

ing to the nature of his case; since no case can be sent to the auditor with directions to state an account in any way, unless it be first shewn, that the plaintiff is entitled to relief; nor can an account or discovery be directed in any case but as ancillary to a previously ascertained or admitted right to relief. So that, if upon a demurrer, plea, or answer, before or at the final hearing it should be determined, that the plaintiff can have no relief, he can have no account, nor any discovery; and although the taking of the account may not be stayed pending an appeal from the adjudication in favour of the plaintiff's title. (a)

I shall therefore in the first place, endeavour to obtain a clear view of the plaintiff's case; and thereupon consider and determine the nature of the relief to which he is entitled; and then give directions as to the accounts necessary to be taken for the purpose of ascertaining the extent of that relief.

According to the law of England, an administrator *de bonis non* cannot call the representatives of the previous deceased administrator of his testator to account for any property of the intestate, that such predecessor may have converted or wasted. Nor can he claim or recover any thing but those goods, chattels, and credits of his intestate, which remain in specie and are capable of being clearly and distinctly designated and distinguished as the property of his intestate. (b) An executor or administrator, who is here considered as a trustee for the creditors, legatees, and next of kin, is expected and required to preserve the property of the deceased apart from his own, and to give it, as it were, an ear-mark, that it may be known and readily traced to any one into whose hands it may happen to fall. And if he does so, the court will do every thing that can be done to protect and assist him. (c)

According to our Provincial testamentary system, an administrator *de bonis non* might, under certain circumstances, have had

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(a) Popham v. Bampfield, 1 Vern. 83, 344; Welford v. Leddel, 2 Ves. 400; Fitzgerald v. Burk, 2 Atk. 397; Jeffreys v. Baldwin, Amb. 164; Fry v. Penn, 2 Bro. C. C. 280; Jacobs v. Foodman, 2 Cox, 282; Lee v. Alston, 1 Ves., jun., 82; Milbourn v. Fisher, 5 Ves. 685, note; Sutton v. Scarborough, 9 Ves. 75; Baker v. Mellish, 10 Ves. 553; Corporation of Carlisle v. Wilson, 13 Ves. 276; Rowe v. Teed, 15 Ves. 377; Drew v. Drew, 2 Ves. & B. 161; Jones v. Jones, 3 Meri. 163; Williams v. Steward, 3 Meri. 502; Attorney-General v. Brown, 1 Swan. 294; Holloway v. Millard, 1 Mad. Rep. 421; Lorimer v. Lorimer, 5 Mad. 363; Sanders v. King, 6 Mad. 63; Mendizabel v. Machado, 2 Cond. Cha. Rep. 40; Moses v. Lewis, 5 Exch. Rep. 398; Mellish v. Richardson, 5 Exch. Rep. 404; Townshend v. Duncan, 2 Bland, 49.—(b) Bac. Abr. tit. Executors and Administrators, B. 2.—(c) Wankford v. Wankford, 1 Salk. 306; Freeman v. Fairlie, 3 Merv. 39.