IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

MAGRANE—*Appellant.*

ELIZABETH ARCHBOLD and others—*Respondents.*

SUB-LEASE with covenant of perpetual renewal under a penalty of 70*l.* made of a church lease held by an administratrix for the benefit of her children and herself. Whether such a lease can be supported, except by considering the option to pay the penalty as of the essence of the contract?

May 7, 1813.

CASE OF A CHURCH LEASE.

MRS. ARCHBOLD was in 1789 possessed of a church lease, of certain lands (about sixty-two acres), in the vicinity of Dublin. In that year she demised the lands to one Magrane, at the yearly rent of 171*l.* 15*s.* 11*d.* taking at the same time a fine of 70*l.* Mrs. Archbold also covenanted that as long as she held the head lease in question, and as often as she obtained a renewal from the Archbishop, she, her executors, administrators, and assigns, would renew the sub-lease to Magrane, his executors, administrators, and assigns, under a penalty of 70*l.* Her husband had died the year before, and she was administratrix of their children.

Mrs. Archbold soon after obtained a renewal of the head lease, and in 1793 renewed the sub-lease to Magrane, in terms of the covenant. In 1806, Magrane assigned his interest to his son, the Apellant. Mrs. Archbold obtained a further renewal from the Archbishop, but refused to renew the sub-lease upon the ground that she had an option to refuse,

May 7, 1813.

CASE OF A CHURCH LEASE.

22d April, 1808.

26th June, 1809.

upon paying the 70*l.* penalty. The Appellant then filed his bill in the Exchequer against her, to compel a renewal; in her answer she insisted on the aforesaid option. After the usual proceedings, the cause came to a hearing in the Exchequer, when the bill was dismissed without costs; whereupon Magrane appealed.

Sir Arthur Pigott and *Mr. Richards* (for the Appellant) insisted upon the known rule of equity, that the penalty was to be considered only as a further security, and the performance as of the essence of the contract. Equity would order a perpetual renewal, however hard it might be on the party, where the contract for that purpose was clear and distinct. Mrs. Archbold might relieve herself from the hardship by not renewing with the Archbishop.

Sir S. Romilly and *Mr. Hart* (for the Respondents). In this particular case the option to renew or pay the penalty was of the essence of the contract, and was the only circumstance that could make it reasonable; without this equity would not order performance, even if Mrs. Archbold had the absolute interest; for it would amount to a sale by her without consideration, in as much as the fines or rents of church lands were raised on renewal, according to the value of the property at the time. The fines might thus be raised so as to leave her no beneficial interest in the lease, but the whole must go to him who had the sub-lease at a rent certain. It was clear that Mrs. Archbold did not understand the nature and consequences of this contract at the time she

entered into it; and equity would not order performance of a contract so improvident under such circumstances, though she had been possessed of the absolute interest. But she was only a trustee or administratrix of her children, and could not be allowed to conclude them by a contract so unreasonable. An administratrix paying her own debt to a third person out of the effects of the intestate, the money might be followed by a legatee, even in the hands of the innncent third person.

May 7, 1813.

CASE OF A CHURCH LEASE.

Willan and Willan, 16 Vesey, 72. Mortlock and Buller, 10 Vesey, 292. Mead and Lord Orrery, 3 Atkins, 235.

Lord Eldon (Chancellor). This was clearly a case where the rule, that the penalty was not to be considered as of the essence of the contract, did not apply. The option was meant as an alternative; it was of the essence of the contract, and the only way to make it reasonable; otherwise the contract would have been bad, though she had been the absolute owner; but she was administratrix of her children, and could not bind their interests by a lease so very improvident.

Judgment. This is not a case where the rule, that the penalty was to be considered merely as a further security, could apply.

Lord Redesdale. These leases with covenant of perpetual renewal arose in Ireland, instead of fee-farms. Persons purchased improveable estates; but having no money to carry on their improvements, they procured it in this manner: they paid, for example, 15,000*l.* for an estate, and conveyed it to another in fee-simple for 10,000*l.*, taking a lease of the whole, with covenant for perpetual renewal, at a rent equal to the interest of the 10,000*l.* There were many such leases, and they had a claim in reason and justice to be supported.

How these leases with covenant of perpetual renewal originated in Ireland.

But this sub-lease was of a different description.

May 7, 1813.

CASE OF A CHURCH LEASE.

This lease would have been bad though Mrs. Archbold had had the absolute interest. *A fortiori* it was bad because she could not bind her children. Whether she could bind her children even to the payment of the penalty?

It would have been bad under the circumstances, though Mrs. Archbold had had the absolute interest in the original lease; but she had not that absolute interest; part of it was in her children, for whom she was administratrix. In both views it was bad, unless combined with the option of paying the penalty. How far she could bind her children even as to the payment of the penalty he would not say at that time.

The decree of the Court below affirmed, without prejudice to any remedy the Appellant might have at law, &c.; possession being immediately delivered, and no writ of error to be brought in the action of ejectment brought in one of the Courts below; and leave given to apply to the Lords in regard to mesne profits, pursuant to an undertaking by the agents.

The action of ejectment above-mentioned was brought at the expiration of the sub-lease, and judgment given in favour of the Respondent. The Appellant had obtained an order from the Lords to stay proceedings upon this judgment, upon an undertaking to the above effect by his agent.

June 2, 1813. Mr. Shadwell now applied on the part of the Respondents for an order for payment of the profits during eight months, being the time the Respondents had been kept out of possession by the stay of the proceedings. If there should be a difficulty about a criterion of value, their Lordships would give them leave to produce affidavits to that point, or remit the cause to the Court below, with directions to ascertain the value and order payment.

An objection to the jurisdiction was made on the part of the Appellant, as the appeal had been already disposed of; but the Chancellor had no doubt but the House had jurisdiction founded on the undertaking of the agents.

May 7, 1813.

CASE OF A CHURCH LEASE.

It was accordingly ordered that the Court below should cause an account to be taken, and payment to be made of what was due up to the time of delivering possession.

SCOTLAND.

ERROR FROM THE COURT OF EXCHEQUER.

WALKER—*Plaintiff in Error.*

ADVOCATE GENERAL—*Defendant in Error.*

THE agent of the owner of an estate, to be sold at auction, attends at the place and time of sale; mentions the upset price, but no bidders. He gives notice that he will be ready to treat for a sale by private bargain. Soon after he is called into a private room by some of those who attended at the public meeting, and they give him offers in writing. He engages, before inspecting the offers, that the highest offer shall be accepted; and it is accepted accordingly. Question, Whether this be a sale at auction under the acts of the 17th George 3, c. 50, and 19th George 3, c. 56?

July 8, 1813.

CASE UPON THE AUCTION ACTS, 17 AND 19 GEO. III.

THE estates of *Foodie*, *Davisie*, and others, in Fifeshire, belonging to the trustees of the Marchioness of Titchfield, were advertised to be sold by public auction, at Edinburgh, and a number of per-

July 1801.