

May 10, 1815.

TITLE.—
PRESCRIP-
TION.

mitted to me in another way. And upon the best consideration which I have been enabled to bestow upon these causes (and I can assure your Lordships I have bestowed a great deal upon them) I cannot offer your Lordships my advice to reverse either of these Judgments. I see by the papers that costs have been claimed in both cases; but where points of so much importance arose for consideration I cannot say that it was at all improper to bring these cases before your Lordships for your opinion; and therefore I should propose to your Lordships to affirm the judgments, but without costs.

Judgments *affirmed*.

Agent for Appellant, CAMPBELL,
Agent for Respondent, FRASER.

IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER,

PHAYRE—*Appellant*.

Representatives of PEREE—*Respondents*.

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A trust fund of 15000*l.*, created under a marriage settlement by which certain lands were limited to the husband for life, remainder to the first and other sons in tail, with a power to the husband of leasing for forty-one years, or three lives at the best rent, was directed by the deed to be laid out with all convenient speed, in the purchase of lands in fee simple, to be conveyed and limited to the same uses as the other lands mentioned in the settlement, and in the mean time the trustees were empowered with the

consent of Phayre to lend out the money on any public or private security. The husband purchased a leasehold interest for 8911*l.*, to which he took the assignment for himself alone, and obtained from the trustees, out of the trust fund, money to complete the purchase, and for other purposes, to the amount in all of 11696*l.* as a security for which they took a mortgage of the leasehold interest and a collateral security for 1310*l.*, amounting with the purchase money to 10221*l.*, being upwards of 1400*l.* less than the sum advanced out of the trust fund. The husband granted a lease at a great under-value for his own term, of part of the purchased lands, to the attorney who managed the purchase for him, which purchase turned out a very beneficial one. Held by the House of Lords, reversing a decree of the Irish Exchequer, that the first son of the marriage was entitled to follow that part of the trust fund which had been misapplied, and to have the benefit of the purchase, and to have the lands sold discharged of the lease to the attorney, whose equity against him (the son) as personal representative of his father, was barred by notice of the settlement and breach of trust.

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IN contemplation of a marriage which afterwards took place between Robert Phayre, the elder, the Appellant's father, and the Honourable Richarda Annesley, a deed of settlement dated July 13, 1761, was executed, by which the said Robert Phayre the elder conveyed certain lands and tenements therein mentioned to the Hon. Arthur Saunders Gore, then called Lord Sudley, afterwards Earl of Arran, one of the Defendants, and Thomas Patrickson, trustees therein named, to the use of the said Robert Phayre the elder, for his life, with remainder to the first and every other son of the said marriage successively, in tail male, with remainders over; in which deed of settlement was contained a leasing power, whereby Phayre the elder was empowered from time to time during his

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life to demise the said settled lands, and also all such other lands as should thereafter be purchased with part of a trust fund of 19,000*l.* created by the settlement, and thereby vested in the said trustees, or any part or parts thereof, for any terms or number of years not exceeding forty-one years, or three lives in possession, and not in reversion, remainder, or expectancy; and so as upon every such lease there should be reserved and made payable during the continuance thereof, the best and most improved rent that could be reasonably had for the same, without taking any sum of money or other thing by way of fine or income, for or in respect of such lease or leases. By this settlement, a sum of 15,000*l.*, part of the trust fund of 19,000*l.*, was directed to be laid out, with all convenient speed after the execution of the settlement, by the trustees, with the consent of Phayre the elder, in the purchase of lands, tenements, or hereditaments, in fee-simple in Ireland, and that such lands, when so purchased, should be conveyed and assured in strict settlement, and to the like uses and purposes, and with the same limitations as were contained in the settlement, with respect to the lands and other fee-simple estates therein limited in strict settlement; and a power was thereby given to the said trustees, until such purchase should be made, to call in the trust funds, and to place the same out at interest on any public or private security, with the approbation of Phayre the elder, during his life, and after his death with the approbation of the person or persons to whom the right of the said money should belong, under the limitations therein mentioned.

Robert Phayre the elder, Appellant's father, on the 6th of February, 1764, entered into an agreement, in writing, with a person of the name of Sarah Cooley, for the purchase of the interest in the lands of Davidstown and Ballynockan, and other lands in the said county of Wexford, which she held for the residue of a term of 2000 years, commencing on or about the 1st day of April, 1667, and which agreement having been reduced into writing by articles bearing date on 6th Feb. 1764; Sarah Cooley afterwards, in pursuance of these articles of agreement, in consideration of the sum of 8911*l.* 12*s.* 9*d.* to her paid by Phayre the elder, and which sum of 8911*l.* 12*s.* 9*d.* was part of the sum of 15,000*l.* vested in the trustees, "by deed bearing date 23d October, 1765, granted, assigned, and conveyed unto the said Robert Phayre the elder, his executors, administrators, and assigns, the said lands of Davidstown and Ballynockan, for the then residue of the said term of 2000 years, for his and their own use and benefit." The next day after the execution of this assignment by Sarah Cooley, a deed purporting to be a deed of mortgage was executed by and between Phayre the elder, and the trustees, reciting the marriage settlement of 1761, and the trust fund and the use thereof, as mentioned in the settlement: and that 8200*l.* of the trust fund had been theretofore paid in to Phayre the elder, and that he had laid out the greatest part thereof in the purchase of a leasehold interest for a long term of years, of lands in Wexford, from Sarah Cooley, and that the said Robert Phayre had occasion for the farther sum of 3856*l.* to complete

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the purchase; and that he had applied to the trustees to call in the sum of 3098*l.* 6*s.* 3*d.*, part of the said trust fund, and to lend the same to him, or so much thereof as would pay the remainder of the purchase money, and enable him to procure a legal assignment of the said leasehold interest, and that they had accordingly done so; and that the said Robert Phayre had then in his hands the sum of 11,696*l.* of the said trust fund: and also reciting the deed of assignment from Cooley to Phayre; by which mortgage deed Robert Phayre the elder assigned and conveyed to the trustees all his estate and interest in the said term of years, in consideration of the said sum of 11,696*l.*, and also assigned to them securities for 1310*l.* 4*s.* of his own property, as a collateral security, all subject to redemption on payment of the 11,696*l.* with interest.

The articles of agreement, the assignment of the purchased lands to Phayre, and the mortgage to the trustees, were all prepared by Phayre's attorney, Thomas Peree, who therefore had notice of the marriage settlement, and the nature and terms of it, as it was recited in the mortgage deed; and the money thereby secured was expressly made subject to the uses of the trust fund mentioned in the settlement.

It was in evidence in the cause that in May, 1764, soon after the agreement with Sarah Cooley, and before the purchase was completed, Peree had applied to Phayre for a lease of part of the lands, and on the 20th April, 1767, Phayre executed to Peree a lease of that part of the lands known under the denominations of Davidstown and Ballynockan, "containing 227 acres and upwards, together with

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“ all timber and other trees then growing or there-
 “ after to grow on any part thereof, to commence
 “ on the first day of May then next, for a term of
 “ 1800 years, at the yearly rent of 36*l.* 8*s.* for the
 “ first six years, and at the yearly rent of 80*l.* for
 “ the remainder of the term.” It was in evidence
 that the rent was far below the value, and certain
 letters from Perce to Phayre were produced and
 proved, in one of which, dated 14th June, 1766,
 he objected to the terms required by Phayre, and
 then stated his reasons for thinking that he ought
 to have the lease on lower terms, in the following
 words :—“ I must certainly lay out some money
 “ to erect a decent dwelling and offices, with other
 “ improvements; and therefore conceive, even in
 “ that light, I am not to be put upon a footing
 “ with the common run of farmers; and as I have
 “ the vanity to think in the article of paying rent
 “ I am entitled to a preference to them and abate-
 “ ment, I imagine a difference of at least two
 “ shillings an acre ought to be made on those con-
 “ siderations, and I think I may reasonably expect
 “ it, and the rather as you well know, had I acted
 “ upon the principles of many people in the world,
 “ I might have been at liberty of purchasing any one
 “ denomination of the estate on the same terms you
 “ did at the time you agreed for that; and add to
 “ this, that if this takes place, whatever demand I
 “ have to you, which you may believe from matters
 “ of this nature is no trifle, shall sink from thence-
 “ forth.” It also appeared that Perce had procured
 opinions of counsel upon cases manufactured for the
 purpose, in order to induce the trustees to consent to
 these transactions.

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Bill filed 9th
June, 1792.

Phayre the elder died in 1786, leaving the Appellant his eldest son of the above-mentioned marriage. He had made a will; but the executors renounced, and administration with the will annexed was granted to the Appellant, who was the residuary legatee. It appeared from the counterpart of the lease which came into the Appellant's possession on the death of his father, that the trustees who were considered as having the legal estate in them, in virtue of the mortgage of 24th October, 1765, had not executed it; and the Appellant brought an ejectment, on the demises of himself and the trustees, to recover possession of the lands let to Peree. But before trial it was found that the trustees had, by indorsement on the back of Peree's part of the lease, confirmed and ratified it as far as they had power to do so, and the ejectment was abandoned. The Appellant then on the 9th June, 1792, filed his bill in the Exchequer to have the lease to Peree decreed fraudulent and void: 1st, as being a fraud on the settlement and leasing power contained in it; 2d, as having been obtained from Phayre the father by fraud and undue influence, and at a gross undervalue, at a time when Phayre and Peree stood in the relation of attorney and client. Thomas Peree died before answer, and the suit being revived against his representatives, and issue being joined, and witnesses examined, and the bill being amended by making the Earl of Arran the surviving trustee a party, the cause came on to be heard on the 16th Nov. 1804. The Court of Exchequer were divided in opinion, the Chief Baron, Lord Avenmore, and one of the puisne Barons, being of opinion that the

Appellant was entitled to the relief prayed by the bill, and the other two Barons being of opinion that the bill ought to be dismissed. It was agreed however to dismiss the bill without costs, to give an opportunity to appeal, and to avoid changing the possession during its pendency. The Appellant then lodged his appeal.

It was contended for the Appellant, that there was fraud and breach of trust, 1st, in the purchase of the leasehold interest of Sarah Cooley, for the benefit of Phayre alone; whereas, under the settlement, the money ought to have been applied in the purchase of fee simple estates for the uses and according to the terms of the settlement; 2d, in taking as a security for 11,600*l.* advanced out of the trust fund, lands purchased at 891*l.* along with collateral securities for 1310*l.*, being together about 1400*l.* short of the sum advanced; 3d, in confirming the lease made to Peree at a gross undervalue: that Peree's lease was obtained by undue influence and imposition on Phayre and the trustees, besides being a fraud on the settlement; that the act of the trustees could not prejudice the *cestui que trust*, and that the Appellant was entitled to the benefit of the purchase from Cooley, the consideration for which was paid out of the trust fund, and that he was entitled to have the lands sold, discharged of Peree's lease, and the proceeds invested in fee simple estates for the uses of the settlement, and that Peree's equity as against the Appellant was barred by the notice.

For the Respondents it was contended, that there were many cases where the *cestui que trust* could not follow the trust money; that the trustees had

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power to lend out the money on securities, and they had accordingly taken these lands as a security, without clothing them with the trust; and that the Appellant could therefore only demand the amount of the loan or money secured, and not the lands themselves, and had therefore no right to set aside the lease to Peree, if the security was sufficient.

Romilly and *Horne* for Appellant; *Leach* and *Horner* for Respondents.

The cause stood over for a few weeks, that some person might appear for the Earl of Arran, or his representatives. Counsel appeared at the bar accordingly, and stated that he was instructed merely to appear without saying any thing.

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Judgment.

Lord Redesdale. This suit, which originated in the Court of Exchequer in Ireland, was founded on a settlement dated 13th July, 1761, made on occasion of the marriage of Robert Phayre the elder, the Appellant's father, with Richarda Annesley, by which the father conveyed certain lands and tenements therein mentioned, to the Hon. Arthur Saunders Gore, then called Lord Sudley, afterwards Earl of Arran, and another person who died soon after, as trustees to the use of Phayre the father, for life, remainder to the first and every other son of the marriage successively in tail male; with remainders over. And the settlement contained a leasing power, by which R. Phayre, the father, was empowered from time to time during his life to demise the settled lands, and also other lands to be purchased with a trust fund of 10,000*l.*

to be created by the settlement, and vested in the trustees, or any part or parts thereof, for any term or number of years not exceeding forty-one years, or three lives in possession, and not in reversion, remainder, or expectancy, reserving the best and most improved rent that could be reasonably had for the same without taking any fine. By this settlement a sum of 15,000*l.*, part of the trust fund of 19,000*l.*, was directed to be laid out by the trustees, Lord Sudley and Thomas Patrickson, with the consent of Phayre the father, in the purchase of lands in fee simple, to be conveyed and assured to the same uses and purposes as the other lands in the settlement. And power was given to the trustees to call in the trust funds, and to place the same out at interest with the approbation of Phayre the elder, during his life and after his death, with the approbation of the person or persons to whom the right of the money should belong, under the limitations in the settlement. This trust fund was partly composed of judgment debt due to Phayre, and partly of a mortgage debt, all which were specified in the settlement. After the marriage, Phayre the elder entered into an agreement with one Sarah Cooley, for the purchase of her interest in certain lands which she held for the residue of a term of 2000 years, commencing on the 1st of April, 1667. This agreement was reduced into writing by articles dated 6th Feb. 1764, by which, in consideration of a sum of 8911*l.* paid her by Phayre, which sum was part of the sum of 15,000*l.* vested in the trustees for the purposes of the settlement, Sarah Cooley assigned her lease of the lands to Phayre, his executors, administrators, and assigns, for the

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remainder of the term. The purchase was in point of form therefore made by Phayre for his own benefit, but the purchase money was clearly part of the trust fund. Then a deed in the form of a mortgage was made and executed by and between Phayre the father, and the trustees, reciting the marriage settlement, the trust fund, and the purposes of it, and that the sum of 8200*l.* secured by judgments as mentioned in the settlement, had been paid to Phayre, and that he had laid out the greater part of it in the purchase of the leasehold interest of Sarah Cooley, in the lands mentioned, and that he had occasion for a farther sum of 3856*l.* to complete the purchase, and that he had applied to the trustees to call in a sum of 3998*l.* due upon the mortgage mentioned in the settlement, being part of the trust fund, and to lend the same or as much thereof as would enable him to complete the purchase, and that they had accordingly done so; and that Phayre had then in his hands a sum of 11,696*l.* of the trust fund, and Phayre by the said deed of mortgage of October 24, 1765, assigned and conveyed all his estate and interest in the said purchased lands to the trustees in consideration of the said sum of 11,696*l.*, and also assigned to them securities for 1310*l.* of his own property as a collateral security subject to redemption on payment of the said sum of 11,696*l.* with interest.

Your Lordships observe therefore that this was a mortgage of a leasehold interest purchased for a sum of 8911*l.* part of the trust property, in addition to a collateral security of 1310*l.* making together a sum of 10,221*l.* in order to secure a sum of 11,696*l.* advanced to Phayre out of the trust

fund; so that this was a very improper transaction in the trustees, independent of the other circumstances in the case. In fact however this turned out a beneficial purchase, and it was contended that the benefit belonged to Phayre alone, though the money was advanced out of the trust fund, and applied in the purchase of this leasehold interest instead of being applied in the purchase of lands in fee simple, to be limited according to the terms of the settlement. The articles of agreement, the assignment, and this mortgage, were all prepared by Peree, who was the attorney and confidential agent of Phayre in such transactions, so that Peree was perfectly acquainted with the settlement, and must have known that this was a gross misapplication of the trust fund. Peree, having thus assisted Phayre, seems to have thought that a share of the benefit ought to arise to himself, and proposed that Phayre should execute to him a lease of a portion of the said purchased lands amounting to 227 acres and upwards, together with all timber and other trees then growing or thereafter to grow on the same or any part thereof, to commence on the 1st of May 1767, for a term of 1800 years, at the yearly rent of 36*l.* 8*s.* for the first six years, and the yearly rent of 80*l.* for the remainder of the term. My Lords, it is perfectly clear that this was less than the value of the lands, and it is also clear that the lease was obtained from Phayre under circumstances which created an impression that Phayre was under a sort of obligation to Peree for managing this business with the trustees. Opinions of counsel, upon cases manufactured for the purpose, had been produced; but when these came to be looked at

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Improper in the trustees to accept an inadequate security.

Notice.

Lease to Peree.

June 28, 1815. it appeared that Sir A. Wolfe, then a celebrated lawyer especially in matters of conveyancing, clearly considered the transactions as improper, though he expressed himself in delicate terms with respect to Phayre. The pretence, as stated expressly in Peree's letter, for having the lease at a lower rent than the common run of farmers, was, that he intended to build a mansion house and offices, and to make other improvements on the lands. Now the building a mansion house and offices on lands let for 1800 years, with a view to the benefit of the person who would be entitled at the end of that period, could not be any real inducement; so that advantage appears to have been taken of the situation in which Phayre stood with respect to the property.

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Peree's letter.

The suit has been instituted with a view different from that which your Lordships must take of it; for your Lordships must look at the case not with reference to the objects of the parties, but with a view to the effect of the decision as it may concern all others in similar circumstances. It is quite clear that if the trustees had purchased this interest, or taken this lease, for themselves, all the benefit would have belonged to the trust fund; for it is perfectly settled that trustees can never deal with the trust fund for their own benefit; nor could Phayre the father, who was only tenant for life, take the purchase for his own benefit solely. This was a very beneficial leasehold interest, but the benefit must belong to the trust fund. If a purchase of stock had been made in the name of Phayre with the trust money, and the funds had risen, according to innumerable cases in the Courts of Equity, the

Trustees cannot deal with the trust fund for their own benefit.

If stock is purchased with trust money, in whatever name it may stand, the profit belongs to the trust fund.

profit must belong to the trust fund. I think then there is no doubt that the situation of Peree with respect to this lease is not such as to entitle him to claim the benefit of it as against the Appellant, tenant in tail under the settlement.

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But the Appellant stands in two different situations, being tenant in tail under the settlement, and also personal representative of his father. Under the first character he is clearly discharged, because Peree certainly had complete notice of the nature of the settlement, and of the misapplication of the trust fund, as he prepared the cases for counsel, and was employed in all these transactions. He therefore could not maintain his claim against the tenant in tail under the settlement; and no doubt the property must be considered as having vested in the trustees, not in the nature of a mortgage, but as part of the trust property which was subject to be sold and laid out in the purchase of lands in fee simple, for the uses and according to the terms of the settlement. It appears that the trustees had been prevailed upon to sign an approval of the lease. But Peree could not avail himself of that circumstance, as he must have known that they were acting contrary to their trust, and that they had no right to stand as mortgagees of this property, in which character only they confirmed the lease. The Appellant then had a right to pursue this property, as it had been vested in the trustees for the uses and purposes of the settlement, and as the act of the trustees in confirming the lease was a breach of their trust, of which Peree had full notice. The consequence is that he (the Appellant) is entitled to have the benefit of the

A person who has notice cannot avail himself of an act of trustees in breach of their trust.

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lease from the time of his father's death, to have the property sold, and the produce applied to the purchase of fee simple lands for the uses of the settlement.

The question then is, whether Peree has a claim against the son, as the personal representative of the father. If this transaction had taken place in the common course of dealing between lessor and lessee, and Peree had no notice of the real state of the case, there would be no ground for contending that the Appellant was not answerable. But that is not the nature of this transaction. Peree knew all, and the lease was his reward for managing the business; so that it was obtained by taking advantage of the situation in which Phayre the father found himself with respect to this property, and was therefore a fraud upon him. It was a fraud likewise if considered as resting on the representation in Peree's letter, which never could be a fair ground for such a transaction. To represent that the lease ought to be granted at a lower rent than might otherwise be justly demanded for it, because the lessee of a term of 1800 years intended to build a dwelling house and offices on the property which was the subject of the lease, was such a manifest imposition, or such a clear proof of improper influence, that the transaction never could stand on that ground. There was no foundation therefore for any claim by Peree, in respect of this transaction, against the assets of the late Mr. Phayre.

The Court of Exchequer having then dismissed the bill without acting with regard to the trust property, as I apprehend they were bound to act, it is necessary to reverse the decree in as far as it dis-

misses the bill, and to declare that the purchase of the leasehold interest in the lands mentioned in the articles of agreement of 6th Feb. 1764, between Phayre the elder, and Sarah Cooley, and the assignment of 23d Oct. 1765, of the said leasehold interest to Phayre for his own benefit, and the mortgage and assignment of 24th Oct. 1765, ought to be deemed a fraud in Phayre the father, and in Peree, and an imposition on the trustees; for it is manifest that a great deal of art was employed to impose on the trustees, by procuring and showing opinions of counsel on manufactured cases: and also to declare that neither Phayre the elder, nor Peree, ought to have the benefit of the said purchase or lease, and that the Appellant as tenant in tail under the settlement is entitled to the benefit of the lease to Peree from the time of his father's death, and to have the lands sold discharged of the said lease, and to have the produce applied to the uses and purposes of the settlement; and to declare that the Appellant is entitled to stand as a creditor on the assets of his father, for the difference between the sum of 11,696*l.* which had got into his hands out of the trust fund, and the sum of 8911*l.* which had been paid to Sarah Cooley, as the consideration for her leasehold interest in these lands, and that the lands ought to be sold discharged of the mortgage to the trustees, and the money applied to the purchase of lands in fee simple for the uses and according to the terms of the settlement: and to declare that the lease to Peree, and the confirmation of it by the trustees, was a fraud on the marriage settlement, on the trustees, and on Phayre the father; and that the cause should be remitted

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to the Court of Exchequer, to have an account taken of the rents and profits of the lands and premises comprised in the said lease, come into the hands of Perce and his representatives since the death of the Appellant's father, and that, after all just allowances made, the same should be paid and applied according to the settlement, and that all proper directions should be given by the Court for that purpose; and that as the bill had been dismissed, no costs ought to be given on either side up to this time, but that it should be referred to the Court of Exchequer, to make such order as to future costs as it might judge proper. This is the way in which it appears to me fitting that the cause should be disposed of.

Lord Eldon (C.) I feel obliged to my noble friend for having gone so fully into the merits of the cause, as I cannot at present state my own view of it at so much length as I should wish to do if I had not the benefit of his assistance.* But I have had an opportunity of considering every point of the cause, and of discussing them with the noble Lord, and I rise to declare my entire concurrence in all that he has stated.

Decree accordingly reversed.

Agents for Appellant, DAWSON and WRATISLAW.

Agent for Respondents, —————

* He had just recovered from a severe indisposition.