

ing a total loss of his debt, and that, therefore, the ancient common law notion, that the land should be considered only as a dernier security for a debt to which the heir became subject on the contract, in respect of real assets, if the personal assets failed, furnished the true principle on which an adjustment ought to be made, between the heir and executor, founded an equity upon that common law notion; and thereupon substituted the heir in the place of the creditor, and fixed the debt on the personal assets if sufficient, making the personal, as between the heir and executor, exonerate the real estate. In which respect the Court of Chancery, acting in conformity with its principles, that in all cases, where there is a measuring cast between an executor and an heir-at-law, held, that the latter should have the preference. Therefore, although a creditor by specialty may, at law, sue either the heir or executor, and shall have the benefit of his security against the one or the other, at his election; yet if the heir or devisee be charged in debt, where the executor has assets, the former may ultimately compel the latter, in equity, to pay the debt; unless he can shew some special exemption by the act of his testator upon which he ought to be discharged. *Powel Mortg.* 777, 779; *Armistage v. Metcalf*, 1 *Cha. Ca.* 74; *Wolstan v. Aston*, *Hardr.* 511; *Clifton v. Burt*, 1 *P. Will.* 680; *Edwards v. Warwick*, 2 *P. Will.* 175; *Galton v. Hancock*, 2 *Atk.* 435.

After the adoption here of the Statute of 1732, subjecting lands to the payment of debts, the phraseology of the writ of *feri facias* was altered so as to authorize the levying of it upon the goods and chattels, lands and tenements, of the debtor; and the statute was thus directly put into operation against living debtors according to its very letter. But it was soon perceived, that a statute, so extensive in its bearing, could not be, in any similar way, literally applied to the estates of deceased debtors in the hands of their heirs, without creating much confusion in the administration of such estates; and without putting it in the power of each simple \* contract creditor to have the estate collusively seized and sold, in fraudulent exclusion of other creditors; or so as to operate injuriously upon the interests of others, and particularly upon the heir by compelling him to seek re-imbursment from the personal estate, which was the primary fund for the payment of debts. And therefore, those principles of equity by which the rights of bond creditors had been so far modified and controlled as, in many cases, to do equal justice to all creditors; and so as, at once, to the full value of the personalty, to protect the realty in the hands of the heir, were so followed out, in the construction of this statute, as not to permit a simple contract creditor to maintain an action at common law, at all, against the heir merely in respect of the real assets descended; but to compel him to go immediately into a Court of equity against the heir, together with the