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COLCLOUGH v. STERUM.

IRELAND.

(COURT OF CHANCERY).

COLCLOUGH - - - - - *Appellant.*

STERUM AND OTHERS - - *Respondents.*

A PERSON purchasing lands under a decree is bound to see that the directions of the decree are observed.

Lands in strict settlement, with a power to grant leases, being subject to prior incumbrances, are, by a decree in a suit instituted by the incumbrancers, directed to be sold subject to the charges prior to the deed of settlement. Pending the suit, the tenant for life under the settlement grants leases not authorized by the power, and raises money upon annuities for his life, which he charges upon the lands, and they are sold subject to those charges.

Held (reversing the decree of the Court below), on a suit by the remainder-man in tail, that the sale, subject to charges not warranted by the decree, is void.

Where considerable delay has occurred in the prosecution of a suit, costs are not to be given, although the decree is reversed.

SIR Vesey Colclough, upon his marriage in 1767, being tenant in tail of a manor and lands called Tintern, &c., subject to portions, &c., conveyed them by deeds of lease and release to a trustee in fee (subject to a term of one thousand years thereby created) to the use of himself for life, remainder to the sons of the marriage successively in strict settlement. The incumbrances then affecting the estates, according to a covenant in the settlement, did not exceed 14,000 *l.* The

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term was created for the purpose of raising 3,000 *l.* according to the appointment of Sir Vesey Colclough, and the trustees of the term had a discretion to raise a further sum of 3,000 *l.* for the use of Sir Vesey by sale or mortgage; and it was provided, that the interest of the existing incumbrances, and of the two sums of 3,000 *l.*, when raised, should be paid out of the rents and profits of the estates by the trustees of the term, and that Sir Vesey and the successive owners of the freehold for the time being should receive the residue of the rents and profits. By the settlement, a power was given to Sir Vesey of leasing for three lives, or 31 years, in possession, &c. for the best rent without fine, &c.

In July 1767, the deed was registered, and a fine levied according to covenant. The Appellant was the eldest and only surviving son of the marriage. The two sums of 3,000 *l.* were raised under the power, and paid to Sir Vesey; but the trustees of the term permitted Sir Vesey to receive all the rents of the estates, and omitted to pay the interest upon any of the incumbrances affecting the estate.

In 1772 a bill was filed in Chancery in Ireland by the husband of one of the daughters of Cæsar Colclough, the grandfather of Sir Vesey, and others, who were entitled to prior incumbrances affecting the lands in settlement, praying that the debts owing to them, and charged on the lands, might be raised by a sale.

In 1778 a decree was made in the cause, referring it to the Master to take an account of the incumbrances affecting the lands comprised in (and prior to the registry of) the settlement of 1767, of

the yearly value of the lands, and the parts most proper to be sold. The incumbrances were accordingly ascertained; but the yearly value of the lands, and what parts were most fit to be sold, were not stated in the report.

In August 1778 Cæsar Colclough was appointed receiver, in the suit instituted as before mentioned, to raise the sums charged upon the lands.

In 1780, by the final decree in the cause, the incumbrances mentioned in the report, amounting to 25,000 *l.*, great part of which was an accumulation of interest, were declared to be charges on the estates comprised in the settlement of 1767, which settlement was recited in the decree; and it was decreed that those incumbrances should be paid, or that the lands should be sold for payment. Pending the suit to raise the prior incumbrances, annuities charged on the lands for the life of Sir Vesey, and leases not authorised by the power, were granted by Sir Vesey to Cæsar Colclough, the receiver in the suit.

In 1781 the lands were set up to sale in the Master's office, subject to the annuities, and the leases, and were purchased by Thomas Richards. The deed by which the lands were conveyed to him recited the grants of the annuities, and that the lands were sold subject to them.

At the date of these transactions the Appellant was an infant. Sir Vesey, his father, had been appointed and acted as his guardian, and among other things signed, in his name, the deed of conveyance to the purchaser under the decree. Sir Vesey died in 1794, leaving the Appellant, his

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eldest son, who, under the limitations of the settlement of 1767, became entitled to an estate-tail in the lands, subject to a jointure and portion.

At the time of his father's death the Appellant was a prisoner in France, and so remained until the year 1805.

In 1802 a notice was served upon the Respondents, who were the co-heiresses of Thomas Richards, the purchaser, and their then intended husbands, that it was the intention of the Appellant to impeach he purchase made under the decree.

The bill in the cause, which was the subject of appeal, was filed against the Respondents in 1805, praying that the deeds of conveyance to Richards might be declared fraudulent, and void, that possession of the lands might be restored to the Appellant; and that the Respondents should account for the rents, &c., the Appellant offering to pay the purchase-money, with interest.

The cause was heard in 1811 on pleadings and proofs, when the bill was dismissed. The appeal was against the decree dismissing the bill.

For the Appellant, *Mr. Agar*, *Mr. Shadwell*, (*Mr. Seton.*)

For the Respondents, *Mr. Wetherell*, *Mr. Lovat.*

9 March 1821. Lord *Redesdale*, after stating the facts of the case, proceeded to the following effect:—It is to be observed, that according to the express declaration of the decree, all the debts and incumbrances subsequent to the registry of the deed of 1767, were

excluded, for the estate was thereby directed to be sold for payment of incumbrances prior to the registry of that deed. That Vesey Colclough was in distress is evident. The lands were under the dominion of a receiver; annuities had been granted, by which they were improperly burdened; and it was under these circumstances that the auction took place. Part of these transactions has been the subject of another suit*, in which the decree of the court below was reversed on grounds and under circumstances in some respects, but not altogether, similar to the present case. It appears that from the death of the father in 1794, the Appellant was a prisoner in France till October 1805. A part of this estate was sold to a Mr. Richards, and the transaction is impeached on the ground of fraud; the purchaser having obtained the estate at an under-value was held a party to the fraud, whether personally, or by the medium of an agent, is immaterial. The estate was put up to sale subject to two annuities granted by Sir Vesey Colclough to Cæsar Colclough, for the life of Sir Vesey. It is clear that such a sale was not warranted by the decree, which included only incumbrances prior to the settlement of 1767, rejecting those which were subsequent. It appears to me that the Appellant was injured by the sale subject to those annuities during the life of his father, which reduced the value of the estate to that extent, and which induced the party to buy the annuities at a sum greater than was advanced to Sir Vesey Colclough. To the

* *Colclough* v. *Bolger*, 28 June 1816, MS.; and see Dow's Rep. vol. v. p. 54.

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extent of those sums at least the estate was injured in value.

It is argued that persons purchasing under the authority of a decree ought to be safe; but it is a settled maxim of equity, that persons purchasing under decrees of the court are bound to see that the sale is made according to the decree. In a case, the name of which I do not at this moment recollect, it was laid down by Lord Hardwicke, that it was the business of a purchaser to see that the persons who had the right to convey were before the court. If he takes a title which a decree in an imperfect suit does not protect, he must abide the consequence*. On these principles the Appellant has a right to impeach the transaction. The decree protects parties only according to its terms. The provision of the decree was, that the estate was to be sold, subject to incumbrances prior but not subsequent to the settlement of 1767. And as to these latter incumbrances, the decree directed that the estate should be free from them. On this account the judgment is erroneous, and the purchase is with notice, because the title is founded on the decree: the purchaser had, moreover, full notice of the settlement, because it is recited in his conveyance. Such a sale, therefore, cannot be protected by the decree. Another objection to the proceeding is, that the estate was sold subject to leases which had been granted under pretence of the power, but were in fact contrary to it. It is probable, from circumstances established in evi-

* See *Giffard* v. *Hart*, 1 Scho. & Lef. 386. *Hamilton* v. *Houghton*, *ante*, vol. ii. p. 1.

dence, that the leases were fraudulently granted by Sir Vesey Colclough; that the purchaser had notice of the undervalue there is strong circumstantial proof, sufficient to impeach the transaction on that ground. It is not, however, necessary to resort to the ground of fraud; and without resting my opinion at all on that circumstance, but confining my view solely to the fact that this sale was made subject to the annuities, I think the decree is wrong: that is a clear ground; the other might require further investigation. Instead of dismissing the bill, the Court below ought to have granted relief. The consequence, if the sale is to be impeached, will be that the estate must be held by the trustees only as a security for the money paid into Court upon the purchase, with interest. The purchasers must, under the circumstances, be answerable for the rents of the estate from the death of Sir V. Colclough, not at an earlier period, though Sir V. Colclough was bound to keep down the interest of incumbrances. The rents and profits must be set against the principal and interest, and the balance paid into Court. The estate must be re-conveyed to the Appellant under the settlement of 1767. As to the lease subsequently granted by Sir V. Colclough being without consideration, and charged to have been fraudulently done by the aid of the receiver, the estate must be relieved from that incumbrance. As to the other leases, if they can be impeached, he may, as tenant in tail, try that question in a Court of law. The decree must be reversed, with a direction that the Respondent is liable for the rents, but that the purchase-money is a lien upon

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the estate. The rent to be charged ought not to be higher than what is reserved upon the lease. On payment of the balance (if any) of the purchase-money above the rent, the Respondent must reconvey the estate to the Appellant, in tail, with remainders, according to the settlement.

The *Lord Chancellor*:—If this decree is to be reversed it may be expedient to delay the final settlement of the order, that the parties may have the opportunity of suggesting any correction of the minutes, or supplying any defects.

The reversal of the decree may be a hardship upon the present Respondent; but if justice requires such a measure, the consideration of hardship must be disregarded. The decree cannot be supported unless the doctrines of Equity in Ireland differ from those in England. Sales under decrees are entitled to protection when they are conformable to the decree, but not otherwise. It might be consonant to moral justice to set a value upon the annuities, and add that value to the purchase-money; but where parties have made a purchase contrary to the authority of the decree they cannot be permitted afterwards to conform for the purpose of taking the benefit of the decree. As to the lease, the main defect is the under-value. In other respects there is strong ground for suspicion, but that is not a safe ground for decision. Judicial acts, in cases of fraud, must rest on clear evidence. By the decree, the Master was directed to inquire what parts of the estate were most fit to be sold. No report was made on that point: but whether that defect

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ought to affect the purchaser may be questionable, since the Court itself ought to have noticed that defect in their proceedings. But the decree reciting the settlement directs a sale of the estates subject to incumbrances of a particular period. The estates are in part sold subject to after incumbrances, in which the purchasers had an interest, and directly contrary to the decree. The loan of money—the purchase of the annuities—the leases at undervalue, and other circumstances appearing on probable evidence, furnish grounds of suspicion. But at all events it is clear that a decree not obeyed, but violated, cannot be a protection to a purchaser.

Lord *Redesdale*:—The length of time which has occurred between the death of Sir Vesey Colclough and the filing of the bill is a reason why costs should not be given.

Die Merc. 14 Mar. 1821.

Ordered and adjudged, That the said decree complained of in the said appeal be and the same is hereby reversed; and it is declared, That the sale of the lands of Curraghduffe, Cloneburne, and Ballycreene otherwise Ballyvovocreene, in the pleadings mentioned, ought to be deemed fraudulent, and void as against the Appellant, and the several other persons claiming after him under the deeds of settlement of the 12th and 13th of June 1767, and ought to be set aside, so far as the same affected the interests of the Appellant, and the several persons claiming after him under such settlement: And it is further declared, That the deeds of conveyance of

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the 7th and 8th of March 1782 of the said lands of Curraghduffe, Cloneburne, and Ballycreene otherwise Ballyvocreene, ought to stand as securities only from the death of Sir Vesey Colclough for the sums of money actually paid by the said Thomas Richards, deceased, for the purchase of the said lands, according to the orders of the said Court of Chancery, together with interest for such sums of money from the death of Sir Vesey Colclough: And it is further ordered, That it be referred to one of the Masters of the Court of Chancery to take an account of the sums of money so paid by the said Thomas Richards, in pursuance of the orders of the said Court, and to compute interest thereon from the death of the said Sir Vesey Colclough; and also to take an account of the rents and profits of the said lands, which accrued after the death of the said Sir Vesey Colclough, received by the said Thomas Richards in his life-time, or by the Respondents, or any of them, after his death, or which, without their wilful default, might have been received; in taking which account the said Master s not to charge the estate of the said Thomas Richards, or the Respondents, with any greater rent for the lands subject to the leases in question granted by the said Sir Vesey Colclough, than the rents reserved by such leases, without prejudice to the question whether such leases were void against the Appellant, or those claiming under him, under the said settlement of the 12th and 13th of June 1767; but the said Master is not to consider the said lands as subject to any other lease, or any other charge or incumbrance thereon made or created subsequent to the registry of the said settlement, and not warranted by the powers contained in such settlement, and particularly as not subject to any lease or incumbrance made or created by the said Thomas Richards, or any person or persons claiming under him: And it is further ordered, That the said Master do apply such rents and profits, in the first place, in or towards discharging

the interest accrued after the death of the said Sir Vesey Colclough, on the sums of money paid by the said Thomas Richards as aforesaid; and in case the same shall appear to have exceeded such interest, then that the said Master do apply the same in reduction of the principal sum: And it is further ordered, That the said Master do thereupon ascertain the balance; and upon payment of any sum remaining due for principal and interest upon balance of such account, or in case such principal and interest shall appear to have been satisfied by the application of such rents and profits as aforesaid, it is further ordered, That all proper parties do join in a re-conveyance of the said lands to the Appellant, according to his rights and interests in the said lands, under the said indentures of lease and release of the 12th and 13th of June 1767, and to the uses of such settlement now capable of taking effect, freed and discharged from any lease or incumbrance made by the said Thomas Richards, or any person or persons claiming under him; and in case, on taking such account as aforesaid, such principal and interest as aforesaid shall be, or appear to have been, overpaid by the application of such rents and profits, it is further ordered and adjudged, That the balance of such account shall be paid to the Appellant by the person or persons from whom such balance shall appear to be due: And it is further ordered and adjudged, That in case it shall appear that the Respondents cannot perfect the conveyance hereby directed to be made, free from incumbrances made by the said Thomas Richards, the Appellant, and the persons claiming after him, under the said settlement of the 12th and 13th June 1767, are entitled to satisfaction for the value of such incumbrances out of the assets of the said Thomas Richards; and that the said Court of Chancery do give all necessary directions for such purpose, but without prejudice to any question between the Appellant and those claiming after him under the said settlement of the, &c. and

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any person or persons not a party or parties to this suit: And it is further ordered and adjudged, That, as between the several parties to this suit, the Lords do not think fit to give any costs of this suit to this time, but that all subsequent costs be reserved for the consideration of the said Court of Chancery, who shall make such order touching the same as shall be just: and it is further ordered, That the said Court of Chancery do give all necessary directions for carrying this judgment into execution.