# IRELAND.

ON APPEAL FROM THE COURT OF CHANCERY.

ROGER MONTGOMERY HAMILTON M'NEILL, and DANIEL M'NEILL, Esquires - - - - - - - - - *Appellants*;

MICHAEL CAHILL, and ROBERT GROVE LESLIE, Esquires - - - *Respondents.*

WHERE a deed of marriage settlement is drawn up, as between the intended husband and wife, and their respective fathers; and the father of the wife secures to the father of the husband, a sum of money, as the portion of the wife, according to a provision of the deed; but neither he nor his daughter execute the deed, and it is executed only by the intended husband and his father; it is binding upon and as between the parties who execute, and creates efficient rights for the objects of the settlement.

If two deeds be executed, bearing different dates, that which is first registered, even with notice of the other deed, has priority both in law and equity, although it be posterior in date and execution.

On points, in which the two deeds are inconsistent, the deed last registered is personally binding on the parties who execute; and the lands and property comprised in the deed first registered, are also bound, after satisfying the trusts of the first, by the contracts and trusts of the deed last registered.

A transaction of sale made upon a false or mistaken consideration between parties in the relation of brothers-in-law; the vendor being an heir succeeding to the estate sold, and the purchaser executor of the will of the vendor's father, and where the party selling is under circumstances of great pecuniary embarrassment and distress, will not be impeached if fairly made; but if the consideration for the purchase was the balance of an account, which appears to be erroneous, the whole transaction must be so far investigated as to correct the accounts.

Upon a bill by the vendor, seeking to rescind the sale, on the ground of fraud and oppression in the transaction, and error in the accounts, although the prayer to rescind the sale was refused, the account was opened after a considerable lapse of time.

If the plaintiff in a suit omits to put facts in issue by his original bill, or by amendment, leave to file a supplemental or amended bill, after the suit is at issue, ought not to be granted by the court, on the ground of inadvertence. A petition to obtain such leave ought to make out a case of new evidence lately discovered, material to the plaintiff's equity, and which, with reasonable diligence, could not have been discovered before; but in such case the suit ought to be disposed of without prejudice to the matter omitted to be put in issue, which the plaintiff may prosecute in any future suit.

If the plaintiff in a suit has, by the course of the court, a right to a decree for an account, he does not forfeit such a right by refusing an account which is offered by the defendant or the court at the hearing. It is the duty of the court to decree an account *ex officio*; and if such decree is not made, it is a valid ground of appeal, notwithstanding the refusal of the plaintiff.

An agreement between an insolvent debtor and his assignee, by which an estate of the insolvent is to be held in trust by the assignee, to pay out of the rents and profits, annuities to the insolvent and his wife, and the surplus towards the extinction of a debt owing to the assignee, is a transaction which, being brought before a court of equity, at the instance of the insolvent himself, must be rescinded, on the ground of public policy.

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THIS was an appeal from a decree of the Court of Chancery, in Ireland, made in a cause in which the appellants were plaintiffs, and the respondents were defendants, by which decree the plaintiff's bill was dismissed with costs; and from a subsequent order of the court, by which an application, on behalf of the plaintiffs, for liberty to file a supplemental bill, was refused with costs.

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The case, as it appeared in the pleadings and proceedings, comprised the following facts:

Marriage contract, 1743.

By a marriage contract, dated the 15th of June 1743, and made between Roger (Hamilton) M'Neill (the father of the appellant Roger) on the one part; and Elizabeth Price, his intended wife, and Cromwell Price, her father, on the other part, and executed according to the forms of the law of Scotland, Roger, the father, bound and obliged himself to settle a certain estate, called the Taynish estate, in Scotland, upon the heirs male of the intended marriage, subject to a life rent or estate for life to himself, and to a jointure and portions for the younger children of the marriage, and subject also to the charges and conditions therein mentioned *.

By the Appellant, on the application for leave to file a supplemental bill, it was alleged that the limitation of the estate was perfected according to the law of Scotland; and that one part of the settlement having been deposited and recorded in the proper office in Edinburgh, in the year 1768, Cromwell, Price in 1769, instituted certain proceedings, and obtained, in the courts of Scotland, an inhibition restraining Roger, the father, from selling, aliening or encumbering that estate.

The marriage took place, and there was issue two children, viz. a son, (the Appellant Roger,) and a daughter, Margaret.

1773 Marriage of Respondent Cahill.

In the year 1773 the Respondent Cahill intermarried with the daughter Margaret.

1777. Marriage of appellant Roger.

In the year 1777 the appellant Roger inter-

* This contract was not put in issue in the cause, and it became the subject of discussion only, so far as the right to give it in evidence, or to amend the bill, or file a supplemental bill, to put it in issue, was in question.

married with Catherine Chambers, the daughter of Daniel Chambers.

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Limitations of the Irish estates of the M'Neill family, at the time of this marriage.

At the date of the Appellant's marriage, the Irish estates of the M'Neill family stood limited as follows, viz. the Shanvally, or Dunseverick estate, in the county of Antrim, (the rents of which amounted only to the sum of 234*l.* a year, above chiefry and other charges of receipt, &c.) was limited to Roger the father, for life, with remainder to the Appellant Roger in tail, with the reversion in fee to him and his heirs; the Ballylesson, or Newgrove estate, in the county of Down, was limited, (subject to certain charges,) to Archibald M'Neill Montgomery, a brother of Roger the father, for life, with a general power to charge the estate with 2,000*l.* (which power was exercised by will,) with remainder to Roger, the father, for life; with remainder to the Appellant Roger, for life, with a power to charge the estate in favour of any wife, with a jointure of 200*l.* a year, with remainder to the first and other sons of the Appellant Roger, successively, in tail male, with remainders over; and the lands called Sheeplands, in the county of Down, held by lease for lives renewable for ever, and the lands called Loughmoney and Carrowcarland, in the same county, held under fee farm grants, were limited to Archibald M'Neill Montgomery, in tail, or *quasi* tail, with remainder to Roger the father, for life, with remainder to the Appellant Roger, in tail, or *quasi* tail, with remainders over.

Archibald had demised the Ballylesson estate to his brother Roger, for the term of Archibald's life, at the rent of 400*l.* a year, under which demise Roger, the father, was then in possession of that estate.

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By an indenture, dated the 15th of October 1777, being a settlement made previously to the marriage of the Appellant Roger, and Catherine Chambers, the Dunseverick estate was vested in William Gillespie, (the attorney of the M'Neill family,) in trust, in the first place, for the payment of certain debts mentioned in a schedule annexed to the indenture; and then, out of the rents, to pay 200 *l.* a year to the Appellant Roger, during the life of his father, for a present maintenance, (which was to be increased to 400 *l.* a year, chargeable on other lands therein mentioned, and which devolved to Roger, the father, on the death of Archibald M'Neill Montgomery,) and subject thereto, to the use of Roger, the father, for life, with remainder to the Appellant Roger, in tail male, with reversion to him in fee. By this deed, the appellant Roger, in exercise of his power, charged the Ballylesson estate with a jointure of 200 *l.* a year, in favour of Catherine Chambers; and Daniel Chambers agreed to pay Roger, the father, the sum of 500 *l.* as a portion with his daughter. The deed contained an agreement to suffer a common recovery of the estate, which was duly suffered accordingly in Trinity term 1778.

Indenture of settlement of the 15th Oct. 1777.

Debts charged by this deed.

The debts set forth in the schedule to the settlement were, a debt of 1,500 *l.* due to William Gillespie; a debt of 150 *l.* due to Sir Patrick Hamilton; and a debt of 250 *l.* due to Skeffington Thompson, and others: all these debts, except that to Sir Patrick Hamilton, had been previously secured by the Appellant Roger, and his father, jointly.

The debt of 1,500 *l.* was owing to Gillespie for his bills of costs, and for money advanced by him in a suit between Roger, the father, and his brother Archibald,

relative to the Ballylesson estate, and which was compromised on the settlement of the estate, according to the limitations before stated. The debt of 150*l.* was originally the debt of the father; the debt of 250*l.* was the debt of the appellant Roger.

Roger the father, the appellant Roger, and William Gillespie, executed this settlement, but Chambers and his daughter refused to execute, and prevailed on the appellant Roger, before the marriage had been solemnized, to execute another settlement in the form of marriage articles, bearing date the 25th of October 1777. By those articles, the appellant Roger covenanted, that as soon as he should become seised of the several lands of Dunseverick, &c. of which his father was then seised in the counties of Down and Antrim, he would vest the same in trustees therein named, to the use of himself for life, with remainder to the first and other sons of the marriage, successively in tail male, subject to a jointure to Catherine Chambers of 400*l.* a year, 200*l.* a year of which was to issue out of the Shanvally or Dunseverick estate, and with a provision for raising 6,000*l.* as portions for the younger children of the marriage.

Marriage articles of the 25th October 1777.

In these articles no notice was taken of the first settlement, or of the debts mentioned in the schedule annexed to it, or of any of the provisions contained in that settlement.

By the activity and contrivance of Daniel Chambers, the articles were registered before the indenture of settlement; the articles having been registered on the 7th, whereas the settlement was not registered until the 13th of November 1777.

Registry of the marriage articles, 7th Nov. 1777. Registry of the settlement, 13th Nov. 1777.

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Notwithstanding the execution of the articles, and refusal to execute the settlement, Daniel Chambers sent to Roger, the father, his bond to secure the 500*l.* portion provided by the settlement; and William Gillespie, the trustee, was permitted to enter without dispute into the possession of the Dunseverick estate, under the trusts of the settlement; the yearly sum of 200*l.* was paid to the appellant Roger, and the surplus rents were applied by Gillespie in the reduction of his debt.

Roger, the father, was not informed of the execution of the articles until after it had been accidentally discovered in 1781, on searching the registry; but Gillespie having obtained information of the fact, took preliminary steps for obtaining a *custodiam* against the Ballylesson estate, in order to enforce the payment of his debt. To prevent that proceeding from being executed, Roger, the father, paid Gillespie 1,150*l.* part of his debt.

The father also paid some debts of the appellant Roger: and by the request of the father, the respondent Cahill paid other debts.

Sale of Taynish estate, 1779.

In the year 1779, Roger, the father, sold the Taynish estate to Sir Archibald Campbell, for 21,000*l.*; which sum was paid to Roger, the father, or allowed in account with the respondent Cahill, as his executor.

A sum of 10,000*l.* or thereabouts, part of the 21,000*l.* for which the Taynish estate was sold, was applied in paying off different incumbrances on the estate, including 2,000*l.* the portion of the respondent Cahill's wife, as the only younger child of Roger, the father, and Elizabeth, his wife; and the

remainder of the 21,000 *l.* except about 700 *l.* was received by Roger, the father.

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In the year 1779, Roger, the father, granted to the respondent Cahill a lease of Mountain farm, part of the Dunseverick estate, for three lives, or sixty-one years, at the rent of one shilling a-year during the life of the lessor, and of 14 *l.* a-year afterwards. It having subsequently appeared that this lease exceeded the power of Roger the father, the appellant Roger, in the year 1785, confirmed the lease, by a memorandum indorsed on the instrument of demise, noticing the defect, and also executed in favour of the respondent a lease of the farm for sixty-one years, to commence from the death of Roger the father, at the rent of 14 *l.* a-year, at the same time promising, that when he came into the possession of the estate, he would grant a lease for the like term at a nominal rent. This he did, of his own accord, in the year 1794, after his father's death, and instructed his bailiff not to demand the rent of 14 *l.* accrued during the interval.

1779. The lease of the Mountain farm;

confirmed by the appellant Roger, in 1785.

Lease by the appellant Roger, in 1785.

Lease by the appellant Roger, in 1794.

In December, in the year 1784, Archibald M'Neill Montgomery died without issue, when the estate of Sheeplands, Loughmoney and Carrowcarland devolved to Roger, the father, under the limitations before stated, and the appellant Roger, from that time received the additional 200 *l.* a-year, provided by the settlement.

Death of A. M'Neill Montgomery, in Dec. 1784.

On the 10th March 1788, Roger, the father died, having made his will, whereby he made the respondent Cahill's wife residuary legatee of his personal estate, and the respondent Cahill his executor. By a clause in the will, the following direction was given: "as "to all sum or sums of money, which I have paid for

Death of Roger, the father, 10th March 1788; will dated 7th March 1788.

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" or on account of my son, Roger M'Neill, and for " which he was joined as security with me, it is my " will, that all such sum and sums shall remain and " be a charge against my son and his estate, and " that the same shall be paid to my daughter, or be " by her raised off the said estate, by sale or other- " wise, as the law shall enable her to do; in regard, " I did, by a settlement executed on my son's mar- " riage, grant to him an annuity off my said estate " during my life of 200 *l.* a-year, and also gave him " up the estate of Sheeplands, in consideration, that " he should pay off certain debts, and also exonerate " me from said joint securites, which he has failed " to do," &c.

The Appellant, Roger M'Neill, for several years before the death of his father, had been very much involved in debt. At the time of his father's death he was in Scotland. The respondent Cahill, in the year 1789, called upon him there, and showed him a list of debts, which he alleged had been paid by Roger the father, for the Appellant Roger M'Neill; and the respondent claimed to be entitled to the amount thereof, under the will of the father, against the appellant Roger M'Neill, and his estates. The respondent Cahill also represented to the appellant, Roger M'Neill, that his estates were liable to those debts; and knowing the embarrassments of the appellant, (as he alleged,) the respondent proposed to lend him a sum of two hundred pounds upon his bond, which the appellant agreed to borrow, and thereupon was induced, for the consideration of 3,500 *l.* part of the alleged debts, to convey to the respondent Cahill, the lands of Loughmoney, Carrowcarland and

28th May 1789. Conveyance of Sheeplands.

Sheeplands, being of the annual value of 180*l.* or thereabouts, by deed dated the 28th day of May 1789.

The claims set up by the respondent Cahill, as executor of Roger H. M'Neill, against the appellant, Roger M'Neill, and his estates, consisted of the following items of account:—

| | £. s. d. | £. s. d. |
|---|---|---|
| 1777. Sep. 10: | | |
| To Gillespie's bond - - - - - | 1,500 – – | |
| Interest to 10th Sept. 1788, at 90 *l.* per ann. | 990 – – | |
| | 2,490 – – | |
| Paid by disbursements, as per Gillespie's acct | 276 19 5½ | |
| | | 2,213 – 6½ |
| To Sir Patrick Hamilton for - - - | 150 – – | |
| Interest to September 1788, at 9 *l.* per annum | 99 – – | |
| | | 249 – – |
| 1778. March: | | |
| Bond to J. Malcolm, assignee to Fulton - | 60 – – | |
| Interest to Sept. 1788, at 3 *l.* 12 *s.* per ann. | 34 4 – | |
| | | 94 4 – |
| From the records of judgments, the date of the bonds and sum of interest, therefore uncertain. | | |
| 1778. Trinity Term: | | |
| William Moore's judgment, 103 *l.* 8 *s.* 5 *d.* | 51 14 2½ | |
| Interest, 10 years, at 3 *l.* 2 *s.* per annum - | 31 – – | |
| | | 82 14 2½ |
| 1781: | | |
| Per Mr. Fulton's account, on preceding page | 1,100 6 3 | |
| Interest 7 ½ years, at 66 *l.* per annum - - | 495 – – | |
| | | 1,595 6 3 |
| 1788. March 10th: | | |
| Legacy on New Grove estate, from Mrs. Anne M'Neill to her grand-daughter Margaret, assigned by her and her husband to William Gillespie, and further assigned by him to Fulton - - - | 200 – – | |
| Interest to 10th September 1788 - - | 6 – – | |
| | | 206 – – |
| | £. | 4,529 18 3 |

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This account was furnished by the respondent Cahill, to the appellant Roger M'Neill, in Scotland, a few days previous to the execution of the deed of conveyance, and at a time when the appellant Roger M'Neill, (as he alleged) was unacquainted with the nature or particulars of the account, or with his late father's affairs, and when he was, to the knowledge of the respondent, in great distress, and had no opportunity of having the advice of his friends or legal assistance.

The principal sum of 1,500*l.* due to Gillespie, as mentioned in the account, with interest to the amount of 990*l.* which (as appears by the date in the schedule) accrued in the lifetime of the testator, was the proper debt of the father, Roger Hamilton M'Neill, the appellant Roger being a mere surety. Part only of the debt to Gillespie had been paid by Roger Hamilton M'Neill, namely, to the amount of 1,130*l.* principal money, which was paid out of the purchase monies of the Taynish estate. The balance of Gillespie's account, to the amount of 392*l.* 9*s.* 7½*d.* had been paid by the appellant Roger M'Neill, since his father's decease.

Sir P. Hamilton's debt.

The debt to Sir Patrick Hamilton, (being a judgment) for 150*l.* with ten years interest, amounting to 99*l.* which accrued in the lifetime of Roger Hamilton M'Neill, was the sole exclusive debt of Roger Hamilton M'Neill, the appellant not being joined therein as a surety.

Fulton's debt.

The debt to Fulton, amounting to the principal sum of 1,100*l.* 6*s.* 3*d.* with seven years and a half's interest thereon, amounting to 495*l.* consisted partly of debts owing by Roger Hamilton M'Neill,

and partly of debts owing by the appellant Roger M'Neill, discharged by his father, and principally paid out of the purchase money of the Taynish estate.

No consideration was given or paid by the respondent Cahill for the conveyance of 1789, except the credit on the foregoing account to the amount of 3,500 *l.* and the sum of 200 *l.* lent by the respondent to the appellant Roger M'Neill, which was secured by his bond and warrant of attorney, to confess judgment.

1790. Appellant Roger arrested;

The appellant Roger M'Neill, in the month of May 1790, was arrested for debt, and detained a prisoner at the suit of several of his creditors until the month of June 1791, when the respondent Cahill, claiming to be a creditor of the appellant, to the amount of 200 *l.* applied by petition to the Court of King's Bench in Ireland, under the compulsory clause in the Irish act 31 Geo. III. for relief of insolvent debtors, to compel the appellant to make discovery of his real and personal estate, to the end that the same should be applied in payment of his debts; and the appellant, having given such accounts and schedules as required by the act, was discharged from confinement under the provisions of that act.

and discharged under the Insolvent Act.

1801. Aug. 3. Order appointing respondent Cahill assignee.

Henry Coulson, one of the Masters of the Court of Chancery, was first appointed assignee of the estate and effects of the appellant, Roger M'Neill; and upon his decease, by an order of the court, in the matter of the insolvent, bearing date the 3d day of August 1801, the respondent Cahill was appointed in the place of Henry Coulson, and acted as assignee.

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The respondent Cahill, after he became assignee of the estate of the appellant, entered into a treaty with him, upon the foundation partly of the old account, including some of the debts alleged to have been paid by the father, and claimed by the respondent Cahill as executor, according to the preceding statement; and by a memorandum of agreement, bearing date the 17th day of September 1801, after reciting that the respondent Cahill claimed to be a creditor of the appellant, Roger M'Neill, as assignee of a judgment debt obtained by Skeffington Thompson, against the appellant, as assignee of a judgment debt obtained by Sir Patrick Hamilton against the appellant's father, on the foot of two judgments obtained by the respondent against the appellant; and also on account of a legacy devised by Ann M'Neill to Margaret, the wife of the respondent; and also on account of the rents of the lands of Sheeplands, Loughmoney and Carrowcarland, which were thereby stated to have been applied in payment of the *custodiam* and *elegit* debts of the appellant, (the several claims according to the respondent's statement, amounting to 3,000*l.*,) and reciting that the claims were disputed by the appellant; and further reciting that the respondent had agreed to accept 1,500*l.* in full of all demands against the appellant; it was thereby agreed, that the respondent, as assignee of the appellant, under the order of the 3d day of August then last, should enter into possession and receipt of the rents of the Ballylesson estate, upon trust, in the first place, to pay thereout 227*l.* 10*s.* yearly in manner therein mentioned, to the appellant Roger M'Neill; and also a sum of

Memorandum of agreement. 17 Sept. 1801.

120*l.* as a maintenance for Catherine M'Neill, wife of the appellant Roger M'Neill, and her family; and after payment thereof, to apply the surplus rents and profits in discharge of the sum of 1,500*l.* with interest.

The respondent Cahill was afterwards, on the motion of the appellants, removed, and the respondent Robert Grove Leslie was appointed assignee in his place.

Original bill filed 6th June 1808; Answer, 17th June 1809.

The original bill in this cause was filed on the 6th of June 1808, by the appellants, and Charles Crauford, a trustee for the appellant Daniel, under a conveyance by the appellant Roger M'Neill, against the respondent Cahill. The bill (comprising allegations of most of the preceding facts) stated, that Roger the father was seised of an estate for life in several lands in Ireland *and Scotland*, which were by *certain deeds* respectively limited in remainder to the appellant Roger, &c.; that at the time of the appellant Roger's marriage, he and his father were tenants for life of the estates in the county of Down, and also of the Scotch estates, *except the lands of Taynish in Scotland*, which the appellant Roger joined his father in selling for payment of debts; that the estate was sold at an undervalue; but by a deed on record in Scotland, it was stipulated that after payment of the debts affecting the estate, the remainder of the purchase money should be vested in securities for the benefit of the appellant Roger and his family; that the lease of the Mountain farm was obtained by undue influence; that the will also was obtained from the father by undue influence; that the debts mentioned in the will had been paid by the father out of the purchase money of the Taynish estate; that the sale and conveyance of Sheeplands was fraudulently, and with-

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out fair consideration, obtained by the respondent Cahill from the appellant Roger M'Neill, while he was in a state of embarrassment as to his affairs, and ignorance as to his rights; that the debts, which formed part of the consideration, were the debts of the father; and that the agreement of 1801 was obtained in like manner, and in fact for the same consideration, the appellant Roger M'Neill, being at the time insolvent, and the respondent Cahill, his assignee. The bill, among other things, prayed a general account, including the purchase money of the Taynish estate; and that the conveyance of 1789, the agreement of 1801, and the lease of the Mountain farm might be set aside.

The respondent Cahill, by his answer, denied that the appellant Roger M'Neill joined in the sale of the Taynish estate, and alleged, that the father was seised in fee of that estate. He denied the existence of any deed settling the residue of the purchase money, on the appellant R. M. H M'Neill and his family. He denied also the imputed influence and fraud in obtaining the lease, agreement, conveyance and will. He contended, that the consideration for the conveyance was full and fair; that the judgment owing to Gillespie, was on a bond given to him for costs and services in a suit relating to the Ballylesson estate, from which the appellant derived benefit; and that the consideration was immaterial, because it became by contract a charge on the appellant's estate; that the father paid Gillespie 1,150 *l.* and other sums to other creditors. He denied that the debts so paid were the debts of the father; and represented that the appellant's solicitor took objections to the accounts when

furnished, which were answered, and the appellant acquiesced.

After this answer was filed, the appellants made an application for an injunction and receiver, which was refused.

On the 8th of August 1811, before the examination of witnesses, the appellants filed a supplemental bill, which stated the appointment of the respondent Cahill, as assignee, and his removal; that the life interest of the appellant Roger M'Neill, in the lands in question, had been sold and conveyed to the appellant Daniel M'Neill, by the new assignee; that Crauford was no longer a necessary party, and prayed the same relief as the original bill, with a few variations, not material to be stated.

Answer to supplemental bill.

In his answer to the supplemental bill, the respondent Cahill stated, that the motion for removing him from his situation as assignee, was unopposed, owing to the absence of his counsel on the circuit, and the circumstance of the appellant's solicitor having detained an affidavit on which he intended to oppose the motion, and that the Lord Chancellor, in that instance, acted solely on the principle of the propriety of dissolving that kind of relation between persons so deeply involved in hostile litigation. He admitted the receipt of 1,209*l.* 3*s.* 3*d.* as assignee, and that he applied the same in payment of the debt due to himself, and did not pay any other creditor of the appellant Roger, because no other creditor had proved any debt against the insolvent's estate; and if any other creditor had proved, that his own were the preferable debts: that by an order of the Irish Court of Chancery, a sum of

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6,000*l.* was lodged in the Bank of Ireland, to answer the demands of the fair creditors of the appellant Roger M'Neill, and by another order made in December 1814, the appellant Daniel undertook by his attorney, in open court, to pay to the respondent any sum not exceeding 6,000*l.* which should finally appear to be due to him.

A replication was filed to the answer to the supplemental bill, and issue being thereupon joined, the appellants and the respondents proceeded to the examination of witnesses, and publication having passed, the cause came on to be heard before the

Cause heard on the 20th May 1816.

Lord Chancellor of Ireland, on the 20th of May 1816, the same having previously stood over to give the appellants time to amend their bill, for the purpose of bringing the respondent Robert Grove Leslie before the Court.

The only points particularly urged at the hearing, were those relative to the purchase money of the Taynish estate, and the sale of Sheeplands. In regard to the former, the appellants were not allowed to read the marriage contract of 1743, nor the inhibition of 1769, as they had not been put in issue by the pleadings, and no deed having been produced, showing the appellant's title to any part of the purchase money for the Taynish estate, according to the allegations contained in the bill. The following decree was made:—

Decree.

"Upon reading the proofs, &c. and the defendant "having offered to account, as on foot of the deed "of the 17th of September 1801, in the pleadings "mentioned, and the plaintiffs declining the same, "it is this day ordered, adjudged and decreed,

" that the plaintiffs' bill in this cause, and all and " every the matters and things therein contained be " and the same is hereby dismissed, with costs, to " to be taxed against the plaintiffs."

26th June 1816. Petition for a rehearing, and leave to file a supplemental bill.

On the 26th of June 1816, the appellants presented to the Lord Chancellor a petition for leave to file a further supplemental bill, on the ground of the new matter therein alleged to have been discovered, after issue was joined, and also for a rehearing. It was supported by an affidavit of the appellant Daniel.

Affidavit of appellant Daniel.

In this affidavit the appellant Daniel, after referring to the settlement of the 15th of June 1743, states:—

" That one part of the settlement was deposited in " the proper office for registering deeds in Scotland, " and the other part always remained in the posses- " sion of Roger the father."

" That he did not, nor did the appellant Roger, " as he believes, know of the registry of the said " deed, or the proceedings had therein, or any of " them; nor did deponent, or the appellant Roger, " get possession of the other part of the original " deed, until after the death of Roger the father.

" That his solicitor procured the part of the said " settlement now in his possession, at the time of the " commission, which was sped for the examination " of witnesses in Scotland in this cause, in the latter " end of August, and beginning of September last, " and not before; and until that time, deponent, and " the appellant Roger, as he believes, were ignorant " of the precise nature of their rights under the said " deed of settlement, of the 15th June 1743, and " the inhibition of the 15th August 1769, and " therefore the same were not put in issue, &c.

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"That at the time of the said examination of wit-
"nesses in Scotland, it was for the first time, as
"he believes, discovered by the appellants, that
"proceedings were had in the Scotch Courts in
"1768 and 1769, at the instance of Cromwell Price,
"and Elizabeth Price, otherwise M'Neill, his
"daughter, for the purpose of obliging Roger, the
"father, to carry the trusts of the said settlement
"of 1743 into effect; and on the 15th August 1769,
"an inhibition containing a statement of the said
"deed or settlement, was obtained from the said
"court, inhibiting or restraining Roger, the father,
"from selling, alienating, or incumbering the estate
"of Taynish; an attested copy of which hath been
"regularly proved in the cause."

The appellant Roger M'Neill, made no affidavit in support of the petition.

Upon the coming on of the petition, on the 26th June,

Order on Petition.

"It was ordered, that this cause be set down
"to be re-heard: And further, that plaintiffs be
"at liberty to file a supplemental bill in aid of
"such re-hearing, for the purpose of putting in issue
"the settlement of 1743, and the inhibition of 15th
"August 1769, and the effect and operation of the
"same according to the laws of Scotland, relating to
"the said Taynish estate, upon paying costs, &c."

1816, July 10. Motion to rescind the order, giving leave to applicants to file supplemental bill, unless cause shewn in ten days.

The above petition having been presented without any notice being given of it to the respondents, and the order having consequently been obtained by surprise, the respondent gave the appellants notice of a motion to set aside the said order, so far as the same related to the filing of a supplemental bill; and a motion was made accordingly, on the 10th of

July 1816, when it was ordered, that the plaintiffs should be at liberty to file a supplemental bill, unless in ten days cause be shown to the contrary.

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The respondent afterwards filed an affidavit, in answer to the appellant Daniel's affidavit. In this affidavit the respondent, among other things, states:

Affidavit of respondent.

"That the cause or suit instituted by Cromwell "Price, as the trustee of Mrs. M'Neill, and her "children, mentioned in the affidavit of the appel- "lant Daniel, in which suit the inhibition was "obtained, was as deponent believes, after the time "when the said inhibition was granted, heard, and "the said Cromwell Price failed therein, as depo- "nent believes, and thereupon the said inhibition "was determined.

"That the appellant Roger must have been "fully aware, before the commencement of this "suit, of the marriage settlement of 1743, and of "his rights thereunder; for in a document proved "in this cause, given to deponent by the said "Roger, in the year 1807, a few months only "before the filing of the bill, and drawn up shortly "before on the part of the said Roger; it being "a statement of claims made by him against one "Doctor James M'Neill, express mention was "made of the said settlement, and the rights "of the said Roger, under the same, are alluded "to therein: that it is further evident from this, "that the said Roger was acquainted with the "said settlement; because at the time of the "execution of the deed of conveyance of the said "Taynish estate to the purchaser, he, in the pre- "sence of the deponent, refused to execute the

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"same, and said that he would not part with his "claim to the said lands: and the said Roger, "at the time when deponent was in habits of "intimacy with him, which continued at intervals "until the year 1807, used repeatedly to talk of "recovering the said estate from the purchaser."

20th July 1816. Cause was shown upon this affidavit, and allowed.

On the 20th July 1816, cause was shown against the last-mentioned order, on behalf of the respondent Cahill, grounded on his affidavit. The respondent at the same time read from the appellant's original bill a passage, in which he speaks of the receipt of 2,000 *l.* by the respondent Cahill, as the portion of his wife, and to which his wife was entitled under the settlement of the Taynish estate. A passage was also read from a letter of attorney, executed by the appellant Roger, and recited in a state of claims, which was delivered by the appellant to the respondent and proved in the cause, in which it is provided, that the attorney "shall pay the rents of "Raplock during the life of R. H. M'Neill, agree-"able to and in terms of the contract entered into "between the said R. H. M'Neill and Mrs. Elizabeth "Hamilton Price, my mother." References were also made to the interrogatories filed by the appellant, and the depositions of a witness in the cause, Walter Moir, who in answer to those interrogatories, stated, that his father was the agent of the appellant Roger, and that on his father's death, the deed of settlement, of the Taynish estate came into his hands as executor, among other papers relating to that estate. The court on this evidence set aside the former order with costs.

Against the decree of the 20th May 1816, and

the order of the 20th July 1816, this appeal was presented on the 10th of February 1817 *.

* On the 4th of March 1817 a petition was presented to the Lords in the name of the appellant Roger, praying that his name might be struck out of the appeal, and that the appellant Daniel might pay costs incurred thereby. On the 24th of March the respondent Cahill presented a petition, praying to withdraw his answer to the appeal, so far as, &c. On the 25th of March the appellant Daniel presented a petition, praying that the two former petitions might be dismissed.

The petitions of the appellant Roger, and the respondent Cahill, set forth instruments executed by the appellant Roger, purporting to be a disclaimer and release, on his part, of the matters pending in the cause, and empowering his attornies, therein named, to appear and disavow the proceedings. The petition of the appellant Daniel, setting forth various circumstances, represented that the instruments were procured by misrepresentation, fraud and circumvention, and by advantage taken of the distress and embarrassments of the appellant Roger, who was at the time a prisoner for debt.

The Lords Committee, to whom the petitions were referred, reported their opinion that the cause ought to stand over, that the parties might proceed, in such manner as they should be advised, to have it determined by a competent jurisdiction, whether the power of attorney and release was binding on the appellants, or either of them, and whether the appellants, or either of them, were entitled to be relieved against the said power and release.

An order of the House having been made according to this report, a bill was filed in the Court of Chancery in Ireland, by the appellant Daniel, against the respondent Cahill and the appellant Roger, stating the circumstances of misrepresentation, fraud and duress; and further, that the appellant Roger, having discovered the fact, had revoked the power, and by a subsequent deed authorized the appellant Daniel to prosecute the appeal.

The respondent Cahill having put in his answer to the bill, and the cause being at issue by replication and rejoinder, witnesses were examined, and publication passed; and the appellant Roger having also answered the bill, the cause was set down on pleadings and proofs, as against the respondent Cahill, and on bill and answer, as against the appellant Roger; and upon hearing, the instruments of disclaimer, and power of attorney, and an indenture of release of the 29th of October 1816, were declared fraudulent and void, so far as they affected the right of the appellant Daniel to prosecute the appeal in the names of the appellants; and it was ordered that the respondent Cahill should be restrained from using the said instruments on the hearing of the appeal, and that the appellant Daniel should be at liberty to use the name of the appellant Roger in prosecuting the appeal. The appellant Daniel was accordingly, on petition, admitted to prosecute the appeal.

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Argued 15, 22 June.

For the Appellants, *Mr. Wetherell, Mr. Heald.*

If the deed of settlement of 1743, the inhibition and other proceedings in Scotland, were not sufficiently put in issue in the pleadings, to intitle the appellants to read evidence of them on the hearing of the cause, yet, under the circumstances, and especially considering that the respondent had full notice of the settlement, and those proceedings, and had actually received 2,000*l.* under the provisions of the settlement; and as also witnesses had been examined on both sides in the cause, relating to the title of Roger Hamilton M'Neill to the estate in Scotland, and his right to dispose of that estate, the Court ought to have allowed the appellants, by supplemental bill, to put in issue the deed, inhibition, and other proceedings in Scotland.

Independent of the several matters relating to the sale of the estate of Taynish, and the right of the appellant, Roger Montgomery Hamilton M'Neill, to an account of the produce, there is sufficient evidence in the cause to intitle the appellants to a decree for setting aside the conveyance of the 28th of May 1789, made by the appellant Roger to the respondent Cahill, as fraudulent and void.

The agreement of the 17th of September 1801, cannot be considered of any avail in a court of equity, the same having been made between an insolvent debtor and his own assignee, to the prejudice of the general creditors of the insolvent.

For the Respondents, *Mr. Hart, Mr. Lynch.*

It appears, from the circumstances stated in the affidavit of the respondent Cahill, from the reference

in the original bill, and the affidavit of the appellant Daniel, to the instrument releasing the 200*l.* the portion of the respondent's wife, which instrument recited the marriage contract of 1743, and inhibition of 1769; from the interrogatories exhibited in the cause by the appellants, as to the marriage contract; from the circumstance of the settlement being in the hands of the appellant Roger's Scotch agent, Walter Moir, (a witness in the cause,) and his father, as well as other circumstances mentioned in his deposition; and from the deed of ratification of 1782, executed by the appellant Roger, to Colonel Campbell, the purchaser of the Taynish estate; that the appellant Roger must have known of the settlement of 1743, and the inhibition of 1769, or at least the former, long before the filing of the original bill. The settlement and inhibition were proved in the cause by the appellants. They must, or might therefore, have known of them before publication was passed. At the hearing of the cause, the appellants did not ask for leave to file a supplemental bill, for the purpose of putting those matters in issue in the cause, and suffered a final decree to be pronounced against them.

Upon inspection of the affidavit of the appellant Daniel, on the ground of which leave was in the first instance given to file a supplemental bill, it will appear that the prior knowledge of the marriage contract of 1743, and of the inhibition, is not unequivocally, or in fact at all denied.

As the appellant Daniel has not shown, or even stated himself to be interested in the question as to the Taynish estate, the affidavit, so far as it related

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to that estate, ought to have been made by the appellant Roger, and more particularly as from the age of the latter, and his having been conversant with the different transactions relating to the Taynish estate, which chiefly took place before the former was born, the appellant Roger was more competent to speak upon the subject of the affidavit. It does not appear that the appellants could gain any advantage by filing a supplemental bill, putting the marriage contract and inhibition in issue; since, if Roger, the father, had not a full power of disposition over the Taynish estate, the proper remedy of the appellant Roger is against the purchaser. If the appellant Roger were held to be entitled to recover against his father's estate, in respect of any part of the purchase-money, such recovery would be no bar to his remedy against the purchaser, and the estate of the father might ultimately become twice charged on the same account.

If the marriage contract were in issue in the cause, the appellant could derive no benefit from it, on account of the internal defects in the contract itself, and in consequence of his interference with the rents of the Raplock estate, during his father's lifetime, and now demanding a certain portion of them by his bill.

The respondent is released from all claims of the appellant Roger, in respect of the purchase-money of the Taynish estate, by a release and disclamation made by him in the Scotch suit in 1789, which suit had reference to that purchase-money.

The appellant Roger, has not by any proof of *mistake*, or *surprise* in the *settlement of accounts* of

17th September 1801; or by excepting to any item, or showing any error in the same, or for any other reason, shown sufficient grounds for avoiding that settlement of accounts, which was made after full opportunity had been given to the appellant Roger, to investigate those accounts, a statement of the respondent's claims having been in the appellant's, and his attorney's possession, and under consideration for eighteen months, and after he had, in fact, investigated them, as appears by the objections delivered to some of the items in the statement, which was made with the advice and assistance of the appellant's own solicitor, and by a deed prepared by that solicitor.

When an account was offered to the appellant by the Lord Chancellor at the hearing, on the foot of the second agreement of 1801, it was refused.

At all events, as the respondent has shewn that he gave a full and valuable *consideration* for the estate, the sale of the lands of Sheeplands, Loughmoney, and Carrowcarland, ought to be considered a valid sale, and ought not to be disturbed; and the more especially, after the repeated confirmations thereof by the appellant Roger, during an interval of nearly twenty years, between the sale and the filing the bill.

The appellant Roger, has shown no ground whatever for his impeachment of the lease of Dunseverick Mountain farm, and the same ought not to be disturbed *.

* Upon the several points discussed on the hearing of the appeal, see the following authorities: as to reading evidence of matters not put in issue by the pleadings, *Clark* v. *Turton*, 11 Ves. 240.—That evidence of a distinct fact, as a declaration by an auctioneer, cannot be read without an allegation in the record, *Smith* v. *Clark*,

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The *Lord Chancellor* and *Lord Redesdale*, in the course and at the conclusion of the argument, made the following observations.

The first settlement followed by the recovery, the uses of which are declared by the deed, is different in its limitations and provisions from the second settlement, and by the operation of the registry act, becomes void as against the second, which, although subsequent in date was first registered. It is material to consider whether the first settlement was not a fraud. It is admitted, that the whole income of the lands settled, did not exceed 234 *l.* per annum. By the settlement, the father is to take 500 *l.* the fortune of the intended wife. Then debts, to the amount of 1,800 *l.* are to be charged on the (Dunseverick) estate, of which only 250 *l.* was the proper debt of the son; all the rest was the debt of the father only, or of the father as principal and the son as surety. After this provision, an annuity of 200 *l.* is to be paid to the son for present maintenance, and the residue is limited to the father for life, with remainder to the son in tail. It is clear from the statement of the rental of the

11 Ves. 477.—As to the right to amend, or file a supplemental bill, or bill of review, *Jones* v. *Jones*, 3 Atk. 217; Red. Treat. on Pleading, 49. 66. 263; *Boeve* v. *Skipwith*, 2 Ch. Rep. 142; Eq. Ca. Abr. 79; *Goodwin* v. *Goodwin*, 3 Atk. 370; *Ludlow* v. *Macartney*, 2 B. P. C. 104; *Norris* v. *Le Neve*, 3 Atk. 25, 34; *Young* v. *Keighley*, 16 Ves. 348.—As to the account, *Drew* v. *Power*, 1 Sch. and Lef. 182.—As to acquiescence by *cestui que* trust, in an agreement with his trustee, *Campbell* v. *Walker*, 5 Ves. 678, (citing *Price* v. *Byrne*,) *Webb* v. *Rorke*, 2 Sch. and Lef. 672; *Medlicott* v. *O'Donnell*, 1 Ball & Beatty, 156.—As to length of time as a bar to inquiry, *Chambers* v. *Bradley*, Jac. and W. 51.

estate made in the respondent's case, not only that there could be no residue, but that there could not be enough to pay half the annuity provided for the son. The father of the intended wife is said to have been dissatisfied. No person in his senses could be satisfied with such a settlement. It was in fact no settlement at all; the whole nearly of the rental or value would have been swallowed by the provision for debts.

A second settlement is then made, to which the father is not a party, and this, it is contended, is a fraud against him. In fact, the whole transaction appears to have been fraudulent on all sides, the father deceiving the son, and the son deceiving the father. The first deed is a delusion upon the face of it: the son permitting the debts of the father to be charged on his interest in the estate, without adequate consideration; the annuity of 200 *l.* being postponed to incumbrances, which would almost exhaust the estate, can hardly be deemed a consideration. The debts of the son, which form part of the charge, might have been paid out of the portion of his intended wife. That portion was taken by Roger the father. It was paid to him by the bond of the wife's father, by collusion between the parties to the second settlement, to induce him to believe that the first settlement was in existence and operation, a device which was so far successful, that for many years afterwards he did not discover the registry of the second settlement.

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*Lord Redesdale*, in moving judgment, after stating the facts of the case, proceeded to make observations to the following effect:

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The schedule to the indenture of settlement of the 15th of October, contained one debt owing by the appellant Roger M. H. M'Neill, amounting to 250*l.*; the rest were properly the debts of Roger the father. According to the terms of this instrument, the debts charged on the lands amounted to 1,800*l.* principal money. The annuity of 200*l.* payable to Roger the son, for maintenance during the life of the father, was an additional and subsequent charge. It must have been the understanding of the parties, that the estate was of sufficient value to satisfy the debts, to pay the annuity for maintenance, and leave a surplus. It is a very informal, ill-worded deed, but that is the effect of it, as the agreement of the parties.

The articles of the 25th of October were registered before the deed of the 15th of October, and the priority of registry, both in law and equity, gives a priority to the instrument so registered, though subsequent in date and execution. But the deed nevertheless binds the appellant Roger, as his agreement. So far as the two instruments are inconsistent, he is bound personally by the deed. The parties are responsible, therefore, by that their agreement for the debts mentioned in the schedule; they must be paid according to the trusts created for the purpose; and as the appellant Roger thus made his estate liable for the payment of those debts, so he became entitled to the benefit of that instrument as against his father, who thereby, as it must be intended, undertook that the estate was sufficient to answer the charge. Upon any other supposition the transaction would be unfair and fraudulent; for Roger the father, taking the por-

tion of the son's wife, gives an estate inadequate to the purpose intended and professed. In consequence of such inadequacy, the limitation to the issue, for which in fact the consideration was given, might have been wholly or partially defeated. The parties, therefore, who executed, had, under this instrument, mutual demands, which were personal so far as it was inconsistent with the posterior settlement: the son to make good to the father the payment of the debts; the father to establish for the son the income thereby provided for maintenance, and the limitations to the issue.

Under these circumstances, Gillespie, the trustee named in the first indenture, took possession of the estate, and paid to the son the annuity of 200*l.* provided by that instrument, but did not keep down the interest upon the scheduled debts, either of the debt of the son, or of those owing by the father and son jointly, in which the son was a surety for the father. In settling the accounts, the father was to be charged with so much of the debt as he did not pay out of the rents of the estate. The father had also paid money in discharge of the debts of the son; and the debtor and creditor account between them remained unadjusted at the period of the father's death.

Upon the death of the father, the respondent Cahill became entitled under the will, and in right of the father, as his executor, to demand the debt owing to his estate from the son. A claim for these debts was made in the year following the father's death. In the account stated by the respondent Cahill, he charges the son with the debt to Gil-

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lespie, and the interest upon it, amounting to 990 *l.*; the whole of which, except 45 *l.* had accrued during the life of the father. Another charge, to the amount of 276 *l.* 19 *s.* 5½ *d.* is made in respect of disbursements appearing by Gillespie's account. There is also charged a debt owing to Sir Patrick Hamilton, which was the debt of the father alone, with interest upon that debt to September 1788. The account contained other charges of sums with interest, which were the debts of the son discharged by the father. The last item in the account was the amount of a legacy, with interest, which was charged on the Newgrove or Ballylesson estate, of which the son became tenant for life on the death of the father, and as such bound to keep down the interest of the legacy. The whole charge in this account amounted to 4,529 *l.* 18 *s.* 3 *d.* which the respondent Cahill, as the executor of the father, demanded against the son. It is clear that much of this was no debt of the son. The interest upon the debts, for example, which accrued in the life-time of the father, ought to have been satisfied out of the rents; but after paying the annuity provided for maintenance of the son, they did not produce sufficient to pay the interest accruing upon Gillespie's debt.

The demand, therefore, made upon Roger the son by the respondent Cahill, as executor of the father, was excessive. It rested upon insupportable charges, and he took no notice of the claims of the son upon the father, in respect of monies received by him from the purchaser of the Taynish estate. Admitting that the father was entitled to sell that

estate, he was answerable for the value. The son had affirmed the sale by executing the deeds: but this was a matter not in the contemplation, or not taken into the consideration of the parties at the settlement of the accounts.

Upon such a state of transaction between the parties, the respondent Cahill contracts with the appellant Roger the son for the purchase of Sheeplands. It is admitted that the consideration was not actually paid; but upon the conveyance, a receipt was signed by the appellant Roger, for the consideration, as part of the debt alleged, and in the transaction supposed to be due, from the son to the father. Whether it was really a consideration must depend upon the state of the account. The bill impeaches the transaction of the sale itself, but not on sufficient ground, supposing the purchase-money to have been, as alleged, a debt from the son to the father. Assuming the account to be correct, or the consideration actually paid, the transaction of sale was proper and fair.

The claim made by the son against the father as to the Taynish estate, is very imperfectly stated in the pleadings. The son, it seems, had at least a right to demand the value of the estate against the father.

It appears, that in 1791 the son became embarrassed, and was discharged under the Irish act 31 Geo. III. as an insolvent debtor. Various creditors had by process of law obtained possession of different parts of his estate; and several persons having been from time to time appointed assignees, the respondent Cahill finally became assignee of his estate and effects. After this appointment, a transaction of agreement took place between the respon-

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dent Cahill, and the appellant Roger, in which upon the old statement of account as to the debt supposed to be owing from the son to the father, to the amount of 3,000 *l.*, and an arrangement by which 1,300 *l.* was to be accepted in full of the demand, it was agreed that the respondent Cahill should have the Ballylesson estate, to pay out of the rents and profits an annuity of 227 *l.* 10 *s.* to the insolvent, 120 *l.* to his wife, and then to apply the residue in discharge of the 1,300 *l.* owing to the assignee himself.

This is a transaction which a court of equity cannot countenance or suffer on the part of the assignee of an insolvent debtor. It is a contrivance to provide for the family of the insolvent, and the assignee as one of his creditors, at the expense of the other creditors. On grounds of public policy, it is necessary to declare that such an instrument is void. It is a deed contriving a fraud against creditors, to which a trustee for them is a party.

The bill in this case was filed by the appellant Roger, to investigate the transactions between him and the respondent, to which fraud is attributed; but I do not enter into the question in that point of view. The bill prayed that various accounts might be taken; that the agreement and conveyance mentioned in the pleadings might be set aside; and a reconveyance. It is a very confused and inaccurate bill.

At the original hearing, which took place in 1816, it was objected that Leslie, who had in the meantime been appointed assignee, was not a party, and leave was given to amend the bill.

When the cause came before the Court upon further hearing, the deeds of 1743, being the settlement of the Taynish estate, and the proceedings in

Scotland, were offered in evidence. It was objected that there was no allegation in the bill to warrant the production of such evidence, and the objection was held valid by the Court. A petition was then presented, praying leave to amend the bill, or to file a supplemental bill, for the purpose of supplying the defect. The prayer of that petition was properly refused, and afterwards the bill was dismissed with costs.

The subsequent proceedings in the cause it is not material to state or discuss.

The appeal raises the question, what ought to have been done in the cause under these circumstances. When the hearing took place in the Court below, the respondent Cahill offered to account on the foot of the deed of 1801; that was an offer in affirmance of the deed. The Court held, that because the plaintiff, (the appellant Roger,) had refused that offer, the Court would not direct the account; but whether he accepted or refused, if the Court were of opinion that the deed of 1801 was binding upon the appellant Roger, it was the duty of the Court, without regard to the sentiments of the parties, to direct the account. On the footing of that deed, the respondent Cahill was clearly responsible in account; it is therefore difficult to understand why the bill was dismissed.

This is an error which makes it necessary for the Court of Appeal to interfere.

The effect of the transaction in 1777, was to constitute the father and son mutually and personally creditors and debtors to a certain extent. The father was bound to make good to the son the annuity provided by the deed, and the interest of the

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debts charged on the estates; otherwise the deed was a fraud on him and the persons to take, subject to the charges. The issue of the marriage might have had nothing. According to the true intent of the deed of the 15th October 1777, the parties executing became mutually and personally debtors, so far as the deed could not have the effect contemplated or professed, by means of the estates conveyed.

At the date of the father's death, it is clear that the account was pending and unsettled. When that account came to be settled between the son and the representative of the father, the actual state of debts and credits on each side ought to have been investigated; whereas, all the debts were charged upon the son, and the son was not made creditor upon the estate of the father, for interest accrued in the lifetime of the father, and upon his own debts, which were charged upon the estate.

Omitting all consideration of the question as to the Taynish estate, it is impossible to hold, that the account so taken was fairly taken between them. In the account there are sums charged as paid by the father for the son. Great part of this demand was constituted by agreement between the father and the son, and looking at the will of the father, it is difficult to hold, that he intended these sums should be charged against the son as debts: the terms of the will raise considerable doubt as to that point. If there was any demand arising out of the sale of the Taynish estate, that was not taken into account in the settlement. The whole amount of the bond to Gillespie is charged in the account against the son, although 392*l.* 9*s.* 7½*d.* of the amount was not paid by the father, but by the son after his death.

So, as to the interest accrued in the life of the father, it was improperly, and not according to the contract between the parties, charged in account against the son. The case is the same as to the debt to Sir Patrick Hamilton. It appears, therefore, that an erroneous account is the foundation of all the subsequent transactions between the parties.

Justice requires that the account should be investigated, to ascertain how far the son was indebted to the father; and, considering the question as to the produce of the Taynish estate, whether the estate of the father was not indebted to the son.

The account, which is the foundation, being erroneous, the subsequent transactions, so far as they depend on the account, must be subject to investigation. It will require much consideration in framing the order. The House must declare what was the true right between the parties when the account was settled and acted upon. The transaction of 1801, cannot stand. The case must be reviewed by the court below. There must be an investigation as between debtor and creditor. The question, as to the lease being, I suppose, of no value, was abandoned at the bar. As to the Taynish estate, if the appellant Roger, has a right against the estate of the father to call for an account of the value, I doubt whether it can be admitted in this suit. If not put in issue by the bill, it cannot be the subject of decision here.

As to that part of the case, the bill may be dismissed, without prejudice to any other suit which the appellant may be advised to institute.

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ORDERED and adjudged, that the decree complained of be reversed: And it is declared, that the deed bearing date, the 14th October 1777, making the tenant to the *præcipe*, and declaring the uses of the recovery suffered in Trinity term 1778, and the deed dated the 15th August 1777, purporting to be a settlement previously to the marriage of the appellant Roger Montgomery Hamilton M'Neill and Catherine Chambers, the father and mother of the appellant Daniel M'Neill, ought to be deemed personally binding, both upon the appellant Roger Montgomery Hamilton M'Neill, and Roger Hamilton M'Neill, deceased, father of the said appellant, notwithstanding the said deed of the 15th October 1777, was not executed by the said Catherine Chambers and Daniel Chambers her father, and was not registered until after the deed of settlement of the 25th October 1777, in the pleadings mentioned, was registered; but so far only as the said deed of the 15th October 1777, may be deemed just and reasonable, as between the said Roger Hamilton M'Neill, deceased, and the appellant Roger Montgomery Hamilton M'Neill, his son, attending to all circumstances: And it is further declared, that according to the true intent and meaning of the said deed of the 15th October 1777, the said Roger Hamilton M'Neill, deceased, was entitled to have the debts mentioned in the schedule thereto, to which he was liable, charged on the estates comprised in the said deed, so far as the appellant Roger Montgomery Hamilton M'Neill, his son, had any interest in such estates, after the execution of the said deed of the 25th October 1777; and the appellant Roger Montgomery Hamilton M'Neill was entitled to have the debts due from him, as stated in the said schedule, also charged on the said estates; and he was also entitled to the several annuities provided for him, and particularly to the annuity of 200 *l.* a year, provided for his immediate maintenance: and inasmuch as it appears that the rents and profits of the lands comprised in the said deed of the 15th October 1777, were inadequate to the payment of the said annuity of 200 *l.* provided for his immediate maintenance, and the interest of the debts stated in the schedule to the said deed, and thereby intended to be charged on the said estates, the said deed ought to be taken to have been so far entered

into by the said appellant, Roger Montgomery Hamilton M'Neill, under a mistake or misrepresentation of the annual value of such estates; and therefore, and inasmuch as the said Roger Hamilton M'Neill, deceased, received the portion of the said Catherine Chambers, according to the terms of the said deed of the 15th October 1777, the said Roger Hamilton M'Neill, deceased, ought to be deemed to have been a debtor to the said appellant Roger Montgomery Hamilton M'Neill, his son, for the amount of such portion, so far as to give said appellant the full benefit of such deed on his part, both with respect to the said annuities and the payment of his own debts mentioned in the schedule to such deed; and the said appellant ought to be deemed a debtor to the estate of his father, the said Roger Hamilton M'Neill, deceased, in respect of so much of the principal of the debts of his said father, mentioned in the schedule of the said deed, as were paid by his father, but not for the interest thereof, nor for the interest of his own debts mentioned in the schedule to the said deed, during the life of his said father, if any interest was paid by his father, but on the contrary, the said appellant ought to be deemed a creditor on the estate of his said father, for so much of all such interest as was paid by the said appellant; and the said appellant ought to be deemed to be a creditor on the estate of his said father, for so much of the interest of his own debts mentioned in the said schedule, which accrued during the life of his said father, as was not paid by his father; and that therefore the demand made upon him by the respondent Michael Cahill, as representative of the said Roger Hamilton M'Neill, deceased, the father of the said appellant, ought to have been made accordingly, subject nevertheless to the question, whether on any other account the said appellant Roger Montgomery Hamilton M'Neill had any demand against the estate of the said Roger Hamilton M'Neill, deceased, his said father: And it is further declared, that the demand made by the respondent against the appellant Roger Montgomery Hamilton M'Neill, by which he claimed the sum of 4,529*l.* 18*s.* 9*d.* as due from the said appellant to the estate of the said Roger Hamilton M'Neill deceased, for principal and interest, calculated to the 10th September 1788, was therefore founded on mistake, and that it appears to have

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been erroneous in other particulars, independent of any question whether the appellant Roger Montgomery Hamilton M'Neill was entitled to make any demand against the estate of his said father, in respect of the money for which the estate in Scotland, called the Taynish estate, was sold: And it is further declared, that such question was sufficiently put in issue by the said appellant's bill, and by the answer of the respondent Michael Cahill to such bill, to warrant an inquiry, whether any part of the principal or interest of any of the debts, mentioned in the schedule to the said deed of the 15th October 1777, which were paid in the lifetime of the said Roger Hamilton M'Neill, or after his death, was so paid out of the money arising by sale of the said Taynish estate; and whether what was so paid ought to have been demanded by the said respondent, as executor of the said Roger Hamilton M'Neill, deceased, against his son the appellant; and also, whether the said appellant had, in respect of such money arising by sale of the said Taynish estate, such demands against his said father's estate, as were equal to, or might in any manner reduce the claim which the said respondent, as executor of the said Roger Hamilton M'Neill, deceased, might otherwise have had against the said appellant; to the end that it might be ascertained, whether upon a just and fair settlement of accounts between the said appellant and the estate of his said father, the said Michael Cahill as executor as aforesaid, had on the 10th September 1788, a just demand against the said appellant to the amount of 4,529 *l.* 18 *s.* 9 *d.* or any other, and what sums of money: And it is further declared, that it does not appear that there are sufficient grounds for impeaching the sale made by the said appellant to the respondent, of the lands of Loughmoney, Carrowcarland and Sheeplands, conveyed to the said respondent by the deed of the 20th May 1789, in the pleadings mentioned; but it being admitted, that the purchase money for the said estate was not paid, except by setting against the same the demands made by the respondent, as executor of the said Roger Hamilton M'Neill, against the said appellant, but for which no discharge was then given by the said respondent to the said appellant; the said appellant ought to be deemed to have a lien on the said estate for the purchase money; and the said respondent ought to be deemed a debtor to the said appellant, for

so much of the purchase money, if any, as would not at the time of the purchase have been satisfied by the just demands of the said respondent, as executor as aforesaid, against the said appellant, and all other demands of the said respondent, at that time against the said appellant: And it is further declared, that the deed of the 17th September 1801, having been entered into by the appellant Roger Montgomery Hamilton M'Neill, under the influence of the prior transactions between him and the respondent, and the said respondent being then assignee of the estates and effects of the said appellant, under the authority of an act for the relief of insolvent debtors, and such deed containing a contract on the part of the said respondent, for the benefit of the said appellant, which was a fraud on the other creditors of the said appellant, who might have sought relief against him under the said act: It is declared, that the said deed of the 17th September 1801, ought to be set aside as fraudulent, with respect to the said appellant, and void on principles of public policy: And it is further ordered, that it be referred to one of the Masters of the said Court of Chancery in Ireland, to take an account between the said appellant and the said respondent, as executors of the said Roger Hamilton M'Neill, deceased, the said appellant's father, according to the declarations hereinbefore contained, and to state the same as it ought to have been stated, according to the declarations aforesaid, on the 10th September 1788, the time to which the interest was calculated, according to the account set forth by the said respondent, in his answer to the said appellant's bill; and that the said Master do ascertain what sum, if any, was actually due from the said appellant to the estate of his father, on the said 10th September 1788; in taking which account, the Master is to have regard to the several declarations hereinbefore contained, and also to enquire whether any, and which of the debts of the appellant, paid by his father, were paid by his father with intent to create, by such payment, a demand against his said son, or with any other, and what intent; and the said Master is also to have regard to the claims of the appellant against his said father, in respect of the money raised by sale of the Taynish estate: And for that purpose it is further ordered, that the said Master do enquire what were the rights and interests of the said Roger Hamilton M'Neill,

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deceased, the said appellant's father, in the said Taynish estate; and whether the said appellant had, according to the law of Scotland, any demand against the estate of his said father, in respect of the money raised by sale of the said estate, and what was the nature of such demand: And it is further ordered, that the said Master do state the amount of the just demands of the said respondent, as executor of the said Roger Hamilton M'Neill, deceased, against the said appellant, for principal and interest on the said 10th September 1788, and also on the 20th May 1789, the date of the conveyance of the said lands of Loughmoney, Carrowcarland and Sheepland, without including any demand of the said appellant, in respect of the money arising by the sale of the said Taynish estate: And that the said Master do also state distinctly the nature and extent of the demands of the said appellant, if any, against the estate of his said father, in respect of the money raised by sale of the said Taynish estate, and all dealings and transactions respecting the same; and that the said Master do also state the just amount of the demands of the said respondent, as executor of the said Roger Hamilton M'Neill, deceased, against the said appellant, on the said 10th September 1788, and also on the said 20th May 1789, taking into such account all demands of the appellant against the estate of his father, in respect of the money raised by sale of the said Taynish estate, so far as the same may extend to balance the amount of the just demands of the said Michael Cahill, as executor as aforesaid, against the said appellant: And it is further ordered, that the said Master do take an account of all dealings and transactions between the respondent, in his own right, and the said appellant, and of all demands of the said Michael Cahill against the said appellant in respect thereof, considering the said deed of the 17th September 1801, as null and void, and not binding on either of the parties thereto; and state the amount of the balance, if any, due from the said appellant to the said respondent, independent of his demands as executor; in taking which account, the said Master is to give the said appellant credit for so much, if any, of the sum of 3,500 *l.* the purchase money for the Loughmoney, Carrowcarland and Sheepland estate, as was not exhausted by any debt due from the said appellant to the estate of his said father on the 20th May 1789, the date of the con-

veyance of such estate: And it is further ordered, that the said Master do state such account between the appellant and the said Michael Cahill, in his own right, according to the direction aforesaid, taking into consideration the demands of the said appellant in respect of the Taynish estate; and also without taking into consideration such demands: And, in case the said Master shall find, on taking such account in either way, that the whole or any part of the sum of 3,500 *l.* the amount of the purchase money aforesaid, was not on the 20th May 1789, due from the said appellant to the estates of his said father, it is ordered, that the Master do compute interest on the whole, or on the balance, as the case may be, at the rate of interest demanded against the said appellant on the accounts before directed: And it is further ordered, that the said master in stating the accounts between the said respondent in his own right, and the appellant, do give the appellant credit for such principal money and interest: And it is further ordered, that all further directions be reserved until after the said Master shall have made his report: And it is further declared, that the said appellant hath not by his said bill, sufficiently put in issue his rights against the estate of his said father, if any he has, with respect to the money arising by sale of the said Taynish estate, beyond the right to have such demands as may arise therefrom set against demands made against him as debtor to his father's estate, as hereinbefore directed: And it is therefore ordered, that the said appellant's bill do stand dismissed, so far as it claims any surplus of the money raised by sale of the Taynish estate, beyond the demands of the said Michael Cahill, as executor of the said appellant's father against the said appellant, but without prejudice to any suit which the said appellant may be advised to institute concerning the same.