from being tried at law; and therefore, before it refuses its interference, it ought to be well satisfied that there has been a forfeiture on which an ejectment could be maintained.

[The Vice-Chancellor then applied these observations to the facts of the case. He was of opinion that no evidence whatever had been given by the Plaintiffs that the premises ever were insured; that the Defendants' evidence proved that there had been no insurance in the Sun Fire Office since 1836; that the premises were out of repair in 1843; that they were still more out of repair in 1845; and that in 1847 and 1848 they were in the same or in a worse condition, so far as the witnesses could inspect them; but that they were prevented from inspecting the interior of the premises by the refusal of the tenant to give them access, a refusal which was in contravention of the terms of the lease. And he was therefore of opinion that, if the lease had been executed, there would have been a forfeiture against which this Court would not have relieved; and, therefore, that the bill must be dismissed with costs against all the Defendants, except Sir T. M. Wilson; but Sir T. M. Wilson having, by his answer, disputed the agreement, and failed in that part of the case, as to him without costs.]

[692] KING *v.* MALCOTT. *March* 9, 1852.

[See *In re Hayton Granite Company*, 1865, L. R. 1 Eq. 15; L. R. 1 Ch. 77; *In re London and Colonial Company*, 1868, L. R. 5 Eq. 566; *In re Parry*, 1889, 42 Ch. D. 570; *In re Hall* [1903], 2 Ch. 235; *In re Nixon* [1904], 1 Ch. 644.]

Claim by a lessor for the administration of the estate of his lessee, and to have a sufficient part of the assets impounded to answer future possible breaches of covenant in the lease—dismissed.

It is not a part of the contract between a lessor and lessee that, on the death of the lessee, his assets shall be impounded to answer the future rent and covenants; and, if any portion of the assets are retained or appropriated for that purpose, it is from the right of the executor to indemnity, and not from any right which the lessor has to require such security.

There is no principle on which a Court of Equity should extend the legal right or remedy of the landlord as against the tenant or his estate.

A claim by a lessor, in the character of a creditor upon the estate of his deceased lessee. The testator, the lessee, had taken a lease of premises known as Smith's Ways, in Wapping, dated in May 1830, for a term of ninety-nine years, at a rent of £450 a year, and had entered into the common covenants, for himself, his heirs, executors, &c., for payment of the rent, and for the due repair and insurance of the premises. The lessee had subsequently assigned the demised property to another person—a fact which was not considered to be material. The lessee, by his will, charged his debts on his real and personal estate. The claim was filed by the lessor on behalf of himself and all other unsatisfied creditors of the testator, to have the proper accounts of his personal and real estate taken, and the proceeds duly applied in the payment of his funeral and testamentary expenses and debts, including what might become due to the Plaintiff in respect of the rent reserved by the lease; and to have a sufficient part of the proceeds of the estate set apart and invested, and secured in Court, as a due provision for the payment of the rent then due and thereafter to accrue due on the lease, and the due performance of the covenants therein contained on the part of the testator. It was not alleged that there had been any breach of the covenants in the lease, or any rent due at the death of the testator.

Mr. Kenyon Parker and Mr. Rogers, for the Plaintiff, argued—1. It was clear that an executor might retain in his hands a sufficient portion of the assets to meet claims which possibly might arise against the estate of the testator by the future breaches of covenants into which he had entered: *Hawkins* v. *Day* (Amb. 160), *Simmons* v. *Bolland* (3 Mer. 547), **[693]** *Dobson* v. *Carpenter* (12 Beav. 370), *Fletcher* v. *Stevenson* (3 Hare, 360). 2. It was not less for the security of the lessor than for that of the executors

that this rule was established; and it was the duty of the executors to provide for the liability in case it should arise. 3. It was not necessary that a sum should actually be due and payable in order to constitute it a debt. It might be a debt, although payable *in futuro: Blount* v. *Hipkins* (before Sir L. Shadwell, V.-C., reported 4 L. J. Ch. (N. S.) 13). Nor was it necessary, in order to raise a case for setting apart a fund in an administration suit, that it should be absolutely certain the fund would be required for the purpose indicated. Legacies given on a contingency were secured, until it was seen whether the contingency could arise. A specialty debt, as this was, although it were not at this time due, would yet, in the appropriation of assets, be preferred to a simple contract debt now actually due: *Lemun* v. *Fooke* (3 Lev. 57), *Goldsmith* v. *Sydnor* (Cro. Car. 362), *Knatchbull* v. *Fearnhead* (3 My. & Cr. 122).

Mr. Amphlett, for the executors. The specialty creditor would have no precedence over a simple contract creditor unless there was a certainty that the specialty debt would become due. The application of the Plaintiff in this case was perfectly novel, and would be attended with most serious consequences to all persons who have become bound in the ordinary covenants contained in modern leases. But the obligation imposed by such covenants did not extend to give the covenantee such a right as he now sought to establish: *Flight* v. *Cook* (2 Ves. 619), *Franks* v. *Cooper* (4 Ves. 763).

THE VICE-CHANCELLOR [Sir G. J. Turner]. This is the claim of the reversioner in a lease against the executors of his lessee, praying that the usual adminis-**[694]**-tration accounts may be taken, including what is or may become due in respect of the rent reserved by the lease; and that the estate of the deceased lessee may be applied in payment of his debts; and to have a sufficient portion of the estate set apart to answer the covenants in the lease. [His Honour stated the substance of the lease, and that portion of the will in which the testator devised and bequeathed his real and personal estate to the Defendants (whom he appointed his executors); upon trust to sell and dispose thereof, and apply the proceeds in payment of his funeral and testamentary expenses and debts, and the legacies bequeathed by his will.] The question is whether the Plaintiff, who is the assignee of the reversioner on this demise, is now entitled to have the testator's assets thus impounded, for securing himself against possible breaches of the covenants. There has hitherto been no breach of covenant upon which any legal debt is due. No action would now lie against the executors for the purpose of compelling payment of any rent in arrear, or any damages for repairs. Not only is there no rent due, but there is no certainty that anything ever will be due on any of these covenants; for if the rent be paid at the day, and if the other covenants be duly observed, no action will ever lie upon any of them. This case is therefore readily distinguishable from the cases which have been mentioned. Where there has been a bond or covenant for the absolute payment of a certain sum of money there the money must become due, and must become due on the bond or covenant. In the general decree for the administration of a testator's estate in a suit for that purpose the usual reference is to take an account of all debts due and owing from the testator. If the testator were a tenant of leasehold premises, and no rent be due from him, no debt is proveable by the lessor under that decree in respect of any such rent. The Court, in the administration of the estate, deals with the legal rights of the parties; and the Court in such a case **[695]** finds nothing, in fact, due at law to the lessor from the testator or his estate. But suppose that rent afterwards becomes due, and that proceedings are or may be taken by the landlord, what is then the course of the Court? The proceedings must be against the executor; and, on the application of the executor, the Court refers it to the Master to ascertain what is due to the lessor, and what provision should be made for the future in respect of the obligations arising from the lease; and a sum of money is commonly set apart to answer what may be required. This course is taken, not because of any right which the creditor has to come in under the decree, but in consequence of the right of the executor to an indemnity against legal liabilities out of the assets. The creditor, not being so at the time of the decease of the testator, but having afterwards become a creditor by reason of the testator's covenant, was not entitled to go in under the decree.

Why should the lessor have any such right as he claims in this case? How can it be the result of the relation between landlord and tenant? The landlord has not bargained with his tenant that the tenant's assets or any fund whatever should be

impounded for the purpose of securing his rent, or the due performance of his covenants. He has contracted for no such security. For the rent and for the performance of the covenants, he looks to the personal security of the lessee, or to the rights which he has expressly reserved to himself over the subject of the demise; and farther than that he cannot proceed at law: why should a Court of Equity give a more extended effect to the obligation contracted between a landlord and tenant than is given by a Court of law?

The case was likened in the argument to the case of contingent legatees. It was said that such legatees, and who, being volunteers, are not to be more favoured than creditors, have the right of retaining and impounding the **[696]** assets of their testator. But every legatee has a present right, and the fund is impounded to answer the demand which exists and is created by the will. The argument overlooks the difference between a contingent debt and a contingent legacy. A contingent legacy is separated from the assets, or secured, because it is a sum which in any event is certainly payable to some person, though it may be uncertain to whom it will become payable. But a contingent debt is a sum which it is altogether doubtful whether it will ever be taken out of the assets. Even in the case of a contingent legacy, the legatee is not, as it was assumed at the Bar, entitled to have a sum actually retained or appropriated, to answer the legacy when the contingency arises. That is not an unusual way of providing for the legacy, but it is a matter of arrangement, not of right; and in strictness the legatee is only entitled to have security for the payment of the sum should the contingency arise. The case of *Webber* v. *Webber* (1 S. & S. 311) illustrates the distinction.

How does the case stand on authority? There is the distinct authority of Lord Redesdale in *Lynar* v. *Mills* (2 Sch. & Lef. 338), which (except that the case related to the performance of a covenant and not to the case of rent) in every respect governs the present case. There the testator had covenanted to pay an annuity, and assigned a terminable fund for securing it; and he had further covenanted that, if such terminable fund should fail, all his real and personal property should be charged with the payment of the annuity. On a bill brought by the annuitant against the executors for an allocation of part of the testator's assets to answer the annuity, the terminable fund having not yet failed, Lord Redesdale said: "I cannot allocate any part of the property in this case; it would be tying up two parts of the property for the same purpose. The particular fund, **[697]** which is ample whilst it lasts, and also part of the general estate, producing the same income. The intention of the deed was that no additional security for payment of the annuity should be given, except upon the deaths of both the persons for whose lives the pension was granted. The Plaintiff has made her bargain and taken a particular security, and now files this bill in direct contradiction to it." (2 Sch. & Lef. 339.)

What is the case between landlord and tenant? Here the landlord has the security of the leasehold property itself, and also the general liability of the whole personal estate of the testator in case the leasehold itself should be insufficient. A case like the present is in fact immediately afterwards referred to by Lord Redesdale in the same judgment. He says: "Every covenant in a lease may be broken; yet was it ever held that a party could come here to have personal assets allocated to answer such possible breaches? Such a bill might possibly be entertained if it were alleged and appeared that the executor had wasted the assets, but that is not pretended here" (*Id.* 340). The case thus put by Lord Redesdale is one of considerable difficulty, although there are I believe some earlier authorities tending that way. Even in such a case, if the executor were committing waste, there would appear to me to be great difficulty in a Court of Equity treating that as a legal debt which is not a legal debt. However, I do not intend to say anything on that question without a review of all the authorities. The question does not arise here, there being no pretence that the executors are wasting the assets. If this claim could be sustained it would prevent the administration of the estate of a testator, although the executor may be willing to take a security in respect of contingent liabilities; and the estate of no lessee could ever be distributed within any reasonable period after his decease. I must dismiss this claim (which is an experiment) with costs.