stand in a very favourable position, for he has gained every possible benefit he could under the contract, and yet he refuses to perform his part of it. This Court, therefore, would not look very favourably on his case if the facts were proved at the hearing to be such as are here stated. The case would be very analogous to that of a man who had taken possession of a house to which no good title could be made, who said, "I will pay you the purchase-money when you give me a good title," which, as no good title could ever be made, would amount to this, "I have got the house, and intend to keep it without paying the pur-**[366]**-chase-money." Supposing a demurrer were put in to a bill stating a case of that description, and praying for specific performance, and it appeared upon the bill that the contract could not be executed by the Plaintiff, the Court might be compelled to allow the demurrer, but I apprehend that in such a case it would give the Plaintiff leave to amend, with a view of enabling the Plaintiff to raise the alternative, viz., that the Defendant was bound to replace the Plaintiff in the same situation as he was in before the contract, and either to restore the possession or pay him an equivalent.

I merely throw out these considerations to shew the view I take of the facts here stated. I do not mean to express any opinion upon the case, except to say that it is not shewn upon the allegations in this bill that the Plaintiff may not be entitled to some relief at the hearing of the cause, and that being so, I am of opinion that I ought not to allow the demurrer; and also, if I went further, it appears to me that there is a graver and more important question to be determined in this case than I could properly determine upon demurrer, and which ought properly to be determined at the hearing of the cause.

Demurrer overruled.

NOTE.—Upon appeal before the Lords Justices, the 16th of July 1856, the Plaintiff desired leave to amend the bill, whereupon the demurrer was allowed, without prejudice to any question in the cause, and liberty was given to the Plaintiff to amend her bill. The bill was accordingly amended, and the Defendant again demurred. The demurrer was heard by the Lords Justices on the 16th of February 1857.

[367] THE OFFICIAL MANAGERS OF THE NEWCASTLE, &C., BANKING COMPANY *v.* HYMERS. *May* 23, 1856.

Payments to legatees is no answer to the claims of creditors, though no debt had arisen at the time of such payment. Thus, where the testator held shares in a banking company, and nine years after his death the bank was wound up and a call made, it was held, that payments to legatees in the meantime could not be allowed to the executors as against the official manager in respect of the call.

Payments to legatees, made under a decree in a legatees' suit, cannot be allowed as against creditors, if made without having the accounts taken, and therefore as upon an admission of assets.

The testator died in 1844, possessed of 100 shares in the above company. By his will he gave a number of legacies, and the residue to Mary Cowan; and he appointed Hymers and Carr executors. The executors retained the shares and received six dividends on them. In 1847 they took some steps to sell them, but were dissuaded by the family from proceeding in the sale on account of the loss of income which it would occasion. The bank got into difficulties, and in January 1853 an order was made to wind it up. In June 1853 a call was made and the executors, in respect of the testator's shares, was ordered to pay £1836 out of his assets. The amount not having been paid, the Plaintiffs filed a creditors' suit for the administration of the real and personal estate of the testator, and a decree was made for taking the accounts.

Thirty-six items of payments made by the executors anterior to 1853, on account of legacies, annuities, interest and of residue, were disallowed by the Chief Clerk, as

was also a sum of £520, paid in April 1853 to Mary Cowan, to compromise a suit instituted by her in respect of the residue.

Carr also stated that in 1847 Robert Cowan, a legatee of £1000, instituted a suit against the executors, and at the hearing in 1849 a decree was made to transfer to him a mortgage for £450, part of the assets, and to pay him £584, which was done. The executors sought **[368]** to be allowed £1000, the amount of Robert Cowan's legacy, thus paid under the decree of the Court; but it did not appear that any accounts had been directed, and it was therefore considered by the Court that the order must have been made as on an admission of assets.

Mr. R. Palmer and Mr. Haig, for the Plaintiffs.

Mr. Roupell and Mr. Cracknall, for the Defendant Carr, and Mr. J. H. Palmer, for the Defendant Hymers. The question is, whether executors are entitled to be allowed in their accounts, as against the Plaintiff, the official manager, payments *bonâ fide* made by them to legatees, at a time when there was no debt due from the testator's estate, and before the present claim had any existence. We submit that, on the result of the authorities, they are so entitled.

The question, whether executors are entitled to be allowed payments made to legatees, as against persons claiming a debt against their testator's estate, which was contingent when those payments were made, but became afterwards payable, is treated as unsettled by Mr. Justice Williams (2 Wms. Exors. 1150 (4th edit.)). The only decision on the question is against the liability of executors, and the other cases, when examined, will be found not to be authorities on the point.

In *Nector* v. *Gennet* (1 Croke, 466), payment of a legacy was resisted by executors, on the ground that their testator had given a bond for a sum sufficient to exhaust the assets, and that they were, or might become, under a liability in respect of that bond. The contest in that case really was, whether the bond had or not been **[369]** forfeited (the Court holding that it had not), for it was admitted by the counsel for the executors and by the Court, that if the bond had not been forfeited, its existence was no answer to the claim of the legatees, Lord Coke saying, "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. 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 never shall be forfeited, and may lie *in perpetuum;* and by such means no will should be performed." This principle was recognized and acted on by Lord Kenyon, in *The Chelsea Waterworks Company* v. *Cowper* (1 Esp. 277). The question was raised, but not decided, in the recent case of *Smith* v. *Day* (2 Mee & W. 684), where one point was, whether executors, in an action against them by a specialty creditor of their testator, could give evidence of payments made to legatees, under a plea of *plene administravit.* The Court held that they had in hand assets sufficient to answer the demand, and, therefore, that their plea was not proved in fact; but if the law had been as contended for by the Plaintiff, there could have been no occasion to consider that question. So, in *Simmons* v. *Bolland* (3 Mer. 547), the question was considered by Sir W. Grant as doubtful.

The cases relied upon by the other side are *Hawkins* v. *Day* (1 Amb. 160; 2 Amb. (App.) 803), and *Norman* v. *Baldry* (6 Sim. 621). The first case, when examined, will be found to be no authority for **[370]** the general principle, and that for two reasons: the one, that the supposed payments of legacies was made too soon, Lord Hardwicke saying (2 Amb. 806), "It would be strange to say that legacies, paid immediately, where the executor has a year allowed him for that purpose, should be good against creditors;" the other, that it appears from the schedule to the Master's report in that case (see 3 Meriv. 558, in a note to *Simmons* v. *Bolland*), that the legacies disallowed were legacies to the executor and his wife, retained by him, and therefore still in his hands. *Norman* v. *Baldry* was a case of an actual obligation to pay a definite sum, and therefore falls within the distinction taken in *Nector* v. *Sharpe*, the defence of the executors being, not that the debts or liabilities were contingent, but that they had not any notice of the bond under which it arose, which, as is shewn by *Knatchbull* v. *Fearnhead* (3 Myl. & Cr. 122), affords no defence. So, *Davis*

v. *Blackwell* (9 Bing. 5), was decided on the ground that the Defendants, the executors, had paid legacies prematurely.

A similar question, in principle, has been sometimes raised with respect to payments of simple contract debts by executors, claims by specialty having afterwards become payable; and it is settled that as against such specialty creditors, these payments ought to be allowed; *Henderson* v. *Gilchrist* (22 Law J. (Ch.) 970), and they have been allowed in this case, though, in the regular administration of assets, the specialty creditor has priority.

2. But all the former cases were cases of liabilities of the testator either actual or contingent, at the time of the payment of the legacies by the executors. Here, but **[371]** for the Winding-up Acts, the liability of this testator's estate would have ceased long since. The remedies of creditors against the shareholders of joint stock banks are governed by the Banking Act, 7 Geo. 4, c. 46, and after three years from the death of a shareholder, his estate ceases to be liable in respect of his shares, both at law and in equity; *Barker* v. *Buttress* (7 Beav. 134). If the Defendants, in the present case, are to be held liable, it is by means of an *ex post facto law*, his estate being made liable wholly by the Winding-up Acts. [THE MASTER OF THE ROLLS. Your argument goes to shew that the Defendants ought not to have been put upon the list of contributories, but which you cannot now contest.]

3. As to Robert Cowan's legacy, that was paid under the decree of the Court, and the Defendants ought to be protected for obeying the order of the Court. That they did not put the testator's estate to the expense of taking the usual accounts ought to make no difference, for, otherwise, no executors could safely pay a legacy without inflicting that expense upon the estate. *Thomas* v. *Montgomery* (3 Russ. 502); *Musson* v. *May* (3 Ves. & B. 194); *Manning* v. *Phelps* (10 Exch. 59), were also cited.

Mr. Bates, for the devisee of the real estate.

THE MASTER OF THE ROLLS [Sir John Romilly]. This case has been argued very elaborately, but ever since the cases of *Hawkins* v. *Day* (1 Amb. 160), *Knatchbull* v. *Fearnhead* (3 Myl. &. Cr. 122), *Simmons* v. *Bolland* (3 Mer. 547), it has always **[372]** been held, that where there are debts, executors are not released from their liability by paying legatees. It is contended that the assets are not liable, but in order to maintain that, it ought to be established that the estate was not contributory. I must assume that the assets are liable, that the debt is established; and, in that case, the executors are not discharged, though they seek to discharge themselves by payment of legacies. It is a very hard case, but if the executors had got in and realized the outstanding estate by a sale of the shares, they would have incurred no liability.

I cannot treat the decree in Cowan's suit as anything. If the payments to the legatees had been made after taking an account of the debts and assets, in the ordinary mode under an administration decree, it would have been a complete indemnity to the executors; but this is not so; no such account was taken, and the payment to the legatees was made as on an admission of assets, and being so, it rather favours the case of the Plaintiffs.

As to the specific legacy, I must treat it as so much money in the hands of the executors, for I assume that they assented to it.

NOTE.—Carr expressed his intention to appeal, but some compromise was come to between him and the Plaintiffs.

[373] HIND *v.* SELBY. *April* 19, 1856.

A testator gave the "residue of his state and effects" to trustees, upon trust to sell sufficient to pay his debts, and after payment, to hold "his said residuary estate and effects," in trust to pay "the rents," interest, dividends and annual produce to A. for life. There was a power to let and sell with the consent of A. Held, that A. was entitled to enjoy leaseholds in specie.

Gift of residue in trust for testator's wife during widowhood, and on her death or marriage, to pay it amongst his five children, or the "survivor or survivors" of