and Weirham, adjudged upon a Demurrer upon the Advice of all
the Judges of Serjeant's Inn. Intrant Hill. 15 Car. Rot. 1350.
For the Ordinary hath no Power to grant Administration, or to give to any other Power to dispose of the Estate of the Testator where he had made an Executor. Com. 277. Greshbrooke's Case.

3. Executor de son Tort cannot bring an Action; For he cannot shew Testament containing his Name as he ought. Br. Administrator, pl. 8. cites 35 H. 6. 31.


5. Executor de son Tort cannot retain. The Defendant in this Case pleaded, that the Testator owed his Wife dun fola 800 l. and that he made his Will, but doth not shew that he was thereby made Executor, and therefore having no Title he became Executor de son Tort, for which Cause his Plea was held ill; and Judgment was given for the Plaintiff. 2 Mod. 51. Trin. 27 Car. 2. C. B. Prince v. Rowfon.

6. Sale of East India Stock by a wrongful Administrator, the Purchaser having Notice of the Fraud, decreed to be transferred back to the rightful Administrator, and that the Administrator of the Purchaser shall account. Fin. Rep. 430. Mich. 31 Car. 2. Johnson v. East India Company & al.

7. If Executor de son Tort of a Term commits Waste on the Land, and be in Reversion recovers the Place wasted, yet that is no Prejudice to the Creditors, because it is a Devittavit in the Defendant, and it there happen to be a rightful Executor or Administrator he shall recover against the Executor de son Tort, but he cannot get the Land again from the Reversioner; Besides, his entering of his own Wrong after Leffle's Death makes him chargeable. 2 Show. 458 pl. 457. Hill. 1 & 2 Jac. 2. in Case of Norwich (City) v. Johnfon.

8. An Executor de son Tort who is but an Executor de facie, if he does lawful Acts with the Goods, as paying of Debts in their Degrees, it shall alter the Property against the lawful Executor; As if he pay just and honest Debts, the rightful Executor shall not avoid that Payment, and yet it is an Act done by one that has no Right. It is true, he is not quit against the rightful Executor, but he shall maintain Pro ver against him; But what shall he recover in Damage? only for so much as he has misapplied, and all that he has well applied shall be abated in Damages. And what is the Reason of this? Why, because the meddling with the Goods is that which gives the Creditor Notice who is Executor, and bound to pay the Debts; and the Creditor is not bound to enquire into the Executor's Title; if there be a Colour and Appearance of it, it suffices; Per Holt Ch. J. 12 Mod. 471, 472. Palch. 13 W. 3. in Case of Parker v. Kett.


(E. a) Executor de son Tort.

[How to be charged or come at where there is an Administrator or Executor.]

1. If a Man dies Intestate, and a Stranger administers de son Tort, and after Administration is granted to another, yet a Creditor of the Intestate may afterwards charge the Stranger as Executor.
Executors.

ecutors de son Tort, because that it may be no Affairs came to the hands of the Administrator to satisfy his Debt, and he cannot charge the Administrator for those Goods which never came to his hands, but only to the hands of the Executor de son Tort; and the Creditor has no Means but in Chancery to compel the Administrator to bring his Action of Trespass against the Executor de son Tort. P. 13. B. R. adjudged, * Keble against Osbeck. f 2 Rep. 34. Read's Case, resolved where Stranger administered de son Tort before the true Executor administered or proved the Will.

ship upon him, or proved the Testament, the other may be charged as Executor de son Tort; For the rightful Executor shall not be charged but with such Goods as come to his Hands after that he has taken upon him the Charge of the Will. 5 Rep. 34. a

* S. C. cited 2 Le 224. in pl. 284.

2. Executor de son Tort deceased shall not be impleaded as Administrator but as Executor, in Pain of Abatement of the Writ. Br. Administrator, pl. 15. cites 50. E. 3. 9.

3. He may be sued as Executor; Arg. 2 And. 29.

4. Debt against Executor de son Tort, who pleaded that he never was Executor, nor administrated as Executor. It was held in this Case not to be any wrong material whether he has Affairs or not, but to prove he has administered any thing of never to little in Value, it shall charge him for the whole Debt. Clayt. 6. pl. 12. Aug. 7 Car. Townley v. Ingram.

5. An Executor de son Tort shall not be charged for more than he converted, and shall discharge himself by delivering over the Reel to the rightful Executor; Admitted; Arg. Mod. 213. pl. 47. Pach. 29 Car. 2. C. B. in Case of Parten v. Bafeden.

(E. a. 2) Executor de son Tort.

Where he takes subsequent Administration.

1. In Debt where a Man administers as Executor de son Tort deceased, and after takes Administration of the Ordinary, this shall have Relation to the Time of the Intestate's Death; Br. Relation, pl. 12. cites 9. E. 4. 33. and says which fee in the End of the Case there.


3. If Executor de son Tort sells a Term in Possession, and afterwards takes Administration, the Sale is good by Relation; but otherwise it is of a Term in Relation; For if he sells such a Term before Administration to A. and after Administration to B. the Sale to A. is void, and B. shall enjoy. Mo. 126. pl. 273. Pach. 25. Eliz. in Scace. Kendrick v. Burgess.

S. P. so that if he will be relieved or satisfied out of the Goods before disposed of, he must be sued as Executor, and if such Administrator pleads in Abatement that Administration was not

S. C. cited Arg. 2 Mod. 175. 2 Mod. 91. 92. Arg. cites S. C. 847. S. C. cited per Curiam.

4. He may be sued either as Executor or Administrator, for it may be, that while he administered of his own Tort he waited the Goods, then if he be only sued as Administrator he shall only be charged of the Goods that came to his Hands since Administration. Cro. E. 102. pl. 9. Trim. 30. Eliz. B. R. Stubbs v. Rightwife.
5. Executor of his own Wrong pleads Pleau Administration, and then takes Letters of Administration, and then nisi darrum Continuance pleads Detainer to satisfy a Debt of a higher Nature due to herself. Ellis J. said, if he had took Administration after the Suit began, and before the Plea pleaded, he might have pleaded a Detainer; but not if he takes Administration after he has pleaded. Freem. Rep 265. pl. 233. Mich. 1679. Whitehead v. Sampson.

6. In an Action of Debt against the Defendant as Executrix of her Husband for Arrears of Rent due from the Testator, the Defendant pleaded in Abatement of the Writ, that after the Death of her Husband Administration of his Goods and Chattles was granted to her, and that she ought to have been named Administatrix in the Writ, and not Executrix unde pet' Judicium de brevi & quod breve licebat caffetur. The Plaintiff replied, that after the Death of the Husband, and before the Administration committed, the Defendant administered divers Goods and Chattles of her Husband's at such a Day and Place &c. To this the Defendant demurred, and Judgment was given for the Plaintiff; For the facts not forth the Day when Administration was committed; So it might be after the Writ brought; and besides, if she disposed of the Goods as Executrix of her own Wrong, the taking of Administration afterwards, though before the Writ was brought, will not hinder the Plaintiff from charging her as Executrix of her own Wrong. 2 Vent. 179. Trin. 2 W. & M. in C. B. Pyne v. Woolland.

(E. a. 3) Executor de son Tort.

In what Cases; And chargeable how far.

1. In Debt, if a Man administers de son Tort demesne, and Action is brought against him, and pending the Writ the Administration is committed to him, yet the Writ is good. Br. Executors, pl. 74. cites 21 H. 6. 8.

2. But if the Administration was committed to him before the Writ purchased, then he ought to bring the Action against him as against the Administrator, or otherwife it shall abate. Ibid.

3. By which he pleaded by the Form; To which the Plaintiff said, that at another Time he brought such a Writ against him as Executor, the which was abated by false Latin, wherefore he purchased this Writ by journeys Accounts as against Executor, and that the Day of the first Writ purchased the Administration was not committed; Prift; and awarded a good Replication, and the Issue joined accordingly. Ibid.

4. If a Man be Executor de son Tort demesne, and Action is brought against him, and he takes the Administration of the Ordinary pending the Writ, there the Writ is good; Contra if it had been taken before the Writ purchased notwithstanding his Administration before as Executor de son Tort &c. Per Catesby, quod futit conceellum. Br. Executors, pl. 90. cites 9 E. 4. 33. 47.

5. Sci. Fa. against Executor, who said that before the Writ purchased the Ordinary had committed Administration to him, Judgment of the Writ which named him Executor; and by the best Opinion it is no Plea, be-
cause he did not allege committing of the Administration to be before he administered as Executor; For if he first administered and after took the Administration, this shall not change the Action, because he was Executor lawfully by the Testament; But if a Man administers de son Tort demofne, and after takes the Administration by Letters of the Ordinary before Action taken against him, this shall change the Action; Note the Diversity by the bft Opinion; & adjournatur. Br. Executors, pl 167. cites 2 R. 3. 20.

6. Administration granted to an Executor de son Tort, how he shall be charged See Keilw. 127. pl 91.
    7. Executor de son Tort cannot be where there is a rightful Executor.

8. Debt upon Bond entred into by the Testator against the Defendant as Executor. The Defendant pleads that the Testator made A. and C. Infants his Executors, and that Administration durante minore aetate was committed to their Father, who administered before the Day of the Writ brought. The Plaintiff replies, that Goods of the Testator's, to the Value of 500l. came to the Defendant's Hands, &c. And upon this the Defendant demurred, and the Plaintiff had Judgment. Freem. Rep. 122. pl. 144. Trin. 1673. Kellow v. Wilmcomb.

9. Upon a Trial at Nift Prius at Guildhall before Ld. Ch. J. North, in Tover and Conversion against an Executor de son Tort, the Question came to be, Whether the Goods having been taken in Execution upon a Judgment obtained against the Defendant by a Creditor of the Deceased should discharge him against the Plaintiff who brought this Action as Administrator? And the Opinion of the Ch. J. was, that this Execution was a good Discharge against another Creditor that should sue him, to whom he might plead Riens inter fe mains, but it was no Discharge against an Administrator, for Men must not be encouraged to meddle with a Personal Estate without Right; but to prevent this Mischief where the Party dies Intestate, and there is Contell about the Administration, a Man may procure of the Ordinary Letters ad Colligendum. Vent. 349. Trin. 33 Car. 2. B. R. Anon.

(F. a) Who shall be chargeable as Executors.

1. An Executor de son Tort shall be bound to pay Legacies as well as rightful Executors. Mich. 3 Ja. B. R. per Popham and Williams. Vill. 7 Ja. B. between Phipps and others. per Curiam. Prohibition denied upon such Suit.

2. If a Feme Executrix takes Baron who waftes the Goods, and Feme dies, by the Common Law there is no Remedy against the Baron. Mich. 3 Ja. B. R. per Popham and Williams.


4. If
Executors.

4. If an Executor waifies the Goods and dies his Executor shall not be charged for this. For Actio Personalis moritur cum perpetuo. 

5. If an Executor de son Tort waives the Goods and dies, his Executor shall not be charged. Held 72 Eliz. B. Perae actio pro de son Tort was not liable.

6. Where Executor by Right or Executor by Tort administered and after referees before the Ordinary and takes the Administration, this may change the Action in Case of Executor by Tort. Br. Administrator, pl. 43. cites 2 R. 3. 29.


8. Executor with Intention to defraud the Creditors resided Executorship, but caused J. S. to take upon him Letters of Administration; J. S. fraudulently gave Trefator's Goods to the Executor. P. r. Dyer, If the Gift be fraudulent, then by the Statute of 13 Eliz. the Gift is void, and then by the Executor and then by the Occupation of the Goods is Executor de son Tort, and Judgment accordingly, contrary to the Opinion of Manwood. 3 Le. 57. pl. 83. Mich. 15 Eliz. C. B. Anon.

9. Goods given by the Intestate by Deed where there are not sufficient Goods by A. and then A. dies Intestate; those Goods in the Hands of the Vendee are liable to Creditors, and he is chargeable as Executor de son Tort. Cro. J. 273. 271. pl. 2. Hill. 8 Jac. B. R. Hayes v Leader. Brown. 111. 112. S. C. —Yelves. C. adjudget. The Donee after the Donor's Death took the Goods and in an Action brought against him as Executor, in which he pleaded Ne quæs Executive. The Jury found the Gift of all his Goods to the Donor, and also that it was to defraud Creditors contra Formam Statutum, and that the Defendant by Colour of this Deed took the Goods after the Donor's Death, and by all the Court Judgment was given against the Defendant. Executor de son Tort. Goldle. 118. pl. 12. Mich. 39 & 43 Eliz. Kitchen v Dixon. — S. C. cited Noy. 69. in a Case where in Debt against one Executor de son Tort the Defendant pleaded the same Plea, and being found against him, Execution was awarded against him for the whole Debt, viz. 601. for his false Plea, though in Truth he had not meddled but with one Bedhead of a small Value. Noy 69. says it was laid by Daniel, that in 36 & 40 Eliz. C. B. Kitchen v. Dixon. That one Mr. Ofkitt for such a false Plea was charged to 100: and he had meddled but with one Bible. Therefore beware, and plead well the special Matter.

10. If one takes Intestate's Goods and pending the Action against him he takes Letters of Administration, this shall not abate the Writ. Arg. Ow. 69. Trin. 42 Eliz. in Case of Malloy v. Jennings.

11. Scire Facias upon a Judgment against the Tefator of 2001. 2 And. 172. The Case was, The Tefator was possessed of Goods to the Value of 250l. Pl. 96. S. C. adjudged. — by Convo courteous the Creditors, made a Gift thereof to his Daughters Ow. 132.
Executors.

8, C. adjudged accordingly, with Condition upon Payment of 20s. it should be void, and died; the Defendant intermeddled with the Goods, and afterwards the Daughter by this Gift took the Goods, and afterwards Administration of Testator's Goods was committed to the Defendant; Adjudged, that when he intermeddled with the Goods, though he was neither Executor nor Administer, and that after Administration was committed to him, a Creditor had Election to charge him as Executor of his own Wrong, or as Administrator, and that the Gift was fraudulent within 13 Eliz. and when the Donee afterwards took them, it was a Trespafs to the Administrator, and he had his Remedy at Law against her, fo as they were Affets in the Defendant's Hands. Cro. E. 8to. pl. 16. Hill.


12. Though there be an administering Executor, yet if a Stranger takes the Goods, and claiming to be Executor pays Debts, or pays Legacies, and intermeddles as Executor; there by such express Administration as Executor he may be charged as Executor de bon Tort though there be other Executors of Right, Rep. 34 a. Trin. 2 Jac. C. B. Read's Cafe, and says that with this agrees 9 Eliz. 13. 5.

And where the Goods so taken never actually come to the Executor's Hands, but were in a remote Place where this Taker becomes Executor. Went. Off. Ex. 175, 176. — Judgment was obtained against the Testator, and upon a Devallavit returned against his Executor he pleaded, and a Special Verdict was found to this Effect, That the Defendant was made Executor by the Will, and dwelt in the same House with him; and that before Probate he possessed himself of the Testator's Goods, and had them appraised and inventoriz'd, and then sold Part, and paid a Debt owing by the Testator, and converted the Value of the Rest to his own Use; that afterwards he refused before the Ordinary, whereinupon Administration was granted to the Widow of the Deceased; and the Question was, Whether he should be charged to the whole Value of the Personal Estate, or only so much as he converted. The Court was of Opinion that the committing of Administration in this Cafe is a mere void Act. If an Administrator brings an Action it is a good Plea to say, that the Executor made by the Will has administered. Accordingly Judgment was given for the Plaintiff. Mod. 212. Patch 26 Car. 2. C. B. Parten v. Saffedan. — Frem. Rep. 151. pl. 172. Parsons v. Maysden. S. C. The Court seem'd to make a Difference when Goods are in the House of the Person named Executor, this Possession shall not amount to an Administration, but perhaps there may be a Difference when he takes them into his Possession And here although he pleaded that he took the Goods by the Consent of the Party to whom Administration was afterwards granted that signifies Nothing, it being before Administration granted. Adjudicatur.

Lat 160. Trin. 2 Car. 8. S. accordingly by Duderidge and Jones, who held that he should be charg'd upon the Special Matter.

13. If Executor during Minor Estate wastes the Goods he shall be charged after the Age of Infant upon the Special Matter, and not as Executor of his own Wrong, because he had a lawful Authority at that Time, Agreed Per Duderidge and Jones. Noy 86. Palmer v. Litherland.

14. Administrator gets Judgment, then Administration is revoked, if he takes Execution he shall be charged as Executor de bon Tort. 1 Mod. 62. pl. 5. Trin. 22 Car. 2. B. R. Turner v. Davies.

Arg. Raym. 25.

15. If Goods come to the Poffession of an Administrator and his Administration is repeated, he shall be charged as Executor of his own Wrong. Per Keeling Ch. J. Mod. 63. pl. 5. Trin. 22 Car. 2. B. R. in Cafe of Turner v. Davis.

Freem. Rep. 292. pl. 156. S. C. held accordingly by Brown v. Collins, and Patch 27 Car. 2. he was adjudged according to the Opinion of Hale, per tot. Cur.

16. An Executor wastes the Goods of the Testator, and died, leaving Affets, and the Defendant his Executor, and if he shall be charged for the Affets, was the Question; and Hale held it is a Personal Wrong, which did die with him that did it; but upon the Importunity of Saunders, of Council for the Plaintiff, he permitted it to be found specially; 2 Lev. 110. at Guild-Hall before Hale Ch. J. Trin. 26 Car. 2.

But in such Cae
(F. a. 2) De fon Tort.

Where he may retain, or Allowances be made him.

1. An Executor cannot pay himself Debt or Legacy, per omnes Jult'; Rep. 301.
   Anglice. Mo. 527. pl. 696. Hill. 40 Eliz. Colter v. Ire-
   land.
   ter.

2. Executor de fon Tort cannot retain for his own Debt, though he 6. C. cited
   is liable to the Acions of Creditors. Poph. 125. Trin. 15 Jac. B. R. 2 Jo. 154 —
   Brook's Cafe.
   D. a. pl. 3. Marg. — If after Action commenced against him he takes Letters of Administration, he
   may retain and plead it, but shall not take the Writ. Arg. 2 Show. 375. in Cape of Loveday v. Young,
   cites the Cape of Williamson v. Norwich. — S. C. cited 2 Vent. 180. in Cape of Pyne v. Wood-
   land. — For by taking Administration he has purged the Tort, and though Executor de fon Tort
   cannot pay himself, yet he may pay others, and after taking out Administration he may plead Press
   ford.

3. Executor de fon Tort was indicted to the Intestate for several
   Rents, and the Intestate acknowledged himself satisfied for all Rents due
   by Defendant. This was held a good Discharge being in his Life-
   time, and so not chargeable with it as Alls in Debt on Bond, but
   where he had paid Money for so many Blacks Intestate appointed to be paid
   at his Funeral, it was disallowed and held no good Administration.
   A. Widow refused herself of some of the Personal Estate of her
   late Husband, and paying just Debts, and that in Order of Payment out
   of his Estate in her Hands, shall have Allowance for the same from the

5. Executor de fon Tort shall be allowed all Payments made to any
   but himself; Arg. (and not denied, but seem'd to be granted by the

6. A. died Intestate. B. desired C. to bury A. and he would pay 1 Salk. 295.
   the Charges. C. buried A. — B. gave C. a Horse of Intestate's in
   pl. 2. S. C. held accordingly. Part of Satisfaction of Funeral Charges, and a Note under his Hand to
   pay him 23 l. more. Afterwards B. took Administration and brought the Deften-
   tier for the Horse; Holt Ch. J. thought the Action lay well, but d'ant had
   Judgment. Delben and Ayre Juitsices contra. 3 Mod. 275. Patch. 2 W. & M. in
   B. R. Whitehill v. Squire.

   Accordingly. — Carth. 105. S. C. held accordingly, and Judgment for the Defendant. —
Executors.

There being no Creditors in the Case, and the Funeral being by the Direction of B this makes him Executor de son Tort, and it being a lawful Act though done by Executor de son Tort, it ought to be allowed; but if there were Creditors perhaps it might be otherwise; Per Dalben and Eyre Jus- tices. 

S. C. 2 Mod. 50. Hill 1. 

S. 3. 

1. Executor de son Tort never shall have Action as Executor of Testator; Arg. 2 And. 39. pl. 25. Trin. 38 Eliz. in Case of Bat- hister v. Trusfill. 

2. Executor de son Torte shall be sued for Legacies as well as a lawful Executor; Per Popham and Williams, but Yelverton doubted of it. Noy 13. Anon. 

3. A Man made his Will and an Executor, and Administration is granted to another, and by Virtue thereof the Administrator gets the Pos- session of the Goods. The Executor proved the Will, and brings an Action of Trover against the Administrator for taking the Goods. The whole Court held clearly that the Action well lies. 2 Bulst. 268. Mich. 12 Jac. Fifer v. Young. 

S. C. 3. 

4. Executor de son Tort of a Term is chargeable in Warrants. 3 Lev. 35. Mich. 33 Car. 2. C. B. Mayor &c. of Norwich v. Johnson. 

It was objected in Error, that if the Plaintiff is imitated to this Action, it must be by the Statute of Gloucester, but that it will not lie against the Defendant even by that Statute, because the Administration is thereby given against the Tenant by the Curtesy, in Dowry, for Life or Years, and treble Dam- ages &c. and that the Defendant is neither of these; and that it being so penal a Law shall be taken strictly; But per Cur, this is a remedial and yet a penal Law, and therefore shall have a favourable Contra- diction; and the Judgment was affirmed. — Comb. 7. S. C. and Judgment affirmed accordingly. —Show. 415. pl. 413. 8. C. and Judgment affirmed. 

6. One as Executor de son Tort brought Seire Facias on Judgment bad by the Tettator, and on two Nibils, and after Execution, H. as Administrato brings Seire Facias on the same Judgment, as per Car. he may, and recover the Money all over again, as by Twilden hach been before 15 Car. 1. and the Party is left to his Remedy against the pretended Execution. Keb. 420, 421. pl. 140. Mich. 14 Car. 2. B. R. Harrison v. Vandibeck. 

7. It has been divers Times held, that where there is a right Executor, and yet another does administer by Wrong, it is at the Election of Creditors, either to see them jointly together, or one or both of them severally, and by himself; But it where Administration is committed another also administers by Wrong, these cannot be sued together as Administrators; for though one may be an Executor by Usurpation or Wrong, yet none can come to be an Administrator by Wrong, since no other but such as receives that Power from the Ordinary can fo be; therefore in that Case there is a Necessity of suing him a-part and by himself, (who so usurpeth Administration) by the Name of an Executor. Went. Off. Ex. 177. 


9. If Executor de son Tort gets 300 l. of the Tettator's Goods, and pays it duly to a just Creditor, there the lawful Executor, in my Opinion, shall not even maintain Trover against a wrongfull Executor, because it is a good Payment, and no Prejudice to the Executor; Per Holt Ch. J. 12 Mod. 472. Pasch. 13 W. 3. in Case of Parker v. Kett.

(F. a. 4) Executor de son Tort.

Pleadings by or against him.

A N Overseer or Conductor, or he that has only Letters ad Collit. tend, viz. to get and keep the Goods in Saltery, and he that intermeddles by Virtue of a Will truly made, but controlled by a later Will after found and proved, may free himself from being Executor of his own Wrong, by special pleading how and in what Right he intermeddles, and traverfing his administilation in other Manner. D. 166. b. pl. 11. Hill. 1 Eliz. Stokes v. Porter.


2. But where a Man claims Title or Interest in the Goods as by the Gift of Tettator in his Life, He shall not traverse without that that he administered any other Goods or in any other Manner, but abique loci that be administered as Executor. D. 167. a. pl. 11. Hill. 1 Eliz. in Cafe of Stokes v. Porter.

3. If Executor de son Tort pleads Plene Administrator as an Action of Debt brought against him, if he can prove that he himself administered Part, and the Administrator the Residue, the same is good Evidence to maintain
Executors.

maintain his Issue, Per Drew Serjeant, which Periam J. seem'd to
to grant; but by him a rightful Executor who intermeddles and after
refuses, upon which Administration is granted cannot plead so, for
such Administration is not well granted. Le. 155. pl. 215. Trin.

4. In Debt against J. S. as Executor he pleads No quæres Executor,
The Verdict found that Administration of the Goods of the Testator
was committed to the Wife of the Defendant, and that she is dead, and he
attained banning Part of the Goods and sold them. It was moved that
this Verdict was void for Uncertainty; for bonam Partem is altogether
uncertain; but it was held well enough; for if he detain any Part it makes him Executor de bon Tort &c. and Judgment for the

5. If Executor de bon Tort be sued with a rightful Executor in one and
the same Writ, the Executor de bon Tort shall not by this Plea prejudice
the rightful Executor; but the Chief Justice. Brownl. 79.
Trin. to Jac. in Case of Lany v. Aldren.

6. In Action against such Executor he is not to be distinguished
by Name from the right Executor, but must be sued generally by the
Name of Executor of the last Will and Testament of the Deceased, and
then if he will deny himself to be, he must plead, That he neither is
Executor, nor hath administered as Executor; and then the Plaintiff must
prove that he hath administered in some such or the like Sort as afore

7. M. the Master possessed herself of the Goods of the Intestate, as
Executrix de bon Tort, and sold them by Affent and Direction of J. her Son,
afterwards they took out Administration, and paid the Debts as far as the
Personal Estate did amount unto, being to the Value of what M. received,
and of all which the Intestate died possessed; then one of the Creditors
sued M. as Executor de bon Tort, and upon Plea Administravit pleaded,
all this Matter was found specially; and adjudged by all the Barons,
That she was not liable to the Suit of the Creditor, because it was
brought after Administration granted to J. her Son, and in such Case
she is chargeable to him, and not to the Creditors; for if he should
the might be doubly charged, which is unreasonable, especially since
the Administrator had paid to the Value of the Estate Cro. Car.
her Hands she is chargeable for them as Executrix de bon Tort till the satisfies the true Administrator
for them, or that the satisfies for the true Debt to the Value; And Judgment for the Defendant. Cro.
C. 89 Mich. 3 Car. in Case of Whitmore v. Porter S. C.

8. The Plaintiff declared against R. the Defendant as Executor, who
pleaded that Testator made his Will, and that he susceplo fipere se nonres
Testamenti præd. &c. did pay several Sums due on Specialties, and that
there was a Debt owing by the Testator to the Defendant's Wife, and that
he retained so much of the Testator's Goods to satisfy that Debt, and
that he had no other Assets; The Plaintiff demurred, because for ought
appears the Defendant was Executor de bon Tort, and it fo he cannot
retain. The Plaintiff's naming him in his Declaration (Executor of the
Testament of &c.) will not help him, for he cannot declare
against him in any other Way. And of that Opinion was all the Court, and adjudg'd accordingly for the Plaintiff. 1 Mod. 203. pl. 39.
Trin. 27 Car. 2. C. B. Atkinson v. Rawfon.

9. A Creditor of the Intestate brought Action against Executor de bon
tort and obtained Judgment, and the Goods were taken in Execution.
Per North Ch. J. this is a good Discharge against another Creditor that
should sue him, to whom he might plead Reinstanter mans, but it is
no Discharge against an Administrator; for Men must not be encouraged to meddle with a Personal Estate without Right, but to prevent the mischief where there is Contest about the Administration to the Inter- tate, a Man may procure of the Ordinary Letters ad Colligation, Vent. 349. Trin. 32 Car. 2. B. R. Anon.

10. An Executor de son Tort pollified himself of the Goods &c. A Creditor of the Intestate gett Judgment against him and took the Goods in Execution, against whom the rightful Administrator brought an Action of Trover for the same Goods; North Ch. J. held that the said Execution did not discharge him of the Action of Trover; It might be a good Discharge against any other Creditor of the Intestate, and he might plead Rien enter maiss, but not against the rightful Administrator; for Men must not meddle with the Personal Estate of others without any Right. 1 Vent. 349. 32 Car. 2. at Nisi Prius at Guild-hall. Anon.


12. Where Trover is brought by a rightful Executor or Administrator against an Executor de son Tort, he cannot plead Payment of Debts to the Value &c. or that he hath given the Goods in Satisfaction of the Debts; because no Man ought to obstruct himself upon the Office of another; Nevertheless upon the general Issue such Payments shall be receiv'd in Damages, Per Holt Ch. J. Carth. 104. Hill. 2 W. & M. in B. R. in Caele of Whitelhall v. Squire.

13. But in an Action by a Creditor against an Executor de son Tort, he may plead Plene Administravit to an Action brought by a Creditor, and may give in Evidence Payment of just Debts to others; But in Action by a rightful Executor or Administrator he cannot plead to; Per Holt Ch. J. Carth. 104. Hill. 2 W. & M. in B. R. in Caele of Whitelhall v. Squire.

(G. a) What shall be said Affairs.

1. If a Man encoff another upon Condition that he shall sell the * Firth. Executors, Land, and expend the Money for his Soul &c. this shall not be Affairs after the Death of the Feoffor where the same Feoffor is made Executor. * 2 Pl. 4. 21. b. Dux warfare * 3 Pl. 6. 3. b. Arg. Le. 225. as adjudged. + S. C. cited Arg. Le. 225.

2. But if a Man makes J. S. Executor, and after encoffs him to Br. Affairs fell the Land and distribute the Money for his Soul, and after dies, and after he tells, these Homies shall be Affairs. 3 Pl. 6. 3. b.

3. So if a Man devises Land to J. S. to be sold, and to distribute Br. Affairs the Money for his Soul, and at the same Time makes him Executor, enter mains. 2 Pl. 2. cites S. C. — Firth, Executors. pl. 1.

M m m 4 f
Executors.

S. P. though they were not the Goods of the Deceased at the Time of his Death; and if they find more than Affets this is a good Verdict. Br. Affets enter mains, pl. 2. cites S.C. — S. C. cited Le. 225. in pl. 326.

Thougb an Obligation shall not be in the Hands of the Executor before the Recovery, yet because he may gain Benefit from it it shall be valuable, and therefore if an Obligation be taken from the Testator, the Executors shall have 'Trespass by the Statute 4 E. 5. to recover Damages which shall be Affets. Sav. 119. pl. 188. 29 Eliz. per Cur. obiter.

5. If an Executor recovers as Executor Things in Chancery by Equity, these Things so recovered shall be Affets. Crit. 12 Ja. 2. adjudged, Harwood against Wragman Crit. 12 Ja. B. R. per Curiam.

6. If a Man devises Land to be sold by J. S. for Payment of his Debts and Legacies, and makes J. S. his Executor and dies, the Money made by J. S. upon the Sale of the Land shall be Affets in his Hands. Crit. 17 Ja. 5. per Hobart.

7. But otherwise it is where the Land is devised to be sold by the Executor and others, for there the Money shall not be Affets; for they are not trusted with it as Executors. Ibid. Per Hobart.

8. If Executor delivers Goods so Merchandize, the Profit of this shall be to the Use of the Testator. 18 P. 6. 4.

9. If a Man devise Land held in Socket to be sold by his Executors, and that the Monies thereof arising shall be disposed in Legacies specially expressed in the same Will, if the Executor after his Death sells the Land for Money, the Money shall be Affets in his Hands to the Legacy. D. 9 Eliz. 264. 41. per Cur.

G. brought Deed upon a Bond against A. as Executor, and the Case was, that the Testator of A. by his Will did appoint certain Lands, and named which, should be sold by his Executors, and Monies thereof arising distributed amongst his Daughters when they have accomplished their Ages of 21 Years. The Lands are sold. The Question was, if the Monies thereof, being in the Hands of the Executors until the full Age of the Daughters, shall be Affets to pay the Debts of the Testator 1 And by the clear Opinion of the whole Court the same shall be Affets, for that this Money is limited to a special Use. Le. 27 pl. 107. Mich. 29 & 30 Eliz. C. B. Germy's Case. — — 2 Le. 82 pl. 174. S. C. in potidem Verbis, 2 Le. 119. pl. 185. Gering's Case. S. C. in potidem Verbis, but adds a Quere of this Case; For it was afterwards resolved in another Case, that the Monies in the like Case remaining in their Hands should be Affets.

All 21. S. C.

10. So if a Deviser be of such Land to his Executor upon Condition S. P. does not fall to sell it, and that the Monies accruing thereupon, and also with
his Personal Estate to pay his Debts, and by the same Will gives Power to the Executors to sell it accordingly &c. and after the Executors sell it accordingly, the Monies received upon the Sale shall be Assets to the Debts; adjudged upon a Special Verdict. Trin. 23 Car. 2. R. Shaw against Huntley. Trin. 21 Car. Rot. 321. London.

11. If Debtor dies Intestate, and the Ordinary commits Administration to Debtor, by which the Debt is extinct, yet this shall be Assets in his Hands. Trin. 7 Ja. 25. per Curiam agreed; for the Ordinary has no Power to discharge the Debt.

12. If the Debtor makes the Debtor or a Stranger Executors, by which the Debt is extinct in the Hands of the Debtor, yet this shall be Assets in his hands to the Debts; for this is extinct but by the Will. 8 E. 4. 3. PI. C. 185. Woodward against Darcey.

13. So if Debtor makes Debtor Executor and dies, by which the Debt is extinct in the Hands of the Debtor, yet this shall be Assets because it is extinct but by the Will. Held Trin. 7 Ja. B. 3. 


14. If the Testator was indebted to the King in 13 l. and the King seizes the Goods of the Testator in the Hands of the Executor for the said Debt, and after the Executor pays the 13 l. and has the Goods re-delivered, the Value of the Goods over the Sum of 13 l. shall be Assets to other Debts; 17 E. 3. 26. b. admitted by Issue.

15. If a Man makes A. his Executor during the Minority of B. and makes B. Executor after his full Age, and after B. comes to full Age, and takes upon him the Executorship of the Will, the Goods of the Testator which are in Specie in the Hands of A. after the Executorship of B. are Assets in the Hands of B. though B. never had any Possession of them; for he may have Tender and Conversion for them against him. Trin. 17 Ja. B. per Curiam, Chandler against Tomson.

16. If a Man has a Term as Executor and purchases the Frankenstein S. P. and if &c. the Leafe is not extinct as to be Assets, but it seems it shall be extinct as to the Executor of the Purchaser to have it as a Term. Br. Executors, pl. 174. cites 43 E. 3. 27. 28.

Br. Extinguishment, pl. 57. cites S. C. — Br. Extinguishment, pl. 54. the Leafe against the Executor shall be Assets; Per Halcs.

17. If a Feme Executrix takes Baron, and the Feme sells the Goods Br. Proper and redeems them, yet these shall remain as Assets; Per Newton. But Y. pl. 52. Brooke cites Quere inde; For it seems that they shall not if they are sold bona fide; for they do not remain now as the Goods of the Testator, but as Goods altered and changed in Property. Br. Executors, pl. 150. cites 18 H. 6. 4. him that the Money shall be Assets, but not the Goods; for the Property is changed without Tort to any.

18. If a Man be indebted in 20 l. to the Testator, this shall not charge the Executor as Assets &c. This is in Action and not in Possession. Br. Executor, pl. 112. cites 8 E. 4. 3. Per Needham.

19. Adwson
Executors.

It shall be Affets in the Hands of an Executor. Hob. 304. in Case of London v. the Collegiate Church of Southwell. 

Br. Execut. tor, pl. 6. cites S. C. 20. N. ote per Fitzh. for clear Law, That where a Man is indebted in 40 l. to one, and 50 l. to another, and dies, and has only 40 l. and his Executors or Administrators agree with the one Creditor of 40 l. for 50 l. and has Acquittance of the 40 l. yet the 30 l. Residue in his Hands shall be Affets in his Hands. Br. Affets enter mains, pl. 1. cites 27 H. 9. 6. 

21. It two have a Lease for Years as Executors of J. S. and they purchase the Receivem in Fee the Lease is extinct, and yet they shall be charged thereby as Affets. Br. Leafe, pl. 63 cites 4 E. 6. 

22. Brook lays, It seems reasonable that the Executor shall be charged with so much as their Testator lends, or upon a Pledge pledged to the Testator in his Life; For when the Owner redeems his Pledge of the Executor the Sum which the Executor received by the Redemption shall be Affets in his Hands. Br. Affets enter mains, pl. 12. 

23. If Money is brought into the Prerogative Court, and there delivered to the Executor as due to the Testator, and presently after in the same Court, by Order thereof, and the same Day, be pays it to the Creditor of the Testator, and after such Payment, and upon the same Day another takes out a Writ, upon Plene Administravit pleaded, this Money will be taken to be Affets, though perhaps by special Pleading the Defendant might have been aided. Dy. 208. pl. 16. Mich. 3 & 4 Eliz. 

25. A. covenants to make a Lease for Years to B. Before the Lease made B. dies, and the Lease is made to his Executors, though the Term first commenced in the Executors; yet since the Covenant with B. was the Cauze of making the Lease to the Executors, the Term is Affets in the Hands of the Executors as well as if it had been made to the Testator himself. Pl. C. 284 a. Trin. 6 Eliz. Chapman's Cafe. 

26. Lease for Years on Condition to be void on non Payment of Rent, the Condition is broken, and then Leasee dies, it is not Affets in the Hands of the Executore. 2 Le. 143. pl. 178. 13 Eliz. In the Exchequer, in Sir Moi. Finch's Cafe. 

27. Lease for Life so as after his Decease the Land remain to his Executors for eight Years, after the Decease of Leasee for Life the Executore have the Term as Executors to the Use of Testator, and so Affets. Per Manwood J. but per Dyer it is not Affets; For though the Executors have the same Term by Purchase, yet they have it as Executors. Per for that is a good Name of Purchase, which Harper J. granted, and that 17 E. 3. 29. doth not prove the same. 3 Le. 21. pl. 49. Hill. 14 Eliz. in Cranmer's Cafe. 

28. A Stranger was bound to the Testator in 100 l. for Performance of Covenant, which were broken, for which the Executors brought Debt upon the Obligation, depending which Suit, both Parties submitted themselves to the Arbitration of A. and B. who awarded, That the Obliger should pay to the Executors 70 l. in full Satisfaction &c. and that the Executors should release &c. which was done accordingly. And it was agreed by the Court, That by the Release it shall be taken in Judgment.
Judgment of Law, That the Executors have Affets to the Value of the whole 100l. and although the Executors were compelled by the Award to make the Release; yet it was their own Act to submit themselves to the Arbitrament. 3 Le. 53. pl. 77. Mich. 15 Eliz. C. B. Anon.


29. A. by Deed limits a Term to his Executors for 20 Years, this shall not be Affets in their Hands. 2 Le. 7. pl. 7. 16 Eliz. C. B. in Cranmer's Cafe.


31. A. leased in Fee made a Lease of Land and Implements for Years rendering Rent to A. and his Heirs and Assigns; But after A's Death his Executors received the Rent for some Time, yet this is not Affets. See Trial (B. g) pl. 3. and D. 20 Eliz. 361. 15.

32. If a Man leases for Years, and the Executor of the Lessee surrenders this Lease, this shall be Affets, though to some Respects the Term is extinct. 1 Rep. 87. b. Patch. 22 Eliz. by Walmesly J. in Corbet's Cafe.

33. Debt against an Executor who pleads he had Rents en fies mains but certain Goods disfriamed and impounded, it was adjudged to be no Affets to charge him. Cro. E. 23. pl. 8. Mich. 25 Eliz. C. B. Anon.

34. A. leased of Land in Fee devised it to B. for 36 Years for Payment of Debts; and makes B. Executor. Afterwards during the 31 Years the Fee descends on B. Though by Decent of the Inheritance the Term is merg'd as to himself, yet it is in Este as to Creditors and Legatees, and shall be Affets in his Hands; Per Clerk J. 3 Le. 112. pl. 159. Trin. 26 Eliz. in the Exchequer, Vincent Lee's Cafe, alias, Lee v. Lee.

35. Infant Executor at his full Age releases to his Administrators under his private estate, who had Affets of 600l. in their Hands, all Actions; Deeds; For the Law presumes that he received so much as he releases, and Judgment for the Plaintiff. Cro. E. 43. pl. 3. Mich. 27 & 28 Eliz. C. B. Brightman v. Keighley.


36. If Trespass be done to the Testator by taking his Goods and he dies, and the Executors release all Actions, the same is Affets, because it might be proved to the Jury, that it they had not released, but had brought Action of Trespass De Bonis Aportatis in Vita Testatoris, they might have recovered Damages which would have satisfied the Debts or Legacies of the Testator, and therefore shall be Affets; Per Periam J. to whom Rhodes agreed. 4 Le. 103. in pl. 209. Mich. 27 Eliz. C. B. in Cafe of Kightley v. Kightley.

37. If an Executor releases an Account, and it is not certain what he shall recover, it is not Affets; but if it can appear or be proved that Rhodes J. so much was due it is Affets; For the Law presumes he has received so much as he does release; Per Periam J. and Judgment pro Quo. pl. 209. Cro. E. 43. pl. 3. Mich. 27 & 28 Eliz. C. B. Brightman v. Keighley. 4 Le. 103. Mich. 27 Eliz. C. B. Brightman v. Keighley. 4 Le. 103. Kightley v. Kightley, S. C. — If an Executor releases a Debt, or discharges one in Execution, it shall be accounted in Law Affets as received; Per Hobart Ch. J. Hob. 59. — Ibid. 66. S. P. per Hobart Ch. J.

Nn n

38. If
EXECUTORS.

38. If the Testator mortgages a Term and dies, and the Executors receive it with their own Monies, the said Lease will be Assets in their Hands for so much as the same is worth above the Sum which they have paid for the Redemption of it; Per Farnum J. Le. 155. pl. 215. Trin. 32 Eliz. C. B. in Case of Hawkins v. Lawes.

39. If a Man is indebted by Obligation in 100 l. to a Testator, this Obligation is not Assets in the Hands of the Executors until it be recovered by them, because it is but a Choise en Action; But if in such Case the Executor relieves the Debtor, now he has determined the Action, and has made it Assets in his Hands to the whole Value of the Bond. Ow. 36. Mich. 15 Eliz. Anon.

40. By Recovery in Quare Impedit for a Disturbance made to their Testator the Executors shall recover Damages, which shall be Assets, and as an Advoles is Assets in the Heir, so a Preament shall be to Executors. Savil. 119. pl. 157. Patch. 29 Eliz. Smallwood v. Bishop of Coventry and March.

41. The Queen was indebted to A. in 100 l. for Goods delivered into the Tower, for which Money A. took a Debenture from the Queen in the Name of J. S. and afterwards made B. his Executor and died. B. procured J. S. to release and surrender the former Debenture to the Queen, and took a new Debenture from the Queen for the said 100 l. to himself. It was held that this was no Devastavit in the Hands of B. the Executor, but it had been otherwise if the first Debenture had been taken in A's own Name, for then it had been a Devastavit by the Executor. Goldab. 115. Mich. 40 Eliz. C. B. Eveling v. Levesen.

42. If an Executor has a Lease for Years of Land of the Value of 20l. per Annu. rending 10 l. Rent per Ann. it is Assets in his Hands only for 10 l. over and above the Rent. Cro. E. 712. pl. 35. Mich. 41 & 42 Eliz. C. B. in Case of Body v. Hargrave.

43. Goods wrongfully taken from Executor or Administrator are Assets, because they may take them again, but Goods taken from Testator are not; Per Warburton. Ow. 152. Hill. 43 Eliz. in Case of Bethell v. Stanhope.


If such Taking be by Subjects known; But if by Enemies, As where Enemies land and take Goods or Cattle near the Sea Coast, it seems that the Executor is not chargeable. Went. Off. Ex. 112.

45. It
45. It shall not be intended that an Executor has special Affrights (as Money received for Lands devised to be sold for Payment of Debts or Damages recovered in Trespass for Goods taken away in the Life of the Testator &c.) unless it be specially flown. Cro. J. 132. pl. 4. Mich. 4 Jac. B. R. Gewen v. Roll and Noble.

46. Goods taken away wrongfully by a Stranger before the Administration shall not be Affrights in the Hands of the Administrator till they are recovered, or Damages for them. Hob. 49. pl. 54. cites Trin. 11 Jac. Keble v. Keble and Osbalston.


47. Damages recover'd by an Executor in all Posteoffice Trespasses 6 Mod. 181. shall be Affrights in his Hands. Hob. 38. cites Trin. 12 Jac. in Case of Cope v. Lewin.


48. If an Executor has a Villein for Years who purchases Lands in Fee, and the Executor enters, he shall have the whole Fee Simple, but because he had the Villein as Executor it shall be Affrights in his Hands. Co. Litt. 117. b. 124. a.

49. If Leases for Years, Hersts, Sheep, Plate, or other Cattle be granted to A. upon Condition that if A. do not such an Aff such a Day &c. the Condition is not performed at the Testator's Death, nor at the Day appointed, now the Chattel is come back to the Executor, and is Affrights in his Hands. Went. Off. Ex. 76.

50. If an Executor stocks the Land of the Testator (which comes to him as being a Leafe for Years) with his own Sheep or Cattle, this shall entitle to his own Benefit, for as he is to bear the Loss by Rot or Death, so he ought to reap the Advantage; But if the Testator's Stock be continued upon the Ground, the Gain or Loss shall redound to the Testator's Estate; The like Law if an Executor finding that he cannot instantly alter the Testator's Death let the Leafe at or near the Value, shall therefore buy Seed-Corn, and hire the Plowing &c. But if a long Leafe worth 100 l. per Ann. come to Executors, and no Sale is made thereof by the Space of a Year or more, (the Term continuing of the same Value as at first) the 100 l. raised in one Year shall be Affrights &c. Went. Off. Ex. 83. 84.

51. If A. covenants with B. to make a Leafe to him of such and such Land by such a Day, and B. died before the Day, and before any Leafe made A. must make the Leafe to B.'s Executor, and this shall be Affrights in his Hands. Went. Off. Ex. 81. cites the Case of Chapman and Dalton in Queen Elizabeth's Time.

52. If
53. If a Bishop hath a Ward fallen and dies, neither the King nor the Successor, but the Executor shall have the Ward, and the Ward shall be Assets; so it is of an Heriot, Relief &c. Co. Litt. 388 a.

54. If an Executor dies indebted, leaving Goods of a great Value of his Testator's, these Goods are not Assets in the Hands of the Executor for Payment of the Debts of Executor, but only for Payment of the first Testator's Debts or Legacies. Went. Off. Ex. 86.

55. If any defeasible Estate of the Testator's comes to the Possession of the Executor, and afterwards is evicted, the Loss shall not fall upon the Executor. Went. Off. Ex. 112, 114.

56. If Testator the Time of his Death had a Ship at Sea in which he had much Goods and Merchandizes, which are cast away and lost before Arrival, the Executor is not liable. Went. Off. Ex. 114.

57. So of a Stock of Sheep left by Testator, and being tainted with the Rats, and dying soon after, the Executor is not liable. Went. Off. Ex. 114.

58. Remainder for Years in Testator in such Manner that he might dispose of it at his Pleasure, though it fell not into Possession in his Lifetime, is doublets Assets to the Executor, even whilst it continues a Remainder; because it is presently valuable and vendible. Went. Off. Ex. 82, 83.

59. If A. affume upon good Consideration to deliver to B 20 Quarters of Malt by 1st of May, or so many Load of Coals or Wood &c. and it is not perform'd in the Life of B, but after to his Executor, it shall be to him as Executor, and shall be Assets in his Hands as well as the Money recover'd in Damages for Non Performance should have been. Went. Off. Ex. 82.

60. If A. makes B. Executor, and B. make C. Executor; The Goods of A. in the Hands of C. are not liable to a Judgment had against B. Nor the Goods of B. in the Hands of C. subject to a Judgment against A. Went. Off. Ex. 137.

61. If A. be bound to B. by Bond, Statute or Recognizance for assurance of Land, and B. dies and the Land descends to the Heir; or be it that B. sold the Land to C. and assigned to him the Bond, Statute &c. the Author thinks that the Extent must be fixed out in the Name of the Executor of B. and that which is recover'd will be Assets in Law to charge the Executor; yet in Equity it pertains to the Heir or Assignee. Quere, If the Executor meddle not, but only suffer his Name to be used. Went. Off. Ex. 75.

62. A Debt due from an Executor to a Testator is Assets in Equity to pay Legacies. 3 Chann. Rep. 89. 21 May 1646. Nichols v. Chamberlain.

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Court declaring that it was not Assets of C's Estate. 3 Ch. Rep. 2. creed 2 Freem. 12 Car. 2. Jones v. Bradshaw.

65. Lands were purchased to A. but convey'd to A. and B. but B. to 2 Freem. take Nothing. A. dies; B. is decreed to convey to the Heirs of A. Rep. 184. These Lands being Trust Lands are no Assets in Equity, though the Trust be decreed in Equity. Chan. Cafes 12. Trin. 14 Car. 2. Bennet v. Bennett and Brownlow v. Box & al.

the Lands were so great that the Revenue would not pay the Interest, for which Reason refolv'd to be no Assets in Equity. — S. C. cited by Lt. Keeper. Chan. Cafes 128. Patch. 21 Car. 2. in Case of Prat v. Coli, where it was held that a Trust of Lands was no Assets. — 2 Freem. Rep. 139. 177. S. C.

66. Delivering up a Bond and taking a new Bond to the Executor But at Law himself with additional Surety is no Conversion in Equity to charge the Executor with the Payment of that Money. Chan. Cafes 74. Patch. 18 Car. 2. Armitage v. Mercall.

67. If Cestuy que Trust binds himself and his Heirs in a Bond, this is not Assets to the Heir, though questioned in Ld. Chancellor S. C. in Hide's Time, but clearly the Trust of a Lease for Years is Assets to 2 Freem. charge an Executor in Equity. 3 Chan. Rep. 37. Patch. 21 Car. 2. Rep. 151. in Scacc. in Cae of the Attorney General v. Sands. 157. S. C.

totidem Verba — But by 29 Car. 2. cap. 3. the Trust of an Inheritance is made Assets at Law, but the Trust of a Term is not, and by a Clause where Judgment is obtained against the Testator, the Sheriff may take the Trust Estate in Execution. 2 Vern. 248. pl. 332. Mich. 1691. The King v. Ballet. Land purchased in Trust was decreed to be Assets to pay Judgment's. 2 Chan. Rep. 145. 30 Car. 2. Grey v. Colvill. Whether the Trust of an Estate in Fee descended on the Heir is Assets in Equity to the Sattisfaction of a Debt by Bond in which the Heir is bound, obitur. Vern. 172. pl. 167. Trin. 35 Car. 2. Creed v. Coville.

68. Feoffment of a Manor excepting and reserving Black Acre to him fell for Life only, Habend' except, before excepted to the Use of A. Vent 73. in Tail, Refolv'd there is no Limitation of Ule of Black Acre, so it S. C. adjourns and defenches and is Assets. 1 Lev. 287. Patch. 22 Car. 2. B. R. Willon v. Armorer. natural, and ibid. 87. S. C. adjudged that it defenched. — 3 Salk. 157. pl. 2. S. C. adjudged accordingly.

69. An Estate in Fee in the Plantations is a Testamentary Thing, and Assets to pay Debts. 2 Vent. 358. Trin. 22 Car. 2. Noel v. Robinson.

70. A Sum of Money given to one to dispose as the Testator shall appoint by a Note, who dies without such Appointment, is a good Bequest to the Party. Chan. Cafes 198. Patch. 23 Car. 2. in Case of Martin v. Douch.

71. On a Bill in Canc. to be relieved against the Heir of the Mortgagor for Money received after his Father's Death for a Release of Equity of Redemption. Finch, Lt. Keeper conceived this is no Assets in Law, Mortgagor to satisfy a Judgment acknowledged by the Mortgagor after the Mortgagage and before the Release, being but a bare Right, and being not Assets in Law, the Release being before the Bill exhibited is no Fraud, and
Executors.

and the Heir and not Afflets in Equity; Decreed for the Defendant ut ducitur, Verdict for the Plaintiff. 3 Keb. 307. pl. 49. Pash. 26 Car. 2.
B. R. Freeman v. Taylor.

Norden Capt. 74. 75. fanrj)' accordingly And Decreed ^^\^ Sale 'Executrix^ S.C of fays an to Proc. in w^sfffi^rm'd &''S^C''

72. A Debt due from an Executor to a Testator is Afflets in Equity to pay Legacies. 3 Chan. Rep. 89. 21 May, 1646. Nichols v. Chamberlain.


75. A takes the Goods of a Testator, B. the Executor brings Trower upon which A. and B. come to an Agreement that Executor shall discharge A. and that A. shall pay Executor 650 l. at a future Day; Per Cur. this is not a Devallavit, but afterwards per Sir T. Jones J. it is a Dispoal or Sale and Conveyance to his own Use by the Acceptance of a new Securitv by which he has discharged the ancient Right to the Goods, and so it is quasi a Sale of them and Affets immediately, though by his Act the Money is not payable till a future Day, and all the Judicatures at another Day agreed that it was a Disposition, and Judgment accordingly was given pro Quer' per tot. Cur. 2 Lev. 189. Pash. 29 Car. 2. Norden v. Levet.

76. 29 Car. 2. Cap. 3 S. 12. An Estate pur Anler Vie shall be devisable by a Will, Signed and Subscribed as by the said Act is directed; and if no such devise be, it shall be chargeable in the Hands of the Heir, if it come to him by special Occupancy as Affets by Devise, else it shall go to the Executors and be Affets in their Hands.

Estate pur Auter Vie Affets for Payment of Debts, and for that End only the Administrator is made an Occupant, but in all other respects the Quality of the Estate remains the same as it were before at common Law. Earth. 376. Palch. 8" W. 3. B. R. Oldham v. Pickering That if it be to the Heirs by Reason of 'special Occupancy', it shall be in his Hands as Affets by devision, that is liable to those Debts where the Heir is chargeable and those only; but if there was no special Occupant then it shall go to the Executors and Administrators, and they shall be in the Room of the Occupant, and it shall be as Affets in their Hands for the Payment of Debts; but it is not Affets to pay Legacies except such as are particularly devized out of it, the Statute only having made it Affets for a particular Intent to pay Creditors, so as to Debts appearing in this Case, the Administrator is not the Occupant and shall not be compelled to make Distribution, 12 Mod. 163. Mich. 8 W. 3. Oldham v. Pickering — 2 Salk. 494. S. C adjudged accordingly.

77. Money due on a Mortgage is Part of the Personal Estate, and shall go in Ease of the Lands to pay Debts, Fin. R. 351. Palch. 30 Car. 2 Corfellis v. Corfellis.

78. A. owes B. 200 l. and C. owes A. 60 l. A. makes his Wife Executrix, who Marries C. Afterwards C. Dies. B. brings Debt against the Wife. Per Curiam the Intermarriage of the Wife with the Deator of the Testator is not a Devallavit of the 60 l. nor is the 60 l. Affets in her Hands. Le. 320. pl. 448 Mich. 30 & 3 Cap. 2 B. R. Cotman v. Read.

79. Reversionary Lands purchased in the Names of A. and B. after the Death of C. who has Eatee for Life in the said Lands, was decreed to go towards satisfaction of Judgments, 2 Chan. Rep. 145. 146. to Car. 2 Grey v. Colvill.

80 A
80. A Promise by the Executors to the Testator to pay all the Legacies in Case he would not after his Will shall bind, though he does not receive out of the Testator’s Estate or Effects sufficient to pay such Legacies. 2 Freem. Rep. 34. Patch. 1678. Chamberlaine v. Chamberlaine.


82. M. polefled of a long Term of Years having issue a Son and three Daughters, makes his will, and devises his Coate Leaves to his Son, and if that Son die before Marriage or after Marriage without Issue, that then they should go to the Daughters. The Son marries and Dies without Issue, the Daughters his Execurrixes against whom an Action of Debt is brought upon a Bond, plead no Affeets and upon a special Verdict the Question whether this were Affeets in their Hands, it was adjudged it was. Sel. Chan. Cafes 18. cited by Lord Ch. B. Montague as Hill. 31 and 32. Car. 2. Rot. 1615. Gibbon v. Sanders.

83. Where a Lease for Years is to wait on the Inheritance, it shall be Affeets as to Deeds as well where the Interest of the Lease is in the Hands of a Stranger, and not in the Owner of the Inheritance, as when it is in the Cestufy que truit of the Inheritance and the Interest of the Inheritance in a strange Trustee per Lord Keeper North. 2 Chan. Cafes 152. Mich. 35. Car. 2. Ratecliff v. Graves.

84. Deed of Trust for Payment of such Creditors as come in within a Year, though some don’t come in within the Year, yet the Remainder Patch. 1695. of the Estate in the Hands of the Trustees is special Affeets, and they may come in after; Per North K. Vern. 260. Mich. 1684. Dunch v. Kent.

85. Upon a Question if the Equity of Redemption of a Mortgage for Years of an Estate in Fee be Affeets? Lord Chancellor’s present Opinion was, if there was a Surplus beyond the Mortgages it should be Affeets to answer Bond-Debts. Vern. 410. pl 384. Mich. 1686. Cole v. Warden.

Question was if the Obligee was relievable here against the Heir and Purchasor on the Statute to prevent fraudulent Devises, or if he was to be sent to Law to get Judgement first. Per Lord Wright that Statute being introductive of a new Law the Relief on it must be at Law, and that a Bond-Creditor must first have Judgement at Law, before he can redeem a Mortgage for Years; though it might be otherwise in Case of a Mortgage in Fee. Chan. Proc. 198. pl 159. Trim 1702. Bateman v. Bauman.—Note, Chancery at this Day gives Relief upon the Statute of fraudulent Devises in such Case. Ibid. Added as a Note of the Reporter.—The very Equity of Redemption of a Mortgaged Term is Affeets, to pay simple Contract Debts. Per Lord Macclesfield, Wm’s Rep. 775. Hill. 1721. in Cases of Coleman v. Winch.

86. If the Equity of Redemption of a Mortgage in Fee, since the Chancery, the Statute of Frauds and Perjuries, should be Affeets in Equity to satisfy Bond-Debts? Lord Chancellor inclined that it was; but reprimed his Decree till the Matter had reported a State of the Case. Vern. 411. pl 385. Mich. 1686. Plucknett v. Kirk.

87. Where a Man that is Executor in Right of his Wife compounds any of the Debts of the Testator, he cannot have the Benefit of these Compositions. Per North K. Vern. 261. Mich. 1687. Dunch v. Kent.
88. If a Debt be due to the Testator, and the Administrator takes a Security in his own Name, although the first Security be not delivered up, yet in Case the Debt be not paid this will be reckoned as Affets come to his own Hands, and will make a Devastavit. The Court seemed to be of this Opinion. 2 Freem. Rep. 100 in pl. 100, Mich. 1687. Anon.

89. An Executor bringing Forer for Goods of the Testator, upon an Agreement the Executor took a Bond for the Value of the Goods; afterwards the Obligor became insolvent, and this was adjudged a Devastavit; Cited as adjudged in the House of Lords. 2 Freem. Rep. 100 in pl. 100, Mich. 1687. Anon.

90. If Baron has a Term in Right of his Wife as Executrix, and he purchases the Reversion, the Term is extinct as to the Same, the Survives but in respect of all Strangers she shall account as Affets in her Hands, No. 54. pl. 157. Pach. 5 Eliz. Anon.

91. A. on his Marriage demises Lands to B. who re-demises them to A. for a shorter Term, paying a Pepper Corn Rent during the Life of A. and after his Death an annual Sum for the Life of his Wife for her Jointure, and a Pepper Corn for the Remainder of the Term. A. dies indebted; the re-demised Term shall not be Affets to pay any Debt but what affect the Inheritance, the Term re-demised being raised for a particular Purpoze, 2 Vern. 52. pl. Pach. 1688. Baden & al v. Pembroke & al'.

92. The Wife had Goods or Effects of her former Husband, the second Husband assigned them in Trust for such Uses as he by Deed or Will should appoint, and in Default of such Appointment in Trust for himself, his Executors, Administrators and Assigns, and afterwards devise them to his Wife and Children. but took no Notice of the Power of appointing. This is but in Nature of a Legacy and decreed to be Affets, 2 Vern. 287. pl. 275. Pach. 1690. Athfield v. Athfield.

93. Tenant in Tail suffers a Recovery to let in a Mortgage of 500 Years, and then limits the Land to the old Uses, and makes his Will and devise all his Lands for the Payment of his Debts. The Court thought that the Equity of Redemption of this Mortgage should be Affets to satisfy Creditors, or a sublequent Grantee of an Annuity. Note, The Redemption was limited to him, his Heirs or Assigns. Chan. Prec. 39. pl. 40. Hill. 1691. Fosset v. Austin.

94. The Judgment against an Heir, who has a Reversion in Fee descended to him, is only of Affets Quamdo accident; and the Creditor cannot by Bill in Equity compel the Heir to sell the Reversion, but must expect till it falls. 2 Vern. 134. pl. 132. Hill. 1690. Forrey v. Forrey.


96. A House was settled by B. on A. for Life with several Remainders over, and B. by Will gives all the Goods Furniture and Ornaments therein to such Persons as the House was to go to after Testator's Death. A. has only Ichre Intereit in the Goods as she has in the House viz. the Ufe of them for her Life, and no body shall have an absolute Property in them but who has an absolute Property in the House, and so not liable to the Debts of A's Husband who died indebted. Ch. Prec. 26. Trin. 1691. Offley v. Offley.

97. All separate Debts mentioned in the Inventory shall be counted as Affets in the Executor's Hands; for it is as much as to say they may be had for demanding, unless the Demand or Refusal be proved. 1 Salk. 296. pl. 3. Trin. 5 W. & M. in B. R. Shelly's Case.

99. In
Executors.

98. In Barbados all Freeholds are subject to Debts, and are effected as Chattels till the Creditors are satisfied; and then the Lands descend to the Heir; per Cur. Obier 4 Mod. 226. Mich. 5 W. & M. in B. R.

99. A. on B. his Son's Marriage settles a Lease for Years on B. for Life, the Wife for Life, and then to the Issue of the Marriage. B. covants to renew the Lease from Time to Time, and to affiign it on the same Trust; the Son B. renews the Lease in his own Name, but makes no Affiignment to the Trustees, and dies in Debt, and without Affiits. Per Cur. the Lease is bound by the Marriage-Agreement and shall not be Affiits, nor liable to Debts. 2 Vern. 298. pl 278. Plowman v. Plowman.

100. Holt Ch. J. doubted whether an Estate pur Auer vie was subject to Payment of general Legacies in case it came to the Hands of an Executor or Occupant by force of the Statute of 29 Car. 2. cap. 3. Carr. 376. Pach. 8 W. 3. B. R. in Cafe of Oldham v. Pickering.

101. Damages recovered by the Husband of an Executrix in an Action brought by him alone upon a Promise made to him by the Debtor of the Testator are direct Affiits at Law; Per Rookby J. though Holt said, It would amount to a Devastation Pro tanto. See Carrth. 462. Mich. 10 W. 3. B. R. Yard v. Ellard.

From a Judgment where the Action is brought by Husband and Wife. Per Cur. 1 Salk. 117. S. C. —


103. A. seized of a Reversion in Fee expedient on an Estate for Life, de- vised it to A. and B. to be held for Payment of Debts and Legates, and made A. and B. Executors. The Question was, If the Money raised by Sale should be deemed legal Affiits? and consequently the Debts to be thereout paid in the first Place, or only as equitable Affiits, and consequently the Debts and Legacies to be paid in Proportion, and pari passu. Decreed the Debts to be first paid; the Devisees being named Executors, the Money becomes legal Affiits; but if to Trustees not made Executors, it had been otherwise. 2 Vern. 405. Mich. 1700. Anon.

104. If H. takes a Bond for another in Trust, and dies, this is not Affiits in the Hands of the Executor of H. 1 Salk. 79. pl. 1. Trin. 2 Ann B. R. Deering v. Torrington.

105. So if the Obliger affiins over a Bond, and covenants not to revoke, and dies, that Bond is not Affiits in the Hands of the Executor of the Obliger. 1 Salk. 79. pl. 1. Trin. 2 Ann B. R. Deering v. Torrington.

106. If Money due to the Testator is paid to a Stranger by Consent of the Executor, it is Affiits in his Hands immediately; and if without such Consent, and he after brings an Action for it against the Receiver (by which he agrees to the Receipt) and recovers, it will be Affiits immediately without Execution, for the original Debtor is thereby discharged; Per Cur. 1 Salk. 207. Hill. 2 Ann. Jenkins v. Plume.

107. The Lord C. upon his Marriage with Sir Stephen Fox's Daughter, vested a Term in Trustees upon Trust to raise 3000 l. for younger Children, and 3000 l. more for such Uses and Purposes as he should appoint. He appoints 3000 l. to be raised for his Daughter, and the other 3000 l. be appointed to be raised, and by his Will gave the last 3000 l. to his Daughter also and died. The Creditors preferred a Bill to have the last 3000 l. applied as Affiits towards Payment of their Debts, which was the only Question in the Case; And in this Case it was decreed, that the last 3000 l. should be Affiits, for he having appointed it to be raised, it was in the Nature of his Personal Estate, and the Debts should take Place before the Legacy given to his Daughter; But in this Case it was
was held, that if a Man who has Power to raise Money dies in Debt, having made no Appointment to raise it, the Creditors cannot make this Affeits and raise the Money pursuant to the Power; but in the Case in Question the Money was appointed to be raised, which made the Difference. 2 Freem. Rep. 279, pl. 350. Hill. 1704. The Ld. Cornwallis's Case.

108. Goods desired by Executor to be sold at a good Price, if they are afterwards taken from him, the Value of the Goods shall be Affeits in his Hands, and not what he recovers in Damages, because there was Default in him. 6 Mod. 181. Trin. 3 Ann. B. R. in Case of Jenkins v. Plume.

109. Money article to be laid out in Land shall be taken as Land in Equity; So Land agreed to be sold is Money; but Query if it be in a Marriage Settlement upon Failure of Issue there is no Issue, but there be Debts by simple Contract, whether this Money shall be taken as Land and thereby defeat Creditors? 1 Salk. 154. Mich. 4 Ann. in Can. Anon.

110. Husband lends out Money in the Names of himself and his Wife upon Mortgages and Bonds, and dies. The Wife is intitled to this by Survivourship, if there are Affeits sufficient without this Money to pay Debts; but admitted in Case of Creditors it might be fraudulent. 2 Vern. 683, 684. Trin. 1712. Chrift's Hospital v. Budgin & Ux.

The S. P. came again before the Court in Ld. C. King's Time, when the Devifee in Remainder, who was not made a Party to the former Suit, was now made a Party; and it was objected, that if one Seized in Fee should convey to the Wife of himself for Life, Remainder to his Executors, that this would not make it Personal Affeits, and that if the Executors are special Occupants, or take by Occupancy, then it cannot be Affeits; but his Lordship said that the Cases are different, that here the Executors and Administrators are made special Occupants, and also take as Executors, whereby the Premises are Personal Eftate as naturally as if originally limited to Executors, and decreed it to be Personal Eftate, and that it could not be devised away by the Teffator from his Creditors. 2 Wms's Rep. 381. Mich. 1716. Duke of Devon v. Kinton.

111. A. was Seized to a Freehold Eftate to him and his Heirs for the three Lives of B. C. and D. but it was not made a Party to the former Suit, was now made a Party; and it was objected, that if one Seized in Fee should convey to the Wife of himself for Life, Remainder to his Executors, that this would not make it Personal Affeits, and that if the Executors are special Occupants, or take by Occupancy, then it cannot be Affeits; but his Lordship said that the Cases are different, that here the Executors and Administrators are made special Occupants, and also take as Executors, whereby the Premises are Personal Eftate as naturally as if originally limited to Executors, and decreed it to be Personal Eftate, and that it could not be devised away by the Teffator from his Creditors. 2 Wms's Rep. 381. Mich. 1716. Duke of Devon v. Atkins.

112. One binds himself and his Heirs by a Bond, and mortgages some Lands of which he is Seized in Fee for more than the Value; His Heir has 200l. for joining in a Sale of the Premises. This 200l. was held not to be Affeits. 3 Wms's Rep. 10. pl. 2. Trin. 1724. Dunn v. Green.

113. A younger Brother beyond Sea purchased Land in Fee of his elder Brother and made his Will, leaving several Legacies, and then added these Words, (viz.) Whatsoever shall remain in Money, Lands and Goods, I give the same to my Brother J. C. (his said eldest Brother) who is hereunto to pay my Legacies, and made J. C. his Executor and residuary Legatee, but the Will had but two Witnesses and was made beyond Sea. The Teffator died without Issue, and J. C. was his Heir as well as Executor. The Purchase Money was not all paid, besides which there were no Affeits for Payment of Legacies. Ld. Chancellor thought that J. C. the Heir being also Executor, may retain out of the Affeits all the Purchase-Money unpaid, though intitled to the Land again as Heir, and cited the Maxim: Quando duo Sur Sum in una Persona concurrent &c. and said, that taking it
it that they had been several, as if A. had been the Heir, B. the Executor, and C. the Vendor, A. would have a plain Title to the Land purchased, and B. must out of the Personal Assets pay the Purchase-Money to C. who would have a plain Title to receive it, and would make no Difference from what it now is. 2 Wms's Rep. 291, 292, 295, 296. Trin. 1725. Coppin v. Coppin.

114. Husband after Marriage purchases a Term to himself and Wife and the Survivor. The Executors, Administrators and Assigns of such Survivor. Husband assigns the Term in Mortgage; Proviso to be void on Payment of the Money by him or Wife, or the Executors of him or Wife. Proviso that the Husband, his Executors or Administrators, shall, till Default of Payment, quietly enjoy. Husband seven Years after contrails Debts and dies. Decreed that this Settlement of the Term being after Marriage in the Power of the Husband, and the Equity of Redemption being referred to him as well as to his Wife, and being also in the Cafe of Creditors, were Assets to pay Debts. 2 Wms's Rep. 364. Trin. 1726. Watts v. Thomas.

115. The Master of the Rolls decreed an Account to be taken of a Personal Estate, doubting at the same Time, whether a Leasehold Estate in Scotland could be looked upon as a Personal Estate in England; though a Leasehold Estate in Ireland is, and may be held here; But the Master was left at Liberty to report any thing specially. 2 Wms's Rep. (622.) Trin. 1731. Bligh v. Ld. Darnley.

116. A Lease granted to one and his Heirs for three Lives is a Real Estate, and though by the Statute of Frauds it is made liable to pay Debts, yet it is only to such Debts as bind the Heir, and where the Spiritual Court sets aside a Will dispoing (inter alia) of such Estate as revok'd, this Sentence did not affect the Devise of such Real Estate. 3 Wms's Rep. 166. pl. 40. Hill. 1732. Marwood v. Turner.

117. When Money by a Marriage Agreement is article'd to be invested in Land, that Money is held not to be Assets for Payment of Debts. 3 Wms's Rep. 217. Mich. 1733. cited in the Cafe of Kettleby v. Atwood, as the Cafe of Lawrence v. Beverley.

118. Where the Husband agreed that the Wife should have two Guineas of every Tenant that renewed a Lease with the Husband beyond the Fine which the Husband received; this was allowed to be the Wife's separate Money. 3 Wms's Rep. 339. Mich. 1734. cited per Cur. as the Cafe of Calmady v. Calmady.


(G. a. 2) What shall be Assets.

At what Time.


2. If
Executors.

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2. If a Trespassor takes Goods from a Testator in his Life-time, so as
they never were but a Chose en Action to the Executor or Administrat-
or, they are not Assets till they are recovered; Per Cur. Cro. E.
810. pl. 16. Hill. 43 Eliz. C. B.

3. A Right (without any Estate in Possession, Reversion or Remain-
der) for which good Remedy lies by Action, is not Assets till it be re-
covered and reduced into Possession. 6 Rep. 58. a. b. Hill. 4 Jac. C. B.
in Brediman's Cafe.

Brownl. 34.
S. C. —
But when
fold the Mo-
ney is Assets
at Common
Law; Per Twifden J. Lev. 224. Dutrick v. Caravan, alias, Curwinc. —— Le. 225. Arg. S. P.

4. Lands devised to Executors for three Years for Payment of Debts, this
is Assets in the Executor's Hands; but if I devise my Land to be sold
for Payment of my Debts, it is no Assets before it is sold. 2 Brownl.
46, 47. Hill. 8 Jac. C. B.

5. All moveable Goods, though in ever so many different and distant
Places from the Executor, shall be in Possession of the Executor pre-
ently upon Testator's Death, yet if without Fraud or Collusion, or
voluntary convinning he is prevented of actual Possession, he is not to be

6. But otherwise it is of Things immoveable, As Leases for Years of
Land, in which Cafe there must be actual Entry; So of Leases of a
Reversion consisting of Glebe Land and Tithes for Years, it may be a Doubt
if actual Possession can be without actual Entry into the Glebe Land.
But in Cafe of Leases for Years of Tithes only the Executor, though in
never so remote a Place, shall instantly upon the setting out thereof, be
in actual Possession to maintain Action of Trespafs for taking them a-

7. If the Executor be of secret Assent to an Embezzlement of Goods
after Death of Testator, whereof even forbearing to sue for Recovery of
them, or the Value of them in Damages if known where they or the
Embezzlers of them are, is a frivolous Evidence or Proof; in such Cafe
the Executor shall be adjudged an Haver of them, and so &tand charged
as having them; For Pro passissore habuitur qui dolo defis possidere. Went.
Off. Ex. 111.

8. In Cales of Account, where the Duty was Chose en Action vested
in Testator, and ascertained only by Auditors, nothing shall be Assets
 till the Executor has recovered the Duty and has it in his Hands; but
a Reversion of a Term which Testator granted for Part of the Term, is
in the Executor immediately by Death of Testator, and also Assets in
his Hands immediately for the entire Value of it. 2 Jo. 170. Mich.
33 Car. 2. B. R. Trattle v. King.

9. If an Executor brings an Action and recovers Judgment, the Money
recovered is not Assets till levied by Execution; Per Cur. 1 Salk. 207.
in pl. 6. Hill. 2 Ann. B. R.

(G. a. 3)
(G. a. 3) Affets. What.

Things which never were in the Testator or Executors.

1. If Executor *merchandizes with Testator's Goods* and makes Gain thereof, it is Affets. Went. Off. Ex. 83.


4. If the Executor submits to *Arbitration*, the Debts or Damages which he is intitled to in Right of his Testator, and the Arbitrators award a Release or Discharge thereof, this being his own voluntary Act shall charge him in the same Manner as if he had released or received the Money. Went. Off. Ex. 71.

5. If the Plaintiff (as Executor) and the Defendant submit all Controversies relating to the Testator's Estate to Arbitration, and Arbitrators award that the Defendant should pay the Executor 300 l. and there is a Custom of Foreign Attachments in London, that if a Suit be commenced against the Executors of any Person, any Debt which was due to the Testator Tempore Mortis sua, might be attached; yet this 300 l. although it be Affets and shall charge the Executor, shall not be within the Custom; for it was not the Testator's at the Time of his Death, and all Customs are to be construed strictly. Vent. 111. Hill. 22 & 23.

Car. 2. B. R. Houfam v. Tunger.


because the Administrator De Bono non of the Testator can never recover the Debt, and the Cives of Affets is not like this; for this shall not be Affets until the Executor receives it, and Judgment for the Plaintiff Nih.

(G. a. 4) Affets.

Pleading Personal Affets.

1. In Debt against Executor the Jury found Affets in Ireland; Per tot. Cur. prater Walmfley, Affets in Ireland are Affets here, and such Affets may well be *found by jury*, though their saying (in Ireland) is idle and void; and adjudged for the Plaintiff against the Executor. Cro. J. 55. pl. 28. Mich. 2 Jac. C. B. Richardson v. Dowell.

2. It shall not be intended that an Executor has *special Affets* (as Money received for Lands devised to be sold for Payment of Debts, or Damages recovered in Trespass for Goods taken away in the Life of the Testator &c.) unless it be specially shewn. Cro. J. 152. pl. 4 Mich. 4 Jac. B. R. Gwenn v. Roll and Noble.

3. Executor was sued in the Spiritual Court to Account for Goods of Testator's omitted in the Inventory, and which were in Testator's Possession at his Death. The Executor pleaded that the said Goods were disposed by the Testator in his Life, and by his Leave. On this Plea the Spiritual Court gave Cofts, for that it was a Confeffion of more Affets than Q q q

Executor.
Executors.

than were in the Inventory. 8 Mod. 168. Trin. 9 Geo. Hinton v. Parker.

4. In Sai. Fa, on a Judgment in Debt to have Execution, the Defendant's Executor pleaded that he had not Assets over and above what would satisfy the former Judgments pleaded, and held a good Plea; But if he pleads any of the Judgments ill, or that it be found against him upon Issue tried that any of them is kept on Foot by Fraud, he shall not then have the Allowance of being free of such a Judgment till Assets depend to the Value of the other Judgments. Cited by Holt Ch. J. 12 Mod. 528. as Pafch. 23 Car. Rot. 359. Walpole v. Prettiman.

5. If a Bond due to a Stranger be forfeited, and the Executor pleads this Bond, and that he has not Assets ultra, it is a good Replication to say that the Obligee would have taken Part of his Money in full, and it shall be a Bar for no more. Vent. 354. Pafch. 33 Car. 2. B. R. in Cafe of Page v. Denton.

6. If an Executor hath three or four Bonds in Suit against him, and they all come to Trial at once, being for 28 l. a Piece, and the Executor has Assets only to pay One, yet he shall be chargeable to them all, therefore he should have confessed Judgment to one of them, and that he might have pleaded to the other. 2 Show. 202. pl. 207. Pafch. 34 Car. 2. B. R. Anon.

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(G. a. 5) Suits in Equity as to Assets.

1. Whether a Copyhold devis'd to be sold by Executors to pay Debts and sold accordingly be Assets in Law and in Equity, or at Law only. Hard. 174. Mich. 12 Car. 2. in the Exchequer. Fanlaw v. . . .

2. Upon a Bill in Equity the Court held clearly, That if Land were devised to be sold by Executors for Payment of the Testator's Debts, the Money receiv'd by such Sale should be Assets in the Executors Hands, if an Action of Debt were brought against them, and the Plaintiffs would have been dispossessed all the Land had been sold; but because they did not appear the bill was retained. And afterwards by Agreement the Parties went to Law upon the Defendant's confessing that he had receiv'd 2800 l. for Land sold. Hardr. 405. pl. 8. Pafch. 17 Car. 2. in Scac. Burwell v. Corrant.

3. The Suit is to recover the Estate of R. A. deceased, which is come to the Defendant's Hands to satisfy a Debt of 300 l. due to the Plaintiff from the said R. A. The Defendant insisted that the Plaintiff ought to have Relief in this Court, in regard the Assets in the Defendant's Hands were legal Assets, and nothing appeared, but that the Plaintiff had her proper Remedy at Law, having not proved any Thing more in the Defendant's Hands than was confess'd in the Defendant's Answer. But the Plaintiff insisted that this Court hath directed Accounts in Cases of this Nature to avoid Circuity of Action, and further Charge and Trouble of Suits; and that this Court being possessed of the Caufe, and the Parties at Issue on Proofs, the same was as proper for this Court as at Common Law. This Court ordered Precedents to be searched, where this Court hath directed Accounts, and given Relief in this Case, and the Caufe coming to be heard on the Precedents and Merits thereof; and the Plaintiff insisted, That there is sufficient Assets of the said R. A. come to the Defendant's Hands, to satisfy the Plaintiff's Debt with the Overplus. This Court decreed the

4. **Equity of Redemption of Leases mortgaged made Assists to satisfy a Judgment Creditor, and a voluntary Deed of Trust set aside and decreed, That all the Trust Estate and Surplus thereof after preceding Debts paid be Assists in Equity for Payment of the Plaintiff.** 2 Ch. Rep. 62. 23 Car. 2. Bartrhop v. Weil.

5. **Money due on a Mortgage decreed to be Assists in Equity for Payment of a Debt by simple Contract, but the Personal Estate to be first liable, and then the Principal and Interest due on the Mortgage (after real Incumbrances taken off) shall be liable to make it good.** 207, 208, Mich. 27 Car. 2. Bridgman v. Tyrer.


6. **Leases for Years subject to a Trust devised in Fee Simple.** The Estate would but pay the Debts of all sorts. He pays the Debts and reneweth the Lease Term for a further Term, it being a Church Lease, and offered to account if any Profits would arise out of the old Term; And argued that he could not be charged farther, for it be paid the Debts to the Value, then the Property was altered and vested in him in his own Right. But decreed that the Executor should make no Advantage to himself, and shoud account for the new Lease as well as the Old. 

7. Finch Chancellor said, He would not make a Lease for Years at Law; And where such a Lease is in the Purchaser, and the Inheritance in Trustees, and the Purchaser dies indebted, so that the Purchaser, and Term in Law will come to the Executor and be Allis to Creditors, he would not make it not be Assists in Equity. 2 Chan. Cales 207, 208. Mich. 27 Car. 2. Anon.

8. As to an **Equity of Redemption if A. has a Mortgage and a Bond, North K. said, That before the Mortgage should be redeemed by the Heir the Bond ought to be satisfied; but he did not know that an Equity of Redemption should be Assists in Equity to all Creditors. Vern. Rep. 174. Trin. 35 Car. 2. 1683. Creed v. Covile.

9. A Purchaser takes a Term in a Trustee's Name, and the Inheritance in his own; this Term, wils declared to attend the Inheritance, will be Assists in Equity. If he takes the Inheritance in a Trustee's Name, and a Term in his own, it will be Assists at Law. Vern. 188. in pl. 183. Mich. 1683. in Cafe of Chapman v. Bond.

10. A. and B. were bound to C. for the Debt of A. A. by way of Indemnification assigned to B. a Term for Years and dies, and makes B. Executor. B. applies the Personal Assists to discharge the Debt for which he was bound, so that there was no Personal Assists left to pay a Creditor by simple Contract, who pray'd to have the Benefit of the Security to B. but non allocatur; for it was in the Power of the Executor to apply the Personal Assists the one Way or the other. 2 Vern. 36. pl. 29. Hill. 1683. Springle v. Delawne.
Executors.

10. A. had a Lease for three Lives to him and his Heirs from the Church, and mortgaged it for 99 Years if the three Lives lived so long, and died, the Mortgage being forfeited; Decreed this Mortgage Term which would not have been Affrets at Law, to be sold for the Payment of Debts. 2 Vern. 54. pl. 50. Pach. 1688. Arg. cites it as decreed in Ld. Nottingham's Time in Took's Case.

An Equity of Redemption is every Day made in Affrets in Equity. Arg. Vern. 173.

12. A. on Sale of Lands take a Bond from the Purchaser to pay any Sum or Sums of Money not exceeding 500l. as A. should by Will appoint. Per Cur. A. having Power to dispose the 500l. must be look'd as Part of his Estate, and decreed it to be Affrets liable to the Plaintiff's Debt. 2 Vern. Rep. 319. pl. 306. Trin. 1694. Thomson

Chan. Prec. 52. S. C. Pach. 1695 that A. was indebted to B, in 500l. and B. being v. Towne his heir.

Kinsman A. settled his Estate of about 150l. a Year on himself for Life, the Reversion to B. and his Heirs, and B. as a Consideration of such Settlement gave a Bond to J. S. the Defendant by Direction of A. to pay 500l. to such Person or Persons as A. by Will should appoint. A. by will reciting the Bond to be in Trust for him gives the 500l. to the said J. S. and makes him Executor, and directs him to pay 50l. to D. to bind him Apprentice, and 50 l. more to set him up, and 25 l. a Year to E. for Life. J. S. paid the Bond. B. brought his Bill to subject this 500l. to be Affrets to pay the 500l. and 75l. more due to him from A. Ld. Keeper decreed the 500l. to be Affrets to pay B's Debt, and he to retain so much to satisfy himself, and pay J. S. the Residue, and on Appeal to the House of Lords, this Decree was confirmed.—S. C. cited by Ld. Keeper, as decreed and affirmed accordingly. 2 Vern. 456. Mich. 1704. in pl. 425.

Chan. Prec. 327. pl. 193. S. C. because he had a retracting Equity in it which he might derive, but not to take Place of Creditors, and he had before made an Appointment which satisfied his Power, by appointing it a collateral Security.

13. A. having a Power to charge 3000l. on his Estate for such Purposes as he should think fit, by Deed appoints the 3000l. as a collateral Security for quiet Enjoyment of an Estate he had fold, but the Appointment to be void if no Incumbrance appears. A. devised it to his Daughter; The Creditors of A. brought a Bill to have the 3000l. apply'd to Payment of Debts, and decreed accordingly. Per Wright K. 2 Vern. Rep. 465. pl. 425. Mich. 1704. Laffel's v. Cornwallis.

14. A. made a Purchase of a Lease of a House in B's Name, and takes a Declaration of Trust to permit A. to enjoy for Life, and then in Trust for One who lived with him as his Wife, and was reputed as such. Ld. Wright inclined that this Lease was not Affrets of A. nor liable to his Debts after his Death; For when a Man purchas'd he may settle the Estate as he pleases. 2 Vern. 490. pl. 442. Hill. 1704. Fletcher v. Lady Sidley.

15. On a Question in Canc. Whether the Widow was to account to Executors for the Receipt of Tipping's Water? Ld. Parker declared, 'That if the Secret was imparted to her by her Husband, then it became a Matter of her own Knowledge, part of her Understanding which could not be taken from her; but if she learnt the Art by finding the Receipt after her Husband's Death, or had the Knowledge communicated to her by any Servant &c. then the Executors were to have the Benefit of this Receipt.'

and not a new Invention for which a Man hath a Patent, for that may vest a Property.

Order was, If imparted to her without any particular Trust, then she was intitled to Benefit of it, but if the Secret was lodged in her on any Trust, then she to account for all the Profits she had made thereof.

16. If
16. If a Man Devises all his Lands, Tenements and Heridaments in Deed, in Trust to pay his Debts and Legacies, and the Trustor has some Freehold and some Copyhold Lands there, only the Freehold Lands shall pass; for his Will must be intended of such Lands and Tenements as are deviseable in their Nature. Secus if the Trustor had surrendered his Copyhold Lands to the Use of his Will, because this shows he did intend to devise his Copyhold but even in the first Case, if the Freehold were not sufficient to pay his Debts; when the Trustor devises all his Lands in Trust to pay his Debts, it seems rather than the Debts should go unpaid, that the Copyhold shall in Equity pass. 3 Wms's Rep. 322, 323. pl. 83. Trin. 1734. Hellewood v. Pope.

17. An Action in Fee which descended to the Heir, had been adjudged on an Appeal to the House of Lords to be Assists to pay Debts where the Heir was bound. 3 Wms's Rep. 399. Mich. 1735. in case of Robinson v. Tonge.

(H. a.) In what Actions an Executor may be charg'd.

1. If a Goaler suffers a Man in Execution to escape and dies, his Executors shall not be charg'd in Debt for this, because they shall not be charg'd without Specialty. * 41 All. 15. adjut'd D. 15 Eliz. 322, 25. against the Executor, because it was founded upon a Tort which Moritur cum Persona. 9 Rep. 87, a, 9, cites S. C. and 40 E. 3. tit. Executor 74.

2. If a Sheriff levies Money on a Fi. Fa. upon an Execution upon a Judgment, and doth not deliver it to the Plaintiff in the Action and dies, Action of Debt lies against his Executor, because this is not grounded upon such Tort which is called Maleficium, 173, a mere Tort, but upon a Contract in Law, settled by Receipt of the Money, by which a Debt accrues to the Plaintiff by Imposition of the Law upon a Contract in Law, and for this an Action of Debt lies as well against him as against the Trustor. P. 15 Car. 2. R. adjudged per Cur. this being a Matter moved in Action of Judgment. Packington v. Culliford.


4. The Bishop of C. suppos'd a Custom that the Ornaments of the Chapel of his Predecessor, and such other Goods as he received of the Executors of his Predecessor shall go to the Successor, and that such Goods &c. came to the Hands of A. and B. Executors of his Predecessor, and pray'd Scire Facias against them, and had it, and the Sheriff return'd that they were Clerks, and Nihil Habuerunt in Loci suo, by which Fieri facias de bonis Ecclesiasticis illuid to the Bishop, who sequel'd certain Goods of the Executors. Br. Scire Facias pl. 106. cites 21 E. 3. 48.

5. Deiinune against Executors is by reason of the Bailment, for he who had the Police against whom the Action was brought, file that he had another Executor not named, Judgment of the Writs and the Plaintiff confess'd it, and was non-suited, notwithstanding that he counted upon a coming to his Hands &c. Br. Executors. pl. 28. cites 41 E. 3, 30, 31.

R r r 6. And
6. And see 14 H. 3. 23 24. there it was adjudged, That in *Detinue against several*, the one Executor alone shall render alone where the one appears, and the other not at the Ditfrefs, quod nota; therefore there they are charged as Executors. ibid.

7. *Warden suffer'd a Man condemn'd in Trespass to escape*, and died, and *Writ of Debt* was demanded against the Executors of the Warden, and it was deny'd per Ingleby, because there is no Specialty; and nore, That the Statute which gives Debt upon Escape is R. 2. But see Westm. 2 cap. 12. which gives *Action upon the Escape* in Account, and therefore it seems that this is by the same Equity. *Br. Escape* pl. 28. cites 41 Aff. 15.


9. *Executors are not charged in Action of Detinue, unless by the Possession of the Goods, and not by reason of the Bailment quod nota; and therefore the Action shall be brought where the Testator died, and not where the Bailment was made to the Testator.* *Br. Executors* pl. 10. cites 3 H 6. 35.

10. *Executor shall not be charged in Debt for eating and drinking of their Testator; for he might have waged his Law contra elsewhere where Keeper of a Prison brought such an Action for eating and drinking of his Prisoner; for he may not itarve him.* *Br. Executors* pl. 79. 13 E. 4. 16.

Note that where it was ruled in B. R. upon *Writ of Error* by Deliberation 12 H. 8. that Action upon the *Cafe* lies well against Executor upon the *Assumpsit of the Testator* if they have Assents, Fitzherbert J. said clearly, that this is not Law, and that no such Action lies; therefore Quere; for 37 H. 8. agrees with Fitzherbert. *Br. Action sur le Caf* pl. 4. cites 27 H. 8. 25.

And 24 pl. 58. S. C. accordingly. — *Bendl. 59*.

11. *Action upon the Case was brought against an Executor of the Promise or Assumpsit made by their Testator in his Life by Parol; but it is held that it is Error.* *Br. Executors* pl. 171. cites 12 H. 8. 11.


13. *If the Executor of a Leave for Years assigns over his Interest Action of Debt does lie against him for Rent due after the Assignment.* And if a Leave 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 Leave the personal Privity of the Contract as to the Action of Debt in both Cases is determined. 3 Rep. 24. a. the Reporter cites it as unanimously agreed by Popham Ch. J. Clench, Gawdy and Fenner Justices Trin. 37 Eliz. B. R. in Case of Overton and Sydhall, he held accordingly, and Judgment for the Defendant. — *Poph. 120. S. C. held accordingly.* — *Goldseth 120. pl. 6. S. C. held by three Justices, but Popham e contra.* — *But see Hellier v. Case- bert, and Coghil v. Freloove e contra.*


15. *Executor cannot be charged in Action of Account, but at the Suit of the King only.* *11 Rep. 89. b. Hill 4 Jac. in the E. of Devonshire's Cafe.*

Action of Account does not lie against Ex-
Executors.

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cetur or Administrator; for the Law does not intend them privy to the Account, said to be clear


16. An Action of Debt lies against an Executor of a Leesee for Years for Rent Arrear after the Death of the Leesee though the Executor never entered nor agreed, because he represents the Perfon of the Teftator, and though the Rent exceeds the Profit of the Land, yet the Executor cannot waive the Land, but shall becharged with the Rent. Yelv. 103. Mich. 5 Jac. B. R. Agreed by 3 Justices. Houte v. Webster. And cites the Opinion of Acst. 21 H. 6. 24. and 11 H. 4. Contra but they were denied to be Law.

17. Two retain an Attorney. Both Die. The Executor or Administrator of Survivor shall be charged only and not the Executors of both; for a personal Contract survives of both Parties, otherwise of Real Contracts as Warranty, and on Action against Executors of both they Pleadcd jointly and Judgment for the Attorney, but it layed on Motion because the Executor of Survivor was only chargeable, notwithstanding the Pleading and Admission of the Parties. 2 Brownl. 99. Trin. 9 Jac. in a Note cites 16 H. 7. 13. a. and 3 Rep. Sir William Her- bert's Cafe and 30 E. 3. 4. 17 E. 3. 8.

18. In Affumpit against an Executor, the Plaintiff declared that the Cro. J. Teftator, in Con sideration of 3 l. paid to him, had promised to deliver up such a Bond in which the Plaintiff was bound to him &c. and averred that he paid the 3l. and that Teftator had not delivered the Bond, but C. Tanfield had put the same in Suit. After a Verdict for Plaintiff it was objected in Arrest of Judgment, that an Affumpit would not lie against an Executor upon such collateral Promife of the Teftator, but adjudged in B. R. that it would; Whereupon a Writ was brought in the Exchequer-Chamber, and there the Judgment was affirmed by 6 Justices against the Opinion of Tanfield; and said that if there had been a Deed of Covenant in this Cafe, an Action of Covenant would lie, and that the Reason is the same upon a Promife of the Teftator, where he had received a valuable Consideration. Palm. 329. Hill. 20 Jac. Carter v. Fossett.

Teftator for the not doing whereof Action lies against the Executor. But Hobert and all the other Justices of C. B. and Barons of the Exchequer held that there is no Difference but that in either Cafe the Action is maintainable against the Executors on a Promife of the Teftator; and so it has been often adjudged in this King's Time, though it was held otherwise in Queen Elizabeth's Time and divers Judgments reversed for this Cause, but that of late the Opinions of both Courts are recon- ciled and resolved that the Action lies against the Executor as well in the one Cafe as in the other; and the Judgment was affirmd.— Jo. 16. pl. 5. Fawer v. Carter S. C. and Judgment in B. R. affirmd in Cam. Scacc.


20. If Sheriff, Goalor or Keeper of a Prison, suffers an Escape of one in Execution for Debt or Damages and dies no Action lies for this is in nature of a Trespass. Went. Off. Ex. 126.

21. Action lies not (as he thinks) against Executor for Teftator's carrying away his Corn and Hay without letting out the Tithe, though the treble Value be Recoverable against him in an Action of Debt; for by Teftators dying before Recovery the Action is gone even though Teftator was a Leesee for Years, so as his Eatee come to his Executor. Went. Off. Ex. 127.

22. If A. arrests B. at the Suit of I. S. without the Priory of I. S. or his Attent and dies, his Executor is not liable. Went. Off. Ex. 127.

23. If
23. If A. be Subpem'd to appear as a Witness, and has his Charges tender'd him but does not appear and then dies, Action lies not against his Executor. Went. Oif. Ex. 127.

24. The Plaintiff demijd a Meflilage with a Garden in the Parish of St. Martin's in the Fields, adjoining to the Plaintiff's House, to the Teftator's for 21 Years, who by Indenture covenanted for him his Executors and Assigns, that he would not ered any Building in the Garden to prejudice the Plaintiff's Lights in his House, and that the Assignee of the said Teftator contrary to the Covenant had erected an House in the said Garden to the Prejudice of the Plaintiff's Lights in his House; The Defendant said that the Leflee affigned over his Term to J. S. who paid the Rent to the Plaintiff and that he accepted of him for his Tenant, and so the Action did not lie against the Executor of the first Leflee, the privicy of the Covenant being determined; and so also Covenant doth not lie against him. Resolved, that in regard it is an expres Covenant that he shall not build, it shall bind him and his Executors and no Assignment nor Acceptance of the Rent by the Hands of the Assignee shall bar him of Suing him or his Executors upon an express Covenant, and it was adjudged for the Plaintiff. Cro. C. 193. pl. 8 Parch. 6 Car. B. R. Bachelor v. Gage.

25. Where a Sheriff levies Money upon Goods by Virtue of an Execution, and dies before he pays it to the Plaintiff, his Executors are chargeable; for it is not a personal Wrong, which Moritur cum Personâ; but when the Money is levied 'tis a Duty for which his Executors shall be liable in an Action of Debt, and the Defendant in the first Action is discharged and so is his Executor, and may plead it against any new Execution to be awarded against him. Cro. C. 539. pl. 3 Parch. 14 Car. B. R. Perkinfon v. Gillford.

26. Debt upon the Statute of Minifters for Fifties against an Executor. The Defendant pleads Nil deboe and Verdict for the Plaintiff; Stroud moved for the Defendant that this Action shall not charge the Executor not being a Duty in the Teftator, but by the Court the Executor is chargeable because it was a Duty in the Teftator, but it lies upon the Statute of 2 Ed. 6. for Tythes; and Judgment was given for the Plaintiff by the whole Court. Raym. 57. 58. Mich. 14 Car. 2. B. R. Hole v. Bradford.

27. Escape lies not against the Executor because the Action is founded ex delicto, but it lies upon the Statute 2 Ed. 6. for Tythes; and Judgment was given for the Plaintiff by the whole Court. Raym. 57. 58. Mich. 14 Car. 2. B. R. Hole v. Bradford.

28. The Plaintiff delivered a Cow to R. B. to keep in his Paftrure, who sold the Cow, and converted the Money to his own Use. Afterwards he made W. B. his Executor and died, and an Action on the Cane being brought against the Executor, the Plaintiff had a Verdict; but the Court said this was a Tort, and that the Executor ought not to be charged with it. Raym. 71. Hill. 14 & 15 Car. 2. B. R. Baily v. Birkles.

29. There was a Suit in the Spiritual Court for double Damages against the Teftator on Stat. 2 E. 6. cap. 13. for not feiting our Tithes, pending which Suit he died, and afterwards they sued his Executor for double Damages; but adjudged in B. R. that he was not chargeable,
Executors.

30. Executors are bound by Covenant of Apprenticeship to teach the Apprentice his Trade, and they ought to see the Apprentice taught his Trade, and if they are not of the Trade they ought to assign him to another who is so, that he may be taught according to the Covenant. Lev. 177. Trin. 17 Car. 2. B. R. Walker v. Hull.

31. If the same Person is Heir and Executor, he may be charged in several Actions as Heir and as Executor by the same Person for the same Debt. 3 Lev. 303, 304. Patch. 2 W. & M. in C. B. Haight v. Lantham & Ux'

32. 4 & 5 W. & M. cap. 20. § 3. Enacts that no Judgment not dog- dated as directed § 2. shall have any Preference against Executors or Adminis trators in their Administration.

33. Executor or Administrator shall be punished for Waste, whether voluntary or permissive, though treble Damages are recoverable in it. 12 Mod. 371. Patch. 12 W. 3. per Cur. Arg. Keeling v. Morrice, cites 1 [2] And. 51, 52. pl. 38. 5 Co. Hargrave's Case, All. 42

34. 4 & 5 Ann. cap. 16. § 27. Gives Account against Executors of By the Stake Guardians, Bailiffs and Receivers, and for one jointenant or Tenant in Common, his Executors and Administrators, against the other as Bailiff, and against the Executors or Administrators of such Jointenant or Tenant in Common.

may be brought against the Bailiff or Receiver for receiving more than his just Share, and an Action of Account was brought upon this Statute against the Defendant as Bailiff ad Mercandizandum, who waged his Law; and upon Demurrer it was objected, that Wager of Law would not lie in Account against a Bailiff ad Mercandizandum; but if such Action had been brought against a Receiver, and the Plaintiff did not shew by whole Hands, there Wager of Law would lie; and so it was adjudged in this Case for the Plaintiff.

35. If an Executor takes Possession of a Term of the Testator's, and it is abroad an Action is brought against him in the Debet and Detinet for Rent, or an Action of Covenant for not repairing, he cannot plead Plane Administrat or, for that confesses a Misapplication since no other Payment out of the Profits can be justified till the Rent is answered; But if the Rent is more worth than the Land, the Defendant may disprove that by special Pleading, and pray Judgment whether he shall be charged otherwise than by Detinet only; Per Parker Ch. J. and Powell J. 1 Salk. 317. pl. 25. Trin. 9 Ann. B. R. Buckley v. Pirk.

of the Profits, (Rent and Repairs deducted) is all that is Assets, and liable to the Judgments, and the rest are so appropriated to the Payment and Repairs as not to be exhausted by Debts. 10 Mod. 12. Ann. B. R. Buckley v. Pirk.

(H. a. 2) Chargeable; In what Cases though not named.

1. A Covenant lies against an Executor in every Case although he be not named, unless it is to be such a Covenant as is to be performed by the Person of the Testator, which they cannot perform. Cro. E. 553.
Executors.

553. pl. 3. Pach. 39 Eliz. B. R. in Case of Hyde v. Windsor (Dean and Canons.)

2. Teftator was bound to instruct an Apprentice in Trade for seven Years, and likewise bound to find him Meat, Drink, &c. and Lodging during the Term. The Court held that the Apprentice remained Apprentice to the Executor; For though he cannot instruct him in the Trade, yet he may find him Meat and Drink during the seven Years, and that the Word (Term) does not determine, but outlasts the Life of the Teftator as to this. Sid. 216. pl. 21. Trin. 16 Car. 2. B. R. Wadsworth v. Gye.

although there be no particular Caffom, as in London especially, since 5 Eliz. to which the Court inclined; fed adjournatur.—Ibid. 220. pl. 104. S. C. all the Court inclined, that had it been only to instruct and find Meat is not; and if it were, yet the Breach is sufficiently assigned if either Part is true, as here, in turning them out; Judgment for the Plaintiff.

3. But afterwards, where Teftator covenanted to teach an Apprentice his Trade and died, and Covenant was brought against his Executor, after a Verdict for the Plaintiff it was moved in Arret of Judgment that this was a Personal Covenant of Teftator, and did not obligate the Executor, but the Master only during his Life; But adjudged that the Executor was likewise bound, for he ought to see the Apprentice taught his Trade, and if he was not of the same Trade, then to turn him over to another who is, so that he may be taught accordingly to the Covenant. Lev. 177. Trin. 17 Car. 2. B. R. Walker v. Hull.

(H. a. 3) Charged upon Covenant or Agreement &c. of the Deceased.

1. If a Man demises Sheep or other Stock of Cattle, or any other Goods Personal for any Time, and the Lessor covenants for him and his Assigns to leave them &c. at the End of the Term in as good Condition as he found them, and afterwards he assigns over the Stock of Cattle and dies, this being merely a Chofe in Action in the Personalty cannot bind any but himself, his Executors or Administrators who represent him; So of a Lease of a Houfe, and a Stock or Sum of Money. 5 Rep. 16. b. Pach. 25 Eliz. B. R. the third Resolution in Spencer's Cafe.

2. If one covenants to pay 10 l. Debt lies against him or his Executors, as 40 E. 3. and 28 H. 8. Dyer are; but if he doth covenant that his Executors shall pay 10 l. an Action lies not against them. Cro. E. 232. pl. 2. Pach. 33 Eliz. C. B. in Cafe of Perrot v. Aultin.

3. The Cafe was, A. covenanted with B. to put his Son an Apprentice to C. or otherwise that his Executors should pay 20 l. A. does not put his Son Apprentice to C. and dies. Refolved that Debt lies not against the Executors of A. for it cannot be a Debt in the Executor where it was no Debt in the Teftator. Ibid.

Covenant lies against Executors upon a Writing, by which the Teftator covenanted to be accountable for all such Monies as should be charged by the Covenantee to be paid to J. S. Lev. 47. Mich. 13 Car. 2. B. R. Brice v. Carr, Emerson & al.—Cro. J. 170. contra, for the Goods of Teftator are only chargeable, which he may well bind. Goodwin v. Goodwin.

4. W. being Lord of a Manor covenanted for himself, his Heirs and Executors, within seven Years, upon Request to convey a Copyhold to the Plaintiff for Life secundum Constatudinem Manerii. The Covenantor died, and
Executors.

and the Plaintiff required his Executor to convey the Copyhold, which he refused, and thereupon he brought the Action. It was objected, that the Declaration did not shew what Estate W. had in the Manor, and therefore it shall be intended a Fee-simple; and if so, then the Request ought to be made to the Heir, and not to the Executor; But per Doderidge J. it shall be rather intended that he had only an Estate for Years, and that the Executor represents the Person of the Testator as to the Performance of those Covenants which he was bound to perform, which he ought to do though the Testator had no Estate at all in the Manor; And all agreed that the Request to the Executor is good, and that his not performing it was a Breach of Covenant; and Judgment was given for the Plaintiff. 2 Bull. 158. Mich. 11 Jac. Thurleyden v. Warthen's Executors.

5. In the Case of a Mortgage of a Ship, where the Ship was taken at Sea, and there was no Covenant for Payment of the Money, and though the Ship could not properly be laid to be in Nature of a Pawn or Depositum, since the Mortgagor had failed with the same to Sea, nevertheless the Executors of the Mortgagor were decreed to pay the Money for which the Ship was mortgaged. 3 Wms's Rep. 360. cited as decreed by Ld. Harcourt, Trin. 1735. King v. King.

(H. a. 4) Chargeable.

On Promises made by himself.

1. The Defendant being Executor to a Debtor of the Plaintiff, did promise that if he did take upon himself the Administration he would pay him his Debt; but this was held no Consideration, being moved by Holt in Arrest of Judgment. Freeman's Rep. 434. Pr. 585. Mich. 1676. B. R. Day v. Caudrey.

2. 29 Car. 2. cap. 3. § 4. Executor shall not be charged on a Promise or Agreement to answer Damages out of his own Estate, unless by Writing signed.

(H. a. 5) Favoured, indemnified or charged.

In respect of the Fund out of which Legacies are to arise diminishing in their Value.

1. Made his Will and gave several Legacies, and made B. his Kinman Executor and residuary Legatee; Great Part of his Estate confined in East India Stock, and he by his Will directed his Executor to turn his Estate into Money as soon as conveniently might be; East India Stock bore then a good Price, and several of the Legatee called for the Legacies, and the Executor taking the Estate to be sufficient to pay all, gave them Bonds for their Legacies, but kept the Stock to long till it fell to low that he had not Alices to pay the Legacies, and the Executor brought his Bill to have those to whom he had given Bonds for their Legacies abate, and that those that were unpaid might take their Legacies in
Executors.

Proportion at the Rate the Stock was then at; but Judge would not give him any Relief against those that had Bonds, and as to the others, he was to answer for the Stock at the Value it was of at the End of the Year after Testator's Death. Abr. Equ. 239. Hill. 1702. Kegling's Cafe.

(I. a) In an Action brought against Executors, how the Plaintiff ought to deman, [or plead] for Debt of Testator.

1. In an Action upon a Cafe upon a Contract made by the Testator, the Plaintiff need not aver that the Defendants have Assets to pay Legacies. 9 Rep. 90. b. Pinchon's Cafe. Pl. C. 182. b; adjudged. Norwood against Read.

2. 3 Eliz. 9 Rep. 90. b. In Action upon Assumpsit by Testator for Payment of a Debt, adjudged that he need not aver that Executor has Assets to satisfy the Debts of the Testator.

Upon Assumpsit by the Executor.

And in such Cafe he ought to be sued in his own Name, for the Demand is upon his own Contract. In effect the Forbearance is the Consideration of the Promiss, because without Forbearance no Advantage could be taken of this Promiss. Per Parker Ch. J. and to this Opinion the rest of the Court inclined. Sed Adjournatur. 10 Mod. 254. Trin. 13 Ann. Johnson v. Gardiner.


4. In Debt against Executors if it be founded upon a true Cause, be may suffer a Recovery by Nient derive, and shall have thereof Allowance in Action brought against them by another to plead this Execution. Br. Executor pl. 88. cites 9 E. 3. 12, 314. Per Littleton, Cheoke and Brian.

5. So where they confess the Action if it be true. Ibid. Upon citing this Cafe by Plowden Pl. C. 182. PaCh. 4. Mar, in the Cafe of Norwood v. Read, Fitzherbert bid them to pay this Cafe out of their Books, for that double is it not Law. And it was also said that the Authority of this Cafe was impach'd by Fitzherbert being of Counsel with the Plaintiff in that very Cafe, and with whom Judgment was given, and he being a Judge of great Fame held it erroneous; and that in Fact it seems against the Principles of Law, because such Assumpsit is only a Contract in Patis as a Contract of Debt is. But it was answered, That the said Judgment in 12 H. 8. is not so easily to be rejected by the Saying of Fitzherbert. And the Judges ordered the Record of 12 H. 8. to be search'd and shown to them, and so it was; and the Cafe was entered, Mich. 12 H. 8. Rot. 40, and was between Claydon Plaintiff, and Vincent & Cri. Executrix of the Will of R. Penion, Defendants, and it was not demur'd in Law upon the Cafe, but the Defendants pleaded in Bar as by the Record appeared; and the Record was not according to the Book in this Point viz. for the Averment as to paying Legacies, but the Averment of the Assets was for the Payment of all Debts, and also to content the Plaintiff; and to pay the Legacies was not contain'd in the Record; whereupon Judgment was given in the Principal Cafe of Norwood v. Rede accordingly. —

7. Scire
7. Score across as Administrar of C. upon a Recognizance of 4000 l. being found for the Plaintiff, it was moved in Stay of Judgment, That it is not mentioned in the Writ, Quod prefert Literas Administrations &c. but because it was in a Writ founded upon a Record, and the Courte is not to mention it in Writa, the Court held it to be well enough. Cro. E. 592. pl. 30. Mich. 39 & 40 Eliz. in Canc. The E. of Shrewsbury v. Sir Walter Lewton.

8. Allumplit; A Legacy of 40 l. was devised to the Plaintiff by J. S. who made the Defendant his Executor, and diverse Goods came to his Hands, the Defendant in Consideration the Plaintiff would forbear to rec him promised to pay it at such a Time. It was moved in Arreit of Judgment, That the Declaration was not good because he doth not aver that he had Affets at the Time of the Promise, Sed non Allocatur; for it shall be intended he had, otherwise he would not have made such a Promise; Wherefore it was adjudged for the Plaintiff. Cro. J. 613. pl. 2. Patich. 19 Jac. B. R. Booth v. Crampton.

9. In the Case of an Executor the Creditor must bring the Action for the Sum really due be the Affets never so small, for Judgment must be for the whole Debt; and this seems to be for the preventing a fresh Action in case of more Affets. 10 Mod. 324, 325. Per Cur. Hill. 2 Geo. 1. B. R. Baldwin v. Church.

(K. a.) How Executors ought to demean themselves in an Action against them

How they ought to plead Judgments first to be paid.

1. 9 Rep. 109 h. Meriel Trefham's Cafe. In Debt on Bond the Executor contested diverse Judgments and Recognizances to be paid and that he has sufficient to satisfy them, and after faith that he hath not alia bona, but what are not sufficient to satisfy the Debt aforesaid; Resolved that this Plea is repugnant.

2. In 9 Rep. abordaid. Resolved, If he had pleaded that he had not any bona praetert bona & cotalla quae non sufficient ad Satisfaciendum debturn pradictum, this is not good for the Uncertainty.

3. But he ought to contest that he has Affets to satisfy Debturn pradictum.

ments against the Intestate, or himself as Administrator, and Statutes entered into by the Intestate, and concludes this Plea, That he hath not, nor at any Time had, Affets in his Hands of the Intestate's Estate, praetert bona & cotalla sufficient to satisfy those Judgments and Statutes, and avereth that they are unfurnished, and which Affets are chargeable with the said Judgments and Statutes, that this is a good Plea in bar of the Plaintiff's Action, and so it is admitted to be in Meriel Trefham's Cafe; and the Plaintiff must reply, That he hath Affets ultra what will satisfy those Judgments and Statutes, as is there agreed.

But if the Plaintiff reply, That any one of those Judgments was satisfied by the Intestate in his Life time, laying nothing to any of the rest, and the Defendant demurr upon this Replication, the they Plaintiff must have Judgment, for the Plea was false, and the Fullhood detrimental to the Plaintiff, and beneficial to the Defendant; for having pleased he had no more Affets than would satisfy those Judgments, one of them being satisfied before, he hath contested there is more Affets than will satisfy the other Judgments, as much as the Judgment already satisfied amounts unto, which would turn to his Gain, and the Plaintiff's Loss, If his Demurrer were good.

But to plead, That he hath not bona & cotalla praetert bona quae non attingent, to satisfy the said Judgments and Statutes is not good for the Uncertainty; for if the Judgments and Statutes amount to 500 l. 201 are bona cum non attingent to satisfy them; fo is 40 l. fo is 100 l. fo is 100 l. and every £n m less than will satisfy; so as by such Plea there is no certain Issue for the Jury to enquire, nor no certain £n m could be towards the Payment of any Debt, as is well resolved in Turner's Cafe.
Executors.

So if a Man pleads he hath not Affects ultra what will satisfy those Judgments, the Plea is bad for the same Reason, for 201. is not Affects ultra that will satisfy them, nor 40. nor 100. nor 200. nor doth that Manner of pleading confess he hath Affects enough to satisfy; As to say, I have not in my Pocket above 201. is not to say, I have in my Pocket 401.

If Executor pleads a Judgment generally, he confesses Affects for so much, and can't after say he has Affects for Jefs Value. 12 Mod. 527. Trin. 15 W. 3 Parker v. Atfield.

For if a Judgment be pleaded in its full Extent of the Penalty thereof, and the Plaintiff replies, That there is but so much due, or that the Party is willing to take so much, or that 'tis kept up by Fraud, and Iffue is thereupon joined; it be found by the Jury that the Executor has not where withal to satisfy it he shall not be charged for more, because there he is not guilty of Fraud. Per Holt Ch. J. 12 Mod. 527. Trin. 13 W. 3. Parker v. Atfield.

But if the Executor has no Affects at all, his left Way had been to plead the Judgments and Specialties in their Order, but he must take Care to plead them honestly, for if any one of them be false, he is gone for all; so that if there be a Affidavit in the Pleading or Fraud, it is a Devastation, if Iffue be taken upon the Fraud and it is found; but if you are not found to have Affects for the whole Judgment, it shall not be intended you have more than you confessed; for the Fraud is the only Thing traversable; Per Holt Ch. J. 12 Mod. 528. Trin. 13 W. 3. Parker v. Atfield. — 1 Salk. 511, pl. 16. S. C. — ld. Raym. Rep. 675. S. C. accordingly.

5. 9 C. 4. 12. It Debit the Executors plead a Judgment and Execution of 200 l. and another Judgment of 100 l. recovered of the Goods of Tenantor against them, abique hoc that any of the Goods of Tenantor were in their Hands the Day of the Writ purchased, or after, except to the Value of the said 200 l. so levied, and the Court rule the Plea good, and if the Plaintiff will maintain his Action he ought to say that they have Affects beyond the 200 l. and 100 l.

6. If an Executor has no Affects over a Judgment, if he does not plead in an Action brought against him fully administered, he cannot give the Judgment in Evidence. 21 C. 4. 21. b.

7. But in such Case he ought to plead the Judgment specially; and over this nothing in his Hands. 21 C. 4. 21. b.

8. 9 E. 3. Stat. 1. cap. 3. If Debt be brought against divers Executors they shall not four by Effen, but such as appear shall answer without the Rest.

9. Debt against Executors who pleaded Recovery by A. against them of 200 l. whereas he bad Execution, and that B. add recovery against them of 100 l. Per Brian he need not allege the last Recovery, because he has pleaded no Execution thereof, nor Affairs, but said, that Riens enter mains the Day of the Writ purchas'd, nor after, but that which satisfied the 200 l. and so need not to mention the second Recovery. Pigot said, We could not plead otherwise; For if we have Goods over the 200 l. we are chargeable to the second Recovery and not to the now Plaintiff. Br. Tail Exchequer, pl. 2. cites 9 E. 4. 12.

10. Debt was brought against J. S. as Executor by A. and pending this Action Debt was brought by B. against J. S. as Administrator for a true Debt (whereas J. S. was Executor) J. S. confessed B's Action, and pleaded the Recovery in Bar of A. But resolved not good; for the Recovery against him as Administrator was void. Cro. E. 41. pl. 5. Trin. 27 Eliz. C. B. Anon.

11. Three Administrators; In Debt against one on a Bond, Judgment is by Nikil Dicit. Afterwards Debt was brought on a Bond by another Person against all three; they pleaded the former Judgment against one,
one, and that they had Riens en ses maines to satisfy over and above the said Debts, and good. Cro. E. 471. pl. 23. Hill. 38 Eliz. B. R. Further v. Further.

12. Debt against an Executor who pleaded, That pending that Action G. S. brought another Action against him for 100 l. Pro vero & justo Debito, due to him from his Teller, and that he had confessed Judgment in that Action, and had not Assets ultra, to satisfy that Judgment; the Plaintiff brought another Action against him for 100 l. Pro pleno & juro Debito, and he had also Assets ultra to satisfy that Judgment. Accordingly, the Court held this Replication good enough; for if the Recovery be not by Covin the Plaintiff is barrable, and therefore it is the principal Matter to be answered, and the Consequence of the Action is not material, viz. Whether it be a true Debt and an Action truly purfued, and an Action may be Covenous though it be on a true Obligation. But upon Error brought the Judgment was reversed for the Matter in Law; For it cannot be a Covens Recovery if the Debt be true, and the Covin alleged is not material. Cro. E. 462. pl. 10. Hill. 38 Eliz. B. R. Green v. Wilcockes.

13. Debt against the Defendant as Administrator of E. he pleaded a Recovery against him as Executor, and besides, to satisfy that, he hath no Assets; Adjudged a good Plea, for that he shall not be twice charged. Cro. E. 646. pl. 57. Mich. 49 & 41 Eliz. B. R. Smallpeace v. Smallpeace.

14. Debt against an Administrator who pleaded a Recovery in Debt against him in London, and that he had not Assets præter to satisfy that Judgment. The Plaintiff replies and confesses that Judgment, but shows that before this Action brought the Plaintiff in that Action acknowledged Satisfaction on Record; and upon Demurrer it was adjudged for the Plaintiff, because Satisfaction being acknowledged he cannot plead that he hath Nothing &c, because the Judgment is discharged by this Satisfaction acknowledged without any other Judgment. Cro. E. 728. pl. 4. Mich. 41 & 42 Eliz. C. B. Hampton v. Bartholomew.

15. Debt was brought against an Executor on a Bond of 300 l. who pleaded that his Teller entered into a Statute to E. for 300 l. and that he had but 50 l. of the Teller’s in his Hands, and that the Statute was yet in Force and unpaid; This was held an ill Plea, because the Defendant did not allege that the Statute was made for Debt, and that the Debt was not satisfied. For that it was made for Performance of Covenants, and probably there may be no Covenants broken, nor ever may be, and if so, then it is no good Plea in bar to the Action. Cro. J. 8. pl. 10. and 35. pl. 8. Trin. 2 Jac. B. R. Phillips v. Echard.

16. If an Action be brought against an Executor, and the Plaintiff does not ever that Defendant hath Assets to pay the Debts it is not material; for the Defendant is to show that; for if he had not Assets and pleaes non Assumptis, he hath lost that Advantage; Affirmed in Error. Cro. J. 293. pl. 13. Mich. 9 Jac. B. R. Legate v. Finchion.

17. Debt against an Administrator who pleaded two Recognizances acknowledged by the Insolvent, which were not satisfied, and that he had not Goods &c. Preter quam Bona & Catala, which did amount to the Debts due, on the said Recognizances; it seemed to all the Justices that the Plea was not good, but that the Defendant ought to have pleaded, that he had not Goods preter quam Bona to satisfy the said Recognizances, or no Goods beyond such Value, which do not amount
amount to the said Sums due on the same. 2 Brownl. 153. Pach.
10 Jac. C. B. Crossock v. Corey.
18. Sciæ Factas was sued by H, against W, Executor to his Father, for Execution of a Judgment obtained against the Testator; the Defendant pleaded Plea Administrae at the Time of the Bringing of the Action; and thereupon they were at Illuc; Per Cur. it is no good Plea, but the Executor should have pleaded, there was nothing in his Hands at the Time of the Testator’s Death, because the Judgment bound him to satisfy that Debt before others; but by joyning of Illuc the Advantage of that Exception to the Plea is waived. No. 853. pl. 1178. Hill, 11 Jac. C. B. Harecourt v. Wrenham.

19. Debt against an Executor upon an Obligation of 40l. The Defendant pleaded three Judgments in Debt in the Court of Rochester, and Judgment in B. R. pro ut pacta per Recorda prædicta, and that he had not Affets to satisfy those Judgments, whereupon it was demurred, it. Because he doth not say, pro ut pacta per fæperali recorda, and conclude every of them severally Pro ut pacta per Record in the said Court &c. 3dly, It is not shown what Sums he had in his Hands to satisfy, so as the Court might know and adjudge thereupon. 3dly, Because it is not averred that they were Vera & fætta debita, whereupon the Judgments were given, and Dodderidge held it was ill for all those Caufes; But Haughton held it to be ill for the second Caufe, and the Ch. J. for the first Caufe, and not for the other; Chamberlain J. was absent, wherefore they all agreed, That for the one Caufe or other the Plea was ill, and therefore it was adjudged for the Plaintiff. Cro. J. 625, 626. pl. 19. Mich. 19 Jac. B. R. Samms v. Mercer.

25. If Recovery be had against Executor without good Caufe, and by Covin to defraud Creditors, the Creditor may say generally, That it was had by Fraud without good Caufe to defraud Creditors; But if it was without good Caufe but no Covin, but by faint pleading or Negligence the Executor suffers the Judgment, the Creditor may say that this was without Caufe, and by faint pleading. But if Recovery was not had upon good Caufe but by Covin, the Creditor cannot avoid the Recovery by saying that it was by Covin to defraud him, because the Party had good Caufe, and where the Recovery is upon legal Caufe it cannot be said Covinous though it was upon Consent, and with Intent to prevent the Other of his Debt. Jo. 91. pl. 5. Hill. 1 Car. B. R. Vele v. Gatesdon.

21. In Action against the Executor on a Bond made by the Testator; The Defendant pleaded Judgment against his, Ultra quod non habet &c. not showing what was the Ground of the Judgment as Bonds or single Contracts; for which Cause, as Pro vero debito, the Plaintiff demurred, and Judgment per Cur. for the Plaintiff Nili. Keb. 234. pl. 90. Pach. 14 Car. 2. B. R. Hutchinson v. Innocent.

22. Debt against an Executor who pleaded a Judgment ultra quod he had not Affets; The Plaintiff demurred specially, because he did not show the Value of the Goods which he had. The Court held it to be only Form; but being specially demurred on it is ill. Lev. 132. Trim. 16 Car. 2. B. R. Davies v. Davies.

S. C. cited


23. If
23. If an Executor is sued on four several Bonds of 20 l. each, and they S. P. per are all tried at once, and he has only 20 l. Assets, yet he shall be charge- able to them all; but he should have conjoined a Judgment to one of them, and have pleaded that to the other. 2 Show. 202. pl. 207. of Parker v. Paich. 34 Car. 2. B. R. Anon.

24. Debt against an Executrix, who pleaded that T. S. had obtained a Joint Judgment against her Tettator, and E. H. who is still living, and that she had not Assets ultra the said Judgment to satisfy. The Plaintiff demurred and adjourned for the Defendant, because the Lien survives, and fo the Executrix is not liable. Raym. 153. Paich. 18 Car. 2.

B. R. Harvey v. Harvey.

26. Cafe against an Administratrix upon a Promise of the Intestate, Lev. 200. S. C. and Judgment per rot. Car. The Defendant pleaded in Bar two judgments had against him, one in Debt upon simple Contract, and the other upon an Informant Computation receiv- per separata recorda inde plenius liquet &c. beyond which he had not Assets. The Plea was adjudged good without averring that the judgments were itendant, — pro veris & justis debitis; lor if it were not so obtained the Plaintiff ought to shew it in his Replication, and cites 3 Cro. 471. Futterer's Cafe. And as to the prout patet per separata recorda, without concluding to each Prout patet per recordum, it is well enough, for it shall be taken distributively; and as to the Matter of the Plea in Bar, it was adjudged that judgments in Debt upon simple Contract are pleadable to this Action, for the Debt is not lost by the Death of the Tettator, but his Executor is still liable, because an Action on the Cafe lies against him for those Things for which these Debts upon simple Contracts are brought, and upon which the Plaintiff recovered against him, and he need not to use Dilatory, but may let Judgment pass against him by Non sium Intormatus, as in this Cafe; and though Debt upon simple Contract cannot be maintained against an Executor if he had demurred to the Declaration, yet if he pleads to it is good, and the Judgment shall not be reversed for that Reason, and those Cafes in 1 And. 132. and 3 Cro. 121. which are to the contrary, are not Law; and if this Plea is not good, then those Payments are a Devitavit, which it is not, because in Action on the Cafe on a Contract, and Plea Administratrix pleaded, he may give Payment on another Contract in Evidence, and by the same Reason he may further Judgment to pass against himself. Sid. 332. pl. 17. Paich. 19 Car. 2. B. R. Palmer v. Lawton.

27. Debt against several as Executors; they plead a Judgment against one of them as Administrator. Plaintiff demurred, 1st. because the Action and Judgment is as Administrator, which he might have avoided by pleading in Abatement that he was Executor. 2ndly, Because it was only against one, whereas it lay not but against all; But resolved that the Judgment was pleadable in Bar, and as to the first Point cited 3 Cro. 646. Whetstey v. Lane, adjudged in Point in B. R. and as to the second Point cited 3 Cro. 437. and though the Action was not well brought, the Defendant was not bound to plead in Abatement and put himself to greater Charge, since there was a true Debt and a Recoveory had upon the Right of it. Lev. 261. Hill. 20 & 21 Car. 2.

B. R. Parker v. Amys.

28. Action was brought against an Executor, who pleaded several Judgments, but as to the last Judgment pleaded by him, he did not ex- press where it was entered, nor when obtained; and this being aligned for Error, Twidgen J. held it not good, because by this Plea he is tied up to plead nothing but Null Secul Record; but if the Judgment had been pleaded as it ought to have been he might have pleaded Ob- tent.
Executors.

29. Debt against an Administrator, who pleaded a Recognizance not satisfied, and also a Judgment in Debt for 5000 l. on a Note payable with Interest upon Demand, and that the Money being not paid till such a Day, the Interest amounted to 1700 l. and so the Judgment was against him for 6700 l. and that he had not Assets ultra 40 l. chargeable to this Recognizance and Judgment; And upon Demurrer the Plaintiff had Judgment per tot. Cur. For his pleading a Judgment for Interest is ill, because it is a Debauch in him to suffer it to run in Arrear, and Defect of Assets to pay it before the incurring of it by the Administrator shall not be intended, not being expressly pleaded. 2 Lev. 39. Hill. 23 & 24 Car. 2. B. R. Seaman v. Dee.

Ibid. fad per Cur. that this very Point was resolved lately in C.B. in Cafe of Johnson b. Jefung, by Reason of the Premption, that by the Acceptance of the Lands the Statute is satisfied.

31. Debt upon an Obligation against an Executor, who pleads a Recovery in Debt and Judgment, and that he had not Assets ultra &c. After a Verdict it was moved that this was no good Plea, because for all that appears this Recovery might be upon a Debt for a simple Contract, for a Plea shall always be presumed strongest against him that pleads it, and cites Plow. 46. 1 Inft. 102. 3 H. 7. 2. and then, though a Verdict be for the Defendant, yet he ought not to have Judgment, and cited Nicholls's Cafe, 5 Rep. Moor 867. Hob. 112. But the Court seemed to incline that it was well enough after a Verdict, though perhaps upon Demurrer it might have been bad, according to 8 Rep. 133. Turner's Cafe, for that Cafe was not after a Verdict, but upon a Demurrer; though it was alleged by Goodfellow to be after a Verdict. Curia ad vitam vult. Freem. Rep. 215, 216. pl. 223. Mich. 1676. Read v. Dawson.

32. Debt upon Bond of 40 l. against an Administrator, who pleaded that the Inheritance was indebted to W. R. in 250 l. on a Statute Merchant yet in Force &c. and that he had not above 40 l. Assets besides what will satisfy that Statute. The Plaintiff replied, that the Statute was burnt with Fire; And upon a Demurrer to this Replication, and by the Opinion of three Justices, the Plaintiff had Judgment, because by the Demurrer the Defendant had contended that the Statute was burnt, and it so, then it could never rise up against him. But Vaughan Ch. J. differed in Opinion, and said that it is a Rule in Law, that Matter of Record shall not be avoided by Matter en Pais, which Rule is manifestly thwarted by this Resolution, that it was a Matter of Record to both Parties, and the Plaintiff could not avoid it by such a Plea, any more than the Defendant could by any other Matter of Fact; and said it

Ing. should be allowed, it would be very difficult to find the Record, and then he could not plead that it was kept on Foot by Fraud or the like. Sid. 439. pl. 12. Jorden v. Pofler, S. C. and the Bar was held ill, and Judgment for the Plaintiff.
it was a proper Cafe for Equity.  Mod. 186. pl. 18. Trin. 26 Car. 2. of his D jot
C. B. Buckley v. Howard.

and yet he is entirely incapable of having any Benefit by it, so that he should lose both his Statute and the Obligation too. But Vaughan Ch. J. said, that the Inconvenience will be as great on the other Side; for if the Plaintiff should recover upon this Obligation, perhaps he may be taxed afterwards upon the Statute, which for all that he knows may be in being. To which Aikins said, that then he should have travelled it, and then it might have been tried. Curia adiuvare vult.

33. Affirmat against an Executor, who pleaded a Bond of 40l. entered into by his Testator adhuc infus? and no Assess ultra 5l. quae non sufficient ad satisfaciend? debitum predict? et ad illud onerat? et obligat?. The Plaintiff replied, that the Bond was conditioned to pay 20l. at a Day yet to come, and upon a Demurrer Judgment for the Defendant, because the Plaintiff did not allege in his Replication that the Defendant had Assests ultra to pay the 20l. for if he has not, he is not bound to pay the Plaintiff the Debt upon Contract before the Debt upon Bond due at a Day yet to come. 3 Lev. 57. Trin. 34 Car. 2. C. B. Lemun v. Fooko.

34. Executor pleaded that his Testator entered into a Bond to pay 100l. which was not yet paid, besides which he has not Assests, and held good upon a special Demurrer without saying Pro vero & justo debito. Cartb. 8. Trin. 3 Jac. 2, B. R. Luke v. Raw.

35. Debt upon Bond against an Executor, who pleaded several Judgments obtained against him upon Bonds made by the Testator, and that he had not Assests ultra &c. The Plaintiff replied as to one Bond of 200l. that the Condition was to pay only 100l. and so to the rest severally, and that the Defendant had Assests to pay the Plaintiff, and ultra, to satisfy the said Iffer Sums in the Conditions &c. viz. at such a Place. The Defendant rejoins, that he had not Assests ultra to satisfy the Debts and Judgment in his Plea. The Plaintiff demurred specially, because this Rejoinder did not answer the Replication, but ambiguously; for he should have rejoined, that he had not Assests ultra to satisfy the Iffer Sums, and not to make the penal Sums Parcel of the Illeue, for if he had Assests ultra the Iffer Sums he ought to pay the Plaintiff; but resolved per tot. Cur. that the Penalties are legal and due Debts till the Obligees are satisfied; for though in Equity and Conscience the Iffer Sums are only due, yet perhaps the Obligees will not accept them without Suit in Equity; And if they would or offer to accept them, and the Defendant would not pay them, the Plaintiff might help himself by pleading it specially that they would, and offered to accept the Iffer Sums, but that the Defendant would not pay them, but kept the Judgments on Foot by Fraud and Covin, and give the fame in Evidence, but he cannot aid himself by such a general Pleading as this is in the principal Cafe, and therefore Judgment was given for the Defendant. 3 Lev. 368. Trin. 5 W. & M. in C. B. Thompson v. Hunt.

36. If an Executor pleads his Judgments against him, Ultra quae he has not Assests, and he confesses by Implication that he has Assests ultra five, and it the Plaintiff in his Replication takes illue upon the Irens ultra it is ill, and a Man cannot oblige another to an Iluee of Fact which he has confessed before; and the better Way is only to answer to such Judgments as he knows to be obtained per Fraudem, and if any of them are found for the Plaintiff he shall have Judgment, because it would appear that the Defendant has Assests, he having confessed Assests ultra five for his pleading six Judgments. Ld. Raym. Rep. 263. Mich. 9 W. 3. Ashton v. Sherman.

or any one of the Judgments set up by the Executor. —— Cartb. 229. S. C. adjudged against the Plaintiff. —— 12 Mod. 153. S. C. held accordingly. —— Comb. 444. 449. S. C. and says the better Way was for the Plaintiff to answer to every Particular; For though the Replication to one be fall,
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false, yes if it is good for any of the rest the Plaintiff shall recover; For the Defendant shall not take Advantage of his own Wrong; and that the Plaintiff having concluded with a Quoad to every Replication, is better than one Conclusion only to all.

37. Debt against an Executrix, who pleaded several Actions of Debt brought against her, pro eo videlicet quod cum the Testator &c. per quodam Scriptum fumum Obligatorum became bound &c. and that Judgment was obtained against her &c. and that he had not Affets ultra &c. Exception was taken, because it was not expressly alleged that the Testator was bound in the said Bond. But all the Court held the Plea good; And Holt and Powell said, that none but the Party himslef, his Heirs, Executors or Administrators, can plead Non est Factum. And per Powell J. the Plaintiff cannot infilt upon any Thing but the Fraud. Lutw. 636, 652. Trin. 11 W. 3. Robinson v. Corbett.

38. If Executor pleads Judgment which is ill pleaded, or on Issue found to be kept on foot by Fraud, he has confessed Affets for it; Per Holt Ch. J. 12 Mod. 527. Trin. 13 W. 3.


40. To a Scire Facias upon an interlocutory Judgment had against an Executor, the Defendant cannot plead a Judgment in Bar. 1 Salk. 315. pl. 23. Patch. 3 Ann. B. R. Smith v. Harmon.

41. S. as Executor sued a Sci. Fa. against the Defendant, setting forth that the Intestate sued the Defendants in such an Action, and had Judgment by Nikil dicit, and a Writ of Inquiry of Damages, which abated by his Death before the Return of the Writ, and that Administration was granted to the Plaintiff, and had Sci. Fa. against the Defendant, to show Cause why Plaintiff should not have Judgment, who pleaded that the Plaintiff ought not to recover, because the Defendant's Testator was indebted to A. in 1001. upon Bond, who obtained Judgment against the said Testator, and that he had not Affets ultra &c. The Plaintiff demurred and had Judgment, because the Statute never intended that the Executor should make any other Defence than what his Testator might have done; and if a Scire Facias had been brought against his Testator, he could have pleaded nothing but a Release, or other Matter in Bar arising Puis darren Continuance. He is, by the Words of the Statute, to show Cause why Damages shall not be arrested and recovered, and it he appears at the Return of the Sci. Fa. and does not show any Matter sufficient to arrest the final Judgment, then a Writ of Enquiry shall be awarded. 1 Salk. 315. pl. 23. Patch. 3 Ann. B. R. Smith v. Harmon.

6 Mod. 142.
S. C. and per Holt Ch. J. the Statute, viz. 8 & 9 W. 3. S. 6. has now established the interlocutory Judgment, and it was never the Intent of it that the Executor should say more than the very Party might have said, and its Meaning was to put the Executor in the same Condition with the Testator, and now he pleads in Bar of the original Action, which lies not in his Mouth to do; and Powell agreeing put this Case in Account, viz. Judgment is, Quod Defendens comptus, a Scire Facias lay for the Executor before this Statute, yet the Party could plead nothing against the first Judgment; and per Holt Ch. J. the Sci. Fa. is not so good as it should be; For it should be Sci. Fa. ad audient' Judicium, that is, giving them Day to come and hear the Judgment of the Court; and Judgment was given for the Plaintiff; and Holt Ch. J. said that the Executor could not plead a Release here though to himself, and therefore the not pleading it would not be a Devastavit.

42. The Plaintiff obtained an interlocutory Judgment against the Ld. Mohun in an Action upon the Cate. The Ld. Mohun died, and the Plaintiff took out a Scire Facias upon the 8 & 9 W. 3. cap. 10. against the Defendant his Executrix, and had an interlocutory Judgment against her by Default, and executed a Writ of Inquiry, and had final Judgment against her De Bonis Testamentis, and took the Testator's Goods in Execution. The
The Court was moved to set aside the Execution, and to order Restoration of the Goods for want of a Scire Facias quare Executio non after final Judgment, and the Cafe of Smith and Harman now reported in Salk. 315 and Mod. Cafes 442. was cited, that upon a Scire Facias upon an interlocutory Judgment, an Executor cannot plead either a general or a special Administration, and that therefore unless a Sci. Fa is to go out upon a final Judgment in such Cafe, an Executor will be in a worse Condition than if final Judgment had been against the Tettator. The Court, upon hearing Counsel on both Sides denied the Motion, because by the said Statute the Executrix stands in the Place of the Tettator, and can say nothing but what he might have said if he had lived. Quaere it if it be not a better Reason because Executrix had, upon the Scire Facias being taken out, an Opportunity to plead all such Matters as the Law allowed in such Cafe. N. B. The Judgment in the said Cafe of Smith v. Harman seems to be Law, because the Executor there was the original Defendant, and had an Opportunity to plead the Bond in Bar of the Action, but instead thereof he let Judgment go by Nile dict, or after the interlocutory Judgment he might have pleaded that to the Action upon the Bond; but where an Executor or Administrator is not Party to the original Action, but brought in by such Scire Facias, he ought (as it seems) to be admitted to plead a special Administration, as it is adjudged Salk. 296. he may do where final Judgment is had against the Tettator, notwithstanding the reported Reasons of the Resolution of the said Cafe of Smith and Harman, for the Suit being continued by the said Statute in the same State it was in at the Death of the Tettator, seems not to deprive the Executor of any Plea but such as the Tettator might have had before his Death. MS. Rep. Pash. 12 Ann, C. B. Snape v. Lady Mohun.

Executor. Administrator.

(L. a) Who of them may retain.

1. A Lawful Executor may retain the Goods of the Tettator in Satisfaction of a Debt due to him by the Tettator.

If he has no other Goods he may plead Pleae Administration if Debt be brought against him; Per Hebb Ch. J. Winch 19. Anon.


† Godb. 217. pl. 310. S. C. held per totam Curiam, but that Executor de son Tort cannot — Brownl. 75 pl. C.

3. If A. be indebted to B. and to C. by several Bonds and Dies, and D. takes Administration, and after B. makes D. his Executor and Dies, D. may retain Goods which he has as Administrator to A. to satisfy the Debt due to him as Executor to B. per Cur. D. 8 Ja. B. Barnett v. Dixie.

4. An Executor de son Tort cannot retain to satisfy himself, because he comes to it by his own Act and Tort, and not by any Court.
Of Executors.

Course in Law, and if he might retain, great Inconvenience and Confusion would ensue. Resolved, 5 Rep. 30. b. Coulter's

No. 537.

pl. 669. S.

C. ad
judg'd. —

AC. 30. executor

tet

12. S. F. Mahv. Law coirre

and Brown. because

But 13, alio

10 granted

Godiarci. 

Coulter


137. S. C. — But Gro. E. 526, held obiter, that where one is made Executor by a former Testa-

ment, and afterwards another Testament is made, and therein another made Executor, and the last

Testament not being known the first is proved, and the Executor pays Debts to himself, and then the

second Testament is discovered and proved, yet peradventure the Payment of the first Executor's

Debts shall be allow'd him against all Strangers at the least, for he had Colour to do it as Executor by

the first Testament, and he is to be allow'd for all Judicial Acts done by him &c.

5 It seems that the Ordinary might before the Statute of 31 E. 3 return to satisfy a Debt due to himself, because he had the

power of Administration call upon him by the Law.

6 But it seems that after the said Statute of 31 E. 3. that he cannot retain, * because now he ought to Jure to grant Adminis-

tration, therefore they not Granting, but the Administration by himself is in a Manner injurious, and therefore he cannot re-

tain and to take Advantage of his own Wrong.

7. If Admimistratrix durante minore aetate of an Executor makes

divers Bonds to the Creditors of the Testator, and after takes Baron,

the Baron may retain so much of the Goods of the Testator as

announces to the Value of the Debts secured by the Obligations


Goddard.

8. Dilect if the Feme dies whether the Baron may retain after, for then

the Baron is no longer chargeable by the Obligations. Hob. Rep.

pl. 327. it seems if Baron in Life of his Wife declares that he retains

such particular Goods in lieu of the Obligations, though the Wife

dies after dies, yet the Declaration of the Property was absolutely

altered in the Baron, and then the Death of the Wife after will not

deprive it.

9. If two Executors are, and one pays the Debts of the Testator

with his own Money, he may retain so much of the Goods of the

Testator against his Companion. 37 H. 6. 30. 20 H. 7. 5. b.

S. P. by

Rede J. and

agreed by

the others.

Kewl. 63.

a. Trin. 20 H. 7. that he may retain.

S. P. by

Hale Ch. J.

Vint. 159.

Palcl. 24

Car. in R. x

in Case of

Edgecomb v.

Dec.

Sty. 357.

358. S. C.

adjudg'd. —

S. C. cited

2 Vent.

2 Show.

273. Arg.

cites S. C.

11. An Executor may retain a Debt due to himself by the

Testator upon a Contrac, for though no Action of Debt lies against

an Executor upon a Contract, yet this is a Duty, and if he pleads

to it and does not take Advantage of it, it shall find him. And

also an Action upon the Case lies upon such Contract against an

Executor. Vint. 1649. adjudged per Cur. upon Denmer. 2


12. If an Action be brought upon a Contract against J. S. as Ex-

ecutor to B. (where he is Executor de for Tors) and pending the

Suit upon Continuances Administration of the Goods of B, is

granted to J. S. he may retain in the Case Goods to satisfy an

Obligation in which B was bound to him; because Debts upon

Sectivity ought to be first satisfied, and now he is made lawfully

Administrator and cannot lie himself. Tr. 1652. adjudged upon


1667.

13.
13. If Debtor of Testator be Debtor to the Executor in a like Sum, and the Executor in Satisfaction of Testator's Debt releases his Debt, the Property shall be altered presently of the whole Goods in the Hands of the Executor; So where a Debtor makes the Creditor Executor; Per Anderson Ch. J. Le. 112, pl. 153. Paich. 30 Eliz. C. B. in Case of Stamp v. Hutchins.

14. Two are jointly bound in a Bond, one as Principal, and the other as Surety. The Principal died, and the Surety admitted. The Bond being forfeited the Surety agreed with the Creditor and discharged the Debt. Another Creditor brought Debt. Adjudged he cannot retain; for by joining in the Bond with the Principal it became his own Debt. Godb. 149, pl. 104. Mich. 3 Jac. B. R. Anon.

15. The Husband on Marriage gives Bond to Trustees to pay 3000 l. to the Wife (not to the Trustees) if she survives him. The Husband dies leaving a Daughter and the Wife living. The Wife administers during minore estate of the Daughter. Per Raymond J. she may retain, but if the Payment was to have been made to the Trustees she could not. Raym. 483, 484. Hill. 34 & 35 Car. 2. B. R. Roskelly v. Godolphin.

C. adjournatur, but all the Court except Holloway J. inclined for the Retainer.

16. Action was brought against A. as Executor of an Executor of an Executor, against whom the Plaintiff had recovered a Judgment in Debt, the Executor had waited, and was indented upon Simple Contract to the Defendant whom he made his Executor. Per Cur. the Defendant may retain for his Debt grounded on the Devastavit; For it shall not be adjudged a Debt superior to a Simple Contract. 2 Vent. 40. Mich. 2 Jac. 2. C. B. Bathurst's Case.

17. An Executor of an Executor may retain, but then he must be Executor of the first Testator, which an Executor of one of the Executors of Testator, the other Executor being still living, is not, and therefore cannot retain. Per Ld. Wright. Ch. Prec. 180. Mich. 1700. Hopton v. Dryden.

18. A. dies indented by one Bond to B. and by another Bond to C. and leaves B. and J. S. Executors; B. intermeddles with the Goods and dies before Probate, and before any Election made to retain; Quære, Whether, as B. might have retained the Goods in his Hands, his Executors have not the same Power. 3 Wms's. Rep. 183. Paich. 1733. Crott v. Pyke.

(M. a) Executor. Administrator.

In what Cases they may retain.

1. If Testator gives a Cup of Gold in Pledge for 20 l. and Executor of his proper Goods redeems the Pledge, he may retain the Pledge as his proper Goods. 20 H. 7. 2. 4. 5.

S. C. per Frowike Ch. J.

Contra per Kininmill.

Vavilor and Fisher Julifces. For the Executor hath done that which the Law would not charge him with, as to pay a Simple Contract &c. and therefore this remains as Affes. Br. Administrator, pl. 51, cites 20 H. 7. 2 Br. Affes enter mains, pl. 12. cites S. C. — Br. Executor, pl. 179. cites S. C. And says that in the same Year, Fol. 4. by the Opinion of all the Julifces except Kingmill the Property is charged to the Executor, and the Pledge shall not remain in their Hands as Affes.— D. 2. b. pl. 6. Paich. Mich. 6 H. 8. S. P. — In Debts against the Executors of R. at the Issue, upon fully administrated, pleaded &c. the Plaintiff gave Evidence, That they had Goods, Plate &c. in their Hands; The Defendant pleaded, That they redeemed Part of them with their own Money, which Goods were pledged by the Testator to the full Value, and for the Refuses that
that they had paid for the Debt of the Testator so much to the full Value, or more. And upon Demand it was adjudged good Evidence for the Executors to maintain the Issue; for a Man shall have Recompence for that which he hath lawfully paid; as a Defier paying Rent it shall be recouped in Damages. And it is not like the Cane, where the Testator devises that his Executors shall sell his Land, for in that Case they may not retain it, because it is the Will of the Testator that they shall sell. Dy. 2. pl. 5. Mich. 6 H. 8.

If A. being possessed of a Lease for 60 Years of 100 L. Land, mortgages this for 500 L. or be it that the Mortgage or Pledge of a Jewel or Piece of Plate for half the Value, and before the Day limited for Payment and Redemption, A. having made B. his Executor dieth; and B. maketh Payment at the Day. Now, this Lease, Plate, or Jewel is in B. as Executor to A. and is subject to the Payment of Due and Legacies; but if the Payment be after the Day the Property or Interest is in the Executor to his Use, this is rather a Re-emption than a Redemption, and if the Executor make the Redemption by Payment at the Day with the Testator's own Money or Goods, the Thing redeemed is in him as Executor, and the Money by him paid for Redemption is well administered, the Goods redeemed being of better Value; and there is no Difference whether the whole Value of the Goods be deemed Affets, and the Money paid for Redemption Rand drowned therein, or that the Sum be still adjudged in the Hands of the Executor as Affets, and only the Surplusage of the Thing redeem'd over and above the Sum paid for Redemption. Went. Off. Ex. 71. to the Middle of S 1.

The fame of a Term. Mo. 2. Shelly v. Sackwill.

And. 22. S. C. — But unless Executor has in his Hands Money of the Testator's (it being easy to make of that a proportionable Charge or unless the Sum paid by him for the Testator, or owing to him by the Testator, amount to the full Value of all the Testator's Goods in his Hands, or exceed the same, no Alteration can be till some Election or Declaration made by the Executor, which of the Goods not exceeding the Value, he will have to be his own. Went. Off. Ex 39. — But if the Election or Declaration exceed the Debt it may perhaps be void. Ibid. 92. — If Executor pays 20s. of his own Money for the Testator, and retains a Horie of the same Value, this is a good Administration, and changes the Property if it be by Licence of the Ordinary. Br. Administrator, pl. 57. cites 21 E. 4. 21. PerChoke. Ex. Sine Quere; and the Reporter doubted. Br. Executors, pl. 116. cites S. C. accordingly, that he may well do it by the Licence of the Ordinary, which Hands with Confidence and the Law, and by this may plead Plene Administravit. But the Reporter doubted, and thought that it does not change the Property; For a Man cannot give to himself; and the Ordinary has no Property in it. — But the Executor cannot retain it suprwm without Licence of the Ordinary. Ibid.

If Executors retain Goods to the Value of 10 l. and pay 10 l. de Propriis, this shall not change the first Goods of the Testator. Br. Property, pl. 50. cites 21 E. 4. 21. — But shall remain in his Hands as Affets, and shall charge him. Br. Executor, pl. 6. cites S. C.

3. If a Man be indebted to the Testator and the Executors have not any Goods in their Hands by which they bring Debt against the Debtor and recover, where the Costs amount to the Value of the Debt recovered, in this Case they shall retain as their own Goods. 20 P. 7. 4. 6.

4. Resolved, That if an Executor with his own proper Monies pay a Debt owne by the Testator, he may retain so much of the Value of the Testator in his Hands. Mo. 2. pl. 3. Hill to H. 8. 7. Cleydon v. Spenfer.

5. Executor cannot retain Goods for Part of the Debt and have Affets against the Heir for the Refidue, for he cannot apportion his Debt, but must retain Goods for the Whole, or have the Whole against the Heir. Arg. Pl. C. 185. b. Trin. 5 Mar. 1. in Case of Woodward v. Darcy.

6. If the Executor be taken in Execution for the Debt of the Testator, he may retain so much of the Goods of Testator, and it shall be accounted Affets in his Hands; Per Periam J. Le. 112. pl. 153. Patch. 30 Eliz. C. B. in Case of Stamp v. Hutchins.

7. Executor takes in a Bond and gives another in his own Name for a Marge of the same Sum; He may retain: Mo. 260. pl. 409. Patch. 30 Eliz. cites S. C. Stamp v. Hutchins.

D. 2. pl. 5.

8. S. C. held accordingly — S.P. But if he compounds for les, the Surplusage shall be Affets. Goldsb. 79. p. 15. Hill. 70 Eliz. Anon. — But per Anderson it is otherwise of a Promiss. For the Bond Debt is not thereby discharged. Ibid.

S. Executors
8. Executors appointed to sell Land cannot retain this Land and pay so much as it is worth, and almon as Tefeator appointed upon the Sale. For it is both against the Words of the Will, and the Intenion of the Testator. Jenk. 189. pl. 88.

9. A. is a Principal, and B. is Surety in a Bond. A. dies, B. takes Administration, the Bond is forfeited; B. gives the Creditors a Bond in discharge of the Debt. He cannot plead Plene Administrativ, and by shewing this Matter be relieved, because by joining with the Principal the Debt became his own Debt. 4 Le. 236. pl. 373. Mich. 5 Jac. C. B.

10. Two Men were bound jointly in a Bond, one as Principal and the other as Surety; the Principal died Intestate, the Surety took Administration of his Goods; and the Principal having forfeited the Bond, the Surety made Agreement with the Creditor, and took upon him to discharge the Debt; In Debt brought by another Creditor, the Quetion was upon fully administrably pleaded by the Administrator, if by shewing of the Bond, and that he had contented it with his own proper Money, whether he might retain so much of the Intestate's Estate; And it was adjudged that he might not; For Flemming Ch. J. said, That by joining in the Bond with the Principal, it became his own Debt. Godb. 149. pl. 194. Mich. 5 Jac. in C. B. Anon.

11. It has been adjudged that Executor may retain for a Debt due to him from Testator on a simple Contract; Per Hale, Vent. 199. Pach. 24 Car. 2. B. R. in Cale of Seaman v. Dec.

12. As far as the Personal Estate goes the Administrator may prefer himself, but no further; Afterwards they can only share with the other Creditors &c. 2 Chan. Cafes 55. Trin. 33 Car. 2. Gell v. Adnderley.

13. B. was bound as Surety for A. to C. and for B's Indemnification A. assigned to B. a Term for Years and dies, and made B. Executor; J. S. was a Creditor to B. by simple Contract, and there being no personal Ailts left, A. having applied all them to the Payment of his own Debt, J. S. would have the Benefit of the Term for Payment of his Debt, fed non allocutus, for that the Executor may apply the personal Ailts one Way or other. 2 Vern. 36. pl. 29. Hill. 1638. Sprinnet v. Delawne.

14. If an Action be brought against a special Administrator and the Administration determines pending the Action, he ought to retain Ailts to satisfy the Debt which is attached on him by the Action; Per Holt. Comb. 465. Hill. 10 W. 3. B. K. Sparkes v. Crofts.

15. Administrator may retain a Bond Debt against Rent, but he cannot plead a Bond Debt due to another. 1 Salk. 326. Hill. 11 W. 3. B. K. Per Curiam in Cale of Gage or Gray v. Action.

16. A Court of Equity will never affix a Retainer, and if there are equitable Aftets only, the Executor ought not to retain to pay all but only a proportionable Part. Per Ld. Wright Ch. Prec. 181. Mich. 1700. Hopson v. Dryden.

17. If Administration be granted to a Creditor, and after repealed at the Suit of the next of Kin, he shall retain against the rightful Administrator. 1 Salk. 38. pl. 6. Pasch. 13 W. 3. B. R. Per Holt Ch. J. in case of Blackborough v. Davis.

18. A. 
18. A. before Marriage gave a Bond to a Trustee for his Wife to leave her 100 L. if she survived him, and after was indebted by Bond to B. in 120 L. A. died and made his Wife, who survived him, Executrix; it was objected that the Executrix cannot retain the 100 L. though she might give Judgment to her Trustee on this Bond, but that the Right of Retainer is where the Executrix cannot sue, and therefore for Necessity shall retain, and that the Debts shall be paid in Average as had been often decreed by the Master of the Rolls; but Ld. C. King held, That though in Striftness of Law the Executrix cannot retain in this Case, yet since it would be a vain Thing for her to pay the 100 L. to her own Trustee with one Hand and take it back with the other, there this Bond in Equity should be the same as if made to herself. Trin. 1725.


(M. a 2.) Pleadings in Retainer.

And. 24. pl. 1. In Debt by A. against B. Executor of C. he pleaded Plena Administration, and in Evidence A. proved that B. had a Farm of C. in his Hands of the Value of 200 Marks; The Defendant showed how he had expended 200 Marks for the Debts of Tenant. Upon Consultation with the Justices of B. R. this was admitted for Evidence in maintenance of the Issue of Fully admintitred, and it is tantamount. Mo. 2. pl. 3. cites 6 E. 6. Shelly v. Sackville.

for their Opinion, viz. Whether this is good Evidence for the Defendant without having pleaded this Matter by way of Bar? who answered that it was * not; by which they proceeded further in the Matter. — [* Quere, If the Word (not) should not be omitted]

2. A. was indebted by Bond to B. in 20 L. and to C. in 60 L. A. makes D. his Executor and dies. C. makes D. his Executor also and dies; D. may retain against B. for the 60 L. but then he must plead as of his Election made before the Action brought by B. 2 Brownl. 50. Hill. 8. Jac. C. B. Burdett v. Pix.

3. An Action of Debt brought against an Administrator, who pleads that the Intestate was indebted to him by Obligation, and he retained the Money in his Hands to satisfy the Debt. The Plaintiff replies that the Money was not due and payable to him at the Time of the Intestate's Death; and that he took Administration after the Day of Payment; and if the Administrator had pleaded, he might have took Administration before the Day of Payment; and the Court held the Defendant's Plea good, but he shall not have the Forfeiture. Brownl. 73. Pach. 12 Jac. Grove v. Jourdain.

4. Administrator Defendant may give Retainer in Evidence or plead it at his Liberty. Brownl. 75. Bond v. Green.

5. On pleading, Plaintiff demurred because it did not appear that Administration was committed to the Defendant, and so had no Colour to retain; adjudged for the Plaintiff, for the Plea is insufficient. 2 Jo. 23. in C. B. Calverly v. Ellifon.

6. In Debt against an Executor he pleaded, that the Tenant was indebted to him on Bond condition'd to pay Rent, and that at the Time of his Decease there was 300 L. due for Rent, and that he had no more than 60 L. Ass'ts to pay it; the Plaintiff replied, that at the Time of the Tenant's Death there was but 30 L. due for Rent. The Court held this a good Replication, though the Penalty of the Bond was forfeited at the Time.
(N. a.) The Power of an Executor.

[Or; The Power of a Feme Executrix.]

1. A Feme Executrix cannot give the Goods of the Testator in Pious uses without the Assent of the Baron. 18 H. 6. 4. b. admiss/ed by Blue. Contr. 8 H. 6. 4. b. 

2. A Feme cannot make Acquittance or Releasewithout her Baron. 27 G. 3. 82. 

Er. Executor pl. 155. cites 16 H. 6. Contra, that the Releas of a Feme Covert Executrix is a good Bar; 6 of an Infants Executor. But Brook says Spare of a Feme Covert. 

3. Before Entry Executor may alien a Term; Arg. Pl. C. 520. b. Hill. 22 Eliz. in the Case of Welden v. Elkington. 

4. Executors may justify the Entry into the House of their Testator upon the Heir or Succesor to take the Goods of their Testator if the Doors are open. Br. Executor, pl. 129. cites 21 H. 6. 30. 

5. If Administrator on Condition before the Condition broken gives S.C. cited the Goods of the Intestate, and after the Condition is broken, the Gift stands good. 6 Rep. 19. in Packman's Case, cites Dy. 339. 17 Eliz. and 34 H. 6. 14. a. b. 

6. Executor will not sell Testator's Goods at the Value, or sell under the Value, he shall be charged, and the Party shall demand the Debt against him with an Averment; But if upon a Recovery against Executor the Plaintiff has a Fi. Fa. to the Sheriff of Testator's Goods, and they pro defectu emptorum remanency &c. and a Vindicationi Exposas is awarded, and the Sheriff sells them under the Value, the Party has no Remedy unless he does it by Covin; Per Frowike Ca. J. Keilw. 64. b. Trin. 29 H. 8. 


7. Administrator has the absolute Property of the Goods in him, and Covin, may give the Goods to whom he will, and though the Adminiftration is afterwards revoked by Citation, (but if it on Appeal it is otherwife) yet the Gift is not defeated; But if the Gift be by Covin, this shall be void, Packman,


10. An Executor cannot waive a Term, but he shall be charged for the Rent if he has Affairs; for he is obliged to perform all Contracts of the Testator if he has Affairs, be the Rent high or low. 1 Lev. 127. Hill. 15 & 16 Car. 2. B. R. Hellier v. Caebebert.

An Executor that intermeddles cannot waive a Lease or any other Part of the Testator's Estate, for he cannot assume the Executriceship for Part and relitig for Part; but in Cale the Land is not of more Worth than the Rent, it is a good Plea to an Action of Debt in the Debtor and Definitet, for he is to be charged in the Definitet only; though when the Rent is of less Value he may be charged in the Debtor and Definitet for what is accrued in his own Time, according to Hargrave's Case 5 Rep. Vent. 271. Trin. 27 Car. 2. B. R. Bolton v. Cannon. — Freem Rep. 504. pl. 510. S. C. it seemed per Cur. that an Executor could not waive his Term; for if he had Affairs he should be charged de Bonis Testatoris, and the Profits of the Land are only Affairs to the Rent, and only the Surplus above the Rent is Affairs to other Debts.

11. A devised 1000 l. to be laid out in a Purchase of Lands, or otherwise to the best Advantage, and the Interest thereof to be paid to B. till a good Purchase of some good Lease, Annuity or Rent-charg should be made therewith for B. during his Life, but if he died before such Purchase, then 500 l. to C. and 500 l. to D. On Bill for her 500 l. Defendant pretend the Money was all spent at Law for B. whilst he lived and was under his Care, and otherwife for his Benefit. Decreed the 500 l. and Damages since the Bill to D. for that the Defendant could not lay out the Money in any other Manner than such as was directed by the Will. Fin. Rep. 250. Pasch. 28 Car. 2. Corbet v. Franklin.

12. Monies due on a Contract for Land are secured by Bond. Vendor dies, and leaves three Executors in Trust, and one of them delivers up the Bond and takes a new one in his own Name, and the Name of his Co-Executors, and releases the Articles, by which Means 500 l. Interest was left to the Infant for whom the Trust was. Fin. C. decreed the Payment to be made according to the Times of Payment in the first Articles, and the said Executor and the Vendee to be charged therewith notwithstanding the Release. 2 Chan. Cales 235. Mich. 29 Car. 2. Hilliard v. George.

13. A devised a Term to his Executrix for Life, and after to his Daughters. The Executrix asbent to the Legacy, and assigned the Term, though there was not want of Affairs, and died. Decreed the Term to the Daughters. Fin. Rep. 378. Trin. 30 Car. 2. Tomlinson v. Smith.

14. A devised Lands to B. to pay Mortgages first and then Legacies, and makes B. Executor. Executor mortgaged the Lands to raise Money to pay other Debts of A. 'Th' Debts are not directed to be paid by the Will,
Executors.

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Will, but only Mortgages and Legacies, yet such new Mortgages shall take Place of the Legacies; Per Finch. C. Vern. 69. pl. 65. Mich. 1682. Brent v. Beft & al.
15. Some Debts owing are within the Statute of Limitations, and Equity will the Executor refuses to plead the Statute. Ld. Somers denied to give Leave to the relibatory Legatee to make Defence instead of the Executor, and to enable him to bar such Creditors by pleading the Statue Chan. Prec. 100. pl. 88. Mich. 1699. Ld. Castleton v. Fanthaw.

Equ. Abr. 505. S. C.

16. Upon the Death of a Termor Reversioner entered and died seized, Afterwards Administration De Bonis non is granted. Per Car. the Term had an Existence as soon as the Administration was granted, and the Administratrix may have a special Action of Trespasts, fo his Entry not told d. 5 Mod. 384. Hill. 9 W. 3. B. R. Trevillian v. Andrew.
17. The Executor has such immediate Possession of Goods at a Distance, of the Testator's that he may maintain Trover for them in his own Name against any Converter of them, and the Damages recovered shall be Austs in his Hands. 6 Mod. 181. Pach. 3 Ann. B. R. in Cafe of Jenkins v. Plume.
18. As an Executor may fell, fo he may mortgage, and the Purcha-

sor is not concerned to see the Estate cleared, though it was once held otherwise in Cafe of a specifick Legacy in the House of Lords, which he said was an hard Cafe, and hap'd would never happen again; but if it did, he did not know how it would be a Precedent, but he would not allow it in any other Cafe; Per the Matter of the Rolls. Trin. Vac. 5 Geo. 1719.
19. Executor is no more than a Trustee made by the Testator, and has not the same Right to the Personal Estate as the Heir has to the Lands; for the Heir is to sit in the Seat of his Ancelors; Per Car. 8 Mod. 126. Pach. 9 Geo. in Cafe of Goodright v. Opie.

(N. a. 2) Power to prefer one Creditor to another, or pay his own Debt first.

1. If all the Goods are but 25l. and Debts are due to two by Obliga-
tion, each of 20l. the Executor may pay which of them two he will. Br. Executor, pl. 172. cites Dr. and Stud. fo. 76. cap. 10.
2. Where an Action is brought against an Executor for a just Debt, if the Plaintiff fears he will confess a Judgment to another to defeat him of his said Debt, he may move the Court that the De'endant may plead to his Action in the same Term, in which the Plaintiff declared against him, and not be bull'd to gain Time by an Imparlance; Per tot. Car. 1 Bull. 122, 123. Pach. 9 Jac. Anon.
3. Verbal Demand of a Debt from the Executor by one Creditor where there are other Creditors in equal Degree, takes not away the Executor's Power of Preference where the Debts are all presently due. Went. Obs. Ex. 143, 144.
4. An Action was brought against an Executor, and pending that Action, he procured another to commence an Action against him for a just Debt due and owing by his Testator; and the Executor gave way to the Plaintiff in the last Action, to obtain Judgment before the other, which Judgment
Judgment he pleaded to the 1st Action, and adjudged good, because he has Liberty to pay one Debt before another; for though in Conscience all his Testator’s Debts ought to be paid, yet there may be some Circumstances, which may make it reasonable to prefer one Creditor before another. As if one lends Money without Usury, and the other with Usury, or if the Detinee is very poor, and in such Case where the Executor consents to pay him first, it shall never be intended to be by Covin. Sid. 21. pl. 3. Hill. 12 Car. 2. C. B. Blundevill v. Loverdall.

5. An Executor or Administrator may in many Cases suffer a Judgment where he might have avoided it, and yet the Creditors without Remedy; As if Debt upon a simple Contract be brought against an Administrator or Executor, and be suffered Judgment against him, this Judgment may be pleaded to other Creditors; and that hath been so ruled in B. R. which was admitted by Pemberton. Freem. Rep. 256. pl. 271. Trin. 1678. C. B. Per Cur. in Case of Drake v. Randall.

6. The Executor of a Testamentary Estate has the Power over it so as to alien or sell as he shall judge necessary; And if it be sold in prejudice of a Specieck or a Refiduary Legatee they may have their Remedy against the Executor, but not follow the Estate in the Hands of a Purchazer. 2 Vern. 445. Mich. 1703, in Case of humble v. Bill. But this Decree was afterwards reversed in the House of Lords. 2 Vern. 444.

The Master of the Rolls cited S. C. but said that he took it to have been since resolved, and that with great Reason that the Executor, where there are Debts, may sell a Term devoted to another, and the Device has no other Remedy but to obtain from the Executor to recover the Value if there be sufficient Affairs to pay Debts; But he admitted if an Executor should sell for an under Value, or to one who has Notice that there are not Debts, or that all are paid, this might be another Consideration, but it not being so in the present Case he dismissed the Bill. 2 Wms’s Rep. 148. Trin. 1743. Curtr. B. Corff, where the Case was. That a Termor devised his Term to J. S. and made B. Executor; and A. dying indebted, B. sold the Term, and his Honour said, That Notice of the Devise of the Term was nothing; For the very naming him Executor gives Notice, so that if Notice were any Hindrance no Executor could sell; and to put a Purchazer of a Term to take Account of Debts is not reasonable, and would lay an Embargo upon all Personal Estates in the Hands of Executors and Administrators, which would be attended with great Inconveniences, unless there is some particular Trust or a Fraud in the Case, it is impossible to say, but the Sale of the Personal Estate made by an Executor must stand, and that the Creditors cannot afterwards break in upon it. Per the Master of the Rolls. Barn. Chan. Rep. 81. Pauch. 1740. Eliot v. Merryman.

7. The Law gives an Executor, being a Creditor, a Preference, and not only to, but the Law allows this Executor to give any other Creditor in equal Degree a Preference. Per Parker C. 10 Mod. 496. Pauch. 8 Geo. in Canc. in Case of Cock and Goodfellow.

So in such Case the Debt of the Executor must be in equal Degree with the Debts of others, and then he may prefer himself according to the Rule of In Equali Jure Melior off Conditio Poenitendi Went. Off. Ex. 142.

8. But true it is that Chancery will sometimes interfere, because these Powers may be an Inlet to Fraud. Ut supr.

9. But it will never take from the Executor himself this Preference which the Law gives him. Per Parker C. Ut supr.

10. A. a Freeman of London possessed of several Leasehold Houses, and other Testamentary Estate, by Will devolved one Third of all his Personal Estate to his Wife; Another Third to his Children, and his own Testamentary Third to his Wife for Life; Remainder to such of his Children as should be living at his Wife’s Deceac; and having made his Wife Executrix, appointed J. S. Overfeer of his Will, giving him 101. for his Care in seeing the Will performed. She sold all the Leafes to J. S. the Overfeer of the Will. The Wife died, and the surviving Child would have
set aside this Sale as purchased by one privy to the Will and Estate, and in Breach of Truth, and would have distinguished this from the Cafe of Cuer v. Corbet; but the Court said, That this was not so strong as that, because here nothing specific, nor any particular Lease was devised to the Children as in that Cafe, but only a third Part of his Personal Estate in general. Per the Master of Rolls. 2 Wms's Rep. 150. *Trin. 1723. *Burring v. Stonard.

11. A Bond was put in Suit against an Executor who pleaded Plane Administration, that he was a Bond Creditor himself, and had paid himself; on the Trial it appeared there was an Interposition of 50 l. after the Bond was executed; so at Law the Bond was entirely void. Now Application was made, that though the Bond be void at Law, that it may be considered as good in Equity for what it was really given. Ld. Chancellor said, That this at most can be a Charge by simple Contract; for you yourselves have destroyed its being as a Bond, so it is as if it never had been; and so can be no Bar to the Payment of a Debt of a superior Nature. Cafes in Canc. in Ed. King's Time. 24. *Trin. 11 Geo. Anon.

(O. a) The Power of Executors &c. among themselves.

1. If two have Lease for Years as Executors, and one aliens the Mo 352.
Whole, this shall bind the other, and all shall pass; for each has the more *Power to dispose of all, being in Possession Right of the Tenantor. 37 Eliz. B. R. agreed and adjudged, *Panel against Pn. Executors sold it to one, and the other Executor sold it to another, and adjudged that the Executors did not take as Devisees, and so to have Meloeties, but that they took the Term as Executors, though as to Freehold Land devised to them by the same Will they took that as Executors —Cro. E. 347. pl. 19: S. C. held that the Executors took not the Term as a Legacy but as Executors.

2. Rot' Parlament, 43 E. 3. No. 22. the Commons pray that where a Man makes several Executors, and dies, and one of the Executors refuse the Administration, that Acquaintances made by him who refused Administration be not prejudicial to them who accepted Administration, but such Acquaintances be void.

A N S W E R.

3. Let the Law before this Time iled upon this Point be held and kept.

4. Surrender of a Term by one Executor is good for all. D. 23. b. Two Executors have a Term. Marg. pl. 146. cites 21 H. 7. 25. b.

One grants to a Stranger all that which to him belongs. The Court seem'd that the whole Term passes, because each of them has the entire Authority and Interest in the Term as Executor; Though of other Jointenants it is otherwise. D. 23. b. pl. 146. Mich. 28 H. S. Anon.

5. Release of a Debt by one shall bind the other. D. 23. b. pl. 146. 5 P. per Marg. cites 4 H. 7. 4. b.

was a good Cause of Equity against him that released. —Godb. 451. 412. pl. 406. Pulch. 5 Car. —But by Jones J. there is no Remedy for the other at the Common Law. Ibid. 452. —Per Henr all shall be bound by it. Godsb. 141. in pl. 54 —A. takes Goods out of the Possession of one Executor, Release by the other Executor is a good Plea. 5 Le. 209. Arg. cites 16 H. 7 4.


7. They
Executors.


12. Two Executors bring Debt. One is summoned and served. The other prosecuted to Judgment. He that is summoned and served shall not be received to acknowledge Satisfaction of Debt and Damages recovered, because he has not Day, nor is privy to the Judgment, but included of it, and yet his Release before Judgment shall be a Bar notwithstanding the Severance. D. 319. b. pl. 15. Mich. 14 & 15 Eliz. Anon.

13. Two Executors make Partition of Specialties of Testator; after one releases to the Debtor a Bond which by the Partition belong to the other, the Debtor having notice of the Partition, yet Chancery gave no relief; but if the Release had been got by Coemior les than the just Debt was, the Debtor should satisfy the Overplus. Mo. 620 pl. 846. Mich. 42 & 43 Eliz. in Canc. Anon.

14. If an Action is brought against one Executor where several are, and he admits the Writ and confesses the Action, this shall bind all the Goods of the Testator as well as if they were all named; Per Hern. Goldsb. 141. pl. 54. Hill. 43 Eliz. in Cafe of Nefcon & al' v. Gennet & al'.

(O. a. 2) What particular Interest he has in the Goods of the Testator.

1. GOODS which one has as Executor are not forfeited by Outlawy for Debt &c. or upon Conviction or Attainder of Felony or Treason. Wentw. Off. Ex. '85.

2. If a Villain had been made Executor his Lord could not take those Goods which he had as Executor, and for taking such Goods or for a Debt due to the Testator the Villain might have lued his Lord. Went. Off. Ex. '85.

3. The Goods of Testator are not to be taken in Execution for Executors Debt, whether upon Recognizance Statute or Judgment had against the Executor. Went. Off. Ex. '56.

4. Executor can't devise the Lands which he has as Executor; Per Williams J. Arg. 3 Buls. 7. Hill. 12 Jac.

5. In Evidence to the Jury in an Action of Debt, It was said by Dyer and Manwood, That if Executors grant Omnia Bona fina that the Goods which they have as Executors do not pass, and cited to E. 4 b. by Danby. But the Contrary was holden by Wray Ch. J. and by Flowdeu
Plowden in Bracelidge's Case P. 18 Eliz. and they denied the Opinion of 10 Eliz. 4 to be Law, for by such Grant made by Executors the Goods of the Tsettator de pafs. Le. 263, pl. 351. 19 Eliz. C. B
Ld. St. John v. the Counts of Kent.

6. If an Executor releases all Actions, Suits and Demands whatsoever which he had for any Cause whatsoever, this extends only to such as he has in his own Right, and not to such as he hath as Executor. Per Holt Ch. J. Show Rep. 155. Pauch. 2 W. & M. in Case of Knight v Cole.

7. An Executor may have Trepass for taking Goods in his Time Quaere Bona & Catalla but because of the Possession, and so may a Servant; but it for Trespasses in Tsettator's Time the Words are quaevrunt Tsettators. Per Holt Ch. J. 2 Show, 155. Pauch. 2 W. & M.

(P. a.) For what Debt of the Tsettator the Executor may be charged.

1. A
ction of Debt lies against the Executor upon Arrearages Though no
of Account made by the Executor himself at Receipts up
Tsettator. 2 H. 4. 13. 6.

2. So it lies upon Arrearages of Account found before Auditors. For Au-
ditors are by Statute Judges of Record, but Tsettator could
not wage his Law, 4 H. 6. 18. 10 H. 6. 25. 11 H. 6. 48. But if
Tsettator was found in Arrearages of Account before Auditors who
were not Auditors within the Statute of Wettminister 2. but Auditors
at Common Law, the Executors shall not be charg'd, because they
are not Auditors of Record. 10 H. 6. 25.

3. The Executor is not chargeable for Debt due by Tsettator Debt upon a
Contrat of the Intestate

4 A
Executors.

not after the Law, but that against an Affiance Wager of Law did lie; It was adjudged for the Defendant. Cro. C. 137. pl. 6. Pauch. 6 Car. B. R. Morgan v. Green. —— Jo. 223. pl. 2. S. C. adjug'd per tot Cur. that the Affiance shall have no other Remedy than the Debeeree himself had, and this was by Action of Debt, or Action on the Cafe in the Life of the Debtor, and after his Death by Action for the Cafe against Executors, and to the Affiance may have Action on the Cafe but not Debtr.

Action of Debt will not lie against Executor for Debt upon simple Contract if the Executor demurs to it, but Affirmant will. 1 Lev. 201. Hill 18 & 19 Car. 2. B. R. Palmer v. Lawson—Sid. 532. pl. 17. S. C. held that the Executor is not bound to use Dilatatories, but he may demur to it if he will, or he may answer to it if he will. —— Yet Debt will lie if Executor pleases; Per Hale Vcnt. 199 Pauch. 24 Car. 2. B. R. Semian v. Dec.

Debt will lie on simple Contract. 1 Built. 183. Trim. 9 Jac. Strong v. .


In the other Editions cites S. C. but not S. P. directly but only by way of Reference. —— Where a Man leaves for Life of the Lejsson and the Lejsson dies, Action of Debt lies against his Executors without Specialty. Per Pinch and the Servants Br. Executor. pl. 53. cites 42; E. 5. 42. —— So upon a Lease for Years; for where the Tettator can't wage his Law the Executor shall be charged. Ibid. —— Cro E. 485. S. C.

By what Action.

5. 9 Rep. 87. Pinchon's Cafe. By all the Justices and Baronets, that where the Tettator upon a Bond of 2001. to him assained to pay it on Demand, the Executor may be charged in an Action upon the Cafe in Affirmant, because the Tettator could not have waged his Law in this Action though it be intire with a Trestal, as the Action has, yet non montium cum Personam. Pl. C. 101. Norwood against Read. 15 E. 4. 16. and this agrees with 9 Rep. 87. Pinchon's Cafe. Debt does not lie against Executor for eating and drinking of the Tettator, because the Tettator in this Action might have waged his Law.

6. 4 P. 7. 16 b. 9 Rep. 87 b. The same Law of a Limner for his Wages. 4 P. 6. 19 b. Because such Servant was not compellable by Statute to serve, and so could not wage his Law. Went. Off Executors. 121. —— Debt against Executors of N. P. of 10 Marks, and counted that he was retained with the Tettator in the Art of a Limner by the Year, &c. Per Marten. Executors shall not be charged without Specialty in this Cafe; for there is a Diversity between this Cafe and a common Labourer, who may be compellable to Labour in Spight of his Teeth, and his Salary is put in certain by the Statute, and therefore there the Master cannot wage his Law, and therefore the Executors shall be charged; Contra in this Cafe, for here he is not compellable to serve, and therefore it is his Polly that he had not taken Specialty of his Salary; quod non negotium. Br. Executors, pl. 87. cites 4 H. 6. 19.


8. If A. by Deed makes B. his Attorney General to retain Servants, and he retains one, and after A. makes B. his Executor and dies, the Servant shall not have Debt against the Executor for Wages incurred in Life of Tettator, because Tettator might have waged his Law if Action had been brought against him notwithstanding the Decr. 46 E. 3. 15. (B. Quere this, because as to the Tettator it was a Contract made by other Hands.)
9. If the Testator makes a Contract and dies, and his Executor by his Deed acknowledges the Contract, the Action of Debt lies against him, though the Testator might have warded his Law in the Action, for he might have denied the Contract of which the Plea the Executor is ousted by the Deed. 46 C. 3. 11. Adjudg'd 11 H. 6. 48 b. without Deed.  
   So for Arrear's after Death of Lees for Leas for Life or Years. 46 C. 3. 10. without Deed. 11 H. 4. 64 b. unless entred or agreed. Yelv. 130. Houfe v. Webber. — S. P by Markham Ch. J. because in such Case the Testator could not wage his Law, and therefore the Executor shall be charged. Br. Executor, pl. 127. cites 21 H. 6. 1.  

10. If a Servant be retained for a certain Sum to serve in War, if the Bailiff dies Debt does not lie against his Executor for the Salarie without Deed. 2 H. 4. 14 b.  
   Br. Destr, pl. 53. cites S. C. — Br. Executor, pl 51. cites S. C.  

11. Action of Debt lies against Executor for Arrarages of Rent incurr'd in Life of Leeser relieved upon Lease for Life or Years. 46 C. 3. 10. without Deed. 11 H. 4. 64 b.  
   Br. Destr, pl. 53. cites S. C. — Br. Executor, pl 51. cites S. C.  
   never entred or agreed. Yelv. 130. Houfe v. Webber. — S. P by Markham Ch. J. because in such Case the Testator could not wage his Law, and therefore the Executor shall be charged. Br. Executor, pl. 127. cites 21 H. 6. 1.  

12. In an Action of Debt against an Executor, for Fees and Charges by him expended as Solicitor of the Testator, in a Suit against the Testator, if the Executor pleads no unique Executor to unnerk Administavt ut Executor, and afterwards Judgment is given against him, yet he may reseive this in a Write of Error; for it appears to the Court that the Action does not lie against the Executor, and the Plea indented has not contested the Contract. 37, 38 Eliz. B. R. Adjudged in a Write of Error, German against Roules.  
   Br. Destr, pl. 52. cites 50 H. 4. 23.  
   Note per Davers, That where Debt does not lie upon a simple Contract against Executors, yet if the Creditor was in Debt to the King he shall have Lino minus in Seaccoaro of it by the common Uc.  
   Br. Executors, pl. 128. cites 17 E. 3. 17.  

13. Deatine was brought by a Feme against the Executor of her Baron of the Moiety of his Goods by the Custom, and well. Br. Executors, pl. 128. cites 17 E. 3. 17.  

14. Debt against Executors upon Tally of their Testator sealed written by Br. Destr. Words, that the Testator had put his Seal to it to pay 20 l. and two Sketches. Pl. 52. cites were in the Tally, and it was awarded that the Plaintiff take nothing. S. C.  
   By his Writ; And per Skrene the Reason is, insomuch as the Writing may be pur out by Water &c. and a greater Sum written &c.  
   Br. Executors, pl. 60. cites 12 H. 4. 23.  
   Br. Executors, pl. 159. cites 10 H. 6. 24, 25.  

15. Executors shall be charged in Debt of the Excess which their Testator Lord of D. had received of his Bailiff found before Auditors assign'd upon Account, and Auditors assigned by the Executors after the Death of the Testator. Br. Executor, pl. 159. cites 10 H. 6. 24, 25.  
   If Termon be in Arrear of Rent, and makes Executors and dies, and the Executors occupy, they shall be charged of the Arrears; but if they waive it and do not occupy then e contra. And to see that the Termon himself cannot waive, but the Executors in whom no Pilly is
Executors.


18. And it is said elsewhere, that where a Men takes Land for Years, rendering more Rent than the Land is worth, and makes Executors and dies, if the Executors waive the Land they shall be discharged of the Rent; Contra if they occupy. Br. Waiver de Chooses, pl. 10. cites 21 H. 6. 24.


20. Debt against Executors of Goods sold to the Testator, the Attorney was demanded, who said that he would avow the Suit; by which Littleton awarded that he take nothing by his Writ; For where the Testator might have waged his Law the Executor shall not be charged, and so he Judgment ex Officio without Demurrer by the Defendant; Quod Nota. Br. Executor, pl. 80. cites 15 E. 4. 25.

21. If a Creditor of the King issues Tally of the Exchequer to the Custom- er or Comptroller, who dies, this shall charge his Executor as well as the Customer or Comptroller himself. Br. Executors, pl. 157. cites 2 H. 7. 8. 9. and 1 H. 7. 17.

22. Debt lay against Administrator for Money paid by Plaintiff to Intendee to traffick with for Plaintiff; and this signified by Note of Intellate, D. 20. a. pl. 118. Trin. 28 H. 8.

23. The Words of a Leave are, that it shall not be lawful for Leefe to sell, give or grant his Term aforesaid, yet Executor shall not forfeit. D. 65. b pl. 8. Mich. 3 E. 6.

24. If A. covenants with B. to put his Son Apprentice to C. or otherwise that the Executors of A. shall pay B. 20 l. and A. does not put his Son Apprentice to C. but dies, B. shall not have Debt against the Executors of A. for it cannot be a Debt in the Executor where it was none in the Testator; Adjudged. Cro. E. 232. pl. 2. Parch. 33 Eliz. Parrot v. Aulfin.

25. In all Cases where any Price or Value is set upon the Thing in which the Offence is committed, though he that did the Offence dies, the Executors shall be charged for this Offence; As in the principal Case of an Information for cutting 100 Oaks growing on the Land of the Queen to the Value of 100l. or if it were for the taking of 20 of the Queen's Trees of the Value of 20 l. the Executor shall be charged. But when the Action or Information is for spoiling of Graves &c. ad Damnum &c. the Executor shall not be charged; Per Manwood, which was a- greed for good Law. Sav. 40. pl. 90. Mich. 24 & 25 Eliz. Sherington's Cale.

26. The Testator retained an Attorney of C. B. to prosecute a Suit in that Court. Resolved that an Action will lie for his Fees which be due to him in that Suit against the Executor of the Testator, because the Testator in such Case could not wage his Law; but for Monies expended in Suits in other Courts by the Attorney, the Action will not lie. Mo. 366. pl. 500. Mich. 36 & 37 Eliz. B. R. Rolls v. Germain.

27. Action grounded on a simple Contract lies not against Executors unless upon Assumpsit for a Debt due or owing by the Testator himsif, and not upon such a collateral Matter as the Forbearance of the Debt of another. See Owen 57. Trin. 37 Eliz. Gowood v. Binks, and cites the Case of Jordan v. Harvey.

23. Assumpsit.
28. Affirmuit was brought against an Executor upon a Promise of the Tefator, to pay 100l. in Consideration of the Marriage of his Daughter, when required; The Defendant pleaded Non Affirmuit, and Judgment was given in B. R. for the Plaintiff; but upon Error brought in Cam. S. C. and Scaee, the Judgment was reversed, for that the Action did not lie against the Executor. Mo. 691. pl. 954. Mich. 37 & 38 Eliz. Rotheram v. Stibbing.

Anderson said, that the Reason why Debt lies not against Executor on the Contract of the Tefator is, because the Law does not intend that he is privy thereto, or can have Notice thereof, and he cannot or may have his Law for such Debt as the Tefator might, and when Debt will not lie, it is not fit that this Action upon a bare Promise should be given; for it stands all upon one Reason; and if these Executors shou'd be allowed it would be very mischiefous. —— Ibid. says, Note that the same Term the like Judgment was given between Griggs and Kittlucic, in an Action against an Administrator on a Promise of the Intestate's to pay Monies &c. —— S. C. cited Mo. 691. as adjudged, and Judgment reversed accordingly. —— Cro. E. 459, pl. 2. Hill. 39 Eliz. Scalf v. Rolle, S. P. and Judgment in B. R. reversed in Cam. Scaee accordingly.

29. A Man by his Will devised 40l. to two Infants equally. The Yelv. 23. Whorwood delivered the Money to one to whom the Defendant was Executor, who made a Bill sealed, stating that he had received the 40l. to the Use of the Infants. One of the Infants died Intestate. His Administrator brought Debt against the Defendant, the Executor of the Bailee. It brought, by the Defendant the Action was maintainable, and the Specialty, although it was not made to the Infant, yet it was a sufficient Testimony of the Debt on which the Executor is chargeable. Mo. 667. pl. 914. Hill. 42 Eliz. Shaw v. Norwood.


30. Debt for a Relief was brought by the Executor of the Lord against the Executor of the heir who was to pay it; and adjudged for the Plaintiff. Cro. E. 883. pl. 17. Pach. 44 Eliz. B. R. St. John v. Brandring.

and the Judgment affirmed in Error.


Thing, viz. Meat and Drink, which binds even an Infant to Payment, yet will it not charge an Executor of one of full Age; but this is meant where the Contract is only by Word. Went. Obl. Ex. 120. —— Mo. 433. pl. 608. S. C. & S. P. held by the greater Opinion in the Exchequer Chamber.


the Cafe lies against the Executors &c.


34. In Debt against Executor of Leefe for Years for Rent arrear, the Executor pleaded, That he never agreed to the taking of the Term; but the Plaintiff had Judgment. For inasmuch as he took upon him the Office of Executor he cannot refuse the Term. Lat. 261. Arg. Hill. 15 Jac. C. B. Rot. 3263. Heydon v. Hudson.

4 B. 35 Debt
Psalm. 112. 

Exequtors.

35. Debt for Rent against an Executor upon a Lease made to the Tenant for Rent incurred after his Death. The Defendant pleaded, That after the Death of the Testator be relinquished the Possession of the Land, and did not intermeddle therewith, and had administered all the Testator's Goods. The Writ was brought in the Debt & Detinue, and adjudged good. 2dly, Resolved, the Executor could not waive the Possession, unless it had been specially alleged that the Rent was greater than the Value of the Land; for then perhaps, by special pleading of it, he might be discharged of it. Cro. J. 549. pl. 10. Mich. 17 Jac. B. R. Mawle v. Cacyfry.

36. Debt against an Administrator who pleaded that the Intestate acknowledged a Judgment to him for 100£, and died, and that he retained Goods to that Value to satisfy himself, and that he had not Assets ultra more than 40£. It was moved, that he ought to plead the general Issue, and give this Matter in Evidence; Per Hobart, He may give this in Evidence, or he may plead that the Judgment is not satisfied or discharged; but we may not compel him to change his Plea unless he will. Win. 70. Hill. 21 Jac. C. B. Bacon v. Welton.

37. Executors may be charged for Debts and Damages recover'd against Testator, and Debts by Recognizance. And so also for Debts by Statute Merchant, though Lod. Brooke thought the contrary. Went. Off. Ex. 117, 118.

38. So of Issues forfeited, Fines imposed by Justices at Westminster, or at Aliens, Quarter Sessions, Commissioners of Sewers or Bankrupts, by Stewards in Leets &c. For all these are Debts of Record which Executors stand charged withal. Went. Off. Ex. 117.

39. It seems that the Executor is liable in all Cases where Testator could not have waged his Law had he been sued in his Life-time. See Went. Off. Ex. 118. 120.

40. Executor shall be chargeable for Money due to a Gaoler by a Prisoner for his Diet; Because it is for the publick Good to have Prisoners kept, which cannot be without affording them Vitals. Went. Off. Ex. 121, 122.

41. If one has an Exchequer Order to receive Money of some Officer of the Crown, and delivers to one of them who has Money of the King's then in his Hands, but dies without paying the same, his Executor shall be chargeable with Payment thereof. Went. Of Ex. 122.

42. An Executor shall not be charged with a Trespass committed by the Testator. Toch. 151. cites 3 & 4 Car. Holland v. Owen.

43. Covenant was brought against the Executor of the Lease for non-payment of Rent upon an express Covenant. The Defendant pleaded, That before the Rent became due be aligned over to J. S. The Plaintiff demur'd. It was laid by the Court, that though the Defendant had aligned over before the Rent became due, yet be might be charged as Executor upon the express Covenant, but he could not be charged as Assignee, if he be aligned over before the Rent became due; and here the Plaintiff hath Election either to charge him as Assignee or Executor, and having charged him as Executor it is no Plea; for as he might have charged the Testator upon this express Covenant after Assignment, to be may the Executor, but then Judgment shall be only De bonis Testatoris. Freem. Rep. 377. pl. 489. Mich. 1674. Jenkins v. Hermitage.
44. If a Man desists a Term for Years, being greatly indebted and not leaving Assets, and the Executor assents to the Legacy, and the Devise enters, a Creditor that hath a Judgment due from Testator cannot take this Term in Execution by averring, that this Assent of the Executor was per Fraudem; but he must take Advantage of it by way of Devolution in the Executor. Arg. Freeman Rep. 465. pl. 636. Trin. 1678. in Case of Knight v. Peachef.

45. An Administrator pendente lite of a Will is liable to Actions. 2 Show. 69. pl. 54. Trin. 31 Car. 2. Impey v. Pitt.


47. By 1 Jac. 2. cap. 17. No Administrator shall be cited to Account otherwise than by Inventory, but in Behalf of a Minor, or by a Creditor or next of Kin.

48. An Administrator must give Bond to the Sheriff of the Penalty of 40 l. for his Appearance at the Return of the Writ, and the Sheriff is not obliged to discharge him on the Attorney's Promife to appear, but it an Attorney of this Court or of C. B. do make such Promife, the Court will compel him to perform it. Cumb. 259. Mich. 6 W. & M. in B. R.

49. On a Trial before Holt Ch. J. in Debt for Rent, he held that an Administrator is chargeable as Assizee for the Time he enjoys it, and is in Possession. Show. 348. Patch. 4 W. & M. Buck v. Barnard.


52. Tenant for Life and Remainderman joins in Mortgage of Lands, and they both covenanted and gave Bond to pay the Money; The Tenant for Life dies. Lord Cowper faid, if Remainderman pays the Money and takes up the Bond, or gets the Covenant affigned, he may proffer his Bill against the Executors of the Tenant for Life, but not else. G. Equ. Rep. 69. Patch. 7 Ann. in Case of Hungerford v. Hungerford.

53. Attorney having delivered up Deeds to an Executor, which he was not obliged to do till his Bill was paid, which Deeds would be of great Use to the Executor in several Suits that were then carrying on, the Executor having changed his Attorney, this is a sufficient Confrontation to make the Executor liable for the full Demand, whether Assets or not. MS. Tab. January 27th, 1719. Dutches of Hamilton v. Incledon.

54. An Husband voluntarily, and after Marriage, allows the Wife for her separate Use, to make Profit of all Butter, Eggs, Pigs, Poultry and Fruit, beyond what is used in the Family, out of which the Wife saves 100 l. which the Husband borrows and dies. The Court will allow this Agreement to encourage the Wife's Frugality, and the Wife shall come in a Creditor for this 100 l. especially there being no Defect of Assets to pay Debits. 3 Wms's Rep. 337. Mich. 1734. Slanning & al v. Style & al.

(P. a. 2)
Where an Executor shall pay Costs.

Keilton 277. 1. An Administrator brought Account against B. supposing B. to be Receiver to his Intestate, and before Court made A. was non-suited. B. cannot have his Adjuts directed to him by the Court by Virtue of the Statute 23 H. 8, because A. did not suppute the Defendant to be his Receiver, but Receiver of the Intestate. Bendel. 19. Pach. 28 & 29 H. 8. Allen v. Allen.

2. In Assumpsit brought by the Plaintiff as Administrator of J. S. upon a Promise made to the Testator; after Issue joined the Plaintiff was nonsuit. Costs were prayed for the Defendant upon the Statute of S. Eliz. which gives Costs against him who sues maliciously; but the Court denied to give Costs, for that it cannot be fast to be used maliciously being for another, neither can it be known but that the Plaintiff had Colour to sue. Cro. E. 69. pl. 21. Mich. 29 & 30 Eliz. Ford v. Roll.


4. Where they bring Action in their own Rights, as upon Conversion or Trespasses made to them, Costs shall be paid, sic dicituit. Savil 134. pl. 211. Pach. 39 Eliz. Drake v. Royman.

5. Debat against an Executor upon an Obligation made by his Testator. The Plaintiff was non-suited. The Defendant had Costs by Order of Court. Otherwise it is where an Executor is Plaintiff and is non-suited, for it cannot be intended that it was conceived upon Malice by him. Cro. E. 503. pl. 25. Mich. 38 & 39 Eliz. in B. R. Fetherston v. Allybon.

6. In Debat against Baron and Feme as Executors &c. they plead Payment by the Testator, and upon Issue it is found against them, and Judgment quod recuperet debirum de Bono Testatoris, and the Costs and Damages &c. And if not, then the Costs and Damages de Bono propris. And in Error it was held to be a good Judgment, although a Feme Covert cannot have Goods in her own Right; Yet the may have them as Executrix. And so Judgment affirmed. Noy 125, 126. Anon.

7. It was adjudged by the whole Court, that in those Cases where an Executor is Plaintiff touching Things concerning the Testament and is nonsuit, or the Verdict passes against him, that he shall not pay Costs upon the new Statute 4 Jac. for the Statute ought to have a reasonable Intendment, and it cannot be presumed to be any Fault in the Executor who complains, because he cannot have perfect Notice of what his Testator did, and so it was resolved by all the Judges of C. B. Brownl. 107. Hill. 7 Jac. Anon.
8. Executor declares for Goods of Testator's taken out of his Possession; but on Evidence they appear to be his own Goods. He shall be nonsuited and pay Costs; Per Holt Ch. J. 6 Mod. 94.

9. If a Man dies Intestate, and be to whom the Administration appertains is sued by others which pretend to be Administrators, and Sentence is given against the right Administrator, and Colts given against him, the Colts shall not be of the proper Goods of the Administrator, but of the Goods of the Intestate; as the Colts which were spent in the Spiritual Court, for the Probate of a Testament shall be only of the Goods of the Teftator; Per Hobart Ch. J. Winch. 11. 19 Jac. Anon.

10. If Executors are Nonsuit, or Judgment given against them upon a Verdict, they shall not pay Costs within the Statute of 23 H. 8. or 4 Jac. and so is the constant Practice, for the Statute speaks of any Contract or Specialty made with the Plaintiff, or between the Plaintiff and Defendant; and the Executor brings an Action upon the Contract of another: Winch. 70. Hill. 21 Jac. C. B. agreed in Cate of Treheran v. Claybrook.

11. If Executors have a Leave for Years, and they demise it rendring Rent, and for Rent arrear they bring an Action, it shall be in the Debt and Detinu, and they shall pay Costs if they be nonsuited, and yet their Title is as Executors, but it is founded upon their own Contract. Hutt. 79. Hill. 1 Car. in Cate of Townly v. Steele.

12. So if they bring an Action of Trepass for the taking of Goods which came to their Possession, which Goods were in Truth wrongfully taken by the Testator and demised thereof, and they being nonsuited they shall pay Costs; and Executors in Actions brought against them shall pay Costs, and if they have no Goods of the Testator it shall be de Bonis propriis. Hutt. 79. Hill. 1 Car. in Cate of Townly v. Steele.

13. An English Bill was preferred to be relieved against a Bond entered into by the Plaintiff to the Defendant's Testator, upon an Agreement of the Testator's to save the Plaintiff harmless against others. It was afterwards ordered that the Executor here being a Defendant should not pay Costs, because it is without a Precedent, and that it was no Reason to give Costs in Equity because the Law allows Costs; for that an Executor cannot plead the Recovery at Law in Exce of Affairs. Hardr. 165. Hill. 1659. Twifleton v. Thelwell.

14. Twiften conceived Executors only liable by 13 Car. 2. to pay double Costs, but not within 3 Jac. unless Debt be brought against him on the first Judgment, which be has by Deojudicatu made his own Debt, which the Court agreed. Keb. 716. in pl. 42. Pasch. 16 Car. 2. B. R. in Cate of Webber v. Bat.

15. The Ch. J. on Conference with all the Judges at Serjeant's-Inn, delivered the Opinion of the Court, that on Judgment de Bonis Testatoris an Executor that has no Affairs shall not pay Costs of Damage clear, but this follows the principal Debt, whereupon they ordered to much as was asseized for Damage clear to be delivered back by the Sheriff out of Execution. 2 Keb. 275. pl. 36. Mich. 19 Car. 2. B. R. Upton v. Noell.

16. An Administrator brings Debt upon an Obligation. The Defendant pleads Payment to himself; Upon which it was found for the Defendant. Coleman prayed that he might have Colts, As where an Executor brings an Action for Trover and Conversion in his own Time, and found against him, it was ruled in Athens's Cafe, Cro. E. that he should pay Colts, and here of his own Knowledge he had no Cause of Action, the Money being paid to him himself; But the Court resolved that there ought to be no Colts in this Cafe, for the Action of Trover in his own Time might have been brought in his own Name, so it was 4 C Needlest.
17. Executor or Administrator non-suit shall not pay Costs, though for a Tort done in their own Time. 3 Lev. 60. Trin. 34 Car. 2. C. B.

18. Lady Pye Executrix to her Husband found a Statute of 25 Geo. 1, against the Duke of Norfolk, &c. Upon her filting in it, a Deed of Covenant was shewn to her Counsel, and afterwards shewn in Court for the Delivery of the Statute un; however the proceeded and brought in a Crofs-Bill, and put them to as much Trouble as the could. Upon the Hearing it appeared that the Statute was satisfied, and ordered to be vacated, not aligned, and she ordered to pay Costs, not as to oblige her Perfon, but out of the Estate. Skin. 85. pl. 2. Hill. 35 Car. 2. Lady Pyle v. Duke of Norfolk.

19. Executor's Agent refusing to pay a Legacy because of uncivil Language given him by the Legatees, but contending Affists, decreed to pay the Legacies with Interest from the Time they were made payable, and Costs out of his own Estate. Fin. Rep. 243. Trin. 27 Car. 2. Ireland and Walthew v. Thurston and Smith.

20. An Executor lies on an Injurious Computation with himself for a Debt due to the Testator and is non-suited, he shall not pay Costs; Per three Justices, but Wild e contra. 2 Lev. 167. Hill. 27 & 28 Car. 2. B. R. Bulmer v. Palmer.

21. An Action brought against two Executors. One appears and pleads no Affists, and found against him. Judgment against both, but with Costs only against him that did appear and plead. Quere if good. 2 Show. 365. pl. 354. Trin. 36 Car. 2. B. R. Anon.

22. J. S. was in Execution in the Custody of the Defendant at the Suit of Testator. After whole Death J. S. escaped; whereupon the Executor brought Action of Debt and was non-suited. The Defendant prayed Costs upon the Statute, but it was denied, because he brought the Action as Executor, and not in his own Right; For Coke Ch. J. said, that the Damages which the Executor should recover would be Affists, and when he brings such Action it is in the Detinat. Roll Rep. 63. pl. 8. Mich. 12 Jac. B. R. Long v. Wincombe.

23. Judgment was given against an Executor who brought a Writ of Error, and the Judgment was affirmed and ruled that the Executor shall not pay Costs, and the Court always has been accordingly, which the Court said was the best Expolitor of the Statute. Skin. 400. pl. 34. Mich. 5 W. & M. in B. R. Gale v. Till.

24. In an Action upon the Cause against an Executor upon Plene Administravæ pleaded, the Plaintiff must prove his Debt, otherwise he shall recover but 1 d. Damages though there be Affists, for the Plea only admits the Debt, but not the Quantity. Per Holt Ch. J. Salk. 296. pl. 3. Trin. 5 W. & M. in B. R. Shelley's Cafe.

25. Adjudged, that where Executors sue upon any Contract of their Testator, or for any Wrong done to him, they shall pay no Costs either upon a Non-suit or Verdict against them; so wherever he must sue as Executor,
Executors.

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Executor, as for Instance, He brought an Action of Debt upon a Bond due to his Testator; The Defendant pleaded Payment of the Money to himself, viz. to the Executor, upon which they were at Issue, and a Verdict against the Plaintiff, yet he paid no Costs; but if he had brought the Money into Court, then the Plaintiff must proceed at his Peril. 3 Salk. 105. Hill. 8 W. 3. B. R. Bigland v. Robinson.

26. In all Cases where an Executor or Administrator sues for a Debt or other Thing belonging to the Testator &c. and grounds his Action upon the same Contract that was to the Testator, he shall not pay Costs if he fail in the Suit; But if he grounds his Action upon a Contract expressed, or by Implication and Operation of Law, which accrues to him after the Death of the Testator, there the Action lies in his own Name, and the naming him Executor &c. is void, and he shall pay Costs; Per Treby Ch. J. and Powell J. Ld. Raym. Rep. 437. Hill. 10 W. 3. in the Case of Nicholas v. Killigrew.

27. If an Administrator brings an Action for Money received to his Use, the same being so much due to the Intestate, and received by the Defendant after the Intestate’s Death, and the Plaintiff is nonsuited, he shall pay Costs. Ld. Raym. Rep. 436. Hill. 10 W. 3. Nicholas v. Killigrew.

28. If the Executor &c. brings an Action upon an Inamba computus, viz. 28^ with himself after the Death of the Testator, he shall pay Costs; and yet Bush 28 it is for a Duty due to the Testator and not altered; For the account of the Executor does not give any new Duty, but only alterations that was due before; Per Treby Ch. J. Ld. Raym. Rep. 437. Hill. to W. 3. in Case of Nicholas v. Killigrew.

29. The Reason why an Executor, Defendant or Plaintiff, upon a Non suit shall pay no Costs is, because the Suit being in auter Droit, he may well be thought miscomstant of the Truth of the Cause of Action. Per Cur. 12. Mod. 440. Hill. 12 W. 3. Anon.

30. Executor shall pay Costs for not going on to Trial. Per Cur. Far. So of Administrator, Far. 118.


S. P. 1 Salk. 314. pl. 21. Paich. 2 Ann. B. R.

31. Where the Thing sued for is Affects in the Executor or Administrator before Recovery, there they shall pay Costs on the Non suit; Or when the entire Cause of Action arises in his own Time. Per Powell. 6 Mod.

92. Hill. 2 Ann. B. R.

32. In Trover &c by an Executor upon a Trover &c. in his own Time And by the he shall pay Costs of Non suit; For he need not name himself Executor, and the Goods are Affects in his Hands though he never recovers them. Per Cur. 1 Salk. 314. pl. 21. Paich. 2 Ann. B. R. in Case of Eaves v. Mocato.

Geo. Courtworth v Shaffoe.—So the Administrator shall pay Costs where he declares that the Intestate was possess’d of Goods, and that after his Death, and before Administration committed, they came to the Defendant’s Hands who converted them, and it is found for the Defendant, the Conversion being since the Death of the Intestate. Vent. 109, 110. Hill. 22 & 23 Car. 2. B. R. Anon.

33. For Rent accruing in Executor’s own Time, Executor nonsuited The Re shall pay Costs. 6 Mod. 92. 93. Per Powell J. Hill. 2 Ann. B. R. porter makes
Executors.

...fays it was agreed to have been adjudg'd, as also that in Covenant with Testator, and Breach in Executor's own Time he should pay Costs.


36. Executor brought Action and declared on an Injmal Computation set with himself, Defendant could not have Costs, because such Promise begat not a new Cause of Action, but ascertained the Old which remained till the Debt of the Testator. 1 Salk. 207 cited per Cur. as the Case of Elwes v. Mocato.

37. If there was Judgment and Execution in Testator's Life, and Escape in Executor's Time, upon a Nonfuit in Action by Executor, for this Escape he shall not pay Costs, but if he had Judgment and Execution in his own Time, and an Escape had happened, for which he brings Action and is nonsuiting he shall pay Costs. Per Holt Ch. 6 Mod. 92. Hill. 2 Ann. B. R. in Case of Jenkins v. Plume.

38. If Testator's Goods are taken and converted before they come to the Executor's Hands, he shall not pay Costs upon a Nonfuit in an Action brought for these Goods, for they were never Assets; Per Holt Ch. 6. Salk. 2c8. pl. 6. Hill. 2 Ann. B. R. Jenkins v. Plume, alias, Hill.

39. Executor brought Assumpsit for Money of his Testator, had and received by the Defendant to the Use of the Plaintiff as Executor and was Nonfuit. Per Cur. he shall not pay Costs, for he could not sue but as Executor, and it is not material whether the Money was received by the Defendant since the Death of the Testator, or before; for suppose it since, it is not Assets in the Hands of the Executor till it is recovered. 1 Salk. 314. pl. 21. Patch. 2 Ann. B. R. Elwes v. Mocato.

40. Where the Executor sued not, though he does, name himself Executor, he shall pay Costs on a Nonfuit. 6 Mod. 181. Trin. 3 Ann. B. R. Jenkins v. Plumbe.

41. In an Assumpsit by an Executor for Money received after the Death of the Testator, if the Executor be Nonfuit he shall pay Costs; For the Law gave this Privilege to Executors of not paying Costs, only where the Cause of Action accrued in the Testator's Life-time; and there, because it could not be supposed that the Executor was constant or privy to the Act of the Testator. 11 Mod. 133. pl. 17. Trin. 6 Ann. in B. R. Modely & Ux's v. York.

42. Action brought by an Administrator and declares upon two Counts, one upon a Promise to the Intestate in his Life-time, the other upon a Promise to the Plaintiff himself, and names himself Administrator in both; and upon the Trial the Plaintiff was Nonfuit; And the Question was, Whether he should pay Costs? Powell J. Holt absented, said, that these two Counts could not be joined; and if an intire Judgment had been given, Judgment should have been arrested; But it is a Question, whether it might not have been made good by taking Judgment...
ment upon Count only? But in this Case the Plaintiff must pay Costs, because *Non suit* goes to the whole; And so it was ruled by Powell, Powis and Gould. 11 Mod. 256. pl. 10. Mich. 1739. B. R. Jones v. Wilton.

43. In an Action of *Trove*, the Plaintiff declared that the *Testator* was possessed of the *Goods in Question*, and being so possessed made his Will, and the Plaintiff Executrix, and died, after whose Death the Goods came to the Hands and Possession of the Defendant by his finding them, who converted them to his own Use. Upon Not Guilty pleaded the Plaintiff was nonsuited. The Court resolved here that the Plaintiff should pay Costs, for his Testator died possessed, and then the Property and Possession was vested in his Executor, and the Trover and Conversion by the Defendant was in his Time, and therefore he might have had an *Action* in his own *Name* without alleging himself *Executor*; But in the Case of *Hunt v. Balloe*, cited as now lately settled and resolved in this Court, that though the Trover and Conversion was alleged in the Time of the Executor, yet there it appeared that the Testator did not die in Possession of the Goods, and therefore there is a Difference between the Case. Comyns's Rep. 162. pl. 110. Poch. 8 Ann. C. B. Hole & Ux v. King.

44. An Executor brought *Debt upon a Bond* entered into by the Defendant to the *Testator* in 1676, and a *Breach* was assigned to be made by the Defendant in the *Executor's Time* about a Year before the Action brought; and on Issue thereupon Verdict was given for the Defendant. And Serjeant Chappie moved the Plaintiff might pay Costs, because the Breach was assigned to be done after the *Testator's Death* in the *Executor's Time*; *Sed non allocatur*; For per Cur. the Bond is the *Cafe of Action*, and the Plaintiff could not sue but as Executor, and therefore the Motion was denied. 2 Ld. Raym. Rep. 1413. 1414. Hill. 12 Geo. B. R. Portman v. Cane.

45. *Plaintiffs Executors* do not *Costs* upon the original *Judgment*, but it has been always held that *Defendants Executors* do. The same Distinction he thought ought to be observed upon Writs of Error, especially as in the present Case the *Executor* is found to be guilty of a *Devaltavit*; By the Chief Justice, to which the others agreed. 2 Barnard. in B. R. 450. Poch. 7 Geo. 2. in *Cafe* of Calwell v. Nor- man.

46. Where a *Bill* is brought to secure and have the *Benefit of a contingent Interest* devised over, the Costs shall be paid out of the Assets of the *Testator*, who by his Will has occasioned the Difficulty. 3 Wms's Rep. 303. Trin. 1734. Studholme v. Hodgson.

(Q. a) What Debts ought to be first satisfied.

1. *If* the *Testator* had acknowledged a Statute for Performance of *Covenants* in certain *Indoerentures*, ye the *Executor* cannot *plead* this in *Bare of Action* of *Debt* upon a Bond, the Statute not being forfeited at the Time, because it is uncertain whether it shall ever be forfeited. *Adjourned* 5 Rep. 28. 44. *Harrison's Cafe.* Deffart. 38 Eliz. B. K. adjudged, *Woodcok* against *Fox.*

Executors.

Heard divers learned Men doubt of it; and he thought, that if the Executor pays this Debt, and the Statute is broken after, he shall be chargeable in a Deafault of his own proper Goods.

If in this Case the Recognizance or Statute be executed by Extent upon the Testator's Lands in his Life-time, the Judgment shall not outlie it; For the Land was first bound by the Statute or Recognizance. Jenk. 274. pl. 94.

S. C. cited by Vaughan Ch. J. Vaughan, 104. that such Recognizances are to be satisfied before Debts on simple Contract, and before Debts by Obligations also.

Bridgn. 79. S. C. and Duderidge and Haughton were of Opinion for the Plaintiff, but Mountain contra. — Roll Rep. 495. pl. 36. S. C. adjoiner.


2. If the Testator had acknowledged a Recognizance with Condition for the Payment of a less Sum at a Day to come, the Executor may plead this Recognizance in Bar of an Action of Debt on a Bond, though the Day of Payment by the Condition of the Recognizance be not yet come, because this is a Duty presently and certain, and the payment is evidenced thus. Cr. 14 Ja. B. K. agreed. Rolison against Francis.

3. But if the Condition of the Recognizance had been for the Payment of 100 l. to an Infant when he comes to his full Age, this Recognizance during the Infancy is no Bar of a Debt upon Bond, because it is uncertain whether ever any Thing shall be paid upon the Recognizance, for the Infant may die before his full Age, and then nothing shall be paid. Cr. 14 Ja. B. K. Dubitatuir. Rolison against Francis.

4. If the Testator acknowledges a Recognizance in Nature of a Statute Staple, whereas the Decease was, that where the Conuniae and Testator are 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 is granted by the said Decease, that it the Testator, his Executors or Assigns, pay the 100 l. to B. at the Day, then the Statute shall be void. Though in this Case the Day of Payment is not yet come, and though it be a collateral Sum to be paid to a Stranger to the Statute, and not to the Conuniae, and to no Duty to the Conuniae, and peradventure the whole of the Testator will pay the Money at the Day, yet manifestly as it is the Payment of the Money certain, for which by Intention the Executor is to be charged, the Executor may plead this Statute in Bar of an Action of Debt upon a Bond before the Day of Payment comes. Salsch. 13 Car. 2. R. per Cur. Goldsmith against Rider. But Judgment was given for the Plaintiff for a Default in the Plea in Bar. Intratur Nisi. 9 Car. Rot. 432.

5. Where there are two Debts upon Specialties, and of the one the Day of Payment is past, and of the other the Day of Payment is not come, yet he cannot pay this Debt whereas the Day of Payment is not come before the other. Dr. and Stud. 77. b. 9 C. 4. 13.

6. If there are several Debts due to several Persons by Obligations or by Contracts, and for the one Debt an Action is brought, the Executor, Administrator or Ordinary, cannot pay the other Debt whereas no Action is brought, before this for which the Action is brought. Dr. and Stud. 77. D. 28 & 29 P. 8. 32. pl. 2. D. 6 & 7 Eliz. 232. pl. 5. * 48 C. 3. 21. b. Kelsoy 21 D. 7. 74. per Froweke.

Executor, pl. 172. cites Dr. and Stud. lib. 2. fol. 26. cap. 10.

7, 50
Executor.

7. So if Action brought against an Executor abate by a Plea that he was Administrator, and not Executor, and after other Debt is brought against him as Administrator by Journey's Account, he cannot pay other Debts meant between the two Actions brought for this Debt, for he ought to plead fully administered the Day of Administrator, pl. 18 cites S. C. the first Debt brought. 49 E. 3. 21. b. S. C. but says nothing as to paying other Debts. — And see (T a) pl. 5. S. C. where the Matter as to Payment of other Debts meant between the two Actions is taken into a Parenthesis as a Remark of Roll.

8. If there are two Actions brought against an Executor one by A. and another by B. the Executor ought to pay that Debt, whereof he has first Notice of the Action brought, though this Debt was last purchased.

9. If there are several Actions brought against Executors &c. of equal Nature, the Executor cannot pay any of them before the others pending the Actions.

Bring several Actions of Debt together, the Executor may pay the one, and the other has no Remedy if he has not more Goods of the Tenant. Br. Executor, pl. 172. cites Dr. and Stud. lib. 2. fol. 76. cap. 10.

10. If there are several Actions brought against an Executor &c. of equal Nature, the Executor may acknowledge the Judgment to any of them who has an Action depending, though his Action was brought after the others. Dr. and Stud. 77. b. Holloway 21 H. 7. 74. per Cit. 9 E. 4. 13.

11. If two several Recoveries are against Executor the first Recovery shall be first executed; For if he pays the Last first, this is a Devaf
taventure. Br. Executor, pl. 103. cites 5 H. 7. 27.

other. Br. Executor, pl. 172. cites Dr. and Stud. lib. 2. fol. 76. cap 10.

12. If Executors or Administrators, or the Ordinary pays Debts by simple Contract before Obligation &c. they shall answer the Oblige of their own proper Money if they have not Affairs. Br. Administrator, pl. 50 cites II H. 7. 12.

13. They ought to pay Judgments and Condemnations before Obliga
tions, but Obligations ought to be paid before Contrasts. Br. Executor, pl. 172. cites Dr. and Stud. lib. 2. fol. 76. cap. 10.

14. Scire Facias against Executors on a Judgment in Debt against their Tisflator. They pleaded, that before they had any Cominance thereof, they had fully administered by paying Debts on Bonds. On a Demurrer it was adjudged for the Plaintiff that it was no Plea, because they at their Peril ought to take Notice of Debts on Record, and ought to pay such Debts in the first Place, unless there are Debts due to the Queen, wherein she has a Prerogative. Cro. E. 793. pl. 37. Mich. 42 & 43 Eliz. C. B. Littleton v. Hibbins.

15. An Executor making Doubt, whether he should pay Debts before a Decree in Chancery; It was decreed they should be protected. Toth. 152. cites Terry v. Fowler.

16. Debt was brought against an Executor in C. B. for 100l. and pending that Action another was brought against him in B. R. for 100l. by Vaughan in which he confessed the Action, and pleaded the Judgment in Bar to the first Action, and that plea Administered all but the fard 100l. The Court inclin'd that the Plea was not good, and that by the first Proceeds the Goods were so attached in his Hands, that he ought to answer that Action first, and that it was a Devolavit if he confesses any Action that it is left a Quare, Quare, the
Executors.

Quere, for the Justices doubted. Mo. 173. pl. 306. Mich. 25 &
26 Eliz. Anon.

but that the Law is since taken that the Judgment is a good Bar to the first Action. — Sid. 21.
pl. 3. Hill. 12 Car. 2. C. B. Blundevill v. Loverdale held a good Bar to the first Action.

17. Debtor in Bonds and single Contrasts assigns Lands to sell in Trust
for Payment of his Depts; Resolved and declared to be the constant
Rule, that the Creditors should have in Proportion, and not the Bonds
to be first satisfied; so Legatees shall have equal Proportion pro Rata
greatness or Smallness, for the Land is made Debtor &c. but otherwise of Judgments, which affect Land by their own
Strength and Nature. 2 Freem. 175. pl. 233. 6 Nov. 15 Car. 2.
Woolston-Croft v. Long.

18. After Suit commenced against Executor, yet until the Executor
has Notice of it he may pay any other Creditor, and then plead that
he had fully administred before Notice. Went. Off. Ex. 144.

19. Nor is the Sheriff’s return of Summons or Distresses sufficient Cause
of Notice; For the Summons might be on the Land; But if it were to
his Person it is sufficient, and then he must plead that he was not summoned
till such a Day, before which he had fully administr’d. Went.
Off. Ex. 144.

20. And if the Executor is sued by Latitut out of B. R. this supposing a Trespass gives no Notice of a Debt. So also of a Subpœna out
of the Exchequer. But the Original returnable in C. B. expresseth the
Debt, and so in some Sort doth the Process thereon. Went. Off. Ex.
144. and says, that where some Books seem that if it be laid in the same County where the Executor dwells he must take Notice of it at his
Peril; He takes this not to be Law. Ibid. 145.

21. An Action was brought against an Administrator, if pending that
Action, he procured another to commence that Action against him for a
just Debt, due and owing by his Testator, and gave Way to the Plain-
tiff in the first Action, to obtain Judgment before the other, which
Judgment he pleaded in the first Action, and adjudged good, because
he hath Liberty to pay one Debt before another; for though in Con-
science all his Testators Debts ought to be paid, yet there may be some:
Circumstances which may make it reasonable to prefer one Creditor be-
fore another, as if he is very poor, or one lent his Money with, and
the other without Usage, and in such Case where the Executor con-
ents to pay him first, it shall never be intended to be by Covin. Sid.

But where Debts were brought against A. as Executor, and pending this Action
J S brought Debt against A. as Admin-
sistrator for a true Debt

A. was Executor)

A. confessed the latter Action, and pleads this Recovery in bar of the first Action. Resolved that the Plea was not good, the Recovery being had against him as Administrator. Cro. E. 41. pl. 5.
Trin. 27 Eliz. C. B. Anon.

22. No Man ever thought it a Devastavit in an Executor to satisfy a
Judgment obtained upon a simple Contrà, before a Debt due by Obligation.
Per Vaughan Ch. J. Vaug. 94. Trin. 22 Car. 2.

23. Debts against S. and D. Executors of G. upon a Bond of 100l. en-
tered into by the Testator; the Defendants plead, that G. had ac-
knowledged a Recognizance in the Nature of a Statute Staple to J. S. for
1200l. and that they had not Assents ultra; the Plaintiff replied, That D. was bound with the Testator in the said Recognizance; The Defendants
demurred; it was argued for them that the Recognizance of 1200l. was
conceasserent fe & utrumque eorum, so that it being joint and several, the Cognize might elect to sue either the surviving Cognize, or the Executors of him who is dead, so that the Testator’s Goods that are
in their Hands are liable to this Statute; that if the Recognizance
were
were joint, the Charge would survive and charge the Defendant; That this Defend- 
it is common for Executors on fully administrated pleaded, to give in at may pay 
Evidence Payment of Bonds in which they were bound with their 
out of the 
Tetator, and sometimes such Perlons are made Executors for their 
Security. The Court were of Opinion against the Plaintiff, and so he Tetator, 
pray'd Leave to discontinue and had it. Mod. 165. pl. 3. Mich. 

they agreed that if the Statute had been only Joint, or if it had been a joint Obligation, there the 
Survivor must be charged out of his own Estate, and the Executors of the Perlon dead are not 
chargeable; and resolved that the Recognizance was joint and several, and to Judgment for the 
Defendants.

24. Devis of Lands to his Brother charged with the Payment of 600 d. 
at such a Time, and in default thereof the Tetator devis'd the Lands to 
another; the Brother and the other Devisee joined in a Mortgage of these 
Lands, and the Mortgagee suffered the Mortagor to continue in Possession, 
and to fell Timber, so that there was not sufficient to satisfy the said 600 d. 
and the Mortgage; Decreed that the 600 d. shall be paid before the 
Mortgage, because the Mortagor had Notice of this Will. Fin. Chan. 

25. A Bond was in Quadragesima libr. conditioned for the Payment of 
180 l. The Court decreed this to be good pro Quadragesimis, by Reason 
of the greatnefs of the Sum exprefied in the Condition; and that it 
should be satisfied by the Executor before any Bond that Judgment was not 
obtained upon before the Day of pronouncing the Decree; but the Court 
admitted that Judgments upon Bonds obtained after the Subpœna, and before 
the Decree, should be preferred before it, though the Contrary was pref- 

26. The Question was, Whether Rent due upon a Lease Parol, paid by S. C. cited 
an Executor should be good Defeance to him againſt an Obligation of the Vern. 
Tetator's? It was objected that Debts by Specialty are of an higher 
Nature than Debts without Specialty; and therefore the Executor hav- 
ing paid this Rent, which was not due by Specialty, had paid it in 
his own Wrong, fo long as there were Debts owing upon Specialty. 
But the whole Court were of Opinion that it was well enough; and 
that Rent, though it be upon a Lease Parol, is of as high a Nature as an 
Obligation, and 11 H. 4. it was held, that an Obligation taken 
for Rent did not extinguish the Rent, and the Ch. J. said, he had ad- 
vised with Serjeant Maynard, who told him that it was always held in Cafe of 
the Western Circuit, and allowed to be given in Evidence upon 
fully administr'd; and so Judgment was given pro Def. Freem. 

for the Plaintiff in C. B, and affirmed in B. R. Per totem Curiam, and they held that the Contract 
remain'd in the Reality, notwithstanding that the Term was determined, 2 Lev. 267. Pacth. 2 W. 
& M. Newport v. Godfrey. —— 2 Vent. 184. S. C. lays it appear'd by the Declaration that the 
Leaves (there being several) ended in the Life of the Leellie. And adjudi'd in C. B. for the Plaintiff, 
and affirmed in B. R. —— 4 Mod. 44. S. C. laid accordingly, and Judgment in C. B. for the 
Plaintiff, and affirmed in B. R. —— Comb 185. Godfrey v. Newport S.C. in B. R; the Court held 
that the Rent being in the Reality is of as high a Nature as a Bond, for no Wager of Law līth. —— 
But the Court was unanimously of Opinion that Debts due for Rent on Leave by Deed, and Debts on 
Bond are in equal Degree, and that Leave by Deed, and a Parol Leave in this Cafe are the fame. Card. 
S. P. —— And per Holt Ch J. Newport and Godfrey's Cafe does not contradict this, it was 
Debt for Rent upon a Parol Leave; Defendant pleaded such a Debt upon Obligation ultra græd he 
had not Affets; for being in Equall Gradu he could not plead the one against the other till Judgment 
or Payment then the other, and there is no Diversity, because Debt in the Reality without Speciality 
as to Equality of Degrees. 12 Moda. 291. in Cafe of Gage v. Alton. —— Adjudged in C. B, and 
affirmed in Error in B. R. 4 Mod. 45. —— Debt for Rent ought to be paid before all other Debts. 
Per Croke J. Bull. 23.
27. The Executors of F. preferred a Bill against all the Creditors, some being by Judgment, some by Bond, and some by simple Contract; the Testator having devised Lands to the Executors for the Payment of his Debts and he had in the first Place devised an Annuity of 50 l. per Ann. to be paid to his Wife. My Lord Chancellor directed first, that the Lands being devised to his Executors, it shall be construed that the Testator intended that they should be paid in the same Order as the Law directs, that is to say, that the Debts should be first paid before this Annuity, which was but a Legacy let the wording of the Will be how it will; although it devised the Lands charged with this Annuity for the Payment of Debts, yet the Debts should have the Preference; but he held that the Debts of all Kinds, whether by Judgments, Bonds or simple Contract, should be satisfied pari passu, and if the Value of the Land fell short, then that they should be satisfied in Proportion, only Judgments that did affect the Land without any such Devise were to have the Preference; but a Debt by a Decree in Chancery should be put in equal Degree with Debts by Bond or Contract, because at doth not bind the Land until Sequestration. But so far as the Personal Estate did extend, he ordered that the Debts should be paid in that Order as the Law did direct, and there a Debt by a Decree in Chancery should have the Preference of a Bond. And the Case of Hickfon and Witham was cited. 2 Freem. Rep. 49. 50. pl. 34. Hill. 1679. Foly's Cafe.

28. Ordered, That a Decree should precede Debts on simple Con- tract and Bonds, and take Place next to Judgments, And the Case of Parker and —— was cited, where it had been fo resolved; and as to the Objection that in Debt upon a Bond at Law an Executor could not defend himself by pleading he had no Allies ultra what would amount to satisfy the Decree, it was anwered he might defend himself by a Bill in this Court, which would take Care to protect him therein Vern. 143. pl. 137. Hill. 1682. Harding v. Edge.

29. The Lading of the Ship in Constrruction of Law is tacitely obliged for the Freight, the same being in Point of Payment preferred before any other Debts to which the Goods to laden are liable, though such Debts as to Time were precedent to the Freight; For the Goods remain as it were bailed for the same, nor can they be attached in the Matter's Hands, (though vulgarly it is conceived otherwise). Molloy. 258.

30. B. was indicted to A. his Brother in 50 l. on simple Contract. A. died, leaving two Sons; and by Will left an Allowance of 25 l. a Year for their Education, and made J. S. his Executor. B. agreed with J. S. to educate them at a lower Rate, and they continued with him three Years, when B. died, and left his Wife Executrix. Decreed the Executrix to discount the 50 l. and that it should be no Default, though Bond Debts owing by her Husband should afterwards be put in Suit against her, and that if any Judgment should be recovered against her as for a Deval-vait this Court will protect her. Nelf. Chan. Rep. 158. Hill. 1 W. 3. Berrile v. Berrile.

31. A Devise to Trustees for payment of Debts and Legacies, and the Trustees are made Executors; The Estate falls short; The Debts must be paid first, because the Trustees being made Executors the Money is legal Allies. 2 Vern. 248. pl. 233. Mich. 1691. Greaves v. Powell.

32. Debt on Bonds for Payment of Sums certain to be preferred in Payment to Demands on Articles founding in Damages. 2 Vern. 272. pl. 257. Trin. 1692. Whitchurch v. Baynton.

290 Executors.
33. A Decree was had against the Defendant's Intestate by the Plaintiff for
400 l. for the Profits of Land received by him, and the Intestate, before
the said Decree, was indebted to the Defendant by Bond. The Intestate
saying the Defendant got Administration, and the Question was, Whether
the Defendant could retain to satisfy his own Bond against this Decree, there being no Affets to satisfy both? And held by At-
kins, Turton and Leechmere, that he might, and thereupon decreed that
the Defendant should pay the Plaintiff in Cafe he had Affets, in the
first Place. Powell dubitavit, for that in Cafe the Party was sued
at Law for Debt upon a Bond, he could not plead nor give this Decree
Evidice in Evidence at Law to bar the Plaintiff, and so it would be one way
at Law and another way here; But for that it was answered, that the
Party might be relieved by his Bill in Equity and have an Injunction.
Powell.

34. A Man devised Lands to A. and B. in Trust to be sold for the Pay-
ment of his Debts, and makes the same Persons Executors, and the only
Question was, Whether Bond Debts should have a Preference, or all
Debts be paid Pari Palatu? The Difference was taken, when the same Perso-
ns that are Trustees to sell the Lands are Executors likewise, and
where not; for in the former Cafe after the Land is sold, it is Affets
even at Law, and therefore to decree them to pay otherwife than ac-
* cording to the legal Course, would be to decree a Devailavit. Lord
Keeper took Time to confer of it, and afterwards delivered his Opinion,
that Bond Debts must be prefered, and the 23 December 1703,
at Powis Houle, in the Cafe of Bichman v. Packman, was a like
back v. Smith.

35. A treats for a Purchase with B. and the Lands to be Purchased
were incumbered with Mortgages and Judgments; The Purchase-Money being
agreed was returned to London, and placed in an indifferent Hand to be
paid in Discharge of these Incumbrances when the Quantum of them should
be adjudged, and Assignments made; but before that was done the Pur-
chaser died, and did not leave sufficient Affets to pay his Debts upon Bond.
The Question was, whether the Money deposited as aforesaid should be
Affets of the Purchafor, and be applied to pay his Debts, or must
be applied to pay off the real Incumbrances on the purchased Estate?
for if it were to be applied to pay off these Incumbrances, then the
Creditors of the Purchafor must loose their Debts; but it otherwise,
then the Mortgagees &c. would be paid out of the Land by Virtue of
their Securities, and the Creditors would have their Satisfaction out
of the Money, and so all might be paid. Lord Keeper was of Opinion
that the Money was bound by the Agreement, and must be applied to pay off
Middleton.

36. If a Man recovers Judgment or Sentence in France for Money due
to him, the Debt must be considered here only as a Debt on simple Con-
tract, and the Stature of Limitations will run upon it. 2 Vern. 740.
Hill. 1705. Duplein v. De Koven.

37. The Creditors of J. S. exhibited a Bill in Chancery for Debts on
Mortgages, Judgments and Bons. Upon one of the Bonds the Defendant
was outlawed, and upon one of the Judgments the Recoveror had brought an
Action of Debt, and the Question being, which of these Debts should
be first paid, it was argued that the Judgments were by Confession, and it
was not equitable that it should be in the Power of the Party to prefer one
Creditor to another; but that seemed to be overruled; And as to the
Outlawry the Court ruled, that that being only upon.meine Proces did
not alter the Nature of the Debt, nor create a Lien on the Land in this
Cafe.
Executors.

A. died indebted by Mortgage and simple Contract. One of the simple Contract Creditors gets Judgment of Assets Quando accidit. The Executor applies the Assets to pay off the Mortgage. The simple Contract Creditors shall stand in the Place of the Mortgagee as to what he exhausted out of the Personal Assets, and this being only by the Aid of Equity, all the simple Contract Creditors shall come in equally with the Creditor who got Judgment. 2 Vern. Rep. 763. pl. 663. Mich. 1718. Wilfon v. Fielding, alias Hilleriden v. Fielding.

41. A Lease for Years, or a Bond or a Grant of an Annuity taken in a Trustee's Name, being personal Assets, shall be applied in a Course of Administration, and not for the Payment of all the Debts equally. Judgment.

42. Dec. The Judge is to observe, the distinction between the 1st Term of Years, 2dly Rents upon Leases for Years, 4thly Judgments, 7thly Statutes and Recognizances, 6thly Obligations, 7thly Contrafits, 8thly Legacies. The Non-Observeance of this Rule exposes the Executors to a Devallavat, which is Pro tanto to answer of his proper Goods. Jenk. 274. pl. 94. — A Judgment is higher than a Recognition or Statute, for a Recognition is but an Affirmance by Consent of the Parties, and is but a Bond recorded, and there is no Reason that an Executor by bringing a Writ of Error should make the Judgment thereof, and therefore an Execution upon a Statute to obtain shall not prejudice it; but afterwards upon conferring with other Judges it was adjudged for the Defendant the Executor, that the satisfying the Debt upon the Statute was not any Devallavat because he could not withstand it, and he shall not be put to his Audita Querela. Crl. E. 522. Bearblock v. Read. — A Recognition is a Record, but inferior to a Judgment. Per Cur. 11 Mod. 223. (And Holt Ch. J. called the Recognizances a Pocket Record.) Buffon v. Ridgley — S. P. per Coke Cb. J. 2 Build. 65. in Case of Weaver v. Clifford. — Went. Off. Executors, 155. places Judgment next after Debts of the King. And Page 14 & 15. conceives no Priority between Debt by Bond and Debt for Rent or Damages on a Covenant broken. Went. Off. Executors 158. takes Notice that he finds no Difference of Priority between Recognizances and Statutes, yet he says that one Reason given for preferring Judgment to Statutes in Harrison's Case, viz. That the one remains a Record upon the Roll of the Court; whereas the other being only a Pocket Record, is more private, and that this should give Priority also to Recognizances before Statutes; And further Statutes are not properly Records but Obligations recorded. And the Executor may satisfy the Statute before the Recognizance if he do it before Execution sued thereupon, for being in equal Degree, he has Election to prefer which he will; Nor does the Antiquity of either as being more old than the other, and the like between one Statute and another, give any Advantage as to the Goods, but that first gets his Execution served shall have the Preference, though otherwise as to the Lands. Ibid. 159.

Where an Obligor entered into in a Recognizance in Nature of a Statute, and Judgment against him upon the Bond and then he died, his Executor paid the Creditor upon the Statute, and to a Scire Facias on the Judgment he pleaded Payment of the Recognizance & bane, for he is not bound to take Notice of the Judgments against the Teftator without being made acquainted therewith by the Creditors, for he is no ways privy to his Acts. 2 And. 159. in pl. 87. Pach. 42 Eliz. Anon.

65. The
Executors.

42. The late Earl of Winchelsea died seized of some Lands in Fee, and considerably indented by Judgment and simple Contract, and after the Death of the said Earl, and before the Efflux Day of the next following Term, many of the Judgment-Creditors delivered Fieri facias's to the Sheriff, and took the Goods and Furniture in Execution, whereupon the simple Contract-Creditors petitioned, (for it did not come before the Court upon a Bill) that the Judgment-Creditors might be paid out of the Land, or at least, that as to so much as the Judgment-Creditors had by taking it from the Personal Estate, exhausted the same, (they the simple Contract-Creditors) might stand in their Place, and be paid out of the Land. Sed per Cur.

This Rule of Equity is very just, but not applicable to the present Case; Here the Judgment-Creditors having lodged their Writs of Execution with the Sheriff in the same Vacation that the Party died, it relates to the 'Tette of the Writ as to all but Purchasers, and consequently by Relation the Personal Estate, of which the simple Contract-Creditors would avail themselves, as being in the Possession of the Earl at his Death, was not so, being evicted from him in his Life-time by the Execution, and therefore the simple Contract-Creditors seem to be without Remedy as to such of the Afflets as have been seized by these Executions; Per Lord Parker. 3 Wms's Rep. 399, 420. Hill. Vac. 1719, in a Note there by the Reporter cites Finch v. the Earl of Winchelsea; but the Reporter says Quere.

43. Appeal from a Decree of the Rolls upon this Case, Martin a Fellow of Gresham College, and a Fellow like-wife of a College in Cambridge, by a Note directed to the Defendant his Executor, taking Notice that he was indebted to the Plaintiff in the Sum of 80 l. defers the Debt should be paid out of what should be due to him from the College as Fellow at the Time of his Death, and out of what might be raised by the Sale of his Furniture of his Chambers at the Time of his Death. Quere if this Note of directions to his Executor doth create a specific Lien of these Things in favour of the Plaintiff to give her the Preference to other Creditors? King C. said this is no specific Lien upon these particular Things, but the Note is fraudulent as to other Creditors, and the Plaintiff ought to prove her Debt and come in as other Creditors in equal Degree; if such Notes should give a Preference to Debts by simple Contract, just Creditors by Specialty or Record might be tripe of their Debts, and the Plaintiff in this Case ought to come in only as a Creditor by simple Contract, without any Performance upon Account of this Note; But the Plaintiff agreeing to accept the Sum offer'd by Defendant's Answer, it was Decreed by Confect. MS. Rep. Trin. 12 Geo. Canc. Hudson v. Martin.

44. Debt upon an Obligation was brought against the Defendant as Executor. The Defendant pleads a Recovery against him already had in Placito Debuit, and that he had Notice of this Bond at that Time, and that there was no more in his Hands than would satisfy this Recovery. Upon which the Plaintiff demurs. The Ch. J. said he was of Opinion, that the Defendant's Plea might well be understood of a Recovery in Debt upon Bond, or other Matter of as high Nature, and if so it was beyond Question that the Plaintiff ought to be barred; But however, the Court unanimously agreed, that if the Plea was to be understood of a Recovery upon simple Contract, the Recovery would be a good Bar, as the Defendant had no Notice of the Obligation. In this they said, conf'ts the Difference between Duties of a private Nature, and Duties upon Record; for those the Court did allow that Executors are bound to take Notice of at all Events, but these they need not, where a Suit is commenced against them to recover Debts of an inferior Nature. However the Court did allow, that if an Executor makes a voluntary Payment of a Debt by simple Contract where there are not
Executors.

Affets to satisfy the Bond Debts it is otherwise, though he has no Notice; for there are many Cases where a Man’s voluntary Act shall prejudice him, where the Necessity of Law would not. Upon the whole, Judgment was given for the Defendant. Barnard. Rep. in B. R. 186. Trin 2 Geo. 2. Paterson v. Hudleston.

45. All Executors shall be presumed to take Notice of all Judgments even in the inferior Courts of Law, and therefore are not to pay Bonds before such Judgment but at their Peril. 3 Wms’s Rep. 117. pl. 26. Trin 1731. in Herbert’s Case.

46. Any voluntary Bond is good against an Executor or Administrator unless some Creditor be thereby deprived of his Debt; indeed, if the Bond be merely voluntary, a real Debt, though by simple Contract only, shall have the Preference; but if there be no Debt at all, then a Bond, however voluntary, must be paid by an Executor. 3 Wms’s Rep. 222. Mich. 1733. in Case of Lechmere v. Charles, Earl of Carlisle.

47. A. and B. are Partners in Trade; A. gives a Bond to leave his Wife 1000l. A dies; 7 be other Partner administrators; If the Wife would be paid out of the separate Estate of A. on there being Effects, the shall have a Preference before other Creditors; but if there is no separate Estate, and the Wife would have Satisfaction out of the Partnership Effects, then all the Partnership Debts shall be first paid. 3 Wms’s Rep. 182. Pach. 1733. in Case of Croft v. Pyke.

8. One possessed of a Term for 1000 Years, articles to purchase the Inheritance, and by Will gives 3000l. to his Daughter, and makes his Son Executor and dies. The Son Assesses the Term in Trust to attend the Inheritance, of which he takes a Conveyance in his own Name. Afterwards the Son acknowledges a Judgment to A. and Mortgages the same Lands to B. and dies in Debt. A. shall first be paid his Judgment, then B. shall be paid his Mortgage, and then the Daughter (being Administrator to her Brother) is intitled to her Legacy of 3000l. Preference to the simple Contract-Creditors. 3 Wms’s Rep. 328. Mich. 1734. Charlton & al’ v. Low.

49. A, having a Wife who lived separate from him, afterwards courted and married another Woman, who knew nothing of the former Wife’s being alive, but it being discovered to the second Wife that the Former was alive, A. in Order to prevail with the second Wife to stay with him, some Years afterwards gave a Bond to a Trustee of the second Wife, to leave her 1000l. at his Death, and died not leaving Affets to pay his simple Contract Debts; If this Bond had been given immediately on the Discovery, and they had parted thereupon, it had been good, but being given in Trust for the second Wife after such Time as the knew the first Wife was living, and to induce her to continue with A. this was worse than a voluntary Bond, and decreed to be postponed to all the simple Contract Debts. 3 Wms’s Rep. 359. pl. 88. Mich. 1734. Cox’s Case.

50. If a simple Contract Creditor on Behalf of himself and the rest of the Creditors, were to bring a Bill and obtain a Decree, that be and the rest of the Creditors should come in before the Master and be paid all their Debts; and that an Advertisement be put in the Gazette for that Purpose; Here any Bond Creditor coming on the Foot of the Decree, shall be paid only pro rata with the simple Contract Creditors; for his coming in implies a Submission to the Decree. And this was thought to be clear. 3 Wms’s Rep. 343. Mich. 1734. in Case of the Creditors of Sir Charles Cox.

51. But if such Bond Creditor would lie by, having Notice of the Decree and Advertisement in the Gazette, (notwithstanding every one is in many Cases
(Q. a. 2) What Debts shall be first paid in respect of actions commenced.

1. Executors may pay Debts and other Creditors pending a Writ Br. Administrators, pl. 43. cites 2 H. 4. 21.

2. And where Writ abated, and they have Assets the day of the first Writ purchased, they shall be by this charged in the second Writ. Br. Executors, pl. 43. cites 2 H. 4. 21.

Caufe the first Writ abated, whether in his own Default or not, and yet the Plea awarded good enough, per to Cur; quod nota; And yet it was not found that the second Writ was brought by Learn'ys Accounts, and the Defendant compelled to reply to it; And the Plaintiff showed the Title of his first Writ, and that the Defendant had Assets the day of the first Writ purchased; And the Plaintiff showed that the Testator enforced the Defendant upon Condition that if he returned from beyond Sea, that then to re-inburse him or otherwise to fell the Land, and to distribute the Money for his Soul, and you sold it for 200 Marks, which you had in your Hands the Day of the Writ purchased; By which the Defendant showed a Schedule of the Debts; And because he had not Notice of this Suit till Oct. Mich. and at the Petition he came and pleaded to the Writ, as it appears there, and that the Writ of Debt was brought in Middlesex, and he is dwelling continually in London, and he had fully administered the 200 Marks before he had Notice of the said Writ purchased; pritn &c. And Rickhill for the Defendant said, that he did well before Notice &c. By which the other said, that he such a Day in S. gave him Notice, which Day he had Assets, and the other that he had nothing in his Hands after Notice, Paid, and the other as contra. And per Rickhill, this Matter does not prove Assets of the Money of the Sale; for these were not the Monies of the Testator; And if he had died Interdict, the Ordinary could not demand Account of it. But Markham contra; because the Money shall be received to his Use, and by his Executors to distribute for his Soul, which can't be better employed than in payment of Debts. Br. Executors enter main, pl. 4. cites S. C.
Executors.


Yet if the Executor pays the Recognizance before Notice of the Judgment, he may well plead it, for he is not bound to take the Notice of Judgments against the Teller, without being acquainted therewith by the Creditors, he being not privy to his Acts. 3 Mod. 115. Trin. 2. Jac. 2. B. R. Harman v. Harman.

4. Debts to the Crown are to have the Precedence in Payment. Went. Off. Ex. 132.

5. But this is to be understood only of Debts by or upon Record, and not of Debts otherwise due to him. Went. Off. Ex. 132.

But Fines and Arrears of Record in the King's Courts of Record are Debts of Record without Doubt. Went. Off. Ex. 134, 135. — Arrears of Fee, Farm Rents, or other Rents of Inheritance are not Debts of Record, as it seems. Went. Off. Ex. 134.

6. As Money due for Woodfares or Sales of Tin or other Minerals, for which no Specialty is given, so also for Amencements in his Court not of Record, as Courts of Honour and Courts Baron; so of Fines for Copyhold estates there, so of Money for which Straits coming into the King's Manors are sold; so of Debts by Bond &c. forfeited by Forfeiture &c. or Arrears of Rent so forfeited are not Debts of Record until Office found, and so not to have Priority. Went. Off. Ex. 133.

7. Decree in Canc. against an Executor shall not be satisfied before a Bond, it shall take Place next to Judgments made by Teller, and become due after his Death. Per Roll J. Stey. 38. Trin. 23 Car. in Cafe of Ecles v. Lambert.


8. It is a Devastavit to pay voluntarily a Debt by simple Contract before a Debt due by Obligation whereof he had Notice, not otherwise. But no Man ever thought it a Devastavit in an Executor to satisfy a Judgment on simple Contract before a Bond Debt; Per Vaughan Ch. J. Vaugh. 94. Trin. 22 Car. 2. C. B. Edgecomb v. Dec.

9. It is a Devastavit in Executor to satisfy a Debt on Bond before a Judgment on simple Contract, and so it is to satisfy any latter Judgment if there be no Aliens to satisfy a former also (cites 5 H. 7. 27. 8. Mo. 678. Starle's Cafe. Cro. E. 462. Green v. Wilcocks) per Vaughan Ch. J. 95. Edgecomb v. Dec.

10. After a Suit began the Executor may not excuse himself by any voluntary Payments, he may use legal Delays as Imparlance and Estobs &c. to prefer one Creditor before another, but he may not do it by false Pleading of what lieth in his own Knowledge; otherwise if Falsity lies not in his own Knowledge as Non est factum Telleroris. 2 Ch. Cafes 201. Mich. 26 Car. 2. Parker v. Dec. S. C. cited. 12 Vern. 62. Per Cur.

But even in the Cafe of a voluntary Payment if the Suit be not decided by the Law and the Purpose by a Lattit out of the King's Bench, there a voluntary Payment shall stand good after the Action brought, 2 Vern. 300. Trin. 1693. Goodfellow v. Burchet. — But an Executor moving the Court to Enlargement of Time to plead, (the Rules being out,) was denied unless he would enter into a Rule not to plead any Judgments obtained against him after the Rules were out. 3 Mod. 508. Mich 11 Geo. Anon.

If Executor is sued at Common Law, and after an Original pay a Debts of the same Nature without Notice of the Original, he is executed. 2 Chan. Cafes 116. Trin. 34 Car. 2.

Where Creditors bring a Bill, and make the Executors and all other Creditors Parties, the Executors shall not have the Power by confining or flattering Judgment by Default after the Bill exhibited, to prefer one Creditor to another. Per Maller of Rolls. 2 Vern. 62. Patch. 1683. cites Parker v. Dec.
Executors.

11. Generally where lands are devised for payment of debts, there all A man dev"*"o: *Lands to be held for payment of debts and makes the devisees Executors; and the devisee of lands in trust for payment of debts be also made executor, then do the lands so devised become legal affairs, and then debts must be paid according to their precedence or superiority at common law. And so it was resolved in the case of Hixine v. Mortley, which was agreed to be law of all sides. Vern. 64. 65. pl. 60. Mich. 1682. Girling v. Lee.

according to the Court of Administration? My Lord Keeper having taken Time to consider till this Day, now delivered his Judgment, That they must be paid in a Course of Administration, because where the same Petition is Executor and Trustee, the Land when sold is legal Affairs; otherwise when the Trustee is Executor, there they shall be paid in Proportion. Chanc. Prec. 156. pl. 119. Mich 1700. Dickham v. Freeman.


Cafe of a Bond fraudenlently cancelled, and for Relief wherein a Bill is brought, the Plaintiff shall have the same Benefit as if he had not been cancelled, and this was in the Cafe of a Bond by the Husband to the Wife, before Marriage, to leave her 6000 l. having brought them to much. Fina. Rep. 184. Mich 26 Car. 2. Brown v Savage.

16. A Judgment in a Piepstudio Court will oblige the Priority of Payment before Bonds by Executors; Per Ld. C. 2 Vern. 89. Mich. 1688. in Cafe of Searle v. Lane.


former Decree. ——— 2 Freem Rep 103. pl. 114. S. C. decreed for the Plaintiff; But if the Decree had only been to account, and had not ascertained the Sum, it had been no more than a judgement quod comptum at Law, which is no compleat Judgment till the Account placed. This Case was re-heard in Term' Pach 1649, before the Lords Commissioners, who took Time to consider of it; And the Reporter says, Quare hoc determined. ——— Eqn Abru 332. pl. 4 cites S. C. decreed, Hill. 1688.

An Executor paid Money pursuant to a Decree of this Court, and upon a Plene Administrativus they would not permit him to give any Payment in Evidence at Law, this Court decreed it should be allowed, and referred the Matter to an Account here. 2 Vern. 57. Arg. cites Pach. 1667 Jones v. Bradshaw, S. P.

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17. Judgment
Executors.

17. Judgment precedent to a Statute from A. — A. dies. A Writ of Error is brought on the Judgment, and pending that Writ the Money due on the Statute is paid, and not enough left to satisfy the Judgment Creditor, it has been said that the first Payment to the Creditor is good, because by the Writ of Error the Execution of the Judgment was suspended; Per Cur. 4 Mod. 247. Mich. 5 W. & M. in B. R. in the Case of Dighton v. Greenvill.

2 Chan. Ca.

16. After a Bill in Chancery by one Bond Creditor against the Executor, the Executor confesses a Judgment to another Bond Creditor. The Court allowed the Payment on the Judgment confessed after the Bill brought.


A simple Contract Creditor brought an Action, and filed his Original against the Executor; the other simple Contract Creditors offered the Plaintiff to divide the Allets in Proportion, but he having filed his Original infilnted on his whole Debt in Preference to the others. Upon this the Executor gave Judgment in several Quantum Meruits brought by the other simple Contract Creditors, of the several Sums which were laid as Damages in the Declaration, without ascertaining the Damages by Writ of Inquiry, but they were so laid as not to exceed the real Debt. Upon which the Plaintiff brought his Bill in Equity, but decreed that Executor might prefer any Creditor, and the Master of the Rolls dismissed the Plaintiff's Bill with Costs, and affirmed on Appeal by Lord Chancellor. Wms's Rep. 295. Mich. 1715. Waring v. Danvers.

Ibid. 189, is a Note, that Appeal was brought in the House of Lords, and on 21 November, 1702, the Decree was reversed, and the Payment allowed. — S. C. cited 5 Wms. Rep. 401, 402. in a Note there, and that the Decree was reversed in the House of Lords.

19. A Decree Nisi &c. against an Executor shall be preferred to a Judgment on a Bond obtained on an Action brought after such Decree, and the Judgment had before the Decree was made absolute. Decreed by the Master of the Rolls, and affirmed per Lord Sommers on a Rearriving, Chan. Prea. 79. pl. 69. Mich. 1697. Joseph v. Mott.

20. After a Bill and Answer put in the Executor voluntarily paid a Bond Debt, and was disallowed on the Account, because he might, by confessing Judgment having preferred him, and no Difference in Reason, where paid without such confessing. Chan. Prea. 188. pl. 154. Hill. 1701. Darlot v. Earl of Orford.

21. If Executor voluntarily pays a Statute before a Judgment had against his Tetterator it is a Devastavit; but if atter Tetterator's Death Execution be taken and executed, he may plead it to a Sci. Fa. upon the Judgment because he could not hinder Execution; Per Holt Ch. J. 6 Mod. 145 in Case of Smith v. Harman, cites And. 208, 209. that such Payment is good. — Per Holt. Farr. 140. Anno. cites Yelv. 29. the Court was divided, but upon the Reference to the other Justices, the major Part held the Payment good. Read v. Bearblock. — Skinn. 589. S. C. cited by Holt Ch J and said, that this shows that the Writ of Error had so totally suspended the Effect of the Judgment, that it shall not have any Regard or Order.

2 Chan. Ca.
 Executors.

a Decree is in the Nature of a Judgment ; Per Cowper C. 2 Salk. 597. pl. 1. in Canc. Malon v. Williams.

23. Executors having paid off Debts by Specially, and retained their own Debts on simple Contract, agree with the principal Creditors on simple Contract to pay them equally. One brings an Action on a special Original to get Preference to him, and thereupon the Executors confes judgments to the rift, but he brings his Bill to set aside the judgments. N. B. There was an Agreement between the Executors and the other Creditors to whom the judgments were to given, that what should be recovered by them should be equally divided among them exclusive of the Plaintiff, which the Plaintiff suggested to be a Fraud. But Bill dismiffed with Costs by the Master of the Rolls, and the Decree affirmed on Appeal by the Ld. Chancellor. Wms's Rep. 295. pl. 73. Mich. 1715. Waring v. Danvers.

(R. a) [What Debts ought to be first satisfied.]

Judgments in Life of Testator.

1. If a Man acknowledge a Statute to another, and afterwards an—*Le. 528. a Statute. the other recovers in Debt against him, and after he dies, the Executor ought to satisfy this Judgment before the Statute because it is more worthy, for in a Sci. Fa. against him upon the Judgment, it is no Idea for the Executor to plead the Statute acknowledged by the Testator before the Judgment. Mich. 32, 33 Eliz. B. R. adjudged. *Bond against Boyte. And there it is said that Patch, 32 Eliz. B. it was adjudged between * Conyn and Barbam.

cites S. C. 2 Le. 271. in pl. 564. S. C. cited.

2. If a Man recovers a Debt against B. and after B. acknowledges Cro. E. 744. a Statute to C. and after makes his Executor and dies, the Executor ought first to satisfy the Judgment and not the Statute which became due after the Death of Testator, for the Judgment is more high. Dublatur. Hall. 42 Eliz. B. R. between Bearbrook and S. C. Patch. 364, 36 Eliz. adjudged. ——

4 Rep. 59. b. 60. a. S. C. cited by the Reporter as resolved. ——S. C. cited accordingly 5 Rep. 23. b. but a Writ of Error having been brought of the Judgment, and the Record removed, pending which the Executor paid the Statute, it was held by the greater Part of the Justices at Sergeant's Inn on a Reference, that the satisfying the Debt on the Statute first was no Devallavit because he could not withstand it, and he shall not be put to his Undra Queria; and therefore adjudged for the Defendant. —— Yev. 29. Rede v. Bereblock, S. C. held by the major Part of the Justices accordingly; for it was doubtful whether the Judgment would be affirmed or not. —— See 4 Mod. 248. where it is said per Card. that by the Writ of Error the Execution of the Judgment was suspended.

3. If A. recovers against B. and after C. recovers against him, and after B. dies, the Executor may satisfy which of the Judgments he pleases, settled, the latter Judgment the will, for they are one as to him. Trin. 12 Fa. B. R. per Nichols.

4. One owed Money on a Bond, and also upon a Recognizance, and the Bond Creditor got Judgment, but before Execution the Defendant died, having Goods to the Value of the Debt recovered, and made his Wife Executors, to whose Hands the Goods came; Afterwards the Goods were taken in
Executors.

Execution upon the Recognizance, and thereupon the Bond Creditor brought a Scire Facias against the Executrix, to which the pleaded the Execution on the Recognizance, and adjudged a good Plea, because the being chargeable with the just Debts of her Husband, and Execution being taken out upon the Recognizance, she could not prevent his being executed, epecially since she had no Notice of the Judgment on the Bond, and she shall not be charged with the Judgment without other Matter. 2 And. 157. pl. 87. Mich. 44 & 45 Eliz. Anon.

5. Plaintiff brings Debt against Administratrix upon two former Judgments against the Intestate, and shews the Recoveries. Defendant pleads the Intestate entered into a Recognizance to Sir H. B. and that after the Judgments obtained by the Plaintiff, Sir H. B. had Judgment against the Intestate upon the Recognizance, and he had not Affairs beyond the Goods liable to the Judgment on the Recognizance. Plaintiff demurs, and two of the Justices held the Plea good, as if it had been demanded upon the two first Obligations; But the two other Justices were of a contrary Opinion, for the Plea had not been good against the Intestate himself, and that the Action brought by the Plaintiff was in Nature of a Scire Facias, for he demanded the Debt in another Course than it was at first, for the Debt is now become a Judgment on Record; but the Plaintiff dying the Court did not resolve. Yelv. 133. Trin. 6 Jac. B. R. Gomerfal v. Aske.

6. To a Scire Facias on an interlocutory Judgment against an Executor the Defendant cannot plead a Judgment in Bar; for the Statute never intended that the Executor should stand in any other Circumstances to make another Defence than the Party to the Contract himself might have made against the Inquiry, and he could have pleaded nothing but a Release or other Matter in Bar arising Puis d'ar- rein Continuance. He is, by the Words of the Statute, to shew Cause why Damages in such Case shall not be ass'd and recovered, and if he shall appear at the Return, and not shew any Matter sufficient to arrest the final Judgment, then a Writ of Inquiry shall be awarded &c. and arresting Judgment is by Matter apparent in the Record, and not extrinlick. 1 Salk. 315. pl. 23. Pach. 3 Ann. B. R. Smith v. Har- man.

(S. a) What Debts ought to be first satisfied by them, and what not, without a Devasta'tavit.

Judgment in Life of Testator.

1. So much of the Goods of Testator as is sufficient for his Funeral, may be employed to such Use before Debts or Legacies paid. 37 Jac. 6. 30. 28.

The Order which an Executor is bound to observe, is first to discharge the Funeral. 2dly, Debt to the King. 3dly, Rent upon Leases for Years. 4thly, Judgments. 5thly, Executions and Recognizances 6thly, Obligations. 7thly, Contracts. 8thly, Legacies. If he does not observe this Rule, he exposes himself to a Devasta'tavit, which he is to answer Pro tanto out of his own Goods. Jenk. 274. pl. 94.

2. It seems that Rent referred on a Lease which comes to Ex- ecutor, if the Rent become due in Time of the Executors, it ought not
Executors.

not to be satisfied before Judgments or other Debts of the Testator; for this is the proper Debt of the Executors; for the Action shall be reported, brought against them in the Debet and Deliver, as in 5 Rep. Har. Rep. 51, is grave's Case.

1. said he knew it to be reversed in Point of Judgment for this. Caw. C. 225. in Case of Smith v. Norfolk.

3. But it seems otherwise it is of Arrearages incurred in Life of Br. Dcco, Testator; But Where this, for Hackett Dcco said to me that it has been resolved contra because it is real, for 10 4. 79. h. acceptance of a Bond, for it does not extinguish it, therefore higher.


4. A Judgment in Life of Testator ought to be satisfied before any Debt, for it the Executor suffers a Judgment against him at the Suit of another and Execution it is a Devastavit it he has not sufficient.

21 C. 4. 21. h.

5. That Law is if Testator be indebted of Record to the Br. Prerogative, pl. 71. cites S. C. — The King has no Pre-

rogative in his Debts, unless his Debt be of Record, but if the Executor of his Debtor pays other Debts before the Debts of the King it is good Administration, unless the Debt be of Record, and the Executor is excused against the King, per Brown and Cholke Justices. Contra Liberton. But see at this Day a great Statue 25 H. 8. cap. where the King has now Prerogative in his Debts. Br. Pre-

rogative, pl. 71 cites 21 E. 4. 31. — If a Man had Judgment against A. on an Obligation, who died, and another Oblige of the said A. assigns his Obligation to the King, and the Executors of A. falsity the said Judgment it is good against the King in respect the Debt due to the King was not upon Record before the Death of the Testator; Per Tanfield Ch. B. which was granted by the Court. Lane 63. Trin. 7 Jac. in Dimmock's Case.

6. Where there are several Judgments against Testator it is not material which of them was Precedent or Prior in Time; But he which first sues Execution must be prefer'd. And before Execution sued by either it is at the Executor's Election to pay which he will first. And it each brings a Scire Facias, yet the Executor may confess the Action of which he will first, notwithstanding the Scire Facias was brought by one before the other. Went. Off. Ex. 136, 137.

7. Scire Facias against Executor of J. S. upon a Decree in the Exchequer against J. S. for Money; The Defendant pleaded, That the Testator was indebted to him by Bond, and that he had paid himself before the Scire Facias brought, or Notice of the Decree; It was ruled by three Barons against Baron Powell that this was no Bar; And that a Decree in Equity obliges an Executor in equal Decree at least, with a Judgment at Common Law. 3 Lev. 355. Pastch. 5 W. & M. in Scacc. Shaitoe v. Powell.
(T. a) [What Debt ought to be first satisfied.]

Judgment in their own Time.

1. If a Man brings Debt against Executor, and pending this another brings Debt and first recovers, he shall be first satisfied. ed. 9 P. 6. 58.

Where Action is brought.

2 If an Action be brought against Executor the other County than where the Executor lives, he may before Notice of the Action brought pay other Debts, because it is in an other County. 2 P. 4. 21. b. Curti. Pl. C. 279.


4. Debt: The Defendant pleaded fully administered; The Plaintiff replied, That at another Time he brought an Action of Debt against the now Defendant, whereupon he was outlawed upon mean Process, and the brought Error and reversed the Outlawy, whereupon he freely brought this Action, and that at the Time of the first Action brought she had Affairs, & hoc petit quod inquiratur per patriam, et Defendens simulat; And thereupon a Verdict found for the Plaintiff; and Judgment, Error was brought and inflicted upon, that here is not any Plea; For though she had Affairs at the Time of the first Action brought, yet the afterwards might have well administered it by Reason of a lawful Recovery, or lawful Payment after; Sed non allocatur, For it shall not be intended without special Matter shewn; and it suffices that there was enough at the Time of the first Action brought, unless she shows sufficient Cause of Discharge after that Time. Cro. J. 579. pl. 9. Trin. 18 Jac. B. R. Aldrich v. Walthal.


6. In Assumpsit after Verdict for Plaintiff, and before Day in Bank Defendant dies. Plaintiff brings Scire Facias upon a Judgment entered next Term upon the Oxford Act; the Executor Defendant pleads Obligation to himself for 100 l. and a Judgment to A. but no Scire Facias upon it, and that he has no Affairs beyond 40 l. (he is Executor) This Judgment shall to relate that it shall be as a Judgment in Litem of Tellor by the new Statute and be first paid. 1 Lev. 277. Mich. 21 Car. 2. C. B. Burnet v. Holden.

7. To Debt upon a specially against an Executor it is a good Bar that Judgment has been bad against him on a simple Contract &c. Gibb. 76. Trin. 2 & 3 Geo. 2. C. B. Davies v. Monkhouse.
What Debts &c. shall be first paid.

1. Debts for Servant's Wages within the Statute of Labourers shall be paid before simple Contracts, as to me it seems.

Contracts.

2. Debts upon simple Contract are to be paid before Legacies.

3. Dr. and Student 78. They are to be paid before Legacies in Confidence, but the Dr. seems, and it is not denied by the Student, that if he pay the Legacies first, the Debtor has no Remedy.

4. Question, whether a Debt upon simple Contract be to be paid after a Debt for Servant's Wages who is not within the Statute of Labourers.

5. 37 P. 6. 32. By Prison Debts are to be paid before Legacies. If Executor pays Legacies first, so that the Residue is not sufficient to pay the Debts, he shall be charged of his own proper Goods; for this is not sufficient Administration, and the Issue was Fully Administered, and this Matter was given in Evidence. Br. Administrator, pl. 57. cites 21 E. 4. 21. [And so it should be in Roll (21 b) the (23) being misprinted.] * S. P. Dr. Device, pl. 5. cites S. C.

6. Debts to the King by Matter en Fact are all one with Debt of See (S. a) a common Person, and of them the Executor has Election to pay which he will first. 21 E. 4. 21.

(X. a) What Debts ought to be first satisfied before Legacies.

1. If a Man binds himself in an Obligation to perform a certain Thing, and device divers Legacies and dies, leaving but sufficient to satisfy the Bond, if it shall become forfeited, yet this Obligation shall not be any Bar of the Legacies, because it is uncertain if the Obligation shall ever become forfeited, but the Executor Goldsb. 141. shall make a conditional Deliverance of the Legacy, belike, if the Obligation be recovered against him, the Legatee shall re-deliver the Legacy. Vill. 13 Eliz. B. R. in Case of Nelson and Sharp's Cafe.

Norton and Sharp v Gennet, S. C. — Cro E. 466. pl. 17. S. C. held accordingly; but the Legatee by the Civil Law should enter into a Bond to make Restitution if the Obligation should after wards be recovered, and so there is no Inconvenience to any, and to that the Counsel of the other side, and the whole Court, besides Penner, agreed; And a Consultation was granted. — S. C. cited by Roll Ch. J. Sty. 56. Mich. 25 Car.

2. So if a Man binds himself in an Obligation, being under Keeper of Ludgate, to the Sheriffs to keep all Prisoners safely, and also to have them harmless from all Escapes of Prisoners to be com-
Executors.

committed to him during their Shrevalty, and after he suffers a
Prisoner to escape, by which the Debt is recovered against the Sheriffs
in a Writ of Citape, and to the Obligation is forfeited, yet if he gives
givers Legacies and dies, not leaving sufficient Assets, but to satis-
tify the Bond the Executors shall not bar the Legacies by this
Obligation forfeited, because it may be that the Sheriffs will never sue
them upon the Obligation, but he shall deliver the Legacies condition-
ally, direct, if the Sheriffs recover against them, they shall re-deliver

3. Devise of Lands to his Executors towards Payment of Debts and
Legacies Decreed that the Debts be fully paid before the Legacies,
and Difference taken between such Appointment made by Will or by
Deed. 1 Chan Cases 275. Pasch. 28 Car. 2. Whitton v. Lloyd.

(X. a. 2) What Debt ought to be first paid.

Debts by Specialty.

The Obliga-

1. DEBT upon Bond, though the Day of Payment is not yet come,
shall be paid before a Debt on Contract. Cro. E. 315. pl. 9.
Hill. 36 Eliz. B. R. Buckland v. Brook.

2. A Statute is a present Duty, and therefore ought to be paid be-
fore a Bond. Sty. 55. Arg. 14 & 15 Jac. cites Robinson's Cafe.

Arg. cites

Thurton

v. Verney, Hill. 20 Eliz.

Mod. 175.

3. It is a Devasavit in Executor to pay voluntarily a Debt by simple
Contract before a Debt by Bond, whereas be has Notice (and not other-
wife) in that Cafe; Per Vaughan Ch. J. Vaughan. 94. Trin. 22 Car.

4. Husband before Marriage gives a Bond to leave his Wife worth
1500l. if she survived. He died in Debt to others, and no Provision
made for the Wife. This Bond decreed to be satisfied first. Fin. Rep.

5. A is indebted to B. by Mortgage, and gave Bond to perform Cove-
nants, and is indebted to C. by Bond. The Personal Assists shall be
applied to pay off the Bond-Deed, and no Allowance to be thereout
made in respect of the Bond for Performance of Covenants in the

6. If an Indebitatus be brought against an Executor, and he
pleads that his Testator did covenant several Things, and that the
Cove-
Covenant was broke, and that the Damage thereof amounted to so much, and shews that he has no more Affets, it will be a good Plea though the Damages are not certain; Per Holt Ch. 6 Mod. 144. Patch. 3 Ann. B. R. in Case of Smith v. Harmen.

7. Decreed at the Rolls that Mortgages were to be paid first, then Judgments, and then Recognizances &c. But on Appeal to the Lords it was adjudged, that Mortgages were not to be preferred to other real Incumbrances, but Mortgages, Judgments, Statutes and Recognizances, should take Place according to Priority, and as they stand in Order of Time. 2 Vern. 525. pl. 474. Mich. 1705. Earl of Britol & al' Creditors of Bullet v. Hungerford.

8. A mortgage'd Land to J. S. and gave a Bond to perform Covenants, and about six Years after died Intestate. M. poiffled herself of the Goods without taking Letters of Administration, and pays away all the Affets in discharging Debts on simple Contract. About seven Years after A's Death an old dormant Entail was discovered, and the Heir in Title brought Ejectment and recovered Pottektion, whereupon the Executor of J. S. sued M. on the Bond. M. prays an Injunction, the having paid all away, and never having any Notice given her of the Bond. Defendant demurred and was allowed, the Bill being an Attempt to alter the Course of Law; But if any Fraud had been charged on Defendant, by which she was deceived, or inducing her to pay away the Affets, it might have varied the Case. Chan. Proc. 524. pl. 329. Trin. 1752. Greenwood v. Brudnith.


(X. a. 3) What Debts ought to be first paid.

Debts without Specialty.

1. Whether a Fine upon Admissance may be paid before a Bond and not be Devastavit? Three Justices thought it would, but the Ch. J. e contra. 3 Mod. 242 Mich. 4 Jac. 2. B. R.

2. Executor cannot pay so much as Funerals before he pay a Judgment had against Teftator. Brownl. 76. Hill. 11 Jac. Hancock v. Wrenham.

3. A contingent Security shall not stand in the way of a Debt by simple Contract as to the Administration of Affets by the Executor. 2 Vern. 101. Patch. 1639. says it was so resolved in the Case of Eales v. Lambert.

Otherwise Creditors might be exceedingly defrauded by Recognizes for the Peace, and of good Behaviour &c. and so by Statutes for Performance of Covenants for Enjoyment of Land if these should keep off the Payment of Debts, and yet themselves perhaps never be forfeited, nor the Sums never become payable. Went. Off. Ex. 141.

4 Articles of Agreement on Marriages settle 1500 l. per Ann. on Issue, A. Settlement is made, but deficient. The Husband devised all his unsettled Lands for Payment of Debts. Per Cur. If the Settlement is deficient, yet in Regard there is no Covenant in the Articles, nor Mention of any particular Lands, the Widow and Infant must come in for

Satis-
Executors.

Satisfaction after Bond-Creditors, whose Debts are ascertained and fixed, whereas the Demands on the Articles only found in Damages. 2 Vern. 272. pl. 257. Trin. 1692. Whitchurch v. Lady Anne Bainton.

(X. a. 4) What Debts shall be paid first.

By special Direction of Chancery.

1 Bond to secure 400 l. borrowed was made in Quadragesima Libris, where the Sum borrowed amounted to Quadragesimam 120 l. of the 400 l. was paid. Decreed the Bond to stand as a good Bond of the Penalty of the 400 l. for the securing the 280 l. due, and that this Bond takes Place of any other Bond on which Judgment has not been obtained. Fin. Rep. 413. Hill. 31 Car. 2. Simms v. Barry.

2. A Freeman of London having three B airds by B. contentes a Judgment to B. of 1000 l. defaced for Payment of 500 l. in three Months after his Death. Decreed that this, being a voluntary Judgment, shall not prevail against Debts by simple Contract, nor against the Widow of the Freeman, but that the same have her Share according to the Custom of the City, without any Regard had to this Judgment; but his Debts being paid the Judgment would bind the Legacy-part. 2 Vern. 202. pl. 186. Hill 1690. Fairhead v. Bowers.

was without Consideration, and being to be paid after A's Death, it was looked upon

Cham. Pec. 159. pl. 155 S. C. See tit. Pay- ments (P) pl. 5. and the Notes there.

3. Where there are legal and equitable Assets, such Creditors as will take their Satisfaction out of the legal Assets, shall have no Benefit of the equitable Assets until the other Creditors, who have only a Remedy out of the equitable Assets, have receiv'd thereout an equal Proportion of their respective Demands; Per Wright K. 2 Vern. 435. pl. 399. Pach. 1702. Sheppard v. Kent.

(X. a. 5) Devaftavit. What is a Devaftavit.

If Executor

1. F an Executor sells at great Under-Value the Goods of the Teitator, 'tis no Devaftavit; Per Frowike Ch. J. Kelw. 51 a. pl. 5. Trin. 18 H. 7. Anon.

all the Sur- plusage shall be adjug'd a Devaftavit; Per Frowike Ch. J. Kelw. 59—The Plaintiff may aver the Under-Value, and it shall be try'd by Jury; Per Frowike Ch. J 63. 6.—But it is better to sell under the Value than to lose the whole by a total Forfeiture, as in Case of a Lease for Years which comes to the Executor Subject to a Condition for Payment of Rent, or of a Sum in Gross, and no Profits accrue to him to enable him to pay it. Went Off. Ex 114. 115.

2. Administration durante minore estate of two Infants Executors was granted to another, who possejfed himself of the Goods of the Teitator to the Value of 400 l. and when the Infants Executors came of Age they releas'd to the Administrator all Demands. Adjudged this was a Devaftavit, though the Goods never were in their Possession, and the
Executors.

Release of the Infants Executors was Affixed. Godb. 29. pl. 39. 27 Eliz. C. B. Kitley's Cafe.

3. Surrender of a Term by Executor which was devised by A. adjudged a Devastavit, yet it seems A. may have this as Legacy notwithstanding this Surrender. No. 358. pl. 487. Trin. 36 Eliz. Carrer v. Love.

4. If one sues the Administrator and gives Notice, yet he may confess the Action of another that commences his Suit after if there is no Fraud; but if Administrator is sued on a Bond, and pays another Debt on Bond without Suit, there is he had Notice of the Suit it is a Devastavit. The Notice is material. No. 673. pl. 926. Trin. 44 Eliz. C. B. Searls's Cafe.

5. If an Executor pays a Bond made on an usurious Contract, it is a Devastavit; for Hobart. Brownl. 33. Anon.

6. If Executor pays a Bond made on an usurious Contract it is a Devastavit in the Executor, and if he be bound to present one to a Church, and he presents one on a financial Contract, the Bond is broken.

7. If Defendant confesses that he had more in his Hands at the Time of Administration repeal'd than was sufficient to pay the Plaintiff's Debts, it alter Judgment against Defendant the Sheriff can't levy the Debt in Defendant's Hands, he may on the Defendant's own Shewing without any Damage return a Devastavit. Brownl. 116. Pach. 10 Jac. Morgan v. Sorck.


9. Submission to Arbitrement being their voluntary Act, altho' the Arbitrators by their Judgment do discharge the Debt or Damage in part, or in whole, yet shall the Creditors have like Remedy thereupon against the Executors as if they had released, or, which is more, received the same. Wentw. Off. Ex. 74.

10. If an Executor of full Age, upon Receipt of all Principal and Interest due, releases a Bond, it is no Devastavit, and is Affixed only for the Money received; for nothing is done but what in good Conscience ought to be done; Per Brampton Ch. J. and Damport Ch. B. Cro. C. 491. Mich. 13 Car. in Case of Knighton v. Latham.

11. Executor is sued. Tho' he may abate the Action, but does not, but sues Judgment against him, yet it is no Devastavit. Sid. 404. Per Twidena J. Hill. 20 & 21 Car. 2. in Case of Parker v. Masters.

12. Payment of Debts upon simple Contract is a good Administrat. Stry. 54. &c. on against Judgments defeasible upon Performances of Covenants; Arg. said it had been so agreed. Allen 40. Hill. 23 Car. B. R. in Case of Eales v. Lambert.

Way of Legacies, but the Legatee by the Civil Law shall enter into a Bond to make Restitution if the Bond should be recovered afterwards; Agreed per Counsel and Court, except Fenner J. Cro. E. 467. pl. 17. Hill. 33 Eliz. B. R. Nector and Sharp v. Gennor—S C a Bond to save Harmlets shall not stand in the Good of Legacies, but the Legatee by the Civil Law shall enter into a Bond to make Restitution if the Bond should be recovered afterwards; Agreed per Counsel and Court, except Fenner J. Cro. E. 467. pl. 17. Hill. 33 Eliz. B. R. Nector and Sharp v. Gennor—S C a Bond to save Harmlets shall not stand.

13. In a Sci. Fa. on a Judgment, 'tis suggested that Defendant Bona &c. ad valentiam &c. elongavit vendidit, & in Ufum suum proprium convertit, & disponuit ea intentione quod dicta Executo nam fieret. The

Perhaps the Defendants on a like Cafe have
The Sheriff found that dispossess in \textit{Ujium proprium}, and Defendant appeared and travelled, and 'tis found by Verdict against him, the Court will not doubt the \\textit{Ex} Intentione, and so he has done a tortious \\textit{Act} in contriving and endeavouring to defraud the Plaintiff of his Debt, which amounts to a \\textit{Devavtavit}. Saund. 307. Mich. 21 Car. 2. Merchant v. Driver.


16. The Penalty of a Bond is but 40l. but the Condition is for 200 l. The Executor cannot pay it without a Decree, without a Devavtavit to other Creditors; But the Payment was decreed. 2 Chan. Cases 225. Hill 28 & 29 Car. 2. Sims v. Utry.

17. Execution against the Goods of the Executor for a Debt in \textit{Jure proprio} is a Devavtavit noles volens, 3 Keb. 839 in pl. 1. Hill. 29 & 30 Car. 2. cites it as held by Rainsford Ch. J. in the last Term in Norden's Case.

18. It is a Devavtavit to permit Interest to run in Arrear, and then suffer Judgment for it, and want of Assents to pay it before the incurring of it by the Administrator shall not be intended unless it be expressly pleaded. 2 Lev. 40. Hill. 23 & 24 Car. 2. B. R. Seaman v. Dec.

19. Executor confesses Judgment in Assumpsit when there is another Debt upon Bond, he must pay both, for he might have pleaded the Bond in Bar of the Contract Debt, which not having done, his not having Assents to pay both is no Excuse. 3 Lev. 114. Patch. 35 Car. 2. C. B. Britton and Bathurit.

20. Place cauf'd recovered against an Executor de son Tort is a Devavtavit, and if there happen to be a rightful Executor or Administrator, he shall recover against the Executor de son Tort, but he cannot get the Land from the Reversioner again. 2 Show. 457. Hill. 1 & 2 Jac. 2. B. R. City of Norwich v. Johnston.

21. Executor of an Obligee takes a Goldsmith's Note, who fails; it is a Devavtavit; cited as adjudged by Pemberton Ch. J. Vern. 474. Mich. 1687. in Case of Barker v. Talcott and Shaw.

Freem Rep. 22. An Administrator brought Trover for Goods, and recovered, and takes Part in Hand, and accepts a Covenant for Satisfaction of the Residue; and the Debtor afterwards failed. It was adjudged in C. B. to be a Devavtavit in the Administrator, and the Judgment was afterwards confirmed upon a Writ of Error in the House of Lords. Vern. 474. Mich. 1687. cites the Case of Norden v. Levet.

23. Submission to an Award by an Executor is a Devavtavit. 12 Mod. Award the 11. Per Cur. Mich. 3 W. & M. Wrong-doers be discharged without making full Recompence, he must answer the rest of the Value to the other Creditors, because his Submission was his voluntary \\textit{Act}. Went. Off. Ex. 139.
24. Executor *loses a Bond due to Testator*. The Court inclin'd to charge Defendant with the Debt, but for the present directed only that Defendant, prosecute with effect a Suit brought by him against the Obligor, in order to recover the Money on the lost Bond, and repaid Judgment in the mean Time. 2 Vern. 299. Trin. 1693. Goodellow v. Burchet.


26. *If Intestate after the Action brought had died within the six Years*, fo as the Administrator had convenient Time to bring the Action within the six Years, and that he does not do, but brings the Action after the six Years, that will not help him; *So not bringing the Action within the six Years would be a Devastavit*. Per Holt Ch. J. 12 Mod. 573. Mich. 13 W. 3. in Case of Hayward v. Kinsey.

27. *Executor appoints another to receive a Debt of Testator's*, who will not repay it; *it is a Devastavit*. 6 Mod. 93. Hill. 2 Ann. B. R. in Case of Jenkins v. Plume.

28. *A Term assigned by an Executor in Trust to attend the Inheritance* shall in Equity follow all the Estates created out of it, and all Incumbrances subsisting upon it; *but the Term being by this Means become not Aftes at Law*, the Executor who assigned the same is liable to the Creditors as for a Devastavit. Per Le. Chanceller. 3 Wms's Rep. 330. Mich. 1734. in Case of Charlton v. Low.

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**Devaftavit.**

**(X. a. 6)** Who shall have the Action.

1. *Is Creditor by Statute 100 l. and B. C. and D. by Bond 100 l.* and the Aftes in the Executor's Hands are only 100 l. *Executor pays the 100 l. to D.* this is a Devastavit only as to A. and he is not liable to B. or C. Went. Off. Ex. 163.

2. *But if he had only paid a Legacy or Debt by Contrary leaving nothing to satisfy the Debts by Speciality, then he had been equally liable to each of the other Creditors, viz. to him who could first recover, or by the voluntary Act of the Executor could obtain Payment, who must be preferred if the Sum would reach no farther, and there being no Creditor by Record.* Went. Off. Ex. 163.

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**(X. a. 7)** Liable. Who.

1. *In this Case it was holden by all the Barons clearly, that the Executor of an Executor should not be charged with a Devastavit made by the Executor of the first Testator, so not in the Case of the King, because it is a Personal Wrong only.* 3 Le. 241. pl. 334. Mich. 32 Eliz. in the Exchequer. Sir Brian Tucke's Case.

2. *If D. were indebted to A. 100 l. and A. his Executor *took a new Bond of him, or another* for it, *giving up the old Bond*, now it is become his own Debt, and so shall stand in his Executor.* Went. Off. Ex. 72.

4 K. 3. Ex.-
30 Car. 2. cap. 7. 2. It is enacted, that Executors or Administrators of any Person or Persons, who as Executor or Executors of their own Wrong, or Administrators, shall waste or convert Goods &c. to their own Use, shall be chargeable in the same Manner as their Testator or Intestate would have been if living.

3. Executor of an Executor is liable to make good the Quantum of the Devastavit to the Creditors if he has Affects from the first Executor. Chan. Cases 257. Hill. 26 & 27 Car. 2. Chamberlain v. Chamberlain.

4. Feme Covert cannot waive during Coverture, though the Devastavit of the Baron shall charge her if she survives. 2 Lev. 145. Trin. 27 Car. 2. B. R. adjudged in Cafe of Horsey v. Daniel.

5. Twifden put this Cafe. A. has several Debts owing by Bond and dies, and makes B. his Executor, who delivers up these Bonds, and takes Bond in his own Name and dies Intestate. The Question is, how the Creditors of A. shall recover these Debts, there being no other Affects of the Administrator de Bonis non of A. or the Executor of B.?

6. So far as the Personal Estate of the first Testator, which is come to the Hands of the second Executor, will go, the second Executor shall answer. 2 Chan. Cases 217. Patch. 28 Car. 2. Price v. Morgan.

Debt was brought against A. Executor of B. Executor of C. who pleaded that he had not of the Goods of C. in his Hands. To which the Plaintiff replied, that B. had wafted the Goods of C. to the Value of the Debt demanded. Upon which Issue was joined and found for the Plaintiff, and he had Judgment to recover de Bonis B. in the Hands of A. But that Judgment was reversed. Vent. 292. Hill. 27 & 28 Car. 2. B. R. in Cafe of Brown v. Collins.

7. Note per Hale, Debt doth not lie against the Executor of an Executor upon a Surmise of a Devastavit by the first Executor; for lit. it is a Personal Tort, for which his Executor cannot be charged. 2dly, It is such an Action of Debt as would have admitted Wager of Law, and therefore lies not against the Executor. Vent. 292. Hill. 27 & 28 Car. 2. B. R. in Cafe of Brown v. Collins.

8. Debt is brought against A. Executor of B. Executor of C. who pleaded that he had not of the Goods of C. in his Hands. To which the Plaintiff replied, that B. had wafted the Goods of C. to the Value of the Debt demanded. Upon which Issue was joined and found for the Plaintiff, and he had Judgment to recover de Bonis B. in the Hands of A. But that Judgment was reversed. Vent. 292. Hill. 27 & 28 Car. 2. B. R. in Cafe of Brown v. Collins.

9. It was said by Finch, that though an Executor of an Executor should not be charged at Law for a Devastavit by the first Executor, yet in Equity he should be charged. Freem. Rep. 313. pl. 386. Mich. 1675. in Canc. Anon.


11. 30 Car. 2. cap. 7. 2. It is enacted, that Executors or Administrators of any Person or Persons, who as Executor or Executors of their own Wrong, or Administrators, shall waste or convert Goods &c. to their own Use, shall be chargeable in the same Manner as their Testator or Intestate would have been if living.


14. By 4 & 5 W. & M. cap. 24. S. 12. The Act of 30 Car. 2. is made perpetual, and forasmuch as it had been a Doubt, whether that Act extended to Executors or Administrators of any Executor or Administrator of Right,
(X. a. 8) Proceedings and Pleadings in Devastavit.

1. A Man recovered against Executors, and Fieri Facias issued, and the Sheriff returned Quod Devastaverunt &c. and Scire Facias issued to say why Execution should not be made de Bonis propriis, and it was quod cum &c. recuperatisf &c. and the Writ did not make Mention if the Recovery was by Verdict, Default or otherwise, nor in what Action the Judgment was, and yet the Writ was awarded good. Br. Scire Facias, pt. 191. cites 19 H. 6. 49.

2. R. brought Debt against A. as Executor, and upon Plene Adminiftravit, and Issue upon that Affets are found, and Judgment for the Plaintiff, and upon a Testat' Execution was awarded to the Sheriff in another County than where the Trial was, that Sheriff may return a Nibil, and is not stopped by the Verdict and Judgment; Otherwise it is of the Sheriff of that County where the Action was brought, for he cannot return a Nibil &c. but he ought to return a Devastavit. Noy 69. Robbins's Cafe, cites 9 H. 6. 9.

3. If Judgment be given against an Executor on Demurrer, and Execution be awarded, the Sheriff cannot return Nulla habet Bona Testatoris, but is to return a Devastavit, as it it had been found against the Executor by Verdict; For per Cur. he has charged himself by his own Plea. Cro. E. 102. pl. 9. Trin. 30 Eliz. B. R. Stubbs v. Rightwife.

4. Sheriff of the County where the Writ is brought ought to return Devastavit &c. and thereupon the Plaintiff shall have Process in another County; But a further Question was, If a Sci. Fa. upon Testatum shall issue into another County before the Sheriff of the County where the Writ was brought had returned a Devastavit? For some conceived that Devastavit where the Writ was brought ought first to be returned, and then upon a Testatum Process should issue into any County in England. Others conceived that so it might, though no Devastavit was returned on a Testatum. 2 Le. 67. pl. 90. Trin. 31 Eliz. in the Exchequer. Noon's Cafe.

5. Sci. Fa. against an Executor why the Plaintiff should not have Execution de Bonis propriis is not to be awarded on the Survival of the Party upon a Devastation, nor in any Case where the Judgment is de Bonis Testatoris, unless it be upon Return of the Sheriff where he returns.

4. The Defendant is not concluded by the Inquisition and Return of the Sheriff but that he well may traverse it. For otherwise he should be without Remedy. Cro. E. 865. Gibbon v. Brook.

5. In Case of a Devastavit by one Executor, Judgment shall be general against all for the Principal De Bonis T实实在在 & non de Bonis of him only against whom the Devastavit is return'd. D. 210. Marg. pl. 23. cites Mitford's Case.

6. Where Verdiel poses against the Plaintiff no Devastavit can come in Question; For no Judgment being for the Plaintiff no Writ of Execution can Issue. Went. Off. Ex. 164.

7. And therefore if upon the Issue of fully administr'd it appears that there was a Devastavit which caused Affairs to fail, then the jury must find that Defendant has Affairs and not find a Devastavit; For finding a Waite, viz. a Surrender of a Lease for Years held by Tparator, it was held void and nugatory, and the Court said it must come in by the Sheriff's Return, viz. upon the Fieri Facias; So Affairs being found, Judgment is given for the Plaintiff to recover his Debt to be levied of those Affairs. Went. Off. Ex. 164, 165. cites the Case of Hankford v. Mitford.

8. In Scire Facias against an Executor upon a Devastavit returned; he pleaded that he had no Affairs at the Time of the issuing of the Scire Facias allique pro that he had waifed &c. And this was adjudged to be an ill Traverse; for his having waited is but Inducement; and the Subsistence is, Whether or no he had Affairs at the Time of the first Action brought. Hardr. 70. pl. 6. Trin. 1656. in Scacc. The Protecor v. Holt cites Mich. 22 Car. B. R. Ld. Roberts v. Luxton.


10. In a Judgment against an Executor a Fieri Facias issued out to the Sheriff, with a Scire Fieri Inquiry, and a Devastavit was found according to the common Course, the Return whereof was, Quod diversa bona qua fuerunt TPARATOR &c. habuit que elongavit & in sumum proprium convertit; It was objected against this Return, That it was not paid Devastavit, for in some Cases an Executor may justly convert the Goods to his own Use. Hale said, Anciently when the Sheriff returned a Devastavit, which was not found by any Inquisition, and to which there was no Answer, it was necessary to insert the Word Devastavit; but otherwise in a Return upon this special Writ; For if the Case be, that he hath not waifed the Goods, but only elogned them to as the Sheriff cannot come at them, the Executor is chargeable upon the Writ De bonis Propriis, and this Return answers the Writ. Vent. 221. Trin. 24 Car. 2. B. R. Blackamore v. Mercer.

11. In a Scire Facias with Enquiry of Affairs and Waite found and adjudged for the Plaintiff, to which the Defendant pleads a former Judgment ultra quod &c. fo Plene Administravit, to which the Plaintiff demurrd, especially because the Waite is not traversed, which is the Point of the Inquisition; Per Cur. it ought to be traversed albeit on a Scire Facias on a Judgment Plene Administravit be a good Plea without travers of the suppos'd Waite in the Count; but here the Waite being returned it is otherwise. Sed adjoignant. 3 Keb. 187, 188. pl. 45. Trin. 35 Car. 2. B. R. Bold v. Rice.

12. If Feme Executrix survisves her Baron the shall be chargd for Waite committed by the Baron, but not for the Costs recover'd against the Baron De bonis Propriis. 2 Lev. 161. Hill. 27 & 28 Car. 2. B. R. Horsey v. Daniel.
Judgment.

(Y. a.) In what Cases the Judgment shall be de Bonis Tectatoris si &c. Si non de Bonis Propriis.

Damages.

1. If a Man recovers a certain Thing as a certain Debt, or &c., and over this Damages for the Decease or otherwise, there the Judgment shall be for the Damages de Bonis Tectatoris si &c. Si non de Bonis Propriis. 8 Rep. 134. M. Shirley's Case. 34 D. 6. 23. B. 21 D. 6. 1. 33 D. 6. 24.
the Goods of the Deceased if he has. But the Book at large is reported further in these Words, and if he has not, then de Bonis Propriis; but these Words are not in the Record, which Matter was notified by Fitzherbert and others Anno 23 H. 8. and commanded to amend the Book, for it is contrary to the Record, and so misreported. Br. Executor pl. 22. cites 54 H. 6. 22, 23.
Firzh. Judgment, pl. 40. cites S.C.

2. If a Pian recovers Damages in a Detinue against an Execut or for a Detinue after the Death of the Temailor, the Judgment shall be for the Damages de Bonis Testatoris &c. Sii non &c. Contra. 14 H. 4. 29 b.

3. If a Pian recovers against an Executor in an Action where his Recovery shall be all in Damages, there the Judgment shall be de Bonis Testatoris tantum.

4. As if a Pian recovers in a Quare Impedit against an Executor, where he makes Title in Right of the Temailor by force of a forged Grant made to the Temailor, the Judgment shall be de Bonis Testatoris tantum, for here all is to be recovered in Damages; (it seems the Sir Bonds ought to be paid) 34 H. 6. 23 b.

5. In Debt against three Executors, if two are outlawed, and the Third pleads fully administrat and Assets found, the Judgments shall be against all for the Debt de Bonis Testatoris, und for the Costs against him only that pleaded. Br. 7. A. B. adjudged per Cur. upon Advice. Partridge's Case.

6. Debt against two as Executors, who pleaded that the Temailor died intestate, and the Administration was committed to J. N. and they as Servants to J. N. sold the Goods, and render'd to him an Account abique hoc, that they administered in other Manner, and because they did not say that he who committed the Administration was not Ordinary of that Place, therefore no Plea per Judicium, and Judgment was of the Debt and Costs of the Goods of the Deceased; and the same Law if they had confessed the Action; But it they had pleaded a false Plea, as Plene Adinistra
tit &c. which had been found against them, then the Judgment of the Debt shall be of the Goods of the Deceased, and of the Costs and Damages de Bonis Propriis. Br. Executor pl. 164. cites 31 H. 6. 13.

7. Debt against three Executors, the one appear'd and pleaded Plene Administrat, and the other made Default, and the Third pleaded Ne un


8. If the Plea pass'd for the Plaintiff, against the first who pleaded &c. and against him who pleaded ne un

ges Executor, or non est Bantum, or other Plea which bars the Plaintiff for ever, Judgment shall be of the Goods of the Deceased if he has, and if not de Bonis Propriis. Ibid.

9. And 18 H. 6. The Judgment was of the Goods of the Deceased, of the Debt and Damages if they have, and if not, the Damages of their proper Goods where they confessed the Action. Ibid.

10. And 28 H. 6. The Judgment was of the Goods of the Deceased, and no Judgment special against him who confessed. Ibid.

11. And 18 H. 6. The Sheriff returned upon a Fieri Facias, that the Executors converted the Goods in tios suos Propriis, by which he had Fieri Facias de Bonis Propriis of the Debt and Damages, and after a Capia & Exigent. Ibid.

12. And 9 H. 6. One pleaded that he had an Executor and found against him, and the Opinion was that Judgment shall be of the Goods of the Deceased. Ibid.

If Executor pleads a false Release made to himself, or pleads no 22, 23.
14. As if they pleaded a Release made to themselves, or an Acquittance, or the like, or ne unques Executor, ne unques administrator as Executor, and it is found against them, there the Judgment shall be of the Goods of the Deceased, if &c. and if not, de Bonis Propriis. Ibid.

15. But Contra where they plead a Release or Acquittance made to their Tesfator, which they found in his Chiet, or if they deny the Deed of their Tesfator; for they cannot have perfect Notice of it, and therefore Judgment shall not be de Bonis Propriis. Ibid.

16. So it they plead Plene Administration, & so Riens enter mains; for it is no Bar for ever, for Scire Facias lies if they have Afters after. Ibid.

17. Also where they plead Missofuer, or that there is another Executor alive not named in the Writ &c. which goes to the Writ, though they may have perfect Notice, yet there Judgment shall be De Bonis Tesfatoris tarnum, and not De Bonis Propriis; quod nota Diversity for a good Cae. Ibid.

pris, but where he pleads the false Plea of ne unques Executor, which utterly ousts him from the Benefit of the Testament. Cro. J. 642. pl. 15. Mich. 20 Jac. B. R. Bull v Wheeler.—S. P. Because it is a Falsity in his own Knowledge, and he ought to pay a Fine to the King, Cro. J. 652. Mich. 21 Jac. in Case of Bridgman v. Lightfoot.

But if the Pleading such Plea is by Reason of finding such Release among the Tesfator's Writings, through forgery, or never sealed and delivered by the Plaintiff as his Deed, or if he pleads Payment by Tesfator, the Judgment in either of these Cases shall not be de Bonis Propriis. Went. Off Ex 184.

So if Executor denies the Bond or Bill (upon which the Suit was grounded) to be the Tesfator's Deed; For in all these Cases the Truth not being known to him, he might honestly and reasonably conceive it to be as he did plead. Went. Off Ex 185, 186.

But in all these Cases though the Deed shall not be adjudged upon the Executor's Own Goods, yet the Damages shall, in all Default of the Tesfator's own Goods to satisfy them. Went. Off Ex. 185, 186.

And in those Cases it was not material whether the Judgment passed upon Trial or Demurrer. Went. Off Ex. 186.

Nay, if Defendant Executor pleads no Plea, but confesses the Action generally, or be condemned by a Non jun Informatus, the Judgment is the same, viz. to recover the Debt out of the Tesfator's Goods, and the Damages out of the Executor's Goods in Default of the Tesfator's. Went. Off. Ex. 186.

18. Debt against three Executors; at the Diffires two appeared, and the Third made Default, and the Second confessed the Action, upon which Judgment was against all of the Goods of the Deceased, and before Execution on the Plaintiff made his Executor, and died, who brought Scire Facias against the Three, and the two who confessed made Default, and he who first made Default appeared and pleaded Ne unques Executor, Ne unques Administrator as Executor, and found against him, and Judgment was given of the Goods of the Deceased against them who made Default, and the Plaintiff prayed Execution of the Goods of the Deceased against him, who pleaded Ne unques Executor if he has &c. and if not, De Bonis Propriis; and a Man shall have two Judgments for one Debt; but he shall have but one Execution; For if he has Execution against the two &c. then the Third by this is discharged, and therefore Judgment was enter'ed as the Plaintiff had prayed, quod nota. Br. Executor, pl. 81. cites 14 H. 7. 28, 29. and 15 H. 7. 8.

19. Where Executors plead Plene Administration, and it is found that they have some in their Hands, but not Aftes, they shall not be charged but of that which they have of the Goods of the Deceased. Contr. a where they plead, Ne unques Executor &c. For there they shall be charged De Bonis Propriis, if they have not De Bonis Tesfatoris. Br. Executors, pl. 105. cites 9 H. 7. 15.

20. Judgment against an Executor, to recover de Bonis Tesfatoris; The Sheriff returned that the Executor had nulla Bona Tesfatoris; Per Curiam a Scire Facias shall not be awarded de Bonis Propriis upon a Surmise of the Plaintiff of a Devaltavit, nor in any Case where the
Executors.


21. In Debt against an Executor the Plaintiff recovers, and a Fieri Facias de Bonis Teseatoris, and upon that the Sheriff returns, that the Defendant had not any Goods of the Teseator's tempore judicis, nor after; The Plaintiff comes to the Court, and summons the Defendant had wasted the Goods, and prays a Writ to the Sheriff to inquire. But after the very Matter being moved at the Court, by the Court a Superfluedas was granted, for it was out of the Court and without Precedent, Justice Williams being only of the Contrary, and cites the 9 H. 6. 57. that he may have a special Writ, and also the Cae between Haworth and Pecle. Noy. 11. Hill. 2 Jac. B. R. Brook v. Smith.

(Z. a) By what Names Actions lie against Executors.

1. **Action does not lie against Executor and Executor of Executor, for this is repugnant.** For Survivor shall have all; But if the Executor of the Executor administers with the other, Action lies against both by Name of Executor. 39 C. 6. 45. b. 46.

2. Executor shall not be vouch'd by Grant of a Ward by the Teseator, though he binds him his Heirs and Assigns to Warrant. Br. Executor, pl. 154. cites 3 E. 2. and Fitzh. Voucher. 212

3. T. Bishop of E. brought Writ of Debt against R. M. Executor of the Teseament of J. Archbishops of C. Administrator of S. late Bishop of E. Quere, if Debt lies against Executor of Administrator; but where severall are Executors, and some Administrator, and some not, Debt lies against those who administer well enough. Br. Executor, pl. 83. cites 24 E. 3. 54.

4. **Covenant against Administrator of Assignee of a Term generally in his own Name upon a Covenant in the original Demise to Repair, and a Breach in his Time;** And agreed first, That this Covenant ran with the Land, and bound the Possessor without the Word Assigns. cites 5 Co. 15. and Dean and Chapter of Windor's Cafe, Mo. 339, 1 Cro. 229, Jo. 245. And he shall not say, I shall not be charged for my own Wrong for want of Assigns; for it is his own Act to administer; and he is presumed to have known the Covenant annexed to the Leases, as well as Executors under Pain of Devaluation, are obliged to take Notice of their Teseator's Debts by Bonds, and give Preference of Payment to them; and he might have discharged himself by assigning over before Breach; and by the fame Reason that he should be charged for the Rent de Bonis Propriis, so he ought here for the Damages, and Judgment for the Plaintiff Nifi &c. 12 Mod. 371. Patch. 12 W. 3. Keeing v. Morrice.

5. **Action was brought against one as Administrator, who pledged that he was Executor, and upon Demurrer adjudged for the Plaintiff, because it was only in Abatement.** For the Matter was if he be chargeable or not, and though it was said that this was well pleaded in Bar to the Action as in Robinson's Case 5 Rep. 32. and that upon Evidence upon no Unques Executor he may give Letters of Administration in Proof, and cited Dyre 305. this was denied by Holt Ch. J. and Eyres ceteris tacentibus; and Hold said, that notwithstanding this he shall be charg'd, but said that it is otherwise of Letters ad colligend' Bona


**Executors.**

*Bonas defuntis; But where one sues as Executor, the Defendant may plead by way of Eltoppel that he was Administrator &c. Skinn. Exec. 365. Mich. 5 W. & M. in B. R. Harding v. Salkeld, and cites 5 Rep. 32.*

may be pleaded in Bar to another Action brought against him as Administrator.—— Court.

S. C. accordingly by Holt Ch. J.——12 Mod. 40. S. C. held accordingly, and that the Case was not of Executors.

1. **Executor** may bring *Replevin* of an Ox of the Testator’s, taken by thee Words De bono suo capta. quod nota; For now no other can have thereof Property. Br. Property, pl. 51. cites 24. E. 3. 35.

2. Per Prifon and Needham a Man shall not have Anfwer in Debt by Executors or Administrators in denying the Testament or Letters of Administration, but shall say that the Testator did not make the Plaintiff his Executor, or that the Administration was not committed to the Plaintiff. Br. Reponder, pl. 50. cites 6 H. 6. 31.

3. In Debt against Executor it is no Plea that the Testator died Intestate unless he traverses the making of him Executor. Br. Executor, pl. 126. cites 7 H. 6. 13.

4. In Debt against J. by Name of Executor, and be imparded, he shall not say after that he is Administrator and not Executor, Judgment of the Writ. Br. Executor, pl. 24. cites 35 H. 6 35. 36.

Ne unques Executor, ne unques Administrator as Executor in Bar &c. Br. Eltoppel, pl. 24. cites S. C.

5. A Man shall not have Traverse to a Testament or Letters of Administration, as to say that the Testator did not make this Testament or that the Letters are not the Letters of the Bishop, or the Testament was not proved, but he may say that the Testator did not make him Executor, or that the Administration was not committed to him. Per Needham Justice, and Prifon conceifit. Br. Traverse per &c. pl. 157. cites 35 S. C. H. 6. 31.

and not as Executor; and upon Demurrer to this Plea, it was objectted that it was ill without a Traverse, that he was Executor, or ever admiifred as Executor; but adjudged that the Plea was good without a Traverse. 5 Mod. 156. Mich. 7 W. 3. Bowers v. Cook.——1 Salk. 297. pl. 8. Pooler v. Cook. Mich. 7 W. 3 B. R. in Assumpsit S. P. and seems to be S. C. and held better without a Traverse, which would be impertinent; For though the Defendant supposes an Intempering, yet it does not suppoze How or in what Manner, and to deny any Intempering as Executor de fono Torr is to traverse where is not alleg’d. And per Holt Ch. J. The Difference is between being one as Executor (as in this Case) for then there needs no Traverse, and where one is fixed as Administrator to J. S. for then if the Defendant pleads he is Executor, he may proceed and traverse, that the said J. S. died Intestate, because, unless there be a dying Intestate, an Action cannot be brought against an Administrator, and to plead he was made Executor, is by Implication only an anwer to the dying Intestate.——Carth. 565. S. C. and the Court held the Plea better without a Traverse; For if the Truth was that the Defendant had administered in his own Wrong before Administration actually granted to him, that Matter ought to come in by way of Replication by the other Side.——12 Mod. 85. S. C. held accordingly.

6. Executors get the Charters of their Testator, and J. N. took them. The Executors released to him all Actions except Actions as Executors, and after
after they brought Action of the taking of the Charter, and the other pleaded the Release; and admitted that it is no Bar. Brook says the Reason seems to be, inasmuch as they brought this Action by reason of the Possession of the Charters, and not as Executors; for the Charters do not belong to the Executors. Br. Executors, pl. 154. cites 39 H. 6. 15, 16.

7. In Action by Executor the Defendant may say that the Testator made A. and B. his Executors, ubique hoc that he made the Plaintiff his Executor; Per Chocke and Catesby; quod non negatur. Br. Executors, pl. 140. cites 21 E. 4. 50.


9. Debt was brought against J. S. as Executor, and pending this Action J. D. brought Debt against him as Administrator for a true Debt; (whereas in Truth he was Executor) J. S. contested the latter, Action, and pleaded this Recovery in Bar of the first Action; And it was resolved to be no good Plea. 1st, Because the Recovery was had against him as Administrator, and so is void, altho' this had been only a Plea to the Writ, and a Stranger shall not falsify that which is only to the Writ. 2dly, He that first sues shall first be served, and the Executor might have pleaded the first Action against him that brought the Second. Cro. E. 41. pl. 5. Trin. 27 Eliz. C. B. Anon.

10. An Administrator may declare of Goods taken out of his own Possession, tho' be never so possed of them; for of trancitory Things the Law calls upon him a sufficient Possession to maintain an Action possessorily, As the Lord before Seftin may have a Ravishment of Ward &c. But otherwise it is if one takes the Goods of the Intestate out of his Possession before he dies, for then nothing but a bare Right comes to the Administrator. Godb. 34. pl. 41. Pasch. 37 Eliz. C. B. per cor. Cur. Carter v. Crofts.

11. In Trover by an Executor, he declared that he was possed of 40 l. in quadam Cruena existens at de Bonis suis propriis which he loft, and the Defendant found and converted it to his own Use in Retardationem Executionis Testamenti &c. Error was assign'd that this was Contrariant, the Goods being his proper Goods, and yet that they should be converted in Retardationem &c. But all the Jurites, prater Penner, held otherwise; for the Executor is possed of the Testator's Goods ut de Bonis suis propriis, and may declare fo, and the Conversion of them is in Retardationem Executionis Testamenti. Cro. E. 568. pl. 2. Trin. 39 Eliz. B. R. Rivers v. Oodskirt.

12. Error of a Judgment, because the Plaintiff brought Debt as Administration and supposed the Administration to be committed to him by such a Bishop, but doth not say Loci ilius Ordinarius, nor cui Administratione pertinet, it was holden no Error, and the Judgment affirmed; for in a Declaration it is well enough, but not in a Bar. Cro. E. 838. pl. 12. Trin. 43 Eliz. B. R. Chard v. Bird.

13. If Executor brings an Action of Trespass for taking Goods which were the Testator's at the Time of his Death, he need not set forth that they were taken extra Custodia sua; for it shall be intended that the Goods were in Custodia sua, because the Possession is cast on him by the Death of the Testator. Cro. J. 113. pl. 11. Hill. 3 Jac. B. R. Adams v. Cheverel.

14. Error of a Judgment in Assumpsit brought as Executor because tho' he shews himself to be Executor to him to whom the Promi was made, yet he faith not Testamentum bis in Curia prolatum. This was held to be Matter of Substance and Error; And the Judgment reversed. Cro. J. 299. pl. 1. Pasch. 10 Jac. B. R. Browning v. Fuller.
15. Caehe brought upon a Promise made to the Intestate, and in the Count omits to shew the Administration, and after Trial that Paul was moved in Arrest of Judgment; and the whole Court was of Opinion, that he should not have his Judgment, for it did not appear that he was Administrator, for at the Common Law no Administration lay, but the Ordinary ought to have the Goods. Brownl. 9. Trin. 12 Jac. Cope and Ux v. Lewyn.

16. A. brought Debt as Executrix against B. and counts that Teflutor S. C. and made his Will, and Plaintiff Executor at D. and died. Plaintiff pleads 249. Ad hoc absum hoc A. is Executor. Whilcock held this Traverle good, but not good, but that he ought to have traversed the making the Will; and Coke Ch. J. cited 7 E. 4, that a Traverle is not necessary. Roll Rep. 395. pl. 18. Trin. 14 Jac. B. R. Parry v. Parry.

quod consuitum est Executorem, but the Books question whether in such Case any Traverle ought to be, and cites to H. 6. 25. 9 E. 4. 33. 4 H. 7. 13.— Debt by A. as Administrator, and S. I. recovered against B. Afterwards B. being in Execution escaped, and then A. as Executor brought Debt on Escape. It was held, that if one recover as Administrator where there is an Executor, the Party against whom the Recovery is shall have Audita Querela, supposing he had no Right to recover, as 2 R. 5. 8. a mullo fortiere where it appears by their own shewing that there is an Executor, he cannot found an Action upon that which he did as Administrator, and tho' one and the same Person brings this Action as Executor who first recovered as Administrator, and to Quasi a Privity therein, which is the principal Doubt of this Case, as Doderidge said, (for if he had made a Releafe he might well have barred that Action, or if the Money had been levied he might well have retained it) yet because it appears that he ought not to have an Action in this Manner, all the Court held the Recovery was erroneous, and to a Judgment in C. B. reversed.—Cro. J. 394. pl. 6. Hill. 15 Jac. B. R. Stingley v. Lambert. — Godth. 362. pl. 361. Lambert v. Stingley, S. C. the Question was, if he might maintain an Action against the Sheriff for the Escape as Executor when he was only Administrator at the Time? and the Court held that the Action would lie, and that the same Debt should be Affix'd in the Executors Hands. — Roll Rep. 276. pl. 51. S. C. adjournature. But the Reporter says, if he heard the Case was moved again, Coke being present, and it was adjudged that the Action was not maintainable.— 3 Bulst. 112. S. C. Doderidge and Coke held that the Action lay, but Houghton e contra; et adjournator. The Reporter says that he heard the same was ended by Agreement between the Parties.

17. Debt by an Administrator for Arrearages of Rent upon a Lease made by the Intestate and declares that Administration was committed by the Archbishop, but did not say, profess biv in Curia Literas Administration. Resolved that the not shewing the Letters of Administration remit c. was Matter of Subsistency, and ought to be shewed by the Plaintiff to enable him to his Action, and the Defendant shall take Advantage thereof at any Time; and adjudged for the Defendant. Cro. J. 499. pl. 9. Mich. 14 Jac. B. R. Sr. John Curtis v. Bennet.

18. In Scire Facias on Judgment in B. R. by Executor shewing Teflutor recovered against Sheriff of S. and that Part is unsatisfied. The De. that H. died defendant pleaded that Administration was committed to J. S. not traversing abique hoc that the Plaintiff was Executor, and this after Impartially is ill; Per Cur. Judgment for the Plaintiff on Demurrer by the Plaintiff. Keb. 381. pl. 87. Mich. 14 Car. 2. B. R. Horsemann v. Watters. Pl. Com. Greibrook v. Fox.

19. The Administratrix of B. brought an Action of Debt against the Defendant, as Executrix of R. G. Upon a Bond executed by him for the Payment of 200 l. to B. The Defendant pleaded in Bar that the said R. G. died Intestate, and that Administration was granted to her, and this she ought to be named Administratrix and not Executrix; Adjourn'd in B. R. and affirm'd in Error in Cam. Seacc. that this was an ill Plea, because the Defendant did not traversed that she had administered any of the Goods of the Intestate before Administration was granted to her. Littw. 889, 891. Trin. 2 Jac. 2. Grey v. Thoroughgood.

20. Scire
21. Seire Facias by Executors upon a Judgment obtained by the Testator; And upon a General Demurrer it was insisted that the Practice of this Court in such Case is, that the Plaintiff in the Seire Facias should infer this Clause, (viz.) Proert in Curia Literas Testamentrias &c. which being omitted, the Writ is not good. To which it was answered, that the Practice is to infer that Clause at the Conclusion, and not in the Middle of the Writ, and here it is inferred at the Conclusion. But the Court held both Forms to be good, and that in C. B. this Clause is always inferred in the End. Judgment for the Plaintiff. Carth. 69, 70. Mich. 1 W. & M. in B. R. Bofworth v. Ridgley.

22. Debt by an Administrator. Defendant pleaded in Abatement that A. made his Will, which after Administration granted was proved by the Executor. Upon which Plaintiff demurred. And the Question was; Is the Plea was good without the Traverse, abque hoc that A. died Intestate? It was resolved in this Case by the Court without any Difficulty, that the Plaintiff ought to have traversed, abque hoc that the said A. died Intestate, for the Plea is not a full Confession and Avoidance of the Plaintiff's Title without such Traverse; for as the Plaintiff alleges himself to be Administrator of A. and the Defendant says that A. made his Will, which was proved, this is not an absolute Avoidance of the Plaintiff's Title, but only by Argument or Implication, and perhaps the Probate was afterwards revoked, or another Will made, of which the Plaintiff shall have the Advantage upon the Issue tried, and though the producing the Will under Probate is conclusive Evidence against the Plaintiff, who cannot prove that there was no such Will, or that it was forged, yet it is but Evidence, and there are many Cases where what is sufficient Evidence to prove a Thing, is not sufficient to be pleaded, As in Trover a Demand and Retusul is sufficient Evidence to be pleaded. Comyns's Rep. 156, 157. pl. 104. Patch. 7 Ann. Landon v. Beftingham.


25. Statute of Limitation was pleaded by an Executor, where Testator had desired all his Estate, both Real and Personal, for Payment of his Debts. Ld. Chancellor over-ruled the Plea; But the House of Lords ordered it to stand for an Answer, with Liberty to except, and saved the Benefit of the Plea to the Hearing. MS. Tab. cites 7 Feb. 1727. Ld. Strafford v. Blakeway.

(Z. a. 3) Actions by Executor and Pleadings. And in what Cases it must be in the Debet and Detinet.

1. Debt against Administrator. The Plaintiff recovered upon Pleue Administratoris pleaded, and brought Debt upon the same Recovery in the Debet and Detinet, and therefore took nothing by his Writ by Award. Br. Administrator, pl. 17. cites 7 H. 4. 10. 11 H. 4. 56. 2. Quaer
2. Quere if he had recovered upon Ne ungues Executor pleaded, or Not the Deed of the Testator. Ibid.

3. And see 11 H. 6. 7. 36 and 37. where it is against two, and the Baron and Feme as Executor; One and the Feme appeared, and the Baron not; She shall not answer, nor in this Case shall the other be compelled to answer, by Reason that the Writ is in the Debet and Detinet, which is out of the Case of the Statute, for it cannot be intended to charge them as Executors or Administrators by this Form; Per Thirm Ch. J. Ibid.

4. Where Leafe for Years is in Arrears of his Rent, and makes an Executor and dies, if the Executor occupies the Land, he shall render the Arrears; Contra if he waives it and does not occupy; Per Afcue J. Br. Barre, pl. 27. cites 21 H. 6. 24.

5. Debt by Executors upon Arrears of Account made by Assignment of themselves after the Death of the Testator. The Writ was Quos ei Detinet, and not Debet, and therefore challenged and much argued; & non allocatur, but the Writ awarded good; For in every Case where Executors are compelled to name themselves Executors, the Writ shall be Detinet only, and they cannot declare upon the Arrears of Account, which Account is due to their Testator, without naming themselves Executors, and therefore the Writ good by Award. Br. Dette, pl. 9. cites 20 H. 6. 4.

6. But where the Executors fell the Goods, and take the Obligation to themselves or Contrad, there the Writ shall be Debet and Detinet; Note the Difference. Ibid.


9. Executor shall have Writ of Debt of Arrearages of Annuity due to the Testator in his Life, and the Writ shall be in the Detinet, but the Writ of Annuity itself is in the Debet, and so fee that Debt lies of Annuity where the Annuity continues, and the same Law elsewhere where the Annuity is extinct by the Act of the Party himself, yet Debt lies of Arrearages due before. Br. Executor, pl. 168. cites 2 R. 3. 22.

9. Debt by Executors shall be in the * Detinet only, and not in the * S P. and Debet and Detinet, as well of a Sum which is due after the Death of the Testator, as of that which was due in his Time; Quod Nota. Br. Executor, pl. 1. cites 19 H. 8. 3.

Arrarages of Rent-Charge due to the Testator by the Statue 32 H. 8. the Writ shall say Detinet, Br. Executor, pl. 119.

10. Debt upon an Escape, and declared that the Plaintiff as Executor Sav. 150. pl. recovered against L. and had him in Execution, and the Defendants jux- 199. S. C. perain to be escape, and counted in this Action in the Debet and Detinet; If three Barons con- The Defendants pleaded Nihil debent, and found for the Plaintiff. tra Periam. It was moved in Stay of Judgment, that the Action was not well brought, as for the first was in the Detinet, and so this Action ground upon the Record ought to be to pursue it; It was the Opinion of two Justices contra Periam, that the Ground of the Action is the Recovery as Executors, and the wrong is to them in that Right, and therefore the Action is and when to be brought in the Detinet only, and so it was afterwards adjudged. Cro. E. 326, 327. pl. 4. Patch. 36 Eliz. B. R. Hitchcock v. Skinner and Lacy.

shall be Asssts; and Judgment recovered accordingly.

11. In Escape by an Executor against a Gaoler after a Recovery by Jenk. 300. the Executor, the Action ought to be in the Detinet only. Hob. 272. pl. 62. cites 5. C.

Lancastefl v. Sidley.

A N

12. Executor
12. Executor got Judgment against his Testator's Debtor, and had him in Execution, and Sheriff let him escape. In Debt against the Sheriff it ought to be in the Detinet only, for though the Judgment was had by the Executor, yet it was for a Debtor of his Testator's, for all the Justices and Barons, except Hutton J. who doubted. Cro. J. 545. pl. 5. Mich. 17 Jac. B. R. Reynell v. Lancetall.

13. And in the same Case it was held not to be matter of Form only, but matter of Substance and not aided by the Statute, as it was resolved 5 Rep. 35 in Player's Case, and 36 in Walcot's Case. Cro. J. 546. ut supra.

14. And it was there further said, that an Executor can never have an Action in the Detinet, but where Testator might have had the same Action, Cro. J. 546. ut supra.

15. An Executor never shall be forced to bring his Action in the Detinet, only where he need not name himself Executor; it was so said Winch. 80. Pach. 22 Jac. C. B. in Case of Holman v. Tuke.

16. In Debt by an Executor, the Court was on a Lease made by himself by Indenture to J. S. as Executor, naming himself Executor in the Lease, and this was of Land delivered to him in Execution by Extent upon a Statute made to his Testator. The Action was brought in the Debtor and Detinet, and held good; for it is of his own Contract, and though he be named as Executor in the Contract, yet the Action is not brought by him as Executor. See Winch. 80. Holman v. Tuke and Cro. J. 655. S. C. Pach. 22 Jac. C. B.

17. If Executor is sued for Rent behind after Testator's Death upon a Lease for Years made to Testator, and by him left to his Executor, this shall be adjudged and levied de Bonis Propriis, for so much of the Profits as the Rent amounted to shall be accounted as his own Goods, and not his Testator's, and therefore he is to be sued as well in the Debtor as in the Detinet. Went. Off. Ex. 192.

18. So if any thing delivered to or detained by Testator come to his Hands, and Executor still detained the same after Demand, and be thereupon sued in an Action of Detinue; for this is own Act. Went. Off. Ex. 192.

19. Debt against an Executor on Lease to the Testator. Resolved that where part of the Arrears demanded were due in the Time of the Testator, and past after his Decease, the Action in the Detinet was good for the whole, as well as if all had been due after the Death of the Testator, and that after a Verdict, Quod non Detinet, the Land shall not be intended of any Value, as it is well known in these Times, in many Places Lands have been of no Value, yet the Executor is liable to the Rent as far as he has Aflents; and clearly if he has Aflents he cannot waive his Term. Per ROLL. All. 76. Trin. 24 Car. B. R. Cornill v. Cawley.

20. In Debt against an Executor on Lease for Years arrear in his own Time, the Defendant demurred specially because it was in the Debtor and Detinet, and per Cur. it is good both ways; and Judgment for the Plaintiff: 2 Keb. 788. pl. 24. Trin. 23 Car. 2. Temple v. Forell.

21. In Debt against the Defendant Administrator as the Assignee of Y. after Verdict, Simson excepted in Arrear of Judgment, that though an Action lieth in the Debtor and Detinet by reason of taking of Profits, yet the Administrator is not chargeable as Assignee, fed non allocatur, this being but the mit-titling of the Declaration, which being by Bill and not by Original, the Administrator or Executor is quodam modo Assignee; and Judgment pro Quer, 2 Keb. 819. pl. 27. Mich. 23 Car. 2. B. R. Sewell v. Young.
22. If an Executor assigns over, he may still be charged for Rent in the Detineth; if he have Afiets, but not in the Debt and Detinent, but for the Time that he occupies. Freem. Rep. 338. Trin. 1673. Boulton v. Canon.

23. J. S. Leafe for Years, rendering Rent, assigns and dies, his Executor if he have Afiets, may be charged in the Detinent, or in Covenant; if there be a Covenant to repair, or not to assign, the Executor is chargeable after Affinment, but not de Bonis Propriis. Adornatur. Freem. Rep. 338. in pl. 417. Trin. 1673. in Cae of Boulton v. Canon.

24. An Action of Debt in the Debent and Detinent was brought against an Executor of a Leafe for Years, and he pleads that before the Action brought he had fully administered, and that his Term was of less Value than the Rent, and that he was offered to surrender. Quere, Whether if a Rent be of greater Value than the Land the Executor shall be chargeable in Debent and Detinent? And it seemed he shall not, but shall be charged in the Detinent only, for there the Judgment will be de Bonis Tefioris only. Freem. Rep. 393, 394 pl. 510. Pallch. 1675. Boulton v. Canon.

the Land and relied upon the Tender of a Surrender which was nothing to the Purpose: Judgment was given for the Plaintiff. — 3 Keb. 495. pl. 58. S. C. & S. P. adjug'd for the Plaintiff. — Pollexf. 125. to 134. Bolton v. Carhum. S. C. argued, and Judgment for the Plaintiff.

25. When a Leafe for Years dies, and his Executor enters, it is in the Election of the Leflor to charge him either as Executor in the Detinent only, or else as he takes the Profits (and is as it were an Affinee) in the Debent and Detinent; and if he charges him in the Detinent only, Judgment shall be de Bonis Tefioris, Per Hale Ch. J. Freem. Rep. 337. pl. 417. Trin. 1673. in B. R. Anon.

26. Debt was brought in Debent and Detinent against an Administrator for Rent incurred upon a Term for Years in his own Time. He pleads fully administered. The Plaintiff demurs. But it was agreed, that if an Executor brings an Action of Debt for Rent upon a Lease made by the Tefior, it must be in the Detinent only; but if an Executor makes a Leafe himself, it must be in the Debent and Detinent. Freem. Rep. 171. pl. 183. Trin. 1674. C. B. Sackvill v. Evans.

26. It was held per Cur. that an Action of Debt upon a Bond would not lie against an Executor in the Debent and Detinent upon a bare Sub- gestion of a Devastavit; But otherwise it is of a Judgment. Freem. Rep. 458. pl. 623. Mich. 1677. Ent v. Withers.

if the Action is brought on a Judgment, and counts of a Devastavit, it lies well. — S. C. cited Lev. 147. in Cae of Corey v. Thine, that it lies not on Debt on an Obligation. — 2 Lev. 145. S. C. cited by the Name of Eali v. Withers as adjudged accordingly.

27. A possessor of a Term for Years makes an Under-Leafe for Part of the Years, retaining a Rent, and makes his Executor and dies. His Executor brings an Action for the Rent in the Debent and Detinent, and after Verdict it was moved in Arreit of Judgment that it should have been in the Detinent, for that the Rent is incident to the Reversion, and that he hath the Reversion as Executor, and therefore the Action shall be intended to be brought as Executor, and so ought to be in the Detinent; But the Court said, of such Things as lie in manual Occupation, or whereof manual Occupation hath been had, as Goods &c. the Executor is not bound to name himself Executor, and then it will be good in the Debent and Detinent, but for a Cline in Action it shall always be in the Detinent, for that till it be recovered it is not Afiets, and for this he shall always name himself Executor; but a Lease for Years is Afiets in the Hands of the Executor for the whole Leafe at first, therefore he need not name himself Executor; but if he doth name
name himself Executor, he must then say Detinet only; Therefore Judgment for the Plaintiff Nil. Skin. 5. Mich. 33 Car. 2. B. R. Prattle v. King.

28. Debt against the Defendant Administrator, and declares upon a Demise to the Intestate for 129 l. due in the Life of the Intestate in the Detinet, and for 64 l. in his own Time in the Debent and Detinet. The Defendant demurred; and adjudged the Action did not lie to charge him in the Detinet for Part, and the Debent and Detinet for the other Part, which requires several judgments, viz. De Bonis propria for the Arrears in his own Time, and De Bonis Intestate for the Arrears due before his Death, and the发光 of the said Sums in the Declaration is not sufficient, but he ought to have several actions. 3 Lev. pl. 74. Mich. 34 Car. 2. C. B. Salter v. Cobbold.


30. If an Executor has a Term, and the Premises are of less Value than the Rent reserved thereon, in an Action brought against him in the Debent and Detinet, he may plead the special Matter, viz. that he has no Affsets, and that the Land is of less Value than the Rent, and demand Judgment if he ought not to be charged in the Detinet tantum. This Holt Ch. J. said was his Opinion, and that Hale was of the same Opinion, and it was but reasonable, because an Executor could not waive for the Term only; for he must renounce the Executorship in toto or not at all. 1 Salk. 297. pl. 6. Patch. 11 W. 3. B. R. Billinghurst v. Speermaan.

31. Debt was brought in the Debent and Detinet against the Defendant upon a Judgment had against him as Administrator, and suggests a Deesentavit committed by him. The Defendant pleads that the Plaintiff sued against him as Administrator and obtained Judgment, and that afterwards, and before this Action brought, the Administration committed was repealed, and committed to one Law, to whom he paid the Receipt of the Goods of the Intestate, having first satisfied himself of 20 l. which the Intestate owed the Defendant for Wages. The Court took Exception to this Pleading, because the Defendant did not traverse the Deesentavit; for without Wafte the Defendant could not be charged in the Debent and Detinet, and this is the usual Way of declaring since the 20 Car. 2. and cites Wharton v. Laut. 1 Sand. 216. 1 Lev. 255. So they defined Sergeant Hall to take Time to consider of it; for the Gift of the Action is the Wafte, which you should traverse; but if the Fact be with you, perhaps we may allow you to amend your Plea upon Payment of Costs; therefore you do well to consider of it. Holt's Rep. 46. 47. pl. 11. Mich. 5 Ann. Bonner v. Underwood.

32. Debt on a Bond against an Executor as Executor must be in the Detinet tantum. Trin. 11 Ann. B. R. Cockletone v. Clowter.

33. Debt on Bond given to the Executors of A. for a Debt by simple Contract due to A. Declaration was quod Defendens cognovit se debere to them as Executors of A. Upon Demurrer Exception was, that it ought to have been in the Detinet tantum, not Debent and Detinet. Sed Car. contra, for the Executors may say, you are indebted to me by Bond, and you detain it from me, but if Bond were to the Testator, they could only say that it was detained. Trin. 3 Geo. B. R.
(Z. a. 4) In what Cases he must name himself Executor.

1. If the Ordinary commits the Administration to the Executors upon Refusal by them before that they have administered, they shall be impleaded by Names of Administrators; Contra if it be after the Administration; for then the Refusal is void. Br. Ordinary, pl. 9. cites 5 C. 9 E. 4. 33.

2. If Executors assign Auditors, and the Bailiff is found in Arreages, and the Executors bring Action of Debt upon the Arreages of Account, they shall be named Executors though they assign the Auditors; Per Keble. Br. Executor, pl. 170. cites 2 H. 7. 15. and 6 H. 7. 6.

3. Contra where Executors bring Trespass of Goods of their Testator taken out of their Possession, there they need not be named Executors. Ibid.

4. So in Action of Detinue brought by them of their own Bailment. Ibid.

5. Or Action of Account against their own Bailiff, there they need not be named Executors; Note a Diversity; For in the one Case the Thing is a Close en Action which never was in their Possession, and in the other Case it was by reason of their proper Possession. Nota bene. Ibid.

(Z. a. 5) Pleadings in Actions against Administrators.

Alleging by whom the Administration was granted.

1. Debt against Administrators, if suit were taken that the Administration was not committed to him by the Ordinary, and held good suit. Br. Negativa &c. pl. 9. cites 7 H. 4. 10.

2. Debt against an Administrator. The Plaintiff is not bound to count that the Administration was committed to the Defendant by the Ordinary; quod nota; by which he was compelled to answer. Otherwise it seems where the Administrator is Plaintiff. Br. Administrator pl. 22. cites 6 H. 5. 6.

3. Debt against Administrator, and counted that the Abbot of W. S. P. for Ordinary there, committed the Administration; Laikon demanded Judgement of the Count, because he did not Shew how the Abbot is Ordinary there; and non allocatur. Br. Count, pl. 25. cites 35 H. 6. 46.

Ordinary there, ab insane hoc that the Abbot is Ordinary there, per Moile. As where a Vill extends into two Dioceess &c. Br. Administrator, pl. 9. cites 5 C.

4. Administrator in his Count ought to Shew in what Place the Administration was committed to him; Per Opinionem Curiae. Contra of pl. 21. cites Executors; for a Man may be Executor without making, as de Son S.

5. In Debt against Administrator, it is no Plea that the Administration was committed to him by the Archdeacon, ab insane hoc that it was committed to him by the Bishop without knowing how the Archdeacon has Power to do it, by which he forced how the Archdeacon and his Predecessors have had this Authority time out of Mind, ab insane hoc ut supra; Judgment of the Writ; and no Plea if he had not taken the ab insane hoc; quod nota; by which
which the Plaintiff maintained his Writ that it was committed by the Bishop. Br. Administrator, pl. 31. cites 37 H. 6. 27, 28.

6. It is a good Plea that the Administration was committed to him by another Bishop, and not by the Bishop by whom the Plaintiff sues; Judgment of the Writ. Br. Traverle per &c. pl. 141. cites 37 H. 6. 27, 28.

7. In Debt by Administrators, the Defendant said that the Deceased made Executors who administered, and it was adjudg'd that he ought to pay further, abiguos hoc that he died Intestate. Br. Traverle per &c. pl. 181. cites 4 H. 7. 13.

8. Where a Man declares on an Administration committed of all the Goods in Kent and Suffolk by the Archbishop, without saying how, either as Ordinary or by Virtue of his Prerogative, this was held to be a material Exception. But it being afterwards alleg'd that all the Precedents in this Court and in C. B. are fo in general, without saying how, and because they would not change the Precedents they disallow'd the Exception. Cro. E. 6. pl. 2. Trin. 24 Eliz. C. B. Dorrell v. Collins.

9. An Administrator declared on an Administration granted to him per W. L. Vicarium generalém in Spiritualibus Episcopi Rossiae, without saying, Loci titius Ordinarius, and held well, for such a Vicar amounts to a Chancellor; for in Truth the Chancellor is Vicar-General to the Bishop. Leon. 312. pl. 435. Mich. 32 Eliz. C. B. Gillam v. Lovelace.

10. In Allen brought by an Administrator, he did not say in what Place Administration was granted to him; yet the Declaration is good, but it would not be good in a Bar. Cro. E. 283. pl. 5. Trin. 314 Eliz. B. R. Piers v. Turner.

11. An Administrator declared on an Administration granted by Andrew Vane scire Theologiae Doctoris, and did not say, Loci titius Ordinarius, or cui de jure pertinuit; and because it was in a Declaration which ought to be certain, and he is not a Bishop nor such a Person as may be intended to be the Ordinary, the Judgment was reversed. Cro. E. 431. pl. 39. Mich. 37 & 38 Eliz. B. R. Morgan v. Williams.

12. The Plaintiff declared on an Administration committed to him by the Dean of Litchfield, and did not say by what Authority, nor that he was Loci titius Ordinarius, and this was held ill; for the Court intends not his Authority, it being speciai, without knowing it; but in Case of a Bishop it shall be intended, and fo are the Precedents; but in a Bar or Replication it is vicious. Cro. E. 791. pl. 34. Mich. 42 & 43 Eliz. C. B. Temple v. Temple.

13. Debt by an Administrator. The Plaintiff declared, that the Administration was committed to him by the Bishop of St. David's, but saith not Loci titius Ordinarius, nor cui Administratio pertinet, yet the Court said it is intended that he is Ordinary unless Administration is alleged to be committed by one who hath a peculiar Jurisdiction. Cro. E. 879. pl. 9. Patch. 44 Eliz. B. R. Skidmore v. Winstone.

14. A Judgment in Debt given against an Administrator was reversed by Error, for that it was not proved by the Plaintiff by whom, nor by what Authority the Administration was committed; for as well he takes Conunance that he is Administrator, he may take Conunance by whole Means he is made Administrator, for otherwise he may charge him as Executor of his own Wrong. Cro. J. 10. pl. 13. Patch. 1 Jac. B. R. Wade v. Atkinson.

15. Theorid v. Bally, in which the Defendant demurred, because the Plaintiff did not shew the Name of him.
him who granted the Administration to the Defendant, the Court held that the Allegation in the Declaration that Administration was committed to the Defendant de jure Juris Forma was sufficient without showing by what Ordinary; and Judgment for the Plaintiff.

15. As to making Prefert of the Letters of &c. not granted by the Palm 97. Metropolitan or Bishop, but which are granted by the Archdeacon or Chiverton in Peculiars, those granted in Peculiars must be sought forth that the Grantor S. C. ad-
is Locii illius Ordinarium; for it cannot be intended that they have any judg'd ac-
Authority unless be given. But it is otherwise of those granted by the Archdeacon, for he is Oculus Episcopi, & de jure Ordinario he is to commit Administration. Cro. J. 556. pl. 22. Mich. 17 Jac. B. R. Chiberton v. Trudgeon.

accordingly per to. Cur. that the Administration being granted by the Bishop's Official, the Declara-
tion need not say Locii illius Ordinarium, but otherwise to the Case of a Peculiar.

16. In a Declaration it is not necessary to shew by whom Letters of Admin-
istration are granted, or to say that they were granted by him Cui pertin-
ent or per Locii illius ordinarium; But in a Plea in Bar it is otherwise, for this is not the Causa of the Action and Effect of the Suit, but to shew they have been in the Spiritual Court; sic dictum fuit. Sty. 282. Titn. 1651. B. R. in Case of Marshal v. Ledsham.

17. If an Administrator bring an Action against an Administrator it is not necessary for the Plaintiff to shew by whom the Letters of Administration were granted unto the Defendant; but he must shew by whom the Letters were granted to himself to entitle himself to the Action, for if it appear not to the Court that he is Administrator, he cannot sue by that Name; per Glyn Ch. J. Sty. 463, 464. Mich. 1655. in Case of In-
gram v. Fawler.

18. In a Declaration by Administrator, want of alleging by whom 12 Mod. Administration was committed is cured by pleading non est jacta, (which the Court held that the Defendant by pleading in chief had
cured all the Faults in the Declaration, and Judgment for the Plaintiff, which was affirmed on Writ of Error; and without Doubt if it had not been aided by the Plea, yet it would have been well by the Statute of 16 & 17 Car. 2. Ld. Raym. Rep. 634. S. C. and Judgment for the Plaintiff, but per to. Cur. the want of shewing that the Administration was granted would have been ill on De-
murrer.

19. In a Sci. Fac. by Administrator, be must produce his Letters of Admin-
istration as well in this Court as in C. B. and though the Administra-
tion be committed by the Ordinary, yet when there is an Appeal from the Delegates, the Entry is always that it is committed per Dom. Reg. &c. 2 Keb. 47. pl. 104. Pach. 18 Car. 2. B. R. Holt v. Lenchall.

20. An Administrator declared on an Administration committed to him by R. B. Archdeacon of Norfolk, and did not say Locii illius Ordinar-
ium, nor Cui de jure pertinent to grant it, and held good, as well as in
the Case of a Bishop. For the Archdeacon is Oculus Episcopi. And per Twyden a Declaration is good without saying Locii illius Ordina-


21. An Administrator brought a Bill to discover and have an Account of the Intestate's Estate; the Defendant pleaded that the supposed Intestate made a Nuncupative Will, and another Person Executor whom he named in
in his Plea, to whom only he was accountable, and not to the Plaintiff or any other, but decreed, that though there was such a Nuncupative Will, yet it was not pleadable against an Administrator before it was proved, and fo the Plea was over-ruled. Chan. Cases 192. Hill. 22 & 23 Car. 2. Verhorn v. Brewin.

22. In Debt by an Administrator he declared on an Administration granted per Carolum Regem &c. without saying Debito Modo, &c. adjudged good; because the King has universal Jurisdiction here. Allen 33. Patch. 24 Car. B. R. Hobdon v. Wills.

23. The Defendant set forth, that Administration was granted to her by the Commissary of the Bishop of Litchfield, legitime constitutionum, and held good; For in such Case it is the same Thing as it granted by the Bishop himself. And the Difference is between a peculiar Jurisdiction and the Authority of the Chancellor or Commissary of the Bishop. Lutw. 9. Mich. 36 Car. 2. Walford v. Smith.

24. In Covenant brought by a Lessee against the Administrator of Lessee, Exception was taken to the Declaration, because it did not allege by whom the Letters of Administration were granted to the Defendant, and what Authority the Grantor had. Sed non allocatur; For the Plaintiff who is a Stranger need not shew it though an Administrator who is a Plaintiff ought to shew it. Lutw. 297. 391. Hill. 1 & 2 Jac. 2. Knight v. Greenes.

25. An Administrator declared on an Administration de Bonis non granted to him by the Steward of the Manor of Mansfield &c. cui commisso Administrationibus illius de jure pertinuit, and concludes with a Prolong hic in Curia, and this was held good. Lutw. 406. 408. Hill. 1 & 2 Jac. 2. Burbridge v. Clayton.

26. The Plaintiff entitles himself as Administrator, the Defendant pleads the Plaintiff is not Administrator; It was objected this is a Negative Plea. Per Car. allow the Plea; It is a good Plea in Abatement at Law. Vern. 473. Mich. 1687. Winn v. Fletcher.

27. An Action against an Administrator, and not in the Declaration that Letters of Administration were committed to him; And this was held by the Court incurable. For though they need not shew by what Authority they were committed, yet it is neccessary to set forth That Administration was committed to charge him with the Action. Otherwise of an Executor; It is not necessary to shew he proved the Will, becaufe an Action lies against him before Probate. 2 Vent. 84. Mich. 1 W. & M. in C. B. Bracton v. Lifter.

28. Administrator brought Debt for Rent due in the Life of the Inhabitant, and shew’d that Administration was granted to him by the Official of the Prebendary of Brampton et Peculiaris Jurisdictionis. After Verdict it was moved that it be a Peculiar the Plaintiff ought to have shewn by what Authority; to which it was answer’d that it is ill on Demurrer, but it is now aided by Verdict. Adjudged for the Plaintiff by three Judges, Holt dubitante. Comb. 196. Trin. 4 & M. in B. R. Malton v. Hanfon.

29. Trover was brought by an Administrator, and upon Not Guilty pleaded, Verdict was for the Plaintiff; and it was moved in Arrest of Judgment, because Letters of Administration were not shewn to be granted by the Ordinary or his Official, or other Person having Authority from him, but only per A. B. Doctorum per Episcopum Cicetrensem legitime Constitutionum, i.e. the Bishop had made him a Doctor.
Executors.

Doctor, but he does not say that he was Official, or any other Officer of the Bishop, as Archdeacon &c. non allocatur; for though he had not sworn any Administration at all, yet it is good after a Verdict as it is ruled Sty. 262. and it was adjudged for the Plaintiff. Skin. 531. Mich. 6 W. & M. in B. R. Cheethborough v Linton.

30. Debt on a Bond as Administrator; the Plaintiff in his Count says that Administration was committed to him per J. 8 Official’s Decr. Sutnum loci illius Ordinari’ legitime constitu’ cui Administratio de jure pertinuit, without saying Ad time pertinuit; he does not lay How Constitution, and held good notwithstanding. 12 Mod. 100. Mich. 8 W. 3. Truevock v. Hartfield.

Comyns’s Rep. 17. pl. 9. Truevock’s Case. S. C. and held good inasmuch as the Plain.

tiff set forth that Administration was granted by the Official of the Dean, to whom of Right granting Administration &c. belong’d.

31. Want of showing by whom Administration was committed is nought upon Demurrer; for it might be a Peculiar, and then it must be aver’d, Cui Administrationis Comititio de Jure pertinuit. And there is good Reason why it should be set forth by whom Administration was committed; for the Defendant may contest the Right of the Person granting, and may plead that Administration was granted to another, or that there were Bona Notabilia. 1 Salk. 38. pl. 5. Hill. 12 W. 3. B. R. the first Resolution in Case of Gidley v. Williams.

32. Debt by Administrator Cui Administratio debito modo commiss’s fit; Defendant pleads over; Per Cur. This had been bad if demurred unto, but it now helped by your pleading over, for you thereby admit he has a Right of Suit, and is Administrator. 12 Mod. 537. Trin. 13 W. 3. Hall v. Bond.


34. Plaintiff declared upon an Administration granted to him by the Official of a Peculiar, and that debito modo commis’s fit, Holt Ch. J. Gould and Powis held the Declaration good, and that the Debito Modo was a sufficient Averment; And Holt Ch. J. said that there was no Peculiar but had the Power of granting Administration, and that this was a needful Exactsnefs, not so much regarded lately as it had been formerly, when it was thought not enough even to thow an Administration committed by a Bishop, without averring that there were Nulla bona notabilia; And Judgment for the Plaintiff, Powell J. diffentiente; and afterwards affirmed in Cam. Scacc. per tot. Cur. 1 Salk. 40. pl. 10. Trim. 3 Ann. B. R. and 4 Ann. in Cam. Scacc. Denham v. Stephenfou.

35. Where one grants Administration Virtute Officii the Plaintiff need not aver his Authority; but otherwize it is where it is by Special Commis’s. 1 Salk. 41. in S. C.

36. In Action against Administrator it was not said Cui Administrationis commis’s fit, whereupon was a special Demurrer, and to prove it necessary the Case of Wade and Atkinson, 2 Cro. was cited. Likewise an Opinion to this Purpose, in 1 Syd. 225. and a Case in 2 Vent. 84. where this was directly adjudged. But the Court said, That the Declaration charging the Defendant as Administrator is the very fame in commen Sense, as if it had said, Cui Administratio &c. They said too, That one Part of the Case in 2 Cro. had been over-ruled several Times; and therefore this Part of it was of let’s Authority. It is true, they said there was such an Opinion in Syd. And as to the Case in Ven. the Counsel gave an Anwerto that; for they said, That that was a Case in the Common Pleas, and there the Declaration is, that the Plaintiff Queritur, quod
(Z. a. 6) Pleadings in Actions against Executor or Administrator.

1. Debt is brought against two as Executors. It is a good Plea to the Writ that they are Executors, and not Administrators. Br. Executors, pl. 39. cites 50 E. 3. 9.

2. Where Writ is brought against two as Executors where the one is not Executor, and he confesses the Action, and the other pleads Non est Factum, the true Executor shall say that he who confessed was never Executor; Per Littleton; But Chocke contra. But if the Decealed's Goods are put in Execution, the true Executor shall have Writ of Redemp's. Br. Executor, pl. 88. cites 9 E. 4. 14.

3. Where the Testator pleads in Barr and dies, and Restitum is brought against the Executors of the Defendant, they cannot plead to the Writ unless it be Matter coming of younger Time, As a Release &c. because their Testator has affirmed the Writ before; Quod Nota. Br. Executor, pl. 82. cites 24 E. 3. 25. 26. 47. 48.

4. Recordare by R. Executor of the Testament of J. B. against C. de Equo suo capto, and did not say Equo Teflatoris, and yet well; and so fo that Executors shall call the Goods of their Testator, which they had once in their Possession, Bona fua. Br. Executors, pl. 84. cites 24 E. 3. 15.

5. Waste against an Executor, and did not count of whose Lease the Executor held, and yet well; for he represents the Estate of the Testator. Br. Executors, pl. 130. cites 38 E. 3. 18.

6. And because the Writ was against J. as Executor of the Lease, where he was Executor of the Executor of the Testator, the Writ was abated upon Exception thereof. Ibid.

7. In Debt Administrator shall be sued by the Name of Administrator, and not by Name of Executor, and Administrator shall have Action &c. and the Defendant pleaded to the Writ that the Administration was bailed to him by one K, and the other said that K. did not administer but as Servant to the Defendant; but the Issue was, whether the Administration was bailed to them or not; for if it was to both, then the Administration shall be said by Virtue of the Commiision, and not as Servant of the other. Br. Administrator, pl. 23. cites 38 E. 3. 29. 21.

8. Debt by Administrator, and revered the Letters of Administration as he ought, and that they were committed by the Commissary of the Bishop; and Exception was taken because it was not committed by the Bishop himself, who is immediate Officer to the Court; & non allocatur; but the Commiision awarded good; Contra of Certification of Batardry, or of Excommunication, for this ought to be by the Bishop himself; Nore a Diversity. Br. Administrator, pl. 19. cites 1 H. 4. 64.

9. Debt against two Executors, the one came at the Pluris Capias, and pleaded Plea Administration at W. Prif; and the other e contra, and after came the other by Exigent and pleaded to the Writ, because three others
were Executors with them who have administered, and are not named. Judgment of the Writ; and the Plaintiff replied that the two are the Executors, and the Defendant pleaded this Matter in Arrest of the first Inquest upon the first Issue, for by the Replication to the second Plea he has waived the Advantage of the first Plea where this was sufficient for all by reason of the Statute, which wills that he who first comes by Distrefl shall answer; Per Hank. and the Opinion of the Court. Br. Executor, pl. 46. cites 7 H. 4. 12.

10. Debts against Executors upon Death of their Testator, who pleaded good non Adminin ut Execut' alius Bona que siueant Testatoris tempore Mortis fiue, and found against them. And by the Opinion of the Court this is no Plea, for it may be that they received Debts due to their Testator after his Death, or retook Goods which were taken by Trespassers before his Death, or otherwise recovered Damages for them, but because it was found against them, therefore the Verdict has made the Plea good; Per Opinionem. Br. Executor, pl. 50. cites 7 H. 4. 39.

11. Debts against Administrator, and did not show that the Administration was committed to him by the Ordinary; Judgment; And by the said Opinion the Writ is good, and that if it be otherwise the other may plead it. Br. Administrator, pl. 19. cites 11 H. 4. 72.

12. There was no Action against Administrator at Common Law, but this is given by the Statute; Per Hank. Br. Administrator, pl. 19. cites 11 H. 4. 72.


14. Trespass of a House broken and Goods carried away; The Defendant said that the Plaintiff's Husband was seized in Fee of the House, and possessed the Goods, and made the Defendant his Executor and died, and the Defendant found the Door open and entered and took the Goods, and the Plaintiff supposing that she had been Executor took them &c. and this was admitted good Colour, and the Plea was awarded good per Cur. notwithstanding that the Plaintiff brought the Action of her Goods, and the Defendant justified of the Goods of the Testator, &c. and the Plaintiff said that the Testator devised them to her, and the Defendant delivered them to her after the Testator's Death, and after took them, and the Defendant said Proteftando that they were not devised, and pro Placito that he did not deliver them, and so to Issue. Br. Trespass, pl. 9. cites 2 H. 6. 15.

15. Debt against two Administrators, at the Diftringas the one came and the other not; And the Opinion of the Court was, that he should answer alone, notwithstanding that the other did not come; for though the Statute says, that of Executors he who first comes shall answer, yet Administrators are taken by the Equity; Quod Nota. Br. Administrator, pl. 4. cites 3 H. 6. 14.

16. Debt against one as Executor. He said that the Deceased died Intestate, and the Ordinary committed the Administration to him, and to two others who are alive not named; Judgment of the Writ; Per Newton, you say that they have administered. Markham, I do not say so; and there it was laid by two Justices, and not denied, that if the Administration be committed to any one, yet he shall not be charged if he do not administer; And the other said, that after the Death of the Testator the Defendant administered de su Fort demogine, and after he took the Administration upon him pending this Writ; Judgment &c. Br. Administrator, pl. 5. cites 20 H. 6.
Executors.

19. But the same Folio, in another Action of Debt, Fortescue said, that where the Defendant pleaded, ut supra, that he is Administrator, Judgment of the Writ, he shall say ab ille loco that he be administered as Executor, and so it seems supra, that if Administration be committed to one, and he refuses to administer, he shall not be charged by Force thereof. Ibid.

18. Debt against Executor; The Defendant said that the Testator died intestate, and so be had no Goods; Judgment is Action et Adjournament, therefore Quere, for it seems that he is chargeable to the King. Br. Dette pl. 4. cites H 6. 17.—But see H 7. 18. that to say that the Plaintiff is outlaw'd, is no Plea.

19. In Debt against Baron and Feme Executrix, it is a good Plea that the Feme has * fully administered, and a good Replication that the Feme has Assets, without mentioning the Baron; And it was said there that if the Feme may administer and distribute without her Baron, and that the Baron is chargeable and renews them they shall remain in her Hands as Assets. Br. Baron and Feme pl. 84. cites H 6. 4. and Fitzh. Replication 7. per Newton.

Brown 97.
cites S. C.
and 9 H. 6. 7. accordingly.— Yelv. 115.
Mich. 5.
Jac. cites fame Case accordingly in the Case of Lathbury.

20. Debt against Executors, who said that the Testator died intestate at D. Prift. and no Plea without traversing the Plea; Per Martin, you ought to say that he died intestate ab ille loco that he be made him Executor. Per Strange, No, for it may be that he made him Executor, and after revoked the Testament. Per Martin, Then he may say that he be made him Executor and after revoked the Testament, and so he did; and there it is agreed that after the making of an Executor, the Testator may discharge him again of the Executorship. Br. Barr. pl. 21.
cites 7 H. 6. 13.

21. In Debt against Executors, it is a good Plea that after the making of them Executors the Testator repealed this Testament at B. or discharged them, and after died intestate at N. Br. Executors pl. 126. cites 7 H. 6. 13.

22. Debt against J. Administrator; Candish said, the Administration was committed to us and to N. P. by the Ordinary who is alive not named &c. Per Hales, you not allege that he administered, by which Candish said as above, and that N. administered to S. Judgment of the Writ; Per Hales, he did not administer, Prift; and the Issue was received, and not it the Administration was committed to them or not: But per Danby 33 H. 6. Po. 31. the Issue shall be that the Administration was not committed to him. But note, that it may be committed to him, and yet it he does not administer, he shall not be charged; but he himself shall not say that he unques Administrator he unques Administrator as Administrator, and concordat 1 H. 5. Br. Administrator pl. 24. cites 8 H. 6. 2.

23. And see T. 2 H. 5. 8. That in Case ut supra against an Executor, who said that there is another alive who administered, the Issue was if the one alone was made Executor. Ibid.
24. Debt against Executor, the Defendant pleaded a Gift of the Testator in his Life of all his Goods except such and such by which he took the Goods given by reason of the Gift, and to the rest that he has fully administered, Cam'd, said all amounted to Plene Administrator, & non allocatur; but all was entered to inform the Lay Gents, and yet the taking of them as of his proper Goods by the Gift is not Administrator to charge him. Br. Executors pl. 162 cites 11 H. 6. 35.

25. In Debt against Executors it is a good Plea that the Testator made the Defendant and A. his Executors, which A. has administrat and is above; Judgment of the Writ. Br. Executors pl. 75, cites 22 H. 6 59.

26. Deed against Executor who said that there is another Executor whose administrat at D. &c. the Plaintiff said that the other named Executor did not administr, Prift; and the other contra, and so fee that in this Case the Administrat of another Executor is to be alleged and is illusory, and was pleaded to the Writ. Br. Executor pl. 166. cites 32 H. 6. 25.

27. Debt by Administrat, it is a good Plea that the Testator made the Defendant his Executor and died, and after the Ordinary committed the Administration to the Plaintiff, and after the Defendant proved the Testament; Judgment & Affid; for the Ordinary may commit the Administration in the mean Time; but when the Executor has proved the Testament the Power of the Administrator is determined, unless the Executor has refuted before the Ordinary before this; Per Newton, Littleton and Danby. But it was doubted if he ought to traverse, abique boo that the Party died intestate prior &c. or not; and by the best Opinion he ought to traverse it. Br. Executor, pl. 111. cites 7 E. 4. 12, 13.


29. So to say that he is Administrator and not Executor. Ibid.

30. Contra in Deatine of Charters rei�티 in manibus Testatoris. Ibid.

31. In Deb against Executors, it is a good Plea that their Testator died outlawed, or was the King's Villain; Per Littleton, Young, and Pigot. Contra per Jenney, for it is only an Argument. Br. Executor pl. 137. cites 8 E. 4. 6.

32. Deb against Executor who appeared by Attorney and imparled to another Term, and then said that the Administration was committed to him by the Ordinary, insinuath the Testator died intestate; Judgment of the Writ; and per tot. Cur. he can't have this Plea contrary to the War, C. rant and Imparlanlce; for this is a Misnomer; but he may say no unques Executor ne unques administrat as Executor, for this is Bar; and the Efect is that he never administrat as Executor, and upon this the Issue shall be taken, and not whether he be Executor or not; by which he said protestando that he died Intestate, and that the Administration was committed to him, & pro placito that Never administrat as Executor, and the other contra. Br. Executor, pl. 91. cites 9 E. 4. 40.

32. Trespass of Goods carried away, the Defendant justified as Executor of J. N. and the Plaintiff replied, that the same Plaintiff was Executor to J. N. by a left Testament, and the Defendant rejoined that this left Testament was repealed in the Court of Rome, and So the Testament void; and per Cur. it is no Plea, by which he concluded thus, and so not Executor; quod nota, and there it was agreed that Judgment given in the Court of Rome is not good in England; quod nota. Br. Executor pl. 168. cites 2 R. 2. 22.

33. In Deb against Executor it is a good Plea to say that he has nothing in his Hands but 20 l. and J. S. has recovered 20 l. against him as Executor &c. Br. Executor, pl. 103. cites 5 H. 7. 27.
Executors.

24. Of Personal Things Administrators shall have Writ of Error upon a Judgment given against the Testator, and Seive Facias upon it; and by the Statue of 31 Eliz. c. 11, it is ordained that Administrators shall have Action, and shall answer to the Action, so that now Administrators shall have Action as Executors & contra before at Common Law; For then as it seems none might have administered but the Ordinary, who should be impleaded, but should not implead, nor at this Day, Contra of Administrator, but the Ordinary might have Treoffas of Goods taken out of his Possession. Br. Administrator, pl. 44. cites F. N. B. 21. (M.)

35. A brought Debt on a Bond against B. who pleads that after the Art brought by A. and before Notice one C brought Action against B. as Administratrix of J. S. and that Administration was afterwards granted to B. who confessed the Action on which C. had Judgment beyond which he has no Goods; Per Anderdon Ch. J. the Plea is no Bar; for had he pleaded the Administration committed after, C. could not have Judgment; so were there are three Executors, and Debt be brought against two, they must plead that Matter in Abatement, and in Cafes of Contention of the Actions it must be averred to be a true Debt. Le. 69. pl. 91. Mich. 29 & 30 Eliz. C. B. Blauchflower v. Fry.

36. Debt upon two Obligations against Executors, one of the Defendants pleaded Ne unques Executor, Judgment was given for the Plaintiff, and Error brought and assigned for Error, that the Plaintiff had sued one jointly with the Executor who was not Executor; this shall not abate the Writ, for it would be mischievous when divers are made Executors and one refuseth, it the naming of him should abate the Writ. Cro. E. 110, pl. 7. Mich. 30 & 31 Eliz. in Cam. Scac. Thirkettle v. Reeve.

37. Debt upon a Bond against the Administrator, who pleaded, that there is a Custom in London that if a Citizen of London contracts with another Citizen to pay Money to him, and he who made the Contract dies, that his Executors or Administrators shall be chargeable with such Contract, as if it had been a Debt due on Bond, and that he had not Assents ultra to pay that Debt upon Contract; and upon a Demurrer this was adjudged a good Custom. For the Executor in Conscience is bound to pay a Debt upon simple Contract as well as a Debt on a Bond. Cro. E. 409. pl. 21. Trin. 37 Eliz. C. B. Snelling v. Norton.

Noy 52.
S. C. and the Plea held good; For Debt against an Administrator is not first given by 51 Eliz. 3; but that was at the Common Law, and the Statute is declaratory.——5 Rep. 82. b. Snelling's Case. S. C. ref. this that the Custom was good, and that though the Plaintiff was a Stranger and not a Citizen, yet this Custom was good to bind him.

If a Subject to whom the Testator was indebted sues the Executor, Ex. 133.

38. If a Debt of Record be due to the King, and a Subject creditor sues Execution on a Statute, so that the Executor has no Day in Court to plead this Debt to the King, in this Case the Executor is put to an Aut. Quer. in which he must set forth the Matter. Went. Off. S. C. cited 4 All. 42.

39. Seive Facias against an Administratrix upon a Judgment had against the Intestate; the Defendant pleaded he had no Goods, which were the Intestate's at the Time of his Death in her Hands, to be administered; nor had any at the Time of the Writ brought, or at any Time after. For tot. Cur. this is no Plea; For a Judgment cannot be answered without another Judgment, and it may be he had administered all the Goods in paying
40. In Action brought against Executors they pleaded an Outlawry of the Testator not reversed; it was helden to be no Plea, for the Testator might have Debt due upon a Contract, or it might be, he devied Lands to his Executors to be sold, which are sold and the Money Affets in their Hands, in Cae they are not forfeited by Outlawry. Cro. E. 575. pl. 21. 39 Eliz. B. R. Woolley v. Bradwell.

41. If A. brings Debt against B. as Administrator to 7. S. without saying that 7. S. died Intestate, yet it is good. For it may be that J. S. made a Will and Testament, and yet Administration might be committed to the Defendant by refusal &c. But otherwise it is where the Plaintiff is Administrator; there ought to show that the Party died Intestate. Williams said, that he had viewed the very Record of that Case accordingly. Noy 137. cites 5 Rep. 31. Mich. 41 & 42 Eliz. B. R. Hargrave's Cafe.

42. In an Action of Debt against an Administrator he pleads that the Testator was indebted to him, and over and above which Sum he hath not to satisfy &c. Per Cur. that is a good Plea, and later then to plead Plene Administravit &c. for by that Plea it may be tried. Noy 106. Anon. cites Trin. 2 Jac. C B.

43. In Debt against an Executor; he pleads that his Testator was Cro J. 103. obliged to B. in a Recognizance of 300l. ultra quod he had not to satisfy, pl. 54. 39 Eliz v. 39 Allies v. 39. Sheffield. The Plaintiff demurs, and Judgment for the Plaintiff, because the Defendant had not averred, that it was pro vero et juro debito upon which S. C adjudged Issue might have been taken, and the Executor well knowing upon nature, what Deceance that was made. And by Coke Ch. J. it was ruled accordingly. Noy 113. Trin. 2 Jac. C B. Meller v. Sherfield.

44. Debt against an Executor who pleaded the Testator was indebted to the King for the Office of Sheriffship, and because it was not averred it was a true and just Debt, and not paid; it was adjudged upon Demurrer for the Plaintiff. Cro. J. 182. pl. 182. Trin. 5 Jac. B. R. Wodel v. Hungate.

45. In Scire Facias on a Judgment Defendant may plead generally Plene Administravit before the Scire Facias brought, without showing that he did administer in Payment of Debts of as high Nature, yet that must be proved in Evidence, or else the Trial will fall out against the Executor. Went. Off. Ex. 137.

46. A. being Executor administrated and yet would not prove the Will, whereupon Administration was granted to B. and B. being sued for a Debt pleaded the Matter above, and it was held a good Plea, and found for him before Doderidge J. at Oxford. Went. Off. Ex. 39. Marg.

47. In Debt against an Executor who pleaded, that his Testator was indebted to another upon a Statute in such a Sum, beyond which he had no Atest; the Plaintiff replied, that the Statute was acknowledged by Fraud; Warburton said that one may plead generally that the Statute was acknowledged by Fraud, without proving the special Matter. Brownl. 51. Trin. 9 Jac. Brookesby v. Tricham.

48. A. makes
48. A. makes B. his Executor and dies; and then B. makes C. his Executor and dies; and in Action of Debt against C. as Executor of B. Executor of A. C. pleads that he had renounced the Executorship of B. But per Cur. he ought to be Executor to both or to none. For by Hobart Quod Lex conjunxit nemo separat. No. 30. Wolfe v. Hayton.

48. Debt against an Executor for Arrears of Rent upon a Lease made to R. who assigned it to his Tettator. The Defendant pleaded, that after the Death of Testator he did not enter upon the Lands demised, but left the Possession & nulla proficua inde receptor, and upon a Demurrer to this Plea it was adjudged not good, because the Executor cannot waive the Term; for where once he agreed to be Executor, he agrees to every Thing that shall be accidental to the Executorship, otherwise there would be an Agreement to one Thing, and a Disagreement to another Thing, which cannot be, therefore if the Rent which he is to pay is more than the Yearly Value of the Land, he should have pleaded this Matter specially, and might have discharged himself by such Plea. 2 Roll Rep. 151. Mich. 17 Jac. B. R. Paul v. Moody.

49. A. was accountable to J. S and afterwards J. S. was outlawed in an Action Personal. A. died. The Queen by her Letters Patent granted unto B. omnia Bona & Catala, exitus, proficua, forisactur & advantagia quaecunque which came to her, or accrued by reason of the Outlawry of the said J. S. and now B. brought an Action of Account against the Executors of the said A. as Executors of their own Wrong. The Defendants pleaded they had Letters of Administration committed to them by the Ordinary, and demanded Judgment of the Writ. The Plaintiff in Maintenance of his Writ replied, that the Defendants did administer of their own Wrong before that Administration was granted unto them. Upon which the Defendants did demur in Law. It was the Opinion of some of the Justices, that the Wrong is purged by taking of Letters of Administration, and now they are to be charged as Administrators only, and not otherwise. Le. 197. pl. 250. Hill. 30 E. Liz. in the Exchequer. Anon. cites 50 E. 3. 9. 20 H. 6. 1. 3.

50. Assumpsit against an Administrator, who pleaded that on such a Day the Intestate entered into Bond to T. S to pay 40l. at Michaelmas next ensuing, and that Plene Admistratorius all the Goods of the said Intestate presenti quam to satisfy that 40l. and upon a Demurrer the Court held it a good Plea; for Debts on Bonds are to be paid before Debts on Contracts. Cro. E. 315. pl. 9. Hill. 36 Eliz. B. R. Backland v. Brooke.

53. Debt was brought against an Executor upon a Bond of his Tettator. The Defendant pleaded Non est Factum sum. It was inlisted for the Plaintiff that this Plea was ill, because the Relative sum must refer to the Defendant and not to the Tettator, there being no Mention of Tettator in all the Bar. But three Justices held e contra, for it shall be referred to that which is may reasonably relate to make the Plea good; But Whitlock doubted. Latch. 125. Trin. 1 Car. Baker's Cafe.

54. Debt against an Executor who pleaded Plene Admistratorius. It was held no good Evidence to prove the Defendant had promised to pay J. S's Debt due by the Tettator before this Action brought; but otherwise if he had given his Bond for it; and if an Executor renew a Bond which Tettator had entered into as Surety only, this is no such Administration as will make this Plea good against other Creditors by Spe-
Executors.


55. In Debt on Bond against an Executor who pleads Plene Administrator, and gave in Evidence Bonds cancelled and taken in, and Acquitances for Money, this was held not good without Proof of real Payments made, or new Security given. Clat. 112. pl. 193. March 24 Car. Sot's Cafe.

56. Administrator may have Trespafs or Trower for Goods taken before Administration granted to him, for that relates to the Death of the Intestate, and not to the Time of the granting it. Sty. 241. Mich. 1652. Long v. Hebb.

57. Where the Creditor administers to the Intestate Debtor, he may retain the Goods to satisfy his Debts, and where the Goods are taken away before Administration granted to him, so that he hath none to retain, in such Case he may have TrespaP or Trower, or Debt against the Person who took them, for the Action is not suspended by the Administration. Sty. 384. Trin. 1653. Alhby v. Child.

58. Debt against an Executor who imparked, and afterwards pleaded a Mifnomer in Bar, viz. that he was Administrator with the Will annexed; and not Executor, and therefore ought to be named Administrator; but upon Demurrer Judgment was for the Plaintiff Nifi &c. for he cannot plead a Mifnomer after Imparllance. Sty. 385. Trin 1653. B. R. Filler v. Jeffries.

59. Resps enter mains pleaded by an Executor is an affirmative Plea in Substaiice, though it sounds somewhat in the Negative, for it is in Effect the same with Plene Administrator, and such Plea must be averted; Per Roll Ch. J. Sty. 405. Hill. 1654. Anon.

60. If an Action of Debt be brought against an Executor upon a simple Contract of the Debtor, and he appears and pleads N. 1 debet, and found against him, the Plaintiff shall have Judgment because he has dissented with his Advantage. Freem Rep. 6. 7. in pl. 3. Mich. 1670.

61. In Affumpsit against Executor the Defendant pleaded a Recognizance not satisfied, and also a Judgment in Debt for 5000 l. upon a Goldsmith's Note, payable with Interest on Demand, which not being paid till such a Time after, and the Interest amounting to 1700 l. the Judgment against him was found for 7600 l. [6700 l.] and that he bad not utra 40 l. chargeable to this Recognizance and Judgment. Adjudged that this Plea was ill, because of pleading a Judgment for Interest, which is a Devatavit to permit it to run in Arrear, and then to suffer Judgment for it, and it shall not be intended that there was a Want of Afflents to pay it before the incurring of it by the Administrator, the same not being expressly pleaded. 2 Lev. 39. Hill. 23 & 24 Car. 2. B. R. Seaman v. Dee.

62. Affumpsit by the Plaintiff as Administrator, but at the End of the Declaration the Prefont hic in Curia Litoras Testamentarias was omitted. There was a frivolous Plea, on which the Plaintiff demurred, and the Defendant joined in Demurrer and insisted on this Fault; but it was ruled by Hale, ceteris rcentibus, that it is only Matter of Form, because it was not a Fault in the Declaration itself, but an Omission of what ought to be inferred after the End of the Declaration, and therefore on a General Demurrer no Advantage can be taken of it. It was urged that there are 20 Books that prove it to be Matter of Substance, which Hale confessed, but said that the Opinion had been otherwise for 10 Years past, (but the Reporter thinks that he intended his own Opinion) and therefore Judgment for the Plaintiff. 2 Saund. 402. Palech. 24 Car. 2. Slow v. Wilmott.

4 R. 63. Sci.
63. Sci Fa. by an Administrator upon a Judgment of 1000 l. The Defendant pleaded, that such a Day before Administration was granted to the Plaintiff it was granted to J. N. who is still alive at B. and demanded Judgment of the Writ. The Plaintiff replied that J. N. was dead, and concludes to the Country. The Defendant demurred, for that the Plaintiff should have traversed absque hoc that he is alive. This Plea was held ill, for though it contradicts the Declaration, the one affirming that Administration was granted to him, and the other that it was granted to J. N. yet an apt Iliue is not formed without an Affirmative and a Negative. Vent. 213. Trin. 24 Car. 2. B. R. Fortescue v. Holt.

64. Affirmtft against Executor; The Defendant pleads four Judgments, and that he had but 5 l. Affairs to satisfy those Judgment, (each of the judgments being for a greater Sum). The Plaintiff replies to one of the judgments that it was kept on Foot by Fraud and Covin &c. and demands Judgment whether he ought not to have his Debt. It was objected, that he ought not to answer only to one, to all; As if a Man pleads Outlawries in Bar, and the Plaintiff reverses one of them, this will not serve his Turn, but he must reverse them all. Vaughan said the Defendant hath four Strings to his Bow, whereof each of them will serve his Turn; though you have cahiered one, yet he has three left; and the most proper Replication would have been, that he had Affairs above 5 l. and then if Iliue had been taken, and it had been found for the Plaintiff, he should have Judgment de Bonis Teffratoris, As if Iliue had been taken upon a Plene Administrativit, and Affairs had been proved. This was referred to Serjeant Turner, who made an End of it. Freem. Rep. 28. pl. 35. Hill. 1671. Chamberlain v. Pickering.

64. An Action of Debt was brought on a Bond against the Defendant as Heir of the Obligor, who pleaded that his Ancestor died Intestate, and that Administration &c. was granted to J. S. who gave the Plaintiff another Bond in Satisfaction of the first; Adjudged a good Plea, because by this Bond given by the Administrator the Plaintiff’s Security was better’d, and the Administrator is now chargeable De Bonis propriis. Mod. 225. pl. 14. Trin. 28 Car. 2. C. B. Blythe v. Hill.

brought an Action of Debt on a Bond. The Defendant pleaded a Concord that he should give the Plaintiff a new Security for this Debt, and another upon another Obligation, and that he being Executor of the Obligor, and the Person with whom the Concord was made, gave the Security according to the Concord by a Bill seal’d by himself. Adjudged an ill Plea, because one Bond given in Satisfaction of another is not any Discharge whether on Concord or not, and the Concord cannot mend the Matter, and yet the new Bond here obliges him de Bonis propriis, where the first Bond obliged him only De Bonis Teffratoris. 5 Lev. 53 Mich. 53 Car. 2. C. B. Loosley v. Giltard.

65. Three several Actions were brought at one Time for 100 l. each; He pleaded Riens enter Mains ultra 100 l. to each Action, and so upon each Action there was Judgment against him for 100 l. and upon a Motion for an Injunction it was deny’d by Lord North. In Cases proper for Law a Man may defend himself by legal Pleadings, and every Executor ought to be careful to cover all his Actions with a Judgment. Vent. 119. pl. 108. Hill. 1682. Anon.

66. Judgment upon a Sci. Fa. against an Executor and an Inquiry; and returned that he diversa bona Teffratoris disponit elongavit & ad proprium Usum convertit; he comes in and pleads that he was never Execu-
tor, or administréd as Executor, and traversés, abique hoc that he Bona Téfators dijïpint &c. whereupon Illice joined and found against him and Judgment, which was held good upon a Writ of Error for he having gone off from his Plea of Ne unques Executor and traversed the Converfion, it shall be intendent a Conversion as Executor. Skin. 85. pl. 3. Hill. 35. Car. 2. B. R. Bird v. Harrison.


2 Jo. 146. S. C.

68. An Executor has 20 l. Affairs, and he is sued by two Obligees for 20 l. at the fame Time and pleads Plene Administravit. Both fhall have Judgment for that Affairs; but had he paid it to one on the first Suit, or controff Judgment to one, he might plead it to the other; Chancery will not grant an In-junction, for in Cases proper for Law a Man muft defend himfelf by legal Pleadings, and every Executor ought to be careful in the first Place to cover all his Affairs with a Judgment. Vern. 119. pl. 103. Hill. 1632. Anon.

69. Debt against an Executor, who pleased that his Téfator entered into a Bond in fuch Penalty to 2. S. conditioned to pay fo much Money, which was not yet paid, beyond which he had not Affairs. To this Plea the Plaintiff demurred especcially, and shewed for Cafe that the Defendant did not aver (as he ought) that the Bond was entered into by the Téfator pro vero et justo debito. But the Court held the Plea good without fuch Averment, for it fhall be intended the Bond was given for a just Debt, and the Obligation itfelf fhall be fufficient to discharge the Executor tho’ he had not received any Money of the Téfators’ Carth. 8. Trin. 3 Jac. 2. Lake v. Raw.

70. Action against an Administrador and the Plaintiff did not fet forth that Administracion was granted to him; Adjudged an incurable Fault, for tho’ the Plaintiff need not shew by whom Administracion was granted, yet it is absolutely neceffary to shew that Administracion was granted to charge him in an Action. 2 Vent. 84. Mich. 1 W. & M. in C. B. Bradton v. Lifter. 

71. In Proof of a Plene Administratif the Action be Debt on a Bond, and you offer Pament of a Bond on Plene Administratif, Proof must be made that ‘twas a Debt by Bond, that ‘twas felled and delivered; But to Debt on fimple Contract you need only prove Payment because if no Bond ’tis a good Administratif in an Action; Per Holt Ch. J. Show. 81. Mich. 1 W. & M. Sanderfon v. Nicholl.


74. And as to the Cafe of Drutton v. Speaddrall, which was quoted as reported to the contrary by Croke, it appears by Mo. 352. that Popham and Fenner were againft Gawdy and Clench, and it appears that the Action was brought in the Debt and Definet, and by a Prebendary upon the Lease of his Predecessor, and then an Affignment will be a
Bar, which Matters indeed do not appear to be urged in the Case as cited by Lord Coke, and reported by Cro. El. 355 but they go upon the Privity of Contract said to be dissolved by the Death of the Lessor, 2 Vent. 209. in Cave of Coghill v. Freeloze.

75. And Twidwen, Windham and Keeling, (Hide Ch. J. being dead) held that this is not contrary to Overton and Siddall's Case cited in Walker's Case 3 Rep. 34. [24.] and in Poph. for there the Action was brought by a Successor of a Precedent against Executor of Lessor, and Privity of Contract does not go to the Successor more than to the Heir, and the Heir of Lessor shall not maintain Debt against Executor of the Lessor after Alignment, Because no Privity of Contract, but only of Estate descended to him. Ibid.

76. Sere Fiscus was brought against an Administrator upon a Judgment against an Executor. He pleads Plain Administratrix the Day of the first predated, upon which the Plaintiff demurred; and in such Case he ought to plead Reses enter manus at the Time of the Death of the Testator; but it he had joined Issue this had been a Waiver of the Advantage of it, and Holt Ch. J. cited the Case of Parcourt and Wrenham, Moor 858. and Drummy and Godsey's Case 4 Cr. 575. and tho' some Cales in Keble and the Office of Executors were cited, the Court ruled the Case at supra, and did not regard the Cales in Keble, but demanded other Authority, and as to the Office of Executors they said that this was a good Book, but they did not agree with it in this Point. Skin. 565. pl. 12. Mich. 6 W. & M. in B. R. Newton v. Richardson.

77. Aetion against an Executor who pleads several Judgments, the Plaintiff may reply to them severally, or generally, that they were kept or Foot by Fraud; Per Holt Ch. J. Adjournatur. Show 289. 290. Mich. 3 W. & M. Beake v. Kent.

78. The Plaintiff in Cur. Pal. counted against the Defendant that he was indebted to the Plaintiff as Administrator to F. B. in 131. pro tant' Denar' fim' ejusdem Quer' as Administrator of F. B. pet ipsum Def'. ad Usum iipius Quer'. as Administrator of F. B. habet & recepit. Upon non Attumpit pleaded, a Verdict and Judgment was pro Quer', and a Writ of Error was brought in B. R. and Error assigned that the Plaintiff was general, and no Mention of F. B. in the Plaint, so there is a Variante between the Plain and the Declaration, and for this Error the Judgment was reversed. Skin. 356. Mich. 3 W. & M. in B. R. Neath v. Reeves.

79. Defendant must not only prove Payment without Abatement or Collusion as Discharge of Bonds, but also that there was a real Debt for which the Creditor's Oath sufficeth, or if Evidence be given that the Tellator acknowledged so much due by Bond that may be allowed, for that
that would have been good Evidence against himself. Cumb. 352. per Holth Ch. J. Trin. 7 W. 3. Anon.

80. If an Action be brought against an Administrator, the Plaintiff need not aver in his Declaration that Administration was committed to the Defendant contra 2 Vent. 84. Stanton v. Lifter Et Nola bene per per Mather, in an Anonymous Case in C. B. Mich. 93. it was held to be ill upon Demurrer, but cured by the Defendant's Pleading whereby he admitted himself a lawful and rightful Administrator; Per Holth Ch. J. Comb. 465. Hill. 10 W. 3. B. R. Sparkes v. Crotts

81. Debt for Rent upon a Parol Lease, Defendant pleaded such a Debt upon Obligation ultra quod he had no Assets, for being in equal gradus he could not plead the one against the other till Judgment or Payment of the Money, but otherwise if one of them be of higher Nature than the other, and there is no Divinity between Debts in the Reality by Specialty, and in Reality without Specialty as to Equality of Degrees. 12 Mod. 291. Pach. 11 W. 3. in Cafe of Cage v. Aton.

82. Covenant was brought against the Administrator of an Affinee of a Term &c. for Years, and the Declaration against him was as Affinee of the Lease, though he was only the Administrator of the Affinee, and adjudged that the Action was well brought against the Administrator by the Name of Affinee. Carch. 519. Pach. 12 W. 3. B. R. Tilney v. Norris.

83. If Executor suffers Judgment to go against him by Default, it is an Admission of Assets, and the Sheriff may on the Pl. Fa. return a Dehaven. 12 Mod. 411. Trin. 12 W. 3. Rook v. Sheriff of Salisbury.

84. In an Action against an Executor or Administrator, if he pleads twenty Judgments, he confestes Assets for above nineteen of them; and yet they melt at their Peril plead all the Judgments in Force against them, lor if they fail in one of them, they shall never take Advantage of it, lor the Creditor shall have Judgment to execute when Assets come, and if the Executor plead not all his Judgments, he loses the Right of preferring them, and may be charged in a Dehaven for those Judgments he has omitted to plead, of which see a Case well reported in Hutton; for the pleading of the Judgment is a Protection of the Assets which you have or may have until the Judgment be satisfied, and it one pleads five Judgments and one of them be false or fraudulent, you are faulted with the whole Debt. Per Holth Ch. J. and Gould J. 12 Mod. 196. Trin. 13 W. 3. Atfield v. Parker.

85. When an Executor pleads to a Recognizance, he must set it forth to the Court, that the Court may see whether it be to be performed or not, but if it be a Debt, they only need say that a Judgment was obtained against him in such a Court, if it be in any of the Courts of Wholeminster, but if it be in any Inferior Court, they must give it Jurisdiction, and say taliter procezum fuit &c. Here the Plaintiff had Judgment upon the first Exception; Per Holth Ch. J. 12 Mod. 613. Hill. 13 W. 3. B. R. in Cafe of Ingram v. Foot.

86. Adjudged, That where an Executor suffers Judgment to go against him by Default upon the Writ of Inquiry, he shall not give in Evidence want of Assets, because he is now ellopped; for he ought to have pleaded Pleas Administrator, or specially what Assets he had. 6 Mod. 528. Mich. 3 Ann. B. R. Treile v. Edwards.

87. A Sci. Fa. quam damna effideri non detent, was sued out against an Administrator upon the new Statute for preventing of vexatious suits Ex. upon an Injunction Judgment against the Intestate, to this the pleads Judgments recovered against her upon Bonds entered into by the Intestate, and adjudg'd no Plea, because the Act doth not allow the Executor or Administrator to lay any thing in Bar of the Action, more than the 4 S
Executors.

Testator or Intestate could have had when living, which was only in Arrest of Judgment, but he shall not be chargeable with Costs. L. P. R. 43. cites 3 Ann. B. R. Smith's Cale.

88. In Debt against an Executor for Rent incur'd after his Entry, he cannot plead Plene Administravit, for that confesses Misapplication, since no other Payment out of the Profits can be justified till the Rent be answered. 1 Salk. 317. pl. 25. Trin. 9 Ann. B. R. Buckley v. Pirk.

89. An Executor cannot plead Rents on ses mains in any Case but to a Sore Facta upon a Judgment, for he may commit a Devastavit by a Release, though he had never the Goods in his Hands. Trin. 9 Ann. B. R. Peck v. Peck.

90. Executor promised to pay a Debt of Testator's on a certain future Day, and the Action was against him as Executor; but Parker Ch. J. held that the naming him Executor was Surplufage, because it appears on the Face of the Record that the Demand was a Demand upon him upon his own Contract. In effect the Forbearance is the Consideration of this Promise, because without Forbearance no Advantage can be taken of this Promise. 1 Salk. 117. Yard v. Ellard. and to this Opinion the rest of the Court inclined. Sed adjutor. 10 Mod. 254. Trin. 13 Ann. B. R. Johnson v. Gardner.

(Z. a. 7) Replications to Pleas of Judgments &c. good or not good.

1. IN Debt upon Bond against an Executor, who pleaded several judgments in Bar to the Action, ultra good he had not Assets; The Plaintiff replied that (placitum) praedit' est minus sufficient to bar him, because Satisfaction was acknowledged on such an one of the judgments, and that all the other were kept on Foot by Fraud, and because rat' est verificare, but did not say per Recipitum; and upon Demurrer to this Replication, it was adjudged for the Plaintiff, because hoc rat' est verificare shall be taken respectively, and shall be good on a General, though otherwise on a special Demurrer, and the Word Placitum is not but one Bar, viz. all the Judgments make but one Bar, and therefore Placitum in the Replication answers the whole. Sid. 429. pl. 16. Mich. 21 Car. 2. B. R. Hancock v. Pwoit.

2. If an Executor pleaded several judgments, the Plaintiff may reply distinctly to each of them, that they were obtained by Fraud; or you may say separata judicia &c. obtunn per fraudem, but in the last Pleading, if one is found to be a true Debt, the Plaintiff must have Judgment. Per Twidley. Mod. 33. pl. 79. Hill. 21 & 22 Car. 2. B. R. Anon.

and says that it had been so ruled several Times before. The Reporter says, that this is an Anomalous Case, and against the Rules of the Law which condemns double Pleading; but that it has been allowed in this particular Case several Times, and cites S. Rep. 132, 133. Turner's Case, and 9 Rep. 108. Meriel Treharn's Case. 2 Keb. 591. pl. 11. Treharn v. Meriel, S. C. ruled accordingly. — In Alsumpt against an Executor, who pleaded a Recognizance and several judgments against himself, and several Obligations, and Payment of them all, and that he had fully administered &c. The Plaintiff may reply to all or to as many of them as he pleases; Per Curiam. Lev. 251. Hill. 20 & 21 Car. 2. B. R. Jeffries v. Dee.

3. In Debt against an Executor, he pleaded judgments, and that he had not Assets ultra; The Plaintiff replied, that the Judgments were kept on Foot by Fraud and Covin. The Defendant rejoined, that he did not
not keep them on foot by Fraud; and Exception was taken, because he did say the judgments or any of them. Vaugh. Ch. J. held the Exception good, for the Rejoinder is a negative Pregnant; and Judgment per rot. Cur. for the Plaintiff. Cart. 221. Patch. 23 Car. 2. C. B. Warren v. Symonds.

4. Debt against an Executor upon a Bond of his Testator; the Defendant pleaded two judgments had against the Testator and set them forth, and that he had not Assets ultra 40 s. towards Satisfaction. The Plaintiff replied, that Defendant paid so much upon the first judgment, and so much upon the other, yet kept on foot by Fraud; and upon Demurrer it was intimated that the Replication was too complicated, that no distinct issue could be taken upon it, for the Plaintiff put them both together, when he alleged they were kept on foot by Fraud; but the Replication was held good, and the Plaintiff had Judgment. 2 Mod. 36. Patch. 27 Car. 2. C. B. Mason v. Stratton.

5. Debt on Bond against an Executor, who pleaded a Judgment obtained agst. him upon another Bond of the Testator, but did not say prout. Lutw. 450. paet per Recordum; then he pleaded several other judgments, and that Plene Administravit all the Goods of the Testator praeter quern 10 s., which was charged with the said judgments, and not sufficient to satisfy them; the Plaintiff replied protestando, that all the judgments were obtained by Fraud, pro placentia dicti; that the Day of the Writ there was no more than 100 l. due on all the judgments, and that the Defendant had sufficient Assets to satisfy the judgments, and likewise the Debt due to the Plaintiff, but that he suffered the judgments to remain in Force to defraud him. Upon a Demurrer, it was resolved that this general Pleading of Assets to satisfy all the judgments, and the Plaint was good; but because no Venue was laid where he had Assets, so that it was not triable, it was an incurable Fault. 3 Lev. 311. and 368 Trin. W. & M. in C. B. Knighton v. Moreton.

6. Debt against an Administrator upon a Bill penal of the Intestate &c. the Defendant pleaded in Bar several judgments obtained against him as Administrator upon Bonds of the Intestate amounting to 141 l. and that he had fully administravit praeter quern 10 s., which was not sufficient to discharge the said judgments. The Plaintiff replied, and confessed the Bonds, but that at the Time of the judgments obtained there was but 48 l. 10 s. due on the said Bonds, and lays to whom, and that it was more than was really due for all the Debts and Damages on the said judgments, and that it would be accepted in full Discharge thereof, and that the Defendant had Assets ultra the said 48 l. 10 s. to satisfy the Plaintiff’s Debts; and upon Demurrer to this Replication it was held ill, because nothing was put in Issue; for the Allegation of 48 l. 10 s. would be accepted in full Discharge of the judgments is Matter which might be given in Evidence to prove the Fraud; he should have said, that the Creditors would have accepted less than the Debts due to them, and that the Defendant would not pay it, but keep the judgments on Foot by Fraud. Nell. Abr. 172. pl. 9. cites 1 Lutw. 445. [Mich. 3 Jac. 2] Bell v. Bolton.
(Z. a. 8) Pleadings. Ne Unques Executor, Ne unques administred as Executor &c.

1. DEBT against an Administratrix, who said that the Writ ought to be brought against them by the Name of Executors, though they are Administrators, Judgment of the Writ, because the Statute gives Writ of Debt for Administrators, and Action of Debt was maintainable against them at Common Law, therefore the Writ was awarded good; by which the Defendant said that he was not Administrator; Nota. Br. Administrator, pl. 19. cites 41 E. 3. 2.

2. In Debt against Executrix if the Defendant says, that she is Administratrix &c and did not administer any Goods before the Letters of Administration committed to her, there it fullices for the other to say, That such a Day and Year she administered certain Goods &c. without showing what Goods. Br. Pleadings, pl. 22. cites 19 H. 6. 14.

3. Contra where she says, That the made the Funeral with such Goods, and shows what abique hoc that she administered other Goods before the Letters committed to her, there the Plaintiff shall say that she administered other Goods before, and shall show what in certain in this special Case; Contra in the common Cae as above. Ibid.

4. Debt against two as Executors, who said that the Ordinary committed to them the Administration because he died Intestate, and so they ought to be named Administrators and not Executors, Judgment of the Writ; the Plaintiff said, that the Testator made them two Executors and died, and they administered as Executors, and pending the Writ the Ordinary committed to them the Administration, Judgment &c. and the Defendants said that he died Intestate, and the Administration was committed as above before the Writ brought, abique hoc that it was committed pending the Writ. Br. Traverfe per &c. pl. 89. cites 21 H. 6. 23.

5. Debt against three Executors, two pleaded Fully administered, and the third said that the Testator died Intestate at B. and the Ordinary by his Commission ordained the Defendant and two others to receive and levy the Goods of the Deceased, and to render Account of them to the Commisary upon Request, by which the Defendant and the two, receiv'd divers Goods, and thereof have fully accounted before the said Commisary, Judgment &c. Per Newton this is no Plea without Traverfe, no more than if I say, That the Testator gave to me, by which I took it, this is no Plea without Traverfe, abique hoc that they administered any Goods of the Deceased as Executors of the Testament in other Manner, and the other said that he administered divers Goods and Chattles at H. as Executor, Prift &c. and the others e contra, and that all was enter'd for the Difficulty of the Lay Gents, and so it was. Br. Traverfe per &c. pl. 91. cites 21 H. 5. 27, 28.

6. And in Debt against a Feme as Executrix, who said that the Baron died Intestate, and he expended certain Goods in his Sepulture, abique hoc that he administered as Executrix. Br. Ibid. cites 2 H. 6.

7. Debt against Executor who said, That the Testator died Intestate, and the Ordinary committed the Administration to J. N. who sold such Goods to the Defendant, by which he took them and administered as his proper Goods, abique hoc that he administered other Goods, and by some this amounts but to the general Illue, by which he pulled over, and said that
Executors.

be deliver'd to him certain Goods, and certain Apparel, and likewise what abide that he was Executor, or administered as Executor &c. Quare.

Br. Dette, pl. 189. cites 32 H. 6. 6.

8. Where the Defendant in Debt against him as Administrator says that he was the Intestate or was his deviser, and took his necessary Apparel, this abique hoc that he was administered in other Manner, this is a good Traverse.

Br. Traverse per &c. pl. 141. cites 37 H. 6. 27, 28.

9. But where he confesses no Administration, there the traverse shall be Abique hoc that he administered. Note the Difference. Br. Ibid.

10. Debt against an Executrix, who pleaded she never was Executrix, or ever administered as Executrix; The Plaintiff replied that she had administered as Executrix of the Testament &c. Prift. And in Evidence the Defendant swore letters of Administration granted to her of the Goods of the Decedent, by which she administered them, and that she did not administer before. This was good Evidence. For she administered as Administrator by Authority, and not de non Tort, and yet she might have pleaded this Matter in Abatement of the Writ, in which she was nam'd Executrix. Quare. D. 305. b. pl. 61. Mich. 13 & 14 Eliz. Anon. her Abique hoc that she is Executrix, or ever administered as Executrix. The Court held this to be a Plea only in Abatement, and therefore not pleadable as here after Imparlance, and gave Judgment for the Plaintiff; t Salk. 266. pl. 4. Mich. 5 W. & M. in B. R. the S. C. of D. 597. pl. 61. cited and relied upon, but the Court held it no Plea in Bar.

11. The Defendant made Censure at Ballivis Administratrix of the Grantee of a Rent, but did not produce the Letters of Administration; The Court agreed that this would have been a good Exception, but that it being taken after a Demurrer it was relieved by the Statue of 27 Eliz. of Demurers. 4 Le. 116. pl. 214. Trin. 29 Eliz. C. B. in Cafe of Ognell v. Underhill.

12. Administrator durante Minore Aetat cum Testamento annexo Plaintiff did not set forth that Administration was committed to him, but, Profert hic in Curia literas Testamentarias, without saying Literas Administratrices; This was held ill, and not cured by a Verdict. 2 Jo. 193. 34 Car. 2. B. R. Lake v. Thacker.

13. Action was brought against E. as Executor of J. S. who pleaded he was not the same Person named in the Will; (and in Truth J. S. made others Executors and not E.) this upon a Demurrer was held an ill Plea, because he might be Executor de non Tort, though he be not named in the Will, and so may be chargeable, and therefore he ought to have pleaded that he was not Executor, nor ever administered as Executor; and Judgment for the Plaintiff. Scy. 63. Mich. 23 Car. B. R. Seaman v. Edwards.

14. If the Defendant pleads that the Testator made one J. S. Executor, who proved the Will &c. he ought to traverse abique hoc that he was Executor, or ever administered as such, for both may be true, and yet the Defendant liable as Executor de non Tort. 2 Mod. 169. Hill. 28 & 29 Car. 2. C. B. Singleton v. Bownree.

(Z. a. 9) Pleadings in Actions by or against Executors &c. Where there must be Monstrans of the Testament, or Letters of Administration.

IN Ravishment of Ward by three Executors, the Defendant demanded Oyer of the Testament, & non allocatur; But he demanded
Executors.

Oyer of the Writ, and it was granted. Br. Montrans, pl. 29. cites 7 H. 4. 2.

As to the Estate of Actions, the Judges will not admit the Executors to sue, for Things in Action unless they shew the Testament duly proved under the Seal of the Ordinary, but if proved by some of them the King's Courts will allow it. 9 Rep. 33. a. in Henlloc's Case.

3. Debt by Executor; The Defendant impales; He shall not have Oyer of the Testament after this, by Award. Br. Oyer de Records, pl. 39. cites 19 H. 6. 7.

4. And after Imparlance the Defendant shall not have Oyer of the Testament, nor of the Obligation and Condition, and yet he may plead Variance between the Writ and the Obligation after Imparlance, for the Obligation remains always in Court; Contra of the Testament. Br. Ibid. cites 38 H. 6. 2.

4. Debt against an Executor, who said that the Dean of Paul's in London has Jurisdiction Ordinary in K. and shewed by Specialty, Pleading, How, &c. and that the Party died there, and that the Dean committed the Administration to the Defendant because the Party died intestate, and that he ought to be named Administrator, and not Executor; Judgment of the Writ; Yelverton prayed Oyer of the Letters of Administration. Portington said you shall not have it; for where an Executor brings an Action he ought to shew the Testament. Br. Montrans, pl. 55. cites 21 H. 6. 23.

5. But if an Action be brought against two Executors, and they say that the Testator made them and J. N. Executors, who administered with them, and is alive not named &c. Judgment of the Writ, there they need not shew the Testament; and to note a Diversity where they bring the Action and where the Action is brought against them; And the best Opinion was, that in the Case above the Defendant need not shew the Letters of Administration. Ibid.

Wherefore the Plaintiff said that the Administration was committed to him pending the Writ, where he was made Executor and admitted as Executor before, and the Defendant said that the Administration was committed in supra, abisse hoc that it was committed pending the Writ, and the other c contra. Br. Ibid.

The Defendant need not shew the Letters of Administration by way of Defence. Contra where it is by way of Action. Br. Administrators, pl. 34. cites Hill. 21 H. 6. 23. and Patch. 10 E. 4. 1.

6. Testament and Obligation shall be shewn without Demand of the other Party, but in Formedon in Remainder the Defendant is not bound to shew it unless the Tenant demands it; Quod nota Diversity. Br. C'onunt, pl. 53. cites 36 H. 6. 16.

8 Trepass of Chattels taken; The Defendant justified as Administrator of the Goods of J. N. to whom the Goods belonged, and was not compelled to shew the Letters of Administration, because it was a Thing vested in Possession and by way of Bar; But if it was by way of Demand he and Executor shall shew the Letters of Administration and Testament, but he who claims a Rent-charge or Reversion shall shew Deed though it be by Bar, lor he is intitled to the Thing by the Deed, but Letters of Administration intitles him to the Action only, and not to the Thing. Br. Montrans, pl. 118. cites 10 E. 4. 1.

9. Trepass by an Executor of Goods carried away in the Life of the Testator, the Plaintiff shall not be compelled to shew Testament in another Term, by the Opinion of the Court; and therefore if the Defendant does not demand Oyer of it the first Term he has surcease his Time; Contra of Letters of Administration; for there the Form is quod non

protest
Executors.

Profer Literas suas Administrationis, and therefore there Exception may be taken at any Time. But see the old Book of Entries that he ought to shew the Testament also, et pretor Literas Testamentar' &c. nevertheless it appears there, that notwithstanding this the Defendant shall not have Oyer of it in another Term. Br. Montrans, pl. 143, cites 16 E. 4. 8.


11. So where he justifies as Administrator; Per Brian. Br. Montrans, pl. 125, cites 21 E. 4. 50.

12. Trespass by A. Administrator of the Goods &c. of J. N. and So of an Executed of Goods taken out of his proper Possession, and yet did not shew the Letters of Administration, notwithstanding that he named himself Administrator, by Reason that it is of his own Possession. Br. Montrans, pl. 128, cites 22 E. 4. 11, 12.

13. So if Executor brings such an Action &c. and counts of a Duty to himself, or of a Bailment made by himself. Br. Montrans, pl. 128, cites 22 E. 4. 11, 12.

14. In Trespass the Plaintiff intituled himself by Lease for Years of a Stranger. The Defendant said, that before this the Lessor leased to W. N. for Years, which Term yet continues, and W. N. made the Plaintiff his Executor and died, and he entered as Executor, and a good Plea without shewing the Testament, for it shall not be scarce to the Court but to enable the Plaintiff to the Action, and now the Defendant has admitted it; Quod Nostra by Award. Br. Montrans, pl. 167, cites 1 H. 7. 18.


16. Assumpsit by Executor of a Promise to his Testator found for the Plaintiff, and Judgment; Error was assigned, because he did not shew in Court the Testament in the Declaration mentioned. It was helden per tot. Cur. to be Matter of Substance; for otherwise he does not intitle himself to the Action, and the Judgment was reversed. Cro. E. 551, pl. 1, Pauch, 39 Eliz. B. R. Edwards v. Stapleton.

17. In a Sci. Fa. by an Administrator on a Judgment recovered by the Intestate or by himself, he need not say Proter Literas Administrationis; And Raymond having for want thereof demurred, it was over-ruled per Cur. on reading the Record. Keb. 894, pl. 59, Pauch. 17 Kar. 2. B. R. Whitmore v. Jacob.

18. When the Defendant pleads Letters of Administration he need not say Hic in Curia Prolat'. But the Plaintiff that intitles himself to the Action must; Per Vaughan. Cart. 227, Trin. 23 Car. 2. C. B. Mellor v. Overton.

20. An Administrator brought an Action and did not set forth the Letters of Administration; yet the Defendant having pleaded Novus ultra Falsum Interlati, that made the Declaration good. 8 Mod. 356. cites Hill. 11 Geo. in the Case of Hedley v. Williams.

(Z. a. 10) Pleadings. What shall be said to be an Admission of Affairs.

1. Brought Action against an Administrator, who pending that Suit, let Judgment be had against him by B. and did not plead that Judgment in Bar to the first Action, but sold the Goods of the Intestate to pay B. A likewise got Judgment and brought a Fieri Facias, on which the Sheriff levied Part, and as to the Rest returned a Devalvavit. In an Action brought against the Sheriff for a false Return, it was inferred for the Plaintiff, that the suffering Judgment by Default was no Confection of Affairs, and that the Sheriff ought not to have returned a Devalvavit, but a Nulla Bona, and upon that there ought to have been a Scire Fieri Inquiry, but adjudged, that he may return a Devastavit on the first Fieri Facias if he will run the Risque of its being true or not, and that the Inquiry is only for his Safety, that if an Executor suffers Judgment to go by Default, or confesses it, he admits Affairs; That he might have pleaded the first Judgment obtained by B. against the Action of A. & Riens ultra; but not having done it, it is an Admission of Affairs, to answer the Judgment in this as well as to the first Action, and he is estopped to say the Contrary upon a Devalvavit returned. 1 Salk. 310. pl. 14. Mich. 12 W. 3. B. R. Rock v. Leighton.

2. If there are three Judgments against the Testator, each one for 20 l. and the Executor has Affairs but to the Value of 20 l. if he pleads these three Judgments and one of them is ill pleaded, or upon Iflue joined one of them is found against the Executor, (though in Fact perhaps he has but 20 l. which will not be sufficient to satisfy the other two Judgments of 20 l.) yet by pleading the Three it is an implicit Confession of Affairs for more than the two Judgments, and therefore in such Cases Judgment shall be against him for the Value of the said Judgments; Per Holt Ch. J. which Gold. J. agreed. Ld. Raym. Rep. 678, 679. Trin. 13 W. 3. in Cafe of Parker v. Atfield.

(Z. a. 11)
(Z. a. 11) What Plaintiff must do on Plene Administravit granted.

1. In Debt against Executors or Administrators Plene Administravit is no Plea, unless he lays the Day of the Writ purchased, quoted by Executor who pleaded Plene Administravit.

The Plaintiff replies, that it was not filed till after fourteen Days or after in that Term, nothing which he had in his Hands which he had paid within that Term to discharge other Debts of equal Nature, before the very Day of filing the Bill shall be Plene Administravit. Stid. 452 Mich. 21 Car. 2. B. R. Man v. Adams.

2. Debt against three Executors of an Executor, one pleads a Release to his Testator at L. the other pleads that first Testator made their Testator, and one B. his Executors who is yet living, and not named in the Writ, and prays Indict de Breve; The Third pleads Plene Administravit in the County of W. and so to Issue upon it. Here all the Pleas go to the Action, and therefore it was said that the Plaintiff at his Election might try which he would first, for if any one were found with him he shall recover de Bonis Testatoris. But the Release being a perpetual Bar between the Parties, and to avoid Entanglement, if any of the other Issues were tried first, a Nisi Prius shall issue to L. to try the said Release at the Prayer of the Defendant. But if one had pleaded in Abatement of the Writ, the other to the Action, the Plea in Abatement should be first tried, for the Plaintiff ought not to recover upon a bad Writ. 8 E. 4. 24. a. pl. 3.

3. Executor administers, and afterwards refuses in Court, and Administration is granted to J. S. In Debt brought against the Executor he pleaded Plene Administravit, and gave in Evidence that he himself had paid certain Debts, and that all the Residue of the Assets were recovered by Creditors against the said Administrator and paid by him. This is no good Evidence to maintain the Issue; For he to whom the Administration is granted is a mere Stranger, and what he did is without Warrant, and therefore it is no Administration to prove the Issue. Le. 154, 155 pl. 215. Trin. 32 Eliz. C. B. Hawkins v. Lawes.

4. Debt was brought by original Writ against an Administrator in another County than where he was commorant, and before he had Notice of this Action be paid several Debts of the Intestate due by Specialties, and so he had not Assets to pay the Debt demanded, though he had Assets at the Day of the filing of the Original. And now the Defendant appearing pleaded this special Matter, and concluded, viz. And so nothing remained in his Hands; and it was held per Cur. to be a good Plea. Le. 312. pl. 434. Trin. 32 Eliz. C. B. Corbet's Cafe.

5. A Man may plead Plene Administravit specially as Debt against Executor, who pleaded three judgments of 100 l. a Piece, and that he had paid 40 l. in full Satisfaction of two of the Judgments, and that he hath not paid the said 40 l. and 20 l. more, which is not sufficient to pay the other, whereupon the Plaintiff demurred and Judgment for the Defendant, for it is a Pleinm' administer special. Hob. 218. pl. 284. Trin. 15 Jac. Kid v. Chineny.

6. In Debt against Executors they pleaded that they had fully administered all the Goods except a Term, which Term they had refused; and it was adjudged against the Executor contrary to 21 H. 6. 24. Lat. 261. Arg. cites Pach. 17 Jac. B. R. Manly v. Moody.
 Executors.

7. Debt is brought against an Executor, the Executor is outlawed upon the said Action of Debt; he reverses the Outlawry; the same Plaintiff brings a new Action against him; he pleads Plene Administravit; It is a good Replication that he had Assets on the Day of the first Writ purchased; For the Defendant shall not take Advantage of his own Wrong by Contemp of the Law, if the Plaintiff brought the said new Writ in convenient Time. Jenk. 300. pl. 77. 17 Jac. C. B.

8 Debt against an Executor; the Question was, Whether he may plead Plene Administravit, and give in Evidence a Debt in which the Testator was indebted to him? Or, Whether he may plead the special Matter, that Plea amounting but to the general Issue? Hobart said, If no special Matter may be alleged to the Contrary, the Defendant shall be compelled to plead the general Issue, and this is good Difference in the Court, to take away the Perplexity of Pleading, because one Plea is as good as the other; to which Winch being only prefent agreed, and it was ordered that the Defendant here plead accordingly. Win. 19. Trin. 19 Jac. Ayleworth v. Harrison.


10. In Scire Facias against the Defendant as Executor he pleads fully administrated, to which the Plaintiff demurred, because this is no Plea against a Judgment had against the Testator, which binds the Goods, cites Mo. 838. pl. 1178. Harcourt v. Reynan, and the Executors shall not be allowed all Charges against the Judgment; but per Cur. the Defendant cannot plead better, and on Payment of inferior Debits it is a Devaftavit, and the Defendant need not shew how he hath fully administrated, or that he had no Assets then or since, and Judgment for Defendant, but that none prayed it. 2 Keb. 756. pl. 32. Mich. 22 Car. 2. Smith v. Rawfon.

11. In Scire Facias against the Defendant as Administrator of R. the Defendant pleads Plene Administravit, which is ill; and he should say nothing came to his Hands after the Death of the Testator; but Issue being thereon, it is well enough. 2 Keb. 762. pl. 32. Hill. 22 & 23 Car. 2. Lane v. Merryweather.

12. Judgment against the Testator in Debt, and upon a Scire Facias against his Executor he pleaded Plene Administravit generally. It was moved to amend the Plea, because the Defendant should have pleaded specially. Per Hale Ch. J. the Judgment binds the Goods, and therefore it shall be presumed that the same were rightfully administrated; And Twifden said it had been adjudg'd a good Plea, but let it be amended if the Defendant will. Raym. 230. Mich. 25 Car. 2. B. R. Bradley v. Hutchifon.


13. In Debt against Executor, he pleaded that he had no Notice of the Action till the 27th of March &c. before which Day he had fully administered &c. The Plaintiff demurred, because he did not say that he was Commissar in another County; for if he be Commissar in the same County, he must take Notice at his Peril. But Vaughan Ch. J. was of Opinion contra, and said he had contred with Ed. Ch. J. Hale, who said that in B. R. they always used to have express Notice, or otherwise the Party not to be charged for any Thing administrated after the Precipe. Freem. Rep. 54. pl. 69. Mich. 1672. Nightingale v. Lee.
that the Sheriff could summon him to give him Notice. Sed adjournatur. 3 Keb. 171. pl. 4. S. C.

14. The Testator left a Personal Estate to the Value of 2000 l. and owed 500 l. on Specialties, and 500 l. more upon simple Contrats, and disposed of 400 l. in Legacies, and made the Defendant Executor during his minor estate of his Son; The Executor paid 1000 l. in Discharge of the said Debts and Legacies, and acceded with the Infant Executor when he came of Age, and upon Payment of 90 l. Residuum to him, he released to him all Actions. Afterwards an Action was brought against him by an Executor of one of the Creditors of his Testator, and upon pleading Plene Administravit, the Jury found that J. had paid such and such Debts and Legacies, and had delivered up all the Residue of the Personal Estate of the Testator to the Infant Executor when he came of Age; It was objected by Atkins J. that this Verdict did not maintain the Plea of Plene Administravit; for that cannot be pleaded unless all Debts &c. are discharged as far as the Affets will reach, whereas here the Residuum is delivered over, and that is liable to the Payment of this Debt which is yet undischarged; But the three Justices held that howsoever he discharges himself of the Testator's Estate, he may plead this Plea, and that it is his safest Plea. Mod. 174. pl. 10. Pach. 26 Car. 2. C. B. Brookin v. Jennings.

15. On a Scire Facias against the Executors of the Plaintiff in Rhode to know why he should not have Execution of Ret' habendi adjudged on Verdict against the Testator; The Defendant pleaded fully administered all but one Coo; to which the Plaintiff demurred. And by Rainsford and Wild, this Coo being in Custodia Legis is in his Hands, and so Affets; and if an Averia elongata be returned, a Writ of Withernam shall be de Bonis Teftatoris; and if the Sheriff return the Testator had no Goods, on a Scire Facias with a Fieri Facias, there remains no Remedy, but as on Devastavit; and Judgment for the Plaintiff Nifi. 3 Keb. 463. pl. 40. Pach. 27 Car. 2. B. R. Green v. Sucliffe.

16. Atjumpsit against an Executor, who pleaded several Bonds owing by the Testator not satisfied, and that Plene Administravit all the Goods which the Testator had at the time of his Death, preterquam Bona &c. ad valentiam 10 l. Upon Demurrer to this Plea it was adjudged ill, because the Plea relates to the time when it was pleaded; and if there had been joined upon it, the Defendant might give in Evidence at the Trial, that after the Writ brought, and before the Plea pleaded, he had paid Debts upon Contract without Suit; and for want of the intervenient Clause, Et quoq. is nulla habet bona vel partis Testamentariorum, vel bonorum: Dice imperationem brevis praeud est unquam posse, preterquam Goods and Chattels to the Value of 10 l. which are not sufficient to satisfy the Debts due on the Bonds with which they stood charged, and this would have made the Plea good, but as the Pleading is the Plaintiff had no Remedy but to demur, and therefore Judgment was given for the Plaintiff. 3 Lev. 28. Mich. 33 Car. 2. C. B. Heblet v. Framingham.

17. Adjudged upon Demurrer that Plene Administravit is no good Plea in an Action of Debts brought against an Executor or Administrator in the Debt and Definites as for Rent. Sid. 334. pl. 19. Pach. 19 Car. 2. B. R. Austin v. Miller.

In respect of Perception of the Profits, but if it were in the Definit only it were a good Plea, which the Court agreed, and Judgment for the Plaintiff.

18. Case &c. against an Executor upon Plene Administravit pleaded. Holt Ch. J. declared, That the Plaintiff must prove his Debt; or else he shall recover but a Penny DAMAGES though there be Affets, because this Plea only admits the Debt, but not the Quantum; that all the Debts mentioned in the Inventory shall be accounted Affets in the Executors
Executors.

22. For if it is as much to say that they may be had on Demand, unless a Demand and Refusal is proved. 1 Salk. 296. pl. 3. Trin. 5 W. & M. in B. R. Shelley's Case.

19. Upon a Plene Administravit Holt said, If an Inventory be produced where there is one Particular of good and bad Debts, the Defendants shall be charged with the whole, because he doth not distinguish them, unless he can discharge any Part of it by special Evidence. Comb. 342. 7 W. 3. B. R. Anon.

20. At Guildhall, upon Plene Administravit the Quittance was, If the Defendant shall be allowed the Payment of a Quarter's Rent accrued due within four or five Days after the Death of the Intestate, he having received all the Profits of the Land till within such a small Time? It was objected that this was not a Debt due Tempore Vitae of the Intestate, and therefore it is not being his Debt it ought not to be allowed to be paid out of his Estate. On the other Side it was said, that it will be hard that an Executor or Administrator shall pay a Rent out of his own Estate when the Intestate &c. had received all the Profits, except for two or three Days; and Holt Ch. J. seem'd to incline, that if this was a Term continuing after the Death of the Intestate, that the Administrator shall be allowed for the Rent; otherwise if it be determined by his Death. Skirn. 649, 650. pl. 8. Trin. 8 W. 3. B. R. Mitchel v. Meete.

21. In Debt by Husband and Wife against an Executor who pleaded Plene Administravit; and upon Affidavit it was proved, that the Executor had discharged a Debtor of the Intestate out of Ludgat taking a Bond from him for the Debt, and it appeared that he was too extreme poor that he was downright starving; Yet the Debt was judged Assets in Executor's Hands. 12 Mod. 346. Mich. 11 W. 3.

22. It was moved to plead double Non Assumpsit and Plene Administravit, which was denied by the Court, no Affidavit being produced that Defendant had fully administrated. Notes in C. B. 234. Mich. 8 Geo. 2.


23. On Motion to plead double, Solut ad Diem and Riens per Decent, it was objected that an Affidavit of the Fact as to Riens per Decent ought to be produced from the Heir as from an Executor or Administrator in a Plene Administravit, and the Objection was held good. No Motion was granted. v. Frier. Ibid. 144.

The Reporter adds a Note that Affidavit must be made by the Executor or Administrator, that he hath fully administrated, and by the Heir that he has nothing by Decent, before Motion.

(Z. a. 12) Pleadings by Executors or Administrators.

Fraudulent.

1. Debt was brought against an Executor who pleaded a former Recovery against him for 200 l. and that Execution issued; and pleaded also another Judgment had against him for 100 l. abate but that he had Assets to satisfy that Execution of 200 l. This was adjudged a good Plea,
Plea, and the Plaintiff must reply, that he had Affets in his Hands ultra the 200l. and ultra the 100l. for before those are satisfied, the Plaintiff was not intitled to his Debt. cited by Vaughan Ch. J. Vaugh. 105. as 19 E. 4. 12. b.

2. In Debt against the Defendant as Executor, he pleaded Plene Administrator; The Jury found that his Wife was Executor, and that he, to pl 16. Wil-

deceive his Creditors, made a Gift of the Goods before Marriage, but still

kept them in her Possession; and afterwards married the Defendant, and so

died, and that he had so much of the Goods as are sufficient to satisfy the Creditors; adjudged for the Plaintiff, because the Defendant by plead-
ing Plene Administrator, had confessed himself to be Executor, and therefore is chargeable; for the Property of the Goods did not pass out of the Wife by the Grant it being made by Fraud. No. 396. pl. 518.

Hill. 37 Eliz. Watton's Case.

3. A brought Debt on a Bond of 100l. against B, and others Ad-

ministrators of C. The Defendants pleaded in Bar divers former Recoveries against them in Debt, and that they had not Affets praeteriwm Bona C. B Tur-

more's Case, & Catala que non attingunt ad volorem of the said Debts recovered, per v. C. The Plaintiff replied, that the Defendants since the Recoveries did pay Part of the Debts in full Satisfaction, thereof, with which they held themselves content and offered to acknowledge Satisfaction, but the Defendants adjudged, that did refuse to agree to that, to the Depriving of the Plaintiff; And ad-

judged that the Plaintiff should recover; for an Executor ought to ex-


4. In an Action of Debt against an Administrator who pleaded Sta-

tutes, and further that he had not sufficient &c. The Plaintiff replied, that for one of the Statutes a greater Sum was accepted in Satisfaction, and as to the other, that it was for Performance of Covenants, and that none was broken; and the Defendant demurred; and adjudged for the Plaintiff, and that the general Averment of Payment and Acceptance, and that the Statute was for Performance of Covenants was good, because the Plai-
tiff was a Stranger thereto. Bridgeg. 80, 81. cites 9 Rep. 108.

Brownl. 151. Brakesby and Vaux v. Treffitham S. C.

5. If Judgment were had against an Executor by Covin, the Plaintiff may traverse generally; But suppose that the Judgments were had upon good Cause, and after comes an Agreement as to pay so much a Month in Satisfaction, and in the mean Time to keep the Judgment on Foot, in this Case the keeping the Judgment on Foot is traversable, and the Pay-

ment is but Inducement, and Matter of Inducement shall never be traversable; Per Doderidge J. Lat. 111. Hill. 1 Car. Beaumont's Case.

6. Debt against an Executor upon an Obligation. The Defendant S. C. cited pleads several Judgments ultra quod he had not Affets.

The Plaintiff replies, that those several Judgments were kept on Foot by Fraud, and doth not say, nor either of them; and it is possible, that if one only be kept on Foot by Fraud it may cheat the Plaintiff of his Debt; and for this Cause Judgment was given for the Plaintiff. Freem. Rep 121 pl. 141. Trin. 1673. Waterhouse v. Symonds.

Ibid. 250. Holt Ch. J. mentions the Exception in that Case for not living Nec cor ali?, and said he thought that hard enough, for in a general Illus you must say nec cor ali?, but in a special Illus you need not; for if false in Part it is so in all.

7. Debt upon Bond against an Administrator, who pleaded a Judg-

ment against his Intestate in Hillary Term 26 Car. 2. and that he had not Affets ultra &c. The Plaintiff replied, that an Action was then brought
brought against the intestate, but that he died before judgment, and that it was obtained after his death, and kept on foot by fraud. The defendant traversed the fraud, but did not answer the death of the intestate; and on a demurrer it was infinitted for the plaintiff, that the judgment was ill, and that he being a stranger to it could neither bring error or deceit, and had no other ways to avoid it but by plea, and the court held that the plaintiff might avoid the judgment without writ of error, especially in this case, where it is not only erroneous but void.

2 Mod. 308. Trin. 30 Car. 2. C. B. Randall's cafe.

8. Indebitatus atfumpsit against an executor who pleaded several judgments &c. and that he had not assets ultra. The plaintiff replied particularly to each judgment, and aver'd that they were kept on foot by fraud. The defendant in his rejoinder put all the judgments together, and said that they were not kept on foot by fraud; and upon a demurrer the question was, whether he should not have made several rejoinders to all the judgments particularly, and not have put them all together? but per cur. The plaintiff need only aver in his replication that several judgments were kept on foot by fraud, and then this rejoinder had been good likewise. 4 Mod. 63. Mich. 3 W. & M. in B. R. Beak v. Kent.

9. If there is a fraud in the pleading of judgments or specialties the executor's issue must be taken on the fraud; if you reply a composition made, and that yet the judgment is continued by fraud, till it is the fraud that is traversable; and if one pleads ten judgments, and one of them is by fraud, he has confessed assets at least to the full value of the judgment. 12 Mod. 528. Gould J. cited Deal v. Sikeston, and Northoule v. Simon, and said it had been held in C. B. that a traverse of the composition had been well.

10. Debt upon a bond against an administrator who pleaded several judgments, and nihil ultra 5 l. The plaintiff replied, as to one judgment there was but so much due, which the creditor was willing to accept in full, and that the defendant by fraud deferred the payment of that money and kept the judgment on foot to defraud the creditors, and replied the same thing as to another judgment and demurred as to the rest. The defendant rejoined that as to one judgment it was not kept on foot by fraud &c. and as to another no assets ultra so much, and so to the 3d, and as to the rest he joined in demurrer; and judged, if it appears that the debtor was willing to take less than is recovered; this is evidence of fraud, but if 'tis showed that the administrator had not assets to pay that sum, 'tis no fraud, and that the conclusion of the replication with hoc paratus eft verificare as to every judgment is well enough, but a general conclusion to all had been better. 1 Salk. 311. pl. 16. Trin. 13 W. 3. B. R. the 4th and 6th resolution in cafe of Parker v. Atfield.

(Z. a. 13)
(Z. a. 13) Pleadings. In what Cases he must name himself, or be named Executor or Administrator.

1. **Debt by one Executor;** The Defendant said that there is another alive; Judgment of the Writ; The Plaintiff said that he is discharged of the Administration and never administered, and yet the Writ was abated, because he may administer when he pleases. Br. Executor, pl. 27. cites 41 E. 3. 22.

2. Debt against Administrators; It was agreed that if the Defendant says that the Party made him and another Executor who proved the Testament, Judgment of the Writ brought against him as Administrator, and the Plaintiff says that he was died intestate, Prift, and the Defendant would have stopped him by the Testament proved under the Seal of the Ordinary; & non allocatur. Br. Administrator, pl. 11. cites 44 E. 3. 16.

3. An Executor who refuses and takes Administration before the Ordinary shall be impleaded as Administrator, but Executor in Right and Executor de Jure separe & shall not be impleaded as Administrator, but as Executor in Pain of Abatement of the Writ. Br. Administrator, pl. 15, cites 50 E. 3. 9.

4. If Executor brings Rавishment of Ward of a Rавishment in Time of Testator, he shall be named Executor in this Action; Contra of a taking out of his own Possession, there he need not be named Executor. Br. Executor, pl. 122. cites 7 H. 4. 2.

5. Executors assign Auditors to the Bailiff, and he is found in Arrearages, and they brought Debt not naming them Executors, and counted how be was in Arrearages to the Testator who made them Executors, and they assigned Auditors; The Writ abated per Cur. because they are not named Executors in the Writ; and this Exception shall be pleaded to the Writ; Quod Nota. Br. Executor, pl. 12. cites 9 H. 6. 11.

Names of both by the Name of Executors; for this Thing, viz. the Debt, was never in their Possession; Per Kebbe, Br. Executor, pl. 101. cites 2 H. 7. 15.

6. Debt against Executor, he said that the Testator made him and J. S. *S. P. Ibid; his Executors who administrated and is alive &c. not named, Judgment of the Writ; and the Plaintiff said that he made the Defendant Executor absole hoc that he made J. N. Executor, and ill; by which he said at supra, absole hoc that be made both Executors; and the other contra upon. Br. Executors, pl. 69. cites 19 H. 6. 5.

Note a Divinity; For where it is brought against Executor, it is no Plea to say that there is another Executor alive if he does not say that he has administrated; but where it is brought by Executor it is a good Plea to say that there is another Executor alive, tho' he does not say that he has administrated; for if the one administrates, the Action shall be brought in the Name of him and of all the others; but the Action shall not be brought against him who does not administer; Note a Divinity. Br. S. P. Ibid; Executors, pl. 88. cites 9 E. 4. 12. — S. P. in Account by Executors, to which the Plaintiff said, that after this the Testator made the Plaintiff his sole Executor at B. in the County of M. &c. To which the Defendant said, that the Truth is, that he made the Plaintiff his sole Executor, but after this he made the Plaintiff and the other his Executors, absole hoc that he made the Plaintiff his sole Executor after this &c. and at last he was compelled to shew at a Day in this Term in his Rejoinder, that such a Day he made both his Executors absole hoc that he made the Plaintiff his sole Executor after this Day; Quod Nota. Br. Executor, pl. 21. cites 33 H. 6. 44.
Executors.

So where four are made Executors, and the one, or all except one, refuse before the Ordinary, and the one proves the Testament, in Debt by him he and all the others shall be named; for the Testator cannot die tete-a-tete; and the Extrares. judgment; yet with Jor, and another P, but should be 6. E. 4. 12.—S. P. if there are 20 Executors, and one only proves the Testament, they may proceed jointly or be feared if the others will not. Ibid. pl. 117. cites 21 E. 4. 24. per tot. Cur.

7. Debt against a Feme Executrix of the Testament of her Husband ; The Defendant demanded Judgment of the Writ for. The Baron and intestate, and the Ordinary committed the Administration to her, and so ought to be named Administer, and not Executrix; Judgment of the Writ. The Plaintiff demanded Oyer of them, and the Letters, which should that the Ordinary contain the Feme Coele. For ad potent levand' collin- gend' et exigend' omnia bona, &c. de pellacum Inventorium inde conficiend' &c. debitorque acquidnd' &e. postfactam committimus. Per Fairfax, it appears that she is not entire Administrator, therefore the Writ is good. Per Brian Ch. J. Debt does not he against a particular Administrator, As where the Administration is committed of all Things which founds in Action, Debt lies not, but against such who has Administration omnium bonorum &c. Catalla denuit’ &c. by which, answer; Quod nota. Br. Administrator, pl. 34. cites 16 E. 4. 1, 2.

8. If a Feme be Executrix and takes Baron, and after she delivers Money to J. S., and her Baron dies, and she brings Writ of Account, and does not name herself Executrix, and yet well; because it was a Thing which was once in her possession; Per Keb. Br. Executor, pl. 101. cites 2 H. 7. 15.

9. In Debt by Administrators or against them all shall be named, but in Debt against Executors it suffices to name those who administer, but in Debt by Executors all shall be named, and in Debt against one as Heir he shall be named Heir, and it shall be Debet and Detinctor. Br. Delte, pl. 183. cites the Register.

10. If Goods are taken out of the Possession of one Executor where there are several Executors, he alone may maintain an Action, and that without naming himself Executor. Went. Off. Ex. 194.

11. In Detinctor for Goods delivered to and detained by Trustor, and now detained by Executor, he need not be named Executor; for he shall not answer Damages for his Testator’s detaining. Went. Off. Ex. 192. 193.

12. Debt against an Executor, who pleaded that J. S. is Co-Executor with him not named in the Writ; Judgment of the Writ; but does not over that the other had administered. Upon which the Plaintiff demurred, and the Plea was adjudged ill; For although when an Executor sues the Defendant may plead another Executor not named without shewing that the other has administered, for he may not know whether he has administered or not; yet when an Executor is sued, it he plead another Executor not named, he ought moreover to say that he has administered; for this lies in his Knowledge. 1 Lev. 161. Patch. 17 Car. 2. B. R. Swallow v. Emberson.

(Z. a. 14)
Bond to the Ordinary; And in what Cales Executor must account in the Spiritual Court.

1. After many Legacies departs the Residue of all his Goods to one Taylor, and makes Trott his Executor and dies. Trott after accounts before the Ordinary &c. and pays the Residue to Taylor, and thereupon has an Acquittance from the said Taylor. Trott dies, and Taylor sues his Executor in the Court of Requests to account due upon. The Executor pleads the Acquittance, and the Plaintiff thereupon demurred. Cook Attorney General prays a Prohibition, and the Court said that an Executor shall not be compelled to account in any Court, although the Court of Conscience; But by the Court it was agreed, that an Executor of an Executor may be sued for a Legacy given by the first TelleTator. Noy 3. Hill. 2 Jac. B. R. Taylor v. Trott.

2. The Court learmed that the Ordinary cannot take an Obligation of Hob 85 pl. the Administrator, that after the Debts and Legacies paid be will distribute the Residue of the Goods at the Appointment of the Ordinary. Mo. S. C. & S. P. 864 pl. 1191. Hill. 13 Jac. Slawney v. Elbridge.

3. An Administrator is sued in the Spiritual Court to make an Account, and a Prohibition was denied; But otherwise it had been if to make a Division of the Goods. Noy 24. Mich. 15 Jac. Mountague v. Clerk.


5. The Ordinary has no Power to hold Plea to try Payment or not Payment, or to administer an Interrogatory to a Witness, but ought to accept the Account as it is; for the Creditors may sue for their Debts at the Common Law, and then Payment or not Payment shall be well tried, and there one Witness will suffice. Noy 78. Bellamy v. Alden.

6. The Spiritual Court try Plene Administravit per Testes, but if they refuse such Proof as is allowable at Common Law in Discharge of the Party, a Prohibition will go. 3 Bulk. 315. Mich. 1 Car. B. R. Dickes v. Brown.

7. 22 El 3 Car. 2. cap. 10. S. 1. All Ordinaries and ecclesiastical since the Judges having Power to commit Administration, shall upon their granting Power of Administration of Intestate Goods, take Bonds with Sureties, two or more, in the Name of the Ordinary, with this Condition, viz. The Condition of an Administrator by this
Virtue of the Obligation entered into by him to give in his Account in the Spiritual Court, without being cited; And a Person intituled to Distribution by that Statute may sue the Administrator for an Account, as a Legatee might have done before that Statute. For the next of Kin is a Legatee by the Statute, and as a Statute Legatee shall have the same Remedy as the other Legatees might have before the Statute; But a Debtor cannot sue the Administrator for Non payment of a Debt to him, or a Devallavit committed by the Administrator. 1 Salk. 318. pl. 14. Hill 6 Ann B. R. Canterbury (Archbishop) v. Will's. 11 Mod. 145. Canterbury (Archbishop) v. Willet, S. C. and by Holt Ch. J. an Executor is bound to account, but a Creditor must take the Account as the Executor has made it upon Oath; but if a Legatee comes he may unravel the Account, because it is the only Court for him to sue in, and therefore he is not bound by that Account; But if the Executor will pay him his Legacy, then he cannot compel him to exhibit an Inventory, or to Account, because he has the End of his Suit; and cites Raym 470a.

H was bound in a Bond according to the Statute 23 & 24 Car. 2. cap 10. that C. the Administrator should bring in a full Inventory, and a Distribution was decreed by the Commissary and Judge of the Court in Suffolk in several of the Intestate's Relations, which the Administrator would not comply with, and therefore was communicated. The Defendant craved Oyer of the Bond, and pleaded that there was an Account given in, and Stowe joined that there was no such Account, and Puts darrim Continuance he comes and offers a Plea of a Release. Exception was taken; For if it should be in the Commissary's Power to release this Bond the Estate would be of no Force. And per Powell J the Debtor has not done well in giving this Release, and it is a Breach of Trust; Quoque quid inde venit. Holt's Rep. 660. pl. 7. Hill. 7 Ann. Butler v. Hammond.

8. The Widow in the Spiritual Court set up a Procurator for her Children the Intants, and gets her Account paid, and each Child's Proportion ascertained, and Distribution decreed, and on giving new Security got the old Security discharged; The Court of Chanery, without Regard had to the Proceeding of the Spiritual Court, decreed an Account of the whole Estate. 2 Vern. 47. pl. 45. Pasch. 1688. Bull & UX v. Axtenel & al.

9. A Person who had a Debt due to him from the Intestate by simple Contract, but more than six Years were elapsed, was adjudged to be a Creditor within the Statute 1 Jac. 2. cap. 17. for it is a Debt though barrable by pleading the Statute of Limitations; and therefore a Prohibition was denied. Ld. Raym. Rep. 232. Trin. 9 W. 3. Wainford v. Barker.

10. The
11. The Spiritual Court may try the Issue of Plene Administravit, but if they over-rule this Plea, or refuse to give Precedency to Debts of a higher Nature, and to vary from the Common Law they shall be prohibited. Cumb. 189. Port. 4 W. & M. in B. R. Lady Winchelsea v. Nichols.


there cites S. C. from the Author's MS. Report thereof, wherein it is observ'd that the Spiritual Court has sometimes refused to grant the Probate of a Will to an Executor who has been reputed a Person of no Subsistance, and adjudged for Debt, until he should give security for a due Administration of the Affets under Presence that the Legatees, which were considerable, were in Danger of being loit; and that they might as well reject an Executor where he declins giving such Security, as where he refuses to take the Oath of due Administration, which is the common Practice. But the Court of B. R. has in such Case forced the granting of the Probate by a peremptory Mandamus.

13. One by Will gives an Annuity out of his Personal Estate; if the Executor has misbehaved himself, the Court will order Part of the Personal Estate to be set aside to secure this Annuity. 2 Wms's Rep. 163. Trin. 1723. Bolteu v. Earnley.

14. Administration is granted, and one Administration Bond is taken upon the granting it; another Administration Bond in a farther Penalty cannot afterwards be taken. Barnard, Chan. Rep. 24. Patch. 1740. in the Case of Havers v. Havers.

(A. b) What Acts or Pleas of one shall bind his Companion.

1. In an Action upon the Case against four Executors upon a Promis made by the Testator, if one Executor acknowledges the Action, and the other three plead Non Assumpsit their Pleas shall be received; because the Plea of that Executor which is belittled and Power of the Testator shall be received, but the Executor who acknowledges the Action shall excuse himself of Damages by it. P. 13 Car. B. R. between Cheaffe and Kelland, and others. Per C. that the Plea shall be return'd. But Above.

Executor shall bind the Estate of the Testator, Arg. and Judgment accordingly. 10 Mod. 524. in Cafe of Baldin v. Church.

Entry for Difficult; Two Executors prayed to be received to save their Term by the Statute of Gloucester, and after the one made Default, and per Rede Ch. J. it shall not be the Default of both; For that which is most beneficial for the Testator shall be taken. Br. Executor, pl. 94. cites 21 H. 7. 55. As where they plead two Pleas, the Pleas which is most for the Benefit of the Testator shall be taken and first tried. Ibid. And where they plead a Release, and the one makes Default after, the other shall maintain the Release for the Advantage of the Testator. Ibid. S. P. But per Kingsmill J. after they have joint in Plea the Default of the one is the Default of both. But Brocke says the Saying of Rede seems to be Law. And he who relinquish'd would have forgiven'd and was not suffer'd; For the Court has no Warrant but to Record his Default; the Reason seems to be inasmuch as he is not Party to the Original. Br. Reexif, pl. 79. cites S. C. Br. Default, pl. 55. cites S. C.

2. If there are several Executors and the one releases the Debts, this is a Bar against all, and therefore where there are four Executors and Action is brought against one of them, and he admits the Writ and consiltes the Action, this shall bind all the Goods of the Deceased, and
Executors.

Payment by one Executor shall be good for all. Per Jenney. Br. Executors, pl. 88. cites 9 E. 3. 12. 314. but it should be 9 E. 4. 12.

3. The same it seems of a Receipt by the one Executor &c. Ibid.

4. Gift of a Chattel by an Executor, or his Release without his Company is good. Br. Done pl. 46. cites 24 E. 3. 31.

5. A Feme, and f. N. were Executors, and the Feme took W. S. to Baron and the Executors had Land, and Goods of a Stranger in Execution, and f. N. the other Executor granted their Interest in the Execution to the Baron, and after the Baron granted it to a Stranger, and after the Baron and Feme, because he was Executrix, granted it over to another Man, and the first Grant of J. N. good, and the Second void; For Gift of an Executor is good. Br. Executors, pl. 130. cites 24 E. 3. 31.

6. Account by two Executors; the one was summoned and served, and the other sued forth till the Defendant was outlawed, and sued Charter of Pardon, and showed Acquittance of the Executor who was severed, and the other Executor said, that the Testator had devis'd all the Rest of his Goods after his Debts and Executrix paid, Judgment if he shall be barr'd by the Acquittance of his Company who was sever'd; Per Finch, You shall be barr'd by his Acquittance, and shall be without Remedy unless by Account against him before the Ordinary; and after Seire Pacias was filed against the Feme, at whose Suit he was outlawed; For the one Executor was a Feme; And fo Nore, that the Acquittance is admitted good. Br. Executors, pl. 37. cites 48 E. 3. 14. 15.

7. But where two Executors are, and the one refuses before the Ordinary, he shall not be named with his Company; and by Consequence his Release shall not be; Per Wich, quod tot. Cur. negavit. Br. Executors, pl. 37. cites 48 E. 3. 14. 15.

8. Trespass by A. and B. of certain Goods taken, the Defendant said that one C. was possess'd and made one of the Plaintiffs, and one D. his Executors, and died; which D. released to him all Casual Personal; and by the Opinion of the Court a good Plea, and yet the Plaintiff brought the Action as De Bonis Propriis &c. Br. Trespa, pl. 12. cites 3 H. 6. 54.

9. Two Executors recover a Debt of their Testator's, and the one prayed to have the Body in Execution, and the other prayed Fieri Facias; Execution shall be awarded of the Body; For this is best for the Testator; Per Cottentmore. Br. Executors, pl. 125. cites 7 H. 6. 6.

10. Debt against two Executors, and the one appeared, and the Plaintiff counted upon an Obligation of the Testator, and the Executor confessed the Action, and Judgment was given of the Debt and Damages against all the Executors of the Goods of the Deceased. Br. Executor, pl. 16. cites 28 H. 6. 3. But 19 H. 6. it was said that it was adjudged by Newton and Palfen, and their Companions, that the Plaintiff shall recover the Debt and Damages against all the Executors of the Goods of the Deceased, and if they have nothing of the Goods of the Deceased, then against him, who acknowledged, of his proper Goods. But by the Reporter the Damages for his own Time shall be of his proper Goods. Ibid.

11. Subpoena was su'd, because two were Executors, and the one released without the Assent of his Company the Debt of the Testator, where the Will could not be perform'd by Reason thereof, as furnis'd &c. and the Subpoena was su'd against him who releas'd, and him who accepted the Release. Fineux said, This is not remediable; for each Executor has the entire Power. But the Chancellor said, None shall go away from the
the Chancery without Remedy; and therefore the one Executor shall not release alone, and made several grand Reasons for Conscience, and said that he would take Remedy in Conscience. Br. Conscience, pl. 7. cites 4 H. 7. 4.

12. Note, per Keble where two Executors are, and the one only has the Possession of the Goods, and a Man takes them from him, and he brought Trepass, and the Defendant pleaded the Release of the other Executor, this is a good Plea; For the Plaintiff had not Possession to him alone, but in Right of both Executors, and therefore the Release of the other is a good Bar. Br. Executor, pl. 177, cites 16 H. 7. 5. 6.

13. After Summons and Severance the Executor that is summoned and fevered is yet Party, for he may release the Suit; Per Bendloes. Dal. 51. pl. 17. 5 Eliz.

14. Two Executors brought Action of Debt. The one was summoned and fevered, yet he may release before Judgment; but after Judgment he cannot acknowledge Satisfaction, because he is not privy to the Judgment; and yet his Release before Judgment shall be a Bar notwithstanding the Severance. D. 319. b. pl. 15. Mich. 14 & 15 Eliz. Anon.

15. One Executor shall not be charged by the Devallavit made by the other; for the Act of one Executor shall charge the other no further than the Goods of the Testator in his Hands amount to, but not to charge him of his own Goods. Cro. E. 318. pl. 5. Mich. 36 Eliz. B. R. Harthorpe v. Milforth.

16. Where they shall be charged of the Goods of the Testator the Nofumt, Realeis, or other Act of one shall bind the other, but not if they interred, and shall be charged de Bonis Propriis cites 11 H. 4. 69 where both do not write the Goods, nor shall be charged both of their proper Goods. Cro. E. 318. pl. 5. Patch 36. Eliz. B. R. Hargthorpe v. Milforth. was found that the Defendants and A. their Mother were made Executors, and that A. had administered and wafted the Goods to the Value of 600l. and that the Defendants had not Goods of the Testator but to the Value of 16l. and that A. was dead. It was the Opinion of the Court, that one Executor should not be charged by the Devallavit made by his Compromise; and the Court held clear, that the Judgment should be of the whole Debt, but the Execution should be only of the 16l. which was found in the Defendants Hands.—S. C. cited Barnes's Notes in C. B. 318, 319. Patch 3 Geo. 2. in Case of Champneys v. Browne.

17. If there are two Executors, and one dissent, yet the Act of the other shall be good. Toth. 151. cites Feb. 39 Eliz. Bacon v. Bell.

18. Two Executors made Partition of Specialties of their Testator, and afterwards one releases to the Debtor a Bond which by the Partition belongs to the other, the Debtor having Notice of the Partition; yet Ld. Keeper Egerton would not relieve the other Executor. But if the Release had been procured by Covin for a les Consideration than the Debt really was, the Debtor should satisfy the Overplus. Mo. 620. pl. 846. Mich. 42 & 43 Eliz. in Canc. Anon.

20. Though by one Co-Executor's Grant of his Part of a Term the whole paffes, yet one may demife or grant the Moiety of the Land for the whole Term, and so may the other, and fo they may settle in Trusts for them a Moiety for each either in several or undivided. W. Off. Ex. 99.

21. The mis-doing of the one shall not charge the rest, as both appears by the Book of Entries, (fol. 320,) and was also held in Time of H. 7. (Kelw. 23,) and in this Opinion were the Judges in the Case of Walter v. Sutton in C. B. and shortly after in B. R. in Case of
Executors.

22. The Petition of one Executor is the Petition of all the rest; so as if one appearing to a Suit, and the other making Default in whole Hands all the Goods be which are not administrat; if I say, here he that appears pleads that he hath nothing in his Hands, this shall be found against him; for whatsoever any of the Co-Executors hath, be also hath, and is in his Petition; and so shall the Creditor recover, and have Judgment to be satisfied out of the Testator's Goods, as in his Hands. And therefore if Goods be taken from one, all may maintain an Action of Trepass thereupon; for the Petition of one is the Petition of all. But the Petition of one shall not be to the Petition of all as to charge the other's own Goods. Went. Off. Ex. 99, 100.

23. In an Action of Debt against two Executors, and Plene Administrat pleadst, an Inventory had been exhibited by one of them, and it was held, the other shall not be obliged by it, but the Plaintiff ought to prove that he hath actually administrat, and that Goods came to his Hands, and so give him a Charge because he was but Executor here of his own Wrong, and because the Plaintiff could not prove this, he was nonsuit. Clayt. 169 pl. 170. 8 Car. before Whitfield J. Ireland's Case.

24. Where there are two Trustees of a Lease or two Executors, and one writeth the Goods, the other shall not be charged unless he was a Co-actor. Thot. 152, 153. cites Trin. 9 Car. Townley v. Sherborne.

25. In Case of joint Executors none is chargeable for more than comes to his Hands severally; but yet in that Case if by Agreement among themselves one be 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 pursuivant to the Agreement made between both. Per Hale Ch. B. Hard. 314. pl. 5. Mich. 14 Car. 2 in Scacc.

26. Though at Law one Executor is not answerable for the Devastavit of the other, yet in the Ecclesiastical Courts and by their Law if an Executor proves the Will they will charge him, though he intermeddles no further than to pay the Legacies; But Quare, If that is not only where there is a Failure of bringing in an Inventory. Ch. Cases 201. Patch. 22 Car. 2. Vanbrugh v. Cock and Drybutter.


28. Two Executors join in an Acquittance, but one only receives the Money, both are chargeable for it to the Creditors: But the actual Receiver only to Legatees. 1 Salk. 318. In Canc. 12 Ann. Churchhill v. Hopson.
29. One of the Executors was a Banker of great Credit, and Cashier to many Monied Persons, and the other Executor having received 500l. of the Testator's Money paid it into his Co-Executor the Banker's Hands, and who was the Person with whom the Testator intrusted his Money in his Life-time; for which Reason Ld. C. Harcourt thought that the other Executor ought not to be charged with that 500l. he having only trusted him whom the Testator himself in his Life-time intrusted, and whom at his Death he made one of his Executors. Wms's Rep. 241.


30. A devises a Legacy of 200l. to B. payable at 15, and in the Interim to be put out by Executors, and devi'ted other Legacies, and the Surplus of his Real and Personal Estate to C and D. whom he made Executors. D being an Infant C. proved the Will alone. B. being 15 applied to C. for the Legacy, for which C. paid B. Interest. E. Guardian to D. the Infant Executor settled Accounts with C. relating to A's Estate, and left 100l. in C's Hands to pay B. and received Interest after for the Share of D's Surplus. C. became a Bankrupt. B. came into the Commission and proved the 200l. Legacy as a Debt, and received her Dividend. The Guardian for D. came in &c, and received his Dividend for the Surplus belonging to D. left in C's Hands. On a Bill by B. against C. and D. for the Legacy, it was decreed that B. should have Satisfaction against D. out of A's Estate come to his Hands, or what D. or his Guardian received for Interest of the Surplus or the Dividend. 2 Ld. Raym. Rep. 1320, 1321, 1322. Mich. 1 Geo. in Cae of Spendlove v. Aldrich & al.

31. Any or either of the Executors, though they are only in Trust, may receive and give Discharges for Money before Probate, especially when (as appeared in the principal Case) they afterwards proved the Will, and so were Executors ab initio. Agreed. Abr. Equ. Cafes 319. Hill. 1729. Autfen v. Executors of Sir William Dodwell.

32. Three Administrators appointed a Receiver, who received a Sum of Money for their Use, and divided to each Administrator one third Part. Two of the Administrators afterwards failed. The Question was upon a Point referred at Nifi Prius, Whether the third Administrator was liable for the whole Sum, or for his own third Part only to a new Administrator? Per Cur, the Defendant is responsible for that third Part only which he received, and not for a Devollavit committed by his Co-Administrator. If Payment had been made to a wrong Person the Cafe had been otherwise, but here the Money was properly paid. Defendant is not concerned how his Co-Administrators di[sp}ose of their Parts. The three are equally entrusted. Barnes's Notes in C. B. 318, 319. Patch. 8 Geo. 2. Champney v. Browne.

(A. b. 2) Joint-Executors; Inter fe.

Remedy for one against the other. And Pleadings.

1. An Executor shall not have an Account against his Companion. The one cannot force the other to account in Chancery; Per Sergeant Maynard. Sid 33, pl. 12. Hill. 12 & 15 Car. 2. in Can. Apric 1. Flower. But the Reporter says, Quere tamen.

2. Release
2. Release to one Executor shall serve for all. Br. Dette, pl. 65. cites 11 H. 4. 83.

3. If one Executor be possessed of Goods of the Testator, and the other Executor takes them from him, the other has no Remedy by any Action. Br. Executor, pl. 93 cites 39 H. 6. 27.

4. In Treipals; Per Brian Ch. J where a Termor devises his Term, the Devisee cannot after his Death without Livery of the Executor; By which he said, that the Devisee made the Plaintiff and this Defendant his Executors, by which he was entered; And per Cur. He may enter and hold in Sevency. Br. Devile, pl. 24 cites 20 E. 4. 9.

5. Treipals by A. against B. who said that W. was possessed of the Goods, and made the Plaintiff and Defendant his Executors and died, by which he took the Goods &c. Judgment in Action. The Plaintiff said, that the Testator willed by his Testament, that when all the Debts and Legacies were paid the Plaintiff should have the rest of the Goods which remained, and that they had paid such Debts and Legacies, and lewed to whom &c. which were all the Debts and Legacies, and the Goods in the Action were the Residue which remained, by which the Plaintiff took them, and was possessed till the Defendant took them; By which the Defendant said, that such a Legacy and such a Debt is yet due, and not paid, alleging he that the Debts and Legacies alleged by the Plaintiff were all the Debts and Legacies &c. and the Goods found for the Plaintiff; And per Cur. the Traverse was well taken, and shall come of his Part who took it, and not of the other Part, and without the Traverse the Plea is not good; for he has not confessed and avoided it, and therefore be ought to traverse. Br. Traverse per &c. pl. 187. cites 6 H. 7. 5.


8. And if the one dies, the other who survives shall have Dejusuis against the Executor of him who died, or against him who has the Possession of them, Quod Nota. Ibid.

9. If I make my Debtor and another Executor, and Debtor dies, the other Executor shall have Debt against the Executors of Debtor, because the Action was only in Suspence, and not extinct, and so is reversed; Per Kebler, Arg. Keilw. 122. b. pl. 75.

10. Demurrer pretending one Executor cannot sue another was overruled, because the Matter is mere Testamentary. Toth. 137. cites 20 Eliz. Crocker v. Hamden.

11. A. the Plaintiff's Brother devised Goods to his two Sons to be delivered at their full Age, and made the Plaintiff and Defendant Executors. 1001. of the Goods came to the Plaintiff's Hands, and 250 I. came to the Defendant's Hands. The Plaintiff's Bill is, that in respect of the Fruit and Joint-charge which may survive, that the Plaintiff and Defendant may each be bound to the other to pay the Children their Portions in their Hands at their full Age, and if either Plaintiff or Defendant die before, then the Executor shall pay that which was in the Testator's Hands to the Survivor, which this Court thought in Con-
Executors.

Confidence to be meet, because the Defendant by Answer confesses the
Truth and Receipt of 250l. Therefore a Subpoena is awarded against
the Defendant, to flew Caufe why it should not be decreed. Curv's

12. One cannot assign a Term to the other because he was possieed of

13. One Executor may sue another in this Court though not at Law.
Barnard.

15. One cannot give or rel ease his Interest to the other; But it will
be void, and the Releasor shall have as much as his Re-leefer;
because each had the whole before, and therefore it was held long
since that such Release of his Part of a Debt, or by Grant of his
Part of Teftator’s Goods all was discharged or passed, because each
had the Whole, and there are no Parts or Moieties between Executors.

16. So, and for the fame Reafon the one cannot make a Leaf to the
other of any Part for he had the Whole. Went. Off. Ex. 99.

A. dies. The Administrator of A. sues B. for an Account which was
decreed, (but to the Diffatisfaction of the Bar.) Chan. Cafes 239.

Sell to the Ld. Keeper to reverse his Decree, he directed that several Judges be attended with this
Order, and to certify their Opinions, who were severally attended but gave no Opinion; whereupon
the Ld. Keeper upon considering the Matter again ordered the Bill to be ditlimed, but without
Coils.— 2 Freem. Rep. 140. pl. 179. Cox v Queenlock S. C. decreed; but says that upon a Re-
hearing the Ld. Keeper took the Affeaffance of Ld. Ch. J. North, and three other Judges, who were
of Opinion that it was against the Common Law in the Point of Survivorship, and would introduce
a Relief in Equity against all Survivorships in Café of Jointenancy, having no other Circumstances
in the Cæfe, and so that Decree was reversed. The Reporter adds a Note, that this was reversed
chiefly on this Ground, that Debs may arise 7 Years after, and to the Estate should survive for the
Possibility of Advantage to the Creditors.— Equ. Abr. 242. (C) pl. 1. S. C. abridgd from
Chan. Cafes 239. But the Author (Mr. Foley as is strongly suppol’d) makes a Queae in the
Margin; For that the Reafolutions since have been otherwise in Equity; and it seems well settled,
that the Survivor shall have the whole by Law; as where a Man devised Goods to A. and B. and
the Executor attented to the Legacy, and A. died, and his Executor sued in the Spiritual Court for
A’s Share, there being no Survivorhip in such Case, by the Ecclefiafical Law; whereupon B. sued
a Prohibition, and declared; and upon Demurrer and Argument, it was adjudged the Prohibition
should stand; for by the Allen of the Executor, the Interfell was wetted in the Legatees, and be-
came a Chattel in them, governable by the Rules of the Common Law. Mich. 29 Car. 2., between
Ballard and Stukely. 2 Lev. 299, and says Sec 1 Lev. 164. 2 Jo. 161. 179.

18. A Co-Executor was decreed to perform an Award 12 Years after
the Award made, and though the other Co-Executor made no Demand in
all that Time; but Transafions were between them. Fin. Rep. 384.
Trin. 30 Car. 2. Sweet v. Hole.

19. They are to be considered as Jointenants where Survivorship S. P. decreed
shall take Place as well in Cafes of Chattes as in Cafes of Inheritance,
accordingly at the Rolls. Gray v. Willis.

confider of the Café, and citing most of the Authorities both out of the Civil and Common Law.
Equ. Abr. 243. pl. 3. Trin. 1729. at the Rolls. Gray v. Willis on Time
taken to

but if Teftator devolvs to one of his Executors the Refiduum after such Debts and Legacies paid,
there after Payment such Executor may take the Goods and maintain Trefpafts against the other Co-
Executor if he takes them from him, and consequently Detinue for keeping or detaining them. But
this is as Legue, his own Allen perfecting the Legacy. Went. Od. Ex. 99.
(A. b. 3) What one may do without the other.
And where one is an Infant.

1. Debt shall be brought by one Executor only, where there are three Executors, and the Plaintiff only sold the Goods of the Testator for a certain Sum; for it is of his own Contract only, but of Debt due to the Testator all ought to join. Br. Dettt, pl. 81. cits 38 E. 3. 9.

2. If one Executor will release a Debt without the Content of his Co-partner, whereby the Will cannot be performed, the Releafe and the Releafee shall be ordered therefore in Chancery; by the Chancellor against the Opinion of Fineax. Cary's Rep. 20. cits 4 H. 7. 4.

3. 21 H. 8. cap. 4. S. 1. Where Part of the Executors of any Person making a Will of Lands to be sold by his Executors refuse to take upon them the Administration, all Bargains and Sales of such Lands made by such only of the Executors that accept such Administration shall be as effectual as if all the Executors had joined in the making of the Bargain and Sale.

S. 2. Provided that this Act shall not give Power to any Executors to bargain or put to sale any Hereditaments otherwise than by the Common Law.

P. 21. the law it is by Construction extended where Lands are devise to Executors to be sold. Yet in neither of those Cases, albeit one refuses, can the other make Sale to him that refused, because he is Party and Privy to the last Will, and remains Executor still. But Ld. Coke says, That his Advice to them that make such Devises by Will is to make it as certain as they can, as that the Sale be made by his Executors or the Survivors or Survivor of them if his Meaning be so, or by such or so many of them as take upon them the Probate of the Will or the like. And it is better to give them an Authority than an Estate, unless his Meaning is that they should take the Profits of his Lands in the mean Time, and then it is necessary that he deviseth, that the mean Profits till the Sale shall be Affect in their Hands; For otherwise they shall not be so.

A. tested of the Manor of D. devised the same to J. S. and three others, and their Heirs, to the Intent the Devisees should sell it for the best Profit, and convert the Money to the Performance of his Will, and makes them his Executors, and dies. One of them refuses to sell, but the other three sell, living the Fourth. Adjudg'd that the Sale was good by the Three, either by the Common Law or by the Statute 21 H. 8. and the making them his Executors is as much as if he had devised that the Executors should sell, and in such Case the Sale by the Three without the Fourth is good. Cro. E. So. pl. 43. Mich. 29 & 30 Eliz. Bonenfant v. Greenfield.—Le. Co. pl. 78. S. C.

4. Three Executors, one an Infant, they must sue by Attorney, because they make all but one Person, and sue in Author Dirit. Cro. E. 378. in a Nova in pl. 28. Hill. 37 Eliz. C. B. in the Case of Rutland (Countses) v. Rutland (Countses) says it was refolv'd that it was good.

5. There were two Executors, and the one of them gave a Bond due to Teller to a Creditor of his own in Payment of his own Debt, and dies; adjudged that Detinue lies not by the Survivors. Mo. 422. pl. 539. Mich. 37 & 38 Eliz. Kellick v. Nichollson.

6. The curving of one Executor is good; and though that he might after administrator, as the Book of 21 E. 4. is, for that the Interest of his Companion prefers his Authority, where there are two or more. But if there be but one Executor, and he refuseth, and the Ordinary grants Administration to another, he cannot then administer again. 2 Brownl. 58. Agreed by all the Justices in the Case of Bedel v. Bedel. Hill. 8 Jac. C. B.

7. There
12. Infant Executor ought to sue by Guardian; Twifden J. says it 2 Saund. has been so adjug'd. Vent. 54. Hill. 20 & 21 Car. 2. B. R. Fox—213. S. C. with Tremain.

that he ought to be sued by Guardian, or else it is Error, cites St. 318. Wild in Romney, and adjudged accordingly, ibid. 190. Coan v. Bowles. — The an Infant sole Executor cannot sue per Atornatum, yet if he does sue per Atornatum and recovers, his Appearance is no Error; but his wife where he is condemned in the Action; Per Holt Ch. J. Carth. 125. Patch. 2. W. & M. in Case of Coan v. Bowles.


14. Four Executors; two of them are under Age; Quære, whether they shall sue by Attorney? It seems those of Age may make an Attorney for those under Age. Vent. 49. Trin. 21 Car. 2. B. R. Fox—with Tremain.

and Morison J. contra Twifden, abente the Ch. Justice — Raym. 198. S. C. but no Opinion. —

Mod. 296. S. C. Moreton and Rainfard were of Opinion contra Twifden, but say that afterwards the Suit was compounded — Lev. 299. adjudg'd accordingly that the Defendant answers over. — Sid. 499 pl. 13; S. C. adjudged accordingly. The Reporter says Nara, it was agreed by all that if one Executor be of full Age and another within 17 Years, that they shall join in Action, because both are Executors Quoad Effe though they are not Quoad Atornatum. — 2 Saund. 212. S. C. reports it to be adjudged by Moreton, Rainfard and Twifden, (the Chief J. being Sick) for the Plaintiff; but Twifden said that his Opinion was, that the Infant Executor cannot sue by Attorney, but said that the Opinion of the Chief Justice and the other Justices were to the contrary. — Where an Infant is Executor alone he cannot sue per Atornatum, for if he do he shall be amerced Pro fa10 claiomore; but where he is joined with others of full Age it is otherwise, because those of full Age have Authority to dispose all their Affairs without the Alarm of the Infant, and this is the Reason of the Difference between an Infant Plaintiff and Defendant in 2 Saund. 212. [Mich. 22 Car. 2. Foxwit v. Tremain.] Per Holt Ch. J. Carth. 125. Patch. 2. W. 3. in B. R. in Case of Coan v. Bowles. — 2 Saund. 212. denied to be Law, and held that Infant Executor can neither sue nor be sued by Attorney. Gibb. 2. Mich. 1 Geo. 2. B. R. in Case of Kenilton v. Friskobald.

15. There were two Executors and one of them an Infant, they both joined in an Action, which they brought per Atornatum; it was objected that they could not sue by Attorney, because an Infant may not make a Warrant of Attorney; for the Law premises that he is not able to instruct one; but was it adjudged, that since one of the Executors was of full Age, they might both sue per Atornatum, for both represent the Person of the Testator, and sue in the Right of another; and it seems unreasonable, that one of them should sue per Atornatum, and the other by his Guardian; but Twifden was of another Opinion, viz. that an Infant Executor cannot sue per Atornatum because he cannot make a Warrant of Attorney, and if he should be nonsuit he must be in Michericordia, which an Infant ought not to be. 2 Saund. 207, 212. Foxwit v. Tremain.

Lev. 299. S. C. adjudged by Rainford and Moreton Contra Twifden, that they could not sue by Attorney, because an Infant may not make a Warrant of Attorney; for the Law premises that he is not able to instruct one; but was it adjudged, that since one of the Executors was of full Age, they might both sue per Atornatum, for both represent the Person of the Testator, and sue in the Right of another; and it seems unreasonable, that one of them should sue per Atornatum, and the other by his Guardian; but Twifden was of another Opinion, viz. that an Infant Executor cannot sue per Atornatum because he cannot make a Warrant of Attorney, and if he should be nonsuit he must be in Michericordia, which an Infant ought not to be. 2 Saund. 207, 212. Foxwit v. Tremain.

pl. 13. S. C. & S. P. adjug'd accordingly, but Twifden forfetter e contra. — Mod. 47. pl. 102. and 72. pl. 26. and 296. pl. 40. S. C. & S. P. held accordingly; and ibid. 299. lays the Suit was afterwards compounded. — Gibb. 1. Mich. 1 Geo. 2. B. R. Kenilton v. Friskobald. S. P. and per tot. Car. The Disability of an Infant is adherent to his Person; and the Law regards the Acts of an Infant Executor because he is liable to a Debaulment; and they held that an Infant may neither sue nor be sued as Executor by Attorney; That the Case of Foxwit and Tremain Lev. 299. 2 Saund. 212. was not Law, and that Holt's Opinion was always known to be the Rever of what is reported by Shover in the Case of Coan v. Bowles; And the Judgment was revers'd.

16. Executors need not join, but may act severally if they will; D. 21 b. executors fell allign or releafe the Whole without joining with the other; pl. 142. But otherwise of Co-Trustees. Per Cowper K. in assurance of a Decree from the Rolls. 2 Vern. 570. pl. 516. Hill. 1795. Murrell v. Cox and Pitt.

17. Each.
11. Each Executor has an Interest and Power over the whole Estate of the Testator; Arg. 10 Mod. 324. Aunten v. Executors of Sir William Dodwell.


Nor can he sue by Attorney and Twedem as the Case of Law 209. Person v. Termin — The Reason why the Law will not allow of his prosecuting or defending his Right by Attorney is, that tho' the Attorney should act contrary to his Warrant, he is not answerable to him for it, whereas in such Case he has Remedies against his Guardian, and likewise because he has not Power by Law to make an Attorney. Gibb. 2. pl 1. Mich. 1 Geo. 2. B. R. in Case of Kenilton v. Friskobaldi.

(A. b. 4) Joint Executors. Actions against them and their Hearsings; and Judgment; How.


2. A Writ of Dover was maintained against one as Guardian who had the Ward as Executor without naming his Co-Executor, because he alone occupied the Ward, and that the Writ was not brought against him by Name of Executor. Thel. Dig. 47. lib. 5. cap. 12. S. 3. cites Trin. 8 E. 3. 420.

3. It was held that a Man may have Writ of Debt against Executor of the first Testator, and the Executor of the Executor of the same Testator jointly. Thel. Dig. 47. lib. 5. cap. 12. S. 4. cites Trin. 19 E. 2. Executors 117. and 15 H. 6. Executors 12. And says it was held Hill. 29 E. 3. 4. that the Executor of the Executor ought in such Case to be named if he has the Goods of the first Testator in his Hands.

4. In Writ of Debt to be brought against Executors, it is sufficient to name those who administer'd only. Thel. Dig. 47. lib. 5. cap. 12. S. 1. cites Mich. 17 E. 2. Brief 822. and 24 E. 3. 21. and Patch. 3 E. 3. Brief 341. where Writ of Distinction of Charters was maintained against one Executor alone without naming his Co-Executors who administered'd, because the Charters were in his keeping only; And that so agrees Hill. 39 E. 3. 6. 11 H. 4. 50.

5. Debt against Executor and Executor of his Co-Executor, and executed upon a Contract between him and the Testator, and because the Writ was brought against both, and he did not plead specially, therefore the Plaintiff took nothing by his Writ. Br. Executor, pl. 25. cites 41 E. 3. 13.

6. In Writ to be brought against Administrators they ought all to be named to whom the Administration was committed by the Ordinary, and no other. Thel. Dig. 47. lib. 5. cap. 13. S. 1. cites Mich. 38 E. 3. 24. Hill. 41 E. 3. 2. Patch. 9 H. 5. 6. But says it seems that the Opinion of Mich. 8 H. 6. 2. is, that he need not name him who has not administer'd; which is not Law as he believes.

If Administration be committed to five, and three only administer, yet the Action shall be brought against all; but it seems that the two may refuse by Plea. Br. Administrator, pl. 21. cites 9 H. 5. 5.
7. In Writ against two Executors, if the one pleads fully administered, and the other that there is a Co-Executor not named &c. they shall not have both, but shall be compelled to join. Thel. Dig. 213. lib. 15. cap. 2. s. 6. cites Paich. 7 H. 4. 12.

8. But one Executor was received to plead Variance between the Writ and the Specialty, and the other No unques Executor, No unques admini-ster'd as Executor. Thel. Dig. 213. lib. 15. cap. 2. s. 6. cites Paich. 11 H. 6. 42.

9. It was held that the Writ may be brought against the Executors of the first Tettator only, and that they should have Action of Trespass against the Executor of their Executor. Thel. Dig. 47. lib. 5. cap. 12. s. 5. cites 13 H. 6. and 20 H. 6. 27. Executor 22.

10. Where there is a true Executor, and another who administers de son Tort demeline, the Writ may be brought against the true Executor alone without naming the other. Thel. Dig. 47. lib. 5. cap. 12. s. 5. cites 13 H. 6. and 20 H. 6. 27. Executor 22. and says that it seems the Opinion of Trin. 2 H. 5. 8. to agree; and that it may be against both cites 15 H. 6. Executors 12.

11. Executors represent the Estate of their Tettator, and are as one and the same Person, therefore every one severally shall not have a Plea which goes in Abatement of the whole Writ; But Brook says there were but two. Executors. Br. Executor, pl. 93. cites 37 H. 6. 17.

12. Subpnea against Executors, the one shall not answer without the S. C. cited other; the same Law of Fees of in Truit. Br. Executor, pl. 136. cites 8 E. 4. 5. 6.

was taken to be out of the Reach and Intent of the Statute of 9 E. 5. 3.

13. Two Executors; One of them is made Defendant; He shall be charged no further than for the Goods that came to his own Hands. Toth. 150. cites 35 Eliz. Herbage v. Backhaw.

14. If one Executor will confess an Action this shall bind the other; So if he will release or give away the Goods of the Tettator, this shall bind his Companion. Cro. E. 318. pl. 5. Paich. 36 Eliz. B. R. Hare- thorp v. Millorick.

15. Debt against two Executors; Only one appears and confesses the Action; The Judgment shall be against both of the Goods of Tettator's in the Hands of all the Executors, and the Damages of him that appeared only. Brownl. 53. Paich. 6 Jac.

16. In Action against them they must all be joined and made Defendants, or at least so many of them as do administer. Went. Off. Ex. 95.

18. If one will plead one Plea and the other another, some say that that shall be received which is best for the Testator's Estate. Went. Off. Ex.

19. Judgment may be against that Executor or Administrator that hath Affets, and Nil capitee per Billam against the other that hath fully administred. St. 148. Mich. 24 Car. in Case of Gill v. Cross, cites 7 Car. in Scacc. Rot. 1189. Nevill v. Greenwood.

20. In Debt on a Bond all are named in the Declaration, and but one only arrested, and for him he appears as Attorney and strikes out the Names of the other, because he had no Authority for them, and after pleads in Abatement that there are other Executors not named in the Writ, which the Court set aside as frivolous, and only to put off Trial, and ordered a common Bail to be filed for all, and pleaded in chief; but by Twidlem, the Statute of 9 E. 3. cap. 3. extends not to Executors that come in by Arrest upon Lattat, quod non fuit negatum. Keb. 743. pl. 32. Trin. 16 Car. 2. B. R. Lower Executor's Cafe.

21. The Court ex motione Wild conceived 9 E. 3. cap. 3. that the Executors or Administrators that come first by Distriffs shall answer, extends not to a Lattat. Keb. 843. pl. 34. Hill. 16 & 17 Car. 2. B. R. Livermoor's Cafe.

22. Two Executors were possed of a Term for Years rendring Rent; The Rent is arrer for four Years since the Death of the Testator; The Plaintiff brings an Action of Debt against the Defendant (one of the Executors) and declares, that he final cause the other did occupy the Term &c. The Defendant pleads Nil debet, and the Illie is found for the Plaintiff. It was moved in arrest of Judgment that the Plaintiff could not have Judgment, because by his own shewing there were two Executors and he had sued only one of them. It was answered by the Court, that now he comes too late, and hath pretermitted his Time; for he might have pleaded it at first, and demanded Judgment whether he should answer, but now the Jury hath found him a Debtor Modo & Forma, and he hath lost the Advantage. Freem. Rep. 6. pl. 5. Mich. 1670. Goodwin v. Wickins.

23. An Executor who is Defendant must say that the other Executor did administer; But otherwise where Executor is Plaintiff; Per Hale Ch. J. 3 Keb. 63. pl. 54. Trin. 24 Car. 2. B. R. Bullington and Salter's Cafe.

24. Action against one Executor where there are more; if that one Executor doth not plead that Matter in Abatement, but pleads to the Action, he shall never have the Advantage of such a Plea afterwards; Arg. Carth. 61. Trin. 1 W. & M. in B. R. Bonyn v. Sandford.

25. By the Statute 9 E. 3, if Debt be brought against divers Executors, and one appears and the other makes Default upon the grand Distrefs the Court may proceed against him that appears, and if the Plaintiff recovers Judgment shall be against all the Executors for the Goods of the Testator, and the 25 E. 3. cap. 17. which gives a Capias in Debt, has always been construed within the Equity of 9 E. 3. so that if there are several Executors Defendants, and a Capia is returned as to one, and a Veni eff Inventus as to the rest, the Plaintiff shall proceed against him that appears, and shall have Judgment against all; For the Default upon the Capias is the same upon the Grand Distrefs. Thus the Judgment being against all, one only ought not to bring the Writ of Error, For the Judgment being at Grave Damnum of all, and the Costs which are adjudged against him only that appeared are but an Accesory to the principal Judgment, which cannot be reversed quod them only; Per Holt Ch. J. 1 Salk. 312. pl. 17. Pasch. 1 Ann. B. R. Roule v. Etherington.
(A. b. 5) Joint-Executors.

In what Cases one shall answer alone on the Default of the other.


ENACTS, that in a Writ of Debt brought against divers Executors, the same Executors, or any of them, shall have but one Escoffon before Appearance, that is to say, at the Summons or Attachment, or after Appearance, they shall have but one Escoffon, as the Toflator should have had, so that all the Executors do present the Person of the Toflator as one Person.

S. 2. And though the Sherif do answer at the Summons, that some of them have nothing whereby he may be summoned, yet there shall be an Attachment awarded upon him.

S. 3. And if the Sherif answer that he hath nothing whereby he may be be attached, the Great Distrefs shall be awarded, so that at the Great Distrefs returned upon them, be or they that do first appear in the Court shall answer.

Distress, and the one appeared, and the other made Default, and notwithstanding that the Statute lays only that Executor &c., yet Administrators are taken by the Equity, and therefore he shall answer in the Absence of his Companion; and so was the Opinion of the Court. Br. Respondre, pl. t. cites 3 H. 6. 14.

Where a Man brings Debt against Executors or Administrators in the Debt and Detinet, he who first comes by Distress shall not be compelled to answer by reason of this Word (Debet) which cannot be intended as against Executors, nor where it is brought in the Detinet as it ought to be. Br. Respondre, pl. 10. cites 11 H. 2. 55.

And if a Feme Covert and her Baron and others are Defendants, as Executors or Administrators, and she comes without her Baron, she shall not be compelled to answer without her Baron notwithstanding this Statute. Ibid. — Br. Administrator, pl. 17. cites S. C. — Br. Executors, pl. 54. cites 11 H. 4. 56. S. C.

S. 4. And although some of them have appeared in the Court, and make Debt against Default at the Day that the Great Distress is returned upon the other, yet three Executors who made Default, and Pone infilled against the one who was returned Summoned, and did not come, and Capias was awarded against three who were returned Nihil, and at the Day the one in the Capias appeared, and three made Default, and yet he was compelled to answer; for at Common Law the one Executor should not answer if all did not come, or that the Process be determined against some of them, and the Statute wills that he who first comes by Distress shall answer, and therefore the Statute is put in Use, that he who comes at the first Capias shall answer; Quod Nota by Award; So it items that this Word Distress is taken there as a Coercion; For a Man may be compelled as well by Arreft by Capias as by Distress, Quod Nota. Br. Respondre, pl. 22. cites 4 H. 6. 14.

S. 5. And in Case the Judgment pass for the Plaintiff, he shall have his Judgment and Execution against them that have pleaded, according to the Law heretofore used, and against all others named in the Writ, of the Goods of the Toflator, as well as if they had all pleaded.

S. 6. And it is to be understood, that in any such Case will be according to the Law that hath been used heretofore, he may freely do it notwithstanding this Statute.

2. Dehine was brought by a Feme against the Executors of her Baron of the Moiety of his Goods by the Custom, and well, and the one Executor appeared alone, and was awarded to answer by the Statute. 9 E. 3. cap.
Executors.

3. cap. 13. and the Statute says, that the Executor who first comes in Debt shall answer, and the other Actions brought as Executor are taken by the Equity of the Statute. Br. Executor, pl. 128 cites 17 E. 3. 17.

3. *Audita Querela* against two Executors; the one made Default, and the other was compelled to answer alone, for the Writ is in Nature of a Writ of Trespas, and the Plaintiff shall recover Damages for Execution sued against him not rightfully if it be [lound]. Br. Executor, pl. 42 cites 2 H. 4. 17.

4. *Audita Querela* against two Executors who sued Execution upon a Statute Merchant made to their Exeutor contra Facsum Testatoris; the one came at the Grand Distrefs and prayed Idem Dies till the other came; & non allocutus; but was compelled to answer though the Statute of Executors in this Case be in Writ of Debr, and this by the Equity; Quod Nota. Br. Executor, pl. 48 cites 7 H. 4. 15.

5. In Debt; Per Hauk. Plurias Capias in Debt is returned against three, and Exigent issues against two, and Plurias Capias against the third, there if the one appears at the Exigent, and no Exigent is returned, yet he shall answer; because the Defendants are Executors, but he shall be discharged of the Mainprize, because the Exigent shall be adjudged as none, in as much as the Processe illud illi. Br. Exigent, pl. 25 cites 12 H. 4. 17, 18.

Br. Charters, de terre, pl. 21. cites 14 H. 4. 23, 24, 29, and 21 H. 6. 1. S. C. and it is said there that 12 H. 4. is contra; And see 41 E. 3. 30, 31. because the one Executor was omitted in the Writ the Plaintiff shall not proceed but was nonnull, which agrees with this Case; But Brooke says it does not much appear there that this was ex necessitate.

6. Where four Executors were impleaded, and three appeared, and the fourth made Default, the three were compelled to answer at the Distrefs where the 4th made Default, and was returned Nihil &c. which was against the Opinion of Hill and several &c. Br. Executor, pl. 64. cites 14 H. 4. 23, 24.

7. The Statute 9 E. 3. cap. 5. is, that that Executor who first comes by Distrefs shall answer, yet it is put in Use that he who comes by Capias shall answer; Quod Nota; And this seems to be by Equity. Br. Parliament, pl. 24. cites 4 H. 6. 14.

8. Where all the Executors die, and the Survivor has Executors, where they are impleaded, he who first comes by Distrefs shall answer as well if they were the first Executors; Quod Nota; For this is a like Mischief. Br. Executor, pl. 99. cites 39 H. 6. 47.

9. Debt against three Executors, and at the Summons two came and the third not, and it was agreed there that the other two shall not answer without the third; For the Statute is intended at the third Writ, be it by Distrefs or Capias, though the Statute says that the Executors who first comes by Distrefs shall answer, for Capias is by Compulion as well as Distrefs, therefore shall answer there by the Equity of the Statute; Contra of him who comes by Summons, by which Process was made against him, and Idem Dies given to them who appeared; Quod nota bene. Br. Executor, pl. 106. cites 1 E. 4. 1.

10. In *Rationabile parte honorum* against Executors he who first comes by Distrefs shall answer; for they are charged there as Executors. Br. Executor, pl. 135. cites 7 E. 4. 20, 21.

S. P. As in Debr or De- tinus; For where Ne unques Ex- ecuto r, Ne unques administret as Executor is a good Plea, as here, there Executor who first comes by Distrefs shall answer. Br. Respoudre, pl. 35. cites 7 E. 4. 29.

Executive.

11. "Subje&i against Executors," the one shall not answer without the S. P. but in other; Per Opinionem; And the same Law of Feoffees upon Trust. Br. Executor, pl. 136. cites 8 El. 4, 5, 6. Attachment against two Clerks of the Chancery is not in the Statute that he who first comes shall answer, for the Attachment is as a Suit at the Common Law; Quere of Subje&i. Br. Confidence, pl. 15. cites S. C.


1. If a Man makes two Executors and dies, and the one refuses to. S. P. 156. for the Ordinary, and the other proves the Testament, yet Action pl. 168. cites shall be brought in the Name of both. Br. Executor, pl. 9. cites 3 H. 6. 2 R. 5. 20. 6, 7. per Cott. 2. The Confession, Pleading, or Default of one Executor will not If two Executors charge his Companion; So a Sale by one is good, for as to the Goods of the Testator they are but as one Person, and such Act of one charg- and one eth both only as to the Testator's Goods, but not their own proper Goods. As one Executor may confess, so he may release &c. But if the Action, one be non-suited, yet the other may sue again. Br. Executor, pl. 77. cites 21 H. 6. 45.

for so much as he hath in his Hands. 2 Brownl. 186.—But a Confession by an Executor de Non Tor shall not prejudice the rightful Executor.

3. If two Executors have Judgment and the one prays a Capias, and the other a Fieri Facias, the Capias shall be awarded as beit for the Testator; Per Hob. Ch. J. Hob. 61. in Case of Foster v. Jackson cites 7 Hen. 6. 6. per Calimore.

4. Account by two Executors against B. and have Judgment quod Computet. One dies; yet the Writ shall not abate, but the Survivor shall a special Sci. Fa ad Computandum in his own Name reciting that the other is dead. Noy 68. Anon.

5. Two Executors and joint in the Bill shall be sever'd upon hearing. Toth. 151. cites Mich. 8 Car. Moore v.

6. Two Executors sued and declar'd as such, and that they proved the 7 Mod. 39. Will; but upon setting forth the Probate it appear'd that the Will was S. C. accord- ingly, The Defendant pleaded this in Abatement, but a Respondent Outier was awarded, because they both have a Right, and he that did not prove may come in when he pleases, but cannot refuse during the Life of him that did prove. 1 Salk. 3. pl. 6. Patch. 1 Ann. B. R. Brookes v. Stroud.

7. If one of them in Action brought by them is sever'd the other shall go on. Far. 39. Trin. 1 Ann. B. R. Brookes v. Stroud.

5 C (A. B. 7)
(A. b. 7) Joinder in Action by and against Executors &c. In what Cases; And of Summons and Severance.

1. A Writ of Debt brought by Executor, and Executor of Executors, was adjudged good. Thel. Dig. 31. lib. 2. cap. 11. S. 1. cites Patsh. 18 E. 2. Executors 115. and that so it is agreed Mich. 7 E. 3. 348. But says it was said in both the Books that the first Executor who survived might have Action alone without the other.

2. But it was held clearly that they cannot join. Thel. Dig. 31. Lib. 2. cap. 11. S. 2. cites Trin. 19 E. 2. Executors 117. And that to agree Mich. 29 E. 3. 6.4 and Hill. 38 E. 3. 8. and Patsh. 28 E. 3. 92. And that the clear Opinion 39 H. 6. 48. that the first Executor surviving shall have Action of Trespass against the Executors of Executors &c. and 13 H. 6. Executors 22. Notwithstanding that some who are named Executors in the Testaments refused the Administration before the Ordinary, yet they shall be all named in a Writ to be sued by them. Mich. 15 E. 3. Executors 80. and fo agrees Mich. 41 E. 3. 22 &c. 35 H. 6. 36. and Patsh. 9 H. 5. 6. Trin. 4 E. 3. 157.

3. Where a Reconoizance was made to two, and both die, and the Executors or both like a Scire Facias &c. Hill said that by the Law the Executors of him who survived ought to have the Suit alone. Thel. Dig. 31. lib. 2. cap. 11. S. 3. cites Mich. 15 E. 3. Executors 81. and that fo agrees Hill. 38 E. 3. 8 where one was Bailiff of a Wood to two Tenants in Common, the Writ of Account was maintained for the Executor of him who survived alone.

4. Where one of the Executors sells the Goods of the Testator, he alone may maintain Writ of Debts upon this Sale without his Co-Executor. Thel. Dig. 31. lib. 2. cap. 11. S. 4. cites Patsh. 38 E. 3. 10.

5. Deftime of Charters against a Feme, and counted that they were delivered to the Baron of the Feme who died, and they came to the Hand of the Feme; The Defendant pleaded to the Writ because the Baron made her and one J. his Executors who is in full Life not named. Per Belk this Action is brought by reason of the Possession &c. and alter the Plaintiff confused the Exception, by which Defendant pray'd that the Writ abate, but because he was an Infant he was permitted to be nonsuit'd. Br. Deftime de biens. pl. 12. cites 41 E. 3. 30.

6. Trespass was maintained by Two, and by the Name of Executors of Goods of the Testator taken out of their Possession, because the third Executor did not administer; Quere inde, for it seems that of Goods taken out of their Possession they need not join in Action. Br. Executors. pl. 31. cites 42 E. 3. 26.

7. A Man bail'd Goods to W. S. who made two Executors and died; the one Executor got Possession, and Deftime was brought against him only and well by Award; For nothing shall charge him but the Possession, and not the Bailment nor the Executorship. Br. Executor pl. 92. cites 39 E. 3. 5. Deftime of Charters lies only against that Executor who has the Possession, and not against all. Br. Executor. pl. 145. cites 43 E. 3. 24 and Kirsh. Brief. 341.

Thel. Dig. 31. lib. 2. cap. 11. S. 3. S. P. cites Micah. 42 E. who admistinthes shall have Action without the other who refused; per Candish.
Candish, quod non negatur; and it is taken for Law at this Day. Br. 3. 26. and
Executor, pl. 38. cites 49 E 3. 17.

that so agrees
Mich. 12 R.

2. Executors 75. — But the Opinion of Newton is to the Contrary notwithstanding, that he name
himself Executor in the Writ. Thel. Dig. 31. lib. 2. cap. 11. S. 6. cites Pach. 19 H. 6. 62. And say
that to this seems to agree the Opinion of Rome Hill, 16 H. 7. 4.

9. If three are Executors and the one has the Possession, Action lies a

10. Where there is one Executor and another administers with him,
yet the Creditor is not bound to bring his Action, but against the Ex-
cutor only; but he may implead both if he will. Per Coremore. Br.

11. It was held that where in Account brought by two Executors the
one was secured, and the other pursued the whole, in which Suit the De-
fendant was adjourned to account, that the Acquittance of him who was se-
 cured shall bar the other of the whole. Thel. Dig. 31. Lib. 2. cap. 11. S.
cites Pach. 48 E 3. 14. And that so it is agreed, Pach. 9 H. 6.

11. Where it was said that if two Executors are, and the one assigns Au-
ditors &c. he who aligns the Auditors shall not have Writ of Debt alone
for the Arracages of Accounts without his Companion.

12. Debt against two Executors upon an Obligation of their Testator,
the one pleaded Pleue Administravit, and the other Not the Deed of his
Testator; and the best Opinion was, that they may aver in Plea, contrary
it is said elsewhere in Dilataries. Br. Executor, pl. 110. cites 7 E. 4. 8.

But by sever-

where the
one Ex-
cutor con-
fesses the
Action, the
other shall not plead Non est factum; for where the one confesses, all are condemned, and Judgment
shall be against all of the Goods of the Deceased, and of the Damages against him who confessed de
Bonis Propriis se non sunt bona mortui; viz. where one Executor shall answer alone
without his Companion.

13. Where one makes his Feme and another his Executors and dies,
the Feme takes Baron, and the Feme dies, the Baron and the other
Executor shall join in Writ of Trepass of the Goods of the Testator
taken out of their Possession. Thel. Dig. 32. Lib. 2. cap. 11. S. 8. cites
Pach. 21 E 4. 4. & 20 E. 4. 17.

14. The Plaintiff ought always to acknowledge of his Part all the
Executors; But where a Stranger brings an Action against Executors, it
is sufficient for him to name those that administred in fact, and not
others that did not intermeddle with the Administration. Thel. Dig.
ibid. pl. 9. Hill. 16. H. 7. 4. pl. 1.

15. But upon an Obligation made to one B. and to an Abbot, if B. dies,
now his Executors and the Abbot shall join in Action of Debt. Thel.
Dig. 32. Lib. 2. cap. 11. S. 9. cites Pach. Nat. brev. Tit. Br' de
Debito.

16. If one Executor only sells Goods of Testator, he alone may main-

17. Where one Executor refused, yet in Action brought by the other
he must join him that refused. 9 Rep 37. Trin. 42 Eliz. Henlloe's
Cafe.

18. Two Executors, one an Infant, the Executor of full Age took out
Administration during the Minority of the Infant, and then brought an
Action in his own Name only; The Action abated. Brownl. 104.

Trin. 6 Jac. Smith v. Smith.

19. If Goods are taken from one, all may maintain an Action of Tres-
pas; for in such Cafe the Possession of one is the Possession of all,
though it is otherwise where it is to charge another Executor's own

42 E. 3 26. — One only may maintain the Action. Went. Off. Ex. 124.

20. Error
20. Error of a Judgment in Debt. Debt was brought by six Executors, and after three of them being summoned and severed, the three others bringing Debt upon an Obligation made to the Testator; the Defendant pleaded non est jadum, and it was found against him, and Judgment for the Plaintiffs; Error was brought and affirmed, because there is not any Mention therein of those that severed, for they being always Executors ought to be named in the Judgment; The three Prothonotaries certified that the Court was to give Judgment for those only that prosecuted, and Refolved, That it was no Case of Error, for the Executors which are severed peradventure never proved the Will, and it may be they never will prove it, nor administer. The Judgment was affirmed. Cro. C. 420. pl 11. Trin. 11. B. R. Price v. Parkhurst.

21. In Error in a Judgment in Debt against three Executors, one of them appeared upon the Summons and confessed the Action, and Judgment was given Quod recipiatur Debtorum against the three Executors, and that he should have Execution against them de Bonis Testatoris in their Hands, and DAMAGES de Bonis Propriis against him who appeared, and MISERICORDIA against them all. The Error affirmed was because the Appearance was upon the Summons and not upon the Diftrefs, and therefore was out of the Statute of 9 & 10. cap. 3. Secondly, because it is Misericordia against three, whereas two of them never appeared, and against him who appeared no Misericordia ought to be because he came upon the Day of Summons, so it was resolved that he who was taken in Execution should be discharged. Cro. C. 564. pl. 9. Mich. 15 Car. B. R. Proctor v. Chamberlain.

Raym. 198.
S. C. where there are several Executors, and one or more under Age, and the rest of full Age, all must join in an Action. Per Twilid. Mod. 47. Hill. 21 & 22. Car. 2. B. R. Hatton v. MascaL

22. A makes two Executors, one is an Infant, he of Age sues alone, and good. Lev. 181. Pasch. 18. Car. 2. B. R. Hatton v. MascaL

24. A Scire Facias was brought by two Executors, reciting that there was a Third, but within Age; Resolv'd that all must join. Arg. Mod. 47. pl. 102. Hill. 21 & 22. Car. 2. cites Hutton v. Askew.

5 Lev. 259.
S. C. states if that the Executor of full Age provided the Will and had Administration Durante Minoritate of the Infant and sued alone. —


[Though where there are several Residuary Legatees they must all join in an Action yet] where the Share of each (there being in all 16) was let to the Discretion of the Executor, as he without Compulsion at Law should declare. The Executor declair'd what the Sum of the Restidue was, and that he had paid all the Legatees but one, yet he alone sued for an Account in Chancery without the others joining, and was releiv'd. 2 Ch. Cafes 198. Trin. 26. Car. 2. Gibbons v. Dawley.

(A. b. 8)
(A. b. 8) Joint Executor. Survivor.

Where Survivors shall have the Surplus &c. and join or be join'd in Actions with Executor &c. of the deceas'd Co-Executor.

1. Note, it was said that where two are Executors, and the one makes his Executor and dies, that by way of Demand, the Executor who survives shall have the Action alone by Survivor, and the Executor of the other Executor shall not join with him by Demand. Br. Executors, pl. 29. cites 41 E. 3. 13. 22.

2. But they shall be joined with the other in Action against him; For it may be that he has of the Goods of the first Testator. Ibid.

3. But Brook says it seems that all is one, and that he shall not be joined with the other in any of the Cases; Quaere this Diversity. Ibid. and cites 21 E. 4. 22. 23. 10 H. 6. 26. and 39 H. 6. 45. that the Survivor shall neither sue nor be sued but as Executor de son Tort demise.

4. Debts against Executors and Executors of Executor and per the Julices, it does not lie against both; for they cannot join in Action; but the Survivor Executor shall have Action alone, and the like Action shall be brought against him. Br. Executors, pl. 99. cites 39 H. 6. 45.

5. And if the Executor of the Executor has any of the Goods of the first Testator, the Executor who survives shall have Action against him, and yet a Man may have Action against Executor de Droit, and Executor who administers de son Tort demise; For this is his own Act and Tort, and he is charged de son Tort; but here the Plaintiff would join both together by the Law, which cannot be; For he cannot charge them jointly by the Law; quod nota. Ibid.

6. A. and B. were made Executors to the Use of Children; B. having gotten a great Part of the Testator's Estate into his Hands devises divers Legacies to Strangers, and makes C. the Defendant, (his Son) and dies; C. by anwer confesth his Father had devises Goods of the first Testator's in his Hands, but that he had not Goods sufficient more than would satisfy the Legacies given by his Father; therefore ordered that C. shall first pay to the Plaintiff the Goods which were the first Testator's, and so much of his Estate as came to his Father's Hands, Cary's Rep. 123. cites 21 & 22 Eliz. Wray v. Sapcote.

7. A. made B. and C. Executors and Residuary Legates, and died. B. died. The Question was between C. and the Executors of B. Whether this being a Matter Legatory and siable in the Spiritual Court, (where survivorship would not be allowed) C. should be liable to account with the Executors of B. And after Time taken to consider of it, the Matter of the Rolls decreed that the Survivor should take the Whole. 2 Wms's Rep. 529. Trin. 1729. Cray v. Willis.

8. G. Amhurst by Will devises the Residuum to Defendant Selby, and to E. Us' B. and to C. Us' T. and makes them three Executors, the Defendant Selby only administrators, and before all the Estate of the Testator was got in and his Debts paid, E. Us' B. dies; and then B. his Husband dies. Quaere, If the Administrator of the Husband is intitled to the third Part of the Residuum of the Testator's Estate, or the Administrator of E. the Wife? Northey, Attorney General, intitled that the Defendant being the acting Executor, his Possession of the Goods and

5 D Efficts
Effects of the Testator, is the Possession of the two other Executors, though they did not administer, and that is an Interest vested in the Wife, and consequently shall go to the Administratrix of the Husband. Per Cowper C. The Refiduum of the Testator's Estate is uncertain until his Estate is got in, and his Debts paid, and thereby reduced to a Certainty, and before that it cannot be said to be actually vested, but remains as a Choise an Action, and therefore shall not go to the Administratrix of the Husband, but to the Administratrix of the Wife. MS. Rep. Hill. 3 Geo. Canc. Amhurit & al' v. Selby.

(A. b. 9) Co-Executors. Actions by them, and Pleadings by Survivors &c.

1. A COUNT' brought by four Executors; Defendant said that there were five Executors, and the Fifth has made his Executors and died, which Executors are not named; & son allocatur; but the Writ good by the Survivors only. Br. Executors, pl. 65. cites 38 E. 3. 7.

2. Three Executors brought Action, two are summoned and severed, and the Third recovered and died; the other two shall have Execution. Br. Executors, pl. 148. cites 11 R. 2. and Fitzh. Privilege 2.

3. Two Executors are, and the one makes his Executor and dies, yet Debt lies against the Executor who survives only. Br. Executor, pl. 160. cites 10 H. 6 26.

4. Debt by Executors, and seew'd Testament, in which there was named two other Executors with the Plaintiff; and per Moile J in this Case and in Debt upon Obligation the Plaintiff ought to survive the Death of the other two in his Count, and otherwise the Writ shall abate, and e contra in Formedon in Remainder, but there the other Party ought to say it for Plea; For Testament and Obligation shall be flown without Demand of the other Party; But in Formedon in Remainder the Demandant is not bound to flew it unlesf the Tenant demands it, quod nota Divergity; but because it was counted of another Term in which the Testament was flown, therefore the Defendant was put over, by which he said that there were two other Executors alive not named in the Writ. Br. Count, pl. 53. cites 36 H. 6. 16.

5. In Debt on Bond brought by two surviving Executors the Defendant demurred specially to the Declaration; and the principal Cause relied upon was, That the Plaintiffs had only alleged that the Money had not been paid to the Testator in his Life-Time; nor to them nor one of them since his Decese. It was now argued that this Declaration was not certain enough, so as the Plaintiffs could recover upon it; because notwithstanding any Matter which they have alleged, the Money might have been paid to the Executor that is now dead. Serjeant Baynes on the other Side answered that if it had, the Money would in Judgment of Law have been paid to the surviving Executors, as well as to the Executor deceased; for a Payment to one is a Payment to all. The Court this a Matter to be further considered of. But a few Days after over-ruled the Demurver, and gave Judgments for the Plaintiff. 2 Barnard. Rep. in B. R. 75. Mich. 5 Geo. 2. Meed v. Gibbons.
Judgment.

In what Cases it shall be given against Executor and how.

1. In Debt against Executor, if Defendant pleads Fully administered, if anyAliases are found in his Hands though it be not to the Value of the Debt, yet the Plaintiff shall have Judgment for all his Debts de Bonis Teiitatoris. 17 T. 3. 66. 6. adjudged. 34 H. 6. 24. 6. Rep. 134. Ma. Skipley's Case Tr. 12 K. B. R. adjudged between Lee and Ridford.

2. But if it be found that he has nothing in his Hands the Judgment shall be Mind queens nihil Capit per Breve, and he shall not have Judgment of the Debt, for he has waited this Advantage by taking of the Issue, and Judgment is to be given upon Verdict. 34 H. 6. 24. 6. contra 33 H. 6. 24. Curia.

3. In Debt against an Executor, if he pleads Plena Administravit, and Plaintiff replies that he hasAliases, and afterwards the Defendant relitig Verificatone cognovit Actionem nec quin ipse Definiet, upon which Judgment shall be given against the Defendant, but that he hasAliases, for the Acknowledgment naturally extends only to the Declaration which is of the Debt, and not of theAliases; but if the Defendant will contest more he may, but otherwise the Confession is but a Disavowing of his Plea of Plena Administravit. Hob. 240. between Bird and Calmer.

4. If A. recovers Debts and Damages against B. and after B. dies, * Cro C. 283. pl. 52. and then a Sc. Fa. to have Execution is brought against four Persons C. D. E. and F. as Executors of B. and in the Writ it is supposed that B. made the four Persons his Executors, and all four Persons appear and plead fully administered, and the Jury find—See this Case that C. has 100 £.Aliases in his Hands, and D. 40 £. in his Hands, and that E. and F. has no Aliases, in this Case the Judgment ought to be against all the four Persons to recover the Goods of the Testator, insomuch as they are all named Executors, and they take it upon themselves and plead accordingly. B. 9 Car. in the Exchequer Chamber, between * Neson and Delahar and others per Cur. where the Judgment being to recover of the Goods of the Deceased 100 £ against C. and 40 £ against D. and that the other two should go fine; it was held per Cur. to be erroneous, because it was not against all; but because the Writ of Error to reverse this and the first Judgment was brought by C. and D. only with the other two, it was held by the Court that the Writ of Error ought to abate. But this Judgment was after affirmed per Cur. and the Writ abjudged good, insomuch as the two Plantiffs in the Writ of Error were only grievous by the Judgment, and the Judgment well given in B. R. Intracut. pl. 7 Car. B. R. Rot. 198.

5. In an Action of Debt against two Executors if they plead severally by several Attorneys fully administered, and the Jury find that one hasAliases, and the other has noAliases, the Judgment shall be solely against him who is found to haveAliases, and that the other who has noAliases shall go quit. Bish. 15 Car. in the Exchequer Chamber in Writ of Error of such Judgment in B. R. abjudged per Cur. and the first Judgment affirmed accordingly. Intracut. 14 Car. B. R. Rot. 1283. between Bulow and Jucknaun.

6. In
6. In an Action against two Executors, if the one is waived or outlawed, and the other appear upon the Attachment in Bank the Record being attached, and the Plaintiff declares against him who appears who pleads to Issue, and a Verdict is for the Plaintiff, the Plaintiff shall have Judgment against both of the Goods of the Deceased, and if not of Damages of him who pleaded, adjudged in a Writ of Error upon such Judgment in Bank, and the Judgment affirmed accordingly. Tr. 16 Car. B. R. between Chamberlain and Nicholls.

7. Error of a Judgment in B. R. against an Executor for 100 l. who pleaded Rims enter Mains, and found that he bad 50 l. and the Judgment was Quod recuperet debitum prædictum, et quod habeat Executionem de semis Testatoris. The Error assigned was because the Judgment was intire for 100 l. instead of 50 l. it was said that the Judgment should be for the entire 100 l. and that he might have Seire Facias upon it when more Affets came to the Hands of the Executor; But the Justices demanded more ancient Precedents, and would advise. Cro. E. 592. pl. 32. Mich. 39 & 40 Eliz. in Cam. Scacc. Waterhouse v. Woodstreet.

8. In Debt against an Executor who pleaded three several Judgments for 100 l. each Judgment, and that he both not besides these Judgments 20 l. in his Hands &c. The Plaintiff replied, that those Judgments were satisfied and helden on Foot by Fraud &c. and did demand Judgment &c. and the Defendant did return that the Judgments were unpaid and transferred without that, they were kept on Foot by Fraud, and the Evidence for the first Judgment was a Decree before the Council at York which was paid, for the second a Witnesse proved that some Part of the Money was behind, but the Creditor did exact no more, for the third Judgment no Evidence was, and Direction to find for the Plaintiff, and this Rule given, that if the Defendant fail in Proof, that any of the Judgments appear to be satisfied, the Issue is against him though the rest were unsatisfied. Claty. 124. pl. 220. March 1674. before Germin J. Morris's Cafe.

9. Judgment was given against an Administrator in an Action of Debt brought against him in C. B. upon duly administered pleaded, and a Writ of Error was brought to reverse the Judgment. The Error assigned was, that Judgment was given for the whole Debt, whereas the Verdict found that the Defendant had Affets only to discharge a Part of it; To this the Court said, If it be found he have any Affets, Judgment must be given against him for the whole Debt, upon his false Plea, but if he have no Affets, it is otherwise. Sty. 88. Hill. 23 Car. B. R. Gaudy v. Ingham.

All 37. Gaudy v. Congham. S. C. the Error assigned was that Judgment should have been for so much only as was found in the Defendant's Hands, and that so are all the Precedents which he had cause to be searched; but Judgment was affirmed; for it is good either Way and in this Case the Court is to give Judgment for the whole, according to Mary Shipley's Case. 3 Rep. 154.

10. If Defendant do not or will not exhibit an Inventory it shall be taken pro Contello that he has Affets; Per Pemberton Ch. J. 2 Show. 163. pl. 152. Trin. 33 Car. 2. Anon.

11. Debt upon an Obligation of 20 l. against an Executor who pleads Plea Administravit, and Affets being found of 10 l. the Plaintiff had Judgment quod recuperet 10 l. whereas it ought to have been a Judgment for the whole, and Execution only for 10 l. (unless it were returned that he had waited) and then he might have had a Scire Facias when more Affets came to the Defendant's Hands; and it was held to be erroneous. Freem. Rep. 351. pl. 441. Mich. 1673. Oxendem v. Hobdy.
In what Causes Scire Facias lies of Assents
Quando acciderint.

1. In Debt of 10 l. the Defendant pleaded Plena Administravit, and it
was found that be but only 4 l. yet the Judgment shall be that the
Plaintiff recover all his Debt, and nothing shall be put in Execution but
the 4 l. but if he gets more Goods of the Testator after by Recovery or
otherwise, then the Plaintiff shall have Sci. Fa. against them upon the
same Judgment; Per Finch, quod nullus dedixit. Br. Executor, pl. 34,
cites 46. L. 3. 9. 10.

2. Debt against Executors who pleaded Plena Administravit, and found
for the Defendant; by which it was awarded that the Plaintiff take no-
ting by his Writ, and after the Plaintiff came and summoned that Assents
is come after to the Hands of the Executors, and pray’d Scire Facias
against them; And per Martyn by the Judgment the Record is deter-
min’d, and Scire Facias lies upon Record which remains, and not upon
Record determin’d, and upon this Matter the Plaintiff may have
the new Writ of Debt; Quod nota, Curia concelebit. Br. Scire Facias,
pl. 130. cites 4 H. 6. 4.

3. In Debt against Executors, or against the Heir, who pleaded Ple-
ne administravit, or Riens per Defentc, and it is found for them, by
which the Plaintiff is barr’d, and after Assents came, he may have * new
A&ion, and shall not be barr’d by the first Judgment; Per Markham;

4. If Executors bar the Plaintiff by Riens enter mains, if they get See pl. 7.
Goods after the Plaintiff shall have Sci. Fa. out of the same Record
by Surmise to have Execution of these Goods; quod tuit conceelum
per omnes Justiciarios &c. Br. Executor, pl. 18. cites 33 H. 6. 23,

5. In Debt against Executor on Bond for 200 l. Defendant pleaded
Plene Administravit, and the Jury found Assents to 172 l. The Plaintiff
had Judgment to recover the entire Debt and Damages, and Coffis &c.
This Judgment was affirmed in the Exchequer Chamber: For upon
the Bar, which in Effect is Riens enter Mains, the Plaintiff might have
prayed Judgment immediately, for it is a Concellion of the Debt,
but he cannot have Execution till Defendant has Goods of the
Deceased; But the Trial in this Case is good Direction to the Sheriff
what to do as to the making Execution. 8 Rep. 134. Patch. 8 Jac.
B. R. Mary Shipley’s Cafe.

6. It was resolved in this Case, that if Debt brought against an Ex-
cutor, who pleads that he has fully administred, and it is found that
he has Assents to 40 l. whereas the Debt is 60 l. that a Judgment
shall be given for the 60 l. against the Defendant; and upon that Judg-
ment, if more Assents come after to the Executor’s Hands, the Plai-
ntiff may have a Scire Facias. Godb. 178. pl. 250. Mich. 8 Jac. in

7. When it is found in Action against Executor that he has some Af-
sets though of little Value, so as he has not fully administred, the Plain-
tiff shall have Judgment for the entire Debt, but he shall not have Execu-
tion but of as much as is found, and shall not be barred of the Residue.
134. Mar. 5 E.
8. In Debt against an Executor who pleads *Plene Administravit*, which is found for him, and so the Plaintiff is barred *pro tempore*, viz. until *Affets* come afterwards to the Defendant's Hands, and then the Plaintiff may have a *new Action*. Heath's Max. 58. cites 19 H. 6. 27.

9. So in Debt against an Heir, who pleads *Riens per Descendent*, or in a *Former* pleads the Warranty of his *Ancestor* with *Affets*, and after the *Affets* are recovered against him, he shall have a new *Former* ; and if he alien the *Affets* his Heir shall have a new *Formedon*. Heath's Max. 58.

10. But where in *Formedon*, *Cui in Vita*, *Mortdaecstor*, and the like, such a Plea is pleaded either against the *Ifue* in *Tail*, or the Heir of Tenant by the *Curtesy* &c. and no *Affets* found, and after *Affets* descend, the Defendant in the first Action shall have *Scire Facias* for the *Affets* if the first Action be a *Formedon* ; Otherwise, as it seems, for the first Land. *Quare*. Heath's Max. 58.

And fee 11 H. 4. and 4 H. 6. Br Tit. Sci. Fa. 74. and 130. in the last of which it is doubted when Executors plead *fully administris*, and it is found for them, and afterwards *Affets* descend, whether the Plaintiff be not driven to a *new Action*, or may have a *Sci. Fa.* thereupon, viz. upon the first Judgment. Heath's Max. 58.

12. Which seems not by the 40 Ed. 3. and 43 Ed. 3. per Brook in Tit. Sci. Fa. 17 and 29. where a Difference is taken when the Plaintiff is barred, and when he doth recover. Heath's Max. 59.


14. Where an *Administrator* pleads two or more Judgments, and the *Plaintiff* confesses the Plea to be true, and prays Judgment of *Affets* in *futuro*, &c. if *Affets* should come afterwards to his Hands he may satisfy the Judgments pleaded, because the Judgment of *Affets de futuro* is only to be discharged after the other Judgments are satisfied.

15. One dies indebted by Mortgage and simple Contract. One of the *Creditors* by *simple Contract* gets *Judgment of Affets quando acciderint*, yet where *Affets* come in by the *Act of Equity*, the other simple Contract *Creditors* stand in the Place of the *Mortgagor* as to what he has exhausted out of the Personal *Affets*; But if *Affets* at Law come, they must be applied in a Course of Administration, and such Judgment-Creditor will be preferred. 2 Vern. 763. pl. 663. Mich. 1718. Wilson v. Field.
Judgments against Executors.

Judgment General.

[Upon a false Plea]

1. 1 Rep. 9. Mounfjev in Action upon Affumptis of the Administrator, in Consideration that Administration was committed to him, and that he has Assists to pay, he promised to pay the Debt due by the Testator: Defendant pleads Non Alwumptis, and found against him, and Judgment general given, and nor de Bonis securati. 9 Rep. 94. Bank's Case.

2. If Executor pleads he unques Executor &c. and is found Executor, Judgment shall be general to recover the Debt. 46 C. 3. 3. 3.

10. 1 R. 3. 3. for his false Plea. 9 D. 6. 44. b. 11 D. 6. 8. 16. Hill. 5 C. — In Debts against two Executors, if the one pleads No unques Executor, and Judgment given to recover de Bonis Testatoris, contra Brooke, that it shall be conditional Judgment. 11 D. 6. 16. b. in the Court of Lynn recovered for those Causes. Instruct Hill. 11 Car. 3. 254.

3. So if in an Action against divers Executors, and one pleads No It was found unques Executor &c. if it be found against him the Judgment shall be general against him to recover the Debt. 46 C. 3. 3.

Executor, pl. 34. cites 46 E. 5. 9, 12. [And so it seems it should be here, and that 46 E. 5. (5) is misprinted.]

So where Administrators denied that they were Administrators, and it was found against them, and that they had 41. in their Hands, where the Demand was of 41. the Judgment was, that Plaintiff recover against them 41. for their false Plea; Quod Natura. Ibid. cites the same Term.

But if Assists are found in the Hands of the other Executor, for pleads fully, and it was found that he had in his Hands 61. and Judgment was, That the Plaintiff recover the 61. from his Executor, and the Residue against the other as if he had denied the Deed of the Testator. Br. Executors, pl. 34. cites 46 E. 5. 9, 10. — Br. Administrators, pl. 12. cites S. C. — — ] See pl. 2. in the Notes.

5. Note.
Executors.

5. Note, that in those Cases if it appears to the Court as by finding of the Jury that the Executor has not Assets in his Hands, then upon such false plea the Judgment shall be general: for it will be in vain to give Judgment of the Goods of the Deceased if he has any, when it appears that he has not any, and so the Cases above are to be understood, for to is 43 E. 3. 10.

* Finch.

Judgment 43. 5. 11 P. 6. 39.


7. So in Detinue the Judgment for the Damages shall be general. 11 P. 6. 39.

8. In an Action of Debt against an Executor who pleads Nihil dicir de Bonis Testatoris et ec. et non de Bonis Propriis, and after a Devia tutavit is returned against the Defendants, the Judgment shall be de Bonis Testatoris et ec. et non de Bonis Propriis as well of the Debt as of the Damages and Costs. Cro. 15 Car. B. R. between Street and Wife in a Writ of Error upon such Judgment in Courts in Devon, and this assigned for Error; yet the Judgment affirmed per Cur. because so is the common Courte. Intercut num. 71 Car. Rot. 751.

9. In an Action of Debt against Baron and Feme as Executors of A., upon which Judgment is given against them by Nihil dicir de Bonis Testatoris et ec. et non for Damages and Costs of Bonis Propriis, and after a Devia tutavit is returned against the Defendants, the Judgment shall be to recover the Debt, Damages and Costs de Bonis Propriis of the Baron and Feme. Cro. 14 Car. B. R. between Mennier and Bourbon, and Will. 14 Car. abjudged per Cur. after Arguments at Bar, because it is the common Courte, though the Feme * cannot properly convert to her own Use, for the may have Goods * as Executrix though he be a Feme covert, and peradven tre the Baronis charged only for Conformity in Respect of the Wife.

10. In Debt against Executive for Rent upon a Lease for Years incurred after Death of Testator, if Plaintiff recovers, the Judgment shall be general. 14 P. 4. 29.

11. If A. recovers against B. Debt and Damages, and after B. dies, and Administration is granted to C. his Wife, who waftes the Goods, and after takes D. to Baron, and a Fi. Fa. is awarded de Bonis Testatoris in the Hands of D. and C. and the Sheriff returns Nulla bona ec. and upon this upon Suretise that they have waived the Goods, another Writ is awarded to the Sheriff Si libi contare poterit per Inquisitionem, that they have waived the Goods, then to warn them to show Caule why Execution should not be de Bonis Propriis, and upon this the Sheriff takes an Inquisition which finds this Matter and refers it to the Court whether the Baron and Feme have waived the Goods of the Testator and convicted them
themselves to their own risk according to the want or not; upon this special Return the Court awarded execution of the proper Goods of Barton and Feme, for the Sheriff has returned the special Matter; and by this the Barton is to be charged for the Commission of the Feme. 26 Car. B. R. adjourned per Curt. Kingdom and Hilton and his Wife Administratrix against Copping.

12. If Executors are at issue upon Plene Administravit, and it is found that they have fully administered except in one County, or that they have fully administered except 20s. they shall be charged of 100l. for the contrary of their issue is found. Br. Executors, pl. 82. cites 24 E. 3. 26, 26, 47, 48.

13. Debt for 20l. against Executors who pleaded Risus enter mains, and it is found that they have 5l. they shall not be charged but of 5l. Coftra of the Plea of Ne quinque Executor. Br. Executor, pl. 141. cites 40 E. 3. 15. & 34 H. 6. 22, 23.

14. Debt against two Executors, at the Plurisy or Distress the one confess'd the Action, the Plaintiff shall have Judgement against him generally, and against the others of the Goods of the Deceased, and the Restit is to be because he did not deny but that he had Assets; for if it be otherwise, he might have said that he had nothing but 10s. &c. and contended the Action, and upon Fi. Fa. against Executors it is no Return that all the Executors but one has nothing; for the Possession of one is the Possession of all, and other Fi. Fa. shall issue against all; for they might have Goods after; and the Sheriff who returned that the Executors had sold the Goods for Money, and for other Goods was amerced; for he might have Execution of the Goods of the Executors amounting to so much &c. Br. Executors, pl. 63. cites 14 H. 4. 12.

15. Debt against L. and others of R. S. of 40l. who pleaded Plene Administravit; the other said that Assets; and it was found that they had Goods of the Deceased the Day of the Will to the Value of 20l. and no more, and put Damages to 5l. and it was awarded that the Plaintiff recover only 20l. of the Goods of the Deceased, and the 5l. of Bonis propriis; and as to the other 20l. that the Plaintiff be amerced; and of the 20l. recovered the Plaintiff had Fi. Fa. of the Goods of the Deceased, and of the 5l. Ca. Sa. Quod Nota, by the false Plea. Br. Executor, pl. 76. cites 21 H. 6. 49, 41.

16. Debt against Executor; Per Chocke J. if the Executor delivers Legacies, the Debts not paid, and the rest not sufficient to pay the Debts, they shall be charged of his proper Goods; Per Littleton J. he cannot know the Debts unless they are demanded, and therefore if they are not demanded they may pay Legacies, otherwise it shall be long before the Legacies shall be paid, and he is not bound to take Conscience of the Debts without Demand, unless of Debt of the King; Per Chocke and Brian, this is all one; for the King has no Prerogative in this unless his Debt be of Record. Br. Executors, pl. 116. cites 21 E. 4. 21.

17. Debt against an Executor, upon the Bond of the first Testator; The Defendant pleaded that the first Testator did owe 100l. to his Testator, after whose Death Goods of the Value of 100l. came to his Testator, as Executor of the first Testator, which he retained, and ultra the said Goods his Testator in Vita sita Plene Administravit. The Plaintiff replied Assets in London Tempore Mortis of the said Testator, and it was found for him, and he had Judgment de Bonis of the first Testator in the Hands of the Defendant, and Damages de Bonis propriis; and therefore a Sc. Fa. was brought against the Defendant; upon which the Sheriff returned a Devittavit, and the Plaintiff had Judgment and Execution de Bonis propriis of the Defendant, and if Nulla bona, then he might have either a Ca. Sa. or an Elegit. Nell. Abr. 790. pl. 2. cites 3 Eliz. Dyer 185. [a. pl. 60. Trin. 2 Eliz. Woodward v. Cother.]
18. In Debt against the Executor of an Executor the Defendant pleaded, that the Executor's Testator had fully administered, and that he had nothing in his Hands at the Time of his Death; and it was found that he had Affairs; whereupon a Fieri Facias issued to the Sheriff, and he returned that the Defendant had nothing; and it was held, that the Sheriff should be amerced, for he shall be stopped to make such a Return, and that it should be no Prejudice to the Plaintiff, for that the Debt shall be charged so long as the Record remains in Force not reversed by Error nor Attaint; and if he hath no Goods of the Testator's, he shall be charged of his own proper Goods; for that when he pleaded that the first Executor had fully administered, he did not deny but that Affairs came to him after the Death of the Testator. Mo. 23. pl. 81. Parch. 3 Eliz. Anon.

19. Executor pleads Release to himself, which is found false, Judgment shall be de Bonis Propriis; but if he pleads false Release made to Testator it is otherwise. Mo. 70. pl. 188. Trin. 6 Eliz. Anon.

20. The Court inclined that if upon Riens enter mains pleaded, it is found that some Part of the Sum in Demand is in the Hands of the Executors, there the Plaintiff upon a Surewif of Goods come to the Executor's Hands shall have a Scire Facias, but not where on such Ifue it is found fully for Defendants that they have nothing in their Hands. Le. 63. pl. 87. Mich. 29 & 30 Eliz. C. B. Bracebridge v. Baskerville.

21. Error of a Judgment in C. B. for that in Debt against Husband and Wife, as Executrix, the Defendant pleaded Payment by the Wife after the Death of the Intestate according to the Condition of the Bond, and Ifue being joined was found for the Plaintiff, and Judgment was Quod recuperet debitum against them de bonis Testatoris, &c. non &c. the Damages de Bonis Propriis; it was objected that the Judgment ought to have been De Bonis Propriis, because the Plea was false; and for the Damages de Bonis Propriis of the Baron only; for a Feme Covert cannot have any Goods; but the Court held the Judgment well given though the Plea is false; yet he is altogether a Stranger to the Intestate who was her first Husband; and though she hath no Goods during the Coverture, yet because the Husband is charged only in respect of his Wife, and he might have Goods if she should survive him, and Execution might be then taken against her, therefore the Judgment was affirmed good. And so are all the Precedents as Mann interim'd the Court. Cro. J. 191. pl. 17. Mich. 5 Jac. B. R. Johns v. Adams.


23. In Debt against Baron and Feme as Executrix &c., they plead Payment by the Testator, and upon Ifue it is found against them, and Judgment quod recuperet debitum De Bonis Testatoris and the Coists and Damages De Bonis Propriis, and in Error it was held to be a good Judgment; although a Feme Covert cannot have Goods in her own Right, yet she may have them as Executrix, and fit Judgment affirmed. Noy 125. Anon.

24. Judgment upon a Scire Facias against an Executor, and an Inquiry, and return'd that he diversa bona Testatoris dispofuit, eloncavit & ad Proprium Uffum Convertit, he comes in and pleads that he was never Executor or administered as Executor, and trespassit abique doc, that he bona Testatoris dispofuit &c. whereupon Ifue joined, and found against him, and Judgment, which was held good upon a Write of Error; for he having gone off from his Plea of Ne Unques Executor, and traversed the Conversion, it shall be intended a Conversion as Executor. Skin. 85. pl. 3. Hill. 35 Car. 2. B. R. Bird v. Harrifon.

25. If
25. If Executor suffers Judgment to go against him by Default upon executing Writ of Inquiry, he shall give Evidence of want of Assents, for he is estopp'd, for he should have pleaded Plena Administratavit, or specially what Assents he has; Per Cur. 6 Mod. 38. Mich. 3 Ann. B. R. Treil v. Edwards.

(D. b) [Judgment.]

In what Cases it shall be De Bonis Testatoris only.

1. If a Recovery of a Debt be against an Executor by Nient de- dine, the Judgment shall be De Bonis Testatoris only.

2. If Executor pleads in Abatement that another Executor not nam'd administr'd and it found against him, the Judgment shall be of the Goods of Executor only. 11 P. 6. 8. Judicial. 9 P. 6. Contra 7 P. 4. 13.

3. If upon fully administr'd pleaded it be found against the Executor, Judgment shall be of the Debt of the Goods of Executor only. 7 P. 4. 13. 11 P. 4. 5. 9 P. 6. 44. b. 11 P. 6. 8.

But where a special Fieri Facias was awarded of the Goods of the Deceased, and if it can appear that they are wasted, then De Bonis Propriis. But this alters the Case much; also by the Decretal the Judgment shall be altered, viz. that Execution shall be De Bonis Propriis, which cannot be without a Return of the Sheriff. Nay 7. Williams v. Roberts.

4. In Debt against Executor if he pleads a false Acquittance and this is found against him, yet he shall be charged De Bonis Testatoris only; For he does not entangle himself from the Testator by this Plea. Contra 11 P. 6. 8.

5. In Debt against Executor upon a Bond made by Testator, if the Executor denies the Deed, and this is found against him, the Judgment shall be only De Bonis Testatoris. Contra 3 P. 30. 45. b. adjudged.

Concurrence whether it was the Deed of Testator or not. Br. Executor, pl. 109. cites 6 P. 4. 1.

6. In an Action of Debt against an Executor, if the Defendant pleads a Judgment had against him in a former Action brought against him by another, and that he has nothing in his Hands but to satisfy this, and the Plaintiff replies that the said Judgment was acknowledged by Covin to defraud the Creditors, which is found by Eliz. S. P. adjudged d' accordingly, though this false Plea is found against him, yet the Judgment shall be only De Bonis Testatoris. Trin. 42 Eliz. B. R. adjudged between Borrett and Boys.


7. If a Man recovers Damages against an Executor or Administra- tor in an Action of Covenant against him upon a Breach of Covenant by Testator, the Judgment shall be De Bonis Testatoris only; But cause

8. By Dyer, Mo. 70. pl. 183. Trin. 6 Eliz.
cause he could not have prevented it, and here the Duty is recover'd all in Damages. 37 El. B. R. agreed per Cur. between Holt and Hor. 8 So the Judgment shall be De Bonis Texitatoris only, though the Covenant was broken by the Executor or Administrator himself; Because all the Duty is to be recover'd in Damages in this Action. Held 37 El. B. R. in Case of Holt against Hor. 15 El. 324. 34. adjudged. 21 Id. B. R. adjudged in Error between Frawman and Lightsfoot And Judgment given in B. De Bonis Texitatoris &c. et s non ec. De Bonis Proprius reversed. Where the Case was, that Lector for Years of an Addowson granted the next Avoidance * to B. who covenant'd that if he would grant this Presentment to any One Lessor should have the Offer and Refusal of it &c. dies, and his Executor grants it to another without any Offer made to the Lessor, upon which Lessor brought Action of Covenant against the Executor, who pleads Non Concessit, and this is found against him, and Damages given &c. and the Court thought this was only a Nonintercourse, and no Act done by the Executor. 254. between COLLINS and THOMASGOOD. Adjudged where the Board was for want of Reparations by the Executor. 9. In Action of Debt against an Executor upon Obligation whereas the Condition was for Performance of Covenants, and a Breach assigned in doing of a Thing by the Executor against the Covenant, and this found against the Executor, though the Breach of the Obligation was by the Executor himself, per judgment shall be De Bonis Texitatoris only. Adjudged 362. Trin. 17 Jac. Calsitation against Smith. 10. Where the Writ is in the Detinum only the Judgment shall be De Bonis Texitatoris; Per Curiam. 35. Trin. 17 Jac. in Case of Callion v. Smith. 11. If Judgment be given in Debt, and a Sci. Fa brought against his Executor, who pleads that he was not Executor, nor that he ever administered &c. and it is found against him, yet the Court agreed that the Judgment shall be De Bonis Texitatoris tautum; because the Execution shall relate to the Judgment, and Scire Facias is to know why he should not have Execution of the first Judgment, and this extends only to the Goods of the Testator; And Myrole Prothorannoty said it was ruled so in C. B. in 5 Jac. Littr. Rep. 53. Mich. 3 Car. C. B. Anon. 12. In Covenant, the Plaintiff declared against Christopher Guyle Baronet, for that he (the Plaintiff) granted a Leafe to one Geo. Harvey, of the Rectory of Berkley for 60 Years after the Determination of a Leafe then in Being, which Leafe expired, and that Harvey covénanted for himself and his Assigns to repair, whose Ettate one William Guiffe had by Assignment &c. who made the Defendant Executor and died, and that the Chancel was out of Repair in the Time of the Testator, and since, and also one great Barn &c. The Defendant as to not repairing the Chancel pleaded, that the Plaintiff did not lease it to Harvey, and thereupon they were at Issue; and as to the Barn he demurred, and the Plaintiff had a Verdict upon the Issue; and 300l. Damages, and also 200l. Damages for not repairing the Barn, if Judgment should be against the Defendant upon a Demurrer; and upon arguing the Demurrer it was intituled for the Defendant, that the Plaintiff was mistaken in the Action, for it was brought against the Defendant in his own Right, when upon the Plaintiff's own Shewing it ought
Ought to be brought against him as Executor, and as such, and not otherwise, he ought to be discharged; for he is not liable to this Covenant but in respect of Affets of the Testator, and therefore the Judgment against him should be De Bonis Tetzatoris, and so it was adjudged, and that this Objection was as well to the Verdict as to the Demurrer. Nelf. Abr. 174, 175. pl. 15. cites 1 Saund. 111. [Mich. 2 Car. 2. pl. 17.] Dean and Chaper of Brittol v. Guife.

for their Damages de Bonis Tetzatoris on this Declaration, but it was not moved. There was also another Exception to the Declaration, viz. that a Que EState could not be pleaded of a Term, and cites Cro. 25 Elin. 22.

13. In Debt upon an Obligation against an Executor Judgment was by Default, and because the Bond had been a long Time unpaid, it was moved that the Damages might be increased by the Court under a Notice of Costs, as the Practice was agreed to be used; but Holt Ch. J. said, that the Damages are to be adjudged against the Executor out of the Estate of the Testator, but Judgment for Costs ought to be out of the Estate of the Testator in tantum, in now, de Bonis propriis, and it would be hard to charge the Executor in Damages under the Title of Costs for the Time in which the Bond was elapsed in the Life of the Testator, but he seemed to incline that it shall be for the Time in which the Bond was unpaid after the Death of the Testator; but upon Examination it was said that the Judgment was entred, and then per Cur. it is too late, and so nothing was done. Skin. 561. pl. 8. Mich. 6 W. & M. in B. R. Roliton v. Main.

14. Leesee convicted to repair and dies, and his Executor assigned over his Term, and the Assignee dies, and his Executor suffers the Premises to be out of Repair, Covenant was brought against the Executor as Executor. Judgment shall be De Bonis Tetzatoris only, though he might have been charged as Assignee. 1 Salk. 316. pl. 25. Trin. 9 Ann. B. R. Buckley v. Pirk.

[(E. b) Judgment.]

Execution of it.

1. If an Execution issues to the Sheriff to levy the Debt of the Goods of the Testator, if Executor has sold the Goods of the Testator before the Writ purchas'd, and has taken Money and other Goods for the same Goods, the Sheriff cannot make Execution of his own Goods, but ought to return it to the Court. 2 H. 6. 12. admitted. Contra 14 H. 4. 12. h. adjudged.

2. Debt against Executors who plead Plene Administravit, and Affets is found against them, and upon this Judgment was given of the Goods of the Deceased, and upon the Pl. Fa. the Sheriff returned Devolveraunt, and thereupon Capias was awarded against the Executor where no Capias lies at first; Quod Nota by Award. Br. Executor, pl. 8. cites 2 H. 6. 12.

3. It in Banco a Judgment is given against Executors to recover a Bic, cites Debt de Bonis Tetzatoris, and thereupon a Fieris Facciis issues, and the Sheriff returns Nullis Bonis, upon which an Entry is made in the Roll and bourn, quod Tetzatoris of, that the Executors have sold several Goods of the fald to be 5 G. Tetzatoris. S. C. as
Executors.

this of Pettifer, gave that the Executors upon the Scire Facias were warned, appeared and demurred, and upon on a Responsive Ouffer, Judgment given de Bonis propriis, and upon a

Writ of Error affirmed by the whole Court, and said, admitting Pettifer's Cafe Law, which they neither absolutely affirmed nor disaffirmed, yet this Cafe stands on good Reason. In Pettifer's Case the Judgment was on Nihil returned, but here was Warning returned and an Appearance, and the Parties might have pleaded they had not walked the Goods, so that if there was any Prejudice it was by their own Default in not traversing the Wafe; and the Court advised the Clerks to use this Court hereafter, as a good and legal Court for the Expedition of Justice and Execution.


4. But if Judgment is given against Executors, and upon a Fi. Fa. Nulla Bona returned, the Plaintiff may have a special Writ of Fieri Facias to levy the Debts of the Goods of the Deceased, & it tibi consfrare potest, that the Executors have waited the Goods, then de Bonis propriis, which is agreeable with Law and Reason; For it the Sheriff makes a false Return the Parties may have Remedy by Action; Per Curiam. 3 Danv. 404. pl. 3. cites 5 Rep. 32. in Pettifer's Cafe.

5. Debt against an Administrator, who pleaded that before the Action brought the Administration was revoked and granted to another, he having then Assets in his Hands to the Value of 200 l. which he had delivred over to the new Administrator. The Plaintiff replied, that it was done by Fraud and Coven, upon which they were at Issue, and so it was found, and thereupon the Plaintiff had Judgment to recover the Debe de Bonis Teltatoris. It was affigned for Error, that the Judgment ought not to be absolute de Bonis Teltatoris only, but conditional, it tanum &c: but the whole Court disallowed of this Error very much, and all held clearly that the Judgment absolutely given was good, and they were not constrained in this Cafe to give a Judgment conditional, and affirmed the Judgment. Bull. 187. Pach. 10 Jac. Morgan v. Soke.

(F. b) In what Cases it shall be de Bonis Telfatoris if he has, fi non, de Bonis propriis.

1. In Debt against Baron and Weme Executor in Right of the Feme, if Plaintiff recovers, and Sheriff returns that the Baron has converted the Goods, the Plaintiff shall have Execution de Bonis propriis of the Baron. 18 H. 6. 4. b.

* Orig. is (ellosed.) --- Br. Executor, pl. 14 cites S. C. --- Br. Return de Briefs, pl. 8. cites S. C. ---
3. So if he returns that they are waited. 11 H. 6. 16. 35. b.
4. Upon Judgment of the Goods of the Decedent, if the Sheriff returns that he had so much Assets but has waited them, upon this Return the Judgment shall be of the Goods of the Deceased if he has, if not De B etis essor is. 11 H. 4. 70.

the Goods for certain Money which they took to their own Use; Quod Nota. Br. Executor, pl. 36. cites S.C. —— S. P. Br. Executor, pl. 36. cites S.C.

5. But see 2 H. 6. 12. b. a Cap as awarded upon such Return, and to Judgment absolute of his proper Goods. 11 H. 6. 7. b.
6. Upon fully administrated pleaded, if 20. Assets are found, and Judgment upon it, and the Sheriff returns that he has not Assets in his Bailiwick, Judgment shall be De B onis Tessarioris fi ec. fi non De B onis propriis. 9 H. 6. 9. b.
7. So if he returns that they have not Assets within his Bailiwick prout ei confiter poterit, because it appears in a manner that the Goods are collectible, the Judgment shall be to recover of the Goods of the Deceased, and 5t Riccoment confiter poterit that they are collectible, De B onis propriis. 9 H. 6. 8.
8. If the Sheriff that he has nothing of the Goods of the Deceased, upon a Suggestion made by the Plaintiff that he has aliened the Assets he shall have a writ, Scissa, Sit in, etc. to make Execution of his proper Goods. 11 H. 6. 8. 35. b.
10. In an Action against divers Executors, if one plead Ne unques Executor, and the others plead fully administrated, or such like, and this is found against them, the Judgment shall be of the Goods of the Dead against all if they have, if non De B onis propriis against him who pleaded Ne unques Executor &c. Contra 11 H. 6. 37. b.
11. In an Action of Debt against an Executor, if the Defendant appears at the Return of the Summons and makes Defence, et Nil dicit in Barram, by which Judgment is given against him by Nil dicit, the Judgment shall be to the Damages and Costs De B onis Tessarioris fi ec. fi Non, De B onis propriis. Hil. 14. Car. B. adjudged per Curia. between Mauion and Bourn in Error upon such Judgment in Bank, for this is the usual Course Intranum.

12. If the Executor comes at the first, Scissa, at the Return of the Summons, and acknowledges the Action, and according to the Judgment shall be given against him as to the Damages and Costs De B onis Tessarioris, fi ec. fi Non, De B onis propriis. Held per Bramston Hill. 14 Car. in the said Case of Mauion against Bourre.
13. If the Executor at the first Day, Scissa, at the Return of the Summons, acknowledges the Action, and faith that he has no Assets, the Judgment shall be for Costs and Damages only De B onis Tessarioris if it be true. Held per Bramston in the said Case.
14. If the Executor at the Return of the Summons and pleads that he has been always ready, and yet is, and this is true, the Judgment shall be only De B onis Tessarioris for Costs and Damages; per Bramston in the said Case of Mauion against Bourne.
15. In an Action against Executor or Administrator, if Defendant pleads Ne unques Executor, He unques administrated as Executor, and this sounds against him, the Judgment shall be De B onis Tessarioris fi ec. fi non, De B onis propriis for his false Plea.

This is to be understood where the immediate Executor of the Defendant is denied, for if A. makes B. Executor, and B. dying makes C. Executor, now if C. be sued for
Executors.

for A's Debt as Executor to B. Executor of A. and he denies that B. was Executor of A. which by Consequence is a Denial of his being now Executor of A. yet if on Trial it be against him, his own Goods shall not be liable to this Debt, because he might possibly not know to whom his Testator was Executor.  Went. Off. Ex. 187.

16. But if a Man recovers Debt or Damages against the Testator, and after files a Scire Facias against the Executor or Administratrix, who pleads No unques Great he unques administered as Executor, and this is found against him, yet the Judgment shall be only De Bonis Testatoris, because he prays in the Writ of Scire Facias to have Execution of the Goods of the Testator, and therefore against his Pray he shall not have Execution of his proper Goods. Dibb. 3. Cat. B. adjudged per Cur. Wadron against Berry.

17. Debt against Executor who pleaded Plena Administration, and the Jury found Affidavit, and the Sheriff returned the Fi. Fa. Nihil, by which upon Argument it was agreed per Paxton and Babbington, that Special Fi. Fa. shall issue again of the Goods of the Deceased, and as compare poesit that the Goods are deligned, then de Bonis propriis, and shall not have Fi. Fa. de Bonis propriis at first, as the Plaintiff prayed; Quod nota bene. Br. Executor, pl. 11. cites 9 11 6. 9.

18. It seems by the Opinion of the Court, that if Executors are implored they shall be charged of such Goods as they had the Day of the Writ purchased, and if they fell before Judgment they shall be charged of their proper Goods; but it is said there that a Sale after Judgment is not good. Br. Executor, pl. 14. cites 9 H. 6. 57.

19. Fi. Fa. against Executors upon a Judgment against them; the Sheriff returned that the Executors have sold the Goods of the Deceased and converted them to their own Use, by which filings Sci. Fa. &c. de Bonis Propriis; Quod Nota. Br. Executors, pl. 71. cites 19 H. 6. 49, 50.

20. Debt against two Executors, one of them appeared and confessed the Affidavit, and the other made Default, and Judgment given to recover de Bonis of the Testator in both their Hands, and to the same Effect issued a Fi. Fa. against both; The Sheriff returned that they had then null Bona &c. but that he made Default had Goods of the Testator to the Value of the Debt, but had wafted them ante receptionem Brevit &c. proinde faet confabulat, and upon this Return a Scire Facias issued against him alone, and upon Scire Feci returned Execution was awarded against him only of his own proper Goods. D. 210. a. pl. 23. cites Pac. 4 H. 8.

21. Debt was against Executors upon an Obligation, which was, that if the Testator or his Executors at Mick, every Year during the Life of the Obligee delivered to the Obligee a Load of Dung, that then &c. the Defendants pleaded that they and their Testator had performed, and should be, which was found against them; Dyer held, that for this false Plea of the Executors Judgment should be against them de Bonis propriis. Mo. 69.

70. pl. 188. Trin. 6 Eliz. Anon.

22. W. brought Debt against R. as Executor, and had Judgment of Bonis Tejatoris, and a Fi. Fa. was awarded. The Sheriff returns Nulla Bona, whereupon the Plaintiff produced that the Defendant had wafted the Goods, and prayed a Sci. Fa. against him, to whom Cause why he should not have Execution de Bonis propriis. It was awarded that he should have no such Execution till the Sheriff had returned a Deceitavit. Noy. 7. Williams v. Roberts.

23. The Plaintiff recovered a Judgment against the Executor for 60 l. de Bonis Testatoris, and 6 l. for Damages, &c. non &c. de Bonis propriis; and upon a Fi. Fa. the Sheriff returned Nulla Bona. Afterwards, upon a Testament that the Executor had Assists in L. which he had wafted, a Special Sci. Fa. was awarded to the Sheriff, who returned an Inquisition that he had Assists the Day of the Writ purchased and had wafted them.
Upon Demurrer it was resolved that this Return and Inquisition by the Sheriff shall not conclude him but that he may well traverse it, because otherwise he should be without Remedy; for he cannot have an Action against the Sheriff, because he returned nothing but what was found by the Jury, and an Attaint lies not because it is only an Inquest of Office, and he is brought in by Sci. Fa. to answer, and other Answer he cannot have. Cro. E. 559. pl. 30. Mich. 43 & 44 Eliz. C. B. Giphon v. Brook.

24. If on a Judgment against Executors the Sheriff returns Nulla Bona &c. upon the Score Facias, the Plaintiff may have a Special Writ of Sheriffs Facias, viz. that the Sheriff ley the Debt of the Goods of the Ttator, & it ibi contare potest that the Executors have evicted the Goods, then de Bonis propriis. 5 Rep. 32. Hill. 45 Eliz. Hill. 45 Eliz. B. R. Pettifer's Case.

25. The Ttator got Judgment in Debt and died, and his Executor acknowledged Satisfaction; Afterwards the Judgment was reversed, and Restitution awarded de Bonis Ttatoris, &c. non &c. de Bonis propriis. Ley Ch. J. said, that it is a mischievous Case both Ways; For it shall be de Bonis Ttatoris tantum, then he who paid the Money upon the erroneous Judgment shall not perchance have Restitution, viz. if the Executor has not Affets But if it should be the other Way de Bonis propriis then the Executor is at great Misthief; because in such Case when he recovers it is Affets to other Debs and liable, so long as the Judgment remains in Force, to pay it; and when he has paid if the Judgment be reversed, and he has no other Affets to pay, that he shall make Restitution of his own Goods. 2 Roll Rep. 420. Mich. 21 Jac. B. R. Nelson v. Powell.

26. Executor of Land for a Term, where the Ttator had covenanted to repair during the Term, was held for not repairing in the Time of the Executor, and bound against him, the Judgment shall be de Bonis Ttatoris de Damnis, it habet; if not for the Costs of Suit de Bonis propriis; But where an Executor pleads ne antques Executor, or a false Release made to himself, and it is found against him, where the King has a Fine, in these two Cases only the Judgment shall be de Bonis Ttatoris it habet, it not, for the whole de Bonis propriis, In Odium Spolitatoris. Jenk. 322. pl. 23.

27. In Debt against Executors, if the Plaintiff had Judgment against the Defendant and sued for Levari Facias de Bonis Ttatoris, and the Sheriff thereupon returns a Devastavit, the better Form is upon that to award a Sci. Fa. against the Executors before a Fi. Fa. shall issue of their own Goods; for that Writ of Execution is warranted by the first Judgment, which was of the Goods of the Deceased only; Per Hutton J. but he said, that if there be issued a Fi. Fa. de Bonis Ttatoris it habuerint &c. devastaverint de Bonis propriis, then he would agree that thereupon shall issue a Capias ad Satisfacendum against the Executors. Hertl. 110. Trin. 4 Car. C. B. Thompion v. Thompson.

28. Seiere Facias against an Executor, with a Fi. Fa. to levy the Debt and Damages de Bonis Ttatoris it tant, & it non, then the Damages de Bonis propriis. The Sheriff returned that the Executor had Nulla bona, but that he had heard the Damages de Bonis Ttatoris; Whereupon issued another Fi. Fa. suggesting a Devastavit, and the Sheriff returned that he had waited &c. which being traversed the Plaintiff had a Verdict, but the Judgment was stayed per tot. Cur. for the Return upon the first Writ was naught, because the Goods of the Ttator ought to be charged with the Debt, and not with the Damages, unless there are sufficient to answer both; but the Damages are to be levied on the Goods of the Executor for the Delay; and though the Trial and Verdict.

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Executors.

dict be upon the Return of the second Writ, and the first admitted good and accepted by the Plaintiff, and that it is for Defendant's Advantage to have the Coils levied of the Testator's Goods, yet all the Proceedings upon the second Writ being founded upon the Return of the first, and that being naught, all the rest is likewise naught. Lev. 7. Mich. 12 Car. 2. B. R. Herne v. .

29. In Debt against Executors in the Detinue only, there can be no Judgment de Bonis Testatoris by reason of the Decesavit, nor de Bonis propris, because in the Detinue only. 3 Keb. 463. pl. 42. Pale. 27 Car. 2. B. R. Hinchman v. Kendal.


1. Debt in the Detinue against Administrators, who by Deed intended had retained the Plaintiff to be Servant to the Intestate for 100 Marks per Ann. The Plaintiff shall recover against the Defendant by reason of his own Deed, notwithstanding that as to the Intestate it was but a simple Contrat &c. and to be recovered by Judgment and had Elegit. Quod mirum! Br. Elegit, pl. 4. cites 46 E. 3. 16.

2. In Action brought on Assumpsit of Testator Judgment shall be of the Testator's Goods, if on the Assumpsit of Executor of the Goods of Executor; Per Kemp Secondary, and Wray J. held that it should be de Bonis propriis, but the Judgment given was general. Le. 94. pl. 121. Hill 30 Eliz. B. R. Howell v. Trevanian.

The Judgment be affirmed; for it was a good Assumpsit, and he shall be charged de Bonis propriis, being of his own Promiss. —— S. P. on a Writ of Error out of C. R. and it was argued, that upon an Assumpsit by Executor Judgment always is de Bonis propriis; for it is an one as if the Executor had given Bond for the Money, and cites S. C. and Cro. E. 466. and v. Rep. 93. and by Parker Ch. J. naming him Executor be Surplightu, because it appears on the Face of the Record that the Demand was a Demand against him on his own Contract. In Effect the Forbearance is the Consideration of this Promise, because without Forbearance no Advantage can be taken of it, and cited 10 W. 3. Yand v. Ellard. And to this Opinion the rest of the Court inclined; fed adjournatur. 10 Med. 245. Trin. 13 Ann. B. R. Johnson v. Gardiner.

And it is all one as if he had given Bond for the Money. Cro. E. 466. pl. 17. Trin. 37 Eliz. B. R. Wheeler v. Collier. —— Mo. 519. pl. 575. S. C. but the Court seemed to be divided, viz. Fenner and Popham that it should be de Bonis Testatoris, and Gawdy and Clench contra, and Kemp said that to are all the Precedents.

3. The Plaintiff recovered against the Defendant as Executor of S. and upon a Fieri Facias a Devessavit was returned; and upon this he proved an Elegit, & habuit de Ferris Executors. Cro. E. 216. pl. 12. Hill. 33 Eliz. B. R. Mead v. Cheynney.

4. Where Executor or Administrator is charged on his own Promiss, Judgment shall be de Bonis propriis; for it is his own Act. Le. 249. pl. 523. Mich. 32 & 33 Eliz in Scacc.

5. Debt against an Executor for 40l. who pleaded Plena Administrat., and the Jury found that he had Assets to the Value of 20l. and Damages to 5l. Adjudged that the Plaintiff in this Case shall have Judgment de Bonis Testatoris as to the 20l. and de Bonis propriis as to the Damages, and that a Capias ad Satisfaciendum lies against him for the Damages. Nell. Abr. 176. pl. 8. cites Godb. 178. pl. 250. Mich. 8 Jac. C. B. Newman v. Balington.

The Cafe in Godb. 178. is, If Debt be brought against an Executor, who pleads that he has fully administered, and it is found that he has Assets to 40l. whereas the Debt is 60l. that a Judgment shall be given for the
6. Debt upon a Lease made to the Teftator, and an Obligation to perform Covenants in it, the Breach was aligned in the Time of the Executor for not repairing a House, and the Judgment was, Quod recupereret de Bonis Telfatoris &c. & fi non &c. tunc de Bonis propriis. Resolved the Executor is chargeable in Debt by the Covenant made by the Teftator, and therefore shall be charged only for the Principal with the Goods of the Teftator, and by no Act or false Plea shall he be charged de Bonis propriis, but where he pleads the false Plea of Ne ungue Executor. Cro. J. 647. pl. 15. Mich. 20 Jac. B. R. Bull v. Wheeler.

7. Judgment against the Intestate, and upon a Scire Facias against his Administrator to shew Cause why the Plaintiff should not have Execution, the Sheriff upon an Inquisition returned Nulla Bona, and the Truth was, the Administrator had Goods of the Intestate &c. but that he kept them privately, that the Sheriff could not find them to levy the Debt &c. It was the Opinion of Ley Ch. J. and Doderidge, contra to Haughton J. that an Action on the Case upon this Matter will lie against the Administrator; but adjournatur. Godd. 285. pl. 493. Pach. 21 Jac. B. R. Yates v Alexander.


9. Upon a Fieri Facias to levy a Debt recovered against an Executor, the Sheriff returned Nulla Bona; whereupon after a Teftatum &c. a Writ was awarded to the Sheriff to enquire &c. who returned, That Goods to the Value of the Debt came to the Executors Hands, & elongavit, &diit, dispusit & ad proprium suum suum convertit; And Illae was taken by the Party, who came in upon a Scire Facias, Quod non elongavit &c. And the Jury found for the Plaintiff; And it was moved by Sanders in Arrest of Judgment, That there was no proper Illae, neither did it appear that there was any Devattavit; for the Executor may eloign and fell the Goods; therefore the Return and Illae ought to have been Quod Devattavit. Sed non allocatur for this tantamounts; S. C. and the Precedents are fo; as it is a good Warrant for a Capias in Withernam when the Sheriff returns, that the Defendant in the Replevin hath eloigned the Beasts; so the Executor ought to be charged de Bonis Propriis upon his Return. Vent. 25. Pach. 21 Car. 2. B. R. Merchant v. Driver.

might have taken Illae that he had not Goods to the Value, or that he had paid any Special Debt, and the Inquisition that he had eloign'd and converted to his own Use is a sufficient Debatavit without the Word Devattavit, and Judgment for the Plaintiff.—Vent. 221. Trin. 24 Car. 2. B. R. in Case of Blackburne v. Parsie. B. P. Hale Ch. J. said, that Anciently when the Sheriff returned a Devattavit which was not found by Inquisition, and to which there was no Answer, it was necessary to infer the Word Devattavit. But otherwise a Return upon this special Writ; For if the Case be that he had not wad the Goods, but only eloign'd them to the Sheriff cannot come at them, the Executor is chargeable upon this Writ, and this Return answers the Writ.—a Surr. 422. Blackmore v. Mercer. S. C. adjudg'd for the Plaintiff.—3 Keb. 62. pl. 49. S. C. adjudg'd for the Plaintiff.

10. Although an Administrator or Executor after the Death of the Teftator may have the Occupation of a Term, and then they shall be chargeable no further than they have Acted; yet if they do possess the Term, they shall be chargeable for the Rent de Bonis Propriis, if it incurs in their own Times. Fricem. Rep. 172. in pl. 183. Trin. 1674. C. E. Sackvill v. Evans.
11. In Assumpsit the Plaintiff declared, that the Intestate was indebted to him, and that the Administrator in Consideration that, at his Request, the Plaintiff had accounted with him, whereupon there appeared to be so much due and the Defendant promised to pay it; and the Plaintiff had a Verdict and Judgment to recover de Bonis Propriis, which was affirm'd for Error, but reliev'd that it was not; For the Plaintiff was not bound to account with the Executor, and his doing it was at the Executor's Request. And per Hale, though a bare Account will not bind an Executor to pay de Bonis Propriis, yet a Promise on Consideration of Forbearance will, and the Case here is all one; For it ought to be intended that an express Request was made to account, and thereupon an express Promise to pay, otherwise the Evidence would not maintain the Declaration, and therefore Judgment in C. B. was affirm'd per tot. Cur. 2 Lev. 122. Hill. 26 & 27 Car. 2. B. R. Hawes v. Smith.

S. C. cited


12. Error upon a Judgment in C. B. where Judgment was given against Green and his Wife, and Brook and his Wife; and Scire Facias, and Enquiry granted on Suggestion, that the Defendants being Executors had waited; and the Sheriff returned that Brook and his Wife de valetavent; but as to Green and his Wife nothing is said, and upon this Judgment is given against Green and his Wife de Bonis Teltatoris; and against Brook and his Wife, de Bonis Teltatoris it tantum, if non, de Bonis Propriis, upon which Error is brought and alledged, that nothing being returned as to Green and his Wife, the Judgment is given without Warrant, and the Writ not being executed according to the Suggestion of it, which is of a joint Devaftavit, and the Return being only of a Devaftavit by Brook and his Wife, this is a void Return; as a Verdict is void that finds but Part of the Issue, and says nothing as to the Residue, and though it was object'd that this is a Misturnt aided by the Statute of Jeoftails, and 1 Cro Eyres and Taunton's Cafe, and other Cases cited to this Purpose, yet the Court feemed e contra, and that there was no Warrant to give Judgment upon this Record against Green and his Wife; and therefore Judgment against them not good. Skin. 571. pl. 15. Mich. 6 W. & M. B. R. Brook v. Ellis.

13. Upon a Return of a Devaftavit Execution shall be De Bonis Propriis, and not a Conditional one, and it is never otherwise; and the Reason is that when a Fieri Facias goes it is de Bonis Teltatoris; and if the Sheriff finds no Goods of Teltator, and is satisfied of a Devaftavit, he cannot execute the Writ of the Goods of the Executor but ought to return the Truth, a Devaftavit, and then he shall have Power to make Execution de Bonis Propriis. Per Holt Ch. J. 12 Mod. 412. Trin. 12 W. 3. In Cafe of Rook v. the Sheriff of Salisbury.

14. If two Actions are brought against an Executor of rum. each, and he has Affairs only for one, and he pleads Plene Administravit in both, and then pays off one, and suffers the other to go by Default he shall answer de Bonis Propriis for it; Per Holt Ch. J. 12 Mod. 412. In Cafe of Rook v. the Sheriff of Salisbury.

15. And if there were to Actions, and he pleads Plene Administravit to all, and after pays off one which is all he has, and then suffers Judgment to go by Default, he shall be charged with all the Rest de Bonis Propriis. Per Holt Ch. J. 12 Mod. 412. In Cafe of Rook v. the Sheriff of Salisbury.

16. Lejeel
16. Letters for Years covenanted for himself his Executors and Assigns to repair, the Lessee brought an Action of Covenant against the Administrators, and proved that Status de &c. in Premises came to the Defendant, and that he entered, and after that the Premises were in decay and he had not repaired; it was inferred, that this Covenant runs with the Land and binds the Assignee, and that the Defendant was Administrator, and that where he answers as Assignee the Judgment against him is de Bonis Propriis; but where he answers as Executor the Judgment against him is de Bonis Testamentoris, though the Breach be in his own Time. Judgment nisi for the Plaintiff, no Counsel attending on the other Side. 1 Salk. 309. Path. 12 W. 3. B. R. Tilney v. Norris.

17. Plea in Debt was of Payment of a Judgment &c. Replication was that it was per Fraudem. On Issue Verdict was for the Plaintiff; a Fieri Facias Issue de Bonis Testamentoris &c. The Sheriff returns a Devittavit, then Issued a Fieri Facias against the Executor de Bonis Propriis et bene, though objected that the Sheriff ought to have found an Inquisition of a Devittavit, and thereupon a Scire Facias ought to Issue against the Defendant. Mich. 8 Ann. C. B. Read v. Bingham.

(H. b) Where an Executor or Administrator is Debtor to his Testamentor or Intestate, the Effect thereof.

1. DEBT against two Executors; the Defendants said that the Testamentor had made them and one Alice his Executors, who had administrated Judgment of the Writ; For he is alway named, the Plaintiff by Protestation that Alice did not administrate, said that he took her to Wife, and it seems there that if she had administrated the Duty had been gone. Br. Detae, pl. 65. cites 11 H. 4. 83.

2. Debt by Executor of W. S. against Executor of J. N. who said that the Testamentor of the Plaintiff made his Testamentor his Executor with the Plaintiff at such a Place, and died; Judgment is Acito. And by the best Opinion if the Testamentor of the Defendant had administrated or taken upon himself &c. the Debt is extinct. Br. Executors, pl. 112. cites 8 E. 4. 3.

in Needham's Cafe. 8 Rep. 156. a. Path. 8 Jac. C. B. that it is a Release in Law of the Debtor for it by the Act of the Obligee himself.

3. Debt by Executors of A. against Executors of B. the Defendant said that the Testamentor of the Defendant was indebted to the Testamentor of the Plaintiff in the Sum that &c. and he made the Testamentor of the Plaintiff and the Testamentor of the Defendant his Executors, and died, and the Testamentor of the Defendant administrated; Judgment is Acito; Per Brian Ch. j. it is a good Plea; For where a Man makes his Debtor, and another his Executors, and dies, and the Debtor makes his Executor and dies, and the other Executor who survive shall not have the Action against the Executor of the Debtor, though the Debtor did not administrate in his Life; For the Action was once extinct before; For the Action cannot be brought before but in the Names of both the first Executors, notwithstanding that the other did not administrate. Br. Executors, pl. 114. cites 20 E. 4. 17.
4. But if a Man makes his Debtor, viz., his Creditor and another his Executors, and dies, there if the Debtor does not administer, he may have Action; and so may his Executor if he dies; For in this Case the Action was not extinct; Quod tot. Cur. conceifit; For I may release my own Debts; but it is no Reason that my Debtor shall determine the Debt which he owes me without Aet or Folly in me. Ibid.

5. If three are bound to a Man Conjun&diam and Divojum, and the Oblige makes the One of the Three Obligers his Executor, and dies; this is a Release in Law, and discharges all, notwithstanding it be joint and several; For Judgment and Execution against the One is a Discharge against all. Br. Executor, pl. 118. cites 21 E. 4. 81.

6. J. H. makes the Obliger and others his Executors, and the Obliger refuses, but the others administer, and the Obliger dies first, yet the Debtor is released; and the only Reason of that must be, That the Refusal was void, and the Obligor might have come in and administered notwithstanding; For the Process by the other Executors is for his Benefit. Per Holt Ch. J. Salk. 308. Mich. 11 W. 3. C. B. in Cafe of Wankford v. Wankford.

7. A makes a Feepliment on Condition that if A. pay 20 l. to B. before Mich. or to his Executors or Assigns, that then he may enter; Feepoll before Mich. makes B. Executor, and by the same Testament gives all his Goods and Chattles to his Wife; Per three Julicises against one, this was thought no Release, so that Payment ought to be made to the Wife. Mo. 38. pl. 166. Pach. 6 Eliz.

8. In Debt by an Executor, the Defendant pleaded that the Plaintiff was cited before the Ordinary to prove the Will of the Tefator, and that he made Default; and thereupon Administration was granted to the Defendant, by Virtue whereof he did administer, and so the Debt became extint; but adjudged that by the Plaintiff's Probate of the Will, after the Administration was granted to the Defendant, that Administration was defeated; and that though the Executor did make Default at the Day on which he was cited, yet he might prove the Will at any Time when he would. But if he had appear'd and renounced the Executorship it had been another Wife. Le. 90. pl. 115. Mich. 29 & 30 Eliz. C. B. Baxter v. Bale.

The Debt is extinct, Arg. PL C. 56. Went. Off. Ex. 31. says it cannot be that the surviving Executor may sue the Executor of the Debtor deceased, for the Debt was utterly extint by the making him Executor, as if the Tefator had releafed it to him yea though he had died before he did ever administer or prove the Will. ——— Debtor did not administer, yet it is a Release. 1 Salk. 507. in Wangford's Cafe cites 20 E. 4. 17. & 21 E. 4. 2. Went. Off. Ex. 30. lays the making Debtor Executor is a Release in Law. ——— Ibid. 141. S. D.


10. Debtor makes Debtor and another Executor, and directly a Legacy to be paid out of the Debts; Per Cur. though the joint Executor has no Remedy to recover this Debt against the Plaintiff his Co-Executors, nor no Action can be had for it in the Life of the Executor Debtor, yet the Debt is not extint, but remains Affets to satisfy Debts, and also the Legacy which is expressly given to be paid out of it. Yelv. 160. Mich. 7. Jac. B. R. Fludd v. Runfey.

11. Executor of one of the Obligers, but without Affets, was Executor to Oblige; this is no Discharge, because though as Executor of Oblige he is the Person to receive, yet by having no Affets of the Obliger's, he is not the Person to pay; But if the Executor of the Oblige is Executor to one of the Obligers, and has Affets of the Obliger, the Debt is extint, and the Executor cannot sue the other Obliger; for the having Affets.
Executors.


[Note] 335. in the Case of Wankford v. Wankford. says that the same Point was resolved. Hill. 24 & 25 Car. 2. B. R. in Case of Lock v. Crois.

12. Obligee makes one of the Obligors his Executor; the Debt is not discharged, for there he has the Debt en Action Droit, and may sue the surviving Obligor, especially when he had administered all the Goods of the Obligor before he was made Executor by the Obligee, resolved; Jo. 345. Trin. 10 Car. B. R. Dorchester v. Webb.

13. If the Ordinary grants Administration to the Debtor, the Debt is not extinct. 8 Rep. 156. a. Patch. 8 Jac. C. B. The third Resolution in Sir John Needham’s Case.

Obligee makes Obligor took out Administration, and made his Executor and died. A Creditor of the Obligee brought Debt against this Executor, and held that it well lies.


14. The Defendant gave Bond to Testator, and afterwards the Testator made Obligor Executor, whereupon Defendant informs that the Bond is thereby discharged in Law; per Cur. though the Bond was discharged in Law, yet in Equity Defendant ought to account for the Arrears of Rent secured by the Bond. Ch. R. 242. 15 Car. 2. Field v. Clerk.


15. A. and B. are obliged to C; A dies and makes D his Executor; D dies and makes C his Executor; C sues B. for the Debt, B pleads the Matter above, and says that Diverfa Bona et Cataloga of A. (the first Testator) came to the Hands of C. but it was ruled against B. because he did not pay Ad Valorem Debti, and perhaps the Goods were but of the Value of 5 d. Freem. Rep. 49. pl. 59. Mich. 1672. C. B. Anon.

16. If Executor Debtor resiues, the Administrator may sue him; * In such Case the Debtor remains. 11 Mod. 39, 42. in Case of Wankford v. Wankford.

17. A Mortgagee of Lands made the Mortgagor Executor, but this being done by Circumvention and Contrivance of the Mortgagor, and in Prejudice of the Mortgagee’s own Child an Infant, and having burnt the Mortgage Deed wherein he pretended were some Things contained to his Advantage, he was decreed to account for the Money in Discharge of Debts, and the Custody of the Infant taken from him. Fin. Rep. 351. Patch. 30 Car. 2. Corcellis v. Corellis.

18. Note, one 7. B. being in Execution, the Plaintiff died intestate, and the Right of Administration came to her, and a Motion was made for a Habeas Corpus to bring her from the Compter into this Court, for that having administered to her Creditor she might be discharged; but it was denied, for the could not be thus discharged, because non-contumaci de Perfoina, neither can she give a Warrant of Attorney to acknowledge Satisfaction; therefore let her renounce the Administration and
and grant to another, and then he may be discharged by a Letter of Attorney from such Administrator. 2 Mod. 315. Trin. 30 Car. 2. B. B. Bailey's Case.

19. Obligee makes the Obliger Executor in Trust for his Children &c. although this be in Law an Extenuation of the Debt, yet in Equity it is not, but it shall be preferred in Being for the Benefit of the Cestuy que Trust. 2 Freem. Rep. 52. pl. 58. Pulch. 1650. Anon.

20. Debt upon Bond by the Plaintiff as Executor of the Obligee, the Defendant pleaded that the Obligee made the Defendant Executor during the Minority of the Plaintiff, and that the Plaintiff became Executor at his Age of Seventeen. The Plaintiff demurred; per Curiam this cannot be a Suspension of the Action, because the Defendant was only Executor in Trust for the Plaintiff during Minority. Adjournatur Ld. Raym. Rep. 605. Mich. 12 W. 3. B. R. Gaweth v. Philips.

(I. b.) Where Debtee or Creditor is Executor to Testator. The Effect thereof,

1. If Debtor makes his Creditor Executor, and he administers, the Debt is extint. So if Creditor makes Debtor his Executor. Per Erank. Br. Dette, pl. 65. cites 11 H. 4. 83.

Debt against the heir, it is a good Pled that the Ancestor made the Debtee, the Plaintiff his Executor, who administered. Br. Dette, pl. 68. cites 12 H. 4. 21.

2. Debt against the heir of J. N. who said that his Ancestor made the Plaintiff his Executor, who retained so much as the Debt amounted to Judgment & Action. And per Hill an Executor to whom the Testator was indebted may pay himself; But Brook says the Contrary seems to be Law; for if he administers as Executor the Debt is determined, and therefore the Issue was there taken if the Executor had administered or not as Executor. Br. Executor, pl. 59. cites 12 H. 4. 21.

3. If Obligee marries one of the Executors of Obliger who administered his Action is gone; But if she did not administer his Action remains, because he may have Action against the other that did administer not naming his Wife; Arg. Pl. C. 184. b. Trin. 5 Mar. 1. in Cafe of Woodward v. Darcey.

4. Debtor makes Debtee and another Executors, and the Debtee does not administer, but dies, his Executor shall have Action against surviving Executor; But if he administers it is otherwise; Arg. Pl. C. 184. b. Trin. 5 Mar. 1. in Cafe of Woodward v. Darcey, cites 21 E. 4. 3.

5. Where the Obligee makes the Oblige his Executor the Debt is not extint, but only upon a Supposal that the Executor has Assets which he may retain to pay himself, but in Cafe of Failure of Assets the Executor may sue the Heir at the very Day. 1 Salt. 304. per Powell J. and cites 12 H. 4. 21. and Pl. C. 185.

6. The
Executors.

6. The principal Debtor by Bond made his Surety in the same Bond 4 Le. 4 pl. 17. S.C. Executor and died; The Surety paid the Money generally; and whether it shall be said that he paid as Executor or as Obligor was a Quare Quare.

7. Where the Surety was Administrator and paid the Debt, it was adjudged he was not relievable; Because by joining with the Principal the Debt became his own Debt. 4 Le. 236. pl. 373. Mich. 5 Jac. C. B. Anon.

8. If the Obligor makes the Executor of the Obligee his Executor and Mo. 855 leaves Affets, the Debt is presently satisfied by way of Re. Gainer, adjudged. Hob. ro. pl. 20. Hill. 11 Jac. Frier v. Gildridge.

9. If A. promises B. to give C. as much as he shall give to any of his Kin, S. C. and afterwards A. makes C. his Executor and dies, this is no Performe. Judges of the Assumptit, insomuch as C. has this as Executor. It was to said, Sid. 25. Hill. 12 Car. 2. C. B. in the Case of Shipston v. Boiler.

10. One Obligor makes Obligee Executor; Obligee may sue the other if not fully satisfied by the Administration. 2 Lev. 73. Mich. 24 Car. 2. B. R. Cock v. Crofts.

11. Obligor makes the Obligee Executor; Executor dies and leaves A. 1 Salk. 504. Executor. A. brings Debt against the Obligor’s Heir, and held good S. P. in Case per omnes; for the Debt is not extinguish’d, but only superseded as of Wangford v. to the Executor. 2 Show. 401. pl. 273. Mich. 36 Car. 2. E. R. Pigeon v. Witts.

(K. b) Where Executor is Legatee. How he shall take, whether as Executor or as Legatee.

1. A Man made his Will and gave divers Legacies, and in the End of it, he gave all the rest of his Goods to his Wife, whom he made his Executrix, to pay his Debts; She took. Husband, who made the Defendant his Executor and died, against whom the Wife Executrix brought Dintune of the Goods of her first Husband, and adjudged maintainable; the Plain- tiff.

2. A seised in Fee devised the Land to B. for 31 Years to the Intent to pay certain Debts and Legacies, and made B. Executor; But if B. died within the Term then A. willed that C. should have such Term &c. and then also be Executor; Per Gent J. B. has the Term as Executor, and is not like a Term devised which the Party has as Legatee, and B. has only Authority in this Term as Executor, and the Land is tied to the Time and the Authority, and when the same determines in his Person, then the Land departs from him to C. who is special Executor to that Purpoze as B. was before. 3 Le. 112. pl. 159. Trin. 26 Eliz. Vincent Lee’s Cafe.

3. A made several Executors, and devised a Term to one of his Exec- cutors; They all renounced the Executorship; After the Executor, Devi- pl. 21. Bro- see v. Char-
Executors.

4. If a Term be devised to an Executor, the Remainder over, and the Executor enters generally, this shall be taken as a Devise, for it is more for his Benefit. Cro. E. 223. pl. 3. Pasch. 33 Eliz. B. R. Trunfel & Ewes.

4. Especially if it be not alledged in Fact that all the Debts are paid; Per Anderson and Periam J. and Anderson doubted if such Allegation be sufficient. Le. 216. pl. 298. Mich. 32 & 33 Eliz. C. B. Cheyne v. Smith.

5. Devise of a Term to B. and C. till his Debts and Legacies are paid, and after to A. and makes B. and C. his Executors; they take the Term as Executors; for no more is given to them by the Will than the Law gives to them as Executors, and then the Devise is void, and they take as Executors, for being given to them till Debts and Legacies are paid, this the Law willth. Cro. E. 347. Mich. 36 & 37 Eliz. B. R. Pannell v. Penn.

as a Legacy, for there is no Mitchell; But where a particular Interest is given, and the Remainder to another, it is otherwise, except there is an express Declaration of their Intent; for otherwise they shall be charged for the Remainder as a Devise, which the Law will not enforce. Ibid.

7. A. devised a Term for Years to his Son after the Death of his Wife, the Executor shall have it in the mean Time, and not the Wife by Implication, but they shall take itnot as Legatories but to perform the Will; Per Popham Ch. J. Cro. J. 74. pl. 4 Trin. 3 Jac. B. R. Horton, alias Burton v. Horton.

8. Devise of Lands to his Daughter and Heirs at her Age of 18. and that his Wife shall take the Profits in the mean Time, provided she keeps the Daughter at School &c. The Widow marries again and dies, the Daughter not being 18. Adjudgeth that this was a plain Term given to the Wife for her own Use; which accrues to the Husband, and the keeping and educating the Daughter is not of such a particular Privity but that it may be performed effectually by another. Hob. 285. pl. 370. Trin. 17 Jac. Balder v. Blackburn.

Therefore Judgment for the Plaintiff.——Brownl. 79. S. C. adjudged for the Plaintiff.

9. If a Man wills that his Wife or any other shall have, hold or enjoy, the Moity of his Life with his Executor, this implies not that the Executor shall have the other Moity as a Legacy also, but otherwise as the Law caufes it upon him. Went. Off. Executor 254.

10. If the Bequest be to him who is made Executor it shall vest in him as Legatee till Election express or implied; Because the Law prefers Debts and the Satisfaction of them before Legacies, and therefore transfers nothing from the Executor till there appears Afters sufficient without it, so as he may not be liable to a Deviseavit. Went. Off. Ex. 27.

11. Devise was of a Term to Executors after the Death of the Wife; after the Death of the Wife the Executors takes as Legates, but till her Death they should have it as Executors generally. Vaugh. 267. Hill. 20 & 21 Car. 2. C. B. in Cafe of Gardner v. Sheldon.

12. By

The other account on the Partnership, the Obligee devised all his personal Estate and Debts due to him, equally to be divided between the Plaintiff and the Defendant the Obligee, and made the Defendant Executor; decreed that by his being made Executor this Debt was not discharged. Fin. R. 410. Hill 33 Car. 2. Phillips v. Phillips. — The Devise was, that after his Debts paid, the Refidues of all his Goods, Chattles, Debt, Shipping &c. shall be divided between the Plaintiff and Defendant, his Nephews, and makes the Defendant his Executor and dies; the Lord Chancellor held clearly that it should not be extinct, but should be in with the Refidue of the Estate, especially in this Case, where Debts are particularly mentioned; and this was a Debt at the Time of the making of the Will; and if the Word Debts had not been in, he said he believed it would have been all one, but that made it more strong. 2 Freem. Rep. 11. pl. 10. Mich. 1676. Phillips v. Phillips.

13. A devised Lands in the Hands of his Trustees for Payment of Debts and Legacies, and made his Wife Executrix, but did not in Terminis expressly devise the Personal Estate to her but only made her Executor. The Personal Estate shall come in Aid of the Real as to the Debts and Legacies, per Ld. Chancellor; so was in her Hands as been in Executrix. Chan. Cases 297. Hill. 28 & 29 Car. 2. Grey v. Grey. By the Will that she had taken it not liable to the Debts and Legacies, and consequently taken it as Legatee, notwithstanding her being Executrix.) Ibid.

14. Obligor is made Executor to Obligee, and admnisters some 11 Mod. Goods but proves not the Will and dies, the Debt is extinguished. 1 Salk. 53. S. C.— 3 Salk. 162. pl. 9. S. C. held accordingly by Holt Ch. J.— Freem. Rep. 520. pl. 694. Wankford v. Wankford. Hill. 1704. S. C. adjudged accordingly.— Unless there was a Defect of Affairs for Payment of Debts; but if there were they agreed that the Debt should be paid for the Benefit of the Creditors rather than they should be defrauded. Ibid.


16. A devised his Personal Estate to his Wife whom he made Executrix; Per Cur. the takes it as Executrix, and it is to be applied in discharge of the Real. 2 Vern. 302. pl. 291. Mich. 1693. Cutter v. Coxeter.

17. A devised the Surplus of his Estate after Debts and Legacies to A makes M. his Wife and B. his eldest Son equally to divided between them, and adds, Whom I make my Executors; But if the marry again the shall render the Right of being my Executors to my Son R. to be Partner with his Brother B. in the Executorship; The Case of Wilkinson, and of Cutter, and Cate cited, where on like Devises it was declared the Wife should take as Executrix and not as Legate. The Master of the Rolls thought she had as well lost her Share of the Surplus as her Right to the afterwards Executorship, and dismissed the Bill. 2 Vern. 308. pl. 299. Hill. 1693. Barron, alias Stone v. Barron.

18. A. by Will charges his Real Estate with the Payment of Debts and C. cited Legacies, and Funerals, and devised to his Wife all his Personal Estate not otherwise disposed of, whom be made Executrix. Ld. Keeper Wright before, and Cowper K. now both held, that the Devise being in the Geo 2 in fame Clause in which he was not named Executrix, and not paid free Scare, and exempt from Payment of Debts, the must take it as Executrix, and the fame must be applied to the Payment of Debts in Eafe of the Real Estate.
Executors.


19. Bill by Heir at Law against Executor to have an Account of the Personal Estate of his Ancestor &c. in Exoneration of the Real Estate devis'd to Trustees to be sold for Payment of Debts. W. by Will devises to Trustees (at supraph) and gives his Wife several Specific Legacies, and further devises to her all the Residue of his Personal Estate, and also gives her the Sum of 600l. out of the Money to be raised by Sale of the Real Estate, and makes her Executrix; Harcourt Chancellor said, This is a much stronger Case than that of Christ's Hospital v. Carroll, for there was no Devise out of the Personal Estate; But here is that, and also a Devise of the Personal Estate. It hews that he did not think this sufficient for her, but gives her a further Sum of 600l. which is the strongest Preumption imaginable of the Intent that the Wife should have the Residue of the Personal Estate, and as to the Account thereof the Bill was dismissed. 12 Ann. in Can. Wafe v. Whitfield.

20. A. by Deed settles his Lands for Payment of his Debts, and after makes his Wife Executrix, and devises all his Personal Estate to his Executrix, and by subsequent Clauses in the Will devises several specific and pecuniary Legacies to her and dies; adjudged that the Wife takes the personal Estate not as Legatee but as Executrix, and so the same after the Legacies paid shall be applied to discharge the Real Estate in Favour of the Heir. But per Fennelly Ch. B. If these Words to her own Use, had been added, or such like Words, it might give some Cause of Doubt. Gibb. 41. Hill. 2 Geo. 2. in Scacc. Lucy v. Bromley.

21. A. by Will gives all his Personal Estate to his three Sisters, equally to be divided between them, and (being indebted by simple Contract, Bond and Mortgage) gives his real Estate to his four Sons chargeable with his just Debts; and makes his Sisters his Executrices. The Personal Estate shall be applied in Exoneration of the Real; especially as one of these Funds must be exhausted. Cases in Equ. in Ld. Talbot's Time. 274. Mich. 1734. Bromhall v. Wilbraham.

(L. b) What amounts to an Election to take as Executor or as Legatee.

1. If a Devise be to an Executor for Education of Children, whom he educates accordingly, this makes an Election to have the Thing by way of Legacy and not as Executor. Went. Off. Ex. 224. cites Pl. C. 543. 'Paramour v. Yardley.

2. It was given in Evidence that the Wife, (who was Executrix and Legatee of a Term of her first Husband) after the Death of her Testator had repaired the Banks of the Land, as if the same would amount to claim it as a Legacy; and the Court said that that Matter should be referred to the Jury; But a Lease made by Executrix and her Husband, reciting that he was possessed in Right of the Wife as Executrix of her first Husband, was, upon producing the Lease, held as an express Claim as Executrix. Le. 216. pl. 298. Mich. 32 & 33 Eliz. C. B. Cheynel v. Smith.

3. If Executor by Will bequeaths to J. S. the Thing bequeathed devised to him, this is an Election to have it as Legatee. Went. Off. Ex. 225. Marg. cites Trin. 37. Eliz.

4. Executor Devisee of a Term entred and occupied a whole Year without proving the Will. Went. Off. Ex. 224. says, that in the later Part of
of Ld. Dyer it is found, that this was held an Election to hold it as Devisee, and not as Executor; But says, that he fees not well How that should be Law. For it. He had good Right to the Term as Executor before Probate, and so might clearly in that Right have taken the Profits, though it not been devised or bequeathed to him, and that before any Will proved. 2dly, He could not by Right have it as Legatee without Assign of himself or some other as Executor, therefore this general Acceptance can determine no Election. Went. Off. Ex. 224, 225.

(M. b) When he shall take as Executor or as Devisee.

1. A Term was devised to Executrix to educate Children of Testator; Prima facie the takes as Executrix; But if she educates the Children, this is Election to take by the Devisee; Arg. Mo. 493. cites [Pl. C. 519. b. Hill. 21 Eliz.] Yardley's Case.

2. A possifled of a Term devised the same to his Son when he came to 18, and that his Wife should have it in the mean Time, and made her Executrix, and died before the Son came to 18. The Wife took Husband. It was held that she should have the Term as Executrix till the Son should have come to 18. 4 Le. 1. pl. 2. Pelch. 23 Eliz. Anon.

3. A devised Land to J. S. and J. N. upon Condition, and if they perform not the Condition, then that their Estate shall cease, and that the Executors of A. should have it to them and their Heirs, upon Truth and Confidence that they shall hand feized to the same Use limited to J. S. and J. N. and makes B. and C. Executors, who refuse Owm Testament; yet it was adjudged that they may take the Land by the Devisee, and that the Words (upon Truth and Confidence) do not make Condition to their Estate. Mo. 594. pl. 882. Mich. 34 & 35 Eliz. Gibbons v. Marliward.

4. A seised of Land and possifled of a Term devised all his Lands and Tenements to his Executors till they had paid all his Debts and Legacies &c. A made J. S. and J. N. his Executors. They entered generally into the Land and into the Term. Adjudged that they took the Term as Executors, and not as Devisees, but they took the Freehold as Devisees. Mo. 350. pl. 470. Hill. 36 Eliz. Pannell v. Pennt.

that they take as Executors. But by Gawdy J. if I make two my Executors, and devise the Profits of my Land to them until my Debts and Legacies are paid, and until they have raised 100 l. and after that to their own Use; they shall take as Legates, and not as Executors in respect of the 100 l. which they are to have to their own proper Use. —— Cro. E. 547. pl. 19. S. C. adjudged.

5. Executor Devisee shall take a Term as Executor where he enters Cro. E. 587. generally, if his being paid to take it as Legatee will be prejudicial to him as to charge him in a Devouement for want of Assents to pay Debts &c. otherwise he shall devise it as Legatee, Mo. 352. pl. 474. Hill. 36 Eliz. B. R. Portman v. Willis.

this being more for his Advantage; But otherwise where I devise a Term to my Executor for Life only, Remainder to J. S. because if the Term were vested in the Remainderman it could not be devolved out of him again, and so might make a Devouement. 2 Wins's Rep. 551. Trim. 1729. by the Master of the Rolls, in the Case of Gay v. Willis.

6. All
6. All the rest of my Goods, my Debts and Legacies being paid, I give to my Executors. The Testator had several Leaves of Lands in several Counties. The Executor proved the Will, and made Election to have one Tenement Part of the Land demised as Legatee and died. The Judges Delegates agreed that the Election of this one Tenement was Election of all notwithstanding the Lands were several, and upon several Demises, because the Devise is intire; and he dying Intestate, though the Debts and Legacies were not paid at the Time he made his Election, yet Administration shall be committed as of his own Goods, and not of the Goods of the first Testator. 2 Roll Rep. 158. Hill. 17 Jac. B. R. Hinfon v. Button.

7. If an Executor enters generally, he is in as Executor and not as Devisee; Per Nallet J. cites it as resolved in Lamper's Case, and in Matthew Manning's Case. Mar. 136. in pl. 209. Mich. 17 Car.

8. Where Testator devised the Surplus to his Executors B and C, after Debts &c. paid, though it must be admitted that until Debts &c. are paid it cannot be known what the Surplus is, yet in Case where all the Debts &c. are paid it may well be known what the Surplus is, and, so there may be an Affent to this Legacy fo that by the Death of B, all shall survive to C. For here is an implied Affent. See 2 Wm's Rep 529. to 532. Trin. 1729. by the Master of the Rolls, Cray v. Willis.

(N. b) Where he shall take as Purchasor.
4. If a Man have a Lease for Life, Remainder for 40 Years, the Remainder is void, because there is no Person named to whom it is limited; but if a Man makes a Lease for Life, and after his Death to his Life for 40 Years, it is good, and the Executors shall have it as in Yelv. 91. Right of his Testator; but where a Man makes a Lease for Years or Centuries, or Life, the Remainder after his Death for forty Years to his Executors, the Executors shall have it as Purchasers for this Word (Remainder) divides it from the Testator, and makes the Executors Purchasers; Per Anderson. Ow. 125. Mich. 40 & 41 Eliz. in Case of Sparke v. Sparke.

Cafe from Cranner's 14 Eliz. Dyer, because in that Case it is limited by way of Use, and by the Party himself, to be used by his own Intent that it should not vest in himself but in his Executors, but here the Limitation is by a Stranger, wherein there is not any Intention appears but that it should vest in the Leasee himself, and by this Difference all the Books are reconciled. Cro. E. 662, in Case of Sparke v. Sparke.

5. If a Man covenants to stand feised to the Use of himself for Life, Remainder to his Executors, the Executors shall take to the Use of the Testator; but if a Man for good Consideration covenants to stand feised to the Use of the Executors of a Stranger, there the Word (Executors) is a Word of Purchafe, and they shall take to their own Use; Per Popham Ch. J. 4 Le. 239. pl. 387. B. R. Anon.

6. Devise of a Rent-charge to his Wife for Life, and after says, If she marry, his Executors shall pay per 100 l. and the Rent shall cease and return to the Executors. The Rent is to continue till the 100 l. is paid, and the Executor is in Nature of a Purchaser, and must pay the 100 l. before he shall have the Rent, and that whether there be Allots or not; Per two Justices against Twifden, who thought the Devisiors Meaning was to give her a present Inteyle in the 100 l. and that in such Case the Rent must cease presently upon the Marriage; but however, since it was to be issuing out of the Inheritance he thought it doubleful, and conflented to the Judgment for the Baron in the Right of the Wife. Mod. 272. pl. 25. Trin. 29 Car. 2. B. R. Osborn v. Wal-ceeden.

(O. b) Where he shall have the Surplus.

1. A. By the Contrivance of B. his Nephew made a Will and B. Executor, and said nothing in his Will of his Personal Estate, which by this Means the Executor claimed though Testator left a Son, but it appearing by several Matters that A. intended it for his Son &c. Decreed for the Son (an Infant) and Defendant to be examined on Interrogatories, and to be restrained from confessing Judgments &c. to Creditors of Testator, and the Custody of the Infant taken from him. Fin. Rep. 351. Pach. 30 Car. 2. Corcellis v. Corcellis.

2. A. bequeathed some Legacies, and adds, I give the rest of my Goods and Chattles to my Executors, and afterwards I give to my Executors the Sum of 100 l. a-piece for their Care and Trouble, and alter my Debits and Legacies paid, I give all the rest of my Personal Estate to the Children of C. the Money to be paid into the Hands of C. and makes C. D. and E. Executors. Decreed the Children of C. to have the entire residuary Estate, because 100 l. a-piece was bequeathed to the Executors, and decreed the Residue of the Money to be paid into C's Hands.
Hands according to the Will, and the rest of the Personal Estate to be delivered to the Children. Vern. 30. Hill. 1681. Fane v. Fane.

3. Mortgagee in Fee-simple devised 100 l. and other Legacies, and then devised 100 l. to H. whom he makes Executor it was strongly urg'd that the Executor was limited to the 100 l. and the rather because his Legacy was expressly Will'd not to be paid till after Debts and other Legacies paid, yet Jeffries C. decreed the Mortgage to the Executor though the Lands was descended to the Heir. 2 Ch. cafes 187. Mich. 2 Jac. Canning v. Hicks.

4. A. makes B. and C. his Executors, and devis'd to them 20 l. at piece, and also devised to them 800 l. in Truf't for Payment of Annuities to L. M. and N. for Life, far exceeding the Interest of the 800 l. and devised the Surplus to his Nephews D. and E. to be equally divided between them, and appoints his Executors to lay out the same for their Benefit. L. M. and N. being Dead, the unexhausted Remainder of the 800 l. shall go to D. and E. the residuary Legatees, and not to B. and C. the Executors who had only the 800 l. as a Depositum, and were not bound to pay beyond it; Per Jeffries C. Vern. 425. pl. 400. Hill. 1686. Cock v. Berith.

5. A. made his Will, and devis'd all the Residuum of his Personal Estate to J. S. and to his Wife, nevertheless in Truf't for his Wife, and made the said J. S. and his Wife Executors. After making of this Will, and six Months before the Death of the Testator the Wife died, and then the Testator died; and the next of Kin preferred a Bill against the Executor to have an Account of the Personal Estate, and inquit up it that J. S. was only a Trustee, and had no Benefit intended him by the Testator. But per ter. Cur. the Bill was dismissed, for the Law had ca'd it upon J. S. by being Executor, and there appeared no Intent of the Testator that it should be otherwise. 2 Freem. Rep. 105. pl. 115. Trin. 1659. Anon.


S. C. cited by Ld. Chancellor in 2 Vern. 649. Hill. 1709, and said by him to be settled in the House of Peers. — Equ. Abr. 243. (D) pl. 1. S. C. but the Author in a Note in the Margin says, that since this Case there have been variety of Resolutions, both in Chancery, and the House of Lords on this Head; notwithstanding which, this Matter seems an undetermined as any in Equity; for though the Law calls the whole Personal Estate on the Executor; yet as the Intention of the Testator is chiefly to be regarded in a Will, it appears by a strong and necessary Implication, that the Executor was not to have it to his own Use, Equity will decree him a Trustee for the next of his Kin to the Testator; and therefore it seems agreed, that if Strangers, or distant Relations are made Executors, and Legacies are given them for their Care and Trouble, that they shall not have the Surplus, but where the Executors are as nearly related, as those who claim as next of Kin; and they have had all Legacies given them, though perhaps some of them greater, and some of them less, great Doubt has been, in which Instances it has (as appears by the Cases) been determined according to the Intention of the Testator, collected not only from the Words of the Will, but likewise from collateral Proof of Testator's greater Kindness, &c. which upon these Occasions has been admitted, sometimes for the Executor, and sometimes for the next a kin. — Parker C. said he was not satisfied with the Notion of a Legacy to an Executor excluding him from the Surplus; and therefore had not the Executor submitted to account for the Surplus he had he knew not if he should have decreed him to account for it. Patich. 4 Geo. 10. Mod. 450. — 3 Moritmer Powell. — See Wm's. Rep. 8. a Note at the Bottom of the Page relating to an Objection that this Case was to be decreed upon a Fraud in obtaining the Will, which is there denied. — 5. P. per Ld. C. Parker. Ch. Prec. 507. — Gil. Equ. Rep. 126, 127. S. C. accordingly. — 2 Wm's. Rep. 162. says the S. P. was decreed by Lord G. Maciefield, 24 February 1720. May v. Lewin. A. dev. 50 l. to B. his brother, and 50 l. to his Nephew G. and C. and Executors, and gave 20 l. a piece to other Relations, several of whom were his brother's Nephews and Nieces, and as such his next of Kin in equal Degree within the Statute of Diftribution, after which the Testator abruptly broke off without saying In Wm's whereof &c. or making any Disposition of the Surplus.
Executors.

7. I dispose of my Estate after-mentioned, and what else I have in the World in Manner and Form following; and gives several Legacies to Chas. Prec. his Relations, amounting to near the Value of his whole Personal Estate. As, apportion'd by a Calculation of his own Hand Writing about that Time made, and then makes B. and C. his Executors, and gives them 20 l. and treats them to get the Trouble of getting in his Estate. Teller lives 10 Years after, and acquires an additional Estate; Per Commisioners decreed the Executors to be but Truftees, and that the new acquired Estate should go to the Legatees in Proportion to their Legacies.


8. Teller by Will gave 20 l. for Mourning to a Stranger, and made him Executor. Distribution was decreed 7 Anne. 2 Vern. 676. in Case of Ball v. Smith cites it as the Case of Cook v. Walker, 19 May. 1691.

9. Wife and two Strangers were made Executors, and 100 l. Legacy to the Wife, and the Interest of 300 l. to her for her Life; To William he gave 20 l. for Mourning. Surplus decreed to be distributed. 2 Vern. 677. in Case of Ball v. Smith, cites it as the Case of Darwell v. Benner, in 1692.

10. A had a Daughter and two Brothers and made his Will, and But such thereby gave 51. a-piece to his Brothers, appointing them Executors, but made no Disposition of the Surplus. On a Bill by the Daughter for an Account, there were Proofs that A. intended his Executors the Surplus, the Daughter being under A's Displeasure by Marrying against his Consent, but being somewhat doubtful it was decreed at the Rolls, and affirmed by the Ld. Somers, that the Executors should be but Truftees after their Legacies paid, and the Surplus to go according to the Statute of Distribution. Wms's. Rep 9. 20 May. 1696. Petit v. Smith.


9. A. devised his Lands to his Executors to be sold for Payment of Debts, and that if any Surplus be after Debts paid, it should be deemed Part of his Personal Estate, and go his Executors; * Yet Executors were decreed to account, and pay the Surplus over to the next of Kin. 2 Vern. 361. pl. 325. Mich. 1698. cites it as the Case of Sir William Baffet.


12. A. gave several Legacies to all her next of Kin by Name, and par- S. C. cited ticular Legacies to B. and C. two differing Ministers, and made them by Lord C. Parker, Executors, but made no express Disposition of the Surplus of her Personal Estate who shall take the Surplus. The Executors were obliged to Wms's. Rep. distribute the Surplus amongst the next of Kin. 2 Vern. 361. pl. 325. 550. in Mich. 1698. Bailey v. Powell.

v. Knightly.—Ch. Prec. 92. S. C. Patch, 1697. Says she bequested the Legacies to Truftees to
Executors.

be put out for the benefit of the next of kin, and did not Trust them with their own Legacies, and it appeared that she had no great Kindness for them. Ld. Sommers decreed a Distribution, and the Executors to pay Costs for infiling on it.

* S. C. cited and admitted by Counsel. 2 Wms. Rep. 359. in Cafe of Attorney General v. Hooker. — S. C. cited by Ld. C. Parker. But he said he did not hear any precedents cited that go further. Wms's. Rep. 549. Trin. 1719. in Cafe of Farrington v. Knightley—But ibid. pag. 551. His Lordship said, that as to what had been said heretofore that there was but a single precedent of this kind, he had now seen several of those Decrees, and that they made no Difference where a Wife, and where a more remote Relation had the Executorship; for that fill in all those Cafes, if there was no express disposition of the surplus, the Executors whoever he was, had been looked upon as a Trustee, with respect to such surplus for the next of kin; and that having spoken with Mr. Verney in his life time, he told him that there had been so many Decrees upon the point, and it had been so fully established, that he thought it not worth While to take Notice of any later Decrees, apprehending it a Principle as much fixed as that fee simple Land should descend to the heir. —— Ld. C. Parker, Wms's. Rep. 552. Trin. 1719, cites this Cafe of Ball v. Smith thus, (viz.) A devolved some Plate to his wife which she had as executrix to her former husband, and two other pieces of Plate in lieu of, and Recompence for some other piece, which likewise had belonged to his said wife as Executrix of his former husband, but which A. had disposed of and made no Devise of the surplus. Decreed that this should not bar her of the surplus, because the Devise of the plate which the before was intitled to as Executrix of her former husband was void, the second husband having no power to dispose of that by his Will, though he might do it by Act executed in his life-time; and as to the other piece in lieu and Recompence of the other plate disposed of in his life-time out of what belonged to her as Executrix, it must be reasonable to construe this as a Restitution rather than a Gift.

13. A. makes his Wife Executrix, but bequeathed nothing more to her than was her own before as Executrix of her former Husband, and what was otherwise her's before her marriage with A. Per Harcourt K. decreed on View of Precedents the Surplus to the Wife, there being only the single Cafe of Warld v. Lane, where the Wife Executrix has been excluded the Surplus, the Cafe of Darwell v. Bencnet, where two strangers were Executors with the Wife, not coming up to the Cafe. 2 Vern 675. pl. 602. Hill. 1711. * Ball v. Smith.

14. After several devises of lands to several Perfons, and 50 l. given to the heir at law to buy Mourning, and other legacies to others, the Testator gives 5 l. a-piece to B. C. and D. to buy Mourning, and all the rest &c. of my Manors &c. Goods Chattels &c. and all other my Real and Personal Estate whatsoever, I give to B. C. and D. whom I nominate and appoint Executors of this my Will, equally to be divided between them, to hold to them, and their Assigns for ever. Decreed that the surplus being expressly given here can be no refuting trust for the heir, and the heir having a legacy given him, and not the surplus, turns the argument strong against him. Affirmed in the House of Lords. Ch. Prec. 94. pl. 83. Paufh. 1699. Dormer v. Berry.

15. The Testator made one executor to whom was no relation to him but a mere stranger, and gave him 50 l. for his care in the execution of his will; the plaintiff being next of kin exhibited a bill for the residuum of the estate, and no counsel appearing on the other side, he had a decree nisi causa; for per Turton J. with whom the bar agreed, the Executor in such cafe shall not have the residuum after debts and legacies paid, but the next of kin to the Testator; and so it was said it had been decreed in the like case between Cordall and Cordall; it is true, if the executor had been nearly related to the Testator it might have been otherwise, but even in such case, if there are other relations in equal degree with him, and are poor and indigent, equity in such doubtful cases, will give the residue amongst them. 3 Salk. 82. pl. 1. Mathews v. Court hope.


16. A. having a wife, but no child, and two brothers, by will gave to his nephew and nieces one moiety, and the other moiety of a banker's debt to his wife, and made her sole executrix per cur. the wife by a devise of the moiety of the debt was excluded from the surplus of the personal estate as executrix though there was no child, and
though *Legacies to the Brothers* (one of which was *Heir at Law*) were given out of the Land, which had not been necessary unless $A.$ intended the Surplus of the Personal Estate for his Wife that otherwise had been sufficient to pay those Legacies. 2 Vern. 425. Pauch. 1701. Randall v. Booke.

17. *The Wife was made Executrix,* and the *Husband living 20 Years* Ch. Prec. after the Will *acquired an Estate.* Surplus decreed to be distributed. 183 S. C. decreed, though it was urged that the Will was made in 1673; and the Course of distributing the Surplus not introduced till long after — S. C. cited by Ld. G. Parker. *Wms.'s Rep.* 150. as decreed by Ld. Keeper Wright. *Hill.* 13 W. 3.

18. A. by Will gave his Library of Books to *J. S.* except Ten, such as *M.* his Wife should chuse, and made *M.* Executrix. Ld. Wright thought this was no Devise of the Books to her, but only an Exception of Ten out of the Devise to *J. S.* and the the Executrix was the proper Person to chuse which should be excepted, and it could not be intended to bar his Wife by so inconsiderable a Legacy. Ch. Prec. 231. pl. 192. *Trin.* 1702. Griffith v. Rogers.

19. A. devised to *B.* and *C.* his Wife's Children (as he called them, not owning them to be his) 10 s. a-piece and no more; and gave the Children which he owned considerable Legacies, and devised Legacies to his Executors, but did not mention them to be for their Care and Pains, or any Thing to the Purpose. Decreed that the Executors should not have the Surplus, but that it should be distributed among all the Children. *Chan.* Prec. 169. pl. 140. *Trin.* 1701. Vachell v. Jeffries.

20. A. made his Wife Executrix during her Widowhood, and if she die or marry then his Son to be Executor, and devised some Curiosities as *Heir-loom* to his Son, and the Use of the Household Goods to the Wife during her Widowhood. Ld. Wright thought the Wife should have the Surplus she having but a *limited Executorship,* and the Heir to have it afterwards when his Executorship should take Place. *Chan.* Prec. 263. pl. 213. *Mich.* 1706. Hoskins v. Hoskins.

21. If a Man be declared Executor, this of it self gives him an Interest in the personal Estate, and he shall have the whole; but if part of that Estate be devised to him, it will exclude him as to the rest, and he shall have no more than that so devised; per Lord Chancellor Cowper, in *Cane.* Pacch. 6 Ann.

22. A. made B. his Wife Executrix, and devised to her the Use of his Table Plate for Life, and after to *C.* his Grandson. Per Cowper this is a strong Implication that B. should not have the whole, and the rather the stronger because more Minute and Restrictive; if the Will had been, *I gave Plate to C.* except the Use of it to D. then it would have been within the Reason of the Cate where Books were given to *J. S.* except fix to Wife, which Cate was rightly adjudged, but this Cate differs. 2 Vern. 648. pl. 578. *Hill.* 1709. Lady Granvill v. *Wms.* 679. *Wms.'s Rep.* 116. *S P.* — Res.

verified in Dom. Prec. and the Surplus decreed to the Dutchess as Executrix, 2 Vern. 677. *Wms.'s Rep.* 114. *Hill.* 1709. S. C. decreed, and that Decree was reversed accordingly. — 9 Mod. 10. S. C. cited. — S. C. & P. cited by Ld. C. Parker, but that it was reversed in the House of Lords; the Reason whereof he said might be because this was not properly a Devise to the Dutchess of the Use of the Plate, but rather an Exception or Reservations to the Dutchess, (viz.) a Devise of the Plate to the Grandson, referring the Use thereof to the Dutchess for her Life. *Wms.'s Rep.* 552. *Trin.* 1709. in *Cane.* of Farrington v. Knightley.

23. One devised his real Estate to be sold for the Payment of his Debts, S. C. cited and the Surplus, if any, to be deemed personal Estate, and to go to his Exec- tors. *Wms.'s Rep.* 194.
Executors.


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Cofieworth v. Brangwin.

2 Vern. 645. S. C. He that drew the Will gave to the Testator gave no particular Directions as to the

2 Vern. 756. p. 645. S. C. He that drew the Will gave to the Testator gave no particular Directions as to the

26. A. bequeathed 100l. apiece to his next of kin, and also to J. S. his Executor 100l, but makes no Disposition of the Surplus exclusive of B. but though (this Suit being between B. and C.) he decreed, yet he made a Doubt if these Legacies to one Executor would not exclude both and let in the next of kin. Ch. Prec. 323. pl. 246. Hill. 1711. Cofieworth v. Brangwin.

27. The Testator devised several Legacies to several Persons, and gave a Legacy to one of the Executors by his Christian and Surname, and his Clothes to be disposed of by his Executors, and then adds, As to the 700l. I am intitled to in the South Sea Company, and the reit of my personal Estate, I will that the same shall be sold for Payment of my Debts and Legacies, and I make John and Thomas Serle my Executors, and dies; the Testator had devised 70l. for Mourning to the Children of Mr. Serle of whom the Executors were two, and intitled to their

Proportion.
Proportion. Lord Chancellor decreed the Residue to the Executors. Surplus, but did the Plaintiffs (who the next of Kin) should have no more, and he would give no more away. Ld. Chancellor held that the Evidence of the Drawer falls in with the Tenor of the Will, and takes away the Premption that he did not intend the Surplus for his Executors, and that the Presumption that the Testator did not intend them all and some may be ousted by Proof of his Intention that the Executor should have the Surplus, or that the next of Kin should not have it, and the Writer proves, that the Testator declared that his Sister (the Plaintiff) should have no more, and should not have the Surplus. — Gibb. Eq. Rep. 123. S. C. decreed accordingly. — Eq. Abr. 246, 247 pl 12. S. C. decreed accordingly.

28. Sir W. B devised his personal Estate to pay his Debts and Legacies, and gave 1000 l. apiece to his Executors, and it was agreed that the Surplus should go to the Representatives of the next of Kin. Chan. Prec. 1750. cited S. C. as Hill. 1697. in pl. 336. Trin. 1721. cited by Lord Chancellor as the Case of Bristol v. Hungerlord.

29. A. made B. and C. Executors, and gave them specific Legacies, and deferring his Executors to be kind to 7 S. an old Servant and to give him some small Pieces of Furniture then in the House if he desired it. Decreed that the Executors shall have the Residue of the personal Estate free from Distriution, it appearing to be the Intent of the Testator by the Words aforesaid. 9 Mod. 11. Trin. 1722. at the Rolls.

Heron v. Newton.

30. An Executor hath certainly the whole and entire Right to the Testator’s personal Estate both in Law and Equity, unless upon the Face of the Will it appears by some Indication that the Testator intended to the contrary, as by giving him a specific Legacy; for by such a Device it appears, that he intended him no more; and this was laid down as a Rule, when the Lord Jelfries was Chancellor, and with good Reason, and hath been a standing Rule in the Court ever since (with some little Variations and Exceptions from the Circumstances of Cases) to exclude the Executors. 9 Mod. 28. Trin. 9 Geo. in Canc. Hutchison v. Vincent.

31. Testator gave Legacies to several Persons, and devised to his next of Kin (his Sitter) 100 l. a Year for Life out of his Bank Stock, and the Residue of his Bank Stock to his Executor (a Stranger and no Relation) and gave to his Executor the Furniture of his House, and a certain Sum of Money to his Sitter the next of Kin. Lord Chancellor King held that if the express Legacy to the Executor be allowed to exclude him of the Surplus, by the same Reason the express Legacy to the Sitter will bar her like wise; and then here being Emulsion against Emulsion, the Law must take Place, and the Executor have the Surplus as Executor. 2 Wms’s Rep. 338. Hill. 1725. Attorney Gen. v. Hooker, and Somner v. Hooker.

Well enough. Ibid. 342. — The Reporter there says that Mr. Lutwich said that this would make many Precedents.

32. In the Case of a Will though an express Legacy be given to the Executor, yet if a Legacy is also given to the next of Kin, this is equally a Bar to the next of Kin, as to the Executor; and therefore if the Surplus be not disposed of by the Will, the Executors shall have it. Qu. 2 Cy for his Care and Pains, though the next of Kin has also an express Legacy; the Surplus shall go according the Statute of Distribution, especially if the Surplus was intended to be disposed of. 5 Wms’s Rep. 43. Tria. 1732. Davies &. al. v. Dewes & al.

5 N (P b)
(P. b.) Executor Trustee. His Power and Interest.

1. An Executor though a bare Trustee, and though there be a Refiduary Legatee, is intitled to sue for the personal Estate in Equity as well as Law, unless the Cefary Trust Will oppose it. 3 Wms's Rep. 34. Hill. Vac. 1729. Jones v. Goodchild.

2. Trustee cannot change the Nature of the Estate by turning Money into Land, or a Lease for Years into a Freehold & e converto. 3 Wms's Rep. 100. Hill. vac. 1730. Witter v. Witter.

(Q. b.) Infant Executor. What he may do; and in what Cases he is bound.

Ibid, says that Plowden was strong in Opinion against the Judgment; but Wray, Ch. J. said to him, that he had conferred with all the Justices of England, and that they had agreed to give Judgment for the Infant; because the Release being without Consideration, the Infant would charge himself in a Devastavit. — 5 Rep. 27 a. S. C. resolved accordingly — And. 177, pl. 212. S. C. resolved accordingly in the Exchequer Chamber. — Ibid. is a Note that Pach. 56 Eliz. this Judgment was reversed in Error in Cam. Scacc. for other Matter in the Pleading, but not upon the Matter in Law.

4 Le. 210. pl 311. S. C. in toto idem

1. Trover and Conversion of Goods by the Executors of R. against Husband and Wife, of the Goods of the Testator, which came to the Hands of the Wife dum sola fui. The Defendant pleaded a Release of the Plaintiff after the Death of the Testator, and after the Trover and Conversion the Plaintiff said he was then within Age; it was adjudged, that because there was no Consideration alleged for the Release, it should not bind the Infant Executor, because he would thereby charge himself in a Devastavit Mod. 146. pl. 239. Hill. 21. Eliz. B. R. Rufiel's Cafe.

2. Note, It was agreed by the Justices in this Case, That where an Infant Executor sold the Goods of his Testator at less than they were worth; and afterwards brought an Action of Detinue against the Vendee upon it in Retardatione executionis Testamenti; That this Sale of the Infant Executor was good; and should bind him notwithstanding his Nonage. 3 Le. 143. pl. 192. Mich. 29 Eliz. B. R. Manning's Cafe.

3. A. made his Wife his Executrix and died, the Wife proved the Will and administered, and made J. S. her Son, of the Age of 13 Years, her Executor, and the Defendant Overseer and died; the Infant proved the Will; the Defendant with the Content of the Infant sold Goods to the Value of 140 l. to the Use of the Infant; it was the Opinion of the Justices that this was no Adminiftration, but a good Sale by the Executor; for an Infant Executor is to pay Debts, and then he must sell Goods
Executors.

Goods to pay them, and therefore the Sale of another by his Consent, where it is not to his Prejudice, is no Administration but good. 

4. What an Infant does according to the Office and Duty of an Executor shall bind; As to discharge the Debtor for so much as he receives; But to do any Thing that may amount to a Devolatavit, as Releafe without Payment &c. he cannot. 5 Rep. 27. b. Hill. 26 Eliz. B. R. Ruffel's Cafe.

5. But an Infant Executor may make a Releafe upon a true Satisfac-
tion, but not otherwise. 5 Rep. 27. b. Hill. 26 Eliz. B. R. Ruffel's Cafe.


has no Consideration he shall answer for his own Goods, when he comes of Age for the waiting of the Estates, and such Release shall be Affets. Godb. 50. pl 39. 27 Eliz. C B. Kitless's Cafe.

7. Debt upon an Obligation made to the Testator, the Defendant pleaded a Releafe made by one of the Plaintiffs, the Plaintiff replies, That this Releafe was made without any Consideration, and he who releas'd was within Age at the Time of the Releafe made. It was thereupon demurred; and adjudged for the Plaintiff that it was a void Releafe, being by an Infant without Consideration. Cro. E. 671. pl. 27. Pasch. 41 Eliz. Knot v. Barlow.

8. It was resolved by all the Judges, that a Releafe of a Debtor, or a Duty by an Infant Executor after the Probate of the Will, without receiving the whole Debt is void, because it should be a Devolatavit, and charge the Infant of his proper Goods, and also it should be a Wrong which the Infant cannot do by his Releafe, because it is an Act not pursuant to the Office of an Executor who is to do his Office truly, diligently and faithfully. But upon Payment of all the Money to an Infant Executor, he may make a Releafe and it is good. Cro. C. 492. pl. 15. Mich. 13 Car. B. R. Kniveton v. Latham.

9. If an Infant Executor affents to a Legacy it is not good unless there are other Affets for Debts, and fo may work a Wrong to the Creditors; Per Ld. Keeper Finch. Chan Cafes 257. Hill. 26 27 Car. 2. in Cafe of Chamberlain v. Chamberlain.


(R. b) Refusal. What is. And How. And the Effect thereof.

1. TRESPASS by Administrators of Goods carried away, the Defendant said that the Testator was possessed as of his proper Goods, and made f. S. his Executor and died, and after the Goods came into the Hands of the Plaintiff, and the Defendant by Command of the Executor took the Goods, and after the Executor refused before the Ordinary who commi
Executors.


lee's Case that the Survivor may have Action.—If H. makes his Will and several Executors, and one of them refuses but the Refe adminiter, that makes his Refusal void, and the refusing Executor may not-withstand ing release any Debt; cites 4 Rep. 28. a [Middleton's Case.] And in Actions brought by them the refusing Executor must be named, cites 9 Rep. 97. And if the refusing Executor survives, he may take the Executorship upon him. The Case made in Dy 160. is contrary, and holds that the re-

fusing Executor must come in and act during the Life of the setting Executor, but the 31 E. 4. 23, is contrary to Dyer, and according to the preceding Position. In Hard. 111. Pawlet v. Frith it is resolved that where the refusing Executor survives, Administration committed during his Life is void; Per Holt Ch. J. 1 Salk 307. Hill. 1 Ann. B. R. in delivering his Opinion in the Case of Wankford v. Wankford.

But when the surviving Executor is dead Intestate, Administration both of the surviving Executor who died Intestate, and of the Goods of the former Testator not being administered may be granted. God. Orph. Leg. 38.


6. 11 Executor neglects Probate for a Year this is a Refusal irrevocable in the Civil Law, and adjudged accordingly. Mo. 273. pl. 426. Hill. 31 Eliz. Bewacorne v. Carter.

7. Executor retuming ligit bis Legacy. Ow. 44. 31 Eliz. Catlin's Cafe.


9. If a Man libels in the Ecclesiastical Court against an Administrator after Refusal of the Executorship for a Legacy, and he can prove the Will
by which the Legacy was given but by one Witness, and therefore they
will not allow it, yet no Prohibition lies; for by our Law there is not
any Testament where there is not any Executor, and therefore if they
will give him Relief they may give it in what Manner they please.
2 Roll Prohibition (Q) cites Hill. 37 Eliz. B. R. per Cur.
10. Debt upon Obligation of 100l. against two Executors A. and B.
— A. was outwitted. B. pleaded that A. was made Executor and fully
proved the Will and administered, and he as Servant to A. took divers of
the Testator's Goods by his Discovery, and by his Appointment sold them, al-
dike too that he administered in other Manner. It was adjudged to be no
Plea because he doth not say he refused before the Ordinary, nor con-
fesses any Administration, and so no Answer to the Plaintiff; And
Judgment for the Plaintiff. Cro. E. 858. pl. 27. Mich. 43 & 44 E-
11. Refusal cannot be verbally, but must be by some Act entered in
the Spiritual Court, and therefore must be before some Spiritual Judge,
being named Executors, they wrote a Letter to the Ordinary that they could not attend the Execu-
torship, and wished him to grant Administration, who did so and recorded their Refusal, and held
good. Went. Off Ex 57. cites it as Sir Ralph Rowlet's Case. — Ow. 44. 51 Eliz. Sir Ro-
bert Rowley's Case. — By the Civil Law a Renouncing may be as well by Matter in Fact as by
a judicial Act, and they may refuse by Parol; Declared to by Dr. Ford to the J u l f i l e s .
12. If Executor administers and after refuses, and the Ordinary not
knowing of the Administration accepts the Refusal and grants Administra-
tion, it was thought that the Ordinary might revoke the Administration
upon its appearing to him that Executor had administered, and might
inforce the Executor to proceed to prove the Will. Went. Off Ex 39.
13. If upon Process against the Executor to come in and prove the
Will and he does not come in, he may be excommunicated; But if
he comes in and will not prove the Will, the Ordinary upon such Re-
fulal may commit Administration. Went. Off. Ex 37.
14. An Executor commanded out to take the Goods, and after the Ex-
ecutor refused before the Ordinary who granted Administration, and the
Administrator sued the Person that took the Goods, who justified by
the Executor's Command, and it was held good. Vent. 304 Hill.
non debuit factum valet, and that it might be that the Ordinary did not know of the Executor's in-
termeddling at the Time when he admitted his Refusal.
15. It was held per Curiam, that if a Term for Years of Lands be
devolved to Executors in Trust for Payment of Debts, if all the Execu-
tors renounce &c. and will not convey over to others, to the End that they
may execute the Trust, that the Trust and Term for Years are both
16. T es la tor as an Encouragement to his Executors (who were four)
to accept of the Trust and Executorship, gave to each 100l. and 12l.
apiece for Mourning, and to each of them a Ring, and 10l. for their
Trouble. Ld. Chancellor said that the refusing Executors should have
their Rings and Mourning which were intended them immediately,
but not the 100l. or 10l. Annuity, and that renouncing Executor's
Share should not go over to the other Executors, but for the Benefit
beriton.
128. S. C. in totidem Verbis with Ch. Pec.
17. One devises that his Executors should sell his Land, and leaves two Executors, one whereof dies, and the other renounces, and Administration is granted to A, who brings a Bill against the Heir to compel a Sale; It was objected that the renouncing Executor, in whom the Power of Sale collateral to the Executorship is veiled, ought not to be made a Party. But the Objection was over-ruled. The Reporter adds a Quere. 2 Wms's Rep. 308. Mich. 1725. Yates v. Compton.

Trustee to the Use of the Will since the Executors renounce, so no Occasion to be Parties.

(S. b) Refusal. At what Time it may be.

1. Debt against Executor, who said that the Administration was committed to him by the Ordinary, and showed in certain &c. by which be administered, but not as Executor; Judgment of the Writ; The Plaintiff said, that before Sequestration of the Bishop, and before the Administration committed, the Defendant proved the Testament before W. T. and administered as Executor of the Goods of the Deceased, allege but that the Deceased died intestate, and did not show what Goods be administered, nor in what Place, and so it seems that he who administers as Executor cannot relinquish it and take the Administration; Contra it seems to be of him who administers de bon tort demense, as in 21 H. 6. 8. Br. Executors, pl. 107. cites 1 E. 4. 2.

2. If the Executors administer they cannot refuse after; Quod Nona. Br. Executors, pl. 90. cites 9 E. 4. 33.

3. And it is laid there, that Mich. 19 H. 6. Debt against an Executor, who said that the Administration was committed to them before the Writ purchased, and so are Administrators; Judgment of the Writ; The Plaintiff said, that after the Death of the Testator, and before the Administration committed, the Defendant administered &c. and upon this they were at Issue, and therefore it seems that he cannot refuse after. Ibid.

4. Two Executors were jointly made in a Will; One of them releases a Debt due to the Testator, and after before the Ordinary refuses to administer; And it was agreed by all the Justices that the Release was Administration, and for that he has made his Election, and then the Refusal comes too late, and so is void. 2 Brownl. 58. Hill. 8 Jac. C. B. Wickenden v. Thomas.

5. A Mandamus was prayed to the Ecclesiastical Court to grant the Probate of the Will under Seal &c. The Case was, the Executor named in the Will had taken the usual Oath, and then refused, (but after a Caveat entered) and another endeavoured to obtain Letters of Administration. The Executor came afterwards to delire the Will under Probate, and contended the granting of Administration which was adjudged against him, supposing that he was bound by his Refusal, and after an Appeal to the Delegates this Mandamus was prayed and granted by the Court, for having taken the Oath he could not be admitted to refuse, and the Ecclesiastical Court had no further Authority; and the Caveat did not alter the Case. Vent. 336. Patch. 31 Car. 2. Anon.

(T. b)
(T. b) Refusal by one Executor where there are more.

The Effect thereof.

1. 
If he who proves the Testament dies, there the other who refuses and survives may have Action. Br. Executors, pl. 117, cites 21 E. 4. 24. per to Cur.

2. If A. B. and C. are Executors, and A. only refuses, and B. and C. proves the Will, yet A. is still Executor and may release Debts, and Release may be made to him, and may administer afterwards when he pleases. Went. Off. Ex. 41.

3. Several Executors were named in the Will, and one refused, and the other asked, and those that asked died, and Administration was committed to J. S. before any Refusal by the surviving Executor. The Administration was held to be void, because the surviving Executor might, notwithstanding his former Refusal, have taken upon him the Executorship; and afterwards on another Refusal before the Ordinary by the surviving Executor, Administration was committed to the last Petre, and was held to be good, and upon that Title he maintained in B. R. an Action of Trover for a Jewel. 1 Salk. 307, 308. per Holt Ch. J. in delivering his Opinion, cites it as before a Commission of Delegates in Sergeant's Inn in Lt. Petre's Case.

4. Where there are two Executors and one renounces, he is still at Liberty to accept the Executorship; Otherwise where both renounce, though in this Matter the common Lawyers differ from the Civilians, the latter holding that a Renunciation once made, though only by one of them, is peremptory. 3 Wms. Rep. 251. Pech. 1734. Robinson v. Pett.

(U. b) Refusal by one. Pleadings.

1. Debt against Administrator, and counted that the Administration was committed to him by the Bishop of Sarum at B. in the County of W. The Defendant said that the Bishop bailed the Letters of Administration to him, and that he said that he would be advised by three Days, and see the Goods of the Intestate, and so he did, and returned the third Day and refused to take the Charge, and re-bailed the Letters, abjure he that be administered in any other Form, and no Plea for he contends no Administration; therefore he ought to say he did not administer. Br. Administrator, pl. 31. cites 37 H. 6. 27, 28.

2. But it is a good Plea that the Administration was committed to the Plaintiff and one J. S. who was not present, and that the Defendant said that he would take the Administration if the other would agree, and after the other disagreed; this is a good Plea; and a Traverso ut supra, for this was conditionally, for he cannot traverse in other Manner if he does not confess any manner of Administration, as about Funerals, or that the was the Wife of Intestate, and took her necessary Apparel to her Body, abjure he that the administering in another Manner, for there is Administration contended, but not such Administration as shall charge; quod nota per Opinionem Cutie. Ibid.
3. Debt against Executor who pleaded Refusal, he was compelled to show before whom, who said before his own Commisary; for it was the Archbishop of Canterbury himself, and then well. Br. Pleadings, pl 37. cites E. 4. 4. 24. 33.

4. If there are diverse Executors of one Will, and one of them refuses to prove the Will, he may plead Ne unques Executor; Per Roll Ch. J. at a Trial at Bar. Stil. 343. Mich. 1652. Cheekman v. Turner.

(W. b) Executors or Administrators of Executors or Administrators. What they shall have.

1. The Teflato made A. and B. his Executors, and devised that his Executors should receive the Iffites and Profits of his Lands till his Son and Heir be Twenty one, to pay his Debts and Legacies, and to educate his Children. A. died, and so did B. during the Minority of his Son, having first made T. S. his Executor. Catline Ch. J. Saunders Ch. B. and Brown and Dyer held that the Executor of B. the Survivor may dispose of the Iffites and Profits for the Purposes mentioned in the Will during the Infancy of his Son; because it was not only a bare Authority or Confidence, but an Interest vested in the Executor by the Devise. Dyer 210. a. b. pl. 24. Hill. 4 Eliz. Stile v. Tomson.

2. If an Administrator has Judgment and dies, his Executors cannot have Execution of the said Judgment; for none shall have Execution of this Judgment, but he who shall be subject to the Payment of the Debts of the first Intestate, which the Executors are not; and Judgment accordingly. 3 Rep. 9. b. Trin. 34 Eliz. B. R. in Bradenell’s Case.

3. Nota. It was said that there is a Difference between an Executor’s and an Administrator’s dying intestate; that in the first Case the Administrator of the Executor shall have the Goods of the first Teflato, especially where it was laid (the Refidue after my Debts &c. I give &c.) Std. 79. in pl. 3. Trin. 14 Car. 2. cites Dyer. But that the Administrator of the Administrator shall not have the Goods of the first Intestate undamaged.

4. A. bequeaths a Legacy to J. S. and makes B. and C. his Executors and dies, B. makes C. and D. his Executors and dies; J. S. sues C. and D. for his Legacy. D. demurs, for that the surviving Executor of A. was only liable to his Legacies, and D. being Executor to one of A’s Executors who died first, and leaving the other Executor surviving, was not privy nor accountable for A’s Estate; this is true in Point of Law; yet inasmuch as it was charged that D. had gotten the Estate of A. the Demurier was over-ruled, the Court declaring that A’s Estate in which-ever Hands, ought to be liable to his Legacies, and decreed. Chan. Cæs. 57. Trin. 15 Car. 2. Nichollon v. Sherman.

5. Debt on Bond in C. B. against an Administrator who wafter Goods and dies intestate leaving Goods to the Value of 500 L. and Debts of his own to that Value, a St. Fa. is brought on the new Statute against his Administrator, and he pleads Payment of that 500 L. for Debts on simple Contracts of his Intestate, and held good, and Judgment for Defendant, because the Wafting is the Charge, and that is of no higher a Nature, and by that Statute he is to be in the same Case with his Intestate, and he might have paid his own Debts therewith. 2 Show. 485. pl. 447. Mich. 2. Jac. 2. B. R. Britton v. Buckworth.

6. If
6. If Executor proves the Will, his Executor shall be Executor to the first TEsalor. 1 Salk. 309. Hill. 1 Ann. B. R. in Case of Wankford v. Wankford.

7. Two Executors died leaving each an Executor. It was first decreed that they should be answerable only respectively for the Receipts of their several Testators, but upon a Rehearing the Court charged each with the whole. Wms's Rep. 82. Arg. cites it as twice heard before Ld, Somers. Widmore v. Bond.

(X. b.) Actions by Executors of Executors.

Or against them. And Pleadings.

1. 25 E. 3. Executors of Executors shall have Actions of Debits, Acts Stat. 5. cap. 5. excepts, and of Goods carried away of the first Testator's, and Execution of Statutes Merchant and Recognisances made to him, as the first Testator might have had if he was alive; and Executors of Executors shall be answerable to others for as much as they have recovered of the Goods of the first Testator, as the first Executors ought to have done.

2. Wale against Executor, and because it was brought against the Defendant as Executor of the Lessee where he was Executor of the Executor of the Lessee, therefore upon this Exception the Writ was abated, quod nota. Br. Wale, pl. 75. cites 38 E. 3. 17.

3. If Trespass be done to the Goods of Testator in the Hands of the Executor, if the Executor after dies, his Executor shall not have Trespass for it, but Murrat can Per sona. 2 Roll tit. Trespass (O. a) pl. 1. cites 18 H. 6. 22 b. Contra.


5. Note. Where Executor recovers and dies Intestate, and the Ordinary commits the Administration of his Goods, and of the first Testator to J. S. he shall have Execution as Administrator of the Testator, and not as Administrator of the Executor; Per Jenour, for now is the first Testator dead Intestate; Contra per Fitzherbert, for then he shall lose the Advantage of the Recovery as Executor, quod nota. Br. Administrator, pl. 1. cites 26 H. 8. 7.

6. Executor of Executor shall be as Executive immediate to the first Testator, so that a Debt of Testator's Goods by the first Executor is void, and the second Executor shall take them, even though he attainted to the Legacy. Pl. C. 526. Trin. 19 Eliz. Bramsby v. Grentham.

7. B. Executor of A. died before Probate and made C. his Executor, and is sued as Executor of A. for a Debt due by A. and not as Executor of C. Pl. 176. S. C. B. Per 2 J. against Wray, the Writ is good. Le. 275. pl. 370. Mich. in tordem Verba.


5 P

8. B.
8. B. brought Debt against P. Executor of the Will of E. Executrix of the Will of A. The Defendant pleaded they had fully administered the Goods of his Testator E. upon which they were at issue, which was found for the Plaintiff; and it was in Arreit of Judgment that there is not any Issue joined, which answers to the Action, for the Action is brought against the Defendant in the Quality of the Executor of an Executor, and the Verdict extends to the Defendant but as Executor of the last E. for it is found by it that the Defendant hath fully administered the Goods of his Testatrix, without any Enquiry of the Administration of the Goods of the first Testator A. in which Capacity the Defendant is charged; So as here the Writ charges the Defendant in the Quality of an Executor of an Executor and in respect of the first Testator, and the Issue and the Verdict dubs concern the last Testator, the Court shall give Judgment as upon a Nihil Dict, in which Case the Execution of the Judgment shall not fall upon the Goods of the last Testator according to the Verdict, but shall follow the Nature of the Action which was brought against the Defendant as of an Executor's Executor.


9. If Executor of Executor brings Debt in the Name of the first Executor for a Debt due to the first Executor, the Writ shall abate.


10. An Executor of an Executor order'd to account upon Oath, and to be examined upon Interrogatories to discover the Estate. Toth. 150, 151. cites 6 Jac.

11. An Executor sues the Executor of his Co-Executor towards Payment out of an Estate which came to the Defendant, who is not chargeable in Law with the Legacies, but the Plaintiff is (as surviving Executor) decreed to be liable. Toth. 152. cites 10 Jac. Allen v. Burton.

12. Two Executors; the one trusteth the other to receive all Rents and dies; The Plaintiff calls his Executor to an Account, being the Executor of a Trustee; Order'd to make Satisfaction. Toth. 152. cites 12 Jac. Capell v. Goftow.


14. A. makes B. his Executor and dies, [and then B. makes C. his Executor and] [dies without proving the Will] and in Action of Debt against C. as Executor of B. Executor of A. C. pleads that he had renounced the Executivehip of B. But per Cur. he ought to be Executor to both or to none, tor by Hobert Quad Lex conjunxit nemo separat. Noy 30. Wolfe v. Hayton.

held that he might assent to be Executor to one Testator (as to C.) and refuse to the other [viz B.] for the Wills are several; and so a Judgment in C. B. was affirm'd. ——Palm. 156. S. C. adjudged accordingly. ——Hunt. 30 Wolfe v. Heydon. S. C. adjudg'd. ——Executor of an Executor may renounce being Executor to the first Testator, but if he does not renounce he is Executor of Course; Per Holt. 1 Salk. 309. Hill. 1. Ann.

15. The Executor of an Executor is Executor to the 1st Testator, and may have an Action of Debt for the Arrearages of an Annuity due unto him. Finch's Law, 173.

16. If A. recovers a Debt as Executor of J. S. and makes B. his Executor and dies before Execution sued, B. is not put to a new Suit, but may have Execution upon that Judgment; But if A. or B. died Intestate, now could none as Administrator to either of them, nor as Administrator of J. S. have Execution of this Judgment, for the former has no Interest in any Thing pertaining to J. S. and the later comes to Title above the Judgment, viz. as immediate Administrator to J. S. who is now dead
Intestate, and derives no Title from the Executor who recover'd. Went. Off. Ex. 103.

17. Lease for 99 Years made Lease for 40 Years rendering Rent, and made A. his Executor, and died. A. prov'd the Will and made B. his Executor. The Rent incurred. A. died. B. proved the Will and avow'd for this Rent in Jure proprio. Resolved, that by the Common Law B. may disinfrain for this Rent by reason of the Reversion which makes a Privyty, though it was objected that for Rent in Testator's Time he shall have Debt and not Dillets; And that the Avowry by the Executor in Jure Proprio is good; And so though he did not say that the first Executor died poll'd it thereof. Lat. 211. Mich. 22 Jace. Wade v. Marth.


19. Plaintiff declared against the Defendant as Executor of E. N. who was Executor to the Debtor; The Defendant pleaded that the Debtor died Intestate, and that Administration was granted to a Stranger, abique hoc that E. N. was ever Executor to the Debtor, but did not say, or ever administered as Executor, whereas in Truth he was Executor de non Tort. The Plaintiff replies, that before Administration granted to the Stranger E. N. possessed himself of divers Goods of the said Debtor, and made the Defendant Executor and died; And upon a Demurrer Judgment was given for the Plaintiff but reversed; for an Executor of an Executor de non Tort, is not liable at Law, though the Lord Chancellor said he would help him in Equity. But here the Administration of the Goods was granted before the Death of the Executor de non Tort, and so his Executorship vanish'd and nothing shall survive. 2 Mod. 293. Hill. 29 & 30 Car. 2 in Cam. Scacc. before the Lord Chancellor, Ld. Treasurer, and the 2 Ch. Justices. Anon.

20. 30 Car. 2. cap. 2. S. 2. Executors and Administrators of any who as Executors, or Executors in their own Wrong, or Administrators, shall waste or convert the Estate of any Person deceased to their own Use, shall be chargeable as their Testator Intestate would have been if living.

Hill. 2 Jace B R. Holcomb v. Pet. ——-2 Show. 43. — See Went. Off. Ex. 161. where it is said that it was so held long before this Statute, viz. 31 & 32 Eliz. T. Mich. and Tr. 34 Eliz. in Case of Walter v. Sutton.

21. 4 & 5 W. & M. cap. 24. S. 12. Executors and Administrators of Executors, or Administrators of Right; who shall waste or convert to their own Use the Goods or Estate of his Testator or Intestate, shall be chargeable as their Testator should or might have been.

(Y. b) What must be first applied to pay Debts and Legacies.

1. E. A. S. E was assign'd to pay Debts and Legacies, the Personal Estate bequeathed to A. by the said Will shall not be subject or liable to the said Debts or Legacies. Chan. Rep. 45. 6 Car. 1. Peacock v. Glasscock.
2. A. on the Marriage of B. his Daughter to C. agreed to give 600 l. A. died and left Affects, and 600 l. secured by a Mortgage to A. C. had obtained a Verdict and Judgment at Law against the Executors and now brought his Bill. Decreed the Executors to account, and that the Personal Eftate be liable first, and if that fail, then the principal and Interest due on the said Mortgage after real Incumbrances are taken off, shall be liable to make it good. Fin. Rep. 256. Mich. 27 Car.


3. If Lands be devised for the Payment of Debts and Legacies, and the Refidue of the Personal Eftate be given to the Executors after the Debts and Legacies paid, the Personal Eftate shall notwithstanding, as far as it will go, be applied to the Payment of the Debts &c. and the Land charged no further than is necessary to make up the Refidue. 2 Vent. 349. Pach. 32 Car. 2. in Canc. Anon.

4. An Executor or Trustee shall not pay off a Mortgage out of the Monies arising by Sale of other Lands directed to be sold for Payment of Debts, because the Mortgagee can have no Damage, being secured by his Mortgage; But if the Mortgagee should be paid thereout the other Creditors might lose their Debts. 2 Freem. Rep. 51. pl. 56. Pach. 1690. Powye's Case.

5. If a Man makes a Lease, or devises an Eftate for Years, (be being sealed of an Eftate of an Inheritance) for Payment of Debts, if the Profits of the Land surpass the Debt, all that remains shall go to the Heir, though not so expressed, and albeit it be in the Cafe of an Executor. 2 Vent. 359. Mich. 33 Car. 2. in Canc. Anon.

6. A. by Will gives 20 l. to B. and makes him Executor, and gives his real Eftate to C. paying his Debts and Legacies, and in Default of Payment within such a Time, the Legates and Creditors to enter and to hold till paid, and makes no express Disposition of the Surplus of the Personal Eftate. The Personal Eftate shall be applied in Eafe of the Real. 2 Vern. 120. pl. 121. Hill. 1690. in Case of Mead v. Hide.

7. A. mortgages Lands to B. and afterwards upon Marriage settles the same on himself for Life, to his Wife for Life, Remainder to the Heirs of his Body by his Wife. Afterwards A. mortgages the same Lands to C. and makes Affidovit that they were free from Incumbrances. A. dies intestate leaving a Son. D. administers to A. during the Minority of the Son, and out of A's Personal Eftate pays off the first Mortgage and takes an Affignment in Trust for the Son. Decreed the Administrator shall not be allowed, as against the second Mortgagee, what he paid in Discharge of the first Mortgage. 2 Vern. 304. pl. 295. Mich. 1693. Fox v. Crane and Wight.

8. Devise of Real Eftate to Trustees and their Heirs to be sold for the Payment of Debts and Legacies, and gives several Legacies and 200 l. to B. The Will is executed according to the Statute. Then by a Codicil he gives 1000 l. more to B. but the Codicil is neither executed or signed by him. Matter of the Rolls said, this Devise is a total Disposition of the Heir, and the whole is out of him, and the Residue is Money (which was given away). The Codicil is a good Appointment, and the Money raised by Sale of the Real Eftate, being a Fund for Payment of Debts, and the Residue of the Personal Eftate being given also away, the Personal Eftate given as such is freed from the Debts without negative Words. Trin. 6 Geo. Bowersby v. Bowyer.

9. If I charge all my Lands with Payment of my Debts and devise Part to A. and other Part to B. &c. The Creditors cannot be paid out of the Lands till the Matter has certified what the Proportion is, which each Devisee is to contribute; But if the Matter certifies that the Debts will exhaust the whole Real Eftate, then the Creditors may proceed against any one Devisee for the whole. 3 Wms's Rep. 98. Hill. 1730. Harris v. Ingleedew.
10. If one devises all his Personal Estate to his Daughter, and all his Real Estate to Trustees in Trust to pay Debts &c. Remainder to his Daughter in tail, Remainder over, the Personal Estate shall in the first Place be all applied to pay the Debts. 3 Wms's Rep. 324. Trin. 1734. Bills v. Pope.

11. Express Words, or Words tantamount, are requisite to exempt the Personal Estate from Payment of Debts; Per Ed. Chancellor. 3 Wms's Rep. 325. Trin. 1735. Bills v. Chapel.

12. One dies indebted by Bond, and feiles in Fee of divers Land, Part of which he devilled to J. S. and other Part he permits to descend to his Heir; The Lands descended shall in the first Place be liable to pay the Bonds. 3 Wms's Rep. 367. Trin. 1735. Chapel v. Chapel.

indebted by Bond and devises some Lands to J. S. and leaves other Lands to descend to the Heir at Law, not mentioning them in his Will, the Lands descending to the Heir shall be first applied to pay the Bond Debts, is, because the applying the Lands devilled to J. S. to pay the Bond Debts would dispoint the Will, which Equity will not permit if it can be avoided; whereas it no way dispoint the Will to say, that the Lands not mentioned should be in the first Place liable to pay the Debts; but it seems it would be otherwise if the Teffator had devilled the Lands to him to his Heir at Law, for the such Devile were void, (as to the Purpose of making the Heir take by Develop) yet it shrives the Teffator's Intent that the Heir should have the Land, and therefore (I take it) the devilled Lands to J. S. and the other Lands devilled to the Heir at Law, shall in this last Case contribute in Proportion to pay the Bond Debts; Also for the above-mentioned Reason, (I should think) the Land permitted to descend to the Heir at Law, and not mentioned in the Will, shall be applied to pay the Bond Debts before a specifick Legacy, left otherwise the Teffator's Intention should be disappointed. Ibid.

13. Every Mortgage, though no Covenant or Bond to pay the Money, implies a Loan, and every Loan implies a Debt; and therefore an Heir of a Mortgagor shall compel an Application of the Personal Estate to pay off a Mortgage notwithstanding there was no Covenant &c. from the Mortgagor. 3 Wms's Rep. 358. pl. 96. Trin. 1735. King v. King and Ennis.

(Z. b) Equity. In what Cases Executor or Administrator must be made a Party.

1. A Covenant for knisself and his Heirs, that a Jointure-Houf shall remain to the Uses in the Settlement. The Jointreys brings a Bill against the Heir for Performance. The Defendant demurs for that the Executor ought to be a Party. Resolved, that though at Law the Creditor may sue the Heir only, where the Heir is expressly bound, yet as the Personal Estate is the natural Fund to pay all Debts, as the Executor may make it appear that he has performed the Covenants, the Executor must be made a Party in Equity. 3 Wms's Rep. 331. pl. 86. Mich. 1734. Knight v. Knight.

2. In a Bill brought by a Mortgagor against the Heir of a Mortgagor to foreclose, it was objected that the Executor of the Mortgagor ought to be a Party, because it did not appear but that he might have paid the Debt; but by the Matter of the Rolls, (in the Abence of the Lord Chancellor) and Goldsborough the Register, there is no Necessity for making the Executor of the Mortgagor a Part; because the Bill being only to foreclose the Equity, the Plaintiff need only make him a Party that has the Equity, viz. the Heir, and the Course is to; neither is the Plaintiff the Mortgagie any ways bound to intermeddle with the Personal Estate, or to run into an Account thereof, and if the Heir would
Executors.

would have the Benefit of any Payment made by the Mortgagor or his Executor he must prove it and cites Duncomb v. Handley, Patch. 1720. So note the Diversity between the Case above reported of Knight v. Knight and this last, for there the Bill was to recover of Satisfaction in Damages for want of Repairs &c. and the Personal Estate is the natural Fund for that Purpose; but here the Bill was not to recover the Debt but only to bar the Equity of Redemption. 3 Wms's Rep. 333. Mich. 1734. A Note of the Reporter at the End of the Case of Knight v. Knight.

3. In a Bill for an Account of the Personal Estate of J. S. though the Person who has a Right to administer to J. S. be a Party, yet this is not sufficient without Administration actually taken out. 3 Wms's Rep. 349. pl. 92. Hill. 1734. Humphreys v. Humphreys.

(A. C.) Decrees on Executors.

1. TWO Hundred Marks were deliver'd to A. to keep and deliver to his Executors or Administrators after his Death to dispose for his Soul, and A. deliver'd the 200 Marks to B. to keep and re-deliver to A. when he should require, and he who first deliver'd made Executors and died; the Executors or Administrators shall have Subpæna against A. to sue the Bond against B. to have Livery of the Money, because the Bond was made to the Use of the Owner who first deliver'd the 200 Marks. Br. Conscience, pl. 10. cites 4 E. 4. 37.

2. A Bill was against the Defendant as Executor to their Father, who in his Life-time being Guardian in Seque to the Plaintiff in Right of the Plaintiff's Mother, whom he married, for and concerning Profits by him taken of the Lands of the Plaintiff during his Minority; for Fines of Leases, Woodsales and willful Decay of Houses, and doth aver Effects sufficient to be come to their Hands; The Defendant demurred because not Privy nor chargeable by Law, but ordered to answer Cary's Rep. 76. cites 18 & 19 Eliz. Burgh v. Wentworth.

3. A Suit was for certain Rents, Fines and Woodsales receiv'd by the Defendant's Tettator during the Plaintiff's Minority; it appears that if the Plaintiff had made good Proof he was to be relieved, therefore a Commiission is awarded by Contry. Cary's Rep. 162. cites 21 Eliz. Borrow v. A. B.

4. Executors are not in Equity compelled to put in Bond to perform the Will or answer Legacies, unless it appear they have either broken the Trust in them repose by the Tettator, or be divested since his Death, 10r at his Death it seemed he trusted them without Bond. Toth. 150. pl. 1. 32 Eliz. Brown v. Purton.


6. The Husband by Will gave his Lands, Goods &c. after his Debts paid, and 100l. a piece to his five Daughters at their Ages of 20 Years, and all the Rest he gave to his Wife whom he made Executor. The Premises not being sufficient to raise Money to pay the Debts and Legacies at the present Days, the Court conceived that this amounted to a Device to sell, and decreed the Executrix to sell and pay the Plaintiff, but before she should receive any Part of the Purchase-Money she was to give Security to pay the Daughters Portions at their respective Ages, and they when of Age to release to the Purchasor. Chan. Cales 179. cites 16 Car. 1. Hughes v. Collins.

7. Exe-
7. Executor decreed to give *Security for a Legacy* on a Suggestion of After a per-
waffling the Estate. *Chan. Cales 121. Hill. 20 & 21 Car. 2.* Dun-
camban v. Stint.

the Spiritual Court to grant a Probat, a Bill was filed in Chancery against the Executor, who be-
ing a Legatee, the Court upon a Suggestion of Inolvency enjoined him from intermeddling with the
Affets any further than to satisfy the Legacy given to himself, he being in Equity only a Trustee for

8. Executor decreed to pay *Arrears of Rent* where the Lands out of which it issue were not known or distinguished, and which the Tes-
tator's Person was not liable to. *Ch. Cales 121. Hill. 20 & 21 Car. 2.*
Eaton College v. Beauchamp and Riaggs.

9. The Testator made his Will, and J. S. Executor, and afterwards declared his Will to be, That T. should have a Bond of 100l. which he owed to him, and died; J. S. proved the Will, but not this Codicil, and
then T. exhibited his Bill in the Exchequer against J. S. to compel
him to prove the Codicil; pending which the Bond was fixed at Law
and to have the Benefit of this Bequest, and to be relieved in the Pre-
mises; On Proot whereof it was held by the Court, that no Relief lay
for this Legacy before the Codicil was proved in the Ecclesiastical Court,
but that afterwards it was proper for Relief by Reaon of the Legacy.


10. Cf any que Trust of a Personal Estate, may sue in Chancery to have
an Account against the Executor or Administrator, and at the same
Time sue in the Prerogative Court to enforce Executor or Administrator
to bring in an Inventory. *Per Ld. Keeper. 3 Chan. Rep. 72. 4 Dec.
1671.* Digby v. Cornwallis.

11. Bill against Administrator of an Executor for a Legacy given to the
Wife of the Plaintiff, who by Articles was to make a Settlement of
Lands, and Part of her Portion on her which he was ready to do,
25 Car. 2.* Nott v. Thynn.

12. The Will directed the Residue of the Personal Estate after
Debts and Legacies paid, to be put into the Chamber of London for
the Benefit of her Son, but the Executor carried on a Trade in Breuing
with Testator's Stock; Decreed an Account of the Profits of the Trade
as well as the Personal Estate, and for what Money he employ'd of his
own in the Trade to be allowed 6 per Cent. but his Labour and Pains
to be considered when the Matter shall make his Report. *Fin. Rep.
381. Trin. 36 Car. 2* Luntley v. Royden & al.

31 Car. 2.* Powell v. Stakes.

14. Executor decreed not to lend Money hereafter without leave of the
Court, and such Monies as he hath lent he shall discover the Securities to
the Plaintiff; and if he likes them, and to declare his Acceptance,
then the Plaintiff shall have the future Interest of the Money lent, else
not. *2 Chan. Cales 21. Hill. 31 & 32 Car. 2.* Grovemir v. Cart-
wright.

15. If an Executor hath Orphan's or other Men's Money in his
Hands and hath Power to lend it, it he lends it and takes Security in
his own Name which fails, he shall answer the Debt of his own Money,
unles that he indorse the Bond, or do some other Thing at the Time
of lending the Money or taking the Security which may doubtles.
declare the Truth &c. *2 Chan. Cales 57. Trin. 33 Car. 2.* in Case of
Dashwood v. Elwell.

16. An
16. An Executor pleaded fully administered to an Action brought against him; Whereupon the Plaintiff preferred his Bill in this Court for discovery of Assets; and whilst the Suit was depending in this Court the Executor confessed Judgment to another Person; this Court caused him to pay the whole Debt, for that the Party should not suffer by an Act that was done to defraud him whilst he was proceeding in this Court. 2 Freem. Rep. 93. pl. 103. Pauch. 1685. in Canc. Cited by the Solicitor General as the Case of Patrick v. Dee.

17. Where the Testator's Estate was great, and the Debtors poor, but propoe to pay as far as they are able, decreed the Executors to be at Liberty to compound any Debts owing to the said Estate if they should think fit. 2 Chan. Rep. 395. 2 Jac. 2. Griffith v. Jones.

18. The Testator devised a Legacy to his Child an Infant, payable at the Age of 23, and made his Wife Executrix; she marries a second Husband and dies, and he takes Administration De Bonis usu with the Will annexed, his Wife being residuary Legatee; Bill sugetts his Infolvency, and prays that he might give Security to pay the Legacy when payable, and decreed accordingly. 2 Vern. 249. Mich. 1691. Rous v. Noble.

19. An Administrator writes a Letter to his Intestate's Creditors, viz.

I promised to pay you what Money was due to you before I went out of Town, but it will be a Kindness to me if you will stay till next Winter; but if not, I will endeavour to pay you. Per Cur. Promise to pay on Forbearance before the Statute of Frauds was accounted a good Consideration to charge the Executor or Administrator De Bonis Propris, and since a Writing is sufficient after a Parol Promise, and by this Letter it appears that the Administrator had made a Promise, and confirmed it by this Letter; so decreed that the Administrator should be bound by the Promise, and should answer Debts and Costs out of his own Estate, but have Satisfaction out of Assets if any. Hill. 1715. Frederick v. Wynne.

20. Executor having received of a Debtor of Testator more Money by Mistake than was really due, and paid it away to Creditors of his Testator he must refund, and may sue the Creditors to whom he by Mistake had paid the same, to refund, but then it seems the Debtor ought not to be Dilatory, and thereby draw the Executor into a Snare. Wms's Rep. 355. Trin. 1717. Fooley v. Rais.

21. Executor brings a very frivolous Bill, which was discomfited with Costs out of Assets; ordered to be examined on Interrogatories if he denies Assets; And so it was done in another Cause the next Day. Sel. Caues in Chan. in Ld. King's Time. 62. Mich. 12 Geo. Cole v. Rumney.

22. A Father left a great Personal Estate to two Infant Children and made his Wife Executrix; A Bill was brought in the Infants Names by a Relation as Prochein Amy, to call the Mother to an Account. On Affidavits of several other Relations, that this Suit in the Infant's Names was out of Pique, and not for the Infant's Good, the Court referred it to a Master who reporting the Matter to be so, the Suit was stayed. 3 Wms's 140. Pauch. 1732. Da-Cofta v. Da-Cofta.

23. Where the Will does not require that the Executor shall give Security, it is not usual for the Court to insist on it until some Misbehaviour; But where one by Will charged the Refidue of his Personal Estate with 40 l. per Annum to his Wife to be paid Quarterly, the Executor was ordered to bring before the Master sufficient in Bonds and Securities to be set apart to secure this Annuity. 3 Wms's Rep. 335. Mich. 1734. Slanning v. Style.
(B. c) Favour'd and indemnified, or charged.

In what Cases more or less in Equity than elsewhere.

1. If Executor sells Goods for a small Matter, and upon Debt brought against him by a Creditor he pleads fully admistrated, the Incurrence of the Value may be given in Evidence. Jenk. 189. pl. 89, cites 20 H. 7. Kelw. 64.

2. If there are several Creditors and the Executor delivered all the Goods to one Creditor for his Debt, another Creditor may aver that the Goods were worth more. Jenk. 189. pl. 89.

3. Though Executors shall not find Bail in ordinary Cases, yet in special Cases they shall, as it it appear'd that they have wasted the Goods &c. Lev. 59. Trin. 13 Car. 2. B. R. Anon.


5. Legacies payable within one Year after Teller's Death, which being past and the Legacies due, but the Legates Infants the Executor retires Payment without being indemnified by the Court, decreed the Matter to put out the Money at Interest, and the Executor complying with the Decree to be indemnified against the Infants and all others. Fin. Rep. 94. Hill. 25 Car. 2. Dyke v. Dyke.

6. Termor for Years dies Intestate; Administration is granted to B. who dies and makes J. S. Executor. C. is Administrator de Bonis non, and brings Bill against J. S. for the original Leaf and decreed accordingly. Fin. Rep. 39. Hill. 25 Car. 2. Prentidge v. Prentidge.

7. A. Articles to pay 6000 l. to C. who acknowledged the Receipt of the Whole by 4000 l. being paid in Money and Lands convey'd for the Rest due; But those Lands being settled on the Wife for her Jointure, and the being made Executrix, C. exhibited a Bill against her for Performance of the Articles; but decreed that the said Acknowledgment is an Evidence of the Performance of the Articles since C. made no further Demand for several Years, and it is unreasonable to put an Executor to prove a precise Payment after so many Years. Fin. Rep. 246. Hill. 28 Car. 2. D. of Newcastle v. Clayton.

8. Bill against an Executor, to exhibit a true Inventory of the Teller's personal Estate, and before he goes beyond Sea to give Security to come to Account for the same; Defendant demurred, for that this Bill seeks to make an Injunction of this Court to be in a Nature of a No exact Regnum, and to make an Executor give Security, when at Common Law he is not to be held to Bail; Demurrer allowed. Fin. R. 257. Trin. Car. 2. Bridge v. Hindall.

9. 29 Car. 2. cap. 3. S. 4. No Action lies to charge an Executor on a special Promise to answer Damages out of his own Estate, unless there be a Note in Writing signed by him or by his Order,

10. A. by Articles agreed to pay J. S. 2000 l. for a Purchase of Land in Barbados, with Covenants to enter into seven Bonds for the Payment of the Money, each Bond for 300 l. A. enjoyed the Plantation, but no Conveyance was made; J. S. died, and left B and C. his Executors in Trust for his Son an Infant; 600 l. was paid; B delivers up five Bonds due, and takes Bonds in his own and his Co-Executor's Names, and executeth himself because A. had received a Commission to
go to Surinam &c. and so to mend the Security he took the new Bonds, but, by this, 500l. Interest was left to the Infant. Ld. Chancellor decreed the Payment to be according to the Times of Payment in the first Article, and A. and B. to be charged therewith notwithstanding that B. on taking the new Bonds had released A. 2 Chan. Cafes 235.

Mich. 29 Car. 2  Hilliard v. George &c.

11. In the Cafe of Lyndfey and Collv. it was admitted that an Administrator or Executor in some Cafes, though he committed a Deviation in Law might be relieved in Equity; as an Administrator in London before the Fire, having Leaves of Houses &c. and a great Surplus of Affaits above and beyond what would pay Debts and Legacies, paid all as they were demanded; and after the Fire coming destroyed the Houses, which was the greatest Part of his Affaits, and then a Debt upon a Bond started up, and the Administrator was relieved against this. 2 Freem. Rep. 1 pl. 1. Paefh. 1676. Croft's Executors v. Lyndfey.

12. Though the Court of Chancery does sometimes compel Executors to give Security for Legacies, yet that must be where they are clear and beyond Disputes, and not when the Right is disputable or depends on a Contingency; Per Lord Chancellor. 2 Freem. Rep. 41. Mich. 1678. in Case of Dingly v. Dingly.

2 Freem. Rep. 62 pl. 29. &c. the Demurrer was overruled.

13. T. gave three Children 200l. to be paid within a Year after his Death; the Executor brought his Bill, and set forth, that neither of the Children was ten Years old, and that the Teller died about a Year since, and that the Plaintiff was willing to pay the 200l. as he might do it later, and be well discharged and indemnified; and complained that the Father sued him in the Conflitory Court, to force him to pay the 200l. to him, without giving the Plaintiff any Security against the Children, their Father being a Butcher; and the Plaintiff intimated he could not be well discharged but by a Decree in this Court, where Care would be taken to secure the Money for the Children, and for the Plaintiff's Indemnity and Discharge. The Defendant demurred, for that this Matter was properly determinable in the Conflitory Court, where the Matter depended, it being for a Legacy. But the Ld. Chancellor declared, The Suit was proper here; and that if the Matter had proceeded to a Sentence in the Ecclesiastical Court, it was proper to come here for the Executor's Indemnity, and that here Legatees were to give Security Fund, but not there; and this Court would see the Money put out for the Children, and so overruled the Demurrer. Vern. 26, 27 pl. 24. Hill. 23 & 24 Car. 2. Horrell v. Waldron & al.

14. A. bequeathed 500l. to B. when should be Twenty-four; Executor pays 250l. at Twenty-one to put him out into the World, and gives Bond to pay the Residue at a Day certain, at which Time B. would be Twenty-four; B. dies before Twenty-four. Whether the 250l. received shall be repaid and the Bond delivered up? Jeffries C. ordered the Plea to stand for an Answer, and decreed it was fit to be heard on the Merits. Mich. 1617. 2 Vern. R. 31. Luke v. Alderne.

15. Executor whose Teller was greatly indebted being desirous to apply the Affaits as far as they would go, and that his Payment might not be afterwards questioned, brought a Bill against all the Creditors, to the Intent they might if they would content each other's Debts, and dispute who ought to be preferred in Payment; On Demurrer held a proper Bill, and a fair Way for an Executor to take. 2 Vern. 37. Hill. 1688. Buccle v. Atleo.

16. An Executor who at the Time of taking on him the Executorship had a good Prospect of Advantage after Debts and Legacies paid, entered into a Recognizance for Payment of them. The Teller's Estate which consisted of Houses in London, was afterwards destroyed by the Fire of London; the Court by Reason of the casual Loss would not
not suffer that Recognizance to run upon the Executor, nor Advantage to be taken thereof any further than he had Afflets in his Hands. 2 Vern. 92. S. C. cited.

17. Debt against Executor on Bond for 700l. he pleaded Ne unques Executor. It appears on Evidence that a Chimney Back, or another Matter of small Value came to his Hands, and thereupon Verdict was given against him; and the Judges came into Court and informed the Lord Keeper Bacon that this was the Paé, and the Party was relieved in Equity. Cited per Hutchins Commissioner, in Case of Robinson v. Bell, Trin. 1690. 2 Vern. R. 147.

18. Action of Debt brought against a Widow of an Alehouse Keeper who died intestate, the pleaded Ne unques Executor; and all the Proof against her, was that she had took Money for some few Pots of Ale after her Husband's Death, and on Hearing she was relieved. Trin. 1690. 2 Vern. 148. In Case of Robinson v. Bell. Hutchins Commissioner, cites it as the Case of Cryer v. Goodhand in Ld. Nottingham's Time.

19. Executor sent a Letter to a Creditor of the Testator's, owning a Mortgage to Tefator for 300l. The Creditor afterwards brought Debt on Bond against the Executor, who gave Directions to his Attorney to plead specially, but he pleaded generally Plena Administravit; The Executor's Letter owning the Mortgage for 300l. was produced, on which Verdict and Judgment pro Quo. The Executor brings his Bill, and proves that there were three prior Mortgages on the same Estate, which before were unknown to him, so that the Court relieved the Plaintiff, and the Proceedings at Law were stayed by Injunction; Per Commisssioners. 2 Vern. R. 146. pl. 143. Trin. 1690. Robinson v. Bell.

20. A intruded J. S. to dispose of Monies; A. dies, the whole not disposed of; J. S. at the Request of A's Executor lends it out on a defective Security; the Executor would have been intitled to one Share of the Money, and M. to another Share; by the Custom of York the Executor is not bound to make it good in this Case, but against a Creditor he should; so it is of Goods sold bona fide to one that becomes Insolvent before all the Money paid. Ch. Prec. 49. pl. 48. Mich. 1692. Gibbs v. Herring.

21. An Executor or Administrator as such, shall not avoid a fraudulent Bill of Sale but when he is a principal Creditor; Per Holt Ch. J. who said that there is no Doubt of this, but that when he is a principal Creditor it may be doubtful, but however that will be considered in Equity but not here. Comb. 348. Mich. 7 W. 3. B. R. Orlebar v. Harwar.

22. Bill by Administrator for Relief after a special Plena Administravit pleaded and Verdict and Judgment, pretending that his Attorney without Direction pleaded that the Defendant (now the Plaintiff) had no Notice of the Original till the 12th of March, and had then fully administered.Issue that Defendant had Notice before the 12th, viz. on the 6th of March, whereas he had in Truth fully administered before the 6th of March, and in Truth before the Original purchased, so that by the false Plea by the Attorney the Right was never try'd. Matter of Rolls dismissed the Bill. Ld. Somers affirmed the Dismissal. Mich. 1695. 2 Vern. R. 325. Stephenson v. Wilson.

23. In Trover by Executor for Goods taken away he recovers left in Demage than the Value of the Goods, and that happens not by his Fault, he shall answer for no more than he recovers; As if the Goods are perishable Goods, and before any Default in him to preserve them, or sell them at due Value, they are impaired, he shall not answer for the first Value, but shall give the Matter in Evidence to discharge himself; But
Executors.

But if one takes Goods out of his Possession he must sue the Taker to have Opportunity of Discharging himself of answering more in Affairs than he recovers; So if Executor omits to sell the Goods at good Price and they are taken from him, there the Value of the Goods shall be Affairs in his Hands, and not what he recovers, for there was a Default in him. 6 Mod. 181. Trin. 3 Ann. B. R. in Case of Jenkins v. Plume.

25. Equity will not compel an Executor to give Security without an Affidavit of Misbehaviour or Insolvency. MS. Tab. February 20th, 1727. Dillon v. Shae.

26. But in this Case a Receiver was appointed, the Executors having married a Person in needy Circumstances. MS. Tab. S. C.

27. Where Bond-Creditors have satisfied themselves out of the Personal Estate, and there is not enough to satisfy the Creditors upon simple Contract, the Justice of a Court of Equity is such, that upon a Bill exhibited of this Matter by the inferior Creditors, they will relieve them out of the Real Estate so far as the superior Creditors might have had that Relief; Per Ld. Chancellor. But however he said the Payment of it itself would be good to the Bond-Creditors, and the Executor would be indemnified in making it; Barnard. Rep. in B. R. 207. Mich. 3 Geo. 2. Cromwell v. Griffith.

28. Though generally speaking an Executor or Trustee compounding or releasing a Debt must answer for the same, yet if this appears to have been for the Benefit of the Trust Estate it is an Excuse. 3 Wms's. Rep. 381. Mich. 1735. Blue v. Marshall & Ux'.


(C. c) Allowances to Executors.

1. Executors first shall have allowance of Funeral Expenses necessary, before all other Things. Br. Executors, pl. 172. cites Dr. and Stud. lib. 2. fo. 76. cap. 10.

2. Executors are to be allowed all Charges they are put unto by the Will except such as arise by their own Default. Cro. E. 347. pl. 19. Mich. 36 & 37 Eliz. B. R. in Case of Pannell v. Penn.

3. As to proving the Will a greater Disbursement (except for Riding-Charges or by Reason of Opposition by a Caveat &c.) will not be allowable than is prescribed by the Stat. 21 H. 8. 5. which limits the Fees. Went. Off. Ex. 130.

4. Legacies paid by Colour of a Will which is after found to be revoked were allowed. Chan. Cafes. 126. Pach. 21 Car. Hele v. Stowell.


7. In Strictness no Funeral Expenses are allowable against a Creditor except for the Coffin, ringing the Bell, Parson, Clerk, and Bearer's Fees; But not for the Pall and Ornaments; Per Holt. 1 Salk. 296. Trin. 5 W. & M. in B. R. Shelley's Cafe.

101. is enough to be allowed for the Funeral of one in Debt; Per Holt; Baron Powel in his Circuit would allow but 11s. 6d. as all the necessary Charges. Cumb. 534. Trin. 7 W 5. B. R. Anon.

8. Bond-
(D. c) Allowances to be made by Executors.

What. And in what Cases.

Executive calls in and receives a Debt well secured. He shall not pay Interest though he lends it out on Profit, but he shall make good the Principal. 2 Chan. Cases 21. Hill; 31 & 32 Car. 2. Grosvenor v. Cartwright.

much Debate that he should not answer the Interest received by him. — But Lt. Keeper North decreed e contra. 2 Chan. Cases 152. Mich; 55 Car. 2. Ratchiff v. Greaves. —— Vern. 196. pl. 193. S. C. decreed that he should answer the Interest received, though it was urged that the constant Practice of the Court had been otherwise for 20 Years past and more, and that there were above 40 Precedents in the Case; and the Cases of Finchwood v. Baldwin, and Gardner v. Cartwright were cited, in which last Case it was fully in Proof that the Executive had received Interest, and therefore it was decreed that he should account for such Interest as he had received; But this Decree was afterwards overruled upon an Appeal to the House of Lords. But notwithstanding these Precedents it was decreed that upon

Executor or Trustee shall account for what Interest he makes, though he is not empowered or directed to place it out at Interest; Per Lt. K. 2 Vern. 548. pl. 408. Patch 17:6 Lee v. Lee.

If an Executor or Trustee being a Person of Substance and places it out in the Funds or other Security, and gains considerably, he shall keep the whole Profit because of the Hazard he runs; But otherwise of an insolvent Executor or Trustee because he runs a Hazard; Per Lt. Chancellor. Ch. Prec. 505. Mich; 17:8. Bronfied v. Witherley.

2. If a Trustee or Executor compounds Debts or Mortgages, and buys them in for 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 intituled to the Surplus; But if one acts for himself, and being not in the Circumstances of a Trustee or Executor buys in a Mortgage for less than is due, or for less than it is worth, he shall be allowed all that is due

upon
Executors.

upon a Mortgage, for he stands in the Place of him that assigned, viz. the Mortgagee, who might have given it to him gratis, and what is due must be the Measure of our Allowance, and not what he gave, for that might have been more than it is worth as well as less, and since he runs the Hazard if Loss happens, he ought to have the Benefit in Cafe it turns to Advantage; So said, and admitted per Cowper. Ld. Chancellor. 1 Salk. 155. pl. 4. Mich. 6 Ann. in Canc. Anon.

3. Where an Executor puts out Money without the Indemnity of a Decree upon a real Security, and such as there was no Ground to suspect at the Time, Ld. Harcourt declared it as his Opinion, (though he said it was not settled) that the Executor under such Circumstances was not liable for the Loss, and so should account for the Interest. Wms's Rep. 141. pl. 37. Patch. 1711. in the Cafe of Brown v. Litton.

(E. c) Where Executors or Administrators are included though not named.

1. WHERE a Man binds himself without mentioning his Executor, yet the Executor shall render the Debt. Br. Obligation, pl. 15. cites 45 E. 3. 17.


3. One makes a Leafe for a Year, and so from Year to Year, rendering therefore, so long as the Lessee should occupy it, 10s. Rent. Lessee after the first Year dies. His Administrator enters and occupies it another Year; And adjudged that he shall be charged for the Rent though the Words were, So long as Lessee should occupy; Arg. Lat. 255. cites 5 E. 4. 4.


6. There is a Difference between an Obligation in which there is no Word of Executor, (because it is a Duty) and a Covenant which is executor and founds only to Damage and Wrong, which (as it seems) dies with the Person &c. Per Baldwin J. D. 14. a. pl. 69. Trin. 28 H. 8. Anon.

7. A. made a Leafe reserving his Dwelling. If he dies his Executor shall not have it; But had it had the Words (During the Term) it had been otherwife; Arg. Lat. 256. 256. cites it as laid per Audley. 29 H. 8. 19.

8. A. leased to B. for 40 Years, and covenanted that B. should take convenient Fireboot &c. in a Wood not Parcel of the Land leased from Time to Time, but no Time mentioned in certain. The Executors of B. shall take it as Affignees. Mo. 6. pl. 23. Patch. 3 E. 6. Anon.

9. A Man covenants to pay all Quit-Rents; if he does not pay them, and dies, it seem'd to several Judges that the Executor is not obliged to pay them; For that it is only a Personal Covenant. But the Reporter says tamen Quere. D. 114. a pl 60. Patch. 2 & 3 P. & M. Ingery v. Hyde.

10. A.
Executors.

10. A Custom is to be taken strictly, and therefore a Custom to bind a Man shall not extend to his Executors. Le. 2, pl. 3. Hill. 25 Eliz. B. R. Wade v. Bembo.


12. It was ordered that the Defendant should pay Money unto one M. who died before Payment, yet he shall pay it to his Executors according to the former Order. Toth. 235. cites 11 & 12 Eliz. Maclain v. Shelly.

13. A. was bound to stand to the Award of two Arbitrators who awarded Payment to a Stranger or his Assigns before such a Day. The Stranger dies before such a Day, and B. takes Letters of Administration. It was the Opinion of the whole Court that the Money should be paid to the Administrator, for he is Assignee; And by Gawdy J. If the Word Assignee had been omitted, yet the Payment ought to be made to the Administrator, quod Coke affirmavit. Le. 316. pl. 445. Patch. 30 Eliz. B. R. Anon.


15. Bond on Condition to pay 10 l. to one whom the Obligee should name by his last Will. The Executor shall not take if no one is named to take expressly. Godb. 192. pl. 274. Trin. 10 Jac. C. B. Meade's Cafe.

Obligation was discharged for want of naming an Assignee.———Brownl. 77. C.———Hab. 9. pl. 29. Peake v. Mead S. C. held accordingly.

16. Bond to pay 10 l. to the Obligee or his Assigns; the Executor shall have it because it was a Duty in the Obligee himself. But if it was to pay to the Assignee of the Obligee, and his Assignee makes an Executor and dies, the Executor shall not have the 10 l. Per Coke Ch. J. Godb. 192. pl. 274. Trin. 10 Jac. C. B. in Mead's Cafe.

17. A. is bound to build a House for B. before such a Time. A dies S. P. and before the Time; his Executors are bound to perform it; Per Coke Ch. J. 3 Bullit. 30. Patch. 13 Jac.

Assumpsit to pay Debts and when it is to do a Collateral Act; Per in such Case if it be broken in Tefeator's Life-time so that it cannot be performed by the Executor, and Damages only are to be recovered, there Moritur cum Persone if the Executor be not named in the Promise; and so in a Covenant if broken in Tefeator's Life-time, he shall not be charged if not named. Roll Rep. 266. pl. 19. Mich. 13 Jac. B. R. in Cafe of Saunders v. Efterby.

So of a Covenant to Repair within six Years; But if it had been to repair during his Life it had been otherwise. Arg 4 Le. 171.

18. Executor doth so represent the Person of his Tefeator, and is so included in him as that every Bond or Covenant made by Tefeator for Payment of Money &c. extends to the Executor though not named, though otherwise it is of the Heir. Went. Of. Ex. 117.

19. A.
19. A. was bound to pay B. 10 l. within a Month after Request to him, and he died before Request. It is not sufficient to make Request to the Executor. Went. Off. Ex. 101. cites it as fo paid per Manwood.


21. Though in Penal Matters the Executor is not all one with the Testator; Yet in Points Beneficial the Testator includes him in some Cafes, as where an Abbot granted to his Leafe to take Elowers in Alieno Solo, it was held that his Executor, though not named, should enjoy during the Term as well as himself should have done, Went. Off. Ex. 102. 103.

22. So where Statute 23 H. 8. gives Costs to a Defendant against a Plaintiff suing for a Wrong or Breach of Promise &c. done to the Plaintiff, against whom it passeth by Verdite or Nonuit; it has been resolved that Executor in such Cafe, suing for a Wrong &c. to his Testator should not pay Costs; Because he is another Person than the Testator, and this is the common Experience. Went. Off. Ex. 103.

23. Condition to pay 10 l. to Obligee at a Day includes his Executor.

Agreed Arg. Hill. 3 Car. Palm. 315.

24. A. devised 20 l. to B. within four Years, within which Time J. S. dies; Yet the Executor shall have it. Palm. 514. Arg.

25. Mortgage Money limited to paid to Mortgagee before Michaelmas, before which Mortgagee dies, yet the Money shall be paid to his Executor; Arg. Palm. 514. Hill. 3 Car. B. R. in Cafe of Wood v. Bates.

26. Where a Condition is to be performed the Court seem'd to be of Opinion that Administror is included, and that it shall be perform'd to Administrator. Het. 115. Trin. 4 Car. C. B. Maningham's Cafe.


28. In a Square Impedit, the Defendant pleaded, that the Patron granted the next Presentation to B. who died, and made his Executor, who presented the Defendant; Iluie was taken upon Non Concellit, and the Jury found that the Patron granted the next Presentation to B. during his Life, and that he died before the Church became void; adjudged that this was not an absolute Grant of the next Avoidance, but is limited unto him to present to the Advowson if it becomes void during his Life, and not that otherwise it should go to his Executors. Cro. Car. 505. 506. pl. 8. Trin. 14 Car. B. R. Mann v. Bishop of Britol and Hide.


30. A. conveyed Lands to B. and his Heirs, and consuited with B. his Heirs and Assigns for quiet Enjoyment; B. was disturbed in his Life-time, and made J. S. his Executor and died. Agreed by all the Justices that though the Covenant was only with B. his Heirs and Assigns, and that the Estate was an Estate of Inheritance, yet the Breach
Executors.


31. Testator for himself and his Executors covenanted to pay B. so much as his Proportion should amount to so as B. gave him. Notice in Writing and dies. “Twas held, that because the Covenant runs in Interest and Charge, and so the Executor is bound to pay, Notice must be given to him. 2 Mod. 269. Mich. 29 Car. 2. C. B. Harwood and Binks v. Hilliard.

32. Interest in an Ideot granted to A. by the King, Quamdiu the Ideot shall continue so, it will go to the Executors of the Grantor; Arg. Vern. R. 19. Mich. 1681 in Cate of Prodgers v. Frasier.

33. If on a Submition to Arbitrators by A. and B. they award 20 l. to A. and that A. shall release all Demands &c. to B. and then A. dies before the Release made or the Money paid, adjudged that A’s Executor not named, shall have the 20 l. (for by the Award a Duty is created) and ought to release all Demands which A. had against B. 2 Vent. 249. Mich. 2 W. & M. in C. B. Dawney v. Vesey.

34. A. is bound to B. that he will not sue J. & S. A’s Executor may sue J. & S. and it shall not be any Forfeiture of the Bond; for this Condition is a collateral Thing, and shall be construed according to the Words which extend to the Person only, and not to the Heir for Executor; Arg. Show. 331, 332. Mich. 3 W. & M. in Cafe of Carivil v. Edwards, cites 27 H. 8. 16. where it was agreed by Fitzherbert, and denied by none in the Prior of St. John of Jerufalem’s Cafe.

Clauses the Executor is bound; Arg. Show. 332. Mich. 3 W. & M.

35. Condition to make A. a Lease for Life by such a Day or pay his 100 l. A. died before the Day. Treby Ch. J. said it was adjudged that A’s Executor should have the 100 l. 1 Salk. 170. pl. 2. Mich. 9 W. 3. C. B. Anon.

(F. c) Where the Word Executors includes Administrators.

1. A Rent upon Condition to the Executors goes to the Administrators; Arg. Hett. 115. cites 46 E. 3. 18.

2. If a Man limits a Thing to be done to his Executors it may be done to his Administrators; Arg. Hett. 115. cites 5 H. 7. 12. 26 H. 8. 7.

3. A. delivered 20 l. to B. ad medium &c. and B. gives a Receipt for so much Money, but it has no Word of Promise of Payment of the said Sum. B. dies intestate. A. may have Debt upon this Deed against the Administrator of B. Adjudged and affirmed in Error. Jenk. 195. pl. 2. cites D. 29.

4. Administrators shall not take a Thing limited in Purchase to an Executor. As he shall not enter for Condition broken, nor have Rent nor Benefit of an Exception appointed to the Executor. Mo. 669. pl. 911. Mich. 44 & 45 Eliz. Sparke v. Sparke.
Explees.

5. Bond to pay to his Executors; If there is no Executor it shall be paid to the Administrator. Litt. Rep. 158. Trin. 4 Car. Manning-
ton's Case.


For more of Executors in General, See Devise, Extinction, Inventory, and other Proper Titles.

Explees.

(A) Alleged. In what Cases or Actions they must be.

1. In Formedon the Explees ought to be alleged, for otherwise the Count is not good, and yet when they are alleged they are not traversable; Per Martin. Br. Explees, pl. 6. cites 9 H. 6. 61.

2. In Writ of Entry in Nature of Assise the Demandant ought to allege Explees in his Count; For this Action is a Precipe quod reddat. Br. Explees, pl. 7. cites 21 H. 6. 18.

3. In Cessavit, nor in Writ of Escheat, the Demandant shall not allege Explees; The Reason seems to be, inasmuch as they claim by his Seigniory, and not by any Seisin in their Ancestor in the Land; Where there is no Seisin in him, nor in his Ancestor in the Land, there he cannot allege Explees of the Profits of the Land, for he has only the Seigniory. Br Explees, pl. 5. cites 21 H. 6. 22.


5. The fame of Woods which may be a divided Inheritance from the Soil. Ibid.

6. When a Fee-Simple is demanded, there Explees ought to be alleged in the Donor and also in the Donee; But when an Estate Tail only is demanded, there it is sufficient to allege Explees in the Donee only. 2 Lutw. 973. Hill. 3 W. & M. by Lutwich in his Argument intended in Case of Gunlock v. Petre, cites 8 E. 3. 19. pl. 3. 27 E. 3. 84. 9 H. 6. 53. and F. N. B. 220. (C) and (D) is express, that in Formedon in Reverter Explees in the Donor and Donee ought to be alleged in the Count, and cites Fitzh. Tit. Formedon 31. as to a Remainder in Fee, and there it was ruled, that a Count for this Defect was ill; but it was amended. And in 50 E. 3. pl. 3. the Difference between a Demand of a Fee-Tail and of a Fee-Simple is taken and revolved by the Court, and with these Authorities the following Precedents agree, viz. Raft. Tit. Formedon in Reverter, three Precedents. Co. Entries
Extinguishment.

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(B) Alleged. How. And in whom.

1. Explees was alleged in medietat' surgitis unde patens sejitus in Dominio suo ut de sejode, and did not say ut de sejode & jure, and well; Quod Nota. Br. Explees, pl. 9. cites 1 E. 3.

2. The Demandants in quod et deforceat alleged Explees in their Ancestor's Donees in Tail, and in themselves also, and awarded good; For it is only Surplusage. Br. Explees, pl. 2. cites 46 E. 3. 21. It suffices to allege Explees in the Donor; Per Cur. but in the Tenant for Life to prove the Gift executed. Br. Explees, pl. 1. cites 9 H. 6. 53. 54.

3. Formedon in Remainder; The Demandant need not allege Explees in the Donor; Per Cur. but in the Tenant for Life to prove the Gift executed. Br. Explees, pl. 2. cites 46 E. 3. 21.

the Donee in Tail, because he demands Fee-Tail. Ibid. pl. 3. cites 50 E. 3. 1. 2.

4. But in Formedon in the Reverter he shall allege Explees in the S. P. per Donor and in the Donee. Ibid.

5. And per Martin in Formedon in Defender upon a Lease for Life, In Formedon in the Remainder to his Ancestor in Tail, he need not make Mention of the Tenant for Life. Ibid.

For more of Explees in General, See other Proper Titles.

Extinguishment.

(A) What shall be extinguished by Conjunction of Estates.

1. If the Conunee of a Statute has the Land of the Conunee in Ex- The Executive, and after it is extended upon an Eelegit sued against the giit of the
Extinguishmmt.

Conseff, and the Tenant by Elegit grants his Estalre to the first Co-
mumor who is Tenant of the Frankenment, this shall not ex-
trajnuish the Extent upon the Elegit, (for there it is in Nature of a
Revolution in the Conseff, for it is to be intended that it is not
extended for all the Years for which the Conseff give his Ex-
tente). 31 L It. 6.

2. If a Copyholder of a Manor has had Time out of Mind of a
Way over the Land of another Copyholder, yet he purchases the Inher-
tance of his Copyhold, by which the Copyhold is extinct, yet the Way is
not extinct by it. [Salk. 40 Eliz. B. R. between Lefis and Wil-
hamston.

3. If Tenant for Life and a Stranger purchase the Revolution, this
extinguishes the Estalre for Life for one Seiety, and leaves the

4. So if one Joint-Tenant for Life purchases the Revolution in Fee, 
this extinguishes the Estalre for Life for a Seiety, and leaves the
Jointure. 2 Rep. 60. b. Wifet’s Cave Revolved. Contra D. 28

5. So in the said Case if the Fee descends to one of the Lefseers for 
Life; this extinguishes the one Seiety, and leaves the Jointure.
2 Rep. 60. b. Wifet’s Cave Revolved.

6. If a Rent be granted to a Tenant of the Land and a Stranger
in Fee, this is extinct for a Seiety, because he has as high Estalre
in the one as in the other, and to the Jointure severed. Pl. C.
410. Bracbridge’s Cave.

7. If Leeffe for Life grants his Estalre to Leeffor and a Stranger,
This is extinct for a Seiety, and the Jointure severed. 2 Rep. 61.
Wifet’s Cave.

* Br. Ex-
iteguifh-
ment, pl. 58,
cites S. C.
thus viz.

Per Hufey Ch. J. If Lord and Tenant are, and the Tenant enfeoff the Lord and another, who make a Peculment over, the Seigniory is not revived for the Seiety; for if the other dies, the second Feoffee may vouch the Lord for the whole, supposing that he enfeoffed him of the whole; and if they were dif.efed and the other dies, the lord shall have Affif of the whole supposing that he
was defeifed of the whole. Divers con. For nothing fulls but the Moiety, and the one can
neither give nor forfeit but the Moiety, and by Partition had between them, the Seigniory is revived
for the one Seiety.

If the Lord and A. B. purchase the Tenancy in Fee, and A. B. survives, the Heir of the Lord
shall have the Moiety of the seigniory; for the Father shall not have as durable an Estalre in the one
as he had in the other. Wich contra. For all is extinct there, by Reason that the Father once had
as high an Estalre in the Land per my to per tout as he had in the Seigniory. Br. Extinguishment,
pl. 31. cites 54 Aff. 15.

9. If Leeffe for Years as Executor purchases the Revolution, this
extinguishes the Lealre for Years, though he has in utter Droit;
but it shall be Affifs. Extinguishment Brook 54.

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Contra, that
the Lealre is not extinct, especially as to be Affifs in his Hands as Executor, and if it should be ex-
ti-
Extinguishment.

If thefe for Years the Reversion for Life to A. a Feme Covert 2 Roll, Rep. are, and the Leaffe grants his Effe to the Baron, and after the Feme dies, this Term is not extint, because the Baron had the Estates in Seeral^s; for the Frank-Tenement was in the Wife, and the Baron only seized in her Right. Mitch. 22 Jac. B. R. adjudged upon a special Verdict between Winch and Winchmore.

Patch. 9 Jac. B. R. Platt v Slep, where the Baron having a Term in his own Right and the Inheritance descended to the Wife (as he had a Freehold in her Right) three Judges, contra Williams, held that the Term was not drown'd, but that the Husband might well assign it over. Built. 118 S. C. adjudged accordingly. — But Ibid. Crooke J. said if the Husband after this Decent had had Hije by his Wife to as thereby he was intitled to be Tenant by the Curtesy, and to have it in his own Right, it would have much intorduced the Case; but there being no Hije, no Opinion was given as to this Point.

If a Feme Leaffe for Years takes the Leffe to Baron, yet this S. C. cited does not extinguish the Term. Pl. E. Curia. 418. b. Bracebridge’s Cafe.

Cro. J 275.—Co Litt. 538. b. S. P. The Term is not drowned but he is presfessed of the Term in her Right during the Coverture.

If Leaffe for Years grants his Term to the Feme of Lefflor, yet this does not extinguish the Term. Curia, Pl. E. 418. b. 

He who has a Statute Merchant delivered to him as Bailee upon Condition &c. and makes the Confeee his Executor and dies, the Confee may have the Livery upon Condition against him as Executor, and contra against him as Party. Br. Extinguishment, pl. 57. cites 43 E. 3. 27, 28.

If Tenant by Statute Merchant &c. brings Affid, and pending the Writ the Fee Simple defends to him, this shall abate the Writ; for the defending of the greater Estate extinguishes the Leffe. Br. Extinguishment, pl. 56. cites 32 H. 6. 59.

If a Man has a Warren by Prescription, and afterwards purchases the Land to him and to another; yet the Warren remains and is not extinft as a Rent or Common should be; note the Diverlity. Br. Warren, pl. 3. cites 35 H. 6. 55.

If there be Ld. Maje and Tenant, and the Ld. Paramount purchases the Tenancy in Fee, the Service of the Meñalty is extinft. Litt. S. 231.

Note, by the Justices, that if Lord and Tenant are, and the Tenant enjefis the Lord and j. N. of the Tenements, and makes Livery to J. N. not knowing of the Seigniory, yet the Lord may distrain for the Services if he does not occupy the Land nor agree to the Feoffment; and it seems that Avowry in Court of Record is a Difclaimer and Waiver of the Tenancy in this Case. Br. Extinguishment, pl. 33. cites 10 E. 4. 12.

A Man has a Leffe for Years, and after takes Interest for Term of Life to take Effete immediately; there the Leffe for Years is extinft. Br. Extinguishment. pl. 50. cites 11 H. 4. 34.

But where one Leffe to J. N. for Term of Life and 20 Years over, there he shall have both; For in the one Cafe both are in him final & femel. Ibid.

Note, That Franktenement cannot be suspending, but shall be adjudged in the King without Office in Cafe of Effete or Reversion after it is determined, or if Remainder be tailed to the King and the Tenant for Life dies.
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Extinguishment.

dies; For Extinguishment cannot be suspended. Br. Extinguishment, pl. 53. cites 9 H. 7. 2.

21. If Feme Executrix has a Term and she takes Baron, and the Baron purchases the Reversion the Term is extinct as to the Feme if she survives, but in respect of all Strangers the shall account as Allen’s in her Hands. Mo. 54. pl. 157. Pa. 5 Eliz. Anon.

22. Leafe or Years assigned the Term to the Wife of the Leffer and a Stranger, and afterwards the Leffer bargain’d and sold the Land for Money by Deed inrolled and died, and the Stranger died, and the Wife claim’d to have the Residue of the Term not expired. The Question was, Whether by the Bargain and Sale the Term of the Wife was extinguish’d? and a Divinity was taken between that and a Feoffment in Fee with Livery; For by the Livery he gives all his Intrest in the Land and Possession thereof, and all that may be adjudg’d in him shall pass by the Livery, and to the Term shall pass also by Union and Extinguish’ment, but by Bargain and Sale nothing will pass but the Use, and cited Plowd. Com. Townend’s Cafe. But in the Principal Case no Judgment was given. Mo. 171. pl. 304. Mich. 25 & 26 Eliz. Anon.

23. The Husband being seised in Fee made a Leafe to one O. and B. but it was in secret Confidence for the Preferment of his Wife; and afterwards he made a Feoffment to the said O. and others of the same Lands to other Uses. Decreed by Advice of Wray, Anderfon and Manwood that the Term was not extinguish’d because of the Proviso in the Statute 27 H. 8. of Uses which seizes all Intrests which the Feoffees to the Uses of others have, or shall have in the Lands to their own proper Use; and here it doth not appear but that O had this Leafe for his own Use, therefore it is not extinguish’d by the Feoffment which he took to the Use of another. Mo. 196. pl. 345. Trin. 27 Eliz. Cheyney’s Cafe.

24. Two were seised of two several Acres of Land of which the one ought to incluse against the other; One purchases them both and lets them to several Men. Adjudg’d that the Inclosure is not revived but remains extinguish’d. Poph. 167, 168. Arg. cites Hill, 36 Eliz. Rot. 1332. Hemden v. Crouch.

25. A Leafe was made to Baron and Feme for Years who entred. The Leffer afterwards ensoffed the Baron who died seised. The Feme surviv’d and claim’d the Term. The whole Court held that by the Acceptance of the Feoffment, the Baron had surrender’d the Term and it is extinguish’d. But if it had been by Bargain and Sale inrolled, or by Fine, it had been otherwise; And Judgment for the Plaintiff. Cro. E. 912. pl. 24. Mich. 44 & 45 Eliz. B. R. Downing v. Seymour.

26. One had a Way from one Acre to another, and afterwards purchased the Acre upon which he had the Way, and after that sold it; the Opinion of three Justices was, That the Way was extinguish’d. Poph. 168. Arg. cites Hill, 4 Jac. Jordan v. Ayloff.

27. If one seised of a Manor makes a Leafe for Years of Parcel of the same, and afterwards makes another Leafe of the same Lands to another to commence after the Determination, Surrender or Forfeiture of the first Leafe, If the Leffer insoffs the first Leafe of the Manor that is a Determination of the first Leafe, and the second Leafe may enter. Hecl. 55. Mich. 3 Car. C. B. Per Crook in Northen’s Cafe.

28. Where
28. Where a charge upon land comes to the same person that is entitled to the land, if he has not the same interest in both, there shall be no extinguishment upon this account. Barnard, Chan. Rep. 117. Pasch. 1740. Price v. Seyes.

(A. 2) Extinguishment of Charge. By Purchase of Part of the Land charged,

1. Land of J. S. was delivered in execution on a statute merchant to A. and B. and afterwards C. sued an ejectment for damages recovered in trespass against J. S. and had execution of a money as of the land of J. S. but before the executing the ejectment J. S. enfeoffed A. one of the conveyees in fee; it seems by this purchase by one of the conveyees only, the entire estate is determined and extinguished. Br. Af. file, pl. 231. cites 21 Att. 23.

2. If conveyee purchases parcel of the land, yet this does not discharge the residue in the hands of the conveyee; for his body and goods are always chargeable. 2 Roll. Statutes, (M,) pl. 10. cites 45 E. 3. 22. b. 25 Att. 7. 25 E. 3. 51. Com. Pope v. Rolfe, 72. b. 23 E. 3. comes to the execution, Contra 22 E. 3. 16.

Whoever Extent. For if it should not the conveyee would hold the residue of the land longer, because the profits that should satisfy the debt must be left, and this would be to the wrong of him in Reverence. Per Ventris J. 2 Vent. 327. in Case of Dighton v. Greenwell.

3. If the grantee purchases parcel of the land all such things as are Br. Release, against common Right, are extinct, because in aflience for them all terr. tenants ought to be named, and inasmuch as the grantee hath parcel of the land by his own Act all the rent shall be extinct. Co. Rep. on 318.

Fines. 7. cites 34 Att. 15.

4. So if a man hath a rent-charge out of 20 acres if he releases all his Br. Release, Right in one acre this extinguishes the Grant in all. Co. Rep. on Fines. 7. cites 34 Att. p. 15.

5. If conveyee purchase parcel of the Land, and after conveyee alienates the residue of his land to J. S. a stranger, J. S. shall hold his land purchased discharged; because he ought to have contribution against the conveyee, and he cannot contribute to himself, and therefore by his purchase all the land which shall come to the hands of feoffees is discharged. 2 Roll Abr. Statutes (M) pl. 8. cites Pl. C. 72. b. Pope v. Rolfe. D. 2 & 3 Eliz. 193. pl. 30. Adjudged. 35 H. 6. Execution 21. Per Cur.

(B.) By Act in Law.

If A. and B. are bound in an Obligation jointly and severally to Cro. C. 572. C. and after B. makes D. his Executor and dies, and D. takes upon him the execution of the will and fully administers all the goods of A. and after the Obligee makes the same D. his Executor S. ad. and dies, whether this extinguishes the obligation as to B. is the
the Question? D. 9 Car. B. R. Dorchester against Webb. this
was a Double and argued upon a Demurrer at the Bar, and the
Court seem'd to be of divers Opinions, and said it was a good
this was adjudged to be no Extinguishment, but the Plaintiff had
Judgment to recover against B. because that he had this on ater
Droit. In the laid Case another Matter was, that A made D. and
C. his Executors, and that C. refused the Administration and died with
in a Month ather, and made (as before is put) D. his Executor also;
and per Ex. the making of C. Executor, he refusing to administer,
does not extinguish the Debt.

2. If the Obligee dies Intestate and Administration of the Goods
of the Obligee is committed by the Ordinary to the Obligor, per this
does not extinguish the Debt, but the Debt remains notwithstanding
this. Resolv'd. 8 Rep. 136. Sir John Needham's Case.

3. If Obligee makes the Obligor his Executor this is a Release and
Extinguishment of the Debt. 8 Rep. 136. Sir John Needham's Case,
Pl. C. 184. Woodard.

4. If Feme Obligee takes Obligor, or one of the Obligors to Baron
it is an Extinguishment of the Debt. 8 Rep. 136. Sir John Need-
ham.

5. If Feme Executrix of the Obligee takes the Debtor to Baron this
is not any Release in Law, because that she has the Debt en autre
Droit, and if this shall amount to a Release in Law it will amount
to a Devalidavit, * which is a Corp, which the Law will not suffer.
R. adjudged.

* Fol. 935.
S. P. adjusted
that by the
Intermar-
riage the De-
bt was not
extinguish'd but only suspended, and the Action was revi'd against the Executors of the Husband. Cro.
by Holt Ch. J. 15 Raym. Rep. 520. Hill. 11 W. 2; for if it should be an Extinguishment it would be a Wrong to Creditors and amount to a Devalidavit, which an Act in Law will not do, and

cites S. C. of 8 Rep. 136. 3. And Things shall be extinguish'd between the Parties which yet shall remain and have Existence as to Strangers; As it a Tenant for Life grants a Rent-charge and then
surrenders to the Rever france, or a Man who has a Rent in Fee acknowledges a Statue and then
releases to the Tenant; the Estate for Life in the one Case will continue as to the Grantee of the Rent
Rent and the Rent in the other Case as to the Conouee. — Where a Man is indebted and marries with the Executrix and the Executrix dies, this is no Devise; but for the Husband has been charged; Cited by Coke to have been adjudged. Gouldsb. 181. in pl. 117.

6. If A. and B. are bound in an Obligation jointly and severally to C. and C. makes D. the Wife of A. his Executrix and dies, D. administers, and after A. the Baron of D. makes D. his Executrix and dies, leaving sufficient Assets to pay the Debt, and after D. dies, C. ad- and E. takes Administration of the Goods or C. the Obleege unadmin-istered, yet he cannot have any Action upon the Obligation against E. the other Obligor, because when the Obligor made the Executrix of the Oblige he Executrix and left Assets the Debt was immediately satisfied by Way of Retainer, and then by Consequence no new Action may be had for this Debt. Hob. Rep. between Fryer and Gillbridge 14 adjudged. Ineractic Hall. 11 Fac. B. Rot. 999.

7. If A. promises B. a Feme, that if he will marry him he will leave her worth 100 l. at his Death, and after they intermarry, yet this does not discharge the Promise which is to be performed after this is ended. Hob. Rep. 279. between Smith and Stefford.

of Hobart. — Brownl. 18. 19. S. C. held accordingly; by three Judges contra. — Nov. 29. S. C. says that Judgment was ready to be given for the Plaintiff but it was compounded in Court. — S. C. cited Ed R. Food. Rep. 531, 532, and agreed thereto; though otherwise in Case of a Bond according to Noy's Report of the same Case.

8. A. and B. were indebted to C. by Contract, and C. accepts a Statute of A. and brought Debt against B. It was ruled that the Acceptance of the Statute was an Extinguishment of the Debt. Litt. Rep. 17. Hill. 2 Car. C. B. cites the Case of Ballot v. Wood.

9. If I enfeoff J. S. with a Premise contain'd in the Deed that it shall be lawful for me to revoke the Feoffment, and afterwards I levy a Fine to J. S. of the same Land, this is an Extinguishment of the Power of Revocation; by Roll Ch. J. Sty. 389. Mich. 1653. Bird v. Christopher.

(C) In What Cases there shall be extinguishment by unity of Possession.

By Act of the Party.

1. If the Tenant infeoffs the Lord and two others this hath not extin- guish the Seigniory, for this shall be reviv'd if the others survive. 7 P. 6. 3.

Per Roff. Br. Extinguishment, pl. 17. cites S. C.

2. So if Leesee for Life grants his Estate to Leesor and two others, Br. Surren- (admitting that it is not a Surrender for a third Part as Wilcox's den, pl. 11. Case. 2 Rep. 19) if the others survive the Leesor the Rent shall be reviv'd, and therefore not extinguish'd. 7 P. 6. 2. b.

3. If he who has Common appendant purchases the Land out of of 8 Rep. 79 which it issues in Fee the Common is exempt by it. 7 P. 6. 3. 18 Contra. E. 3. 30. b. 24 E. 3. 25. Per Wilcox, Dutractur 20 E. 3. 3. A-
measurement 8.

5 X 4 See
Extinguishment.

4. See 5 H. 8. That the Ld. may have Common in his own walled appendant to certain Land.

5. If he, who has Common in Gros, purchases the Land out of which it fits, the Common is extinct. 7 P. 63.

6. Shack Common or Mutual Common, in regard that I have Common in your Ground that you shall have in my Land, shall not be extinguished by Unity of Possession for the Necessities of the publick Good to use without Inclosure. P. 12 Sa. B. per Cur. The Bishop of London's Case.

7. If the Manor of S. be within the Purlieu of the Chase of D. and after the King comes to both, this Unity of Possession of the Chase and Manor shall not extinguish the Liberty of Hunting in S. as a Purlieu. D. 17 El. 327 3.

8. Unity of Possession of the Land to which a Way is appertainant by Prescription, and of the Land over which the Way is, will extinguish the Way; for the Prescription is gone, and the Way is against Common Right. Vill. 4 Jac. 2. B. between * Jordan and Awood adjudged by three Justices against two. Contra 12 J. 7 25. b. per Dabador.

9. Unity of Possession of a Mill and Pool to which a Way is appertainant with the Land over which the Way is will extinguish the Way. * 21 El. 3 2. b. 21 H. 1. admitted. 19 El. 3. Adjunction 3. admitted; for there upon Partition between the Daughters the Mill and Way were assigned to one, and this was as a new Estate. Contra 20 El. 3. Adjunction 8. 17 H. 45.

† If one has a Way or Common appertainant in another's Land, and purchases the same Land, and after parts with the Land, yet the Way or Common is extinct for ever. Br. Extinguishment, pl. 11. cites 1 H. 45. —— Fitzh. Extinguishment, pl. 4. cites S. C.

Fol. 936.

10. If a Vill has a Way to a Church, and one of the Vill purchasers the Land out of which &c. and after aliens it, yet this Unity does not extinguish his Way, because it is a Thing of Necessity. Vill. 4 Jac. 2. B. R. agreed in Jordan and Awood's Case.

11. If the Custom of London be, that where two Tenements are adjoining and the one has a Gutter running by the Teneemnt of the other that he cannot stop it, Unity of Possession doth not extinguish this Custom but that it shall be revived after that they are severed; for the Custom of London extends to all Gutters which are in the Land of another and to the Custom is revived. 11 H. 7 25. b. Vill. 4 Jac. 2. B. R. agreed in Jordan and Awood's Case.

12. If he who has White-Acre ought to inclose by Prescription against Black-Acre, Unity of Possession of both by Purchaser doth not extinguish this Prescription. Patch. 7 Jac. 2. between Ingram and Barret; per three Justices against one.

13. If there hath been used Time out of Mind &c a Water-Course to run from a River over a Cloke called the Hop-Yard to a Watering-Place for the Watering of the Cattle of the Occupiers of a Rectory, and for other Necessaries of the Land Occupiers, and after there is an Unity of Possession in Fee of the Place from which, and of the Hop-Ground over which, and of the Rectory and Watering-Place to which in King H. 8. and after by him ceased again, this Watering...
Extinguishment.

ing-Place shall be revived because it is a Thing of Necessity, and al-
so the Water-Court is natural. Mich. 2 Cat. between Surrey Plant-
tiff, and Pigot and others Defendants, adjudged upon Demurrer.

... A Wat-
er Court which used to have its Current
from such a Place to such a Place, and to the Plaintiff's Yard to supply a Pond with Water for
watering his Cattle, is not extent by Unity of Poffeffion. 2 Bulk. 539. Partch. 2 Cor. B. Surrey v.
Pigott. — Because it has Existence notwithstanding the Unity; Arg. Lat. 153, cites 12 H. 7. 2.
... And it is a Thing distinct from the Land, and also a Thing of Necessity, As in 12 H. 7.

14. A Rent illusing out of Lands in Fee was granted to Tenant by the Curtesy in Fee; It shall not be taken as extinct, but the Rent will go to his Heirs although he himself could not have it; Arg. Godb. 128.
cites 5 E. 3.

15. If he who has a Rent-charge comes to the Land by Tort, and after renders it to him who Right has, by this his Rent is extinguished; Qua-
... Br. Extinguishment, pl. 81. cites 34 Ass. 15. per Belk.

16. But if the other recovers the Land against him by the Law, the Rent is revived. Ibid.

17. Unity of Poffeffion of a Manor, which is within the Cinque Ports,
which comes to the King as Excheat as Parcel of the Honour of », and the
King grants it over, this is no Extinguishment of the Franchise; therefore it seems that this goes with the Land and not with the Seignory, as in the Cafe of Gloucester-Fee. Br. Extinguishment, pl. 9. cites 49 E. 3. 24.

18. Annuity by a Prior against a Parson of a Church, and counted by
Prescription; It is a good Plea to say that A. B. was seised of the Advoc-
son Tempore H. 3, and gave the Advocson to the Predecessor of the Plaintiff in Fee who purchased it to hold in proper Use, so that the Parsonage was appropriated in Fee, for the Unity of Poffeffion determines the Annui-

19. Where Lands of an Abbot charged with Tithes come to Lay Hands, and after return to the Hands of the Abbot, yet it shall be discharge'd of the Tithes; Per Thurn; and therefore it seems that he shall pay to the Tithes again. Br. Extinguishment, pl. 12. cites 11 H. 4. 34, 35.

20. An Executor to whom the Testator was indebted may pay himself; Per Hill; But Brook says the Law seems to be contra; For it be admi-
... Br. Executor, pl. 59. cites 12 H. 4. 21.

21. Profit Appraender is extinct by Unity; Arg. 3 Bullst. 339. cites
14 H. 4. 7.

22. In Allife, if a Man seised in Fee grants a Rent-charge in Fee, and
gives the Land in Tail, and the Tenant in Tail attains to the Grantee in 
Fee, and he attains to another, and the Tenant in Tail has Issue and dies, and the Issue brings Foromedon and recovers, and the Grantee distrains, and the Issue says that he purchased the same Land and to extinguish his Rent, the Grantee shall shew how after this the Issue brought Foromedon and recovered, he shall not aid him to revive the Rent. Br. Extinguishment, pl. 18. cites 19 H. 6. 45.

23. If a Man has Warren in other Land, and after purchases the Land, the Warren is not extinct; for it is not like to a Rent or Common. Br. Extinguishment, pl. 5. cites 35 H. 6. 56.

24. In Debt the Abbot of D. granted to W. S. a Corody, viz. so much of
Bread and so of the Reidue &c. for Term of his Life faciend' holte Ser-
v' protus f. N. & alii cista* fuer facere, and after the Grantee let the Corody again to an Abbot for ten Years rendering 3l. per Annum, and be brought Debt of the 3l. and the Abbot said that the Grantee did not do the Service, and the Grantee said that he is not bound, for by the Leaf the Corody
Carody is suspended; and per Catesby, the Services ought to be done, for it is not suspended by the second Leave, as it is in Case of Land leased by the Tenant to the Lord; for there he cannot distrain; but in this Case, the Services are to be done by his Person, by reason of the Grant of the Carody; therefore he shall do the Services as well during the Lease for Years as before, for it is in effect a Grant upon Condition; and therefore if he does not do the Services he shall lose the Thing granted; Contra of a Seigniory in Land, for there he may distrain, but here he has no other Remedy for the Nonesance, but to retain for the Condition. Br. Extinguishment, pl. 34. cites 20 E. 4. 12. 25. A Man leaves Land for Years; the Lessee leaves part of the Term to the Lessee rendering Rent, it be after surrenders to the first Lessee, the Rent reserved upon the second Lease is determined. Br. Extinguishment, pl. 34. cites 20 E. 4. 12. per Brian. 26. And if a Man leaves Lands to one for Years rendering Rent, the Lessee grants the Rent to W. S. and after the Tenant for Years surrenders, the Rent is not extinct. Ibid. 27. And if a Man engages me upon Condition to render to him 10 l. such a Day, and after I leave it to him for Years rendering certain Rent, and at the Day I do not pay the 10 l. now he shall retain the Land, and the Rent reserved by me upon the Lease is determined and extinct. Br. Extinguishment, in pl 34. cites 20 E. 4. 18. 28. If a Man makes me his Steward of his Manor with a Fee of 5 l. per Year and a Robe, and after I grant all this to an Abbot for Years rendering Rent; if the Grantee does not hold the Courts, he shall not have the Rent reserved; quod Curia consectit. Br. Extinguishment. pl. 34. cites 20 E. 4. 12. per Catesby. 29. If three Coparceners are feited of a Manner in Fee to which a Leet or Law Day is appendant, and the King purchases two Parts of the same Manor with the Appurtenances, yet the Court Leet by such Purchase is not extinct, but remains still appendant to the third Part of the same Manor; and this was the Opinion of the Justices of C. B. Bendli. pl. 30. Hill. 28 H 8. Anon. cites 33 H. 6. fol. 9. &c. 15 E. 4. fol. 5. Trin. 6 E. 3. Fitzh. Quare Impedit 40. Trin. 28 H. 8. Dier fol. 30. p 209. Le. 228. S. C. — Le. 300. Stile v. Miller. 30. Tythes are not extinguished by Unity of Possession. Cro. E. 216. pl 13. Hill. 33 Eliz. B. R. Wickham (Bp. of Lincoln) v. Cooper. 31. A Farmer of the King of a Capital Messuage makes a Contuit to convey the Water to his Houfe, which he carries across the Land of a Copyholder of the Manor; after the King grants the Capital Messuage to A. with the Appurtenances, and the Copyhold was granted to another Person. The Farmer to amend the Pipe breaks the Land of the Copyholder; adjudged justifiable, because Terra transit cum Onere. Mo. 644. pl. 889. Trin. 43 Eliz. B. R. Guy v. Brown. 32. Common is destroyed by Unity of Possession. Arg. Poph. 166. cites as to the Common 4 Rep. Terringham's Cafe. Goldsb. 3. pl. 6. Abbot of Weilminter's Cafe. By the Copyhold extinct, and if by a new Grant he grants Common with it, it is a New and not the Ancient Common. Cro. E. 794. pl 40. Mich. 43 Eliz. C. B Worledge v. Kingswell. Commoner by Prescription takes a Lease of the Land out of which &c. for twenty Years, this does not destroy the Prescription, because the Suspensation is only to the Possession and not to the Right, and the Inheritance of the Common still continues. Co Litt. 114. 8. — Common appen- dant, and Liberty to convey Water, to avoid Nusances, and such Things of Necessity no Unity can extinguish, and shall pass as appendant & quasi Incidents to their Principal. Mo. 644. pl. 889. Trin. 43 Eliz. B. R. in Cafe of Guy v. Brown. — Common appendant is extinct by Unity, Per Crew Ch. 3 Bullit. 341. in Cafe of Sury v. Pigot, cites 4 Rep. 38. Terringham's Cafe. 33. Things
33. Things which have their Original out of Land, and not otherwise, and are due in respect of the Land only, and are part of the Profits of the Land, are always extinguished by Unity of Possession, if a Man has an equal Estate in both; As are Seigniory, Rent-Charges, Commons, Ways &c. But Things not issueing out of Lands as part of the Profits, but being derived otherwise and due in another Respect, though they be taken and had within certain Lands, are not extinguished by Unity of Possession, as Warrens, Franchises, Waite, Stray, Wreck, Leet &c. and Things which are part of the Profits of the Land and payable by such Person only who has the Land, yet if they commence upon any Person's respect and not in respect of the Land, and to the Person is only charged and not the Land, are not extinguished by Unity of Possession, as Annuities, Tythes, Proxies &c. Dav. 5. 6. Trin. 2 Jac. in Scace. in the Case of Proxies.

34. Inclosure is destroyed by Unity of Possession, because it is not natural as a Water Course is; per Whitlock J. Poph. 170. Patch. 2 Car. B. R. in Case of Sury v. Pigot.


35. Things which have no Existence during the Unity are extinguished by the Unity. See Lat. 133. Trin. 2 Car. in Case of Sury v. Pigot.

36. A. has a Stream of Water, which runs through a Leaded Pipe; if Nov. 82. in B. purchase the Land where the Pipe is and cuts and destroys it, the Water Course is extinct; because by this he declares his Intent and Purpose that he will not enjoy them together. Per Doderidge. Palm. 446. Mich. 2 Car. B. R. in Case of Sury v. Pigot.

37. If a Man has a Mill and a Water-Course to it over his Land, and Nov. 84. sells the Land, the Water shall not be stopped being Matter of Necessity, and not like the Case of a Way, therefore not to be extinct by Unity, because of Necessity, and the same hath a continual Running; Per Doderidge J. 3 Bulst. 340. Patch. 2 Car. B. R. in Case of Sury v. Pigot.

38. There is a Difference between a Way, and a Common and a Water-Course, the two first begin by private Right by Prescription by Affent, and may be extinct by Unity, because the greater Benefit shall soon the Lease; But a Water-Course begins only by Jure Naturae, having taken this Course naturally and cannot be averted. Per Whitlock J. 3 Bulst. 340. Patch. 2 Car. B. R. in Case of Sury v. Pigot.


5 Y

40. Warren
40. Warren is not extinguished by Unity of Possession, because a Man may have Warren in his own Soil. Per Whitlock J. Poph. 170. Pach. 2 Car. B. R.—And because Warren and Tythes are Things collateral to the Land. Per Crew Ch. J. Ibid. 172.

41. There were two Houses, and the one preferred that the other should mend the Gutter, and afterwards they come to the Hands of one Man and then he aliens one of them. This Unity shall destroy the mending of the Gutter. Arg. Poph 166 cites 11 H. 7. 25.—It was argued on the other Side, That this was by the Custom of London. Ibid.—Per Whitlock J. The Gutter was not extinguished only by the Unity of Possession, but there also appeareth in the Case that the Pipes were destroyed whereby it could not be revived. Ibid. 170.—Per Dodingridge J. A Reason is given in the Case of 11 H. 7. 25 why a Gutter is not extinguished by Unity of Possession. 2dly, Because it is a Matter of Necessity. Ibid. 172. 173.

42. A had three Parcels of Land and there was a private Way out of the first Parcel to the Second, and out of the two first Parcels to the third Parcel. J. S. purchased all those Parcels, and then alien'd the two first to J. N. The Jury found that there was no other Way to come at the Land not alien'd but through the other two Parcels. This Way being absolutely necessary it was adjudg'd per cœt. Cur. that the Way continues and is not destroy'd by the Unity. 2 Sid. 39. and 111. Mich. 1653. B. R. Packer v. Wellstead.

43. Where an Unity of Possession extinguishes a prescriptive Right it is requisite that the Party have an Estate in the Lands a Qua, and in the Lands in Qua, equal in Duration, Quality, and all other Circumstances of Right. Carth. 241. Pach. 4 W. & M. in B. R. The King v. the Inhabitants of Hermitage.

44. It was admitted that where any Matter of Interest or Charge is claim'd upon Men's Estates, as Rents, Commons &c. such are always extinguished by Unity of Possession and never reviv'd. 4 Mod. 364. Mich. 6 W. & M. in B. R. in Case of Peers v. Lucy.

(D) Customs.

[Extinguished by Unity of Possession.]

By Unity of Possession all Customs and Services annexed to Seigniory or to the Ld. are extinct, as Heriot Custom, Ancient Demesne, Fine for Alienation or Custom to be Bede to the Ld. or to collect his Rents and the like. But contra of Custom running with the Land, as Gavel-kind, Borough-English. [pl. 6, infra] Dowment of the whole Land and the like; For this runs with the Land, and in this Case Unity of Possession in the Ld. and Feoffment by him after shall not change the Custom; For this runs to a Number and throughout the whole Country

Because if he has Ex, culence not-withstanding the Unity.


Cafe for flopping a Gutter through which Water descendent to &c. The Declaration was, That he was posses of a House and Yard, and that he and all &c.

It was excepted to because he lays himself but in Possession of &c. and alludes not to a Seisin in Fee (as he ought to do) in the Person in whom he prefers. But he granted it would have been good if he had laid a Possession of the Gutter; but this he does not neither, so that it comes within neither of the Rules; Judgment was stay'd till moved of the other Side. 2 Show. St. 66. Mich. 31 Car. 2. B. R. Pepyn v. Buffin.
2. If a Custom be that every Tenant of an Honour shall pay a Fine of Alienation, if the Ld. purchases a Tenancy or has it by Descent or Escheat, and after aliens it again, yet the Custom is destroyed in this by the Unity of Possession. 14 H. 4. 3. adjudged.

3. And Note, That this Custom is particular, for though it trenches to diverse Tenants per of the Part of the Ld. but to one. 14 H. 4. 7.

4. But if a Custom be general throughout the County, there Unity of Possession of the Lord does not extinguish the Custom though it be annexed to the Seigniory. 14 H. 4. 7.

5. But if a Custom be annexed to the Tenancy the Unity of Possession of the Tenancy and Seigniory does not extinguish the Custom. 14 H. 4. 8.

6. As if the Ld. purchases Land in Gavelkind or Borough English of the Tenant, this doth not extinguish the Custom, because it is annexed to the Tenancy. 14 H. 4. 8. 11 H. 7. 25. b.

7. If A. seised in Fee of a House which has certain Lights by Prescription, and B. has another House next adjoining to it, and B. tortuously erects a Structure upon his Frankenantement which overhangs the House of A. and thereby stops his Lights, and after B. purchases in Fee the House of A. and after grants or leases over to C. the House which was the House of A. C. has not any Remedy to abate this Disturbance; For by the Unity of Possession the Prescription for the Lights was extinguished, so that C. ought to take it in such Plight as it was at the Time of the Grant* made to him; For the Unity purges the Court, both being in the same Hand who might do with it at his Pleasure. Per Curt. Hobart's Rep. 175. between Robins and Barnes.

8. So it is if B. after pulls down his House and rebuilds it in the same Manner as it was before, so that he both not make it to overhang more than it did overhang at the Time of the Grant made to C. Hob. Rep. 175. Agreed per Curt.

9. But if he makes it to overhang more than before Action lies for C. to remedy it, for it is a new Tort. Hob. Rep. 175. in the Case of Robins and Barnes.

10. If A. seised of a House in Fee in which he has Lights by Prescription, and after purchases another House in Fee next adjoining, and after grants or leases the House which has the Lights to C. the Prescription is revived, for this is but an Eadement running
Extinguishment.

"Ibid."

with the House, and therefore not extinguite by the Unity. Hob. Rep. 175. Dubitatur.

Note there is a great Difference between Interests and Profits, As Rents, Commons &c. and bare Estates, such as are Lights, Air, Gutter, Stillicidia, and the like; for though while they are in one Hand they may be flop'd or foredome, because a Man cannot be said to wrong himself, yet if they be divided, Things of that Nature (fill in Being) do revive, because they are not of no such Things be foredome or altered while they are in one Hand, and so being the Houses be again divided they cannot be restor'd by Law, but must be taken as they were at the Time of the Conveyance.

11. Two have Tenements adjoining, and the one has a Gutter in the other's Land, and alter the one purchaseth both, and after he alieneth the one to one, and the other to another, the Gutter is revived notwithstanding the Unity &c. by reason that it is very necessary; Contra if he who had both had broke the Gutter. Br. Extinguishment, pl. 60.

(E) Acts in Law.

1. If Lands descendent to two Coparceners out of which one has a Rent-charge issuing, this does not extinguite the Rent but only suspends it; for after Partition it shall be revived. 7 P. 6. 4.

2. So it is if Lands descend to two Coparceners, whereof one has the Seigniory, this does not extinguite the Seigniory. 7 P. 6. 4.

And after Partition the Rent shall revive for the Portion.

Br. Extinguishment, pl. 17, cites S. C. —— And if in such Case the Father has one Acre within the Seigniory of that Daughter, and another Acre not within it, and the two Daughters enter and make Partition, and this last Acre is allotted to the other Sister who has not the Rent or Seigniory, there the Rent or Seigniory is revived in toto. Ibid. pl. 25, cites 9 Aff. 22.

3. If the Mesne takes the Tenant to Wife, this does not extinguite the Seigniory but only suspends. 7 P. 6. 3. b.

4. But if the Mesne and Tenant intermarry and have Issue, and the Seigniary and Tenancy descendent to the Issue, this extinguishes the Seigniary, and shall not be revived after though the Issue dies without Issue, by which the Seigniary ought to go to the Heirs of the Part of the Father, and Tenancy to the Heirs of the Part of the Mother, for this was not intended at the Time of the Conjunction of the Estates. 7 P. 6. 3. b. Dubitatur.

5. Lord and Tenant; the Tenant leased for Life, Remainder over in Fee, and he in Remainder dies without Heir, there the Remainder is fallen, and the Seigniary is extinguite immediately, and the Lord shall not after have any Services of the Tenant for Life who was his Tenant before; Quod Nota; and so see that he in Remainder is Tenant though he is only Tenant to the Avowry, which fee plainly in Sibbemer's Case 15 E. 4. 13. Br. Extinguishment, pl. 3. cites 3 H. 6. 1.

6. If Executor who has a Lease for Years by his Testator purchaseth the Franktenement the Lease is clearly extinguite. Br. Surrender, pl. 52. cites 4 E. 6.

7. Quale
7. Quale jus, where a Man purchases a Fee-Farm &c. of an Abbot, viz. certain Land, rendering to the Abbot and to his Successors 20l. per Annum, there if all the Monks die the Rent is extinct notwithstanding others are newly created there; Per Newton and Patton. Br. Extinguishment, pl. 35. cites 20 H. 6. 7, 8.

8. In Annuity, the Plaintiff made Tithe that all his Predecessors were seized of an Annuity by the Hands of one A. Parson of the Church of D. and all his Predecessors Time out of Mind &c. till such a Year &c. and for the Annuity appear he brought this Action. The Defendant said the Parsonage is, and has been, appropriate to the Priory of B. before Time of Memory, which is the Abbey of Cien in Normandy, and that E. 3. feized their Possessions for War, and the Land of all Priors Aliens, which continued till King H. 5. and Anno 2 H. 5. all these were given to the King and his Heirs, and King E. 4. granted this Parsonage to the Dean of St. Stephens and to his Successors, discharged as it was in his Hands, and the other demurred; and it the Parsonage be discharged or not is the Question? or if the Annuity be extinct by reason of the Appropriation? And it seems in a Manner by all, quod non, but whether it was gone by the Poffession of the King, and by the Act of Parliament which gave the Poffession to the King in Fee, or be revived by the Gift to the Dean in Fee or not &c. and by the best Opinion it is not determined but sus- pended during the Poffession of the King, and is now received; for the Par- son of the Parson was charged by reason of the Parsonage, and not the Land; And though the King cannot be a Parson, yet it is only a Suf- pension, and when there is a new Parson made this is revived; But per Va- vor, the Gift of the Land by Act of Parliament discharges the Annuity because every one is Party to the Act, but no other said so; And as it seems this cannot be because the Parson was charged and not the Land; And where a Parson has Annuity of the Vicar, and he enters into the Vicarage, this is no Bar in Writ of Annuity [and cites] to H. 5. for the Parson is charged and not the Soil, and so no Suspension; And per Frowike J. the Writ of Annuity lies well, and the Annuity is not determined; Quere. Br. Extinguishment, pl. 22. cites 21 H. 7. 1.

9. And per Butler, if a Parson grants an Annuity and resigns, and after the Patron and Ordinary confirms it, this is not good; For it was determined before by the Resignation. Ibid.

10. And per Butler, if a Man had had Common in this Land, yet now they may use their Common again notwithstanding the Act of Parliament; Quere in Manus Regis; For per Kingmull they are not out of Poffession by Office which intitles the King to the Land. Ibid.

5. If Land out of which Rent is granted be recovered by ejecting Title all the Rent is extinct; But if a Diffrefs for the same Rent be limited on other Land, and that Land be evicted, yet all the Rent remains. 7 Rep. 24. b. cites the Opinion of Finchden in 41 E. 3. 15, and affirmed it for good Law in Pitt’s Case, Trin. 42 Eliz. C. B.

12. Note, this Difference was taken by Saunders, viz. that if a Lease for Years as Executor purchases the Reversion, this shall extinguish the Term because it is his own Act; But if one that hath a Reversion be made Executor and hath a Term that way, that shall not be an Extinguishment, because the Term and the Reversion are conjoined by Act in Law. Freem. Rep. 289. pl. 338. Hill. 1676. Anon.
(F) What Thing shall be extinct by a Feoffment or other Act of the Party.

1. If the Lord enfeoff the Tenant of the Land since Quia Emptores, (admitting that he map, but Quere how he can the Tenant being in Possession) this extinguishes the Seigniory. 3 H. 6. 43. b. admitted 17 E. 3. 32. 22. 18. b. Curia. 39 E. 3. 20. b.

2. If the Lord of a Manor who has Common de Jure in his Waifes aliens the Waifes, this extinguishes his Common. 18 E. 3. 44.

* Br. Commoner, pl. 22. cites S. C.

3. If a Man makes Feoffment of Land in which he has Common appendant, this extinguishes the Common for ever. 9 Le. 4. by Cur. between Catesby and Wilkinson.

4. If A. possesse of a Term for Years devises it to his Wife for 18 Years, and after to B. his eldest Son for Life, and after to the eldest Ilue Male of B. for Life and dies, and after the 18 Years B. enters and is possesse, and after C. his eldest Ilue Male is born, and after B. makes Feoffment in Fee of the Land and dies, this shall not de- stop the Estate of C. he being born before the Feoffment 8 May 1638, of King Charles upon a Reference out of Chancery to Justice Jones, Crook and Berkley, between Cotton and Heath. By the said Justices resolved and so certified accordingly, and it was then laid that the Opinion of the Ld. Keeper was accordingly. See 8 Rep. 96. b.

5. An Abbot having Occasion to go beyond Sea made J. S. his Procurator to present to such Benefices as became void in his Absence. J. S. presented in the Abbot's Name to one of his own Benefices or Advowsons. It was held that the Right of his own Advowson did not pass; But yet it is an Ufurpation of the Abbot to do that Church; Arg. Godb. 319. cites 17 E. 3. 66.

6. Lord Mefne and Tenant, the Tenant holds by 3d of the Mefne, and be over the Lord by a Penny, and the Mefne dies without Heir, and the Mefnality e'ceats to the Lord, by this the Seigniory is extinct in the Mefnality, and the Mefnality is now all the Seigniory which the Lord has; and therefore now he who was Lord shall have 3d. where he should have but a Penny before. Br. Extinguisment, pl. 39. cites 20 Alif. 29.

7. If Conusor infeoffs the Conusor after Execution, this extinguishes the Execution notwithstanding that the Feoffment be upon Condition, and the Condition is broken, and the Conusor re-enters. Br. Feoffment de terres, pl. 6. cites 46 E. 3. 30.

8. Where the Lord releases Part of his Services, yet the rest remains, so that a Man cannot plead Hors de son Fee. Br. Avowry, pl. 46. cites 14 H. 4. 2.

9. If Lord, Mefne and Tenant are, and the Lord releases to the Tenant all his Right, by this the Mefnality is extinct; for the Mefne has not the Mefnality but in respect of the Charge over, that if the Charge over be determined there is no more Cause to have Service of the Tenant para-vail. Br. Extinguisment, pl. 38. cites 8 H. 6. 24.

10. But per Librum Little. in Releases if there was a Surplus of Service, the Mefne shall have it notwithstanding the Release as a Reat-tek. Ibid.
Extinguishment.

11. So by 7 All. pl. 2. if the Tenant enfeoffs the Lord the Mefnality is determined. Ibid.

12. Note the King may extingui\^h a Cargo by a Grant or Release to an Abbot. Br. Extinguishment, pl. 42. cites 8 H. 7. 12.

13. But he cannot extingui\^h Tenure by Rea\^son of his Preroga\^tive; for the Land ought to be held of somebody. Ibid.

14. Per Huf\^ley, it the Baron has a Term by his Feme and makes a Foe\^ment in Fee upon Condition, and re-enters for the Condition broken, and the Le\^f\^or enters, and the Baron dies, the Feme shall not have the Term; for the Baron had Power to forfeit it. Br. Extinguishment 59. cites 11 H. 7. 25.

15. As if the Lord grants the Seigniory to the Di\^s\^le\^ser of his Tenant, and the Tenant re-enters, yet the Seigniory is extinct. Ibid.

16. If a Man leases to one for 10 Years, and after leases the same Land to another for 20 Years, and the first Le\^f\^see purcha\^ses the Reversion in Fee, yet the first Le\^f\^see is not extingui\^h\^ed, because the second Le\^f\^see which is for twenty Years is Me\^ene between the first Le\^f\^see and the Fee-lim\^ple, which is an Impediment of the Extinguishment. Br. Extinguishment, pl. 54. per Hales.

17. A Release of all the Right to the Land does not extingui\^h Titles, for they are not if\^flu\^ing out of the Land. Cro. E. 216. pl. 13. Hill. 33 Eliz. B. R. Wickham Bp. of Lincoln v. Cooper.

18. Foe\^ment by Le\^f\^see is an Extinguishment of his Term; Per Poph. Cro. E. 322. pl. 10. Patch. 36 Eliz. B. R. in Cafe of Read and Mor\^p\^eth v. Errington, alias Mitford v. Fenwick.

19. If one executes Authority in any Land given by another he does not extingui\^h his own Interes\^t in it; As if Le\^f\^see for Years makes Live\^ry as Attorney of the Le\^f\^lor. Mo. 605. pl. 835. Hill. 42 Eliz. B. R. Diggs's Cafe. So of Land sold by Commi\^ssioners of Bankrupts where one has Right. Godd. Arg. 312.

20. If the Tenant devises that the Ld. shall sell the Land, and the Ld. sells the Land, yet the Seigniory remains. Co. Litt. 52. a.

21. Le\^f\^see for Life makes Foe\^ment, and a Letter of Attorney to Le\^f\^see to make Livery, who does so, yet he shall enter for the For\^seture. But had it been Le\^f\^see for Years that had made such Feo\^ment it should bind the Le\^f\^lor; For Le\^f\^see cannot make Livery as Attorney to Le\^f\^see for Years, because he had no Freehold of which to make Livery; but that was in the Le\^f\^lor. Co. Litt. 52. a.

22. Upon the Statute 13 Eliz. 4. which makes Lands of Receivers liable for their Debts, if the King sells, the Right of the Acco\^mp\^nent passes, but not the King's Right. Arg. Godd. 319. in pl. 417. Patch. 21 Jac. in the Exchequer.

(F. 2)
(F. 2) Avoided or prevented. By what Act.

1. **The Grantee of a Rent-Charge pur chased Parcel of the Land, and the Grantor granted him that notwithstanding this he might divest the Rest of the Land, and that the Grant shall stand in Force, and Finch held that it was good, by which the other said that he did not charge by the Deed. Br. Charge, pl. 48., cites 46 E. 3. 32.**

2. A makes a Lease for Years to J. S. rendering Rent, and then grants the Reversion for 40 Years to B. and C. which he afterwards conveyed to them and their Heirs by Bargain and Sale, and covenanted to levy a Fine accordingly to make them Tenants to the Precise to suffer a Common Recovery to another Use; the Bargain, Fine and Recovery were all executed; and it was adjudged that they made all but one Conveyance, and that the Reversion was not destroyed, and by Consequence the Rent not extinguished; for though the Bargainer might intend to destroy the Reversion by making this Grant to them and their Heirs, yet the Bargainers could never have such Intention, and though they were now lodged to another Use, yet by the Statute of Uses their former Right is saved which they had to their proper Use; and their Intention being only to make a Tenant to the Precise, the Statute shall be so confirmed that the Intent of the Parties shall stand. Arg. 2 Mod. 234. in Cafe of Addition v. Sir John Otway, cites 2 Roll. Rep. 245. Mich. 20 Jac. B. R. Farrowes v. Farmer.

3. A. conveyed Lands to B. in Fee with a Covenant to make further Assurance; Afterwards B. leases to A. for 40 Years, and then A. makes further Assurance upon Request; this basis and conveys the Leaf to Years, unless there were some precedent Agreement to the contrary. But if there had been any such precedent Agreement, then they held that it would have operated only in Confirmation and Corroboration of the Lease, and would not have destroyed it. Per Hale Ch. B. Hardr. 402. Patch. 17 Car. 2. in Scacc. cites it as one Heale's Case.

(G) Suspension.

[Of Rent or Common.]

1. **If Leslor for Years enter into Part of the Land all the Rent is suspended. 7 P. 6. 26. Curia.**


2. **If a Man leases for Years rending Rent, and Leasee leases it to another at Will, and the first Leslor at the Rent-Day enters into Part of the House leased by Licence of the Leasee at Will, yet this does not suspend his Rent. This was adjudged in B. between Darrel against Andrews and Cope. And P. 15 Ja. B. R. this was affirmed and admitted per Cur. and the Counsel at the Bar.**

See pl. 2. and the Notes there.

3. **If a Man leases for Years rending Rent, and the Leasee leases it to another at Will, and the Leasee at Will licences the first Leslor**
Extinguishment.

Lessor to enter into Part of the House, and the Lessee by Force of his Licence enters and continues there by the Space of half a Year, during which Time the Rent-Day incurs; yet this does not suspend his Rent, for the Lease at Will is not determin'd by the Licence to enter, for this does not amount to a Lease for half a Year, for the Licence was not for any Time certain but only to enter; and after he continued there by Virtue of this Licence by Permission for the Time aforesaid. This was adjudg'd in B. between Dorrel against Andrews and Cape, and Patch. 15 Ja. B. R. this was affirm'd and adjudg'd per Cur. P. 16 Ja. B. R. in a new Action between the same Parties this was adjudg'd again upon a Demurrer.

4. If a Commoner incloses Part of the Waste out of which he has Common fishing, this suspends his Common. P. 1 Ja. B. adjudg'd in Bradshaw's Case.

5. In Affise a Man leased Land for Life rendering 10l. Rent per Ann. Br. Arrear. The Rent of one Day is arrear, and the Lessee disjoints the Lessee, and after ages, pl. 17, another Day passes, and the Lessee brought Affise of the Land and recover'd, &c. and the Lessee brought Affise of the Rent, and the Term incurred during the Seisin of the Lessee by Diffeifion was recouped in Damages, and of the Term arrear before the Differient, the Lessee recovered it in Damages, and so see that the Unity of Possession in the Land does not extinguish the Rent which was due before the Differient; Quod nota. Br. Extinguishment, pl. 24, cites 8 Att. 37.

6. Affise of Common of Pasture, the Tenant pleaded that in the Time of E. 2, the one Land and the other were in the Seisin of W. and so by Unity the Common is extinct; the other said that the Land to which he claimed to be appendant is ancient Land, to which Common has been appendant Time out of Mind, and therefore the Affise awarded. Br. Extinguishment, pl. 27, cites 14 Att. 21. & concordat 15 Att. 2. ic. North. But Brooke says it that it is against Law, and that the Unity is Extinguishment for ever.

7. If Lessee does any Thing that amounts to an Entry though be depart presently, yet the Possession is in him sufficient to suspend the Rent, and he shall be said Extraterere the Lessee, until the Lessee has done an Act that amounts to a Re-entry. Le. 110. pl. 149. Patch. 30 Eliz. C. B. Gibel v. Hills.

8. In Debt for Rent reserved on a Lease of a Warren of Conies; the Defendant pleaded that the Plaintiff had placed a Field Parcel of the Warren by which the Conies had not sufficient Pasture; but the Court (absente Anderlon) held it no Plea; for it is not a Rent but a feignory [Sum] in Grofs due by reason of the Contract, by which the Entry or Ufer of that Part is not any Suspensation. Noy 60. 37 Eliz. Anon.

9. In Debt on a Demise for Rent, the Defendant pleaded that before the Rent due the Plaintiff did enter upon him, but did say that he did expel or hold him out, and so Illuse was taken upon Non Intravit and found for the Defendant and judgment given for him; for though the Plea in Bar was insufficient, yet the Verdict was full to the Illuse. Hob. 326. pl. 396. Trin. 17 Jac. Rot. 862. Reynolds v. Buckle.

10. Entry and taking Possession by Command of Lessee does not suspend the Rent; but it he commands to ejeft Lessee, this suspends the Rent. Palm. 150. Mich. 18 Jac. B. R. Heydon v. Godfale.

11. Taking away a Penthouse fixed to the Premisses is a Trespass but no Suspensation. 2 Jo. 143. Patch 33 Car. 2. B. R. Roper v. Loyd.

6 A

(H.)
(H.) What Act will make a Suspension.

[Of Part or of the Whole.]

2 Lev. 143. 1. A Rent Service cannot be suspended in part by the Act of the Party, and in esse for the other Part. Co. Litt. 184. b. Twyden J. said, that what is said by Cook that Rent Service cannot be suspended in Part, and in esse in Part is without Reason and Authority.—9 Rep. 134. b.

Affise of a Rent, a Man feized of four Acres of Land has issued a Son and a Daughter by one Vener, and two Daughters by another Vener, and granted 100 l. out of his Land to his Son in Fee, the Son died without issue in the Life of his Father; the Father died; the Land descended to the three Daughters; and because the entire Rent descended to the eldest Daughter who is of the whole Blood to her Brother, therefore it is not extinct but for the Partition; quod nota by Award by Advice of all the Justices. Br. Extinguishment, pl. 51. cites S. C.

3. If Tenant in Tail the Remainder in Tail are, and Tenant in Tail grant a Rent in Fee to him in Remainder, this is not any Suspension of the Rent, inasmuch as it issues out of the Franktenement. Nich. 15 Jd. B. R. between Dutton and Ingham, adjudged per Cor. Cur. and that it may be granted over by him in Remainder.

4. So if Tenant in Tail the Remainder in Tail are, and he in Remainder purchases a Rent in Fee of J. S. who had it before those Estates created, yet this does not make any Suspension because that he had nothing in the Franktenement. Nich. 15 Jd. B. R. in Dutton and Ingham’s Case; Per Daughton.

5. If Lord and Tenant are of three Acres by 3 d. Rent, and the Tenant leaves one Acre to the Lord for Years, this suspends the Seigniory in the whole; For the Seigniory may be extinct in part but not suspended in part but for the whole. Br. Extinguishment, 48. Co. Litt. 148. b.

6. So if the Tenant leaves for Life, or gives in Tail to the Lord part of the Land, this suspends all the Seigniory. Co. Litt. 148. b.

7. If a Man seizes in Fee leaves for Years reserving a Rent, and after acknowledges a Statute to J. S. and another Statute to J. D. and then grants the Reversion for Years to J. S. and Leslie attorns, this suspends the Statute of J. S. by the Acceptance of the Lease of the Reversion, as long as the Leafe shall continue, though he grants the Lease over to another. P. 16 Jd. B. R. between Sir J. Harrington and Garway adjudged. Cr. 15 Jd. B. R. same Case adjudged.

8. If a Parson leaves his Reversion to another reserving Rent, and after takes the Tythes due, feliject, Lambs, Wool and Corn, this doth not suspend his Rent, for this doth issue out of the Tythes. 28 C. 3. 94.

9. If
9. If a Man lease Land for twenty one Years reserving Rent upon 1 Le. 116. Condition to re-enter for Non-payment, and after Leesee makes Lease pl. 275. for six Years, to commence two Years after; This future Interest made to the first Leesor shall not suspend his Rent or Condition in the mean Time, but that he upon Demand of the Rent and Non-payment of it may enter for the Condition broken. 4 Rep. 52. Rawlin's Case.

turn the Leafe was not suspended.— Jenk 254. pl. 46 S. C. During the two Years the Leesee makes Default of Payment of the Rent, the Condition is not suspended, but that the first Leesor may enter and avoid the Demise and the Re-demise; for the Suspension of the Condition arises by a present Interest passed by the Leesee to the Leesor so that the Leesee ought to have Profit of it. So adjudged and affirmed in Error.— S. C. cited per Hale Ch. Pollex 68.

10. If a Man makes Feoffment in Fee upon a collateral Condition, and after the Feoffee re-demises the Land to the Feoffor, and then the Condition is perform'd; in this Case the Redemise was no Suspension of the Condition, and therefore no Impediment but that the Feoffor shall take Advantage of the Condition, and by this destroy the Term which he himself has accepted. 1 Rep. 97. Shirley's Case. 174. Digge's Case. 4 Rep. 53. Rawlin's Case.

11. Tenant who holds of the King in Chief bonds of other Lords other Lands and dies, his Heir within Age, the King seizes the Ward, the Seigniory is not properly suspended; for the other Lords may have Petition for their Rents to the King, and shall have their Releases. Br. Extinguishment, pl. 44. cites 29 All. 5. and Petition in Fitzh. 5.

12. Where there are several Jointtenants or Coparceners who hold by Suit, and the Part of the one comes to the Lord by Purchase or otherwise, the whole Suit is extinguished; for he cannot be contributory to his Companions for his own Suit. Br. Extinguishment, pl. 6. cites 40 E. 3.

14. Where a Man has a Leet, and the King seizes certain Land within the Precinct of the Leet, there the Leet is suspended for this Parcel during the Seisin of the King during this Time. Br. Extinguishment, pl. 8. cites 47 E. 3. 12. 13.

15. A lease to B. for 20 Years two Acres of Land rendering Rent with Condition of Re-entry. B. leased one of the Acres to C. for 10 Years, and after granted the Reversion of the said Term in the said Acre to A. Per Cur. this is no present Suspension of the said Condition, because there is not any Poffession. 3 Le. 221. pl. 294. Pash. 30 Eliz. in the Exchequer, Brightman's Cafe.

16. In Cafe of Rent-Service, if the Lord purchase Part of the Tenancy in Fee, Part is extinct and in Effe for the Residue. 9 Rep. 135.

17. Remainder in Tail or for Life expectant on Estate for Life or in Tail, shall never suspend a Metalty, Seigniory, Rent, &c. But if Meline grants his Metalty for Life or in Tail, the Remainder to Tenant paravail in Fee, there the Metalty is extinct, because he has an estate in the Metalty as he had in the Tenancy. 9 Rep. 134.

18. A having two Houfes with a long Balcony going out of both lets one to B. generally without Mention of the Balcony, and after lets the other to C. with the Balcony therunto belonging. Afterwards the Leesor divided the Balcony unequally, viz. more to the last Housé than to the first, alter which B. the first Leesee pays Rent, but Rent being afterwards arrest the Leesor brings Debt, and B. pleads the Entry of the Leesor
Extinguishment.

Lesflor into his Balcony and making such Partition in Suspension; and it was conceived that this Partition was no Suspension, because it was not expressly let, and so was never out of Lesflor's Possession, being never divided. 3 Keb. 520. pl. 87. Trin. 27 Car. 2. B. R. Anon.

(I) Suspension by Act in Law.

1. If Guardian in Chiefalty enters into the Land of his Ward within Age, by this the Seigniory is suspended, but if the Feme of the Tenant be after endowed of the third Part of the Land, now she shall pay to the Lord the third Part of the Rent. Co. Lit. 148. 1.

2. So if the Tenant gives Part of the Tenancy to the Father of the Lord in Tail, and after the Father dies, and this descends to the Lord, in this Case by Act in Law the Seigniory is suspended in Part, and in Case for Part. Co. Lit. 148. 1.

3. The same Law is of a Rent-charge. Co. Lit. 148.

(K) Suspension.

By the Act of God, Enemies &c.

Syr. 47 Paradine v. Jane, S. C. Roll Ch. J. said that the Defendant having pleaded that it was Hoftilis Exercitus was not good, but that he should have pleaded that the Army were Aliens and unknown, for the Hoftilis Exercitus makes not the Plea more certain than before, and that if the Tenant for Years covenants to pay the Rent, though the Lands leased to him be surrounded with Waters, yet he is chargeable with the Rent and much more here; and Judgment for the Plaintiff. All. 26. S. C. adjudged for the Plaintiff; And the Court took a Difference where the Law creates a Duty or Charge, and the Party is disabled to perform it without any Default in him and has no Remedy over, there the Law will excuse him; As in Case of Waifs, if a House be destroyed by Tempest or by Enemies the Lessee is excused. And resolved, that though the whole Army had been Alien Enemies, yet the Defendant ought to pay his Rent.

(L)
(L) Suspension of Personal Things.

1. **If** the Obligee covenants with the Obligor, **who is bound to** perform Covenants, not to molest or sue him before such a Day; this is not any Suspension of the Debt, for the proper Sense of the Words is to have Covenant upon it, if he sue him before the Day, and not to make this a Release. **Bib. 37 Eliz. B. per Cur. between Dewes and Jeffreys.**

adjudged accordingly; But if it had been a Covenant that he would not sue it at all, peradventure it might ensue as a Release, and to be pleaded in bar, but not here; For it never was the Intent of the Parties to make it a Release.

2. **If** the Obligee grants to the Obligor that he shall not be sued not be sued upon the said Obligation before such a Day, and if it be, that then he shall plead the said Grant as an Acquittance, and that the said Obligation shall be void and of no Effect; **This is a Suspension of the Obligation, and is by Consequence a Release, for this is a Grant, and that he shall plead it as an Acquittance. 21 H. 7. 23 b. 30.**


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(M) A Personal Thing once suspended shall be extinct.

1. **If** a Personal Thing be suspended by an Act in Law it shall not be any Extinguishment.

2. If a Feme Executrix of the Debtor takes the Obligor to Baron, but if Obligee takes Obligor to Baron and after the Baron dies, **this Suspension is not any Extinguishment because it was by an Act in Law and in a duty. Bib. 30 & 31 Eliz. cites Sir John Needham's Case. 8 Rep. 139. adjudged.**

It is no Release of the Debt because it would be a Deterlavit. Per Gould. J. 12 Mod. 290. There are divers Rights in such Case; Per Holt Ch. J. 12 Mod. 293. — See (B) pl. 2, 3, and the Notes there.

3. **If two oblige themselves jointly and severally to one, and after Obligee makes the Feme of one of the Obligors Executrix and dies, and after her Baron makes her Executrix also and dies, the Obligation is extinct by this Suspension. Cr. 12 Jac. B. adjudged between S. C.**

*Browne. 76. cited Jo. *Fryer and Gildridge. 545 — See Supra (B) pl. 6, S. C. and the Notes.

4. **If two oblige themselves jointly and severally to one who makes the Feme of one of the Obligors Executrix and dies, who administers, this is a Release in Law of the Debt, inasmuch as he acknowledges 6 B.
knowledges the Executive to be the Feme of the Obligor at the Time of the making of her Executive. Tr. 12 N. B. per Cur. between Frier and Gildrich.

5. If A. being indebted to B. by Obligation, and after A. dies intestate, and C. after takes Possession of all the Goods of A. by which he becomes Executive de son Tort, and after B. takes Administration of the Goods of A. though B. may have a Trepass or Crover and Conversion against C. for the Goods by way of Relation, yet he may also have an Action of Debt upon the Obligation against C. as Executive de son Tort, with an Answer that no Goods of the Intestate came to his Hands to satisfy any Part of his Debt, and that the Defendant C. after the Death of the Intestate seized all the Goods of the Intestate before Administration granted to him; for the reason that the Action of the Debtor being the Administrator is suspended when he has Assets is, because he may retain to satisfy himself, and the Law supplies it and gives this Power to retain because he cannot sue himself, and here when he has not Assets he cannot retain, and he is not bound to bring Action of Crover and Conversion as he may, but may also bring this Action of Debt at his pleasure, for it is well proved that this Action is not suspended, nor much as he might have Action of Debt against the Deceit where he has not any Assets. Tr. 1653, between Abdy and Child Executive of Blackeley adjudged per Cur. upon Demurrer. Intercus Mich. 1652. Rot. 686.


7. If Obligation is made by three to one, and he makes one of the three his Executor and dies, the Obligation is dischargsd against all though it is joint and severall. Br. Obligation, pl. 61. cites 21 E. 4. 80.

8. If two are bound to a Feme by Obligation, and she marries one of them, and after he dies, the Debt is discharged for ever. Br. Barre, pl. 53. cites 21 H. 7. 29.

9. Bond to pay Rent reserved on a Lease for Years. In Debt Leesee pleads Re-entry before the Day of Payment. On Demurrer it was argued, that by Leesee's Re-entry on Leesor, though the Rent was reviv'd, yet the Action being Personal and once suspended is extinct, but overruled by the Court without Argument. D. 140. a. Marg. pl. 40. cites Mich. 43 & 44 Eliz. C. B.

10. In Debt on Bond, the Defendant pleaded that the Plaintiff, after the Money was due on the Bond, covenanted and granted by Indenture not to sue the Defendant in 99 Years; Per Holt Ch. J. the Suspension of this Action will not destroy the Bond; for every Defeasance is quodam Modo a Suspension; a Covenant not to sue at all is an Acquittance, but a Covenant not to sue a Bond within such a Time goes only in Covenant; that the Rule that a Personal Action once suspended is for ever extinct does not hold in all Cases, and Dolben agreed; and Judgment for the Plaintiff. Comb. 123. Trin. 1 W. & M. in B. R. Anon.

11. Bond to pay Money after Marriage between Obligor and Obligee, the Debt is only suspended by the Intermarriage; Per two Jultices contra Holt. 1 Salk. 325. Hill. 17 W. 3. B. R. Gage or Grey v. Acton.
(N) Suspension avoided.

1. If a Man leaves a Rectory for Years reserving a Rent, and upon Part of the Glebe in a Corner of the Close is a Sheepcote and the Leesor enters and pulls it down, and the Leesee re-enters, and after the Rent is arrear, the Rent is suspended notwithstanding the Reentry of the Leesee into the Close, for Part of the Profit of the Thing leased is taken from the Leesee, Leesor, his House, and thus by the Act of the Leesor. Br. 37 Eliz. B. per Popham and Gawdy.

seems to be S. C. and held accordingly by Popham and Gawdy, but Fenner and Clench doubted;

2. If the Leesor of a Wood or Orchard rending Rent cuts them down, and the Leesee enters, yet the Rent is suspended. Quere this.

3. Afsise may be suspended and revived; Per Storn. Justice. Br. Afsise, pl. 482. cites 13 E. 3. and Fitzh. Title.

4. As if Defeisor enjoineth W. who dies seized, and his Heir enters and lays to the Defeisor for the Life of a Stranger, upon whom the Defeise Extinquishment-re-enters; the 1st Defeisor brings Afsise and Recoveries; the Heir and ment. pl. C65 that went die; the Defeisor is Heir to the Heir of the Feoffee against 46. cites whom the Defeise brings Afsise. The Defeisor pleads the Recovery in the first Afsise against the Plaintiff, there the Plaintiff may confess and avoid the first Recovery in the Afsise without Aartain, because the first Afsise was of the second Defeisor, and this Afsise is of the first Defeisor, and so the Afsise which was suspended by the Defeisor is now revived; Per Storn. J. Br. Afsise, pl. 482. cites 13 E. 3.

5. If a Man be condemned upon Recognizance by erroneous Judgment, and after is outlawed and has Charter of Pardon, he shall have Writ of Error, and the Outlawry is no Plea; for this Action is revived in him, for it is not like to an Obligation; for there if the one be outlawed the Obligation is forfeited, but here he is not to recover any Thing, but to discharge him of the Execution. Br. Extinguishment, pl. 41. cites 29 All. 47.

6. If a Man be beat or imprison'd, and after is outlaw'd, and then gets Charter of Pardon, now the Action of Trespass is revived by Award; quod nota. Br. Revivings, pl. 7. cites 29 All. 63.

may have the Goods, therefore the Action is gone by the Outlawry. Ibid.

7. Note that Thirne said that in the Time of R. Thorpe, the Opinion of him and of his Companions was, that where a Manor or Suit of Tenants of it descends to two Daughters, who make Partition, the one shall have the Demeines, and the other the Services, she who has the Demeines shall not have the Services nor Suit; for the other has the Services, and she who has the Services shall not have the Suit; for she who has no Manor nor the Suit of it, but in this Case if the one Parson dies without Issue, the other shall have the Suit again, for the Suit was not extinct, but only suspended; quod nota & quere; for the Manor was once defeated. Br. Extinguishment, pl. 13. cites 12 H. 4 25.

8. If
Extinguishment.

8. If a man takes a Distrefs for Rent, and upon Avowry hath Return irreplevisable, if the Distress dies in the Pound, the Party may dis-train de Novo. Hob. 61. in Cafe of Foiier v. Jackson, cites 4 H. 4.

9. The Opinion of two Justices was, that where a Man leaves for Term of Years rendering Rent, and ouths the Lejee and makes a Feoffment in Fee, and the Lejee re-enters, the Rent is revived by reason the Reversion is revived. But quere inde, for he made the Feoffment dis-charged of all Rents; but the Reversion and the Fee Simple was Parcel of the Estate of which the Feoffor was Jailed at the Time of the Distress and Feoffment made; and therefore a Diversitv. Br. Extinguishment, pl. 4 cites 9 H. 6. 16.

10. If a Feoffor upon Condition does Trespass upon the Land, and after performs the Condition and enters, yet the Feoffee shall have Action of Trespass, quod suit Conceiium, by reason that he affirmed the first Possession. Br. Relation, pl. 44. cites 4 H. 7. 10.

11. So by some, where a Man recovers by erroneous Judgement, and he takes loses does trespass upon the same Land, and after reverses the Judgment by Error, and is restored to the Land and mesne Profits, the other shall not have Trespass. But by several contrary, and that he who recovers shall have Action of Trespass by reason that he is charged to render the mesne Profits, and therefore Circuit of Action shall be suffered there, and therefore it is no Relation which may avoid the mesne Actions that are vested. Br. Relation, pl. 44. cites 4 H. 7. 10. But Brook says fee tit. Trespass 425. this Case abridged that the Action of Trespass lies well. Ibid.

12. If Trespass is done against the Heir, and after the eldest Brother is designed, yet Trespass lies for the first Heir; for it is an Action vested, per Filiem. Br. Parliament, pl. 41. cites 4 H. 7. 10.

13. The same seems to be of a Son born after the Death of the Father, where a Daughter was Heir for the Time, the Daughter shall have Trespass. Ibid.

14. If the Abbot of B. be bound in an Obligation by his own Seal, and after is translated to the Abbey of St. A. Action of Debt lies against him as Abbot; Per Vastior or Law. Otherwise it seems where he is depos'd, and after is re-elected Abbot in this House or in another, for there the Action was once extinct, contrary here. Br. Nonabilitie, pl. 28. cites 9 H. 7. 23

15. Note per Fitzherbert and Norwich J. that if a Man be bound to a Feme Sole, and after marries her, and after they are divorced, the Feme shall have Action upon the Obligation though it was once suspended; quod quere. Br. Extinguishment, pl. 1. cites 26 H. 3. 7.

16. If the Lord disaffees the Tenant, and is disaffees, the Disaffee relieves to the second Misprison, yet the Seigniory is not recov'd; for between the Parties the Relafe enures by way of Entry and Feoffment as to the Land; but not having Regard to the Seigniory, and for that the Possession
feoffment was never actually removed or expelled from the Demised, who claimed under the Lord, the Seigniory is not revived. Co. Litt. 278. b.

But if the Lord and a Stranger dispossess the Tenant, and the Dispossession is to the Stranger, the Seigniory by Operation of Law is revived, for the whole is vested in the Stranger which never claimed under the Lord. And in that Case, if the Lord had died, and the Land had survived, the Seigniory had been revived. But if the Lord had dispossessed the Tenant, and been dispossessed by two, and the Dispossession reduced to one of them; the Seigniory is not revived, because he claimed (as hath been said) under the Lord. Co. Litt. 278. b.

17. In Debit for Rent, the Defendant contended the Lease and the Rent referred to it, but pleaded a Prescription for Common in ten Acres in E. S. C. revolved for Bealls Levant and Couchant on the said Tenements every year after the Corn fowed, from 7 August till the Corn reaped and carried away; and that before any Rent became due, the Plaintiff enclosed the said ten Acres, so that the Defendant could not use his Common; and that thereby his Rent was extinct. But on Demurrer it was inferred that this Land included is not alleged to be sown with Corn; and if not, by his Prescription he is not to have Common; besides he did not allege that the Plaintiff kept those ten Acres enclosed with force, and otherwise he might break the Hedges and take his Common; and further that alleging the Rent to be extinguished by the Inclosure is vain; for the Rent is not tuliing out of the Common and so the Inclosing cannot suspend it; and of that Opinion was all the Court, and that the Plea was ill upon the first Exception; and Judgment for the Plaintiff. Cro. J. 679 pl. 16. Mich. 21 Jac. Sanderfon v. Harlton.

18. Covenant upon Indenture for Non-payment of Rent; The Plaintiff declares that he was seized of Tythes, and by Indenture demitted them to the Defendant rendering Rent, and the Defendant covenanted to pay it, and he assigned his Breach in Non-payment of so much; and the Defendant pleaded Eviiction. The Plaintiff demurred; and Judgment was given for the Defendant, because it is a Rent, and the Eviction is a Suspension of it, and therefore a good Plea. Ex. Relatorionem'dri Mather. Ld. Raym. Rep. 77. Pach. 8 W. 3. Daliton v. Reeve.

19. If a Man Obligor marries a Woman Obligee who are divorced, the Debt revives, and the Man shall be closed by the Woman again. 12 Mod. 290. Pach. 11 W. 3. in the Case of Cage v. Acton. Holt Ch. J. because the Divorce being a Vindicta Matrimonii by reason of some prior Incompetence Pre-contrat &c. makes them never Husband and Wife ab Initio; but if the Husband had made a Fee-simple in Fee of the Lands of the Wife, and then the Divorce had been, that would have been a Discontinuance as well as if the Husband had died, because there the Interest of a third Person would have been concerned, but between the Parties themselves it will have Relation to destroy the Husband's Title to the Goods; and it amounts to no more than the common Rule, viz. that Relation will make a Nullity between the Parties themselves, but not among Strangers.

20. In Debit upon a Bond it was pleaded in Bar that in a former Action upon that Bond the Defendant had pleaded the late Statute of the King laying Taxes upon Bonds for Security of Money, and that none should recover such Debts if they had not taxed the same; and that upon that Plea the Plaintiff was barred; and it was objected, that Statute was only a Temporary Law, and now expired; and therefore the Impediment being removed the Plaintiff should recover. But per Holt, the Judgment is remissat. Here the Defendant had a good Plea when the first Action commenced, and Time shall not wear it out. 12 Mod. 400. Pach. 12 W. 3. B. R. Die Queensland &c. which is but a temporary Plea, by which the Parties are put out of Court, but may be brought in by a Re-filing of Commons or Re-attachment, but where Outlawry is pleaded in Abatement after Pardon and Reversal thereof, Party must begin de novo. 12 Mod. 420. Lady Faulkland v. Stanion. 6 C

And
Extinguishment.

And Co Litt. 128 b. and 155. b. is to be understood upon this Diverity when the Cause of Action accrues to Plaintiff at a Time at which he is under the Disability of an Outlawry; there the Plea of Outlawry in Abatement shall quite overthrow the Writ, and after Removal thereof he must begin de novo; but where the Disability of Outlawry comes after the Cause of Action accrued, there the Plea of Outlawry is only a temporary Disability, which does not abate the Writ, but is only quoniam; and after Removal thereof he may re-continue the Action by Re-summons &c. 12 Mod. 400. Lady Faulkland v. Stanton.

21. Where the same Hand is to receive as is to pay, it is an Extinguishment. Per Holt. Ch. J. 1 Salk. 305. Hill. 1 Ann. B. R. in Cafe of Wangford v. Wangtord.

(O) Extinguishment. Quoad one and not quoad another.

4 Le 235. 1. T O some Purposes by the Common Law Rent extinct shall be said in Effe as to a Stranger. 7 Rep. 37. b. Mich. 5 Jac. in Lillingstone's Cafe.

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4 Le 235. 1. T O some Purposes by the Common Law Rent extinct shall be said in Effe as to a Stranger. 7 Rep. 37. b. Mich. 5 Jac. in Lillingstone's Cafe.
(P) Of Part where it shall be of the Whole.

1. If the Ld. releases his Seigniory in Part of the Tenancy, all the Seigniory is gone by his own Act. 6 Rep. 1. b. in Bruerton's Cafe cites Litt. 49. a. [S. 222.] and 5 E. 2 tit. Avowry, 206.

2. If a Man has a Rent-charge issuing out of four Acres of Land, and releases his Right in the one Acre all is extinguished; for it is his own Act; Per Thorp. Br. Extinguishment, pl. 31, cites 34 Aff. 15.

3. If a faile Verdict be found and the Party grieved makes a Feoff-ment of Part he shall not have Attaint for any Part. Arg. Ow. 21. cites 6. and 38 E. 3. and 12 H. 5.

4. In Cae of a Common Person if an entire Thing be divided or extinguished in Part by the Act of the Party it is an Extinguishment of the Whole; but otherwise it is where it is by the Act of God or the Law. And. 175. pl. 211. Mich. 29 & 30 Eliz. Knight v. Brech, alias Beech.

5. Lord accepts Part of the Tenancy, all the entire Services are ex-Utile. 5 Rep. 1. b. Hill. 36 Eliz. in the Court of Wards, in Brerton's Cafe.

6. As to entire Services when the Ld. comes to any Parcel by a mere Act in Law, and partly by the Act of the Party, and namely, when the original Act is the Act of the Party. As where Parcel of the Tenancy is recovered in a Cessavit all the entire Services which are for the Benefit of the Lord are extinct and gone. 6 Rep. 2. b. Hill. 36 Eliz. in 229. (A.) the Court of Wards. Bruerton's Cafe.

7. There is a Difference between a Right of Action and a Right to the Land; for in the first Cae if there be a Suspenden or Extinguishment in Part it is extinguished for the Whole; but where there is Right to S. C. the Land it may be released or suspended in Part, and remain good for the Restidue. Mo. 413. pl. 569. Trin. 37 Eliz. Wright v. the Mayor of Wickham.

8. If he that has Cause to bring a Writ of Error or Attaint takes a Lease of Part he suspends his Action, and if he takes a Feoffment of it he it is quite gone. Arg. Ow. 21. 37 Eliz. B. R. in Wright's Cafe.

9. If one has Title to a Writ of Error to reverse a Fine makes a Feoffment of Part of the Land, the Feoffment only destroys the Title of Error for that Part. Cro. E. 469. (bis) pl. 27. Par. 38 Eliz. B. R. Wright v. Wickham.

10. There is a Difference between a Condition Compulsory and a Power of Revocation that is voluntary. In the last Cae a Man may by his own Act extinguish his Power in Part, as by levying a Fine of
Extinguishmment.

of Part, and yet the Power remain for the Residue, because it is in Nature of a Limitation and not of a Condition. Co. Litt. 215. a, cites it as relify'd, Mich. 40 & 41 Eliz. in the Earl of Shrewsbury's Cafe.

11. Condition or Limitation annexed to the Estate of the Land ought to destroy all the Estate to which it is annexed and not Part of it, 1 Rep. 86. b, Patch. 42 Eliz. C. B. in Corbet's Cafe.


Extoration.

(A) What is Extortion. And who may be guilty of it.

Br. Court 1. TRESPASS of Grass cut, the Defendant said that after the Trespass he was amerced in the Plaintiff's Court for the same Trespass, which was offer'd at 2s. of which be has made Glee to the Plaintiff, and held a good Plea by the Acceptance of it, though the Amercement of the Court Baron be Extortion, quod nota. Br. Tres-

pl. 100. cites 66. cites 46 E. 3. 8.

12 H. 4. 8.

Ibid. pl. 105. cites 39 E. 3. 20.

Co. Litt. 2. Extortio est crimen quando quis colore Officii extorquet quod non est debitus, vel quod est supra debitus, vel ante Tempus quod est debitus, and this is called Crimen Explicationis & Crimen Concussionis. 10 Rep. 102.

Hill, 17 Jac. in Cafe of Empfon

a. Mich. 10 Jac. in Beawlage's Cafe.

s. 3. If Bathurft, S. P. & S. C. cited.
Exortion.

3. If an Officer or Judge takes more than the usual Fees he is punishtable at Common Law. Per Chamberlain J. 2 Roll Rep. 203. Mich.

20 Jac. B. R. Smith v. Mall.

4. Bond to pay Fees before they are due is Exortion. Raym. 62. in Hut. 52. —


5. In every Oppression there ought to be a threatening of the Party; for the voluntary Payment of a greater Sum where a les is done cannot be said Exortion. Godbe 438. pl. 583. Mich. 4 Car. in the Star-Chamber. Floyd v. Sir Thomas Cannon.

6. Church-Wardens of St. Martyns were indicted for Exortion daily the taking of one Reynel a Silver Cup for making him Gallery Keeper in the Church; Keeling said this was no Offence, nor such an Office where Eyres. S. C. upon Exortion can be grounded, but a bare Employment. But the accordingly.

Court would not quash it without Trial; for then it will appear whether the Cup were great or little, exacted or freely given, and per Keel- ing if the Church-Wardens have accounted for it, it shall be quash'd, but not else. 2 Keb. 100. pl. 27. Mich. 18 Car. 2. B. R. The King v. Ayres & al'.

7. Bailiff's taking excessive Bail, as 40 l. where the Plaint was but of 30 s. an Information was ordered against them for this Exortion. 1 Keb. 873. pl. 23. Pauch. 17 Car. 2. B. R. Randal v. Keite.

8. Every several Taking is a several Exortion, and it is not good to lay too many Extractions together; Per Holt. Ch. J. Cumb. 194.

Pauch. 4 W. & M. in B. R. The King v. Roberts.

S. C. held accordingly; For every Taking was a separate Offence. — 4 Mod. 100. 107.

9. Under-Sheriff refusing to execute Process till he has his Fees; If the Party pays him the Fees so before-hand he may alter indict him of Ex- tortion. 1 Salk. 330. pl. 3. Mich. 6 W. & M. in B. R. Hoscott's Cafe.

10. An Indictment for Exortion against an Officer for taking Money for not carrying his Prisoner to a Spunging-House; The Court looked upon it to be so ill a Practice, that they would not hear a Motion to quash it. 12 Mod. 255. Mich. 10 W. 3. The King v. Beechcroft.


12. An Indictment was against several for intending to defraud A. of his Money, and that they threatened to send him to Neugate by Colour of a Warrant, and to indict him of Perjury, unless he would give them Money and a Note, which he did by Reason of their Threats; And Judg- ment for the Queen. 11 Mod. 137. Mich. 6 Ann. B. R. The Queen v. Woodward.
Extortion.

(B) Punishable. How.

1. The Statute of Welfm. 1, cap. 26. adds a greater Penalty than the Common Law did give; For by this Act the Plaintiff shall recover his double Damages, and besides, they shall be punished at the Will of the King, viz. by the King’s Justices before whom the Cause depended. 2 Inst. 210.

2. This Term Nelme a Bailiff in White-chapel being indicted and convicted of Extortion was fined 13 l. 6 s. 8 d. to be imprisoned one Week without Bail, and then till be fined Twenty Guineas for his good Behaviour, and disabled for ever hereafter to execute the Office of Bailiff or Under-Bailiff. MS. Rep. (said to be a Copy of Ld. Ch. J. Keyling’s) Mich. 15 Car. 2. B. R. Nein’s Cafe.

3. The Governor of the Gatehouse Prison in Westminster was found guilty of Extortion and hard Usage of the Prisoners in a most barbarous Manner, and was fined 100 Marks and removed from her Office. Raym. 216. Mich. 24 Car. 2. B. R. The Lady Broughton’s Cafe.

4. An Action lies against a Ferryman for extorting Money for Passage of one that is toll-free by Custome contrary to the Custome, because there is no other Remedy. Carth. 194. Trin. 3 W. & M. in B. R. in Cafe of Pain v. Patrick.

5. It is against the Course of the Court to quash an Indictment for Oppression or Extortion; Per Cur. We cannot do it. Demur to it. 5 Mod. 13. Mich. 6 W. & M. The King v. Wadworth.

6. Upon Affidavit of Extortion, though the Course is to take a Recognizance to answer Interrogatories, yet in Cafe of great Oppression the Court may commit the Party, and he must answer in Vinculis; Per Holt Ch. J. Cumb. 448. Trin. 9 W. 3. B. R.

7. Indictment was against A. and others, for that being Receivers of the Queen’s Tax they Colle Officers extorted Money from several Persons. On Motion in Arreft of Judgment it was held that two Men may be indited jointly for a Battery or Extortion, because it is a Crime at Common Law of which they may be jointly or severally guilty. 5 Salk. 382. pl 32. Patch. 5 Ann. B. R.. The Queen v. Atkinson.

(C) Pleadings.

Le. 59. S. C. cited.

1. The Place where the Extortion was committed should be set down in the Declaration. See Pl. C. 200. Stradling v. Morgan.

2. The Sum certain extorted must be particularly set forth, and he cannot say that the Defendant did extort divers Sums from divers Men generally; And so it was adjudged in Reginald’s Cafe in this Court; Per
Extortion.

Per Richardson Ch. J. Godb. 438. pl. 583. Mich. 4 Car. in the Star-Chamber; Floyd v. Cannon.

3. If the Charge is for oppressing A. B. and C. particularly, and 100 Men generally, the Proof must be first as to A. B. and C. before any be given as to the others. Godb. 438. pl. 583. Mich. 4 Car. in the Star-Chamber; Floyd v. Cannon.

4. Indictment of Extortion against a Bailiff of a Hundred did not ex. pref the Cause, but only that Colore Officis he took so much and held good; but the Book says that perhaps it had been upon Demurrer it might be otherwise. Sid. 91. pl. 13. Mich. 14 Car. B. R. The King v. Cover.

after a Verdict he needed not shew particular Cause.

5. It was moved to quash an Indictment against a Miller for taking too great Toll, because it was not said Jurat nor Onerat nor the Jurors named. But per Curiam, it is against the Course of the Court to quash an Indictment against Extortion on Oppression, and we cannot do it; and bid them demur to it. 5 Mod. 13. Mich. 6 W. & M. The King v. Wadhsworth.

6. A Complaint and Charge of Extortion ought to be particular, and Extortion that the Defendant took it Extorsio, & Colore Officis. 2 Salk. 680. pl. 2. Pafrch. 5 Ann. in Cam. Scacc. The Queen v. Baynes.

be set forth as Felonies in an Indictment; Per Holt Ch. J. 11 Mod. 82. Pafrch. 5 Ann. B. R. The Queen v. the Clerk of the Peace of Cumberland. S. C.

See tit. Fees (A) and other proper Titles.

(A) Extrarparochial.

1. The King shall have all Tities in Places which are out of every Br. Difnes, Parifs, as in the Forst of Rook, Englewood &c. and may grant it by his Letters Patents, quod nota. Br. Prerogative, pl. 47. cites 22 Att. 75.

Br. Seire Facias, pl. 134. cites S. C.


3. If a Place is extrarparochial and has not the Face of a Parifh the Fafhics have no Authority to fend any poor Person thither; Possibly a Place extrarparochial may be taxed in Aid of a Parifh, but a Parifh shall not in Aid of that; Per Holt. 2 Salk. 486. pl. 44. Hill. 11 W. 3. B. R. Precinct of Bridewell v. Clerkenwell.

10 Extrarparochial Places, but that is Caufus Omiffus.—8 Mod. 49. Trin. 7 Geo. The King v. Saint Peter's Parifh in Oxford.

4. If
4. If a Place be a reputable Parish and have Church-Wardens and Overseers of the Poor it is within 43 Eliz. though in Truth it be no Parish; But if it be merely Extraparochial as the Justices cannot send to such a Place, so they cannot send from it, as it is exempt from receiving to it shall not have the Benefit of removing; For they have not proper Persons to complain; Persons in Extraparochial Places must subject on private Charity as all Persons did at Common Law before 43 Eliz. which enacts that every Parish shall keep their own Poor; and that Act does not extend to Extraparochial Places, Per Holt Ch. J. 2 Salk. 487. pl. 48. Trin. 12 W. 3. B. R. Inhabitants of the Forest of Dean v. the Parish of Linton.

5. One settled in a Parish removes into an Extraparochial Place where he gains a Settlement, and then removes into another Parish where he becomes chargeable. The Question was, What this last Parish can do with him? Whether by the Statute that enables them to send such a One to the last Parish where he was last legally settled, they may send him to the Parish he lived in before he remov’d to the Extraparochial Place? For send him to the Extraparochial Place they cannot for want of proper Officers to receive him. Powell J. took this to be Causa Omnifius, and what ought to be moved in Parliament; these Extraparochial Places being many in Number and of great Extent. 10 Mod. 81. Hill. 10 Ann. B. R. The Queen v. Doughton.

6. By Virtue of 13 & 14 Car. 2. cap. 12. S. 21. the Justices may exercise the Powers given by 43 Eliz. and that Act in all Extraparochial Places containing more Houses than one, so as to come under the Denomination of a Vill or Township. Adjudged by Parker Ch. J. and rot. Cur. 2 Salk. 486. pl. 44. in Marg. cites 11 Ann. B. R. Stoke-Lane Inhabitants v. Doltine.

7. The Statute of 43 Eliz. 2. extends to Extraparochial Places, and so do all Poor Acts when such Places are within the same Mischief as other Parishes, and shall be subject to the Control of the Justices of Peace, and the Penalty for not meeting in the Church shall never be inflicted on the Overseers of the Poor, because the Inhabitants of such Places have no Church to meet in. Most of the Forests in England are Extraparochial, and fo is Christ-Church in Oxford, but they ought to maintain their own Poor. 8 Mod. 39. Patich. 7 Geo. Rufford Parish’s Cafe.

For more of Extraparochial, see other proper Titles.