March 4, 6, 8; June 26, 1816.

ADMINISTRATION.—INTEREST.—COSTS.—PARTIES.—ACCOUNT, &c.

also *reversed* as to the question of interest, and it was ordered that the full legal rate of interest on the sum remaining undistributed should be charged against the administrator, making annual rests in the accounts, and charging interest on the annual balances. The decrees were also *reversed* in so far as they directed the costs of the plaintiff to be paid out of the fund, and it was ordered that the administrator should pay all the Plaintiff's costs, subsequent to the original decree in 1800. And it was ordered that G. S. should be charged with the arrears of rent, and it was referred back to the Master to review his report as to the several sums stated as arrears of rent, and as to whether and how far they were due at death of John Stacpoole, and were received, or without wilful neglect, &c. might have been received by G. Stacpoole, &c.; and the decrees, so far as not reversed or varied, to be affirmed.

Agent for Appellant, WILLIAM STACPOOLE KEANE.
Agents for Respondents, G. STACPOOLE, WILLIAMS, and BROOKS.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

MOORE—*Appellant*.

BLAKE and another—*Respondents*.

——1815. March 20, 1816.

A. CONVEYS (or assigns his interest in) lands to B. in consideration, among other things, that B. shall make or give a lease back again to A. of a half or portion of the lands,

and in consideration also of a loan of 200*l.* by B. to A.— B. covenants to execute the lease accordingly, subject to the re-payment of the 200*l.* for which B. has a judgment. No lease actually made, but A. remains in possession of his portion upon his equitable title.—B. lends further sums of money to A. and obtains judgments for these sums, and then conveys the lands, and assigns the judgments to C.— C. issues writs of fi. fa. on the judgments, and in 1781, procures a sale by the Sheriff of A.'s equitable interest; and on ejectment brought on the demises of the purchaser, and of C., A. is turned out of possession.

1815. March 20, 1816.

RIGHT TO SUIT IN EQUITY NOT SALEABLE UNDER FI. FA.—DELAY.—MORTGAGE.

A. in 1782 files his bill in chancery for relief, and execution of a lease to him according to the agreement, but from embarrassment in his circumstances, does not further prosecute the suit till 1801. No steps taken between 1782 and 1801 to dismiss the bill. In 1808 the bill dismissed below.

The decree of dismissal *reversed* by the house of Lords, for 1st, The right to a suit in equity is not a proper subject of sale by the sheriff under a *fi. fa.* and the sale is a nullity.— 2d, The delay in prosecuting the suit is well accounted for, and no steps were taken to dismiss the bill; and, at any rate, the right to the lease does not rest merely on the covenant by the landlord to make it, but is part of the consideration of that conveyance or assignment by which the landlord himself acquired his title.—Therefore the principle of delay does not apply, and A. is still entitled to have his lease executed in terms of the contract; and has his relief in equity, without the necessity of resorting for redress to the Court, out of which the *fi. fa.* issued.

RICHARD Moore, the Appellant's father, filed his bill in chancery, on the 26th April, 1782, against Richard Blake, George Blake, Thomas Martin, Valentine Blake, and George Geale, Defendants, therein named, stating the following facts: That Thomas Duel, late of Ballymagibbon, in the county of Mayo, was, in his life time, possessed of the town and lands of Killesarogh, or Ballymagibbon, and Kilfrehane, or Douogh, containing about 300

Bill filed, 1782.

1815. March 20, 1816.

RIGHT TO SUIT IN EQUITY NOT SALEABLE UNDER FI. FA.—DELAY.—MORTGAGE.

acres of profitable land, under a lease from the see of Tuam, for a term of 21 years, at a small yearly rent, and fine for renewal. In 1761, Duel, on the inter-marriage of his eldest daughter, Mary Duel, with Richard Moore, (the Appellant's father) by marriage articles, duly registered, assigned his interest in the lands to Richard Moore, in consideration of the marriage, and a sum of 300*l.* paid by R. Moore, to Duel's other daughters, &c.; and Moore on his part covenanted to settle on Duel's wife, and on his own intended wife, 30*l.* each, by way of jointures, chargeable on the lands.

1769. Moore possessed of a lease of church lands.

Duel having died in 1769, Moore took possession of the lands, and afterwards contracted debts, and became extremely embarrassed in his circumstances. In consequence of these embarrassments, with which, as was alleged in the bill, John D'Arcy, of Houndswood, in the county of Mayo, was well acquainted,

Agrees to sell his interest in the lands to D'Arcy.

Moore agreed to sell all his interest in the lands or farm (which produced a profit of 800*l.* a year) to D'Arcy, in consideration of D'Arcy's paying off Moore's debts, which amounted to about 800*l.*, and of his, D'Arcy's, making or giving back a lease to Moore of one half of the lands at half the yearly rent and renewal fines, payable to the see of Tuam for the whole, and for the same term under which the whole was held. D'Arcy having afterwards refused to pay more than 575*l.* of the debts, Moore found himself under the necessity of acceding to the terms; and accordingly assigned his interest in the land, upon the above mentioned conditions, to D'Arcy, who however advanced 200*l.* to Moore, by way of loan, to secure the re-payment of which,

In consideration of D'Arcy's giving him back a lease of half the lands.

And lending him 200*l.*

Moore gave his bond and warrant of attorney, upon which judgment was entered up.

1815. March 20, 1816.

Immediately after the execution of the last mentioned deed, another deed or instrument in writing was executed by D'Arcy to Moore, bearing date the 6th day of November, 1769; whereby, after reciting the assignment, and that D'Arcy had paid 200*l.* over and above the said 575*l.* for which sum of 200*l.* Moore passed a bond and warrant of attorney, he, D'Arcy, covenanted with Moore: "That in con-
" sideration of such assignment to the said D'Arcy,
" he the said John D'Arcy would, at the request of
" the said Richard Moore, his heirs and assigns,
" perfect and execute a lease to the said Richard
" Moore, subject to the usual clauses between land-
" lord and tenant, of all that part of the said lands
" then in the occupation of the widow Duel, John
" Browne, and Richard Moore, on the same footing
" and tenure that the said John D'Arcy held or
" should thereafter hold the same under the see of
" Tuam, and renew the same from time to time,
" subject nevertheless to the yearly rent of 5*l.* 5*s.*
" and also to half the fines, fees, and expenses of
" renewal of the whole concern with the see of
" Tuam, and also subject to the payment of the said
" last mentioned sum of 200*l.* and interest thereof
" to the said Richard Moore, indemnifying and
" saving harmless him the said John D'Arcy, his
" heirs and assigns, from all debts, jointures, and
" incumbrances, affecting or thereafter to affect the
" said concerns, or any part thereof."

RIGHT TO SUIT IN EQUITY NOT SALEABLE UNDER FI. FA.—DELAY.—MORTGAGE.

D'Arcy covenants to execute the lease, subject to the payment of the 200*l.*

It is observable that, in the deed of assignment, the lands of which Moore was to have a lease were

1815. March 20, 1816.

RIGHT TO SUIT IN EQUITY NOT SALEABLE UNDER FI. FA.—DELAY.—MORTGAGE.

stated as a moiety, while in the deed of covenant they are mentioned as the part in the occupation of the widow Duel, and others, which seems to have been the portion called Killesarogh or Ballymagibbon. Of that portion, Moore continued in possession, and D'Arcy took possession of the other *moiety* as it was called in the bill, or that portion denominated Kilfrehane, or Douogh.

D'Arcy advances further sums to Moore, for which he obtains judgments, and assigns his interest in the lands, and the judgments to Blake.

D'Arcy afterwards advanced two further sums of 40*l.* and 20*l.* to Moore, who gave bonds for them, upon which judgments were entered up, but never executed the lease; and, in 1777, he assigned his interest in the whole lands, and the three bonds and judgments to Richard Blake, who had an estate adjoining to Moore's farm. Richard Blake revived the judgments in his own name, and, without notice to Moore, as the bill alleged, caused three writs of *fi. fa.* to issue on the three judgments, directed to the sheriff of Mayo; and procured the same to be delivered to one James Geale, who acted as subsheriff to Valentine Blake, the high sheriff, over whom (Geale) Richard Blake, as the bill alleged, had great influence. The bill further stated that Richard Blake having called together two or three of his friends, they repaired to the sessions house, at Ballincobe, in the said county of Mayo; and set up for sale by public cant, without having posted any previous notice thereof, Moore's interest in the moiety, or rather, Ballymagibbon portion, of the lands, though Moore had never obtained any lease from D Arcy, and consequently had not the legal title; and that George Blake, the brother of R. Blake, having bid 330*l.*, being about 15*l.* more than

Blake procures Moore's interest to be sold under writs of *fi. fa.*

Moore's interest purchased by Blake's brother.

1815. March 20, 1816.

RIGHT TO SUIT IN EQUITY NOT SALEABLE UNDER FI. FA.—DELAY.—MORTGAGE.

the amount of the executions and costs, and by several hundred pounds less than the real value, was declared the purchaser, and the interest was assigned to him by the sheriff. The bill further stated that an ejectment was brought on the separate demises of R. and G. Blake, and that they threatened to turn Moore out of possession, under colour of the sheriff's sale. And the bill charged that Blake knew before the sale that Moore had only an equitable title, and prayed that the sale and writs might be set aside, and that Blake, being liable to the same equity as D'Arcy, might be compelled to execute a lease to Moore, pursuant to the agreement; that the defendants might be restrained from turning Moore out of possession, and that a reasonable time might be allowed to Moore to pay the demands against him.

Ejectment.

Charge that Blake had notice of the nature of Moore's title.

Prayer of the bill.

The defendants by their answers admitted the material facts in the bill, and stated that they believed the reason for D'Arcy's refusing to execute a lease to Moore was, that Moore had not performed his part of the agreement, by payment of the 200*l.* and his half of the rent and fines; and they denied that George was merely a trustee for Richard Blake; and insisted that, as Moore had no other property for payment of his debts, the sale was valid; and that George Blake, the purchaser, and not Moore, was entitled to the lease under the agreement.

Answers.

Moore, it appeared, was unable, owing to the embarrassment in his circumstances, to prosecute the suit for several years, and was turned out of possession. At length in January, 1801, he filed his

Delay in prosecuting the suit

1815. March 20, 1816.

RIGHT TO SUIT IN EQUITY NOT SALEABLE UNDER FI. FA.—DELAY.—MORTGAGE.

amended bill against R. and G. Blake, and Stephen Blake, and Margaret, his wife, who was personal representative of John D'Arcy. Richard Blake having died, Moore, in December 1801, filed another amended bill, and bill of revivor against his representatives, praying in substance as before; and answers having been put in, and witnesses having been examined on both sides, the cause came on for hearing before Lord Chancellor Ponsonby, who on the 14th March, 1807, decreed: That the said article of the 6th day of November, 1769, should be carried into execution so far as related to a moiety of the said lands, and that the Master might inquire and report who had been in possession of the said moiety of the said lands from April 1782; and that if the Master should find that he the said Richard Blake, or those deriving under him, were in possession thereof from that period, that the Master should take an account of the rents, issues, and profits from that day to the time of making the said decree, and also the sum due for principal, interest, and costs, on

March 14, 1807, Decree for relief.

foot of the said three judgments in the pleadings mentioned, and also an account of the yearly rent of *5l.* 5*s.*, and the expenses and fines of renewal, and to set off the rents and profits received out of the said moiety of the said lands against the same, first to be applied in discharging the interest of the said judgments; and next to sink the principal of the said sum; and, on payment of what might appear due, if any thing, to Defendants, that they should execute a lease of a moiety of the said lands on the terms mentioned in the said article of 6th Novem-

ber, 1769; and as to so much of the bill as sought to be decreed to the other moiety of the said lands, that same should stand dismissed. 1815. March 20, 1816.

The defendants afterwards obtained an order for rehearing; and, Richard Moore having died, the Appellant, his son and representative, revived the cause; and, the same having been reheard before Lord Chancellor Manners, his Lordship, by decree of the 10th December, 1808, dismissed the bill. It was stated in the Appellant's case that the ground of dismissal was, that the plaintiff was not entitled to relief, in consequence of the delay in prosecuting the suit. From this decree of dismissal Moore appealed.

RIGHT TO SUIT IN EQUITY NOT SALEABLE UNDER FI. FA.—DELAY.—MORTGAGE.

Rehearing.

Dec. 10, 1808, decree, bill dismissed.

Appeal.

The cause was heard in the House of Lords in 1815. The note of the argument has been mislaid, but the cases of *Giffard v. Hort*, 1 Scho. and Lef. 386. 405. Dom. Proc. 1st May, 1812.—*Daniels v. Davison*, 16 Ves. 249.—*Scott v. Scholey*, 8 East. 467.—*Smith v. Clay*, 3 Bro. Ch. Ca. 639. 6 Bro. P. Ca. 395. Amb. 645.—*Hercy v. Dinwoody*, 4 Bro. Ch. Ca. 257. 2 Ves. 87. were cited.

The reasons for the appeal given in the Appellant's case were these:—1st. Because the said Richard Moore's equitable interest, under the article of the 6th of November, 1769, could not pass to a purchaser under a sheriff's sale, had by virtue of any writ of *fieri facias;* and the sale relied upon by the Defendants in bar of the relief sought by the original and amended bills was altogether a nullity. And it was incontrovertibly proved that the said defendants, Richard Blake and George Blake, had notice of the said article of 6th November, 1769, previous to either of them having become pur-

1815. March 29, 1816.

RIGHT TO SUIT IN EQUITY NOT SALEABLE UNDER FI. FA.—DELAY.—MORTGAGE.

chasers; and the Respondents were, after they had obtained possession placed in contemplation of a Court of Equity, in the situation and character of mortgagees in possession, or stood in the situation of trustees of the said moiety of the said lands, by virtue of the said articles of agreement and declaration of trust of the 6th of November, 1769, and the notice thereof to the said Richard and George Blake.

2d. Because it was also clearly proved that it was the poverty and imprisonment of the said Richard Moore which prevented him from prosecuting the said cause with diligence, (which inability was caused by the oppressive conduct of the said Defendants, and the fraudulent sale, and the dispossessing of the said Richard Moore as aforesaid, and the adverse and fraudulent answers filed by the said defendants, Richard Blake and George Blake, to the said Richard Moore's original bill,) and as the said original bill never was dismissed, nor the said cause abated, until after the said Richard Blake's appearance to the said amended bill in the year 1801, as herein before-mentioned, same must be deemed a *lis pendens*; and as it was not laches in the said Richard Moore to have rested on his equitable title, previous to the filing of the original bill, the possession having gone up to that time with the equitable agreement contained in the said article, according to the authority of Lord Redesdale, in *Ormsby v. Crofton*, 2 Schole and Lefroy's Reports, so the pendency of such original bill, according to the same authority, as reported in 1 Schole and Lefroy, 386, had the effect of preserving to the Appellant a right to the same relief, which the said

Richard Moore was entitled to at the time of filing the original bill as aforesaid, and therefore the Appellant should not have been barred from the relief to which the said Richard Moore was entitled at the time of filing the original bill by reason of the delay suffered in prosecuting the suit.

1815. March 20, 1816.

RIGHT TO SUIT IN EQUITY NOT SALEABLE UNDER FI. FA.—DELAY.—MORTGAGE.

It appeared that the decree below had not been made up, and the judgment was delayed till the defect should be rectified.

Judgment delayed till decree made up below.

Lord Eldon (C.) In the Appellant's case, and at the bar here, it was represented that the latter decree in this case proceeded on the ground of the delay in prosecuting the suit. And the question now is, whether this or the former decree is the right one; and whether, if the last decree should not be sustained, the relief under Lord Chancellor Ponsonby's decree was exactly that which ought to be given. It is unnecessary to state the circumstances of this case prior to 1769, when Richard Moore, the Appellant's father, became possessed of this property. It appeared that he was in very embarrassed circumstances; and for the reasons, and upon the conditions stated in the case, conveyed his interest in these lands to one John D'Arcy, who thereupon entered into possession of a portion of the lands, known by the name of Kilfrehane, or Douogh. Soon after this the instrument of agreement, of which I have now seen the original, was executed between the parties; and that instrument, which is dated 6th Nov. 1769, after reciting this last deed, and that John D'Arcy had paid the 200*l.* over and above the 575*l.*, for which sum of 200*l.* Moore had

March 20, 1816. Judgment.

March 20, 1816.

RIGHT TO SUIT IN EQUITY NOT SALEABLE UNDER FI. FA.—DELAY.—MORTGAGE.

given his bond and warrant of attorney, (upon which judgment was afterwards entered up), states, that D'Arcy covenanted with Moore that, in consideration of the assignment, he would at the request of Moore, his heirs and assigns, perfect and execute a lease to Moore, &c. subject to the usual clauses between landlord and tenant, of all that part of the lands in the occupation of, &c. on the same footing and tenure that the said D'Arcy held, or should thereafter hold the same under the See of Tuam, and renew the same from time to time; "subject "nevertheless to the yearly rent of *5l. 5s.*, and also "subject to half the fines, fees, and expenses of re- "newal of the whole concern with the see of Tuam, "and also"—it was for this passage that I was anxious to see the original—"*and also subject to* "*the payment of the said last mentioned sum of* "200*l. with interest thereof*, to the said Richard "Moore, indemnifying and saving harmless him, "the said John D'Arcy, his heirs and assigns, from "all debts, jointures, incumbrances, &c."

D'Arcy a mortgagee upon Moore's interest for this 200*l.*

I take the liberty of addressing your Lordships first on this case, which involves considerations better known to those acquainted with the administration of justice in Ireland, in order to have those doubts which, when viewing this as an Irish case, exist in my mind as to points, which I take to be clear law, both at law and in equity in England. But if the nature of this transaction is to be understood, as I conceive it would be understood here, it made Richard Moore a co-lessee with D'Arcy to the amount of a moiety of the lands—in equity I mean—and also placed him under the obligation to pay

half the rent and fees of renewal for the whole of the lands: but that, whilst it constituted this relation of co-lessees, it also created another relation, that of mortgagor and mortgagee between Moore and D'Arcy, and D'Arcy was under an obligation to make this lease of a part of the lands to Moore, standing at the same time in another relation with respect to Moore as his mortgagee, to the extent of this 200*l.* which was a charge on the lease which he so agreed to make.

March 20, 1816.

RIGHT TO SUIT IN EQUITY NOT SALEABLE UNDER FI. FA.—DELAY.—MORTGAGE.

Relations in which Moore and D'Arcy stood with respect to each other.—Co-lessees.—Mortgagor and mortgagee.

Then the cases represent that D'Arcy having taken possession of half the lands, and Moore remaining in possession of the other half or portion, Moore became further indebted to D'Arcy in two sums of 40*l.* and 20*l.*, for which he gave his bond and warrant of attorney, to enter up judgment, which was accordingly entered up. D'Arcy, without having made the lease to Moore, assigned his interest in the lands to Richard Blake, together with the bonds and judgments for the 200*l.*, 40*l.*, and 20*l.*; and then Blake, in 1781, caused three writs of *fi. fa.* to be issued upon the judgments; and under these, as I understand it, Moore's interest was put up to sale, and purchased by George Blake, the brother of Richard Blake, and a conveyance was accordingly executed upon which Blake caused an ejectment to be brought, which, if not upon that, he might have caused to be brought on the legal estate which was in himself.

Then a bill was filed to set aside the sale, to compel the execution of the lease to Moore, &c. This bill, as I understand it, was filed in 1782; and, if Lord Manners's opinion, that no relief could be

March 20, 1816.

RIGHT TO SUIT IN EQUITY NOT SALEABLE UNDER FI. FA.—DELAY.—MORTGAGE.

given, rested on the ground of delay, that is a ground which does not import an opinion that, if the suit had been prosecuted with due diligence, relief ought not to be given. I mention that, because it was stated—a statement so new to me that I did not know how to deal with it—that it was the usage in Ireland for sheriffs, under writs of *fi. fa.* to sell such interests as this, and then it was further argued that, even if the Sheriff had no right to sell it, redress ought to be sought by application to the court of law from which the *fi. fa.* issued, and not by application to a Court of Equity. It seems to me, that neither of the Judges below adopted that idea, and when we come to consider what this is, we see the more reason to question it. If A. B. makes a lease to C. D. and A. B. afterwards becomes a creditor of C. D. and obtains judgment and sells the interest, he who buys is actually in. But if the matter rests merely in agreement, consider what an advantage the landlord has in this way by being a creditor; for when he becomes the purchaser of the interest he gets the estate itself, whereas another would only get a right to a suit in equity. And this too is not a case where a landlord merely lets a lease, but where he contracts also in such a way as to make himself a mortgagee or incumbrancer on the lease which he was to grant. And the interest is such that, if the landlord were not a creditor, the equity of redemption could not be foreclosed without a suit in equity; and that interest is not the subject of a sale at law, and the transaction of the sale is therefore a nullity from the beginning to the end.

The landlord would have an undue advantage if a sale of this kind were permitted to stand.

The sale a nullity, and relief, it seems, in such cases may be had in Equity without application to the Court out of which the *fi. fa.* issued.

Then we are to consider whether there is any

thing to bar the relief upon the authority of those cases—not of the cases which justify a dismissal on the ground of not commencing a suit in due time—but of those cases which justify a dismissal on the ground that, though begun in due time, it has not been prosecuted with due diligence; and I do not think the present case falls within that principle. The equity of redemption was never foreclosed, and they might at any period have moved to dismiss the bill. I cannot therefore understand the ground upon which the not prosecuting the suit with due diligence has been in this case considered as a bar to the relief. There never was any motion to dismiss the bill for want of prosecution; and the case does not appear to fall within the principle upon which length of time is a bar.

March 20, 1816.

RIGHT TO SUIT IN EQUITY NOT SALEABLE UNDER FI. FA.—DELAY.—MORTGAGE.

Question of delay.

The delay in this case no bar to the relief.

But if relief ought to be given, I doubt whether Lord Chancellor Ponsonby's decree has not gone too far; for, though the length of time during which the suit has been depending is no bar to the relief, permanent improvements may have been made, and other alterations may have taken place, which ought to be provided for in the decree. In these respects there are difficulties to a certain extent; but if, after hearing the noble Lord (*Redesdale*), it should appear that he concurs in my view of the case, the minor matters may be postponed till another day. If I had stood alone, it would have been my duty to give the best opinion on the case that I could; but I am glad that we have the assistance of the noble Lord, who is so much better acquainted with these Irish proceedings, and I hope he will favour us with his opinion; intimating,

Lord Chancellor Ponsonby's decree in 1801, right in granting the relief, but defective in some points.

March 20, 1816.

RIGHT TO SUIT IN EQUITY NOT SALEABLE UNDER FI. FA.—DELAY.—MORTGAGE.

however, that it appears to me that the latter decree cannot stand at all, and that the former cannot stand in its full extent.

Lord Redesdale. I was not present when this case was argued; but it appears that the question relates to a property held by Moore, under lease renewable for ever, from the See of Tuam, subject to the provisions made upon Moore's marriage. The lands, and this ought to be attended to, consisted of two portions, each having a distinct denomination; the one, Kilfrehane, or Douogh; the other, Killesarogh, or Ballymagibbon. Lord Chancellor Ponsonby's decree was inaccurate in one point, as it proceeds on the idea that a precise moiety of the whole was what was claimed; whereas the part or portion called Killesarogh, or Ballymagibbon, was that to which the bill applied. Moore was in embarrassed circumstances, and entered into an agreement with D'Arcy, to dispose to the latter of his interest in the whole lands; but with a condition, that D'Arcy would execute to him a lease of that part called Ballymagibbon, he (Moore) paying half the rent and fines of renewal. I suppose this was generally understood to be a moiety of the whole; but it is stated that Kilfrehane was more valuable. A conveyance was accordingly executed, by which Moore, in consideration of D'Arcy's taking upon him to discharge 575*l.* of Moore's debts, and advancing him 200*l.* more on his bond, and of his executing a lease as aforesaid, transferred his interest in the whole to D'Arcy; and an instrument of agreement, dated 6th November 1769, was at the same time exe-

cuted, by which D'Arcy agreed to execute a lease of that part called Ballymagibbon, to Moore, subject to the payment of half the rent and fines, and to the payment of the 200*l.*, &c. The effect of this transaction then appears to be this, that the contract on the part of D'Arcy to execute this lease, was part of the consideration for which Moore disposed of his interest in the whole. He parted with the whole, subject to this contract, and to the advancing of 200*l.*; and the lease to be executed was again made subject to the payment of this 200*l.* Then Moore was to indemnify D'Arcy against the annuities, and other incumbrances on the whole.

March 20, 1816.

RIGHT TO SUIT IN EQUITY NOT SALEABLE UNDER FI. FA.—DELAY.—MORTGAGE.

Under these circumstances, it seems to me that this was not simply a contract for a lease, but that the execution of the lease was part of the consideration of the sale of the whole interest; and that D'Arcy could not refuse performance, and yet retain the property. The ground of delay then does not apply to this, as it was not a mere contract of lease between landlord and tenant, but a part of the transaction, which gave D'Arcy the character of landlord. Moore possessed without a lease, and D'Arcy had this security for his 200*l.*, in consequence of the contract not being carried into execution. D'Arcy, in 1777, assigned the whole interest in the lands, and the bonds, and judgments, to Blake; and in 1781, four years after, writs of *fi. fa.* were issued on the judgments, and a sale of Moore's interest took place. Now Moore was in possession thirteen years under this contract; both rested upon it, and Moore being in possession, Blake must necessarily have notice that he had

Nature of the transaction.

From the nature of the original transaction D'Arcy could not refuse performance and yet retain the property, so that the ground of delay was out of the question.

Moore being in possession, Blake must be presumed to have had notice of his title.

March 20, 1816.

RIGHT TO SUIT IN EQUITY NOT SALEABLE UNDER FI. FA.—DELAY.—MORTGAGE.

some title, and it is reasonable to suppose that he inquired what that title was. If Blake had been desirous to foreclose for non-payment of the 200*l.*, and had, as he might have done under the Irish statute, tacked the judgments to the mortgage, he might have filed a bill for that purpose, and then Moore would have had a limited time appointed, within which he must pay, or, if not, he would be foreclosed. But, instead of that, Blake takes a different course, which cannot be sustained, that is, he resorts to the sale of a right to a suit in equity; and it would be of dangerous consequence if such a transaction could be sustained, for it would then be impossible for mortgagors, who had judgments against them, to sell the equity of redemption of the mortgaged property.

Blake might have filed a bill to foreclose.

Mortgagors with judgments against them could never sell their equities of redemption, if such sales as this could be sustained.

Then the only question is as to the delay. The bill was filed the moment Blake executed this contrivance, and therefore there was no undue delay in filing the bill, as it was filed before Moore was turned out of possession under the ejectment, and before Blake got possession. There was delay in prosecuting the suit, but then Blake might have moved to dismiss the bill for want of prosecution. He suffered the matter to rest however until Moore proceeded with it and obtained a decree, from which it appears that the Lord Chancellor acted upon somewhat of a mistaken notion of the nature of the case. He decrees a lease of a moiety to be executed; but it was not a moiety, but a distinct portion. When the cause came on for a rehearing Lord Manners dismissed the bill, and it was stated that the ground of that decision was the delay in

Question of delay.

Delay.

prosecuting the suit. If there was no other ground, that ground did not apply. Whether that was the ground or not I do not know, but I have heard of no other, except the alleged practice in Ireland of selling interests of this nature under writs of *fi. fa.*, and even that is stated to have been the practice only in 1781, for I do not understand it to be said that it is the practice now.

March 20, 1816.

RIGHT TO SUIT IN EQUITY NOT SALEABLE UNDER FI. FA.—DELAY.—MORTGAGE

Whatever it might have been, it is not now the practice in Ireland to sell equitable interests under writs of *fi. fa.*

The judgment must be somewhat special, as allowance must be made to Blake for improvements, and the first decree has not provided for the application of the rents to the reduction of the fines and rent to the Archbishop; after which they must be applied to the reduction of the principal and interest of the mortgage money. This requires further consideration, but the contract must be held to be still binding.

On the 26th of March, 1816, the formal judgment was delivered in by Lord Redesdale, *reversing* the decree of 1808, and affirming that of 1801 with alterations and additions as above; *Lord Redesdale* stating (*Lord Eldon* (C.) concurring) that the costs were calculated on the principle that the landlord might refuse to execute the lease till paid his debt, interest, and costs.

March 26, 1816.

Formal judgment.

Agent for Appellant, WATKINS.
Agent for Respondents, WINDUS.