due to the Plaintiff, read, and the Plaintiff being present in Court, and acknowledging he did execute the said letter of attorney, and upon hearing what could be alleged on the other side, this Court declared, that the Plaintiff had proceeded regularly and reasonably, and doth therefore order, that the said order of the 3d be made absolute. But, the Defendants' counsel insisting that a bill of review was prepared in order to reverse the said decree, and praying time to file the same, and that the performance of the decree may be dispensed with until the cause shall be again heard upon the said bill of review, it is thereupon further ordered, that the Defendants do pay unto the Plaintiff £4000, and give security to pay unto the Plaintiff the sum of £37,917, decreed to be due to him, deducting the said £4000, and also £100 already paid to the Plaintiff by the said Defendants, or such other sum as by any subsequent order shall be adjudged to be paid to the said Plaintiff, by the said *East-India* Company, together with interest at £6 per cent. from the 13th of *July* last, until the same shall be paid, &c. And therefore all proceedings upon the said order for the sequestration are hereby stayed until farther order; but such judgment is to be subject to the order of this Court, and the Defendants are to have time till the day after Twelfth-day to file their bill of review."

(2) Reg. Lib. B. 1817, fo. 79. *Mayor, &c., of Colchester* v. *Lowten*; *Lowten* v. *Mayor, &c., of Colchester*. *Dec.* 11, 1817.

"Upon opening, &c., it was alleged, that by an order dated the 13th of *March* 1817, it was ordered that the Clerk of the Subpœna Office should forthwith issue Subpœna for payment by the Mayor, &c., of *Colchester* to the Plaintiffs in the second cause of the sum of £796, 13*s*. 8*d*. for costs, the said Plaintiffs by their Counsel undertaking that in case they recovered the said sum under that process, they would forthwith pay the costs directed to be paid by the two several orders made in the first cause, dated that day, unless such last-mentioned costs should be first deducted out of the said sum. That in pursuance of the said order a Subpœna issued, which was duly served upon the said Mayor, &c.; but the same not being paid, a Writ of Distringas was issued against the said Mayor, &c., directed to the Sheriff of *Essex*, to compel them to pay the said sum. That the said Sheriff has thereupon made his return, and thereby returned 40*s*. issues only. That, as the said Writ directed the said Sheriff to seize into his hands the goods and chattels, rents and profits, of the said Mayor, &c., the Plaintiffs in the said second cause conceive that such should have been his return. It was therefore prayed, That a Writ of Sequestration may issue, directed to the Sheriff of the county of *Essex*, or to certain Commissioners to be inserted in the said Writ, of the personal estate of the said Mayor, &c., and the rents, issues, and profits of their real estates, until the said Defendants shall have paid the said sum, or until further order. Whereupon, &c., *Order*, That a Commission of Sequestration issue, directed to certain Commissioners to be therein named, to sequester the personal estate of the said Mayor, &c., and the rents, issues, and profits of their real estates, until the said Mayor, &c., shall pay the said Plaintiffs in the second cause the said sum of £796, 13*s*. 8*d*. costs, or the farther order of this Court," unless cause shown.

Reg. Lib. B. 1817, fo. 107. (*Dec.* 15, 1817.)

Upon motion to make the former order absolute, *Ordered* accordingly.

[547] SIMMONS *v.* BOLLAND. *Rolls*. *Dec.* 1–8, 1817.

[*Fletcher* v. *Stevenson*, 1844, 3 Hare, 370; *Dean* v. *Allen*, 1855, 20 Beav. 4; *Official Managers of the Newcastle Banking Co.* v. *Hymers*, 1856, 22 Beav. 371; *Walker* v. *Banett*, 1857, 24 Beav. 419.]

Executor claiming to retain out of the residue certain parts of the property, to protect himself against a future contingent demand in respect of covenants entered into by the testator, for payment of rent and repairs of an estate held by him under lease from a Corporation, though there was no existing breach of covenant nor arrears of rent, in respect of which he was liable: on a bill by the residuary legatee for the property so retained, Ordered, that the funds in question be made over to the Plaintiff, on his giving a sufficient indemnity to the executor; the terms of such indemnity to be settled before the Master.

By indenture of lease dated the 23d of *July* 1798, the Mayor and Commonalty of *Canterbury* demised to *Simmons* (one of the Aldermen of their Corporation),

his executors, administrators, &c., for thirty years, at a certain rent, and under covenants for payment of rent and taxes, and for repairs, &c., on non-performance of all or any of which covenants, it was declared that the lease should be void, and a power of re-entry was reserved.

[548] *Simmons*, the lessee, by his will, gave all his real estates, and all his leaseholds and personal estate, to the Defendant *Bolland* and another (whom he also appointed his executors), upon trust to sell; and after payment thereout of debts and legacies, to invest the produce in their names upon certain trusts, subject to which he gave the entire residue of his estate to the Plaintiff on his attainment of the age of twenty-five years.

The testator died in 1807, leaving the Plaintiff his son, then a minor. The trustees and executors proved the will, possessed themselves of the whole of the testator's estate real and personal, and paid the debts and legacies without resorting to a sale of the real estate or of the leaseholds, into the possession of which (including the premises demised by the said indenture of lease) the Plaintiff, on his attaining twenty-five, entered; at which time also, the entire residue of the personal estate was transferred to him by the executors, except a bond for £1000 from the Mayor and Commonalty of *Canterbury*, under their common seal, to the testator; and a sum of £800, 5 per cents., which were still retained by them out of the surplus, and for the recovery of which the present bill was filed.

To this bill the Defendant, the surviving trustee and executor, by his answer submitted that he was entitled to retain the property in question, "for the purpose of protecting himself from any claim which might be made against him as devisee in trust and executor of *Simmons* deceased, in respect of rent due or thereafter to accrue due for the premises demised by the said indenture, or of the present or any future breach or non-performance of any of the covenants therein contained; the payment of which rent, and performance of which covenants, the Defendant was advised he was liable to under the said indenture"; and had ac-**[549]**-tually then lately received a notice to that effect from the Corporation. He at the same time admitted that there were then no subsisting breaches of covenant in respect of which he was so liable, and that no rent was then due or in arrear for the premises; but insisted that, under the circumstances, he was entitled to retain as aforesaid, in respect of any future contingent demands, to which the notice given by the Corporation also extended.

Sir *S. Romilly* and *Wilbraham*, for the Plaintiff.

Harrison's case, 5 Co. 28 *b*. "A debt due by bond shall be paid before a statute made to perform covenants, when none of them are, nor perhaps ever will be broken, but are things in contingency and *in futuro*; and therefore such possibility, which peradventure may never happen, shall not bar present and due debts by bond and other specialties." And see *Philips* v. *Echard*, Cro. Jac. 8, 35, that a debt upon record shall be paid before an obligation, and debt upon obligation which is put in suit, before another that is not. In *Hawkins* v. *Day* (Amb. 160), it was decided that the payment by an executor of a simple contract debt, before breach of condition of a bond entered into by his testator, was good, and no *devastavit*, in case of a deficiency of assets; and what substantial distinction can be taken between a simple contract debt and a legacy? If the one be entitled to priority over a future contingent debt, upon what principle is the other to be excluded from the benefit of the same priority? The *dictum* ascribed to Lord *Hardwicke* (Amb. 162), that "all payments of simple contract debts made before breach of the condition are good, but not of legacies," is unsupported by any reasoning, and the point was not before the Court in the case referred to: the question there arising only on an **[550]** exception to the Master's Report, disallowing payment of certain sums by the executor on account of their being debts of an inferior degree to the Plaintiff's demand. *Wilbraham* also cited and relied upon the case of *Eeles* v. *Lambert*. (It was cited from Aleyn (p. 38), but is also reported by Styles, 37, 54, 73, as see *post*, in His Honor's judgment.)

Cooke and *Combe*, for the Defendant. This is not a bill for a general account, upon which, if a decree were obtained, an inquiry would also be directed as to debts, and the obligees in the bond would be at liberty to come in with the other creditors before the Master. So, when the Court makes a decree in a creditor's suit, all the

creditors are considered as being parties to the suit, and the direction for payment out of Court of any part to the parties entitled, is made in the regular administration of assets. But this is a suit instituted by the Plaintiff, claiming as residuary legatee, in the absence of the creditors whom there are no means of bringing before the Court; and it is a question of great importance, whether a decree made in such a suit would operate as an indemnity to the executor in any action that may hereafter be brought against him by the lessors upon a subsequent breach of covenant. It is clear, that at law it would be no indemnity. In this Court, no legatee has a right to call for the payment of his legacy before all claims upon the estate have been fully satisfied; and this is the distinction between legatees and creditors, which is one of the points in the case referred to. Then, are all claims upon this testator's estate, in the case which is now before the Court, to be considered as having been satisfied? It is perfectly clear that, at law, an executor is personally liable to the lessor of his testator, in respect of rent accrued due [551] since the death of the testator. "He is charged as assignee in respect of the perception of "the profits; and it is not material whether he has assets or not. Therefore he "cannot plead *plene administravit*; and, if judgment be given against him, it "is *de bonis propriis*." "If the land be of less value than the rent, he may plead "the special matter, and pray judgment whether he shall be charged otherwise "than in the *detinet* only"; in which case the judgment is *de bonis testatoris*, and not *de bonis propriis*. (1 Williams's Saunders, 1, note; and the authorities cited.) The case cited by *Wilbraham* does not appear to have been ever decided; nor is it referred to in any subsequent cases, so that it is impossible to state it as an authority. In *Hawkins* v. *Day*, the question of legacies actually did arise, as appears by reference to the Register's book (see note at the end of the case); and the same principle has been acted upon in the case of the Duke of *Queensberry's* leases, in which the residuary legatees, and some of the particular legatees also, have been kept out of possession for years, by reason of the possible demands which may arise under the covenants which the Duke had entered into for quiet enjoyment.

Sir *S. Romilly*, in reply. This case is perfectly new; but the novelty of it is in the Plaintiff's favour, because it is impossible that the circumstances under which it has arisen have not been of frequent occurrence, although no such claim as that made by the present Defendant has ever before been instituted in respect of them. No such claim could have been established under the usual advertisement for [552] creditors to come in and prove their debts in the Master's office. The case of the Duke of *Queensberry's* leases is quite different. For those leases had actually been attacked; and there had been a judgment of the Court of Session against them, which judgment is now under appeal. As to the distinction supposed to have been taken in *Hawkins* v. *Day*, how can a legatee be said, as against an executor, not to be as much entitled in respect of his legacy, as a simple contract creditor in respect of his debt? Then it comes to the question, Whether there exists any prior actual demand? Can the executor be permitted to say, I will keep this in my hands for ever, to answer this future possible demand? or during the whole continuance of the lease, which may be of any possible duration? The cases referred to in *Williams's* note on *Saunders* are not applicable; for they only show that the executor is liable so long as he remains in possession. As soon as he has delivered over the possession to the legatees, his liability ceases, further than to the extent of assets remaining in his hands.

The *Master of the Rolls* [Sir Wm. Grant]. The equitable relief sought in this case depends upon a legal question, Whether an executor can safely make payment of legacies, or deliver over a residue while there is an outstanding covenant of his testator, which has not yet been, and never may be broken. This question was very much discussed in a case (of *Eeles* v. *Lambert*) reported both by *Styles* and by *Aleyn* (Styles, 37, 54, 73; Aleyn, 38, S. C.), the ultimate judgment in which is not, however, stated by either. There is also a case of *Nector* and *Sharp* v. *Gennet*, in Cro. Eliz. (Cro. Eliz. 466), where the same question arose, though in a different shape. A legatee sued in [553] the Ecclesiastical Court for his legacy. The executors pleaded that the testator, who was keeper of a prison, was bound in an obligation to the Sheriff (to an amount exceeding the entire value of his property) for the safe keeping of the prisoners committed to his charge; which obligation had become forfeited in consequence of a judgment against the Sheriffs on an action for an

escape; and the executors had therefore nothing in their hands to answer the demand. This plea was disallowed, whereupon a prohibition was sued, which being demurred to, the Defendant prayed a consultation. Upon this the principal question was, Whether the escape was such that the Sheriff was suable in respect of it? for, if not, the bond was not forfeited; and, if the bond was not forfeited, then it was said to be plain that the legacy should be first paid; and, to this purpose, it was argued, that by the civil law, the legatary must enter into a bond, to make restitution if the obligation should be afterwards recovered; so there was no inconvenience to any. To which the whole Court agreed, and determined that it was no plea, unless the obligation were forfeited. *Coke* said, "The difference is, "when the obligation is for the payment of a lesser sum at a day to come, it shall "be a good plea against the legatee before the day; for it is a duty *maintenant*, "which is in the condition (as 9 *E.* 4, 12). But otherwise it is, where a statute or "obligation is for the performance of covenants, or to do a collateral thing. There, "until it be forfeited, it is not any plea against a legatee; for peradventure it shall "never be forfeited, and may lie *in perpetuum*, and so no will should be performed." The majority of the Judges being of opinion that there was no forfeiture, a consultation was awarded, the effect of which, as far as it regards the present question, was to leave the spiritual Court to proceed according to their own established course, —namely, to compel the legatee to give security to re-[554]-fund the legacy, in case of the executors becoming afterwards liable to be sued upon the bond. In the argument of *Eeles* v. *Lambert*, this case is noticed by *Rolle*, Justice; "It was "*Nector* and *Sharpe's* case, 38 *Eliz.* that legacies ought to be paid conditionally, "viz. to be restored if the covenant should be broken." (Styles, 56.)

In *Hawkins* v. *Day* (Amb. 160), Lord *Hardwicke* makes a distinction between simple contract debts and legacies; and seems to entertain a clear opinion that even an unbroken covenant renders it unjustifiable for an executor to pay a legacy. I see no reason to doubt the accuracy of *Ambler's* report of this case; for his statement is found to correspond with the Register's book; and although, in the order overruling the exceptions, particular legacies are specified, yet it appears, by a reference which has been made to the Master's Report, that they were the only legacies stated to have been paid; and they must have been paid before the forfeiture by breach of the covenants, Lord *Hardwicke* stating the question with respect to them to be, "Whether payment of the assets, before there was any breach of "the condition, ought to be allowed as a good administration of the effects." (See note annexed.)

In this state of the authorities, it would be too much for me to order the executor to transfer and pay without having security given him in case of judgment being recovered against him at law, for any future breach of the covenant. No decree that I can make will bind the Corporation of *Canterbury*, or protect the executor against their demand, if the bond should hereafter be forfeited. All that I can do, is to order the funds to be [555] made over on the Plaintiff giving a sufficient indemnity; and it must be referred to the Master to settle the terms of such security.(1)

(1) Reg. Lib. A. 1752, fo. 72. *John Hawkins*, Gent. and Others, Plaintiffs, *against James Day* and *Mary* his Wife, and Others, Defendants. *Wednesday*, 17th *January*.

"The matter of the exceptions taken by the Plaintiffs and the Defendants *Day* and his wife, to the report made in this cause, by Mr. *Holford*, one, &c., dated the 17th day of *June* last, coming on the 16th day of *January* instant, and also on this present day, to be argued before the Right Honorable the Lord, &c., in the presence of counsel learned for the Plaintiffs, and for the Defendants *Day* and his wife; and upon opening and debate of the Plaintiffs' first exception to the said report, and hearing what was alleged by the counsel for the said parties, His Lordship held the said Plaintiffs' first exception to the said report to be insufficient, and doth therefore order that the same be over-ruled; and upon opening and debate of the Plaintiffs' second exception to the said report, and hearing the 1st and 2d schedules to the said report read, and what was alleged by the counsel for the said parties, His Lordship held the said Plaintiffs' second exception to the said report to be insufficient, and doth therefore order that the same be over-ruled; and upon opening and debate of the Plaintiffs' third exception to the said Master's report, and the

said Defendants' first exception to the said report, being for that the said Master in and by his said report hath disallowed all the payments reported to have been made by the said Defendants in administering the estate of *William French* the testator therein named, which are mentioned in the said third schedule to the said report, amounting together to £3120, 19*s.* on account of their being debts of an inferior degree to the Plaintiffs' demand, whereas most of these payments were *bona fide* paid by the said Defendants many years before any **[556]** breach of the security bond in the pleadings mentioned is proved to have been made, and many years before any notice to the said Defendants of any such bond being existing; such payments were therefore a due administraton of the testator *French's* estate, and as such were good payments, and ought to have been allowed to the said Defendants as good payments, against the Plaintiffs' demands; and the said Defendants ought not to pay the same over again out of their own proper estate. Upon debate of the matter, and hearing the articles, eight-partite, dated the 28th of *October* 1715, the articles dated the 16th of *January* 1718, the Master's report, dated the 29th of *July* 1747, and the said report, dated the 17th of *June* last, read, and what was alleged by the counsel for the said Plaintiffs, His Lordship held said Plaintiffs' third exception to be insufficient, and doth therefore order that the same be overruled. And it is further ordered that the said Defendants' first exception to the said report be allowed as to all the sums contained in the third schedule to the said Master's said report, except the two legacies of £15 and £100, and the sum of £355, under date of 20th *August* 1726, the sum of £630, and the four last items; and as to those sums it is further ordered, that the said exception be overruled; and upon opening and debate of the said Defendants' second exception to the said report, and hearing a bond signed *W. French*, dated the 11th day of *December* 1714, and the answer of the Defendants *Day* and his wife, read, and what was alleged by the counsel for the said parties, His Lordship held the said second exception of the said Defendants, *Day* and his wife, to be insufficient, and doth therefore order, that the same be overruled. And it is further ordered, that the sum of £5 deposited by the Plaintiffs, and the sum of £5 deposited by the said Defendants *Day* and his wife, with the Register on filing their said exception, be paid back to them respectively, and that it be referred back to the said Master to compute interest on so much as shall be found due on the balance according to the directions aforesaid, pursuant to the order made in this cause, the 21st *December* 1748."

The following statement of the report excepted to, as stated in the above order, is **[557]** also extracted from the Register's book.

"The Report of Master *Peter Holford*, dated 17th of *June* 1752, corrects some mistakes in the report of the then late Master *Holford*, dated 29th *July* 1747, as to the receipts and payments of the Defendants, *Day* and his wife, on account of the personal estate of *William French*; and the amount of such receipts and payments, as corrected, are stated in the first and second schedules to this report, and the balance appears to be £3059, 1*s.* 9*d.*, to be paid by the Defendants *Day* and wife. —The report then proceeds in the following words.

"And I find that the said late Master *Holford* did by the said former report certify, that the said Defendants, *James Day* and his wife, had paid on account of the simple contract debts and legacies of the said *William French*, the several sums in the 9th schedule thereto annexed, amounting in all to £3621, 15*s.* 9*d.*, but had not allowed the same by reason they were not of an equal degree with the debt due from the said *William French's* estate to the copartnership in question, in this cause, and there being some payments then which were made by the said other executor, and some other payments which ought to have been allowed the said Defendant, in the 8th schedule to the said former report. I have in the 3d schedule to this report set forth the particulars of the several sums so paid by the said Defendants, on account of such simple contract debts and legacies of the said *William French*, and otherwise as therein mentioned, and instead of the said sum of £3621, 15*s.* 9*d.* the same amount only to the sum of £3120, 19*s.*, which said payments to the amount of £3120, 19*s.* I have thought fit likewise to disallow, on account of their being payments of debts of an inferior degree to the Plaintiffs; but in regard it has been insisted upon by the Defendants, *Day* and his wife, that many of these payments were made prior to any breach of the security bond in question, which they look upon to be a circumstance very favourable for the allow-

ing such payments, and are desirous the same should appear to the Court, I humbly certify that it has appeared to me that several of the sums of money which make up the said sum of £3120, 19*s*. [558] were paid before any breach is proved to have been made of the condition of the said security bond, notwithstanding which I have thought fit to disallow such payments, in regard it appears to me, that *Ebenezer Burdock* and *Benjamin Lane*, who was the principal obligor in the said bond, were two of the acting executors of the said *William French*, together with the Defendant *James Day* ; and that the said *Ebenezer Burdock* was one of the copartners in the sugar-house, and one of the obligees in the said bond, and therefore cannot be presumed to be ignorant that there was such bond ; and for that reason, there being notice to other acting executors, I apprehend I cannot presume that the Defendant *Day* had no notice of the said bond, so as to affect him in the administration of the assets of the said *William French* ; and it does not appear to me that the Defendant *Day*, upon payment of the several simple contract debts and legacies abovementioned, took any security from the persons to whom the payments were made, to refund the whole or any part of the money paid them, in case it should happen that the said bond should be demanded of the estate, which I apprehend he ought to have done."

The third schedule to this report is styled, " An account of what the Defendants, *James Day* and his wife, have paid in discharge of several debts of the said *William French*, by simple contract, and for legacies, and otherwise, which I have not allowed them."

[The several items which are excepted in the above stated order, are in the following terms :]

	£	*s*.	*d*.
Paid to *William French*, his son, by *Mary* his first wife, in discharge of a bond given by the said testator *French*, previous to the marriage with the Defendant *Mary Day*, his wife	600	0	0
Paid for one year's interest thereof	30	0	0
Retained by the said Defendant *James Day*, for legacies given to him and his former wife, by the said testator *William French* . . .	15	0	0
Retained by the Defendant *Mary*, his widow, the legacy left her immediately after his death	100	0	0
[559] *Aug*. 20, 1726.—Paid Mr. *French's* widow for 5 years and 11 months' maintenance and education of his two children, *Thomas* and *Mary*, during the time of her widowhood, till her marriage with Defendant *Day*, 20th *August* 1726, at £30 *per annum* each	355	0	0

The four last items were :

June 27, 1741.—Paid *Thomas Fane* his bill of law charges in the High Court of Chancery, *Day* and wife ats. *Hawkins* and Others . .	124	0	0
Paid *Walter Morgan* in full	1	19	0
To ship *Raymond*, cost by her as by account	50	7	4
To *Noblett Bridgett*, by her as by account	13	11	9

[All the other payments stated in this schedule appear to be in respect of simple contract debts.]

[560] BERTIE *v.* The Earl of ABINGDON and OTHERS. *Rolls*. *Dec*. 2–18, 1817.

[See *Earl of Clarendon* v. *Barham*, 1842, 1 Y. & C. C. C. 704 ; *In re Hoare*, [1892] 3 Ch. 99.]

On a bill by infant tenant in tail, a receiver was appointed, with an order to keep down the interest of incumbrances out of the rents. He kept down accordingly the interest of all but one mortgage, the interest of which (belonging to infants) was never applied for, except a small portion for maintenance, the residue of the rents being paid into Court to the credit of the cause. Tenant in tail, coming of age, suffers a recovery, and resettles the estate, and afterwards dies. The master, by his report, having certified that the deceased was not bound, while tenant in tail, to keep down the interest of the incumbrances, and consequently that the rents paid into Court, during that time, belonged to his personal representatives ; the party claiming to be entitled to the estate under the settlement