

from him. Yet, if before a sale the defendant pays to the sheriff the whole debt and costs, he is bound to re-deliver the property so taken in execution. The Statute of Frauds was intended for the benefit of purchasers and creditors only; therefore, still, as relates to the party himself, the judgment and *fiery facias* relate to the first day of the term, or at least to the *teste* of the writ; so that if it be tested in the defendant's life-time it may be taken out and executed after his death. *Tidd Pra.* 915; *Pow. Mort. by Coven.* 275, 280, 515; *Odes v. Woodward*, 2 *Ld. Raym.* 850; *Bragner v. Langmead*, 7 *T. R.* 20; *Docura v. Henry*, 4 *H. & McH.* 480. And so, on the other hand, if the plaintiff dies, after a *fiery facias* has been sued out, it may nevertheless be executed. And as the writ commands the sheriff to bring the money into Court, it is his duty to do so accordingly, so that it may be there deposited to be paid, if the plaintiff be dead, to his executor or administrator, when he shall appear; or, if the defendant be dead, that the surplus, if any, may be paid to his legal representatives when they may come prepared to shew their right to it. *Tidd Pra.* 915. Hence it is clear, that this positive command of the writ, virtually and necessarily intercepts the property in its course, and evicts it from the hands of the executor or administrator of the deceased defendant, who died after it bore *teste*. *Wilbraham v. Snow*, 2 *Saund.* 47; *Oades v. Woodward*, 7 *Mod.* 94; *Dr. Needham's Case*, 12 *Mod.* 5; *Waghorne v. Langmead*, 1 *Bos. & Pul.* 572; *Robinson v. Tonge*, 3 *P. Will.* 400.

These are the well settled principles of law in relation to the personal property of the defendant against whom the *fiery facias* issued. But, as in England, real estate cannot be taken in execution under a *fiery facias*, there are no English adjudications in relation to a case, like this, where the *fiery facias* had been levied upon the real estate of the debtor. But, the statute, 5 Geo. 2, c. 7, which subjected lands to be sold for the payment of debts has been so interpreted, and carried into effect here, as to make no distinction whatever between the debtor's real and personal estate, so far as may be affected by any execution bearing *teste* in his life-time. *Barney v. Patterson*, 6 *H. & J.* 182; *Davidson v. Beatty*, 3 *H. & McH.* 616. And therefore, by analogy to the principles of the English law, applicable to an execution against the

450 personalty, it has been held * in this, and in other States, in which this English statute has been received, that by a *fiery facias* which bears *teste*, or has been levied, during the life-time of the defendant, his real estate may be intercepted in its descent and evicted from the hands of his heir; who, if he happens to have obtained actual possession of the estate after the death of his ancestor, will be treated merely as a terre-tenant, whose interest cannot be allowed, in any manner, to retard, or turn aside the execution which had been thus, in fact, or by relation, sued out in