present. In that case there was a gift of a legacy made payable at twenty-one with interest from the testator's death till it was payable, and the legacy was charged upon real and personal estate. The legatee dying under twenty-one, the legacy was held not raisable. It was there contended that the assets ought to be marshalled, but that was refused. That case is a direct authority on the question.

I think, therefore, that the legacy is not raisable out of the real estate, and there is no claim as against the purchasers. The bill must be dismissed with costs, as against all the Defendants.

[575] DODSON *v.* SAMMELL. *July* 24, 31, 1861.

[S. C. 30 L. J. Ch. 799; 9 W. R. 887. See *Hardy* v. *Fothergill*, 1888, 13 App. Cas. 370; *In re Nixon* [1904], 1 Ch. 645].

22 & 23 *Vict. c.* 35, *s.* 27. *Executors' Indemnity. Leaseholds.*

Fund which had been set apart out of residue to indemnify executors in respect of leaseholds of testator ordered to be paid out to residuary legatee, such indemnity, since the passing of the Law of Property Amendment Act, being no longer necessary.

The 27th section of the Law of Property Amendment Act is retrospective in its operation.

This was a petition for rehearing of a petition under the following circumstances:—

The suit of *Dodson* v. *Sammell* was an administration suit, and, the testator in the cause being the owner of various leasehold properties, by the original decree an inquiry was directed as to what sum ought to be set apart out of the assets as an indemnity to the executors against liability in respect of future breaches of covenants contained in the leases. The Chief Clerk certified that £1100 was a proper sum for that purpose; and accordingly by the decree on further consideration, made in 1857, a sum of £1100 was ordered to be paid into Court, and set apart to indemnify the executors in respect of such covenants. Lord St. Leonards' Act to Further Amend the Law of Property and to Relieve Trustees (22 & 23 Vict. c. 35) having subsequently passed, the residuary legatee in 1859 presented a petition for the payment out of Court of the said sum of £1100, which had been so set apart, on the ground that under the 27th section of that Act an indemnity was no longer necessary. Upon that petition coming on for hearing the Vice-Chancellor, being of opinion that the 27th section of Lord St. Leonards' Act was not retrospective, refused to grant an order for the payment out of Court of the sum in question; but a similar order to the one prayed by the petition having been made in several other cases, **[576]** the present petition for rehearing the decree on further consideration was presented. It appeared that the trustees had sold and assigned to purchasers all the leaseholds except one, which had been assigned to the present Petitioner, the residuary legatee, who had entered into a covenant of indemnity to the executors with respect to it.

Mr. Jessel, in support of the petition, now asked for an order for the payment out of Court of the indemnity fund, and referred to *Dean* v. *Allen* (20 Beav. 1); *Waller* v. *Barret* (24 Beav. 413); *Fletcher* v. *Stevenson* (3 Hare, 360); *Smith* v. *Smith* (*ante*, 384).

Mr. Glasse and Mr. Fischer, for the executors, contended that the indemnity fund should not be parted with. In the case of an action being brought by a person who was not in a position to pay costs, if the executors had no indemnity fund they might have to pay costs. They cited *King* v. *Malcott* (9 Hare, 692); *Vernon* v. *Lord Egmont* (1 Bligh, N. H. of Lords Cas. 554); *Garratt* v. *Lancefield* (2 Jur. (N. S.) 177).

Mr. Jessel, in reply.

THE VICE-CHANCELLOR [Sir R. T. Kindersley]. Upon this petition of rehearing the question is raised whether in any ordinary case of a suit to administer the estate of a deceased person a fund should be set apart out of his general assets to provide for the possible **[577]** event of a future breach of any of the covenants contained in a lease held by the deceased.

The law upon this subject is in a very unsatisfactory state. For a long time it has been the practice of the Court, where the property comprised in the lease did

not of itself furnish a sufficient security, to set apart out of the residuary estate a reasonable sum to cover any liability which might in any reasonable probability arise by reason of a future breach.

The only principle upon which this practice could stand must have been either that it was required as an indemnity to the executor or administrator, or that it was required for the protection and benefit of the lessor as covenantee.

As to the ground of indemnity to the executor or administrator, it is difficult to reconcile such a ground with the acknowledged principle, now at least well settled, that a decree or order of the Court directing the administration and application of the assets is of itself a complete and perfect indemnity to him, provided he keeps back nothing which ought to be disclosed to the Court. That principle was strongly and justly asserted by the Master of the Rolls in *Dean* v. *Allen* (20 Beav. 1), and *Waller* v. *Barrett* (24 Beav. 413). It seems strange that the Court should think it right to set apart a portion of the estate as a supplement to that indemnity which is already complete and perfect. Indeed I cannot help thinking that an executor, acting prudently, would desire no additional protection to that which the decree gives him, for an indemnity implies, and is an admission of, a risk; **[578]** it throws a doubt on the sufficiency of the protection afforded by the decree. It is difficult to see why the executor should require, or the Court should provide, any indemnity beyond the indemnity of the decree. It seems to me an anomaly to set apart any portion of the assets on the ground of indemnifying the executor or administrator.

With respect to the other ground, that it is required for the benefit of the lessor, it is true that in *Fletcher* v. *Stevenson* (3 Hare, 360) the Vice-Chancellor Wigram thought that, although the decree of the Court would be a sufficient indemnity to the executor, it was right to set apart a sufficient part of the assets for the protection of the covenantee; meaning, of course, that the covenantee had that equity. Now, if the covenantee had such an equity, it would necessarily follow that he could file a bill to enforce it. But in *King* v. *Malcott* (9 Hare, 692), the Vice-Chancellor Turner decided that there was no such equity, and dismissed a bill filed by the lessor to enforce it; and this seems to determine that the covenantee's right to protection is a ground that cannot be maintained.

The effect of setting apart a fund to answer future breaches of covenant is to throw a great burthen upon the residuary legatee, for, instead of receiving his residue in the ordinary course, he would be kept out of a portion of it, possibly out of the whole, as long as any leaseholds of the testator were outstanding, for any period of time, however long. This is a very great evil to the residuary legatee, and should not be inflicted upon him unless absolutely necessary. Now, so far **[579]** as respects the protection and indemnity of the executor and administrator, it appears to me altogether unnecessary; and as to the lessor, he has no such equity.

There is, however, a technical difficulty in the way of deciding this case on the general ground, namely, that the petition does not seek to rehear the original decree. When the case came on in 1857, upon the Chief Clerk's certificate for further consideration, it was a matter of course to carry out the former decree and certificate; the petition of rehearing is confined to the decree on further consideration. But there are other grounds upon which I am of opinion that the fund ought to be paid out, and that the former petition ought not to have been dismissed. The effect of the 27th section of Lord St. Leonards' Act is that, if an executor has sold the leaseholds and assigned them to a purchaser, he may, without the order of the Court, and of his own authority, distribute the assets without making provision for future breach of covenant in the leases, and shall not be subject to any liability; and surely if he does so under the direction of the Court, *à fortiori* he would be free from liability. He is indemnified by the Act, and therefore, so far as the leaseholds have been assigned to a purchaser, there is no ground for the indemnity. In this case the greater portion of the leaseholds have been sold and assigned to purchasers, but there is one which was not so assigned, and which, therefore, does not come within the provisions of the Act. Now, with respect to that lease, the rent reserved by the lease is less than the rack rent; and the lease is of such a value that it is of itself a sufficient indemnity for the rent reserved under the lease. Now, under similar circumstances, in the two cases of *Dean* v. *Allen* and *Waller* v. *Barrett*, the Master of the Rolls decided that, inde-**[580]**

pendently of any general principle, the security was sufficient, because it would be more for the advantage of the lessor to eject than to bring an action on the covenant, and therefore it was not necessary to set anything aside for an indemnity. For these reasons, I am of opinion that the fund must be released. The costs of the executors and of the Petitioner must be taxed and paid out of the fund.

[580] *In re* CROSS. *Nov.* 20, 1861.

Practice. Distringas.

Distringas discharged with costs where made applicable by the person who obtained the writ to a sum of stock which was not the particular stock mentioned in the affidavit on which the writ had been granted.

General practice of the Bank of England with reference to writs of *distringas* observed upon.

This was a motion to discharge a *distringas*, which had been placed on a certain sum of stock under the following circumstances.

The *distringas* in question had been obtained by a Mr. Cross, who by his affidavit upon which he had obtained the writ had sworn that he was beneficially interested in a sum of £13,569, 14s. £3 per cent. Reduced annuities, standing at the bank in the name of Hannah Cross. It was alleged by the counsel for the applicant that the bank authorities had not been in the habit of requiring the production of the affidavit on which the writ was obtained, but that upon the production of the writ itself, with a notice signed by the person obtaining it, requiring the bank not to permit a sale, &c., of the stock in such notice mentioned, the bank prevented the transfer of and the receipt of dividends on the sum of stock mentioned in the notice. The writ in this instance was obtained upon the affi-**[581]**-davit above stated, but the notice which with the writ was produced at the bank required the bank not to permit a sale, &c., of a sum of £4522, 2s. 4d. New £3 per cent. annuities standing in the name of C. F. Maltby, being stock of a different amount, different kind, and standing in a different name from that mentioned in the affidavit.

Mr. Glasse and Mr. H. Fox Bristowe, for Mr. Maltby, stated the above circumstances and moved to discharge the *distringas* so placed on the sum of £4522, 2s. 4d., and referred to the 27th Consolidated Order and to the Act of 5 Vict. c. 5, s. 5.

Mr. Southgate appeared for Mr. Cross, who had become bankrupt, but who had been served with the notice of motion, and submitted that his assignees and not Mr. Cross should have been served with the notice of motion, as they were the parties interested in supporting the *distringas*.

THE VICE-CHANCELLOR [Sir R. T. Kindersley]. It is quite clear the *distringas* must be discharged. The Act of Parliament has prescribed only one form of writ of *distringas*. That form does not mention or even allude to any sum of stock whatever, but purports to have for its object the compelling the appearance of the Governor and Company of the Bank of England to a bill alleged by the writ to have been already filed against them, although in fact there is no such bill at all; whereas the real object and purpose of the writ is not to compel their appearance, but to prevent their permitting the transfer of a certain sum of stock standing in their books. This seems a very strange provision of the Legislature.

[582] By the General Order of 17th November 1841, framed in pursuance of the Act (now the 27th of the Consolidated Orders), the party applying for the writ must make an affidavit to the effect that he is beneficially interested in the stock hereinafter particularly described, specifying the amount of the stock which is to be affected by the writ, and the name of the person in whose name the same is standing; and, on producing such affidavit to the Clerk of Records and Writs, the writ is sealed and sued, but the writ is not marked or indorsed with any sum of stock. The party aving obtained the writ serves it on the Bank of England, together with a notice equiring the bank not to permit the transfer of the sum of stock mentioned in the