READ'S CASE.

(5 Coke, 67.)

Common Pleas. 2 Jac. I.

Read brought an action of debt against Carter, executor of Yong, which plea began in the common pleas, Hilt. 44 Eliz. Rot. 401. The jurors found, that the said Yong made his testament and last will, and made one A. his executor; and the day of his death was possessed of goods above the value of the debt in demand, and died; and before the will was proved the defendant took the testator's goods into his possession, and intermeddled with them; and afterwards, and before the writ purchased, the will was proved; and if on this matter the defendant should be charged as executor of his own wrong was the question. And on great deliberation judgment was given for the plaintiff. And in this case these points were resolved.

1. When a man dies intestate, and a stranger takes the intestate's goods and uses them, or sells them, in that case it makes him executor of his own wrong. For although the pleading in such case be, that he was never executor, nor ever administered as executor; and therefore it was objected, that he ought to pay debt or legacy, or do something as executor: yet it was resolved, and well agreed, that when no one takes upon him to be executor nor any hath taken letters of administration there, the using of the goods of the deceased by any one, or the taking of them into his possession, which is the office of an executor or administrator, is a good administration to charge them as executors of their wrong; for those to whom the deceased was indebted in such case have not any other against whom they can have an action for recovery of their debts.

2. When an executor is made, and he proves the will, or takes upon him the charge of the will, and administers in that case, if a stranger takes any of the goods, and, claiming them for his proper goods, uses and disposes of them as his own goods, that doth not make him in construction of law an executor of his wrong, because there is another executor of right whom he may charge, and these goods which are in such case taken out of his possession after that he hath administered, are assets in his hand: but although there be an executor who administers yet if the stranger takes the goods, and claiming to be executor, pays debts, and receives debts, or pays legacies, and intermeddles as executor, there, for such express administration as executor, he may be charged as executor of his own wrong, although there be another executor of right; and therewith agreeth 9 E. 4, 13.

3. In the case at bar, when the defendant takes the goods before the rightful executor hath taken upon him, or proved the will, in this case he may be charged as executor of his own wrong, for the rightful executor shall not be charged but with the goods which come to his hands after he takes upon him the charge of the will. Note, reader, these resolutions, and the reason of them, and by them you will better understand your books, which otherwise seem prima facie to disagree. 41 E. 3, 13b; 50 Edw. 3, 9; 6 H. 4, 3a; 11 H. 4, 83b, 84a; 13 H. 4, 4b; 8 H. 6, 35b; 19 H. 6, 14b; 21 H. 6, 26 & 27; 32 H. 6, 7a; 33 H. 6, 21; 21 E. 4, 5a; 20 H. 7, 5a; 26 H. 8, 7b, 8a; 1 Eliz. 2 Dyer, 166; 9 Eliz. 3 Dyer, 255. And so the quaere in 1 Mariae, 1 Dyer, 105, 203, well resolved.

HATCH v. PROCTOR et al.

(102 Mass. 351.)

Supreme Judicial Court of Massachusetts. Worcester. Oct. Term, 1869.

Contract by an administrator of the estate of Frank J. Hatch to recover of George L. Lawrence for goods belonging to the estate, and sold and delivered. From an order directing a verdict for the defendant, plaintiff excepted.

H. B. Staples and F. P. Goulding, for plaintiff. C. H. B. Snow and G. A. Torrey, for defendants.

COLT, J. The case presented in the offer of evidence is this: The plaintiff, acting, with the knowledge of the defendants, as executor in his own wrong of his deceased brother's estate, delivered certain personal property, with a bill of sale and warranty of title, to one Lawrence, in consideration of the verbal promise of the defendants to pay the plaintiff $1700 towards the price thereof. At the time of the sale and delivery, the defendants took a mortgage from Lawrence to secure them the amount to be paid, and no credit appears to have been given to him by the plaintiff. The property passed into the possession of Lawrence, and it does not appear that his title, or the title of the defendants, claiming under the mortgage, has ever been questioned by anybody else, or possession under it disturbed. After this, the plaintiff was regularly appointed administrator of his brother's estate, and notified the defendants that he ratified and confirmed as administrator, all his acts and contracts with them in the sale of said property. And thereupon they told him, by the defendant Proctor, their agent in the premises, that the agreement for the payment of said sum was fair, and the money should be paid; though shortly after, while the property still remained with Lawrence, they notified the plaintiff that they claimed no title to the same under the mortgage, which they thought invalid.

In the opinion of the court, the evidence offered should not have been rejected. The facts, if proved, would entitle the plaintiff to maintain his action.

The defendants do not now insist that the contract cannot be enforced as against the statute of frauds. It was an original promise made by the defendants to pay for property delivered to another. Stone v. Walker, 13 Gray, 613; Swift v. Pierce, 13 Allen, 136.

The personal estate of a deceased intestate, when an administrator is appointed, vests in him by relation from the time of the death. Until then the title may be considered to be in abeyance. Lawrence v. Wright, 23 Pick. 128. He may have an action of trespass or trover for goods of the intestate taken before letters granted. When the wrongdoer has sold the property taken, the administrator may waive the tort and recover in assumpsit for money had and received. And, in a case very like the one at bar, it was held that, where the sale was made avowedly on account of the estate, by one who had been agent of the intestate, the administrator afterwards appointed might recover from the vendee in assumpsit for goods sold and delivered. Foster v. Bates, 12 Mees. & W. 226, 233. It is said that, if an executor de son tort obtains letters of administration pendente lite, it legalizes his previous tortious acts. 1 Williams, Ex'rs (6th Ed.) 598, and cases cited. By the law of this state, as laid down by Hoar, J., in Alvord v. Marsh, 12 Allen, 603, the letters of administration, by operation of law, make valid all acts of the administrator in settlement of the estate from the time of the death. They become by relation lawful acts of administration for which he must account. And this liability to account involves a validity in his acts which is a protection to those who have dealt with him.

The case here presents no question as to the peculiar liability of an executor in his own wrong, to creditors, to the rightful administrator, or to others who have suffered by his unlawful acts. As to the defendants, the sale here was not tortious. It was made legal, and the title of the vendee confirmed, by the retroactive effect of the subsequent letters of administration. Nor is it to be overlooked that the defendants knew, when the property was delivered and the warranty of title given, that the vendor had no legal right to sell. There was no ignorance or mistake on their part, and no fraud or false affirmation of title on the part of the plaintiff. The property still remains undisturbed in the hands of the purchaser. The plaintiff's express confirmation of the sale was agreed to, and payment of the price promised. These last considerations alone would, under the circumstances, seem to be a sufficient answer to the defence set up. Story, Sales, § 367b, note; Id. § 423.

Exceptions sustained.

ROZELLE v. HARMON.

(15 S. W. 432, 103 Mo. 389.)

Supreme Court of Missouri, Division No. 2. Feb. 24, 1891.

Appeal from circuit court, Holt county; C. A. ANTHONY, Judge.

L. R. Knowles, John Edwards, and *H. S. Keller*, for appellant. *E. Van Buskirk* and *T. C. Dungan*, for respondent.

MACFARLANE, J. This suit was commenced in the circuit court of Holt county. Plaintiff was a creditor of one B. W. Ross, deceased. The suit was for the purpose of recovering the amount of the debt from defendant on the ground that he had wrongfully appropriated and converted the assets belonging to Ross' estate to his own use. Plaintiff recovered judgment in the circuit court, and defendant appealed to the Kansas City court of appeals, where the judgment was reversed. The case was certified to this court by the court of appeals on the ground that the decision rendered therein was in conflict with the decision of this court in the cases of Foster v. Nowlin, 4 Mo. 18, and Magner v. Ryan, 19 Mo. 196. The question presented by the record in this case is sufficiently stated by Judge PHILIPS (29 Mo. App. 578) to be "whether there can be, under the probate system of this state, an executor *de son tort*, in so far as to authorize a single creditor of the intestate to maintain an action of trover against him, as here sought, and thereby appropriate the whole assets to the payment of plaintiff's debt." The system provided by the laws of our state for the settlement of the estates of deceased persons was evidently intended to be exclusive of all others. The constitution provides for the establishment of a probate court in each county, which shall have jurisdiction in all matters pertaining to probate business. The laws of the state governing the procedure in the management and settlement of estates are ample and sufficient to meet any emergency that may possibly arise during administration. They provide for the appointment of executors and administrators, for the preservation of the property, and the collection of the debts of the estate. They also provide summary and efficient proceedings for the discovery of assets, and for their recovery from the possession of one who intermeddles with them. Under them any creditor can have an administrator appointed. Each county is provided with a public administrator, already qualified, whose duty requires him summarily to take charge of all estates in which the property is left in a situation exposed to loss or damage; and the court is given power to require him to take charge of any other estates in case of necessity. Ample provision is made for the allowance and classification of debts, converting the assets into money, and paying the debts of all creditors *pro rata* according to classification. Executors and administrators alone, under these laws, can recover the assets or damages for its conversion. All these provisions of the law are wholly inconsistent with the idea of executors *de son tort* as at common law. The administration laws of the state do not recognize the right to wrongfully administer, nor the right of one creditor to secure payment of his debt to the exclusion of others. It is insisted by plaintiff that this state has adopted the common law, that under the rules of the common law his action is authorized, and that the rules of the common law on this subject have not been abrogated by the statutes. It is contended that under proper rules of construction a statute in derogation of the common law must be strictly construed, and that none of its rules can be changed, except by express terms of the statute, or by necessary implication therefrom. That rule of construction is not of universal application. It depends much on the character of the law to be affected. In case of statutes penal in their character, or in derogation of common right, a strict construction is required; but in regard to statutes merely remedial in their character a fair, if not liberal, construction should be given. Oster v. Rabeneau, 46 Mo. 595; Putnam v. Ross, Id. 337; Chamberlain v. Transfer Co., 44 N. Y. 305; Buchanan v. Smith, 43 Miss. 90. The statute of this state, adopting the common law, itself limits or modifies the rule of construction insisted upon. Section 3117, St. 1879, provides that the common law, which is not repugnant to or inconsistent with the constitution of this state or the statute laws in force for the time being, shall be the rule of action and decision in this state. The examination we have given shows conclusively that the statute laws of this state on the subject of administration, taken together as forming one entire system, are wholly repugnant to and inconsistent with the common law in respect to administrators *de son tort*. We must therefore conclude that the intention of the legislature was to supersede the common law on that subject altogether. The early cases of this court referred to by the court of appeals do seem to have recognized and acted under the common-law doctrine invoked by plaintiff in this case, but since that early day the administration laws of the state have been greatly enlarged, the jurisdiction of the probate courts extended, and the powers and duties of administrators and executors increased until there is no longer a place in the system for the inequitable, expensive, and tedious proceedings required by the rules of the common law in bringing intermeddlers to settlement. The opinion of PHILIPS, P. J., in this case when before the court of appeals, and which is reported in 29 Mo. App. 570, with the authorities cited by him, is convincing and conclusive, and is adopted as the opinion of this court. The judgment of the court of appeals is affirmed, and that of the circuit court of Holt county reversed. All the judges of this division concur.