otherwise sufficiently authenticated, as by his books of account kept by his servant, &c. Vide *Blunden* v. *Barker*, 1 P. Wms. 642, and note there by Mr. *Cox*.

(5) The custom is if orphan son dies before twenty-one, and daughter dies before twenty-one, and unmarried, the share in both cases survives, *Jesson* v. *Essington*, Pre. Ch. 207. So even after division and partition made, *Leoffes* v. *Lewin*, Pre. Ch. 372; Eq. Ca. Ab. 156, pl. 8. But the survivorship does not extend to any part the orphan takes himself by survivorship, *Anon.* Pre. Ch. 537. And by the custom the orphan is incapable of devising his part by will before twenty-one, or in case of a daughter before twenty-one, or marriage, *Anon.* Pre. Ch. 537. *Wilcocks* v. *Wilcocks*, post, 2 vol. 599. *Knipe* v. *Wale*, Mich. 1721, 7 Vin. Ab. 213, pl. 3. *Hervey* v. *Desbouverie*, Forr. 135. Nor the part he takes by survivorship any more than the original share, ibid. But he may devise his share under the statute of distributions, *Wilcocks* v. *Wilcocks*. *Jesson* v. *Essington*, ub. sup. And if he die intestate after twenty-one, it shall go according to the statute of distributions, *Anon.* Pre. Ch. 537. Et vide stat. 11 Geo. 1, cap. 18, sec. 17, Bacon Ab. Tit. Cust. Lond. (c).

Case 79.—SAVAGE *versus* SMALEBROKE.

18 *Novembris* [1682]. *In Court, Master of the Rolls.*

Defendant demurred, for that plaintiff had made no title by his bill, and also answered several parts of the bill. Demurrer over-ruled by the answer.

The defendant having demurred, for that the plaintiff had made no title to himself in the bill (as in truth he had not), Mr. *Hutchins* insisted, that the defendant had over-ruled his own demurrer, by having answered over to several parts of the bill. (Sic dict. *Jones* v. *Strafford*, 3 P. Wms. 80. Et vide Duke of *Dorset* v. *Girdler*, Pre. Ch. 532.) But the matter of fact being denied, and there being no books in court, the matter was adjourned.

Case 80.—NOEL *versus* ROBINSON.

20 *Novembris* [1682]. *In Court, Lord Chancellor.*

2 Vent. 358; 2 Ch. Ca. 145; 2 Ch. Rep. 248, S. C.

Upon a re-hearing the case was thus. Sir *Martin Noel*, father of the plaintiffs, being possessed of a great personal estate, and of a moiety of a plantation beyond sea, made his will, 23 *September*, 1665, and the defendant *Robinson* and two others (his two sons *Martin Noel* and *Thomas Noel*, since deceased, R. L.) executors thereof, and devised his said moiety of the plantation and of the *negroes* and stock thereto belonging to the plaintiffs *Nathaniel*, *Grace*, and *Elizabeth*, his children, then infants, and directed the executors to receive the profits, and to give an account, and pay the proceeds thereof for the maintenance and education of the plaintiffs.

The defendant *Robinson* only proved the will and took on him the management of the testator's moiety of the plantation, and afterwards made a lease thereof to one *Worsam* for a term of years, and reserved the rent to himself in trust for the plaintiffs' use. (It appears that the other executors joined in the probate, but did not intermeddle, R. L. *Note.*—It is now settled that where a bill is filed against persons as executors, and one of them says he has not proved nor intermeddled, the bill shall be dismissed as against him, with costs, as being an unnecessary party, *Willis* v. *Walker*, 6th Feb. 1804. In Ch. not reported.)

The plaintiffs brought their bill against *Robinson* the executor and one *Faulconer*, who had purchased of the executor [91] the said moiety of the plantation for a valuable consideration, that they might account for the profits of the plantation and pay the same to the plaintiffs, that they might convey to the plaintiffs the said moiety of the plantation, and that they might hold and enjoy the same according to the will; they insisting, that the defendant *Robinson* by making the said lease had assented to the devise of the moiety of the plantation to the plaintiffs.

The defendant *Robinson* by answer admitted the will, and his making the said lease and reserving the rent in manner aforesaid; but said, he made the same in such manner without due consideration, and not with intent thereby to assent to the devise to the

plaintiffs, and thereby deprive the creditors of their just debts, and exempt the estate therefrom; and that the estate fell short of paying the testator's debts, and he had therefore been forced to sell the testator's moiety of the plantation to the defendant *Faulconer* for £500 which he had applied in payment of the debts. And the defendant *Faulconer* insisted on his purchase.

For the defendant *Robinson* it was insisted, that he was now before the court in three capacities, *viz.* as an executor, as a trustee, and as a creditor to Sir *Martin Noel's* estate. And 1*st*, That this lease at most was but an implied assent; and it might be taken to be done two ways, either as a trustee or as executor; and in this case it ought to be taken as done *quatenus* a trustee; because that way it could work no wrong to any one. But it was insisted, that in truth there was no assent, for that depends upon the intent of the party, and it appears he did not intend to assent to the legacy; for when a lease is specifically devised, if the executor assent, there is no longer any interest in the estate left in the executor; and it appears, that in this case the executor apprehended an estate still remaining in himself, as appears by his selling this plantation, and by other subsequent acts concerning the [92] same. And it was likewise insisted, that though in law this lease might amount to an assent, yet in equity it should not; and cited several cases, in which this court had mitigated the rigour of the law in relation to executors, and particularly in the matter of refunding legacies, *viz.* the case of *Biscoe* and *Nelthrope* (1 Ch. Ca. 135), and the case of *Grove* and *Benson* (*Grove* v. *Banson*, 1 Ch. Ca. 148), and that in this case the defendant had done no more than what in equity he might have been compelled to have done, and his doing of it without the trouble of a suit ought not to be turned to his prejudice. (Vide autem the distinction between an executor, doing a thing voluntarily and by compulsion, with respect to his being indemnified, infra p. 94, and Earl of *Winchelsea* v. *Norcliff*, post, 436.)

Then it was insisted that in this case the defendant the executor is to be considered as a creditor to Sir *Martin Noel's* estate; for being an executor, and in disburse for debts by him paid, which were owing by the testator, he is now become a creditor for so much to the testator's estate; and that a creditor shall be relieved against a legatee, that has received his legacy, was settled in the case of *Chamberlayn* and *Chamberlayn* (1 Ch. Ca. 256). If an executor assign a term without consideration, and assets fail, the creditors shall follow this estate, into whose hands soever it comes. And in this case an executor who had carried himself fairly, and without exception, and it may be, if he had come to any one here to advise with, he could not have been directed how to have managed himself more prudently, it not appearing, nor was it in the least suspected when he made the lease of the plantation, but that the assets would have answered all debts with a great overplus, which afterwards became deficient by the breaking of two eminent *Spanish* merchants, that dealt in *negroes*, and broke for the value of £200,000, and were then debtors to Sir *Martin Noel's* estate to the value of £30,000, and therefore in a case of such extremity the executor ought to be relieved against the rigour of the law: and they cited the case of *Holt*, the goldsmith (1 Ch. Ca. 190, and cited *Baden* v. Earl of *Pembroke*, post, 2 vol. 57), who being an executor had given a recognizance for payment of a legacy, and afterwards the assets becoming [93] deficient to pay the debts by the fire of *London*, he was relieved against this recognizance. And where a fine is ordered to be levied by the decree of this court; if it be so done, as to pass a greater estate, or to operate further in law than this court intended, there, though a fine be the most sacred conveyance at law, this court will restrain it to what was the original intention of levying it. (So *Goodrick* v. *Brown*, 1 Ch. Ca. 49, cited in *Baden* v. Earl of *Pembroke*, post, 2 vol. p. 56. And a fine shall be avoided when obtained *mala fide*, sic dic. arg. *Sawyer* v. *Vernon*, post, 383. So this court will relieve against conveyance by deed and fine gained without consideration and indirectly, *Wilkinson* v. *Brayfield*, post, 2 vol. 307.)

For the plaintiffs it was argued by their council; and 1st, as to the objection that this plantation was a fee simple estate, but by the custom of the country made a testamentary and personal estate in relation to debts only, but was not a personal estate in any other respect, and therefore in this case the executor had no power to assent, as he may where a term is specifically devised; it was answered, that an executor may dispose of a term or of a fee simple estate, that he has in trust for payment of debts, and that this assent amounted to a disposition.

As to the objection, that the defendant *Robinson* in this case is a creditor, *that* we deny; for where an executor pays a legacy that he should not have done, that shall

not make him a creditor to his testator's estate: And as to the case of *Hodges* and *Dunkin*, it was not there resolved, that an executor should be relieved upon the voluntary payment of a legacy. As to the objection, that where a thing may be taken two ways, it shall not be construed to do a wrong, they may do well to remember another maxim of the law, that *a man's own deed shall be taken strongest against himself.*

Lord Chancellor. There is a difference between a suit for a legacy in this court, and a suit for a legacy in the Spiritual Court. If in the Spiritual Court they would compel an executor to pay a legacy without security to refund, there shall go a prohibition, as was resolved in the case of *Knight* and *Clarke* (but legatees are not now obliged in this court to give security to refund in case of deficiency of assets, *Anon.* 1 Atk. 491): but in this court, though there be no pro-[94]-vision made for refunding, yet the common justice of this court will compel a legatee to refund. It is certain that a creditor shall compel the legatee to refund (*Hodges* v. *Waddington*, Term. Pasch. 35 Car. 2, 2 Vent. 360. *Anon.* post, 162. *Newman* v. *Barton*, post, 2 vol. 205), and so shall one legatee compel the other, where the assets become deficient: (1) but whether the executor himself, after he has once voluntarily assented unto a legacy, shall compel the legatee to refund, is *causa primæ impressionis*: (2) and it must be allowed that there is a great difference between a voluntary assent, and where the executor was compelled to assent.(3) We know the common case, if a man voluntarily pays money to a bankrupt, after he becomes a bankrupt, it is in his own wrong, and he may be forced to pay it again; but otherwise it is, if the bankrupt recover it against him by course of law: and a small matter shall amount unto an assent to a legacy; an assent being but a rightful act.(4) Whereupon the *Lord Chancellor* confirmed his former decree, and the plaintiff's bill was dismissed.(5)

Note.—This cause was three times heard before the Lord Chancellor *Nottingham*, and a decree pronounced by him for the plaintiff, and twice confirmed. And on 25 *Junii*, 3 *Jac.* 2, this cause was reheard by the Lord Chancellor *Jefferies*, who reversed the Lord Keeper *North's* decree, and affirmed the decree made by the Lord Chancellor *Nottingham.*(6)

In the arguing of this case, was cited the case of *Davie* and *Drew* alias *Drewry* (*Drew* v. *Baily*, 1 Vent. 275, S. C.), in which it was resolved in the *King's Bench*, and afterwards in this court, that where an executor makes a lease rendering rent, his administrator shall have it, and not the administrator *de bonis non.*

(1) The distinction is between the cases where there was originally a deficiency of assets, and where the executor had wasted them. In the former case a legatee who has been paid more than his proportion must refund, but in the latter the legatees who have received their legacies have received no more than they were entitled to, and the executor is therefore the only person to be resorted to, *Walcot* v. *Hall*, 23d Feb. 1788. [2 Bro. Ch. Rep. 305.] Cited *Anon.* 1 P. Wms. 495, in note. Sed vide *Orr* v. *Kaimes*, 2 Vez. 194. And even in case of original deficiency the court conceived that where executor voluntarily paid the full legacies, neither the executor nor any of the other legatees should compel a refund, contra if the legatee had recovered his legacy by decree, *Newman* v. *Barton*, post, 2 vol 205. Sed vide *Anon.* 1 P. Wms. 495. But he must refund if deficiency is created by debts, which did not appear till after payment of the legacy, *Nelthrop* v. *Hill*, 1 Chan. Ca. 136.

(2) A bill filed by executor against legatee, after assenting to the legacy was dismissed, for that an executor shall not be admitted to undo his own assent, *Hodges* v. *Waddington*, 2 Vent. 360

(3) So if trustees for an infant would, with the profits saved out of infant's estate purchase lands, adjoining to infant's estate, the court, on application, will enable them to make such purchase, and indemnify them therein, but if they do it voluntarily, and of their own heads, and afterwards the infant dies within age they are accountable to the infant's executors for the money they shall have so applied, Earl of *Winchelsea* v. *Norcliffe*, post, 435.

(4) 2 Vent. 358, and executor compelled to assent in the spiritual court, and when once given cannot be retracted, Wentworth, Off. Executor, 227. So assent of one executor shall bind all, sic dict. *Southward* v. *Millard*, March, 136. So an assent by infant executor shall bind the other, ibid. Et vide 4 Burn. Eccl. Law, 321.

(5) Not so, the case is stated with sufficient accuracy, but the decree was, "That "by the lease to *Worsam*, the defendant had assented to the plaintiff's legacy given to

" them by the will of their father, and that the devise by the said will was a good devise, " and that the plantation and stock did well pass thereby, and that the said act of the " defendant *Robinson* being voluntary, he put the said estate out of the power of the " creditors of Sir *Martin Noel*, or of any administrator *de bonis non* of him, and that " therefore the defendants should assign the said moiety of the plantation and stock " thereto belonging, to plaintiffs, and that they should have the counterpart of *Worsam's* " lease, and that *Worsam* should henceforward pay the rent to the plaintiffs, and an " account of profits decreed against defendant *Robinson*," Reg. Lib. 1681, B. fol. 643.

(6) The decree for plaintiffs, after declaring that the plantations and stock in question were not subject to the debts of Sir *Martin Noel*, and after reversing the order of Lord Keeper *North*, and confirming the order of Lord *Nottingham*, orders, " That the " defendants *Robinson* and *Faulkner* (the assignees of *Worsam's* lease), should assign " the premises in question to the two senior six clerks, subject to the order of the court, " and that the arrears of rent due, and also the growing rent should be brought into " court, except one year's rent for the present support of plaintiffs, and that defendant " *Robinson* should account with plaintiffs for the rents and profits of the said plantation " received by him, or by his order, from the death of Sir *Martin Noel*, with allowance " for all payments made by him, said defendant, for the plaintiffs' use, together with " all just allowances," Reg. Lib. 1686, B. fol. 679.

[95] Case 81.—WAGSTAFFE *versus* BEDFORD.

20 *Novembris* [1682]. *In Court, Lord Chancellor.*

[1] Eq. Ca. Ab. 6, pl. 5; 2 Vent. 358, S. C.

Bill for an account of money received for one who became a bankrupt. Defendant pleaded he received the money as a menial servant to the bankrupt and had accounted for it to him. Plea over-ruled. *Vid. post, Case* 127 & 204.

The bill being to have a discovery and account of money received by the defendant, on the behalf of one who became a bankrupt, the defendant pleaded he received it only as a menial servant to the bankrupt, and had accounted for it to him already, and that the Commissioners had already examined him on interrogatories. The plea over-ruled. (Reg. Lib. 1682, B. fol. 83. Vide *Anon.* post, 136. *Potts* v. *Potts*, post, 208. Et sic dict. arg. as between master and servant, *Harrison* v. *Hart*, Com. Rep. 410, 11. Et vide *Cary* v. *Webster*, Str. Rep. 480.)

Case 82.—BOWYER *versus* COVERT.

20 *Novembris* [1682]. *In Court, Lord Chancellor.*

[1] Eq. Ca. Ab. 73, pl. 12, S. P.

No good cause of demurrer that an executor is not a party, when plaintiff alleges in his bill, he knows not who is executor, and prays defendant may discover him.

The defendant had demurred for want of proper parties, one of the executors not being made a party; and the demurrer was over-ruled, because the plaintiff had alleged in his bill, that he knew not who was the other executor, and prayed that the defendant might discover who he was, and where he lived. (Vide *D'Aranda* v. *Whittingham*, Mose. 85.)

Case 83.—HUSBANDS *versus* HUSBANDS.

21 *Novembris* [1682]. *In Court, Lord Chancellor.*

2 Ch. Ca. 127, S. C.

Devise of £400 to be laid out in finishing a house. Testator lives to lay out as much himself, but leaves the house unfinished. The £400 shall not be laid out.(1)

The case appeared to be thus. A man intending to build a seat upon his estate, and having laid the foundation of it, made his will (which in time was a little after the