demurrer, that the plea was good in form, and rightly pleaded to raise the question if an executor *de son tort* of a rightful executor can be sued for the debt of the original testator, but that it was bad, as admitting that the defendant as executrix *de son tort* had received all the assets not administered by B., but did not show that the defendant had no assets in her hands unadministered of the original testator, either independent or in consequence of a *devastavit* by B., out of which she might satisfy the debt.

Godolphin proceeds to observe, s. 4. And if one, after wrongful administration of some of the deceased's goods take administration, and after such administration taken be sued by a creditor for a debt as administrator, and after such wrongful administration there remain not goods sufficient to pay the debt, the creditor can recover no more than remained **429** after such rightful administration taken, because he sued him as *administrator; therefore he should in such case have sued him as executor, because he was executor in his own wrong before he took letters of administration; and so then the goods which were administered before the taking such letters of administration must thereby be included to be liable for the debt due to the creditor, otherwise not.

The circumstances, under which a man makes himself liable as executor *de son tort*, are classified in Read's case, 5 Rep. 33 b.

1. Where a man dies intestate, and a stranger takes the intestate's goods, and uses or sells them, it makes him executor of his own wrong, for although the pleading in such case be, that he was never executor, nor ever administered as executor, and therefore it was objected that he ought to pay debt or legacy or do something as executor, yet it was resolved that where no one takes upon him to be executor, nor any hath taken letters of administration, there the using of the goods of the deceased by any one, or the taking of them into his possession, which is the office of an executor, is a good administration to charge them as executors of their own wrong, for those to whom the deceased was indebted in such case have not any other against whom they can have an action for recovery of their debts.

2. Where an executor is made and he proves the will or takes upon him the charge of the will, and administers, in that case if a stranger takes any of the goods and claiming them for his proper goods, uses and disposes of them as his own goods, that doth not make him in construction of law an executor of his wrong, because there is another executor of right whom he may charge, and these goods which are in such case taken out of his possession after that he hath administered, are assets in his hands. But altho' there be an executor who administers, yet if the stranger takes the goods, and claiming to be executor, pays debts, and receives debts, or pays legacies, and intermeddles as executor, then for such express administration as executor he may be charged as executor of his own wrong, although there be another executor of right, see Dorsey v. Smithson, 6 H. & J. 61.

3. Where the defendant takes the goods before the rightful executor hath taken upon him, or proved the will, in this case he may be charged as executor of his own wrong, for the rightful executor shall not be charged but with the goods which come to his hands after he takes upon him the charge of the will.