IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

HONE—*Appellant.*
DAVIS and others—*Respondents.*

Dec. 3, 1813; June 1, 1814.

COVENANT.—CHURCH-LEASE.

LESSEE of a church-lease, made about 150 years ago, sub-leases, with covenant for renewal as long as he could renew the original lease; the *sub-lessees* covenanting to pay double the rent that might be demanded by the Dean and Chapter, and to pay 300*l.* of the fine; the immediate lessee covenanting "to make all proper applications, and "use all proper endeavours, for the renewal of the leases." Renewals at the old rent, and increasing fines, till 1796; when the *sub-lessees* agreed to pay a greater proportion of the fine, on having an addition to their term, and clause introduced into the contract, that they should have the option to reject the renewal, in case the rent should be too much advanced. *Immediate lessee* endeavours to procure a renewal at a small fine and inrease of rent; but the Court below, on bill by the *sub-lessees*, decreed performance of the covenant, by renewal for a large fine at the old rent,—the Dean and Chapter being willing to renew in that way,—on the ground, apparently, that such was the true intent and meaning of the parties;—it being conceived, that the option reserved to the *sub-lessees*, to reject the renewal, was intended to guard against the effect of an increase of rent, if insisted upon by the Dean and Chapter, without its being left to the *immediate lessee* to endeavour to procure a renewal at an increase of rent and small fine, if he could. —This decision affirmed on appeal.

Original lease.

SOME time in or about the year 1650, *John Usher*, of Mount Usher, county of Wicklow, obtained a lease from the Dean and Chapter of Christ's Church, Dublin, of the lands of Ballymolchins, &c.

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in the county of Dublin, for 21 years, at a rent of 107*l.* 12*s.* 6*d.*; and soon after demised the same premises, for 16 years, to *Jeoffry Davis*, (under whom the Respondents derived,) at the yearly rent of 215*l.* 5*s.* being double the original rent; with a covenant for renewal as long as he could renew the original lease. It was the usage of the Dean and Chapter to renew every seven years, at the same rent, on payment of a fine. The covenant for renewal was in these terms:—

Covenant for renewal.

"That he the said John Usher, his executors, "administrators, and assigns, shall and will, at some "time before the expiration of the first seven years "of his present lease from the said Dean and Chap"ter, and likewise at or some time before the ex"piration of the first seven years of every future "lease that shall be obtained by him or them of "the said lands, or at some time sooner, *make all* "*proper application, and use all proper endeavours* "*with the Dean and Chapter, or their successors,* "*for the renewal of the several leases* which shall "be obtained from the said Dean and Chapter; "and upon obtaining of every such renewal by the "said John Usher, his executors, administrators, "or assigns, he or they shall and will, from time to "time, and at any time within six months after his "or their giving notice of such renewal unto the "said Jeoffry Davis, his executors, administrators, "and assigns, renew and make a lease to the said "Jeoffry Davis, his executors, administrators, and "assigns, for the farther term of seven years, to be "added to the term and continuance of the present "lease, and of every future lease; he the said

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" Jeoffry Davis, his executors, administrators, or " assigns, accepting of every such renewal within " six months after such notice, *and paying unto the " said John Usher, his executors, adminstrators, " and assigns, the sum of* 300*l. as a fine for every " such renewal; and also paying double the yearly " rent, and no more, as shall be reserved and made " payable to the said Dean and Chapter, and their " successors,* by the said John Usher, &c. out of " the hereby demised premises. And the said " Jeoffry Davis, in like manner, for himself, his " executors, administrators, and assigns, does cove- " nant to and with the said John Usher, his exe- " cutors, administrators, and assigns, that he the " said Jeoffry Davis, his executors, administrators, " and assigns, on every subsequent and after re- " newal and renewals, will pay to the said John " Usher, his executors, administrators, and assigns, " the said sum of 300*l.* sterling, as a fine for such " renewal or renewals for their said lease, and ac- " cepting of the said lease, within six calendar " months after such renewals made with the Dean " and Chapter, on their having notice thereof; and " also pay to the said John Usher, &c. *double the " yearly rent* as shall be made payable to the said " Dean and Chapter, and their successors, by the " said John Usher, out of the hereby demised pre- " mises."

On a subsequent renewal, the following stipulation was added to the covenant:—

" *And it is hereby declared to be the true intent " and meaning of the said parties to these presents, " that in case the said, &c.* (sub-lessees,) *their ex-*

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" *ecutors, administrators, or assigns, shall, upon* " *any future renewal to be made by the Dean and* " *Chapter, or their successors, of the said lands, to* " *the said John Usher, &c. apprehend that the re-* " *served rent is too much advanced, it shall be at* " *the election of the said, &c.* (sub-lessees,) *whether* " *they will accept of a renewal, or refuse the same,* " *and be content with and possess the residue and* " *remainder of the term of years in their said lease* " *then in being and unexpired.*"

1796.—Renewal.

In 1796 Usher, descendant of the original immediate lessee, (the Dean and Chapter having increased their fines,) called upon the sub-lessees to assist him with a sum in addition to the 300*l.* in procuring a renewal, which they did, on the terms of having two years and a half added to their term; and renewals were thereupon executed, at the old rent, with covenants as in the original sub-lease, and the additional stipulation above stated. In 1801 Usher sold his interest in the lease to *Hone*, the Appellant, for 950*l.* Hone soon after applied to the agent of the Dean and Chapter, (Arthur Maguire,) to know on what terms they would renew; and being informed that a fine of 1035*l.* 8*s.* 9*d.* would be required, he caused a notice, dated July 20, 1802, to be served on the Respondents, the sub-lessees, demanding, that they should pay the whole of the fine, and requiring a specific answer before the 1st of the following September; promising, in case of compliance with the proposition, to renew with them; otherwise, that he should consider himself at liberty to make the best terms he could with the Dean and Chapter, by renewing at

Sale to the Appellant.

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Proposal by Appellant to renew at an increased rent.

an increased fine or rent, or suffering the term to expire. No answer having been given within the time, Hone represented to the agent, that the under-tenants were refractory, and proposed to give 500*l.* fine, and 80*l.* additional rent, for renewal. The Dean, on being informed of this proposal, desired the agent to communicate it to the under-tenants, that they might consider how their interest would be affected. They then, on Dec. 2, 1802, gave notice to the Appellant, that they were ready to advance the whole of the fine of 1035*l.* in the mean time, to prevent the increasing of the rent; leaving it to be afterwards settled by arbitration what proportion should be paid by Hone. This not being attended to, they stated in a memorial to the Dean and Chapter, their liability to pay to the Appellant double the rent which he paid, or might pay, to the Dean and Chapter. On the 30th, the Respondents caused another notice to be served on the Appellant, stating, "that the Dean and Chapter "were ready to renew at the old rent, on payment "of 1035*l.* fine; that Respondents were willing to "pay the whole, and to pay all future fines that "might be demanded, leaving to the Appellant his "profit rent clear; that if he did not renew with "the Dean and Chapter, and grant renewals to the "Respondents, on these terms, they would apply "to a Court of Equity for liberty to renew in his "name." No satisfactory answer having been given, the Respondents filed their bill in Chancery against Hone, and Maguire, the agent, (the object in making the latter a party being for the discovery of evidence;) stating as above, and praying that Hone

Bill.—Jan. 1803.

Prayer.

might be compelled to renew, or that the Plaintiffs might be authorized to renew in his name, under such terms as the Court might think fit to direct. Hone having answered, and Maguire's name being struck out of the bill by leave, without putting him to the trouble of an answer, he having declared that he was ready to answer upon interrogatories, and several witnesses having been examined, the cause came on to be heard before *Lord Redesdale*, (Chancellor,) who recommended an accommodation, but without effect. The cause came on again to be heard, when the Court decreed, "that the Respondents should be at liberty to renew at their "own expense; and that the Appellant should do "all necessary acts for that purpose; and that the "renewal should be in Hone's name, if he consented in a month; otherwise, in the name of a "trustee, to be named by Plaintiffs, and approved "by the Master;—Plaintiffs consenting to pay the "whole fine and fees, and consenting, in case the "renewal should be in the name of the Defendant, "to accept of covenants for renewal from him, with "these variations, &c.; and reserving farther consi-"derations."

March 5, 1804.

Decree.—Feb. 1, 1805.

The Master reported, "that the Defendant had "not consented that the lease should be renewed "in his name; and that a trustee had been pro-"posed and approved." The Dean of Christ Church having died in the mean time, his successor demanded a fine of 4295*l.* 4*s.* 8*d.* which Plaintiffs paid, and a lease was executed to the trustee. Upon farther directions, it was ordered and decreed, "that

Report of Master.

Death of the late Dean pending the suit, and a larger fine demanded by his successor.

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Decree.—July 6, 1805.

"the trustee should execute new leases to Plaintiffs, "pursuant to the covenant in the former leases;" and the Master was directed "to inquire what portion of the fine ought to be considered as demanded in respect of the increased value of the "lands produced by improvements beyond the ordinary expenditure of a tenant; and how much "in respect of the lands exclusive of such improvements;" the sum of 300*l.* to be deducted out of the latter part, and the Plaintiffs to stand as creditors on Defendant's interest in the lease for the remainder; and the renewed lease to remain vested in the trustee, to secure the same, unless the Defendant paid in six months; the Plaintiffs to pay the rents as they became due to the Defendant, according to covenant; and to be at liberty from time to time to apply to the Court for leave to renew the leases, and for that purpose to surrender to the trustee, &c.

March 7, 1806.

The Master reported the payment of the fine by the Plaintiffs; that the whole of it had been demanded in respect of the ordinary value of the lands; and that all rents were paid up to Defendant. Upon petition by the Defendant, the cause was reheard; when the Lord Chancellor (*Ponsonby*) decreed, that as the Plaintiffs had offered to pay the sum required by the late Dean of Christ Church, amounting to 1035*l.* 8*s.* 9*d.*, the decree of July 6, 1805, should be varied, so far as that the Defendants' interest in the lease should stand as a security to the Plaintiffs only for 3259*l.* 15*s.* 11*d.*, being the difference between 1035*l.* 8*s.* 9*d.* and 4295*l.* 4*s.* 8*d.*;

Decree.—Feb. 10, 1807.

and that in other respects the former decrees should be affirmed. From these decrees the Defendant appealed.

Romilly and *Hart* (for Appellant.) The lessor was bound to renew and to under-lease; but he was left at liberty under the covenant as to the terms, whether by fine or increased rent. He was bound to pay all the fines above 300*l.*; and as ecclesiastical bodies were in the habit of taking fines on improvements, the perpetual renewal on such terms would be ruin to him, unless he had reserved the discretionary power to renew upon fines or increased rent. Without this option, equity must have said, that the nature and effect of the covenant never could have been understood by the parties, and would have set it aside, as in *Willan v. Willan.* The renewing at increased rents might be ruinous to the sub-lessees, had not an option been reserved to them to give up their interest when the rents should be too much advanced. The argument on the other side was, that the Court was not to look at the terms of the instrument and covenant; but that the lessor (immediate lessee) must always renew on payment of fines, because that had been done hitherto. The Court, however, must look at the covenant, and could not make a new agreement for the parties. The decrees below proceeded on a mistake as to the facts; for, as Appellant understood Plaintiffs, they had only offered to pay the fines in the mean time. But at any rate Appellant was not bound to accept the offer, as it rested with him to renew at an advanced rent, or on fines. The ques-

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tion was not, what was just, but what was agreed upon between the parties; and the Court could not make a new agreement for them. The subject involved three points:—1st, What was the construction of the covenant. The rule of equity was to consider what was the legal construction of the covenant, and then specifically to perform it. 2d, Whether this decree executed it according to the legal construction. 3d, Upon whom the loss which happened pending the suit ought to fall.—As to the construction, the sub-lessee knew that the Dean would naturally prefer the fines, and not allow the rent to be increased too much; and therefore he was contented to subject himself to the payment of the double rent, contributing only 300*l*. to the fine, leaving the immediate lessee to deal as he could. It could not be the original intent that the immediate lessee should have only the stipulated profit-rent, and forego all the advantages of improvements. The sub-lessee, by the contract of 1796, guarded against the too great increase of the rent, by stipulating that he should be at liberty to reject the renewal and exhaust the term. This construction was also corroborated by another part of that contract; for the sub-lessee, looking to the possibility of too great an increase of rent, had added two years and a half to his term. It was clear, then, that there was nothing to restrict a reasonable increase of rent. 2d, The decree did not execute the contract of the parties, but put a construction upon it which the terms and understanding of the parties did not warrant: or, in other words, made a new contract for them, which the Court then executed. This

might lead to dangerous consequences. In *Willan v. Willan*, the Court held that it could not modify the contract of the parties. It must stand entirely, if it stood at all. 3d, As to how the act of God ought to affect the parties, the Appellant was throughout right. He would have renewed according to his covenant, but was prevented by the Respondents, and they ought to bear the consequences.

Richards and *Nolan* (for Respondents.) The Court did not make a new contract, but only executed the existing contract according to justice and the real intent and meaning of the parties. The leases having been septennially renewed upon fines for 150 years at the old rent, there was no difficulty in the construction of the covenant. In 1796 the parties erected a Court of Equity for themselves. The sub-lessees, on account of the advance of the fines, agreed to pay more than the 300*l.* which was in fartherance of the equitable intent of the old covenant. The price at which Hone purchased clearly showed the impression upon the minds of the parties as to the true construction of the covenant. The intention of Hone was to put it in his power to destroy the interest of the sub-lessees, which it was the duty of the Court to prevent, if the meaning of the covenant was, that both interests should be preserved. The meaning of the option reserved to the sub-lessees, to refuse to renew, was to guard against too great an advance of rent by the Dean and Chapter. The Appellant refused to renew accord-

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ing to the true meaning of the covenant, and the consequences ought to fall upon him.

June 1, 1814. Judgment.

Decrees of the Court below *affirmed*.

Agent for Appellant, BEDFORD.
Agent for Respondents, LANE.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

LAWRIE and others—*Appellants*.
LAWRIE—*Respondent*.

July 27, 1814.

LAND-TAX OF ENTAILED ESTATES.—PURCHASER.

JUDICIAL sale of part of an entailed estate, for redemption of the land-tax, made by decree of the Court of Session, under authority of the Acts of Parliament, afterwards reduced; the terms of the act not having been complied with, &c. and the heir of entail in possession having been himself the purchaser, by the intervention of a trustee. This judgment affirmed in the House of Lords, on the ground of the particular relation in which the purchaser stood with respect to the estates.

Lord Eldon, (Chancellor,) observing, that the question would have been a very serious one, if it had been the case of a stranger purchaser; and *Lord Redesdale* saying, that it would have been very difficult to reduce such a sale, in the case of a stranger purchaser.

Reduction.

THIS appeal arose out of an action brought before the Court of Session, for reduction of a sale of part