Reports of CASES in CHANCERY ARGUED and DETERMINED in the ROLLS COURT during the time of the Right Honorable Sir JOHN ROMILLY, Knight, Master of the Rolls. 1854, 1855. By CHARLES BEAVAN, Esqr., M.A., Barrister-at-Law. Vol. XX. 1856.

[1] DEAN *v.* ALLEN. *Feb.* 17, 1855.

Where an estate is administered and the residue is paid over under an order of the Court, the executor will be protected, and a creditor will not afterwards be allowed to sue him at law.

The executors of a lessee held entitled to no further indemnity against the covenants than the personal indemnity of the residuary legatees.

In this case, an order had been made for the administration of the estate of the testator, William Beer, and an inquiry had been directed, whether his executors or his estate were under any liability in respect of leasehold covenants, and whether the executors were entitled to any indemnity in respect thereof.

It appeared that, in 1798, a house and premises had been demised to the testator for ninety-three years, at a rent of seven guineas and a half, and by the lease the testator covenanted to pay the rent and taxes, and to repair and keep in repair. This property was let for £63. In 1802 twenty-three acres of land, on which **[2]** were now erected a large manufactory and other buildings, and twenty-nine cottages, were demised to the testator for eighty years, at a rent of £167. The testator had entered into similar covenants in respect of this property, the rental of which was stated to be about £1000 a year. The testator was in possession of another small leasehold as mortgagee, but no great stress was laid on this. The property had been sold by the executors, and the purchasers had entered into the usual indemnity covenants.

The executors required a sum of £3000 to be retained to answer the liabilities, if any, which might arise under the testator's covenants, but the Chief Clerk certified that the executors were not entitled to any indemnity. A summons was taken out to shew cause why the certificate should not be varied in respect to the indemnity, and it now came before the Court for argument.

Mr. Hallett, for the executors. The testator was the original lessee, and it will therefore be impossible for the executors to release themselves, or the testator's estate, from the liability under the covenants. This will therefore continue until the expiration of the leases, and down to that time the testator's estate and the executors, to the extent of the assets, will be liable for any breaches of covenant which may be committed. Towards the expiration of the lease, the property will necessarily become dilapidated, and the executors may then be sued on the covenants. The right of the executors to be indemnified is clearly settled by a long series of cases, as *Simmons* v. *Bolland* (3 Mer. 547); *Hawkins* v. *Day* (Ambler, 160); *Vernon* v. *The Earl of Egmont* (1 Bli. (N. S.) 554); **[3]** *Cochrane* v. *Robinson* (11 Sim. 378); *Fletcher* v. *Stevenson*

(3 Hare, 360); *Dobson* v. *Carpenter* (12 Beav. 370); *Hickling* v. *Boyer* (3 Mac. & G. 635).

The decree of the Court would not protect the executors; they would be liable at law under the covenants, and it seems that, in equity, the lessors would not be deprived of their legal remedy. In *Simmons* v. *Bolland* (3 Mer. 554), Sir William Grant expressly states this:—"No decree that I can make will bind the Corporation of Canterbury" (the lessors), "or protect the executors against their demand." [THE MASTER OF THE ROLLS. I think the contrary has been held. Lord Cottenham, in *Knatchbull* v. *Fearnhead* (3 Myl. & Cr. 126), said, "that where an executor passes his accounts in this Court, he is discharged from further liability, and the creditor is left to his remedy against the legatees; but, if he pays away the residue without passing his accounts in Court, he does it at his own risk." I apprehend that where the estate is administered by this Court, the executor is perfectly safe, and that the Court would not allow a creditor to sue the executor at law after he had paid over the residue under an order of this Court.]

This is not the case of a debt which could be proved under the decree, but there is a mere contingent liability, which it is the duty of the executors to provide for. He also cited *Norman* v. *Baldry* (6 Sim. 621); *Atkinson* v. *Grey* (1 Smale & Giffard, 577); *Wright* v. *Adams* (Vice-Chancellor Kindersley, January 12, 1855); *Shadbolt* v. *Woodfall* (2 Collyer, 30).

Mr. Roupell and Mr. W. D. Lewis, for the Plaintiff, were not heard.

[4] THE MASTER OF THE ROLLS [Sir John Romilly]. This Court will, no doubt, direct an indemnity to be given to executors against the testator's unsatisfied covenants, but, I think, that in this case they run no risk. Where an executor, giving the Court all the information he possesses, acts under the order of this Court, he will be protected from liability under all circumstances. This is stated by Sir James Wigram, *Fletcher* v. *Stevenson* (3 Hare, 370), and I cannot think that Sir William Grant, in *Simmons* v. *Bolland* (3 Mer. 554) really intended to question that proposition. It was the duty, no doubt, of these executors to bring forward the matter, and, for their own safety, to see that in the administration of the estate the rights of contingent creditors were protected; for though there was no liability at the testator's death, yet the obligations under the covenants might afterwards become debts, and it was therefore proper to secure these contingent creditors.

In directing an indemnity to be given to executors, the Court looks at the reasonable probability of there being any future demands against the estate, and in a large number of cases it has considered the personal security of the persons who receive the estate, and their undertaking to refund, in case any proceedings should be adopted against the executors, to be sufficient. In this case, the executors have not only the indemnity of the purchasers, but an additional circumstance, which affords a very strong security, namely, that the property itself is held on very small ground rents, compared with the rack rent. In such cases, landlords do not enforce the covenants, but prefer, as more beneficial to themselves, forfeiting the lease. This **[5]** Court is well aware that such is the ordinary way in which landlords enforce the due performance of the covenants of a lease, and that they bring an action of ejectment, which is not abandoned until the property is placed in a proper state of repair. In this case, one property, held at a ground rent of £7, 17s. 6d., is let at a rent of 60 guineas a year; another property, held at £167 per annum, is let for £1000. This circumstance, coupled with the indemnity for the purchasers, appears to me to be such a sufficient protection, both for the payment of anything which may be claimed, and against any proceedings which may be adopted against the executors or their representatives, as to induce me to say that a personal indemnity of the residuary legatees is, in this case, sufficient.

It would be a proceeding harsh in the extreme, where it is more than problematical whether any claim will ever be made, to tie up a sum of £3000 in Court until 1882, and 1891, and during that time deprive these legatees of all enjoyment of it. Though I think it very proper for the executors to have brought the point before the Court, I do not consider it necessary to give any further indemnity than the personal indemnity of those persons to whom the money will be paid.

NOTE.—It appears from the argument in *Simmons* v. *Bolland*, 3 Mer. 550, that

that suit was not for the general administration of the estate, and this circumstance might therefore justify the observations of Sir William Grant (p. 554), that the decree would not protect the executors; but the expression which follows, "if the bond should hereafter be forfeited," is clearly erroneous.—C. B.

[6] GREEN *v.* DUNN. *Jan.* 19, *Feb.* 14, 1855.

[S. C. 24 L. J. Ch. 577; 3 W. R. 277.]

A testatrix devised an estate, E., to A. B. absolutely, and "all her freeholds, &c., not hereinbefore devised" to A. B. for life, with remainders over. A. B. died in the testatrix's life. Held, that the estate, E., passed under the residuary devise.

Mary Colling, by her will, bearing date the 28th April 1847, made separate dispositions by devise of four different portions of her real estate. The first portion, called the Aislaby estate, subject to certain small annuities charged thereon, she devised to Thomas Colpitts Grainger for life, with remainder to his first and other sons, in tail male, with remainder to his daughters and their mother, as joint-tenants, for life, with a contingent remainder to the survivor in fee. If Thomas Colpitts Grainger left no son, or daughter, or widow, then she devised the estate to John Colpitts Dean, for life, with remainder to his first and other sons, in tail male, with remainder to his daughters, as tenants in common, in tail, with cross-remainders between them, and with an ultimate remainder to the right heirs of the testatrix.

The second portion of her real estate, called the Blackwell estate, the testatrix devised to John Colpitts Dean, for life, with remainder to his first and other sons, in tail male, with cross-remainders between them, with remainder to the daughters of John Colpitts Dean, as tenants in common, in tail, with cross-remainders between them, and in default of such issue, upon such trusts as "are hereinafter expressed or declared concerning my residuary freehold and copyhold estate respectively." The will then contained a proviso, that if John Colpitts Dean, or any of his male issue, should come into possession of the Aislaby estate by reason of the failure of the previous limitations, then the Black-**[7]**-well estate should be held upon trust therein described, viz., upon the same trusts "as are hereinafter expressed and declared concerning my residuary freehold and copyhold estate."

The testatrix then devised the third portion of her estates, being her property at Escomb, Headlam, and Cockfield, in the county of Durham, to her sister Margaret Colpitts in fee.

The fourth remaining portion of her real estates the testatrix devised in these words:—"I hereby give and devise all my freehold, copyhold and leasehold messuages, lands, tenements and hereditaments, *not hereinbefore devised*," unto trustees, their heirs, &c., upon trust that they "shall, from time to time, pay the rents, issues and profits of the same unto my said sister Margaret Colpitts, during her life, and after her decease, upon trust to pay the said rents, issues and profits unto my nieces, viz., Eliza Ann Grainger, Ellen Green, Jane Benning, Charlotte Bourne and Mary Jane Copeland, and the survivors of them, in equal shares, during their lives; and when it shall happen that there shall be but one of my said nieces surviving, then my said trustees or trustee for the time being shall stand seised and possessed of the said freehold, copyhold and leasehold estates, last hereinbefore devised, in trust for such surviving niece, her heirs, executors, administrators and assigns, according to the nature and quality of the same estates respectively."

The will then directed the rents and profits to be applied for the maintenance, &c., of the persons for the time being beneficially interested, during their minorities; and the testatrix gave all her personal estate to her trustees, upon trust, to convert and invest in **[8]** Government or real securities, and stand possessed thereof on like trusts, in favour of Margaret Colpitts and the five nieces.

Margaret Colpitts, the sister of the testatrix, died on the 15th of August 1849. On the 8th of December following, the testatrix made a codicil to her will, by which she substituted another gentleman as trustee in the place of one of those named in