IRELAND,

APPEAL FROM THE COURT OF EXCHEQUER.

HAMILTON and others—*Appellants.*
GRANT and others—*Respondents.*

March 17, 1815.

AGREEMENT.—SPEC. PER.

SPECIFIC performance of an agreement refused on the ground of the want of specific mutuality, of laches misapprehensions in the party or parties of its nature and effect, inequality, improvidence, and other circumstances appearing in the case.

JOHN LORD BELLEW was in 1751, under a private Irish act of parliament, seized for life of certain estates in the counties of Louth, Meath, and Kildare, with remainder, in case he died without male issue, to his sister Dorothea and the heirs of her body. Lord Bellew appeared to have a power of jointuring a wife in all, or any part, of the estates. Dorothea was in 1751 married to a Mr. David Dickson, afterwards Sir David Dickson. She had been previously married to Gustavus Hamilton, afterwards Lord Boyne, and had issue by him Frederick Hamilton, afterwards Lord Viscount Boyne, who would be entitled to the estates under the above limitation, as heir of the body of Dorothea, in case no act were done to disappoint his succession. Lord Boyne the son, and Dickson his father-in-law, by deed dated September 27, 1751, entered into the following agreement, reciting that "the reversion "and inheritance of several estates in the several

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Agreement.

" counties of Kildare, Meath, and Louth, then in " the seisin and possession of the said John Lord " Baron Bellew, would, on the death of the said " Lord Bellew and the Honourable Dorothea " Dickson, mother of the said Lord Viscount Boyne, " descēnd and come to the said Lord Viscount " Boyne, in case the said David Dickson did not " and would not join the said Dorothea his wife, " and the said John Lord Bellew, in levying fines " and suffering recoveries of the several lands and " premises of which the said John Lord Bellew was " so seized and possessed; and that *the said Lord* " *Viscount Boyne had proposed*, that, in considera- " tion of the said David Dickson's not joining with " the said Dorothea his wife, and the said Lord " Bellew, in levying any fine or fines, or suffering " any recovery or recoveries of all, or any part, of " the lands, tenements, or hereditaments, in the " said several counties, whereof the said John Lord " Bellew was then seized and possessed, he the " said Lord Viscount Boyne, his heirs and assigns, " should and would *immediately* after he or they " should become seized and possessed of all, *or any* " *part*, of the said several lands and premises, by " good and sufficient deeds and conveyances in the " law, grant and convey unto the said David " Dickson, his heirs and assigns for ever, the fee- " simple and inheritance of such part and parcels " of the said lands and premises, whereof the said " Lord Viscount Boyne should be so seized and " possessed, *as the said David Dickson, his heirs* " *or assigns, should choose*, to the clear yearly value " and amount of 200*l.* sterling; and also one an-

" nuity or yearly rent-charge of 200*l.* sterling, to
" be yearly issuing and payable to the said David
" Dickson and his assigns, during his natural life,
" out of all and singular the said estates, lands, and
" premises, whereof the said Lord Viscount Boyne
" should become seized and possessed as aforesaid;
" and further reciting, that the said David Dickson
" had agreed to the said proposal, and in pursuance
" of such agreement the said David Dickson did
" enter into and perfect, unto the said Lord
" Viscount Boyne, one bond or obligation, bearing
" equal date therewith, of the penalty of 10,000*l.*
" sterling, conditioned that he, the said David
" Dickson, would not join with any person or
" persons in levying or suffering any fine or fines,
" recovery or recoveries, of the said premises, or
" any part thereof, without the consent of the said
" Lord Viscount Boyne first had and obtained in
" writing. It was by the said indenture witnessed,
" that, in pursuance of the aforesaid proposal and
" agreement, and in consideration of the said David
" Dickson's not joining with any person or persons
" in levying or suffering any fine or fines, recovery
" or recoveries, of the said estates and premises,
" or any part thereof, and of the said David Dick-
" son's having entered into the said recited bond for
" that purpose, and also in consideration of five
" shillings, he, the said Lord Viscount Boyne, did
" thereby, for himself, his heirs, executors, admi-
" nistrators, and assigns, covenant, promise, and
" agree to, and with the said David Dickson, his
" heirs and assigns, that he, the said Lord Viscount
" Boyne, his heirs or assigns, should and would,

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" *immediately* after he or they should become seized " or possessed of the said estates, lands, tenements, " hereditaments, and premises, whereof the said " John Lord Bellew was then seized, in the several " counties of Kildare, Meath, and Louth, or in " either or any of them, by good and sufficient " deed or deeds, conveyance or conveyances, or " any reasonable assurance whatsoever, such as the " counsel learned in the law of the said Sir David " Dickson, his heirs and assigns, should advise and " require, grant, convey, release and confirm unto " the said David Dickson, his heirs and assigns, " for ever, *the fee simple and inheritance of* such " part of the said lands, tenements, and heredita- " ments, situate in the said counties of Kildare, " Meath, and Louth, or either or any of them, as " the said David Dickson, his heirs or assigns, " should think proper to choose, of the clear yearly " value and amount of 200*l.* sterling; and also one " annuity or yearly rent-charge of 200*l.* sterling, " to be issuing and payable to the said David " Dickson and his assigns for and during the term " of his natural life, to be yearly issuing and paya- " ble out of all and singular the said lands and " premises whereof the said Lord Viscount Boyne " should become seized and possessed by virtue of " the said settlement, act, or acts of parliament, or " either of them; and in the said deed there is " contained a covenant on the part of the said Lord " Boyne for further assurance; and also a covenant " on the part of the said Dickson, whereby he the " said David Dickson, for the considerations afore- " said, did thereby covenant, promise, and agree

" to and with the said Lord Viscount Boyne, his " heirs and assigns, that he the said David Dickson " would not join with any person or persons what- " soever in levying or suffering any fine or fines, " recovery or recoveries, of all or any part of the " said lands, tenements, hereditaments, and pre- " mises, situate in the said several counties of " Kildare, Meath, and Louth, or either or any of " them, or do, commit, or suffer any act, matter, or " thing to prejudice, defeat, or bar the said Lord " Viscount Boyne's title or interest of, in, or to, the " said lands and premises, or any part thereof, " without the consent and approbation of the said " Frederick Lord Viscount Boyne first had and " obtained in writing; and for the true performance " of the said deed, the said parties did thereby bind " themselves, their several and respective heirs, " executors, and administrators, each to the other " of them, his executors and administrators, in the " penal sum of 10,000*l.* sterling."

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Dorothea Dickson died in 1759, Sir D. Dickson in 1765 without issue, leaving his elder brother's three daughters his co-heiresses at law. Lord Bellew died in 1770, and Lord Boyne came into possession of the estates, of which he, by means of fines and recoveries, acquired the fee simple. In the deed leading the uses of these fines and recoveries, it was declared that such fines or recoveries should not be construed so as to confirm any agreement made by him antecedent to the death of Lord Bellew. Lord Boyne died in 1772, without legitimate issue, having previously made a will by which he devised the estates to trustees, in trust for pay-

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ment of his debts &c., and subject thereto, to the use of his three natural sons, Frederick, Gustavus, and Joseph (Joseph died without issue) Hamilton, for life, remainder to their issue in tail male, in distinct parts, the Louth and Kildare estates to one, the Meath estates to the others, with cross remainders among themselves.

Original bill.

The Misses Dickson in 1780 filed a bill in the Court of Exchequer, for spec. per. against F. and G. Hamilton, and others, to which answers were put in, and the cause was allowed to sleep for several years. One of the sisters having died, the other two in 1794 assigned their interest in the agreement to their relation Captain Allan Grant; and another of the sisters having afterwards died, a bill, in the nature of an amended bill and bill of revivor, was filed in 1796 in the name of Helen Dickson, supposed to be then living, without saying any thing as to the assignment. But it was discovered that she too was dead at the time of filing the bill; and Allan Grant in 1800 filed a bill, in the

Amended bill, and bill of revivor.

nature of an amended bill and bill of revivor, in his own name, stating the assignment, and that the bill of 1796 was filed in ignorance of the fact of Helen Dickson's death, and that he was heir at law of the Misses Dickson, as well as their relation by blood, and assignee, and disclaiming the bill of 1796, and praying that the original suit might be revived, &c. The fact of his being heir at law was put in issue, but no evidence of it was produced. The Appellant Frederick Hamilton, son of Frederick Hamilton the elder, in 1801 answered this bill by his father and guardian. In 1804 the

father died, but his personal representative was not brought before the Court. Allan Grant also died, and the suit was revived by Charles Grant, his heir at law, and his executors, the Respondents. There was some evidence in this cause that Lord Boyne was a weak and dissipated man, but owing to the length of time that had elapsed, this evidence did not go so far back as 1751 when the agreement was entered into; though in a former cause, *Hamilton v. Page*, Dom. Proc. 1809, the fact of his being so in 1751 was proved. In 1808 the Court decreed "that the Respondent Charles Grant was "entitled to a specific execution of the covenant "contained in the deed of September 27, 1751, "by a conveyance of so much of the said estates, "comprised or mentioned in the said deed, as were "then, viz. on February 23, 1808, of the clear "yearly value of 200*l.* over and above all out-"goings and reprisals; and that a commission of "perambulation should issue to certain commis-"sioners, to be appointed for that purpose, to set "out so much of the said lands and premises, at "the election of the said Charles Grant, as were "then of the clear yearly value of 200*l.* sterling; "and the Respondents, Thomas Cockburn, Alex-"ander Cockburn, and George Mowbray, were "decreed entitled to an account of what was due "on the foot of said 200*l.* a year from the 26th "day of October, 1796, the time of filing the "amended bill by the said Allan Grant, down to "the time of his death; and the Respondent "Charles Grant was decreed entitled to an account "of the said 200*l.* a year, from the death of the

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Decree.

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"said Allan Grant, to the time of signing the of-"ficer's report." From this decree F. and G. Hamilton appealed.

Romilly and *Phillimore* (for Appellants). There could be no spec. per. of such a thing as one might choose. Dickson could not be called upon for a specific performance, but only for damages, and therefore spec. per. ought not to be decreed in favour of the other party, there being in this particular a want of mutuality. *Collins v. Plummer*, 1 P. Wms. 104. 107. 2 Vern. 635. *Lawrenson v. Butler*, 1 Sch. Lef. 13. et ib. cit. *Bromley v. Jeffries*, 2 Vern. 415. *Armiger v. Clarke*, Bun. 111. The agreement was without consideration, there was no evidence that Boyne derived any benefit from it. The length of time too before attempting to enforce the contract was a reason against spec. performance. *Underwood v. Courtown*, 2 Sch. Lef. 56. The assignment was within the stat. 32 H. 8. against maintenance. (*Eldon*, C. There is no proof that Grant was the heir at law of these ladies, and it is denied in the pleadings. *Redesdale*. If the wife had survived Dickson, suffered a recovery, limited the estates to Lord Boyne for life, and he had survived her, he would have had to answer a fee simple of 200*l*. a year out of a life estate. *Eldon*, C. To have limited to him for life would perhaps have been the most rational course that could be adopted. *Redesdale*. The same bill is made an amended bill and bill of revivor, but they must be taken according to the nature of each. He could only revive in the character of heir at law,

and that ought to be proved. *Eldon*, C. It was insisted in the pleadings that no such bond as that stated in the agreement was ever executed by Dickson. The account given by this decree was from the time of a bill filed in the name of a dead person.) The suit in 1796 was disclaimed by the bill, but the decree adopted it. March 17, 1815. AGREEMENT. —SPEC. PER.

Piggot and *Hart* (for Respondents). In the fair transmission of a contract made for val. con. the assignee stood in the place of the assignor, and the statutes of maintenance, Champerty, &c. had no application whatever. It was a purchase by Dickson of 200*l.* a year, and that was assigned. The only objections below were that this was not in its nature a contract which equity would specifically execute, or, if it was, that the length of time which had elapsed was a good ground for refusing spec. per. And as to the first point, the circumstances showed a consideration, and there was a clear mutuality in Dixon's abstaining from doing the act which he had covenanted not to do. As to the other point, this was a *lis pendens* since 1780, and from that time the objection on account of delay was equally strong against the Defendants, as they might have dismissed the bill, *Hart v. Gifford*, 2 Sch. Lef. 386.—*Cane v. Lord Allen*, 2 Dow. 289. (*Redesdale.* These decrees in the Exchequer don't state what was read at the hearing. This is very wrong.)

Lord Redesdale. The question was whether equity ought to enforce a specific performance of this agreement of 1751; and the Court of Ex- March 20. Judgment.

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chequer in Ireland had decided that it ought. To that decree various objections had been made, and particularly that this was a covenant which, whatever might be the nature of the transactions in 1751 in other respects, ought not to be specifically performed, as the consideration on the part of Dickson was of a description not capable of specific performance, and the agreement not being in that respect mutual, and that if Dickson had any right the Plaintiff ought to be left to his damages, and not to have a specific performance. And from the case of *Collins v. Plummer* from P. Williams, it did appear that the covenant could not be specifically performed as against Dickson, if there had been a breach on his part. The property, so far as Dickson was interested in it, depended upon the right of the wife; and if he joined with her she might levy a fine and suffer a recovery, and the Court could not control her deed. She might limit the estate to her own separate use, and could not be made liable to his contracts, and Dickson could be responsible only in respect of his personal property; and there was no evidence that he, the younger brother of Sir R. Dickson a Scotch Baronet, had sufficient personal property to answer in damages for non-performance of the covenant. The agreement then was not mutual. On one side a specific performance could not be enforced; and when that was the case, equity would leave the parties to law, generally speaking, unless there were circumstances which did not occur in this case.

Want of mutuality.

Father and son-in-law.

But there were other objections. Dickson was Lord Boyne's father-in-law. Lord Boyne's mother

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was Dickson's wife, and Dickson was the only one on whom it depended what she might do. She might have no wish to dispose of the estate from her son, and yet this was the only supposition on which Lord Boyne purchased any security. There was no evidence that there existed any such disposition in the mind of Mrs. Dickson; and unless such a disposition did exist to be controlled by Dickson, it appeared to him that there was no proof of consideration. With respect to Dickson standing in the relation of a husband, the law was jealous of the influence of the husband over the wife, in parting with the wife's property. The covenant was objectionable on this ground, as it might operate on the mind of Mrs. Dickson, and he might say, If you leave the estate to descend, I have such a claim upon it, and so he might deal with the wife on the ground of this contract, and induce her to do an act which otherwise she might not choose to do. The contract was therefore to the prejudice of the son, supposing the mother had no intention to bar him, because it enabled Dickson to deal with her as otherwise he might not be able to do. The benefit was his, without a corresponding advantage to the son. If she had a disposition to leave the estate to descend, he (the son) only suffered a loss, and it was clear that Dickson would thus have a power over the mind of his wife, which otherwise he would not have.

Want of consideration.

Husband and wife.

There was a great inequality too in the contingencies. If Lord Bellew died, and Lord Boyne came into possession, Dickson gained a great deal. If Lord Boyne died before Lord Bellew, he (Lord B.) gained

Inequality.

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nothing. If Lord Boyne survived Lord Bellew he gained nothing, unless he also outlived his mother, and Dickson was not even tenant by the courtesy in this case. If Dickson died before his wife, and she suffered the estate to descend, Lord Boyne was still injured, as he was liable to make good the contract with Dickson in specie, while Dickson was bound not specifically to perform, but in damages; and if he had any property, it was bound in damages for non-performance. It appeared to him that there was such an inequality that, considering the agreement as one between son-in-law and father-in-law, the influence which the father might have over the son, the apprehensions he might raise in the son's mind as to Mrs. Dickson's intentions, and the manner in which these circumstances and others might operate on the mind of Lord Boyne, the Court ought to look with great jealousy at the transaction. The agreement in itself contained strong grounds of suspicion. It was entered into in 1751, and more than 60 years had now elapsed; and here arose another objection, length of time, which was generally a very good reason for refusing to interfere in the case of a transaction of which, if the matter had been prosecuted at an earlier period, a different view might be given. The statutes of limitations were not a bar in equity, but Courts of Equity looked to them as guides. This transaction might at an earlier period have been objected to, on grounds that could not now be investigated; for instance, that Lord Boyne was a man of infirm mind. Their Lordships might know this from

Length of time.

evidence *aliunde*: in another appeal the fact had been proved. But when this case came to issue, there were none perhaps who could prove the weakness of Lord Boyne's mind at the time when the agreement was entered into. He died in 1772, or 1773, and this cause was not prosecuted till above 22 years after his death: and what the circumstances of the transaction were could not then probably be well ascertained. Another thing was that it did not appear that any bond was executed. The expression was in consideration of a bond; and if no such bond existed, the consideration so far failed. The length of time too, that elapsed after 1780 without prosecuting the claim, was a strong reason against the consequence which was given to the suit in the Court of Exchequer. In truth there was no proper proceeding till 1800. The original bill was filed in 1780, about ten years after the death of Lord Bellew; and when the effective proceeding was commenced in 1800, thirty years after the death of Lord Bellew, all the collateral evidence was lost. There was one striking circumstance which had not been much attended to on either side, but to which he had called the attention of the counsel, viz. that Lord Bellew had power under the settlement to limit all, or any part, of the estates to a wife for life. In looking at the agreement of 1751 it appeared that this fact was not in the view of the parties at the time, and that Lord Boyne had no distinct conception of the real state of the title. Lord Bellew might have made a settlement on a wife which would have exhausted

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the whole estate, or the whole except 200*l.* a year; and thus Lord Boyne would be left without sixpence, besides being liable for the annuity of 200*l.* This was a clear misapprehension of the parties, appearing on the face of the instrument itself. Under these circumstances he thought it too much to say that a specific performance ought to have been decreed. It was not in itself an agreement which could be specifically performed, as against one of the parties, and that party had no right to a specific performance against the other party. It also ought not to have been decreed as there did not appear any evidence of a real consideration, for to make it such, there must have existed an intention in Lord Bellew and the mother to prevent the descent of the property, and such an intention was stated to have existed in the mind of Lord Bellew, but there was no evidence of it. It also ought not to have been decreed, as the contingencies were so unequal that it was evident the mind of Lord Boyne could not have weighed them properly; and when that was coupled with the fact that Lord Bellew might have defeated the object, there was evidently such a want of equality, that equity ought not to assist in this way; and that too coupled with the fact that this was a transaction between a son and a father-in-law, that the whole was to be executed by the control of the husband over the wife, and that as against Dickson it could not have been specifically performed, coupling with that the length of time suffered to elapse before the commencement and effective prosecution of the

suit; all this did appear to afford sufficient ground for refusing a specific performance of this contract. March 20, 1815. AGREEMENT. —SPEC. PER.

There were other circumstances in the case which, though of less consequence, were entitled to some weight. The agreement was unreasonable in another view, as it enabled Dickson, his heirs and assigns, to select such part of the estates as he or they might think proper; and the selection might be made so as to distress Lord Boyne beyond the value of 200*l.* a year. All the ground round the mansion-house might be taken, and thus a much greater consideration than 200*l.* a year extorted. It was also inconvenient with a view to the disposition which Lord Boyne made of the property, as it enabled the person claiming the performance to have it executed out of any of the estates in the several counties, so that, if the lands were to be mortgaged or sold, the covenant, running over the whole, rendered the property unalienable and affected the mortgagee, lessee, and others, all of whom might be injured by this option. The proceeding too was defective in point of parties. At the conclusion of the agreement each became bound to the other in 10,000*l.* for performance. That could be recovered only by the personal representative of Dickson, and this proceeding was not by the personal representative, but by one claiming an inheritable interest in this specific land, so that he thought there were not proper parties. The decree was singular likewise, in as much as it took the value as it stood at the time of the decree. On the principle that he claimed as heir, he was entitled to

Option.

Inconvenience.

Want of proper parties.

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have as much land as was of the value of 200*l.* per annum, at the death of Lord Bellew, and whatever might be said as to the by-gone rents, still the time of taking the value of the lands was the time of the death of Lord Bellew. But even as to the rents and profits, it was very extraordinary that they appeared to be considered by the Court as a charge on the estate. No, but on the persons in possession; and they had not adverted to the fact that Frederick Hamilton was alive in 1780, and in 1800. and that though he died in 1804, his personal representative was not before the Court; and he it was who ought to answer the rents and profits. But these objections were of less importance. The contract was in its nature one which a Court of Equity would not enforce, and the impression on his mind was that the decree ought to be *reversed*, and the bill dismissed.

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Lord Eldon, (C.) It seemed necessary to state the circumstances shortly with a view to a clear understanding of the case. Lord Bellew was seized for life of certain estates in the counties of Louth, Meath, and Kildare, in Ireland, remainder, in case he had no issue male, to his sister Dorothea, wife of D. Dickson, and the heirs of her body. She had been previously married to Gustavus Hamilton and had issue by him, a son, Frederick Hamilton, afterwards Lord Boyne, who, in case no act were done by her to bar the descent, and he also survived Lord Bellew, would be entitled to succeed. It had been represented that Lord Boyne was of a weak and dissipated character, and em-

barrassed in his circumstances, and not very capable of clearly understanding the nature of his contracts. In the present cause there was some, though not very particular, evidence of this; but he did not like to trust himself with looking at what might have appeared in other causes, and in his view of the matter it was not necessary as a fact in the case. In 1751 a deed was made between Dickson and his son-in-law, which was to the following effect. It recited (vid. the agreement as set out *ante*). Now the first objection to this was, that taking what was said by the noble Lord (Redesdale) to be accurate, that Lord Bellew might have limited the whole of the estates to a wife for life, the recital was false. But independent of that question it was false in law; true, if Dorothea and Lord Bellew did no act while living to bar the descent, the estates would so descend to Lord Boyne, but if Dickson died in the life-time either of Lord Bellew or of his wife, it would be competent to the wife, tenant in tail, to disappoint the views of the son. If she had such an intention she might suffer only a part to come to the son, not more than would yield 200*l.* a year; and then the whole of what came to him would go to the heirs of the husband. Then it recited "that Lord "Boyne had proposed that in consideration of "Dickson not joining with his wife, or Lord "Bellew, in levying any fine or recovery of all or "any part of the estates, Lord Boyne, his heirs "and assigns, would *immediately* after he became "seized and possessed of all *or any part* of the "lands, &c., grant and convey to Dickson, his

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" heirs and assigns *for ever*, the fee simple and in-
" heritance of such part and parcels of the said
" lands, &c., *as Dickson, his heirs or assigns,*
" *should choose,* to the clear yearly amount and
" value of 200*l.*, and also an annuity of 200*l.* to
" Dickson during his life, to be issuing and pay-
" able out of all and singular the said estates," &c. In this passage there were two or three circumstances worthy of notice:—1st, that Lord Boyne made the proposition, of which however there was no evidence. 2d, the proposition was that, in consideration of Dickson's not joining with Lord Bellew, or his (Dickson's) wife, or, as it was expressed in another part of the deed, with any person or persons, in levying any fine, or suffering any recovery, &c., Lord Boyne would, immediately on his coming into possession of all *or any part*; &c., grant and convey to Dickson such part or parcels of the estates as he, his heirs, &c. should choose, to the clear yearly value and amount of 200*l.*, besides an annuity for life to Dickson, charged on the whole of the estates. From the mode of expression here it seemed as if Lord Boyne thought that if Dickson did not join, &c., the whole of the estates must come to him, whereas no part of them might so come. 3d, the agreement was to be executed *immediately* upon Lord Boyne coming into possession. That was material; for as the option was given to Dickson to choose such part as he thought proper, and that part then became his absolute property, the estates might be unalienable till the choice was made; and the agreement was, that it should be immediately done.

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And it ought to be noticed too that, though all the property was bound, the agreement was that, if all or any part should come into possession of Lord Boyne, he must perform to Dickson, so that, if not so much as the value of the yearly sum of 200*l.* were suffered to descend, the other real and personal assets of Lord Boyne, if he had any, would be bound to make good the agreement. Another circumstance was that Dickson was not only to have such part of the lands as he chose to the yearly amount of 200*l.*, but also a life annuity of 200*l.* which affected all the estates. The wife died in 1759, Dickson died in 1765, and Lord Bellew in 1770; and then the agreement, if to be performed at all, ought to have been carried into execution. But the first bill for specific performance was filed twenty-nine years from the date of the agreement, and, what was more material, ten or eleven years after the death of Lord Bellew, when, if the agreement was to be specifically executed at all, it was for the benefit of Lord Boyne himself, as well as the other parties, that the act should be done immediately. This bill was filed in 1780; answers were put in, and it was contended that the agreement ought not to be specifically executed, regard being had to all the circumstances. The matter then slept for a long time. Two of these ladies, the other being then dead, were represented as having, in 1794, made an assignment of this claim to Allan Grant, Respondent's father. It was unnecessary to consider the validity of this assignment under his view of the subject, but it purported to be an assignment not for valuable consideration,

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but for the causes there stated. In 1796 a bill was filed in the name of Helen Dickson; and this bill was of a singular nature, even giving credit to the reasons alleged for it, she being dead some time before, and the proceeding being instituted by a person claiming by grant from her and her sister in 1794. After this the matter lay dormant till 1800, and then Allan Grant the assignee filed a bill in his own name, stating reasons for the delay, and the assignment; and the bill represented him as heir at law of the Dicksons as well as assignee, and that was put in issue in the answer, and it was to be recollected that the counsel had been called upon to show the evidence of his being heir, and they had not referred their Lordships to any. Here some difficulties arose on the form of the pleadings. If he sued as assignee, the bill ought to have been of a different nature, and if as heir at law he could not in that character sustain the decree. That decree was, that Charles Grant was entitled to a specific execution of the covenant by a conveyance of so much of the estates as were of the yearly value of 200*l.* at the time of making the decree, &c. and that Allan Grant's executors were entitled to an account of what was due on the footing of 200*l.* a year from the filing of the bill in 1796, that was, from the time of filing the bill in the name of a person who was dead at the time, which proceeding was repudiated by that of 1800. That however might be considered only as an inaccuracy. One of the difficulties was to conceive upon what principle the Court thought that there ought to be a specific performance when they confined it to the

Difficulties on the pleadings, and decree.

time of making this decree; for if the Plaintiff had a title to a specific performance it was derived from the agreement of 1797, and he had a right to land of the value of 200*l.* a year, at the time the contract was to be executed.

Different objections had been taken to this proceeding:—1st, that to support such a title would be to encourage maintenance; and the difficulty there was founded on this, that he claimed under the assignment and not as heir at law. But supposing the facts as to the assignment to be as represented, he was of opinion that the fair acquisition of such a title was not within the statutes of maintenance, &c. Still, under all the circumstances, this did not appear to be a case where a Court of Equity ought to give the extraordinary remedy of a specific performance. Then it was said that the agreement was voluntary, and that it was not the principle of a Court of Equity to execute a voluntary agreement. He was not disposed to say that there was no consideration, if the view given of the facts was correct; but supposing it to be a case of valuable consideration, still he thought this agreement ought not to be executed specifically. Though Equity might not execute a voluntary agreement, he denied that where there was some consideration it therefore would execute; for there might be cases in which some consideration might appear, but which, notwithstanding that circumstance, ought not to be specifically executed. Then the first thing one had to do, in order to see whether this should be executed, was to look at the four corners of the agreement, to ascertain whether it was one which a Court

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of Equity ought to deal with. He had seen the name of one or two cases which had been mentioned in Ireland, but he could not apply the principle to the present case. This was a case where Lord Bellew was tenant for life; he had no issue male, but he had daughters who did not stand in the limitations of these settlements. On the death of Lord Bellew without issue male, the lands were then destined to his sister and to her issue; that sister, Lord Boyne's mother, was Dickson's wife, and Dickson was Lord Boyne's step-father. Then what was the bargain by Lord Boyne, who was her sole issue inheritable? This was an agreement where Lord Boyne was bargaining for 200*l.* a year out of the lands, and an annuity of 200*l.* that Dickson should not join in doing an act, which it might possibly be extremely rational to do. There was no evidence that she meant to do the unnatural act of giving away the estates to a stranger; but it was apparently entered into by Lord Boyne, under the notion that Dickson's forbearance would insure the property coming to him on the death of Lord Bellew and his mother; whereas if Dickson were out of the way she might do any act she pleased, and disappoint Lord Boyne. That was

Improvidence.

not all; the agreement was improvident in another view: Lord Boyne might not be able to do any act respecting the estates, as Dickson would be the owner of such part as he might choose, and the annuity affected the whole; so that the difficulty to manage the title was clear. Then even if this demand had been made in 1770, when Lord Bellew died, a Court of Equity would have looked at the

transaction with jealousy, to be satisfied whether it was understood by the parties, having regard to the circumstance that Dickson was Lord Boyne's father-in-law, and had a control over the property of the wife, and the interests of the son. And when the demand was made in 1780, it became a Court of Equity to look at the whole with the most anxious jealousy, and on that he founded a remark which affected some of the observations made in the Court of Exchequer. It had been said in answer to the charge of laches, Why not dismiss the bill? and this might be said with great effect in many cases. But here there was laches in not attempting to enforce the demand from 1770 till 1780, because if any thing was due, it was due on the death of Lord Bellew in 1770; and it was not only in one sense for the benefit of the party claiming the performance of the agreement, that it should be immediately executed, but in one sense also for the benefit of Lord Boyne. For what was his situation? till the demand was made he could not tell of what acre in Louth, Meath, or Kildare, he was the owner, or might continue to be the owner; and this option was another reason why a Court of Equity should look with jealousy at the transaction, as Dickson, if he survived Lord Bellew, might say "Don't tell me about taking what I ought to take, "here and there; I shall have your park or your "garden." Why then, under these circumstances, was there ever a case where it was more necessary that the demand should have been made without delay? Suppose it had been made in 1770, Lord Boyne might then have said, "The proposition did "not come from me, or if it did, then let us see

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"whether I understood the nature and effect of this "agreement, whether my mother was acting "against, or protecting my interest:" and unless she had intimated an inclination to bar the interest of her son, it was very easy to see that no Court of Equity would deal with it at all. Why then, though the demand ought to have been immediately made, and the parts to be taken pointed out, none such was made, but the estates were left to be devised by will, and the parties had been allowed to deal with the property as their own, to improve the estates, to enjoy them and act with regard to them as their own for ten years together. Suppose that only a part of the property, worth the yearly sum of 200*l.*, had come to Lord Boyne, it was a very different thing to demand the land after suffering him to deal with it as his own, and to improve it as his own, from what it would be to demand it immediately when due. These were main points, in considering whether or not there ought to be a specific performance. The consequence of all this was not that the agreement was void in law; let them go to law and make what they could of it: but the not making the demand in proper time, and the laches connected with it, the loss of evidence, and all the other circumstances, appeared to constitute a case in which the matter ought to be left to law, without the interference of equity in the way of specific performance.

Delay in appealing, and costs.

There was one circumstance which ought to be noticed, that the appeal was not presented for four years after the making of the decree in the Exchequer, and it might have happened that something had been done in the mean time, consequent on the

directions in that decree, such as, the issuing the commission of perambulation, &c., and if so the Respondents ought to be protected against the expense which an earlier appeal would have prevented. March 22, 1815. AGREEMENT. —SPEC. PER.

Decree of the Court of Exchequer accordingly REVERSED.—*Appellants to pay Respondents their costs subsequent to the decree, and the bills dismissed without costs.*

Agent for Appellants, GIBBS.
Agent for Respondents, PALMER.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION, (2D DIV.)

WILKIE and others—*Appellants.*
GEDDES—*Respondent.*

UNDER the implied warranty of the assured, as to sea-worthiness, it is necessary not only that the hull of the vessel be tight, staunch, and strong, but that the ship be furnished with ground tackling sufficient to encounter the ordinary perils of the sea; and therefore, where it appeared that the best bower anchor, and the cable of the small bower anchor, were defective, the vessel was held not to be sea-worthy. Feb. 27, 1815. INSURANCE. —SEA-WORTHINESS.

THE Appellants underwrote a policy of insurance on the ship *Mary*, of Stromness, for a voyage