by extent, statute staple, and *elegit*, seems to have relaxed in favour of the creditor so far as to let him in indifferently on the real or personal fund at his election, it provided no means of determining how the burthen should be borne as between the heir or terre-tenant and the personal representative of the debtor. Here, therefore, equity stept in; and considering the common law remedy against the heir, and the statute provisions against the land as instituted only for the sake of preventing the creditor from sustaining 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. (*k*)

After the adoption here of the statute of 1732, subjecting lands to the payment of debts, the phraseology of the writ of *fieri 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 sim-

(*k*) Powel Mortg. 777, 779; Armitage *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.