FROM THE IRISH CHANCERY

GORE, Esq.—*Appellant.*

STACPOOLE, Esq. and others—*Respondents.*

and

STACPOOLE—*Appellant.*

GORE and others—*Respondents.*

Feb. 17, 1813.

SALE OF MORTGAGED ESTATES.

SALE of mortgaged estates for payment of mortgage and judgment debts, under a decree of court fraudulently obtained in 1733 by collusion between the tenant for life and others, to the prejudice of those in remainder, questioned in 1796 by the tenant in tail three months from the time when his title accrued, established in the Irish Chancery in 1801, set aside by the Lords in 1813 as to part which was sold to a person cognizant of the fraud, and strong doubts expressed by *Lord Redesdale*, if the case had come before them whether it would not have been also set aside as to that portion which was purchased by one not actually cognizant of the fraud, but who might have discovered it by inspecting the proceedings on the face of which it was apparent.

THIS was an appeal from a decree of *Lord Clare* in the Irish Chancery, pronounced under the following circumstances.

General Francis Gore being seized in fee or entitled under a lease for ever of or to certain estates in the county of Clare in the year 1715; mortgaged the same to Joseph Damer of Dublin, for a sum of 6010*l.*; and in the following year borrowed from Damer a further sum of 1058*l.* for which he gave a bond and warrant of attorney, and judgment was soon after duly entered up.

General Gore by his will dated the 20th October, 1721, having directed that all his debts, mortgages, and incumbrances, should be paid out of his personal estate; and, if that should be insufficient,

then that his real estate should be liable thereto, Feb. 17, 1813.
" devised all his real estates to his son, Arthur Gore,
" for life; remainder to the said Arthur Gore's
" eldest son, Cusack Gore, for life; remainder to the
" first and other sons of the said Cusack Gore in tail
" male; remainder to the testator's grandson, Francis
" Gore Fitzarthur, (father of the Appellant,) for life;
" remainder to the first and other sons of the said
" Francis Gore Fitzarthur, in tail male; remainder
" to every other son and sons of the said Arthur
" Gore, in tail male; remainder to the testator's se-
" cond son, Francis Gore Clerk, for life; remainder to
" Francis Gore, the son of the said Francis Gore
" Clerk for life; remainder to the first and other sons
" of the said last mentioned Francis Gore, in tail
" male; remainder to the testator's youngest son,
" George Gore, for life; remainder to the first and
" every other son of the said George Gore, in tail
" male; remainder to the testator's right heirs for
" ever;" and appointed his said son, Arthur Gore,
sole executor of his will. General Gore died in
1724, without having altered or revoked his will,
and without having paid off the above-mentioned
mortgage and judgment debts.

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Will of Gen. Gore.

In the year 1730, Arthur Gore died, having by his will appointed Robert French and others his executors.

Cusack Gore, the eldest son of Arthur Gore, had died in his father's life time, so that at the death of Arthur Gore, his second son, Francis Gore Fitzarthur, the father of the Appellant, became entitled to an estate for life under the will of General Gore, in the mortgaged estates. Francis Gore Fitz-

Appellant's father takes an estate for life, remainder to

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arthur, at the death of his father, was a minor, and Robert French obtained letters of guardianship of his person and estates.

the Appellant in tail under the will.

The interest in the mortgage and judgment debts having come by assignment and bequest into the hands of William Curtis, of Dublin, he, in the year 1731, together with the executors of the original Mortgagee and Joseph Mariott, his trustee, exhibited their bill of foreclosure in the Court of Exchequer in Ireland, to which they made Francis Gore Fitzarthur, the minor, tenant for life, with the executors of Arthur Gore parties dependants; but none of the subsequent remainder-men were made parties. To this will the minor, by his guardian and the executors, put in their several answers, in which the limitations in the will of General Gore were distinctly set forth. The answer of Francis Gore Fitzarthur was, according to the custom in Ireland, signed by his Attorney, Edmond Hogan. On the 10th of April, 1733, the cause came to a hearing in the Exchequer, where the following decree was pronounced: "that an account should

Foreclosure by collusion—without the necessary parties.

"be taken of the sums due on foot of said mortgage
"and judgment, and that the same with interest
"should be paid within six months from the time of
"confirming, the report to be made by the Chief
"Remembrancer of the said Court in pursuance of
"the said decree, and that in default thereof the
"equity of redemption of the said mortgaged premises
"should be foreclosed and the said estates sold, and
"that out of the money arising from the sale, the
"Chief Remembrancer or his deputy should pay to
"the said William Curtis the sums which should be

"so reported due, with interest and costs; that the "remainder should be paid to said defendants, and "that all proper parties should join in deeds of con- "veyance to the purchaser."

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The deputy Remembrancer having made his report of the sum due under the mortgage and judgment, amounting to 9585*l.* 13*s.* 7*d.* the cause was heard on the report and merits, on 19th June, 1733, and the Court made a final decree thereon as follows: "That defendant should pay to said William Curtis "the said sum of 9585*l.* 13*s.* 7*d.* with interest and "costs within six calendar months from the time of "confirming said report; and in default thereof, that "said mortgaged estates should be sold; that out of "the money arising from the sale, said William Curtis "should be paid the amount of the sums decreed "to him, and that the surplus thereof should be paid "to said defendant, Francis Gore Fitzarthur, Appel- "lant's said father."

At time of filing the bill and pronouncing the decree, the Rev. Francis Gore, second son of the testator, General Gore, and Francis Gore, his son, to whom remainders were limited by the will of the General, were both *in esse;* but neither of them, nor any persons except as before stated, were made parties to the foreclosure cause.

No proceedings were had upon the final decree till May, 1746, soon after Francis Gore Fitzarthur (the Appellant's father) came of age; the decree was then revived, and the mortgaged estates put up to sale by the deputy Remembrancer of the Court of Exchequer, in November, 1747, where in pursuance of a previous arrangement between Francis

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Gore Fitzarthur, and John Purdon, a barrister, the latter purchased the estates at 13,400*l.* which, as the Appellant alledged, was far below their value, though even that sum exceeded the mortgage and judgment debts and interest by a sum of 1500*l.*; this surplus which remained after payment of the mortgage and judgment debts was paid to the tenant for life.

Francis Gore Fitzarthur had been engaged in a contested election in 1745, immediately after his coming of age; and his affairs becoming embarrassed, he employed this John Purdon, and Edmond Hogan, attorney at law, as confidential Counsel and Agent to manage his affairs.

That Purdon had purchased the estate as trustee for Francis Gore Fitzarthur, was proved by a written declaration of Purdon to that effect, signed by two witnesses, and by their borrowing 345*9l.* on their joint security from Messrs. Keane and Latouche, Bankers, Dublin; for the purpose of making the necessary deposit.

Sale of part of the mortgaged estates to Hogan, who was cognizant of the fraud.

In order to complete the purchase, Purdon agreed with Hogan, who had been Attorney for Francis Gore Fitzarthur when a minor, and had signed his answer to the foreclosure bill, to sell to him (Hogan) a part of the mortgaged premises for a sum of 3,771*l.* 16*s.* 8*d.* He also agreed with John Stacpoole of Craig Brien, in the County of Clare, for the sale of another part of the mortgaged estates, for the sum of 7,136*l.* 4*s.* 9*d.* By an article in writing dated 30th April, 1748, Purdon covenanted with Hogan, to procure a sale to be made by all proper parties to the said Edmond Hogan of the

lands of Claurode-more and the Liffords, being part of the mortgaged estates; and by a subsequent memorandum, the tolls and customs of Claurane were agreed to be sold to Hogan for a further consideration: the whole together amounting to between 4000*l.* and 5000*l.*

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Purdon executed a conveyance to John Stacpoole, of Craig Brien, of that part of the mortgaged estates which had been purchased by him, but no legal conveyance was executed to Hogan; they both however, took possession; and Purdon himself entered into possession of that part of the mortgaged estates which remained unsold, under pretence of keeping the lands as a security against his liability for the money borrowed from Messrs. Keane and Latouche to pay the deposit.

Francis Gore Fitzarthur died in July, 1796, and in the month of November, in the same year, his son, Francis Gore, the Appellant, who was entitled to the remainder in tail in the equity of redemption of the mortgaged estates under the will of General Gore, filed his bill in the Court of Chancery, in Ireland, against the representatives of Purdon, Hogan, John Stacpoole of Craig Brien, and of Curtis, the mortgagee, together with those claiming interest in the estates under and through these persons—stating the above facts, and praying "to be decreed "entitled to a redemption and reconveyance of the "aforesaid mortgaged estates, notwithstanding the "aforesaid decrees and the proceedings had thereon; "that all proper accounts should be taken from such "periods as to the Court should seem meet; and that "such of the defendants as should be in equity bound

Appellant files his bill against the purchasers of the mortgaged premises, &c.

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"to do so, should, upon payment of such sum of "money, (if any,) as should appear due on the taking "of such accounts, reconvey said estates to the Appel- "lant; or that he might be decreed to be entitled to "said estates, or to possession thereof upon such other "terms as to court should seem equitable."

Simon Purdon, the representative of John Purdon, being conscious it would appear that he had no just defence, came to a compromise, and delivered to the Appellant the unsold lands, into the possession of which John Purdon had entered as before stated.

The representatives of Hogan, (Stacpooles of Lifford) put in their answers, relying upon the sale and covenant by Purdon to Hogan, under whom they claimed; and further stated a recovery suffered of the premises in question, and subsequent charges thereon for portions for children and by marriage settlements.

In February, 1800, George Stacpoole, of Lifford, filed his cross bill, stating the facts, and contending, that as the Appellant's father had joined with the Chief Remembrancer of the Court of Exchequer in conveying the estates to Purdon, this ought to be considered as a covenant and warranty, binding on his heirs; and that, if the conveyance should be found to be defective, he (George Stacpoole) ought to be indemnified out of his personal estate and effects.

The original and cross causes came on together before *Lord Clare* in November, 1801, and his Lordship decreed that the Appellant's bill should stand dismissed without costs, as against George Stacpoole, of Lifford, and those claiming under Hogan; and

should stand absolutely dismissed as against George Stacpoole, of London, the representative of John Stacpoole, of Craig Brien; and that as to the other Defendants the cause should stand over. Feb. 17, 1813. SALE OF MORTGAGED ESTATES.

The decrees of dismissal as to the Stacpooles of Lifford, representatives of Hogan, and Stacpoole of London, were enrolled in 1802.

The cause came on again to be heard for further directions in Nov. 1803, before *Lord Redesdale*, who pronounced a decree, declaring, "That as none "of the persons in being, and entitled in remainder "after the death of the Plaintiff's (Appellant's) father, "were made parties to the proceedings in the cause in "the Exchequer, although the parties to such cause had "notice of General Gore's will, the same being set forth "in the pleadings; and as the Plaintiff's (Appellant's) "father was tenant for life only of the estates under "such will; the proceedings in that cause did not in "any manner bind the rights of the parties entitled to "such estates in remainder, and such proceedings "were on the face of them erroneous and wanting the "necessary parties to give them force and effect, and "that the same, under the circumstances, ought to "be deemed fraudulent, collusive, and void, as against "the Plaintiff, and all persons entitled in remainder, "under General Gore's will, after the death of the "Plaintiff's father," &c. &c. The proceedings in the bill of foreclosure void as against the Appellant.

The decree, after a summary recital of the facts and state of the case, went on to order that the legal estate in all the mortgaged lands and premises should be conveyed to the Plaintiff, (Appellant,) except as to those sold to Hogan, of whom the

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Respondent, George Stacpoole of Lifford, was the representative; and to John Stacpoole, of Craig Brien, of whom George Stacpoole, of London, was the representative, the bill having been dismissed as to them by *Lord Clare*, and the decree of dismissal enrolled, so that it could not be reheard in the Court below.

Gore appealed against the decree of *Lord Clare*, as far as respected the Respondent George Stacpoole of Lifford, the representative of Hogan, but suffered it to remain undisturbed as far as respected Stacpoole of London, apparently because the ancestor of the latter, Stacpoole of Craig Brien, seemed to have been a purchaser for valuable consideration without notice under a decree of Court.

Mr. Hart and *Mr. Leach* for the Respondents in the original cause, and Appellants in the cross case, defended the decree of *Lord Clare* on the ground on which his Lordship was stated to have pronounced it; viz. the length of time elapsed since the original decree in the Exchequer, which ought not now to be impeached. Though the decree was irregular, the Appellant was bound by lapse of time, and they cited *Lloyd and Jones*, 9th Vesey, 37, to show the practice of the courts to be conformable to *Lord Clare's* decrees.

In reply to *Lord Redesdale*, who observed that one of the tenants in tail was in that case in suit, Mr. Hart said that the decree there was equally irregular, because there were intervening estates of inheritance; and yet it was thought improper to disturb a long-standing title under a decree of Court.

In the present case no fraud was intended, as there was no object which fraud could have materially affected.

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The Rev. Francis Gore, and Francis Gore his son, were the only remainder-men in *esse* at the time of the decree; and they being only remainder-men for life, their interests were in this instance too distantly affected to render it essentially necessary to make them parties. The purchase was for a fair and *bonâ fide* consideration; a recovery had been suffered of the lands, and they were subject to marriage settlements made *bonâ fide*, and without notice of the Appellant's claim; and to portions for younger children. The Appellant, if he intended to impeach the decree, ought to have done it by a bill in the nature of a bill of review, and Mitford's Treatise on Pleading was cited to show that such was the course for persons not bound by the former decree.

Mr. Richards and *Sir S. Romilly* (for the Appellant in the original cause, and Respondents in the cross cause) argued, that it was evident that Hogan had full notice of the limitations in General Gore's will, as he, according to the Irish custom, signed the answers in which these limitations were set forth. It was also proved that Francis Gore Fitzarthur had, two or three years after the contested election, in 1745, become so weak in his understanding that he was subject to various impositions, so that it was at last necessary to vest his estate in trustees by Act of Parliament, to prevent his ruin. The decree in the Exchequer was obtained by fraud and collusion, between the tenant for life in possession, John

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Purdon, and Edmund Hogan; and it evidently proceeded on the supposition that Francis Gore Fitzarthur had the fee-simple, or first estate of inheritance in the mortgaged estates; so that the Judges were clearly imposed upon. Two of the remainder-men, the Rev. Francis Gore and his son, being in *esse* at the time of filing the bill of foreclosure, ought to have been made parties, to enable them to redeem the mortgage if they thought fit. The surplus of the purchase money, above payment of the mortgage and judgment debts, had been paid to the tenant for life, Francis Gore Fitzarthur, pursuant to the same plan of fraud and collusion; instead of being brought into Court, according to the custom in Ireland in such cases, for the behoof of all parties. The purchase having been made by Hogan, with a full knowledge of all these circumstances, was fraudulent; and therefore all dispositions of the property made by him, and those claiming under him, were vitiated by this fraud. The recovery and marriage settlements did not alter the case; and one of these settlements was made *pendente lite*, and therefore with notice. The estates indisputably belonging to Hogan and his representatives, were at any rate charged with these settlements and portions, and sufficient to answer their purposes. The legal estate was never conveyed to Hogan or his representatives: and as the Appellant's title did not accrue till the death of his father, and as he filed his bill about three months after, the lapse of time cannot prejudice him. He could not have taken any steps to have secured the application to its proper uses, of the surplus purchase money, after payment of the mortgage and judgment debts, as

that would have been a recognition of the validity of the sale. Francis Gore Fitzarthur could not pass any thing more than his life interest in the mortgaged premises; and nothing in these transactions ought to be permitted to injure the Appellant, or to deprive him of his just rights.

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Lord Redesdale stated the case, and after adverting to the facts, that Hogan signed the answers, and must have known that Francis Gore Fitzarthur was only tenant for life; that the bill had not been amended by adding parties, but that the cause proceeded in such a way as to leave the judges in the belief that Francis Gore Fitzarthur was the absolute owner, and that the decree of foreclosure was pronounced, and the surplus of the purchase money ordered to be paid to the said Francis Gore Fitzarthur under this impression, he observed that it was impossible not to see that there was in course of these proceedings the most cautious suppression of facts with which the Court ought to have been made acquainted. The sum too which should have been paid out of the estates, so as to affect the interest of the remainder-men was only 7068*l.* the original amount of the mortgage and judgment debts, as the interest ought to have been kept down by the tenant for life, and such should have been the directions of the Court. His Lordship also adverted to the dismissal of the Bill by *Lord Clare*, as against George Stacpoole of London, the representative of Stacpoole of Craig Brien, which he believed was done on the ground, (in addition to the lapse of time,) that John Stacpoole, of Craig Brien,

Judgment.

The judges imposed upon in the foreclosure cause, and made to proceed as if the Appellant's father had been the absolute owner.

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Very doubtful whether a purchaser for valuable consideration under a decree of Court fraudulently obtained, though ignorant of the fraud, can protect himself, when the fraud appears on the face of the proceedings.

was a purchaser under decree of Court for valuable consideration without notice of the fraud. *He very much doubted, however, whether this was a protection*, as he held it clear, that a purchaser under such circumstances was bound to see that, at least as far as appeared on the face of the proceedings before the Court, there was no fraud in the case. That case however had not been brought before their Lordships, and therefore it was unnecessary to say any thing further upon it. The case of Purdon's representatives, having stood over for want of parties, came before him (*Redesdale*); but he could give no decision on the case of Hogan's representatives, as the decree of dismissal had been enrolled, and could therefore only be altered by appeal to their Lordships.

It had been objected by the Respondents, that the purchase was made by Hogan, under the decree of the Court. The answer to that was, that he acted with full notice of the fraud. Another objection was, that the proper course would have been to file a bill in the Exchequer, to set aside the decree on the ground of fraud. The answer to that was, that the decree neither did nor could bind the remainder-man at all, but only the tenant for life. The clearest title could not be used by a person cognizant of any fraud affecting it; and by the register statute even a registered deed could not be used against an unregistered deed, if the person in whose favour the registered one was made knew of the prior unregistered deed. Some of the claimants came in, under marriage settlements, for jointures and portions. It was sufficient in answer to

The clearest title cannot be used by a person cognizant of any fraud affecting it.

this, that Hogan left undisputed property to answer all such claims and purposes, and therefore, as to to this cause, they might all be considered as volunteers. One of the cases however was rather stronger than the rest; it was a marriage settlement made after the dismissal of the bill by *Lord Clare*; but still it was a transaction *pendente lite*, since it was still a question for their Lordships' consideration, whether the bill had been *rightly* dismissed, and the parties thus having notice, must take the settlement subject to all its legal and equitable consequences. Such a circumstance could never be allowed to intercept the course of justice.

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A settlement made upon the faith of a final decision of the Court below is still a transaction *pendente lite*, and subject to all the legal and equitable consequences of an appeal.

Lord Eldon, (Chancellor.) On the best consideration which he could give the subject, he had no doubt but the decree in the Exchequer did not bind any remainder-man, for it was clear equitable law, that in order to make a foreclosure valid against all claimants, he who had the first estate of inheritance must be brought before the Court, and even then, the intermediate remainder-men for life ought to be brought before the Court, to give them an opportunity of paying off the mortgage if they thought proper. A bill of review in the Exchequer, to set aside its decree, could not have answered the purpose of the Appellant, for as to him this fraudulent decree was an absolute nullity. And as to the lapse of time, he thought the Appellant had sued in proper time, unless he had given such encouragement to the Respondents to believe themselves secure, and induced them to improve and deal with the property as if it had been securely their own, as would

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make it a fraud in him to prosecute the present claim. This had been alleged by the Respondents; and was the only material point on which his noble friend had not touched. He was of opinion, however, that there was no foundation in the case, for any objection on that ground.

The judgment of *Lord Clare* was accordingly reversed, with proper directions relative to the conveyance of the legal estate to the Appellant, accounting for the rents, and re-payment of the purchase money, with interest to Hogan's representatives.

Agent for Appellant, PINKET, Temple.
Agent for Respondents, J. PALMER, Gray's-Inn.

FROM SCOTLAND.

WATT, Merchant—*Appellant*.
MORRIS and others—*Respondents*.

WHETHER a vessel can be deemed sea-worthy for a foreign voyage without knees?

May 10, 1813.

INSURANCE.

IN 1794, the Appellant freighted the Jenny and Peggy, a vessel lying at St. Andrews, to Riga or St. Petersburgh, and back to Dundee or Newburgh, in Scotland. The owners (the Respondents) engaged "that she *should be completely fitted and found* to proceed on the voyage in four days thence;" and further represented her as so firm and perfect, that she was capable of carrying iron or the weightiest commodity. After the Appellant had freighted the