

COURT OF CHANCERY, IRELAND.

BY ORIGINAL APPEAL.

MARIA RYLANDS and RICHARD }
FRANKLIN GOUGH } *Appellants;*

The Right honourable DAVID LA- }
TOUCHE, PETER LATOUCHE the }
elder, ROBERT LATOUCHE, and } *Respondents;*
JOHN LATOUCHE, Esqrs. - } -

BY REVIVOR AND AMENDMENT.

MARIA RYLANDS, RICHARD FRANK- }
LIN GOUGH, and JOHN FRANKLIN } *Appellants;*

PETER LATOUCHE, and ROBERT LA- }
TOUCHE, and GEORGE LATOUCHE, }
JOHN DAVID LATOUCHE, and } *Respondents.*
PETER LATOUCHE the younger, }
Esqrs. - - - - - } -

A suit having been instituted by a devisor and revived by a party as devisee, whose supposed right is displaced by the discovery of a later will, the cause cannot be continued for the benefit of the effective devisee, by agreement between that devisee and the plaintiff in the suit, so as to enable the devisee under the second will (not being a party to the suit) to appeal against the decree; and an appeal cause cannot be heard before the Court of Appeal until he is made a party in the suit below.

In such a case, where the suit had been originally instituted by the devisor, and upon his death revived by the party claiming under the first will, *semb.* that the proper course to be adopted by the devisee under the second, is not (as in this case) to file a supplemental bill, praying to have the benefit of the proceedings in the revived suit, but to revive, *de novo*, the suit as abated on the death of the devisor.

The case is different where a decree is defective only because incidental parties are not before the Court; as in the case of an assignment in trust for payment of debts, reserving the surplus if the assignee obtains a decree, and afterwards it appears that he had assigned his interest before the decree, his assignees may, by supplemental bill, have the benefit of that decree. (*Semb. Binks v. Binks*, note p. 593.)

A decree for redemption and general account, &c. having been made in the original and revived causes in favour of the supposed devisee, it cannot be restricted in the supplemental suit to an account to be taken as between the executors and mortgagees, &c. to the time of the death of the devisor, dismissing the bill as it regards the interest of the devisee; for the devisee is a necessary party to the account.

The devisee having taken the benefit of an insolvent act, and made the assignee a party to the suit, who, by his answer, disclaimed all knowledge of the assignment, and refused to undertake the trust for the creditors, he cannot be compelled to act, and the suit remains imperfect until another assignee is appointed and made a party.

A decree made in such a state of the cause is erroneous.

* IN and before the year 1803, Thomas Gough, the father of the appellant Maria Rylands, was seised and possessed of lands which he held for lives under John Latouche as head landlord. At the same date John, David and Peter Latouche, carried on business as bankers, and being creditors of Gough upon a bill of exchange, brought an action against him, and obtained possession of the lands under a custodiam, which was granted to David Latouche. The custodiam proving unproductive, a mortgage

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* This case is reported chiefly as an example of the ordinary course and issue of Irish appeals in the appellate jurisdiction; but some of the questions discussed, and points decided of pleading and practice, are not unworthy of attention.

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of the lands was executed by Thomas Gough to David Latouche, as trustee for the other partners, but without prejudice to the custodiam; and finally, after various transactions not material to the issue of this cause, the lands were sold by Gough to John Latouche, under alleged circumstances of fraud, duress, and oppression.

On the 8th of November 1803, Thomas Gough filed a bill in the Court of Chancery in Ireland against David, John, and Peter Latouche, stating several transactions of debt, outlawry, mortgage, and sale, (as before in part set forth), impeaching the sale for fraud, and praying that the respondents might account for the rents and profits of the lands, and that he might be restored to the possession on the usual terms of redemption.

The defendants by their answer, insisted on the fairness of the transactions, and the validity of the sale.

Gough died pending the cause, in November 1804, leaving a will dated the 19th of August 1804, by which he devised property, including the lands in question, to John Hamilton and William Crawford, in trust for the appellant Maria, then a minor, and appointed Hamilton and Crawford his executors. Hamilton and Crawford proved the will, and with the appellant Maria, by her testamentary guardians, revived the suit, which afterwards by order, made on her attaining twenty-one, was carried on in her own name.

After the reviving of the suit, it was discovered that Gough had made another will, dated 30th of September 1804, by which he devised all his estates

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to the appellant Richard Franklin Gough, charged with some legacies, and amongst others a legacy to the appellant Maria, and appointed the appellant Richard Franklin Gough residuary devisee and legatee.

The second will was established under a decree of the Court, obtained in a suit instituted by Richard Franklin Gough, who thereupon agreed with Maria Rylands and Hamilton and Crawford, that the suit which had been revived by them as above stated, should be continued in their names for the benefit of the appellant Richard Franklin Gough.

The cause was prosecuted accordingly, and the plaintiffs and defendants respectively having examined witnesses on the questions at issue, the cause was heard before Lord Chancellor Ponsonby on the pleadings and proofs; and on the 28th of June 1806, it was decreed, that under the circumstances of the case the deed of sale dated the 1st of August 1786, ought to be deemed fraudulent and void as against the plaintiffs in the cause; and accordingly, that the same should be brought in and cancelled, and that the plaintiffs should be entitled to a redemption of the mortgage of the 25th of October 1783, on payment of the balance (if any) which should appear to be due on the foot of the same; and that it should be referred to a master to take an account of the sums due to the defendants, David, John, and Peter Latouche, on the foot of the mortgage; and also, an account of all sums advanced by the defendants, or any of them, as well in the discharge of the debts of Thomas Gough, as also of the sums paid to him or for his use, and

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by his desire, in his lifetime ; and that the master should also take an account of what the defendants, or any of them, had received, or without their wilful default might have received, out of the mortgaged premises, from the 9th of July 1781, being the time when they entered into possession thereof under the custodiam ; and that the rent reserved by any lease, which should appear to have been *bonâ fide* made by the defendants, should be charged from the date thereof, and that the master should set a fair rent on the other parts of the premises ; and that in taking the accounts, the master should set off the sums with which the defendants should be chargeable, first in discharging the interest, and next the principal of their demands ; and thereupon should strike a balance, and the costs and further directions were reserved until the return of the master's report.

The cause was afterwards re-heard before Lord Chancellor Ponsonby, on the petition of John Latouche ; and on the 29th of April 1807, it was ordered that the former decree should be affirmed.

By the report on the 23d of December 1807, the master upon the whole of the accounts found that there was a balance of 6,286 *l.* 17 *s.* 1 *d.* due to the plaintiffs on the day of his report. Against this report several exceptions were taken by the defendants, on the ground that the master, in taking the accounts, had not received certain statements copied and signed by Gough as evidence against the plaintiffs. On this ground most of the exceptions were allowed, and upon reference back to the master to review his report according to rules made on hearing the exceptions, he found by his amended report,

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that after all credits and allowances there was a balance due to the defendants of 4,755 *l.* 4 *s.* 9 *d.* Against this amended report both plaintiffs and defendants filed exceptions, which were over-ruled by decree on further directions, on the 27th of June 1808, whereby it was ordered that the balance found due by the amended report should be paid with interest in three months, and thereupon possession of the lands, with the title deeds, be given to the plaintiffs, and in default of payment the bill to be dismissed. This sum, according to the decree, was paid by R. F. Gough.

Hamilton and Crawford died after the date of this decree, leaving the appellant Maria the only plaintiff on the record. John Latouche also died after the decree and before the appeal, leaving Robert Latouche his heir at law, and Robert and John Latouche his executors. In January 1812, Robert and John Latouche appealed against the decrees of June 1806, and April 1807, but withdrew their appeal in March 1812. Maria Rylands (together with R. F. Gough) appealed against the order of the 23d of March 1808, and the decree of the 27th of June 1808.

After the appeal was presented, the cause abated by the death of the respondent David Latouche, and was revived against the respondents George Latouche, John David Latouche, and Peter Latouche the younger, who were executors, and obtained probate of the will of David Latouche.

On the 20th of May 1818, the appeal was called on for hearing, and on the statement of the appellant's counsel; (no counsel appearing for the respond-

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ents,) the House were of opinion that the appellant, Richard Franklin Gough, ought to have been made a party to the suit in Ireland, which could not, by agreement, be carried on for his benefit, and on this ground adjourned the appeal *sine die*; directing by their order, that the appellants should be at liberty to take such proceedings in the Court of Chancery in Ireland as they might be advised, to make the proper persons parties to the cause there, and to bring all proper parties before the House.

After the decree had been made which established the last will of Thomas Gough, the appellants Richard Franklin Gough, and John Franklin, who had been appointed executors, obtained probate of that will from the Court of Prerogative in Ireland.

The appellant, Richard Franklin Gough, afterwards took the benefit of an Act passed in the fifty-third year of the reign of Geo. 3, "for the relief of Insolvent Debtors in Ireland."

On the 7th of November 1818, the appellant, Richard Franklin Gough, exhibited a bill in the Court of Chancery in Ireland against the respondents, and against Henrietta Gough the surviving executrix of the first will of Thomas Gough, (the three other executors, namely, John Hamilton, William Crawford and George Lloyd being dead,) and against John Franklin, his co-executor under the second will, and Maria Rylands, and against John Massy, who was chosen assignee of his estate and effects under the said insolvent act: praying among other things, that Richard Franklin Gough and John Franklin might have the benefit of the suit instituted by Thomas Gough, and revived by John

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Hamilton, William Crawford, George Lloyd, Henrietta Gough and Maria Rylands, and of all proceedings, orders and decrees in the original and revived suit, so that Richard Franklin Gough might be entitled to appeal therefrom.

The respondents put in a demurrer to the bill, which, on argument, was over-ruled by the Master of the Rolls; but other causes of demurrer, which were assigned *ore tenus*, having been allowed, the appellant Richard Franklin Gough appealed from this decision to the Lord Chancellor, who reversed the order of the Master of the Rolls.

On the 6th of April 1819, the respondent Robert Latouche filed his answer to this bill, and thereby contended that the appellant Richard Franklin Gough ought not to have the benefit of the decrees made in the revived cause, and that any right, or beneficial interest, which the appellant Richard Franklin Gough had in the cause, and the subject-matter thereof, were legally vested in John Massy.

On the 8th of April 1819, the defendant John Latouche answered the bill.

On the 24th of April 1819, the other respondents, Peter Latouche the elder, George Latouche, John David Latouche, and Peter Latouche the younger, answered the bill; and they as well as John Latouche, by their answers, raised the same objections as the respondent Robert Latouche had done to the relief sought by the bill of Richard Franklin Gough.

The several other parties, defendants, also answered the bill, and the defendant John Massy by his answer stated, that he was appointed assignee of the appellant Richard Franklin Gough's estate and

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effects, without his knowledge, consent, or concurrence; that he never accepted the trust, nor acted under it; that he did not intend to undertake, and was desirous to be released from the trust.

The cause was afterwards set down on the bill and answers, and was heard before the Lord Chancellor on the 4th and 5th days of May 1819; and on the 10th of May it was decreed, “That as between
“ the plaintiff and the defendants Robert Latouche,
“ John Latouche, Peter Latouche the elder, George
“ Latouche, John David Latouche, and Peter La-
“ touche the younger, the plaintiff *as executor* of
“ Thomas Gough, be, and he accordingly is hereby
“ decreed, entitled to the benefit of the proceedings
“ in the pleadings mentioned, as prayed by his bill.
“ And it is further ordered, that as between the
“ said plaintiff and said defendants, the remainder
“ of plaintiff’s bill, claiming *as devisee* of said
“ Thomas Gough, be, and the same is hereby dis-
“ missed with costs, to be taxed by the master in
“ this cause, against the plaintiff, and as to the de-
“ fendant John Massy, assignee of Richard Franklin
“ Gough, an insolvent in the pleadings named,”
it is further ordered, “that the plaintiff’s bill in this
“ cause, and all and every the matters and things
“ therein contained, be, and the same are hereby
“ dismissed, with costs, to be taxed by the master
“ against the plaintiff.”

On the 24th June 1819, it was ordered by the House on the petition of the appellants, that they should be at liberty to amend their original appeal, by making the appellant John Franklin a party appellant, which was accordingly done.

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The respondent John Latouche, one of the executors of the will of John Latouche the elder, died after the decree, leaving the respondent, Robert Latouche, surviving executor.

Under these circumstances, the appeal was again brought to hearing before the House in the year 1820.

For the Appellants, *Mr. Horne, Mr. Blake.**

For the Respondents, *Mr. Hart, Mr. Wetherell.†*

Lord Redesdale :—This is a decree giving the benefit of the former decree to the plaintiff in his character of executor, which was an immaterial part of that decree. Substantially, it related to the interest claimed by the plaintiff in that suit as devisee; and the bill is dismissed as to the devisee, in whose absence the account cannot be taken.

The Lord Chancellor :—The decree in the original suit was made upon the bill, and in favour of Maria Rylands. If she is not entitled to that decree, how can another person in a supplemental suit, professing to carry on the former suit, have the benefit of such a decree?

Lord Redesdale.—The fact that Gough was insolvent and discharged by act of parliament, could not have been known to Lord Ponsonby. The decree dismissing the bill as to the right of the devisee, extinguishes the whole right of the appellant, and yet is not made a substantive ground of appeal.

* Since appointed Deputy Remembrancer of the Court of Exchequer in Ireland.

† Since appointed Solicitor-general.

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This proceeding, looking to its origin, is on the appeal of Maria Rylands. In the original appeal Richard Franklin Gough was made an appellant; although he had nothing to do with the cause. For the purpose of making him appellant, it was then supposed that Maria Rylands had no interest. The House ought, on the former hearing, to have dismissed the appeal, without prejudice to any suit to be instituted by Richard Franklin Gough.

To the parties as executors the Court could only give the benefit of the decree in favour of Thomas Gough, so far as the account of receipts and payments to the time of his death extended,

Subsequent to the death of Thomas Gough his devisee became the party entitled, and as Richard Franklin Gough proves to be the devisee, he cannot have the benefit of proceedings in a former suit to which the party in that suit was not entitled. Such a decree might pass by consent, but not otherwise. Perhaps the appeal might stand over, with liberty to re-hear the cause on the supplemental suit. But another supplemental bill will be necessary to bring an assignee of Richard Franklin Gough before the Court. Then it must be considered whether you can be entitled to the supposed interest of Maria Rylands. The proper course would have been to revive the proceedings as they stood on the death of Thomas Gough.

Mr. Blake :—There have been cases where third persons have been allowed to take the benefit of a decree.

Lord Redesdale :—There is a difference between

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the cases of persons who are incidental parties, as legatees, creditors, &c. and sole subsisting independent parties. Suppose the case of a bill to execute a trust to sell an estate for payment of debts, and a person is made a party as the representative of a surviving trustee, who proves not to be so ; in such a case, if the suit is perfect in other respects, the error might perhaps be corrected, and the benefit of the proceedings had by a supplemental suit. But here is a substantial defect of parties.

Lord Redesdale :—The suit in this case was 14 July, 1820. instituted by Thomas Gough, and on his death revived by Maria Rylands, who obtained a decree. It had in the mean time been discovered, that the will under which she claimed as devisee had been superseded by a subsequent will, which was established by a decree of the Court, obtained in a suit instituted by Richard Franklin Gough, the devisee, in the second will. Then followed an agreement, which it was not competent to the parties to make, that Richard Franklin Gough should have the benefit of the suit pending on behalf of Maria Rylands in the character of devisee. The decree was made in the cause, and the appeal brought before the House substantially as the appeal of Maria Rylands, who had, in fact, no interest in the suit. The cause stood over, by permission of the House, to correct that mistake. A bill was then filed by Richard Franklin Gough against the Latouches, and the assignee of his estate, to have the benefit of the former suit. The decree upon that bill gives him the benefit of the former suit as executor. That,

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at the utmost, can only extend to the accounts to be taken up to the time of the death of Thomas Gough. Beyond that interest the claim upon the former suit is a mere nullity. As to all other matters the bill is dismissed; and according to the decree, the title can be sustained in the character of executor only, and not as devisee. In addition to this difficulty, and supposing the title as devisee sustainable, the assignment under the insolvent act took all estate and right out of Richard Franklin Gough, and vested it in the assignee. On the hearing of the supplemental suit the assignee declared, that he had never assented to undertake the trust or administration of the insolvent estate. The law does not compel an acceptance of such a trust, and in consequence of this refusal on record, the parties are left in the same situation as if there had been no assignee. In this predicament how can you proceed? If the respondents had appealed, the House might have determined the question so far as you are entitled as executor; but, in fact, the present subject-matter of appeal respects the interest of a devisee, and not an executor.

Mr. Horne :—We may have the benefit of the account if we assent to confine it to the lifetime of Thomas Gough.

Lord Redesdale :—The Court has decreed, that a certain balance is due upon the mortgage. The executor, therefore, has no interest.

Mr. Horne :—We ask as personal representatives the benefit of the original decree.

Mr. Blake :—The sum reported due has been paid but we seek to recover it; that must be by payment to the personal representatives.

Lord Redesdale :—The original bill prays that the deed conveying the whole estate may be declared void. The decree accordingly, in the revived suit instituted by Maria Rylands in the character of devisee, declares the deed to be fraudulent and void, and directs accounts of all monies due on the mortgage, &c. and all rents and profits, &c. as on the claim of a devisee. The master takes the account of the rents and profits to the date of the report. To the sum reported due on the first report Maria Rylands could not have title as executrix, but as devisee. You now seek to have the benefit of the decree in that suit, which includes the rents and profits from the death of Thomas Gough.

Mr. Horne :—We give up so much of the decree. The appellants contend that the mortgage debt was overpaid during the life of Thomas Gough by receipt of rents, and they claim to be entitled to the surplus.

Lord Redesdale :—Why did the Court dismiss the bill as to the right of the devisee?

Mr. Blake :—It was supposed that the question as to the realty was concluded, and there remained only a question of account.

Lord Redesdale :—Instead of filing a bill to have

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the benefit of the proceedings, you should have revived the suit of Thomas Gough.

Mr. Horne :—The conduct of the parties has given validity to the decree.

Mr. Hart :—No such fact is put in issue.

Lord Redesdale :—The account stated by the master, from the death of Gough in 1804, amounts to £. . . Suppose the House were of opinion that the report is right, we are sustaining the transaction without proper parties. This is in substance a decree for redemption. I do not see how it is possible to cure the defects of the case. If the respondents had appealed so far as the decree gives the benefit of the former proceedings, and the appellants so far as the bill is dismissed in respect of the rights of the devisee, some course might have been adopted. But in the actual state of the cause, supposing the House were of opinion that it is possible or probable that the principal and interest of the mortgage were liquidated by receipt of rents and profits during the life of Gough?

Mr. Horne :—You might send the cause back to take the accounts.

Lord Redesdale .—We could do no such thing in the absence of the devisee, or those to whom his right is transferred.

Mr. Blake :—The bill was originally filed by

Maria Rylands as devisee, and the personal representatives also were parties. The cause might, perhaps, be reheard on the supplemental bill.

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Lord Redesdale:—The devisee or his representative must be a party.

Mr. Blake:—In *Binks v. Binks** in Chancery, August 1814, a mortgagee filed a bill for a sale under a trust. Before the decree he conveyed his whole interest, and his assignees were permitted to have the benefit of the decree which he obtained.

The *Lord Chancellor*:—You have never heard of such a case before or since. I never heard of such a practice.

Lord Redesdale:—The case of *Binks v. Binks* July 17. is not an authority in point. There the party assigned for payment of debts, reserving the surplus, and the assignee had an interest and right to prosecute the suit. There the decree was defective only because incidental parties were not before the Court. Here the party prosecuting the suit had no interest according to the case made by the bill, and no right to the decree. It seems to me impossible to dispose of the case in its present circumstances; the question in substance being, whether Richard Franklin Gough is entitled to recover from the respondent a sum which he paid representing Maria Rylands as a devisee? The estate is only redeemable by the de-

* See the note at the end of the case, where an abstract of the facts of this case is given from the Registrar's book.

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visee, or those who claim in his right, and how can the cause proceed without a nominal assignee, at least, to represent the creditors?

July 19.

Lord Redesdale.—This case was first before the House in 1818. We were then embarrassed by the state of it.* According to the state of the pleadings at that time, Maria Rylands appeared to have the whole beneficial interest, but in fact had only a legacy under the second will, which the parties agreed to keep out of view in that suit, and to continue the proceedings for the benefit of Richard Franklin Gough. The decree was for accounts and redemption in favour of Maria Rylands, as devisee, and the other plaintiffs as executors under the first will of Thomas Gough. On the ground of this private agreement Richard Franklin Gough made himself a party to the original appeal, stating the second will and the agreement. Under these circumstances the House, finding it impossible to proceed on such an agreement, retained the appeal, giving liberty to the parties to supply the defects of their case by such proceedings as they might be advised to institute. A suit was thereupon commenced by Richard Franklin Gough. The cause was heard on the 10th of May 1819, and the decree declares the plaintiff to be entitled as executor of Thomas Gough inaccurately, for he was not sole executor. It declares, that as such he is entitled to

* Here the noble lord stated the facts from the pleadings, as they were set forth in the appeal cases, according to which it appeared that Richard Franklin Gough, who had made himself a party to the original appeal, had no interest in the property.

the benefit of the former decree, that is, of all the proceedings; as to the rest of the prayer, the bill is dismissed. The decree, therefore, appears to be in favour of one of two subsisting executors; and the claim of the plaintiff in that suit as devisee is dismissed, both as against Messrs. Latouche and Massey the assignee. This is a singular mode of proceeding. Supposing Richard Franklin Gough entitled in this suit as one of two executors, something was necessary to be done as to the co-executor; and it seems that the parties are conscious of this defect, as they have made him a party to the appeal. The whole proceeding has been so strangely managed that it becomes difficult to know what course ought to be pursued. In the court below it has been declared that Richard Franklin Gough is entitled to the benefit of the proceedings in the former suit. But the question material for consideration is, whether we have before the House proper parties to maintain the interests mentioned in the appeal? What is the nature of the suit? A bill to have the benefit of former proceedings, not to carry on the unexecuted part of a decree, but to continue the whole for the purpose of reversing a part. The facts require attention;* and the difference in characters and relations of the defendants. David Latouche was mortgagee and custodee; John Latouche was head landlord and purchaser of the lands. The

* Here the noble lord read the facts from the case, as shortly stated in the beginning of the Report. Many of the facts stated in the bill to make a case of oppression, which formed the ground of the original suit, are omitted in the report, as being irrelevant to the points before the House.

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original decree declared the purchase void as against Maria Rylands and her trustees, under the first will, who were also executors. The decree undoubtedly operated upon them in their characters of personal representatives, but in substance - was founded on their rights as devisees, under the first will of Thomas Gough. It could stand upon no other right. As executors they might be required to discharge the debt on the mortgage security. But the decree declared the plaintiffs in that suit to be entitled to a redemption of the lands, on payment of the balance (if any) due on the mortgage. To that relief, and to have the purchase declared fraudulent and void, they could only be entitled as devisees in trust. As to that part of the decree, John Latouche, as purchaser, was the only defendant interested. David Latouche was mortgagee and custodee, and the account directed was general; comprehending all these parties without distinction, although standing in such different rights and characters. This confusion might be a matter of indifference to the defendants, who being connected, might adjust the accounts between themselves; but for the sake of regularity in the administration of justice, it is to be regretted that decrees in Ireland are so imperfectly drawn up. The effect of the decree was to make the estate redeemable, according to the result of the account. The suit was instituted in respect of real estate, which was first mortgaged and afterwards sold. It was to be reconveyed, on payment of what should appear to be due on balance of all the accounts. On taking the accounts, which of necessity comprised rents accrued since the death of Gough

in 1804, a balance was found due to the plaintiffs. Exceptions to this report were filed, on the ground that the account was improperly taken, and these exceptions were in part allowed. Upon the second report the balance was in favour of the defendants; and it is observable, that in the schedule to this second report the master charges the defendants with rents received since the death of Thomas Gough. After the decree, founded upon the second report, was pronounced, Richard Franklin Gough paid what was found due upon the accounts, and took a reconveyance of the estate. After this payment and reconveyance the appeal is presented against the orders by which the exceptions are allowed in favour of the Respondents, and the object of the Appellants is to have these orders reversed, and the former report re-established. The proceedings are so irregular that it is difficult to know how to deal with the case. The original decree cannot be carried into execution for the benefit of the plaintiffs in the supplemental suit, for it was void as a proceeding, by parties having no interest. Upon the subject of costs it may be fit to consider that the respondents have been improperly put to expense, in consequence of the appellants having concealed the fact that a later will existed. The appeal in its present state cannot be heard for the purpose of deciding whether the account is properly taken; what is the balance, and to which party due. Those are inquiries which cannot be made without considering the title, and in the absence of the devisee; yet the bill being instituted by Richard Franklin Gough in that character, it is declared that he has no title as

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devisee to the benefit of the proceedings, but only as executor. It has been dismissed, and that is not made the ground of appeal. As executor the appellant cannot be entitled to the benefit of the proceedings. It is difficult to frame any order in such a case. It would have been better if the former appeal had been at once dismissed. It was retained as an indulgence to the parties, to give an opportunity of making their case perfect. They have not done so; and the House can give no judgment on the merits of the case: but an order may be pronounced in terms which point out to the parties the errors in their proceedings, that they may now endeavour to correct them. It might be to the following effect*:

“ The matter of the revived and amended petition of appeal, wherein Maria Rylands, Richard Franklin Gough and John Franklin, are Appellants, and Peter Latouche, Robert Latouche, George Latouche, John David Latouche and Peter Latouche, junior, are Respondents, having come on to be heard before this House, and it appearing to the House, from the petition of appeal and the cases delivered on the part of the Appellants, and the proceedings of the Court of Chancery in Ireland delivered to the House, that the original petition of appeal had been presented by Maria Rylands, widow, and Richard Franklin Gough, only complaining of an order of the Court of Chancery in Ireland, bearing date the 23d of

* This order was proposed for the consideration of the House, but it was not moved, and does not appear in the journals. The cause has since abated by the death of one of the parties, and has not been again before the House.

“ March 1808, and a decree of the said Court;
 “ bearing date the 27th of June 1808, made in a
 “ cause in which the said Maria Rylands, John
 “ Hamilton and William Crawford, were plaintiffs,
 “ and the Right Honourable David Latouche and
 “ others were defendants, and that Richard Franklin
 “ Gough, who was named in the case delivered on
 “ the part of the Appellants as a joint appellant with
 “ the said Maria Rylands, was no party to the said
 “ cause in which such order and decree so appealed
 “ from were pronounced; and it also appearing to the
 “ House that the proceedings in the said cause were
 “ founded on an original bill filed by Thomas Gough,
 “ deceased, against the said David Latouche, John
 “ Latouche, and others; impeaching a sale and con-
 “ veyance made by the said Thomas Gough to the
 “ said John Latouche, and a mortgage made by
 “ him to the said David Latouche of divers lands
 “ in the county of the city of Limerick, which the
 “ said Thomas Gough held by lease for lives, with
 “ a covenant for perpetual renewal of such lease, and
 “ that the said Thomas Gough having died before
 “ the said cause had been brought to a hearing, the
 “ said Maria Rylands claiming to be beneficial de-
 “ visee of the said lands under the will of the said
 “ Thomas Gough, and the said John Hamilton and
 “ William Crawford claiming to be executors of such
 “ will, and the only executors who had proved the
 “ same in the Ecclesiastical Court, and George
 “ Lloyd and Henrietta Gough, two other executors
 “ named in the said will, had filed a bill of revivor
 “ and supplement, founded on the said bill filed by
 “ the said Thomas Gough, and had, claiming in

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“ those rights on the 28th of June 1806, obtained
 “ a decree of the said Court of Chancery, setting
 “ aside the conveyance of the said leasehold estate,
 “ and ordering divers accounts to be taken between
 “ the parties to such suit, and that the said order of
 “ the 23d of March 1808, and the said decree of
 “ the 27th of June 1808, had been made in such
 “ cause, in which the said Richard Franklin Gough
 “ had been a party, but having been struck out by
 “ amendment, was no party at the hearing; and it
 “ appearing by a bill filed by the said Richard
 “ Franklin Gough against the said Maria Rylands
 “ and others, that the will of the said Thomas
 “ Gough, under which the said Maria Rylands,
 “ John Hamilton and William Crawford, claimed,
 “ had been revoked by a subsequent will, by which
 “ the real and personal property of the said Thomas
 “ Gough had been devised to the said Richard Frank-
 “ lin Gough; and the said Richard Franklin Gough
 “ and John Franklin (who has now made himself a
 “ party to the said petition of appeal by amendment,
 “ together with the said Maria Rylands and Richard
 “ Franklin Gough) had been appointed executors of
 “ such will, and had proved the same, and that
 “ therefore neither the said Maria Rylands nor the
 “ said John Hamilton or William Crawford, as
 “ devisees and executors of the said Thomas Gough,
 “ or the said George Lloyd and Henrietta Gough,
 “ had any right to revive the suit so instituted by
 “ the said Thomas Gough as his devisees, but that
 “ such right was (as now appears) vested in the said
 “ Richard Franklin Gough, and that the said
 “ Richard Franklin Gough and John Franklin are

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“ the executors and personal representatives of the
 “ said Thomas Gough ; and the matter of the said
 “ petition of appeal presented by the said Maria
 “ Rylands and Richard Franklin Gough having been
 “ called on to be heard before the House on the 20th
 “ of May 1818, and it appearing to the House that
 “ under the circumstances then disclosed the House
 “ could not properly proceed to hear the matter
 “ of the said appeal, and having therefore adjourned
 “ the consideration thereof, and on the 10th day
 “ of June 1818, ordered that the parties should
 “ be at liberty to take such proceedings in the Court
 “ of Chancery in Ireland as they might be advised,
 “ in order to make proper parties to the cause, and
 “ bring all proper parties before the House ; and
 “ it appearing to the House that the said Richard
 “ Franklin Gough afterwards filed a bill in the said
 “ Court of Chancery in Ireland against the Respon-
 “ dents and against the said Maria Rylands and
 “ John Franklin, and against John Massey, chosen
 “ assignee of the estate and effects of the said Richard
 “ Franklin Gough, who had been discharged from
 “ prison under an act of the 53d year of his late
 “ Majesty’s reign, for relief of insolvent debtors,
 “ praying that he might have the benefit of the suit
 “ instituted by the said Thomas Gough, and revived
 “ by the said Maria Rylands and others, and of all
 “ proceedings, orders, and decrees in the said original
 “ and revived suit, so that the said Richard Franklin
 “ Gough might be entitled to appeal therefrom ;
 “ and it appearing that such cause was heard in
 “ the said Court on the 10th day of May 1819,
 “ when it was decreed, that as between the plaintiff

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“ Richard Franklin Gough, and the defendants
 “ Robert Latouche, and others, Respondents in the
 “ revived and amended appeal, the said Richard
 “ Franklin Gough as executor of the said Thomas
 “ Gough was, and he was thereby declared to be,
 “ entitled to the benefit of the proceedings in the
 “ pleadings mentioned, as prayed by this bill ; and
 “ that as between the plaintiff and the said defen-
 “ dants the remainder of the said bill claiming as
 “ devisee of the said Thomas Gough should be
 “ dismissed ; and as to the defendant John Massey,
 “ assignee of the said Richard Franklin Gough,
 “ the said bill should also be dismissed, and the
 “ said Maria Rylands and Richard Franklin Gough,
 “ who had presented such original petition of appeal,
 “ thereupon obtained the order of the House as of
 “ course, that they should be at liberty to amend
 “ their original appeal, and make the appellant
 “ John Franklin a party thereto ; and the matter
 “ of the said appeal coming on to be heard before the
 “ House on the 5th day of this instant, July, it
 “ appearing to their Lordships, that under the cir-
 “ cumstances of the case the House could not pro-
 “ ceed to pronounce any decision on the said appeal,
 “ inasmuch as already by the said decree of the 10th
 “ of May 1819, which has not been appealed from
 “ by any of the parties, it was declared, that as
 “ between the said Richard Franklin Gough and the
 “ defendants, the Respondents and John Latouche
 “ deceased, the said Richard Franklin Gough, as
 “ executor of the said Thomas Gough, was entitled
 “ to the benefit of the proceedings mentioned in
 “ the pleadings in the suit instituted by him as

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“ prayed by this bill ; but such decree had declared
 “ no right of the said John Franklin as his co-exe-
 “ cutor, and by such decree the said bill of the said
 “ Richard Franklin Gough had been dismissed, as
 “ between the said Richard Franklin Gough claim-
 “ ing, as devisee of the said Thomas Gough, and the
 “ said Respondents and the said John Latouche
 “ deceased ; and the said bill had also, by the said
 “ decree, been dismissed against the said John
 “ Massey, so that there is no person before the House
 “ in whom the property of the said Richard Franklin
 “ Gough is vested, in consequence of his discharge
 “ under the said act for relief of insolvent debtors ;
 “ and inasmuch as the said decree of the 28th of
 “ June 1806, was and could only have been obtained
 “ by the said Maria Rylands, John Hamilton and
 “ William Crawford, as devisees as well as executors
 “ of the said Thomas Gough, and the same and the
 “ subsequent order of the 23d of March 1808, and
 “ the subsequent decree of the 27th of June 1808,
 “ were founded on the supposed rights of the said
 “ Maria Rylands, John Hamilton and William
 “ Crawford, as devisees as well as executors of the
 “ said Thomas Gough, the House cannot proceed
 “ to determine the merits of the appeal against the
 “ said order of the 23d of March 1808, and the said
 “ decree of the 27th of June 1808, without having
 “ before them the said Richard Franklin Gough in
 “ the character of devisee in the will of the said
 “ Thomas Gough, and also without having before
 “ them such person as may be entitled to be assignee
 “ of the estate of the said Richard Franklin Gough,
 “ under the said act for relief of insolvent debtors,

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“ especially as it appears on the face of the proceed-
 “ ings before the House, that the said decree of the
 “ 28th of June 1806, on which the said order and
 “ decree appealed from were founded, was obtained
 “ by persons who had no right to the estate in ques-
 “ tion; and in consequence of a private agreement
 “ between them and the said Richard Franklin
 “ Gough, to which the defendants in the said cause
 “ do not appear to have been parties or privies, and
 “ which agreement does not appear to have been
 “ disclosed to the Court at the time of such decree,
 “ or during the subsequent proceedings, and there-
 “ fore may be deemed to have been a fraud on the
 “ said Court, and on the other parties to the said
 “ suit, and it therefore may be objected at the hear-
 “ ing of the said appeal, that the said decree of the
 “ 28th of June 1806, and the subsequent proceed-
 “ ings thereon, were absolutely void, or were void so
 “ far as the same respected the said leasehold estate,
 “ it is therefore ordered, by the Lords spiritual and
 “ temporal in parliament assembled, that the hearing
 “ of the said appeal do stand over, with liberty for
 “ the several parties interested to take such proceed-
 “ ings as they may be advised in the said Court of
 “ Chancery, respecting the said suit instituted by
 “ the said Thomas Gough, and the suit instituted
 “ by the said Maria Rylands, John Hamilton, and
 “ William Crawford, and the said suit instituted by
 “ the said Richard Franklin Gough, and to bring
 “ before this House parties competent to litigate the
 “ questions which may arise thereupon between the
 “ Appellants and the Respondents, and the right of
 “ the Appellants to prosecute the said appeal; and

“ it is further ordered, that the Appellants do pay
 “ to the Respondents fifty pounds for their costs for
 “ attending the hearing of this appeal in the present
 “ session.”

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Reg. Lib. A. 1813, fo. 1718. b.

BINKS v. BINKS.

In 1809 Thomas Binks, as creditor, &c. filed a bill in Chancery against Lord Rokeby, Fred. Turner, and Phil. M'Farlane, stating an indenture of assignment and mortgage, dated in 1806, by which certain hereditaments, the property of Lord Rokeby, were vested in the defendants Turner and M'Farlane, as trustees for a term of years, to secure the payment of debts owing by Lord Rokeby to defendant Thomas Binks, &c. and upon trust in default of payment, to sell, &c. and assign or pay over the residue, &c. to Lord Rokeby. The bill further stated, that payment was not made according to the trust, and prayed an account of the debt and interest, and immediate payment, or in default, that the estate might be sold for payment, according to the trust.

The cause was heard at the Rolls in July 1811, and by the decree it was ordered, that the defendant Lord Rokeby should pay, &c.; or in default of payment, that an account should be taken of what was due to Thomas Binks, &c., and that so much of the estate should be sold as would be sufficient to pay, &c.; the surplus, if any, to be paid to the defendants Turner and M'Farlane, to be applied upon the trusts of the indenture of 1806. By the report, dated the 8th of August 1812, the Master found the sum due to Thomas Binks, the estate was sold pursuant to the decree and the report of purchase was confirmed by an order, dated on the 15th of January 1813. At this stage of the cause it was discovered that Thomas Binks, being indebted to various persons by mortgage, specialty, and simple contract, had in March 1810, before the date of the decree, assigned all his interest in the estate and debt, comprised in and secured by the deed of 1806, to Richard Binks, Antony Steel, and William Walter, in trust to recover the debt secured by that deed, and to apply the money

“ it is further ordered, that the Appellants do pay
 “ to the Respondents fifty pounds for their costs for
 “ attending the hearing of this appeal in the present
 “ session.”

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so recovered in payment of the debts of Thomas Binks, enumerated in a schedule annexed to the deed of 1810. In this state of things Richard Binks, Antony Steel, and William Walter, filed a supplemental bill, stating the facts before mentioned; and further, that the solicitor who conducted the cause for Thomas Binks did not know of the deed of assignment of 1810, when the decree was pronounced in the original cause, nor until after the estate had been purchased by, &c.; that the decree, therefore, had been obtained by mistake, and the purchaser refused to complete his purchase unless R. B. A. S. and W. W. were made parties to the cause, and consented to the payment of the purchase-monies into the Bank, in trust, &c.; that the plaintiffs were willing to confirm the proceedings in the former cause, and join in the conveyance; and the plaintiffs submitted that they ought to, and prayed that they might, have the same benefit of the suit instituted by Thomas Binks, and the decree pronounced, and other proceedings had in that cause, as if they had been parties to the cause originally. The defendants Thomas Binks and Anne his wife, by their answer, admitted the facts, and submitted, &c. The defendant Lord Rokeby, by his answer, submitted, that inasmuch as the decree was founded in mistake, and erroneous, it ought not to be carried into execution, and the plaintiffs ought not to have the benefit, &c.; and insisted upon the objection as if he had demurred to the bill. The defendants Turner and M'Farlane admitted the facts, and submitted, &c.

The supplemental cause was heard before the Vice-Chancellor on the 17th of August 1814, when it was "Ordered and decreed, that the former decree and order should be carried on and prosecuted between the present parties, in the manner as the same were directed as to the then parties," and that the Master should tax the costs, &c.