IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

CHADWICK—*Appellant.*
BRADSHAW—*Respondent.*

BILL for specific performance against several Defendants, to one of whom the subject in dispute had been devised by Plaintiff's ancestor. This Defendant, however, by his answer, and on examination as a witness in the same cause, declares himself only a trustee for Plaintiff. Decree in Irish Exchequer, that the beneficial interest was in this Defendant. Held by the House of Lords on appeal, that the deposition of the Defendant as a witness ought not to have been received, and that the decree was wrong in declaring the beneficial interest to have been in a Defendant who admitted that he was only trustee for Plaintiff; for if the beneficial interest had really been in the Defendant, Plaintiff had no right to file the bill, and the course would have been to have dismissed it. Decree varied accordingly.

May 20, June 1, 1814.

SPECIFIC PERFORMANCE.—DECREE.

WILLIAM CHADWICK, (the Appellant's father,) being entitled to certain lands called Longstone, &c. in the county of Tipperary, under a lease for three lives, renewable for ever on payment of a year's rent on the renewal of each life, in December, 1753, entered into an agreement with Robert Bradshaw, Respondent's ancestor, to grant a lease of the lands to Robert Bradshaw, for three lives, at the rent of 1*l.* per acre, the lease to contain a covenant for perpetual renewal at a pepper-corn fine on the fall of each life. This agreement was registered in proper form on 12th February, 1754. No lease,

Agreement.

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however was executed in pursuance of this agreement. Robert Bradshaw died in 1779, leaving his brother, David Bradshaw, his heir at law, but having previously made a will, by which he devised and bequeathed all his real and personal property to one William Hiffernan, subject to the payment of his debts and legacies. Hiffernan declined to prove, or avail himself of the will. The agreement having come to Hiffernan's hands, was by him delivered to one Scott, an attorney, to be produced in some equity cause, by whom it was mislaid, or lost. Robert Bradshaw's creditors took possession of the lands in question. David Bradshaw died, having devised and bequeathed his real and personal property to Hugh and Edward Lloyd, as trustees for his son, Joseph Bradshaw, the Respondent. William Chadwick having died in 1803, his son, Richard Chadwick, the Appellant, in 1805, brought his ejectment in the Court of Exchequer to recover possession of the lands, to which—as no lease had been executed pursuant to the agreement—the Respondent could make no defence at law. But, in March, 1805, he filed his bill on the equity side of the Exchequer, against Richard Chadwick, Hiffernan, and Edward Lloyd, surviving trustee under David Bradshaw's will, praying a specific performance, by the execution of a lease to Joseph Bradshaw, or to Hiffernan, in trust for him and the creditors of Robert Bradshaw. Chadwick, in answer, denied that the alleged agreement had ever existed, or, if it ever had existed, he insisted that it had been unduly obtained. Hiffernan admitted Bradshaw's title, and declared himself a trustee for him.

Devise and bequest to Defendant Hiffernan.

Hiffernan declines to avail himself of the will.

Ejectment, 1805.

Bill filed, 1805.

Lloyd also having answered, witnesses were examined, and among the rest Hiffernan, who gave the above account of the agreement, and a copy of it being produced, he did not take upon him to swear that it was a true copy. The existence of the agreement had however been admitted on oath in more than one cause in the Court of Chancery by the Appellant's father. Hiffernan also admitted that he was assisting the attorney for the Respondent with money to carry on the suit.

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Defendant Hiffernan examined as a witness.

The Court of Exchequer, on the 17th of June, 1809, decreed, "*that the said Defendant, William Hiffernan, as devisee of the said Robert Bradshaw, deceased, was entitled to the beneficial interest in the lands and premises in the pleadings mentioned,* subject to the debts, legacies, and other incumbrances mentioned in the will of the said Robert Bradshaw, *and the said Defendant, William Hiffernan, was decreed entitled to a specific execution of the covenant for perpetual renewal,* said to be contained in the alleged article of 1753; and that the Appellant, the said Richard Chadwick, should execute a lease to the said Defendant, William Hiffernan, at the rent mentioned in the said articles of the 29th day of December, 1753, for the lives in the Plaintiff's bill mentioned, and upon payment of all rent and arrears of rent due out of the said lands and premises, and that it should be referred to the officer to take an account of the said rent and arrears of rent, and also to take an account of what the Appellant, the said Richard Chadwick, had made, or without wilful default might have made, since the

Decree, 1809.

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"execution of the *habere* in the pleadings men-
" tioned, and to set one off against the other, and
" strike a balance; and that an injunction should
" issue *to put the said William Hiffernan into pos-*
" *session of the lands and premises* in the pleadings
" mentioned, and to quiet and establish him and
" them therein from time to time, as occasion
" should require."

Appeals.

From this decree Chadwick appealed, and—Bradshaw having died—his son entered his cross, appeal against the decree, in as far as it declared the beneficial interest to be in Hiffernan, and not in himself.

Romilly and *Trollope* for Appellant in original, and Respondent in cross appeal. *Leach* and *Wingfield* for Respondent in original, and Appellant in cross appeal.

June 1, 1814. Observations in Judgment. Case stated.

Lord Redesdale. This case was founded on an agreement between the father of Chadwick and Robert Bradshaw for a lease of certain premises to the latter for lives renewable for ever at a fixed rent and the payment of a pepper-corn fine; and the rent and fines remaining therefore the same, there was no question about them. Chadwick permitted a long enjoyment by the Bradshaws, with whom the lands continued till the time of the ejectment, to which, as no lease had been executed pursuant to the agreement, no defence could be made at law.

Then the bill was filed, stating the agreement in 1753, and its registration in 1754, so that it was

binding, if there was no ground for avoiding it,— the registration there giving a priority to equitable contracts, which was not the case in this country; stating also the devise by R. Bradshaw to Hiffernan, who admitted himself to be only a trustee for David Bradshaw, and praying an injunction, and execution of a lease, pursuant to the agreement, to Joseph Bradshaw, (son of David Bradshaw,) or to Hiffernan, in trust for him. The objection was, that the agreement was not produced, and that there was no such agreement; and that if there had been any such, there was reason to presume, from the length that had elapsed without an attempt to carry it into execution, that it had been obtained by undue means. The bill was amended by making Lloyd, surviving trustee under David Bradshaw's will, a Defendant. Hiffernan by his answer admitted his being only a trustee. He was also examined as a witness, and proved that the article had existed, but did not swear that a paper produced and purporting to be a copy was a true copy; and he stated that he had assisted the Plaintiff's attorney with money to carry on the suit. It appeared to him that Hiffernan's deposition ought not to have been admitted in the cause, but however it was read, and then it was ordered and adjudged, (states the decree, *vide ante*.) This decree was appealed from, and Joseph Bradshaw and William Hiffernan and Lloyd having died, the appeal was duly revived; and David Bradshaw, the son of Joseph Bradshaw, entered his cross appeal against the decree, so far as it declared the beneficial interest to be in Hiffernan.

Defendant Hiffernan's deposition as a witness ought not to have been received in evidence.

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The objection to the decree was, that there was no evidence of the agreement, Hiffernan's evidence having been improperly admitted; and that the decree had been made, not in favour of the Plaintiff, but in favour of Hiffernan, a defendant.

Existence of the agreement clearly proved.

As to the existence of the paper-writing or agreement, that had been clearly proved, as Chadwick's father had admitted it in an answer in Chancery, and had filed a bill upon the foundation of it, supported by an affidavit stating the agreement, so that there could be no doubt or question as to that.

The next objection was to the form of the decree, stating the beneficial interest to be in Hiffernan, subject to the debts, &c. If Hiffernan had the beneficial interest, the bill was improperly filed by Bradshaw, who had no interest; and no decree could properly be made against one Defendant in favour of another on a bill filed by a person who had no interest; and so far the decree was wrong.

Decree wrong in making Hiffernan beneficially entitled.

But though wrong in form, decree right in substance.

But Hiffernan having declared himself merely a trustee, the consequence was, that the beneficial interest was in those claiming under David Bradshaw, who had devised to Lloyd in trust for Joseph Bradshaw, the Plaintiff; and consequently Joseph Bradshaw had a right to file the bill, as the interest was in him, subject to the debts and legacies of Robert and David Bradshaw. So that, though wrong in form, the decree was not so in substance, and the cross appeal had brought that point before their Lordships. Hiffernan was entitled as trustee for David Bradshaw and his representatives, subject as above,—the ultimate interest being in Joseph Bradshaw. Then it would be proper that the decree

should be varied in these particulars, by declaring, that the deposition of Hiffernan as a witness ought not to have been received in evidence at the hearing of the cause; that the representatives of Robert Bradshaw were entitled to the benefit of the contract, such contract appearing to have been admitted by Richard Chadwick's father in an answer to a bill in Chancery, and Hiffernan also admitting that he was merely a trustee, &c.; that, the representative of Joseph Bradshaw was entitled to the ultimate interest, subject as above; and that a lease should be executed in trust for these purposes.

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Lord Eldon (Chancellor.) He had no doubt but the decree was perfectly wrong in form. The bill had been filed by the Plaintiff on the ground that the beneficial interest was in him. The decree was, that it was in a Defendant; and if so, the course would have been to have dismissed the bill.

If the beneficial interest was in Defendant, the bill ought to have been dismissed, as Plaintiff had no interest.

Two objections had been stated at the bar:—1st, That the agreement had never existed. 2d, That the evidence of Hiffernan ought not to have been admitted; and it was singular, certainly, if they had made Hiffernan beneficially entitled on his own evidence. But it clearly appeared that the agreement had existed, though the evidence by which that fact was proved seemed to have come by surprise on the Counsel. The proof of its existence did not depend at all on the evidence of Hiffernan, which he agreed ought not to have been received.

Hiffernan's evidence ought not to have been received, but the agreement proved independent of it.

But then it was said, that the Plaintiff had not the beneficial interest at the time of the bill filed; and that Hiffernan having declared himself a trustee *since* was not sufficient. But the answer was, that

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if Hiffernan, the devisee, did not choose to take the beneficial interest, it was proper that the heir at law should take it; and therefore the decree was substantially right.

Judgment. Decree altered accordingly, and *affirmed*.

Agents for Appellant, CANNON and GARGRAVE.
Agents for Respondent, FEW, ASHMORE, and HAMILTON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

LORD SEAFORTH—*Appellant*.
HUME—*Respondent*.

Dec. 8, 1813.
June 1, 1814.

HIGHLAND BOUNDARIES.

THE possession of shealings very strong evidence of the right, in questions of Highland boundaries. The circumstance that the burying of charcoal is a common mode of marking Highland boundaries questioned, on account of its apparent inaptitude in a country of that description.

THIS was a conjoined process of declarator and suspension, instituted by the Respondent, to have the proper boundaries in the island of Lewis ascertained between himself and the Appellant. On Lord Seaforth's part, there was evidence of an agreement between his ancestor and Hume's predecessor, that the march should be settled in the line contended