the general issue pleaded, he may give in evidence such payments and they will be recouped in damages, if they be such as the plaintiff would have been bound to make, or, in the language of some of the books, made in due course of administration, Glenn v. Smith *supra*, where it was held that where A., executor of B., gave his own notes for a debt due by B. to C., which were afterwards paid by D., as executor of A., D. was entitled to recoup in damages, in an action of trover against him by the administrator *d. b. n.* of B., the amount of such payments by him. But "when it is laid down generally that payments made in the due course of administration by an executor *de son tort* are good, that must be understood of cases, where such payments are made by one who is proved to have been acting at the time in the character of executor, and not of a mere solitary act of wrong in the very instance complained of by one taking upon himself to hand over the goods of an intestate to a creditor," *per* Lord Ellenborough in Mountford v. Gibson, 4 East 446, which was a case where a quantity of iron having been sold by the defendant to the intestate and not paid for, the intestate's widow after his death delivered it back to the defendant in satisfaction of his demand, and no other acts were shewn to have been done by the widow to prove that she took upon her to act as executrix. The subject was discussed at length in Thompson v. Harding, 2 E. & B. 630, where it was held that a creditor of the deceased may retain against the personal representative payments, made to him out of the assets of the deceased in due course of administration by an executor *de son tort*, if he were really acting as executor, so that the creditor might reasonably suppose him to be the rightful representative of the deceased, but acts sufficient to make the executor *de son tort* chargeable as such do not necessarily make the payment good against the rightful executor; *it **431** having been urged that it could not be the law, that the defendants were entitled to sue the executor *de son tort*, and yet could not receive payment from him; and whether the creditor has reason to suppose that the party, with whom he deals, has authority to act as executor is a question for the jury; see also Pemberton v. Chapman, 27 L. J. Q. B. 429.

As remarked by the Court in Glenn v. Smith, an executor *de son tort* cannot retain for his own debt.[9] The case generally referred to upon this point is Vernon v. Curtis, 2 H. Black. 18, where Lord Loughborough declared the unanimous opinion of the Court, that the law was established by a series of authorities from Coulter's case, (5 Rep. 30,) to that in Salk. 313, that an executor *de son tort* could not retain for his own debt, though of a superior nature, nor could he avail himself of a delivery over of the effects to the rightful administrator after action brought, nor of the assent of the administrator to his retainer, so as to defeat the action of the creditor. But if an executor *de son tort* afterwards, even *pendente lite*, obtains administration he may retain, for it legalizes those acts which were tortious at the time, Vaughan v. Brown, 2 Str. 1106.

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[9] This rule is based on sound public policy and cannot be considered a penalty. It obtains in equity as well as at law. Baumgartner v. Haas, 68 Md. 32.