CHANCERY. 1770.

WILLIAM ROCHFORT, Esq. *v.* EARL of BELVIDERE(1).

Hilary.

Where a purchaser covenanted to pay off a mortgage out of the purchase money, and that the vendor should be exonerated; and with that intention, the amount of the mortgage debt was left in the purchaser's hands. *Held*, that he thereby made the debt his own, and that his personal estate was applicable in exoneration of the land.

Held also, that it made no difference that the party seeking such relief was not the immediate devisee of the purchaser, but claiming under the will of that devisee, who was also executor of the purchaser, and whose will gave no directions as to the payment of the mortgage debt.

The Lord Chancellor. This bill is brought against the Earl of *Belvidere* and *John Rochfort*, executors of *George Rochfort*, who was the executor of Lord Chief Baron *Rochfort*, and the purport of it is, to discover assets of *George*, and of the Chief Baron, sufficient to repay the plaintiff a sum of money advanced by him in discharge of some incumbrances affecting certain lands devised unto the plaintiff by *George Rochfort*, and for satisfaction of that demand out of the personal assets, if sufficient, if not, out of the real estates. In 1754, the then Chancellor, Lord *Jocelyn*, upon hearing of this cause, directed an account to be taken of the assets of *George Rochfort*, and of the Chief Baron, and of their debts and legacies; and in consequence of this decree, a special report was made in November, 1766. By it, the defendant, Lord *Belvidere*, appears to have in his hands assets of the Chief Baron to the amount of £5621, together with some other particulars not necessary at present to consider, and by that report, the Mas-

(1) See 2 Bro. C. C. 105, 108, where this case is referred to both by counsel and the Court, though with dissatisfaction; principally, it seems, from not having the means of judging of the grounds of the decision, which was affirmed in the Lords. 6 B. P. C. 520. The facts are more fully set out there.

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ter states the debt paid by the plaintiff, as a debt of the Chief Baron's. To this report four exceptions have been taken by the plaintiff; and they, together with the special point as to the reporting this debt for one of the Chief Baron's, came on to be considered, together with the merits of the case upon the late hearing; and that matter contained in the special point, in fact, is the great question in the cause.

It appears that the Chief Baron, in 1707, purchased the lands of *Freaghmore*, with other denominations, and in the deed of sale there was a covenant that those lands were then free of all incumbrances, except a mortgage thereon, made to *Thomas Proby*, in trust for *Grace Spencer*, for £450, principal money, which was to be paid by the Chief Baron out of his purchase money. £450 of that purchase money was actually paid by the Chief Baron at the time of the purchase, and the remaining £450 were left in his hands in order to discharge the mortgage; and these things appear from the receipts indorsed upon the purchase deed, and by a clause in it, the vendor was to stand exonerated from this mortgage debt. The Chief Baron never paid off this demand, and in 1722, he demised these purchased lands, and died in 1727. By his will he devised several lands to his wife, for the term of her natural life; and the residue and remainder of his estate he left to *George*, his son, subject to such debts and legacies as he should appoint. And after bequeathing his personal estate to his wife, he declared his intention to be, that his wife should enjoy his mortgaged lands free of all debts; and he left the residue and remainder of his estate and effects to his son *George*, in order to enable him to provide for his younger children. In 1729, the widow of the

Chief Baron sold all her interest in her husband's lands to *George*, in order to enable him to fulfil his father's will; and in 1730 *George* died. By his will he devised *Freaghmore*, &c. (with other lands) to trustees, in order to provide annuities for his sons, until they should attain their ages of twenty-five years respectively; and as they should severally attain such age, he divided his landed property amongst them. *Freaghmore*, &c., with other lands, and the rents thereof, and his interests therein, the testator bequeathed unto the plaintiff and his heirs, according to his interests and estates respectively therein. The residue of his real estate, and the surplus of his personal, be left to the defendant, now Earl of *Belvidere*, and appointed him and the defendant *John* his executors; and Lord *Belvidere* only proved the will, and acted under it. At the time of *George's* decease, the plaintiff, *William*, his third son, was a minor; the defendant, Lord *Belvidere*, paid the interest of the mortgage debt to *Grace Spencer* during the life of the Chief Baron's widow, who died in 1733; but he then refusing to pay any more of such interest, an arrear incurred; and in 1735 a bill was filed for a foreclosure and sale under that mortgage. An account was decreed in that cause, and £670 15*s.* 7½*d.* reported and decreed as due to the plaintiff in that cause, and the lands were afterwards sold under this decree, for satisfaction of that demand.

Under these circumstances, the present plaintiff filed the new bill in 1749; and has been postponed in that cause until this time, by parliamentary privilege, insisted upon by the defendant, Lord *Belvidere*. Upon this bill, the hearing was in 1754, and again upon the report in 1769; and two questions seem naturally to arise in the case; first, whether the

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plaintiff be entitled unto any relief, and secondly, if he should have any such right, what that relief ought to be.

This case is to be considered, first, upon the general principles of equity; and secondly, upon the particular circumstances of the case, and the intentions of the Chief Baron, and of his son, *George Rochfort;* and in considering those general equitable principles, it appears,—First, that a mortgage is the debt of the contracting party, and the land is but a pledge to secure the repayment of that demand; and so it is, whether there be or be not a covenant for the repayment of the money. 1 Wms. 291, *Howell* v. *Price;* 3 Wms. 358, *King* v. *King;* Prec. Cha. 61, *Meynell* v. *Howard.* Secondly, that the personal estate is the natural fund for payment of such debt, and cannot be exempted from this general rule, without an especial direction to that purpose. 3 Wms. 325, *Haslewood* v. *Pope.* Thirdly, that the *hæres factus*, or devisee, shall have aid of the personal estate as well as the *hæres natus;* 2 Atkyns, 436, *Galton* v. *Handcock*(1). Fourthly, that this aid of the personal estate does not take

A mortgage is the debt of the contracting party, and the land is but a pledge.

The *hæres factus* shall have aid of the personal estate.

(1) It was formerly the doctrine of the Court of Chancery, that a devisee of *particular* lands should not have the benefit of the personal estate; but an *hæres factus* of the whole property should; see *Gower* v. *Mead*, Pr. Ch. 3; *Howel* v. *Price*, 1 P. W. 291, Pr. Ch. 477; *Lord Portsmouth* v. *Lady Suffolk*, 1 Ves. 31; *Robinson* v. *Gee*, *id.* 251; 2 Bro. C. C. 263; 2 Atk. 436. And even to the *hæres factus*, this advantage was with difficulty conceded; see *Lutkins* v. *Lee*, Forr. 54. In the case of *Pockley* v. *Pockley*, however, it was said by the Lord Chancellor, that even an ordinary devisee shall have the same benefit; 1 Vern. 36. And such has been the doctrine ever since; see *Middleton* v. *Middleton*, 2 *Frem.* 189; *Hawes* v. *Warner*, *id.* 277; W. Kel. 3; *Galton* v. *Handcock*, *supra*. *Bartholomew* v. *May*, 1 At. 487; *Johnson* v. *Milksop*, 2 Vern. 112; Pow. Mortg. 781, 5th ed. But in order to discharge the personal estate, the intent must appear very plainly to make the real estate the primary fund; see Ll. & G. temp. Sugd. 242, *Vandeleur* v. *Vandeleur;* see also *Scott* v. *Becher*, 5 Mad. 96; *O'Neal* v. *Mead*, 1 P. W. 693; *Tweddell* v. *Tweddell*, 2 Bro. C. C. 101.

place as against a specific or pecuniary legatee, but shall against any legatee of the residuum; and this was determined by Lord *Hardwicke* in 1744, in the case of *O'Brien* v. Lord *Inchiquin*(a), and the reasons supporting these several principles and which are now firmly settled, however formerly disputed, arises from the consideration that the mortgage is properly the debt of the party giving that security. It remains then to be considered, first, whether this demand was properly a debt of the *Chief Baron's*, so as to affect his personal estate under the rules before laid down; and secondly, whether anything mentioned in his will exonerates his personal estate from this demand; and thirdly, whether the plaintiff's not being the actual and immediate devisee of the *Chief Baron*, makes any material difference in the case, and is any reason wherefore the plaintiff should not have the aid of his assets.

As to the first of these points, it seems clear that this mortgage debt was a debt of the Chief Baron's, both by natural reason, upon equitable principles, and under his own intentions disclosed in his will, and appearing from the terms of the purchase-deed. By that deed of sale the plain intention of all parties was, to put the Chief Baron into the place of the vendee, who, by the express words of the deed, was to be no longer liable to this demand, the Chief Baron having retained sufficient of the purchase-money to indemnify him against that demand. Under these circumstances, and under the directions of the Chief Baron's will, his heir might have obliged his executors to have applied his assets in the discharge of that debt; these assets having been increased by the detention of so much of the purchase money as suf-

(a) Ridg. Temp. Hard. 230; Ambl. 33; 1 Wils. 82.

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ficed to answer that demand. In 2 Burr. 1005, *Moses* v. *Macfarlane*, is a great deal of learning, and a good resolution concerning the recovery at law out of the personal estate, of money by receipt whereof that personal estate was increased; and if that resolution were understood and followed, it would prevent many equity suits. The case mentioned in 1 Vernon, 358, is a case very frequent, and has induced a general opinion, universally acquiesced under, that where a purchaser has an allowance for an incumbrance affecting the lands purchased, that the debt is set up and established, although it before might have been deficient(1). This cited case takes notice of that of *Cope* and *Cope*, 2 Salk. 449. In that there was not any express agreement to discharge the mortgage by the purchaser, yet it was determined that he by retention of an equivalent, had made that mortgage his own debt; but this case is much stronger, as there is an express covenant in the purchase-deed, that the mortgage debt should be paid by the Chief Baron, and not by the vendor, who thereafter was to stand clear of it. And the Chief Baron himself considered this demand in that light after the purchase; for he by his will directs the interest of it to be paid out of his other property in ease of his wife, who was the devisee of the mortgaged land: and, by a general clause, provides for the payment of his debts out of his whole fortune. The case of *Pockley* v. *Pockley*, 2 Cha. Ca. 84, and 1 Ver. 36, was one of the first cases which favoured a devisee, by giving him the aid of the personal estate, and there great stress was laid upon the declarations in the testator's will, treating the demand as his own debt.

Where a purchaser has an allowance for an incumbrance, the debt is thereby established.

(1) This case should probably be *Evelyn* v. *Evelyn*, 2 P. W. 664. The question whether a purchaser has or has not made an incumbrance his own

As to the second consideration, whether anything appeared from the will of the Chief Baron exempting his assets from the payment of this debt, it appears that no such exception was ever intended by him. It was objected that he had made specific bequests of that part of his fortune; but it appears that he had so disposed of part only, and that after his wife's death all that he had left her was to become subject to all his debts. So that these directions control all general suppositions and inferences, and rendered the fortune left to the wife in fact assets *in futuro*.

Upon the third question, whether the plaintiff should be precluded from relief because he was not the immediate devisee of the Chief Baron, it seems that such a question is to be considered upon the particular circumstances of the case, which would naturally lead into the general principle. There seems in real justice, to be little, if any, difference between an immediate and more remote devisee. The first takes the matter devised, subject to all charges, and endowed with all the privileges that are annexed to such an estate; and transmits it to the next successor with the same inherent qualities. And in this case there is the less reason for doubt, as the defendant, Lord *Belvidere*, is the actual personal representative of the Chief Baron. The first executor took the assets subject to all charges; and the second must hold them in the same manner. The different estates thus remaining liable in those respective successive hands, what is the real difference

A remote, as well as an immediate devisee entitled to the aid of the personal estate.

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debt, must depend on all the circumstances of the transaction, as they furnish ground to infer that he meant to become principal or stand as surety. See Pow. Mort. 873. See also Mr. Coxe's note to 2 P. W. 664, and the cases there referred to. *Noel* v. *Lord Henley*, Dan. 332; *Lawson* v. *Lawson*, 3 B. P. C. 424; *Tweddell* v. *Tweddell*, 2 B. C. C. 101.; *Alen* v. *Hogan*, Ca. Temp. Sugd. 231.

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between the complainant's being heir in the first or second degree, whether he were *hæres natus* or *hæres factus*, or the other party's being the second or third executor instead of the first? And this case is stronger than that of *Howel* v. *Price*, as here a part of the Chief Baron's assets had been found, and was actually reported to be in the hands of the defendant, Lord *Belvidere*.

An objection has indeed been taken that *George Rochfort* has been silent with respect to this debt, and, by not making any provision for the discharge of it, has left it to lie upon the land. But his intention is apparently to the contrary. He has given this mortgaged denomination expressly as a provision for the now plaintiff, and that provision will be ineffectual if taken thus loaded. 2 Atkyns, 463, *Galton* v. *Handcock*. *George Rochfort* gave this estate as he held it, and transmitted it with the very same privileges which it had when he received it; and he besides has implicitly ordered the debt to be satisfied out of his father's assets in his hands. It is manifest from the will of the Chief Baron that he intended these lands for *George*, in order to enable him to provide for his younger children. So that under this intention, those children are in fact as devisees immediately under the Chief Baron's will, and the acts of *George* are done only to fulfil and execute his father's intention. And here the mortgagee has made his election to recover his debt out of the land, he having a right to follow what fund he pleases; 2 Atkyns, 535, 438; and in truth had thereby left the present plaintiff nothing remaining of the provision which was intended for him by his father and grandfather.

It seems then upon the whole of the matter, that the plaintiff is entitled to the relief sought for by his bill, not-

withstanding the objections raised against it by the defendant's counsel; which are, First, because he is neither heir to, nor original devisee of, the Chief Baron; the answer to which objection has been before given in the reasoning upon this case. Secondly, that this sum never was any debt of the Chief Baron's, because he purchased the equity of redemption only. But this has before been taken notice of; and in the case of *Evelyn* v. *Evelyn*, 2 Wms. 659, the party was a surety only, and no money had been left in his hands, nor the vendor ever exempted from the debt; yet, there the Court declared that if any estate of *George Evelyn* could be discovered, that estate would be liable. The case of *Lutkins* v. *Leigh*, cited as having been determined by Lord *Talbot*, was not similar to the present case. Nor are the cases of *Clifton* v. *Burt*, 1 Wms. 679, and *Herne* v. *Merrick*, Salk. 416, apposite to the case now under consideration. In those cases no directions of the testator's appeared that his personal estate should stand exempted. It is true that a man may purchase an equity of redemption without making himself subject to the mortgage debt. But here the contract before stated excludes all supposition of any such design in the original purchaser; and the intent of the parties governs all cases of this nature; and the expressions in the will, signifying that the parties under that will should enjoy the testator's estates and interests according to his several rights thereto, relate only to the nature of those different estates and interests, and not to any charge upon them, nor any right of having them exonerated in any manner the law should allow. And as to the last point, concerning what the plaintiff should recover, it appeared that he had paid a sum of £1411; and the plaintiff ought now to receive all that he had so paid. But as the Master made his report concerning that matter,

The exemption of the personal estate depends upon the intent of the party.

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without any warrant by the former decree, such report would not support any judgment at this time to be given. So that the decree now proper to be pronounced, is only, that the plaintiff recover against the defendant, out of the said assets in his hands, so much as he paid in discharge of the mortgage debts, and also his costs; and in order to ascertain the sum so paid, that the Master shall take an account of that matter, and compute interest upon such payment from the time when it was made; and that he should likewise tax unto the plaintiff his costs in this cause(*a*).

Lord *Belvidere* appealed from this decree to the House of Lords of *Great Britain*; and in *May*, 1772, that appeal was heard, and the decree affirmed with full costs(*b*).

(*a*) *Reg. Lib.* 1769-70, p. 235. (*b*) 5 B. P. C. 299.

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NEALE and Others *v.* COTTINGHAM and Others(1).

1, 2, 3, 14 *Mar.* A creditor in *Ireland* of a trader in *England* against whom a commission of bankruptcy has issued, cannot by attaching in the Tholsel Court, a debt due in *Ireland* to the bankrupt, hold it over against the assignees under the commission. This Court will give credit to Acts of a foreign competent jurisdiction.

WILLIAM NEALE and *Samuel Grace*, assignees of *John Grattan*, an *English* bankrupt, filed their bill the 16th *November*, 1764, setting forth, that by divers Acts of Parlia-

(1) As to the authority of this case, see 4 T. R. 194. There is a short note of it in 1 H. Bl. 132 n.

REPORTS OF SELECT CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY

IN

Ireland,

PRINCIPALLY IN THE TIME OF LORD LIFFORD;

TOGETHER WITH

SOME CASES DETERMINED IN THE OTHER SUPERIOR COURTS, DURING THE SAME PERIOD.

EDITED FROM THE ORIGINAL NOTES

OF THE LATE

JOHN WALLIS, Esq., K.C.,

BY

JAMES LYNE, Esq.,

BARRISTER-AT-LAW.

DUBLIN:

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M.DCCC.XXXIX.