IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

ROSSE (Earl of)—*Appellant.*
STERLING (Rev. James) and others—*Respondents.*

May 17, 20, 22, 24; June 24, 29, 1816.

AGREEMENT.—SPEC. PER.—WAIVER.—ACCOUNT.—INTEREST.—MORTGAGE, &c.

BILL in 1805 for performance of an agreement made in 1761, for sale of lands, and decreed accordingly below; but the decree reversed in Dom. Proc., Defendant having been left in possession as owner for a long time, and Plaintiff having done acts inconsistent with the notion of his being owner himself, which was considered as amounting to a waiver.

Objection to a decree made in 1812, that it ordered payment of a sum found due, and directed to be paid with interest by a decree made in 1766, on the foot of accounts settled in 1756 and 1761, between attorney and client, in which the attorney charged interest upon interest, with interest on the consolidated sum from 1766 to 1812. That sum acknowledged by the objecting party, by solemn deed in 1783, to be due with interest, and the objection comes too late; though, if objections had been recently made for the purpose of opening the accounts, they could hardly have failed of being effectual.

Father, tenant for life, borrows money, to secure which he, and his son, remainder-man in fee, join in a mortgage of the inheritance. The son is entitled in equity to rank as a creditor on the real and personal assets of his father for the money, and to call on the mortgagee to make the utmost of it for the son's relief, &c. &c.

Marriage settlement, 1730.

BY a settlement, dated September 4, 1730, made on the marriage of Lawrence Parsons, grandson and heir apparent of Sir William Parsons, of Par-

sonstown, in the King's County, and Mary Sprigge, eldest daughter of William Sprigge, of Clonivoe, in the King's County; after reciting that the Parsons' estate was subject to certain incumbrances, and amongst others to a mortgage created in 1707, described as *Upton's* mortgage, the Parsons' estate in the King's County was settled on Lawrence Parsons for life, remainder to his first and other sons in tail male, with power to charge the estate with 400*l.* per annum for any future wife, and with 4000*l.* for the younger children of any future marriage, in case he should have no younger children by Mary Sprigge: and by the same settlement, William Sprigge covenanted to stand seized of an undivided moiety of Clonivoe, Clonad, and other lands, of which he had the reversion in fee expectant on his own death without issue male, and possessed of an undivided moiety of certain leasehold estates, to the use of Lawrence Parsons and Mary Sprigge, and the survivor of them, for life; remainder to their first and other sons in tail male; remainder to Mary Sprigge, her heirs and assigns, reserving a power to himself to charge the undivided moiety of the lands with 2000*l.*

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The marriage took effect. Mary Sprigge died in 1731, leaving William, the father of the Appellant, her only child; and William Sprigge died in 1735 without issue male, leaving William Parsons the son of his daughter Mary, and his daughter Margaret married to Thomas Burgh, his co-heirs at law, having executed his power in favour of his daughter Margaret.

In 1742, Burgh and his wife filed a bill for

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raising this 2000*l.* out of the Parsons' moiety of the Sprigge estate, and obtained a decree; and in 1746, the sum was paid by Lord Loftus upon the security of an assignment of the decree. In 1742, also, Sir Lawrence Parsons married again; and, under the power reserved in his first marriage settlement, he charged the Parsons' estate with 400*l.* per annum as a jointure for his second wife, and 4000*l.* for the younger children. There were issue of this marriage two sons; but the whole charge of 4000*l.* became vested in Anne Parsons, the daughter of one of them, and wife of Richard Blake Deverall. Of this sum of 4000*l.*, a sum of 3275*l.* was afterwards paid by the Earl of Rosse subsequent to his father's death.

In 1754, Sir Lawrence Parsons, and William his son, suffered a recovery of the Parsons' and Sprigge estates, the uses of which were, subject to Loftus's charge, and Upton's mortgage, to Sir Lawrence for life, remainder to his son William and his heirs.

1754, Marriage of Sir W. Parsons to Mary Cleare. Marriage articles.

In the same year 1754, on the intermarriage of William Parsons with Mary Cleare, only child of John Cleare, of Kilbury, in the county of Tipperary, marriage articles were executed, by which it was agreed that all the estates included in the settlement of 1730, except those of Clonivoe and Clonad, should be conveyed to trustees for a term of 200 years, with remainders to Sir Lawrence and William for life; remainder, subject to a jointure to Mary Cleare, and a provision for younger children, to the first and other sons of the marriage in tail male. And it was agreed that, as soon as Mary Cleare should come of age, her estates should be

settled to the like uses. And the trusts of the 200 years' term as to the Parsons' estate were declared to be, that the trustees should, at the request of Sir Lawrence Parsons, raise thereout, by sale, mortgage, or demise, a sum not exceeding 12,000*l*., to be applied in paying off all incumbrances affecting the said Parsons' estate, except jointures, and the residue to be applied as Sir Lawrence Parsons should direct. The trusts of the term of 200 years created of the Cleare estates were declared to be to pay the debts of John Cleare. These articles were prepared and witnessed by Marlborough Sterling, agent and attorney for Sir Lawrence and Sir William Parsons.

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Trust term.

Sir Lawrence Parsons died in October 1756, leaving his son William, his only issue by his first marriage; and in December 1756, an account was settled between Sir William Parsons and Marlborough Sterling, and in this account Sir William was made debtor in a sum of 3899*l*. of which 2500*l*. were the debts of Sir Lawrence. This latter sum was made up of two judgments, obtained by one Moore against Sir Lawrence Parsons in 1730, and assigned to Marlborough Sterling in 1751, and of a bond given by Sir Lawrence to Sterling in 1753, with interest upon these sums. The same day on which the account was settled, Sir William Parsons executed to Sterling a mortgage in fee of the lands of Clonivoe and Clonad, which were not included in his marriage settlement, for securing the payment of this sum of 3899*l*. the interest being thus made principal.

Account stated 1756.

And mortgage for the balance.

In 1758 a private act of parliament was obtained

1758. Private act of

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parliament for raising 12,000*l.* out of the Parsons' estate, and 6000*l.* out of the Cleare estate.

to raise the 12,000*l.* agreed to be raised at the request of Sir Lawrence Parsons, a doubt being entertained whether it could be raised otherwise, Sir Lawrence Parsons having done nothing to signify his request or consent. By this act—reciting the articles of 1754, &c. and that 8000*l.* of the 12,000*l.* was, then and at the time of the execution of the said articles, a charge on the estates of Sir William by old mortgages; and that 4000*l.* was due from Sir Lawrence by judgments which would be lost to his judgment creditors unless the 4000*l.* should be raised: also reciting that the debts of John Cleare amounted to 7000*l.*; and that Sir William Parsons, not having received any ready money with his wife, Mary Cleare, had contracted debts to the amount of 6000*l.*; and that Mary Cleare, or Parsons, was desirous to raise, by sale of a competent part of her estates, 6000*l.* to pay Sir William's debts; and that Sir William was seized in fee of an undivided moiety of certain lands in the King's County which he was desirous to settle to the uses of the marriage articles of 1754 as a compensation to his wife Mary Cleare for such part of her estates as should be sold for the payment of his debts—it was enacted that the Cleare and Parsons' estates should be vested in trustees for the purposes stated in the recitals; and, subject to such purposes, they were limited to the same uses as declared by the articles of 1754. The lands which formed the subject of compensation, as above-mentioned, were part of those which had been previously mortgaged to Sterling. There were several sons of this last marriage, of whom the Earl of Rosse was the eldest.

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Agreement in March 1761, for sale to Sterling of the Clonivoe, &c. estates.

In March 1761, an agreement was entered into between Sir William Parsons and Marlborough Sterling, for the sale to the latter of the lands of Clonivoe and Clonad, reciting the settlement of 1730 and the other family transactions mentioned; and that Sir W. Parsons was seized in fee of these lands, they not having been included in the articles of 1754, nor in the private act of parliament; that Lord Loftus had filed a bill in 1759, praying that the 12,000*l.* might be raised, and the sum due on his security paid thereout, or that the lands of Clonivoe and Clonad might be sold for that purpose: and also reciting that Sir W. Parsons was indebted to Sterling in several sums of money due on judgments and otherwise &c., and that Sterling had agreed to purchase the lands, in discharge of the whole or some of the judgments, at the price of 3934*l.*, being at the rate of twenty-three years' purchase, allowing 900*l.* for the casual rise of the rents on the expiration of the leases: and further reciting that it was uncertain whether the lands in question were not chargeable with the debt of Lord Loftus, equally and rateably with the lands of which Sir W. Parsons was tenant for life, until a decree should be made in the said cause, it was witnessed that Sir W. Parsons agreed to convey the lands to Sterling, or any person whom he should appoint, within a reasonable time after such decree obtained. And Sterling agreed to discharge such of the judgments as he, his heirs, &c. should think proper or convenient, amounting to the sum of 3934*l.*, the purchase money of the said lands, provided that, in case the lands should be found chargeable with any

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part of Loftus's debt, Sterling, &c. should be at liberty, at his or their election, to pay the sum charged upon the lands, and should be allowed the same as part payment of the 3934*l.*; or, in case they did not choose to advance the money, and it should be raised out of the lands, that Sterling should be allowed to deduct the same out of the purchase money: and Sterling, in consideration of an assignment of the rents and profits of the lands from March 25, then instant, agreed that the interest on the judgments making up the purchase money should cease from that time, Sterling having agreed to accept the rents in lieu of interest. And it was agreed that, in case the agreement should not be carried into effect, nothing contained in it should affect or invalidate the mortgage of the lands before executed to Sterling.

Sterling agrees to accept the rents in lieu of interest.

In July 1761, a sale was made of part of Lady Parsons' estate under the act of parliament, and a sum of 1385*l.* was paid by the trustees to Sterling.

August, 1761. Another account stated.

On August 14, 1761, a general account was stated between Sir W. Parsons and Sterling, including, besides the incumbrances, several simple contract debts due from Parsons to Sterling, which were afterwards discharged and form no part of the present question; and a balance of 1915*l.* was stated to be due to Sterling: and this account was signed by Parsons and Sterling, acknowledging that it was correct.

1764. Bill filed by Sir W. Parsons.

In 1764, Sir W. Parsons filed a bill against Lucy Sterling, the representative of M. Sterling, impeaching the accounts of 1756 and 1761, and praying that they might be opened, and that Parsons might

be relieved from the agreement of March 1761, for sale of the lands of Clonivoe and Clonad. Lucy answered, stating that she was willing to settle accounts on the footing of the accounts of 1756 and 1761, and to waive the agreement for a sale, on payment of what should appear due. By decree July 8, 1765, it was referred to the Master to settle an account on the ground of the mortgage of 1756, and the account of August 1761. In Feb. 1766 the Master made his report, finding that the sum of 8857*l.* was due to the representative of M. Sterling, in which was included a sum of 1512*l.*, alleged to be due on account of two judgments passed by Sterling to a person of the name of Neynoe, as a farther security for debts of Sir L. and W. Parsons; though this latter sum was afterwards admitted to be, for the greater part, an overcharge.

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Answer.

Decree, 1765.

Neynoe's judgments.

On Feb. 28, 1766, a decree was made in the cause, that Plaintiff do, in six months, pay to Defendant the said sum of 8857*l.* with interest from Feb. 26, 1766, the time of confirming the report; and that thereupon the sale agreed to be made should be set aside, and that the Defendant should re-convey the lands; and that, in default of payment of principal and interest within the time limited, the sale should stand absolutely confirmed, and that an injunction should issue to put Lucy Sterling in possession &c.; and that either Plaintiff or Defendant might make up a decree for performance. In this decree no provision was made, in the event of the sale being carried into effect, for the payment

Decree, 1766.

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of the residue of the debt, above the sum for which the lands were to have been sold.

1779. Recovery.

In 1779, Sir W. Parsons and his eldest son, the Earl of Rosse, suffered a recovery of the lands comprised in the articles of 1754, and the act of 1758, except the small part of the Cleare estate sold in 1761, the uses of which, subject to Upton's mortgage and Lord Loftus's demand, were declared to be such as Sir W. and his son should appoint, and, in default of appointment to Sir William for life, remainder to the Earl of Rosse in fee. No steps were taken by the representatives of M. Sterling to enforce the decree of 1766 for a sale of the lands of Clonivoe and Clonad, of which Sir W. Parsons was left in possession during the remainder of his life, a period of twenty-five years.

1783. Browne's mortgage.

In 1783, Sir William Parsons having occasion to borrow certain sums, amounting in all to 15,000*l.*, was joined by the Earl of Rosse in a mortgage of the settled estates to one Browne, who advanced the money: and at the same time Sir W. Parsons

1783. Release.

and his son, and Lucy Sterling, executed a deed, reciting the decree of 1766, and that the sum of 8857*l.* was due under that decree to Lucy Sterling, together with a large arrear of interest; reciting also Browne's mortgage, and that, in order to protect the mortgage, it was necessary that three of the old judgments vested in Lucy should be assigned in trust for Browne, and that two more of them should be satisfied, and that 2500*l.*, part of the money borrowed from Browne, had been paid to Lucy Sterling, in part and on account of interest

due to her on foot of the said sum of 8857*l.* so decreed to her, and that Lucy had agreed to assign and satisfy these judgments as aforesaid: and Sir W. Parsons and the Appellant thereby agreed that this transaction should be without prejudice to the demands under the decree, and the other demands of Lucy Sterling against Sir W. Parsons and his father, or to any securities that remained for the same, but that they should be in full force, deducting the said 2500*l.* which Lucy acknowledged to have received in part and on account of interest due to her on foot of the 8857*l.* and released and discharged the same accordingly.

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Sir W. Parsons borrowed a further sum of 2000*l.* from Browne, on assignment of Upton's mortgage; and Lord Loftus's charge of 2000*l.* was assigned, in 1803, to Sir G. Piggott. Sir William Parsons died in May 1791, leaving the Earl of Rosse his eldest son and heir at law, having made and published a will, dated August 1761, devising all his estate and lands in the county of Wexford, which descended to him as heir at law, to his uncle Piggott Parsons St. George, to trustees, to sell the whole or a competent part of the same to discharge his judgment debts; and devised to his right heirs such part of the estate and lands as should remain unsold; and bequeathed his personal property to such younger children as he should have at the time of his decease, and in case he should have none, to his wife Mary Parsons; and appointed his wife and the Rev. Richard Challoner, executors.

1791. Death of Sir W. Parsons.

Will of Sir W. Parsons.

From the time of his father's death the Appellant paid the interest of the 15,000*l.* borrowed from

Payment by the Appellant.

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Browne, together with an arrear of interest due thereon at that time. He also, since his father's death, paid various sums for interest on Loftus's or Piggott's mortgage, and Upton's mortgage, and for younger children's portions created under the settlement of 1730, and a sum due from his father at his death to a creditor of Lucy Sterling; and in 1796 sold the lands of Clonad, and applied the purchase money in these payments.

1805. Bill by Sterling's representatives.

In September 1805, the Respondents, as representatives of Marlborough Sterling, filed their bill against the Earl of Rosse and others, admitting an overcharge in the report of 1766, with respect to Neynoe's judgments, and offering to give credit for it, and praying an account on foot of the decree of 1766, and offering to waive the agreement of 1761 for the sale of the lands of Clonivoe, &c. on being paid what should appear due to them on that account; otherwise that the sale might stand, and the purchase money be applied to disencumber the lands so agreed to be sold: and in that case the bill prayed an account on the foot of the mortgage of 1756, and a foreclosure; and that the balance, if any, should be decreed a lien on the trusts of the act of parliament for raising the 12,000*l.*, and 6000*l.*; and in case it should appear that these sums had been fairly applied, and that sufficient did not remain to satisfy the demands, then that the Wexford estates might be sold for payment of the Plaintiffs and other judgment creditors of Sir W. Parsons, &c. This appears to have been the prayer generally, though the printed cases did not, in several material particulars, correspond to the original pleadings;

and there was some dispute at the bar as to whether the bill was to be considered as a bill for specific performance, or a bill of foreclosure. The Earl of Rosse, in his answer, stated several objections to the securities; that M. Sterling was the attorney as well as agent and receiver of Sir L. and Sir W. Parsons, and in the accounts settled charged interest on interest; that the judgments assigned to M. Sterling were stale demands, and that it was very unlikely he should have paid full consideration, &c.

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Answer.

By decree, Feb. 5, 1810, it was referred to the Master to take an account of what was due on foot of the sum specified in the decree of 1766, deducting the overcharge on account of Neynoe's judgments, and to take other accounts arising out of the above-mentioned circumstances. The Master made his report, finding 17,000*l.* due to the Respondents; which, together with a sum for interest from 1810 to 1812 not calculated by the Master, made up 18,744*l.* in the whole.

Decree, 1810.

On Nov. 17, 1812, the Court decreed the Respondents entitled to the sum of 18,744*l.* with interest from the time of confirming the report, and that, unless the Appellant should pay the same in six months, the Respondents should be, and were thereby declared to be, entitled to have the agreement of 1761 for sale of the lands of Clonivoe, &c. carried into specific execution; and the Appellant was ordered to convey accordingly; and the Master was directed to ascertain the purchase money to be paid for the lands under the agreement of 1761, &c., and to take an account of the rents and profits from that period, and of the purchase money and interest

Decree, 1812.

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thereof of certain parts of the lands sold by the Appellant; and it was ordered that the Master should ascertain the sum due to the Respondents, and that the same should be a charge on the Wexford estates, and the rents thereof received by the Appellant, and on the sums of 12,000*l.* and 6000*l.* mentioned in the private act of parliament, so far as these sums might be applicable to the payment of the Respondent's demands, and that in default of payment sales should be made accordingly, &c.

Appeal.

From this decree the Earl of Rosse appealed.

The grounds of the principal objections made to the decree were, that the agreement which it directed to be carried into specific execution had been waived; that by directing payment with interest of the sum specified in the decree of 1766, interest was charged on interest, which was allowable only in case of a mortgage; and the cases of *Creuse v. Hunter*, 2 Ves. 157, 4 Bro. Ch. Ca. 316, and *Tew v. Lord Winterton*, 1 Ves. 451, where interest was refused on arrears of annuities, were cited. (*Lord Redesdale*. The decree of 1766 directs the payment of the sum found due, with interest; that decree is not appealed from, and the question is not open to you except in this way, that, as this is a bill to carry into execution a decree, that decree may be impeached for impropriety.) That was stated to be the ground taken; and the proposition was that interest was to be calculated as if no decree had been made in 1766, and the cause had still remained in Court. The decree could not, as a decree, affect the real assets of Sir W. Parsons descended or devised. The Respondents could affect them only

by resorting to their securities, and could only have an account of the sums due upon them with simple interest, subject to the inquiries and directions which the securities and alleged settled accounts between attorney and client called for. Another objection made to the decree was, the charging the Appellant with bye-gone rents of the estates descended and devised, which he had applied in payment of other judgment and mortgage creditors of Sir W. Parsons, and most part of them before the filing of the Respondent's bill; and it was objected also that no provision had been made by the decree for the payment of Browne's mortgage as far as possible out of the assets of Sir W. Parsons, the fund primarily liable to pay it.

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Sir S. Romilly and *Mr. Wetherel* for the Appellant; *Mr. Leach* and *Mr. Nolan* for the Respondents.

Lord Eldon (C.) This case itself is a difficult one on account of the variety of transactions at different periods which it involves; and the difficulty is increased by the difference between the case as it appears in the prints, and the same case as stated in the pleadings, a difference now known to be very material. This circumstance I hope will not occur again, as it is impossible that this House can, consistently with the due discharge of its judicial and other functions, take the trouble of minutely examining all the papers in the cause which are not in print, in order to know what the case really is.

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The principal question is, whether the contract

Agreement.

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of 1761 ought to be specifically performed, more than half a century after it was made. There was a mortgage in 1756, which comprehended these estates in the contract in 1761.

It appears by the bill of 1764 that it was filed partly for the purpose of impeaching the contract of 1761, and a decree was made upon this bill for payment, by the Plaintiff, of the sum of 8,857*l.*, or otherwise that the sale should stand confirmed.

Practice.

And I mention that now, as this practice which they seem to act upon in Ireland, where a bill is filed for the purpose of impeaching a contract, of pronouncing a decree upon it, not dismissing the bill, because there are no grounds for impeaching the contract, but ordering the contract to be carried into execution, is a species of proceeding very much unknown to us, &c.

[It is unnecessary to state the remaining observations made this day, as they were in substance the same as those made on a subsequent day, as under.]

Judgment. June 24, 1816. Objections to the account, &c. of 1756.

Lord Eldon, C. (After stating the preceding part of the case, and particularly adverting to the account of 1756.) It has been very truly remarked, that Sir W. Parsons was, within a month after his father's death, made debtor in this account in a sum of 3,899*l.* of which 2,535*l.* consisted of the debts of his father Sir Lawrence, who was strict tenant for life; and that M. Sterling, on the same day, obtained a mortgage from Sir W. Parsons of the lands of Clonivoe and Clonad for securing the said sum, of which a considerable part consisted of interest, which was thus made principal. I take notice

of these circumstances that it may be seen that they have not escaped my attention; but, though this transaction in 1756 was one against which a great deal might be urged if challenged at the time, yet, after what has passed, the representatives of M. Sterling must be held to be creditors for a considerable sum of money.

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Come too late.

By articles made in 1754, on the marriage of Sir W. Parsons with Mary Cleare, a sum of 12,000*l.* was to be raised out of the Parsons' estates, at the request of his father, Sir L. Parsons, for paying off incumbrances on these estates; and a private act of parliament was obtained, in 1758, by Sir W. Parsons, reciting the articles and the death of Sir Lawrence without having done any thing to signify his request, &c. and reciting also that 8000*l.*, part of the said 12,000*l.*, was then, and at the time of the execution of the articles, a charge on the estate of Sir W. Parsons by old mortgages; and that the remaining sum of 4000*l.* was due from Sir L. Parsons by judgments, which would be lost to the judgment creditors, unless that sum should be raised; and reciting that Dame Mary Parsons was desirous to raise a sum, not exceeding 6000*l.*, to pay the debts of Sir W. Parsons, and that Sir W. Parsons was seized in fee of certain lands therein mentioned, which he was desirous to settle to the uses of the articles of 1754; and then enacting that the Cleare estate should be vested in trustees to raise the 6000*l.*, to be applied in payment of debts upon any securities in writing given by Sir W. Parsons before January 1, 1757; and that the Parsons' estates should be vested in the same trustees to

Articles, 1754.

Act of parliament.

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Agreement, 1761.

raise the 12,000*l.* to be applied in payment of incumbrances affecting these estates on June 28, 1754, and then in payment of judgment debts of Sir L. Parsons.

The next transaction was an agreement, in March 1761, between Sir W. Parsons and M. Sterling, for sale to the latter of the lands of Clonivoe and Clonad, upon which, it will be remembered, M. Sterling had obtained a mortgage to secure the balance of the account settled in 1756; thus, as to some of the items, converting interest into principal. This agreement recited the settlement of 1730, and subsequent family settlements; that Sir W. Parsons was seized in fee of the lands of Clonivoe and Clonad, which were not included in the articles of 1754, nor in the private act of parliament; that Lord Loftus had filed a bill in Chancery to have his mortgage money paid, praying that the 12000*l.* might be raised, or that the lands of Clonivoe and Clonad might be sold for that purpose; that Sir W. Parsons was indebted to M. Sterling by several judgments, and was desirous to pay off so much thereof as the purchase money of Clonivoe and Clonad would cover; and that M. Sterling had agreed to purchase these lands for a sum of 3,934*l.*, being at the rate of 23 years' purchase for the then rents, allowing 900*l.* for the casual rise of rents on the expiration of the leases, &c.: and then the instrument went on to witness that Sir W. Parsons had agreed to sell the lands to Sterling, and that Sterling agreed to release such of the judgments as he might think proper to the amount of the purchase money, and that, in case the lands were subject to Lord

Loftus's mortgage, Sterling should be allowed still to retain undischarged so much of the judgment debts, otherwise to be released, as would pay that mortage: and then came a clause deserving particular attention, by which M. Sterling, in consideration of the grant and assignment of the rents and profits of the premises from and after March 25, 1761, agreed that all interest on so much of the judgments as should amount to the purchase money should, from that day, cease and determine; it being the agreement of the parties that, though the interest should exceed the rents and profits, Sterling had, in consideration of the rise in value of the lands on the expiration of the leases, consented to accept the profits of the lands in lieu of the interest: and regard ought to have been had to that particular stipulation. And then there was a clause that, in case the agreement for the purchase of the lands should not take effect, nothing therein contained should affect or invalidate the mortgage. This deed was never registered.

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In July 1761, a sale was made of part of Lady Parsons's estate by the trustees under the act of parliament, and a sum of 1,385, paid to Sterling in part discharge of his demands against Sir W. Parsons: and on August 14, 1761, a general account was stated by Sterling on the foot of the incumbrances, and also on foot of some simple contract demands and costs which appear to have been discharged, and therefore it is unnecessary farther to notice them. Objections were stated to several items of this account, which, if made at an early period after the transaction, for the purpose of

Account, Aug. 1761.

Objections to this account come too late.

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opening the whole account, would have considerable weight. But these objections come too late in a suit instituted after the year 1800, though, if recently made, they could hardly have failed of being effectual.

1764. Bill by Sir W. Parsons to open the accounts, &c.

In 1764, Sir W. Parsons filed a bill against Lucy Sterling, widow and administratrix of M. Sterling (who had died in 1762), and against his two daughters, who were his only issue, praying that the accounts of 1756 and 1761 might be opened, and an account taken on the foot of the original securities, and likewise praying to be relieved from the agreement of sale of the lands of Clonivoe and Clonad. This being a bill for opening the accounts, if Sir W. Parsons did not then obtain the relief prayed for on the grounds then stated, it is impossible that in a fresh suit he should on the same grounds have the relief which he failed to obtain in

Answer.

the former suit. Lucy Sterling answered that she was willing to account on the footing of the settled accounts, and agreed to waive the sale on being

Decree, 1765.

paid what remained due to her. By decree, in July 1765, it was referred to the Master to take an account on the foot of the mortgage of 1756, and the stated account of 1761. The Master having made

Decree, Feb. 28, 1766.

his report, a decree was pronounced on Febuary 28, 1766, which, though it is such as I cannot understand, has not been disturbed since that time. The decree was, that "the Plaintiff do in six months "pay to the defendant, Lucy Sterling, the sum of "8,857*l.* 8*s.* 4*d.* with interest from Febuary 26, "1766, the time of confirming the report, and "that thereupon the sale made of the lands of

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" Clonivoe and other lands agreed to be sold be, " and the same is hereby, set aside, and that Lucy " Sterling should re-convey the lands so agreed to " be sold." So far the decree is quite intelligible, the other party having agreed to waive the purchase on being paid the money due on foot of the mortgage of 1756, and settled account of 1761, and the Court having found that, on these grounds, a sum of 8,857*l.* was due. But there was another alternative, that the Plaintiff might not pay the money; and then, I think, it would not have been difficult to frame a proper decree, regard being had to all that had passed. But all that the decree does is this—that in default of the Plaintiff paying the money within the time aforesaid the sale should stand absolutely confirmed, and that an injunction should issue to put Lucy Sterling in possession of the lands, and that either Plaintiff or Defendant might make up and enrol a decree for performance. If there was no objection to such a decree on such a bill, the land could be conveyed only in consideration of part of the debt, suppose 4000*l.*, and the debt was 8,857*l.*; and the decree did not provide for payment of the residue of the debt. It was then stated that this sum of 8,857*l.* included, on account of Neynoe's judgments, a larger sum than was actually due.

No further steps were taken by the representatives of M. Sterling; and Sir William Parsons, who had been decreed to pay the money in six months, or otherwise that the sale should stand confirmed, continued in possession of the lands during his whole subsequent life, being a period of twenty-five years,

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The agreement of 1761 waived.

Release, July 15, 1783.

receiving the rents and profits during all that time. But in 1783 an instrument was executed which, even if the possession for so long a period should not be considered as a waiver of the sale notwithstanding the decree, appears to me, and the matter is viewed by a noble Lord (Redesdale) near me in the same light, to amount to a waiver of the agreement. I allude to the deed of July 15, 1783, twenty-two years after the agreement, and seventeen years after the decree, between Sir W. Parsons and the Appellant, and Lucy Sterling. This deed recites the judgments vested in Lucy Sterling, and the decree of 1766, and that the principal sum of 8,857*l.*, with a large arrear of interest, was due to Lucy on the foot of that decree; and that Robert Browne had agreed to lend Sir W. Parsons a sum of 9000*l.* on mortgage of the Parsonstown estates (in which Sir W. had been joined by the Appellant), but required that certain old judgments which partly made up the said sum of 8,857*l.* should be satisfied or assigned to his trustee to protect his mortgage; and that 2,500*l.*, part of the said 9000*l.*, had been that day paid to Lucy on account of interest; and that Lucy had agreed to assign to Browne's trustee three of the judgments, and to satisfy two more of them: and it is by this deed covenanted and agreed between Sir W. Parsons and the Appellant, and Lucy Sterling, that such assignments made, and satisfactions acknowledged, should not prejudice the demands of Lucy under the decree, after deducting the 2,500*l.* out of the arrear of interest, but that the decree and all her securities should continue in full force; and Lucy thereby acknowledged the receipt of the

2,500*l.* on account of interest of the sum due under the decree, and discharged the same accordingly. June 24, 1816.

This instrument is important in several views. It must be taken as an acknowledgment, seventeen years after the decree, that the sum of 8,857*l.* was due, and whatever might have been the effect of the objections to the accounts if recently made, these accounts cannot now be opened up on these objections. There is also another important inference to be drawn from it as to the purchase of the lands of Clonivoe and Clonad; for if the representatives of M. Sterling meant to insist that they were owners of the lands it was impossible that in 1783 they could have considered the interest as due on the sum of 8,857*l.*; for they must have said "We became "owners of the lands after default of payment in "1766, and account to us, not for interest on the "sum of 8,857*l.*, but for the rents and profits of "the lands which we must take according to the "agreement in lieu of interest of the judgments "which made up the purchase money;" and then the 2,500*l.* would have been taken in discharge on that principle. Besides, therefore, the long possession by Sir W. Parsons, the agreement must, by this transaction also, be considered as waived. Another circumstance to be attended to is, that the assignments and satisfaction should not prejudice the judgments as securities. That is material in this view. Sir William Parsons had occasion to raise 9000*l.* by mortgage, and in the deed of mortgage there was a clause enabling him to borrow more in the same way. He was then tenant for life, with remainder to the Appellant in tail or in fee. This sum of

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Effect of the release, July 15, 1783.

June 24, 1816.

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9000*l.* was borrowed for the tenant for life; and the consequence generally in equity would be that the son, joining in a mortgage of the inheritance, would be considered as a creditor on the real and personal assets of the father to the amount of the mortgage, and might call upon the mortgagee to make use of it against the real and personal assets of his father to work out his relief: and in general cases Browne would have been bound to make the most of it against the assets of Sir W. Parsons, so as to relieve the Earl of Rosse as far as he could. But then it was agreed that the Earl of Rosse should not make use of that equity as to the 2,500*l.*, to the prejudice of the Sterlings.

1805. Bill by the Sterlings.

In 1805 the Respondents, as representatives of M. Sterling, filed their bill, admitting an overcharge in 1766 on Neynoe's judgments, of which overcharge the amount was therefore to be deducted, and praying an account on foot of the decree of 1766, and offering to waive the agreement of sale on being paid what should be found due to them, otherwise that the sale might stand confirmed, &c. &c.

Now, without going through the detail of these pleadings, of which much is printed, and much ought to have been which has not been printed, the first question is whether the decree is right in considering the agreement of 1761 as binding at this day, so as to form a ground for enforcing a sale and purchase. The decree has so considered it, and after all the attention that I have been able to bestow on the case I cannot advise your Lordships to hold that this is right: and if it is wrong that will produce a very considerable variation in the

Decree of 1812 erroneous in considering the agreement of 1761 as binding.

decree. Another circumstance to be attended to is this. The money raised on Browne's mortgage, in which the Appellant joined, was the proper debt of Sir W. Parsons, and should be paid out of his assets; and the consequence is that the Earl of Rosse may be entitled to rank as a creditor generally on his father's assets for this sum, and to stand in the place of persons whose debts he paid, in competition with the Sterlings. By the industry of the noble Lord (Redesdale) who sits near me, a judgment applicable to the case will probably soon be prepared.

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Ordered and adjudged: "That the decree of 27th Nov. "1812 be reversed. And it is declared that the contract con- "tained in the deed of 17th March, 1761, for sale of the "lands therein described, ought to be considered as having "been abandoned, and ought not now to be carried into "execution. And it is therefore ordered, That the Respon- "dents' bill, so far as the same seeks a performance of such "contract, be dismissed; and it is further declared that the "lands comprised in such contract are to be considered as "real assets of Sir William Parsons, Bart., deceased, the "father of the Appellant, descended to the Appellant, dis- "charged from such contract, but subject to the mortgage "made thereof, with other lands, by the said Sir William to "Marlborough Sterling deceased, in the pleadings in this "cause named, and to the debts by judgment affecting the "same, and to the charge for payment of judgment debts "created by the will of the said Sir William. And it is "further declared that so much of the sum of 8,859*l.* 13*s.* 1*d.*, "mentioned in the decree of 26th February, 1766, as "appears to have been due at the time of the said decree, "after deducting thereout the sums mentioned in the Master's "Report of 25th June, 1811, to have been improperly "included therein, ought to be considered as a principal "debt due from the said Sir W. Parsons deceased, with

June 29, 1816. Formal judgment.

June 29, 1816.

AGREEMENT.—SPEC. PER.—WAIVER.—ACCOUNT.—INTEREST.—MORTGAGE, &c.

" interest thereon from the date of the said decree of 26th " February, 1766, as directed by the said decree, and acknow- " ledged by the deed of 15th July, 1783, in the pleadings " mentioned; and that such debt ought to be considered as " secured by the mortgage made by the said Sir W. Parsons " of the lands comprised in the said contract, and by the " judgments obtained by the said M. Sterling, or assigned to " him as in the pleadings mentioned, and not comprised in " the said deed of 15th July, 1783; and it is further declared " that the Appellant is to be considered in equity as a cre- " ditor generally on the assets, real and personal, of the said " Sir W. Parsons, his late father, for the sum of 15,000*l.*, " raised by mortgage to W. Browne, of the settled estates " in the pleadings mentioned, and for the interest accrued " due on the said 15,000*l.* and paid by the Appellant since " the death of the said Sir W. Parsons: and it is declared " also that as to so much of the said sum of 15,000*l.* as has " been applied in discharge of debts and incumbrances affect- " ing the real estates of the said Sir W. Parsons descended to " the Appellant as aforesaid, the Appellant is entitled to stand " in the place of the persons who were respectively entitled " to such debts and incumbrances according to their respective " priorities, except as to the sum of 2,500*l.* paid out of the " money advanced by the said W. Browne to the said Lucy " Sterling deceased, and except as to the judgments assigned " by the said Lucy Sterling to the said W. Browne, which, " according to the terms of the said deed of 15th July, 1783, " cannot be claimed by the Appellant against the assets of the " said Sir W. Parsons to the prejudice of the Respondents: " and it is further declared that the Appellant is entitled to " have credit out of the real estates descended to him, includ- " ing the estates charged by the will of the said Sir W. Par- " sons with payment of his judgment debts, for the several " sums paid by the Appellant in discharge of debts and " incumbrances affecting the said estates respectively accord- " ing to their respective priorities; and that the Appellant is " entitled, as against the Respondents, to credit out of the " rents and profits of such descended estates, considered as

" real assets, or as subject to the mortgage or judgments June 29, 1816.
" claimed by the Respondents, for such payments as have
" been made by him, prior to the filing of the Respondent's
" bill, in discharge of interest of debts by mortgage or judg-
" ment affecting such real assets, whether prior or subsequent
" to the Respondent's demands; and that the Appellant is en-
" titled to have credit out of the sums of 12,000*l.* and 6000*l.*
" in the pleadings mentioned for all such sums of money as
" were payable out of such sums of 12,000*l.* and 6000*l.* re-
" spectively which have been discharged out of the said sum
" of 15,000*l.*, raised by such mortgage as aforesaid, or by
" the Appellant, in preference to any demand of the Re-
" spondent's upon the said sums of 12,000*l.* and 6000*l.*, and
" that the Respondents can be entitled to no demand against
" the Appellant in respect of the said sums of 12,000*l.* and
" 6000*l.*, or either of them, exceptas creditors of the said Sir
" William Parsons, deceased, and which the said Sir William
" might have had if living: and subject to the said orders
" and declarations, it is further ordered, That the said cause
" be remitted back to the Court of Chancery in Ireland to do
" therein as shall be just."

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Agent for Appellant, LANE.
Agent for Respondents, MUNDELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

IVORY and Co.—*Appellants.*
GOURLAY—*Respondent.*

Feb. 21, 23, 1816.

MERCHANT'S BOOKS.—EVIDENCE.

THOUGH a merchant's books may, by the law of Scotland, afford a *semiplena probatio* in his own favour, yet in order