Feb. 25, 1816.

CUSTOMS KING'S WAITERS.—TRUSTEE.—INTEREST.—COSTS.

pellant's objections. But the Appellant was properly charged with interest for the time during which he kept the money in his hands after the filing of the information in 1807, because then by paying the money into Court he might certainly have indemnified himself. But where there had been so much doubt it was hard upon the Appellant to say that he should pay the costs of the Crown as well as his own, and even to his own he would be entitled according to the rules of Courts of Equity if he had at first paid the money into Court. I agree therefore that the decree ought to be affirmed, subject to the proposed alterations.

Judgment.

Decree accordingly *affirmed*, with these alterations as to interest and costs.

Agent for Appellant, PALMER.
Agent for Respondent, SUDLOW.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

HICKES—*Appellant*.
COOKE—*Respondent*.

Feb. 23, March 14, 1816.

LONG ACQUIESCENCE A BAR TO RELIEF.

LENGTH of time, or long acquiescence in a transaction, may be a bar to relief in cases where the transaction, if impeached within a reasonable time, would be set aside.

Therefore where a fee-farm grant or lease, at a fixed rent, was made of mortgaged premises by the mortgagor to the mort-

gagee, in which there was an acquiescence for nearly fifty years—though the transaction was of a nature to be set aside if impeached within a reasonable time—the House of Lords, affirming the decree below, held that length of time was a bar to the relief.

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Dicente Lord Eldon (C.) that the transaction was one of that description which Courts of Equity always regarded with a great deal of jealousy.

Dicente Lord Redesdale that the only proper principle was that no contract for a beneficial interest out of the mortgaged premises, from the mortgagor to the mortgagee, where the mortgage continued, if impeached within a reasonable time, ought to stand.

THE original bill, filed in June, 1781, by the Appellant George Hickes, stated that Francis Hickes, the Appellant's grandfather, being in 1708 seized in fee simple of the lands of Cloonora in the barony of Slaverdagh and county of Tipperary, computed to contain 299 acres of profitable land, but actually containing 700 acres of land of excellent quality, in the said year 1708 mortgaged the lands to Phanuel Cooke, then of Clonellan in the county of Tipperary, in fee, to secure the repayment, with interest at 8 per cent. of a sum of 280*l.* then due from Hickes to Cooke:—that Francis Hickes soon after died, and his son and heir at law, John Hickes, became seized of the equity of redemption of the estate, and that the said John Hickes in 1721, previous to his marriage, executed articles, by which he agreed to apply his wife's portion in payment of the mortgage debt, and to settle the lands on himself and his wife for life, remainder to the issue male of their bodies:—that John Hickes neglected to register the articles, or to apply the portion in payment of the mortgage

Bill filed, June, 1781.

1708, Hic Appellant's ancestor, mortgaged lands to Cooke, Respondent's ancestor, for 280*l.*

Marriage of John, son of Francis Hickes, and alleged articles of 1721.

Alleged articles not registered.

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Debt increased to 800*l*.

debt, but suffered a large arrear of interest to accrue thereon to the amount, as was pretended, of 520*l*. for which the said John Hickes gave bonds to the said Phanuel Cooke, making the whole debt 800*l*.:—that Phanuel Cooke died in 1733, leaving John Cooke his heir at law, and one of his executors; and that John Cooke, knowing that the debt was made up of interest and compound interest, and that John Hickes was a weak, indolent, and expensive man, and fearing that part of the debt might be disputed, in November, 1733, filed a bill of foreclosure against John Hickes, but wrote to him at the same time that if he would come and settle he would be at no expense by the bill:—that John Hickes immediately repaired to Cooke, and was prevailed upon to execute a mortgage in fee of the lands for the whole sum of 800*l*.:—that Cooke afterwards pressed for payment, and threatened to foreclose unless still further security were given; and that John Hickes, being an extravagant and necessitous person, and therefore greatly in the power of Cooke, was induced to execute, by deeds of lease and release of the 3d and 4th May, 1734, to one Otway (Cooke's brother-in-law and friend), since deceased, a fee-farm lease or grant of the mortgaged premises, at the yearly rent of 80*l*. in trust for Cooke, as a security for the punctual payment of the interest as was pretended, and that Cooke had ever since been in possession and accounted for the 80*l*. rent:—that at the time of executing this lease the lands were worth 300*l*. a-year, and at the time of filing the bill 700*l*. a-year:—that John Cooke had notice of the marriage articles of 1721 before the mortgage of 1733:—that John

John Hickes alleged to be a weak, indolent, expensive man.

Jan. 1734, the lands mortgaged for the 800*l*.

May, 1734, fee-farm grant or lease of the mortgaged premises from the mortgagor to the mortgagee.

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Hickes afterwards paid the greater part of the 800*l.* and died intestate, leaving three sons, Lewis, Francis, and George Hickes, the Appellant:—that Lewis Hickes, being ignorant of the marriage articles and of the payment of the mortgage debt, accepted the rent with deduction of the interest of the 800*l.* till 1750, when Lewis discovered the articles, and that his father was only tenant for life, and that he himself was entitled to the premises subject only to the original mortgage of 280*l.* and threatened to commence a suit to set aside the subsequent mortgage, &c. but was induced to desist, and to ratify the mortgage, and to acquiesce under the fee-farm lease by a loan or gift of 200*l.* from Cooke:—that Lewis Hickes died intestate and without issue in 1769, and, Francis having died in the life-time of Lewis unmarried, the Appellant, George Hickes, became entitled, and, being ignorant of the marriage articles of 1721, and in distressed circumstances, received the rent with deduction of the interest of the 800*l.*: —that in 1774 John Cooke died, leaving the Respondent, William Cooke, his heir at law and executor, who became seized and possessed of the lands, and had never paid the rent. And the bill prayed that the fee-farm deeds might be set aside, or decreed to stand only as a security, that the lands might be reconveyed freed from the mortgages and fee-farm lease, &c. the marriage articles of 1721 established, and that Cooke might pay the arrear of rent without prejudice to the relief.

Alleged payment of the 800*l.* not proved.

Death of John Hickes, 1746. Lewis Hickes succeeds, and continues to receive the rent of the grant or lease.

Death of Lewis Hickes, 1769; Appellant succeeds, and accepts the rent of the lease or grant.

Prayer of the bill, that the fee-farm lease, &c. might be set aside.

In the answer, filed June, 1782, it was stated that Francis Hickes was in 1708 seized, not of the

Answer, 1782.

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Hickes seized only of part of Cloonora.

Moiety. So stated, but in fact only a part or portion.

whole but of part only of the lands of Cloonora, and that Hickes's part did not consist of more than 299 acres, which were an undivided *moiety*, and intermixed with an estate called Butler's Cloonora, and that there never had been any partition. The Respondent denied notice of the alleged marriage articles of 1721, except that he had been informed that a letter demanding money, and containing an allegation to that effect, had been sent to his grandfather in 1774, to which his grandfather, conceiving it to be a scheme fabricated in order to rob him of his property, paid no attention; and that it appeared by the family papers, that several sums had been advanced to John Hickes after the first mortgage, and previous to 1721, for which sums bonds were given, and that the Respondent believed the 520*l.* was made up of principal sums and not of arrears of interest. The Respondent denied that the lands at the time of the execution of the fee-farm lease were worth more than was paid for them, and stated that he did not believe that his grandfather John Cooke, then or at the time of the execution of the second mortgage, knew any thing of the alleged marriage articles; that he knew nothing of the loan or gift of 200*l.* to John Hickes, nor of the pretended distressed circumstances of any of the parties, and that he had refused to pay the rent to the Appellant only because the widow of John Hickes claimed dower out of the rent, and that the lands in question had been the subject of a family settlement in Cooke's family; and that he believed that the fee-farm lease to

Denial that the lands at the time of executing the fee-farm lease were worth more than the rent paid for them.

The lands the subject of a family settlement in Cooke's family.

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Otway was not in trust for his grandfather John Cooke, but that his grandfather purchased the same from Otway.

Amended bill, 1789.

The bill was amended in 1789, and stated the additional fact, that the Appellant had in 1770 filed a bill against John Cooke, to set aside the fee-farm lease, &c., and that Cooke had answered, admitting the trust; but that from poverty the Appellant had been unable to prosecute that suit further.

Marriage articles (not registered.)

The Respondent, in a further answer to the original bill, said that he did not believe that a paper which had been shown him purporting to be a receipt, dated July, 1744, from John Cooke for the 800*l.* was really the receipt of John Cooke; and though it was printed with the evidence none of the witnesses spoke to it. The evidence as to the marriage articles of 1721 was very slight, being only that of an old woman, the Appellant's sister, who said her sight was so bad that she could not see the paper sufficiently to enable her to say whether she had seen it before, but that her husband had received 100*l.* from her brother Lewis, which she believed to have been due to her under the settlement. There was some evidence of the distressed circumstances of John and Lewis Hickes, and the poverty of the Appellant was clearly proved. There was no satisfactory evidence to contradict the statement in the answer that 80*l.* was a fair rent for the lands at the time of executing the grant or lease.

Poverty of the parties (the alleged cause of their so long acquiescence or submission).

Value of the lands.

Hearing, 1807. Bill dismissed. Appeal.

The cause was brought to a hearing only in December, 1807, when the bill was dismissed with

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costs, the Respondent undertaking not to levy them. From this decree Hickes appealed.

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Romilly and *Horne* (for Appellant). 1st. On the ground of oppression, and the advantage taken by the mortgagee of the distresses of the mortgagor, the decree is wrong. This appears from the nature of the transaction of the fee-farm lease. It is a conveyance of the mortgaged premises in perpetuity to the mortgagee, at an annual rent of 80*l.*; so that after deducting the interest of the 800*l.* the mortgagor has only an annuity of 40*l.*, and loses all the benefit of improvements, increased value, and other advantages of land. It is clear that this, if it had been a recent transaction, would, as between mortgagor and mortgagee, have been *primâ facie* evidence of fraud. 2d. The inadequacy of price is such as to amount to evidence of fraud. They admit that the other moiety is worth 500*l.* a year. 3d. In the case of a lease for 999 years, the Court said that if an advantage is taken by such a contrivance, beyond the legal interest of the money lent, this is contrary to public policy, and cannot stand; but this is worse, as it is a lease in perpetuity. 4th. Then as to the length of time that elapsed before the transaction was impeached, that is accounted for by the poverty of the parties. The acquiescence must be voluntary, but this was merely a submission from which the parties could not escape.

Qr. Webb v. Rorke, 2 Scho. Lef. 661.

Leach and *Wetherell* (for Respondent). They rest now merely on the fee-farm lease of 1734.

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The inadequacy of price is not proved, and it is denied in the answer. The Cloonoras, though not divided by metes and bound, are not undivided moieties, but different portions; so that though one part may now be worth 500*l.* a year, it does not follow that the other is worth 100*l.*; and is the price now any criterion of what was a proper price then? The only ground on which the transaction can be impeached is that it is utterly impossible from its nature that it can be fair. But why could not Hickes grant a fee-farm lease at that time when every prudent owner was granting them? And what difference does it make that the transaction is between mortgagor and mortgagee? The mortgagee may have it in his power to give more favourable terms, and therefore it may be more advantageous to the other party. And is this to be challenged after such a length of time and acquiescence? The bill in 1770 was dismissed for want of prosecution. The excuse is the distress of the parties; but are the rules of justice to be dispensed with on that ground?

Romilly (in reply). The transaction being between mortgagor and mortgagee does make a great difference; because a mortgagee, proceeding against a mortgagor who cannot pay, certainly has a great advantage in such a transaction as this. The rules of justice, it is true, are the same for poor and rich. But where the question is why a claim was not prosecuted sooner, poverty is a good reason.

Judgment, March 14, 1816.

Lord Eldon (C.) The bill in this case was in

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Ireland dismissed with costs; and I shall content myself with stating in a few words why it appears to me that the decision ought not to be disturbed now, whatever might have been done at an earlier period of the transaction. The bill states—(states the case, particularly the fee-farm grant). A transaction of this sort ought certainly to be looked at with a great deal of jealousy, and a Court of Equity does regard such transactions with a great deal of jealousy; though, if they should appear to be perfectly fair, it will not set them aside merely because they are foolish. The transaction took place in 1734, when this mortgagor and this mortgagee were, as between each other, in a situation which your Lordships may judge of when you consider that the mortgage from 280*l.* had accumulated to 800*l.*, which shows that the mortgagee had great opportunity for taking advantage of the distress of the mortgagor, a circumstance which makes Courts of Equity always look at such contracts with jealousy.

A fee-farm grant, or lease of mortgaged premises from the mortgagor to the mortgagee at a fixed annual rent, is among that description of transactions at which Courts of Equity look with a great deal of jealousy,

But it is not so expedient to rescind the contract when first impeached only in 1781, as it would have been if it had been impeached in 1734, after a lapse of nearly fifty years, during which the right to the remedy and the opportunity to complain existed.

And there is no possibility of denying that this is material evidence in a question whether a transaction was fair, which was not impeached when the value of the subject, and the whole circumstances of the case, might have been brought forward to show the Court what was the real nature of the transac-

Acquiescence for a great length of time is material evidence to show that a contract was fair, though it be of that kind

tion. I would not therefore advise your Lordships to alter this decree in effect; but it may be proper to make some alteration in the language, so as to affirm it in such a way as to show the necessity of looking with a great deal of jealousy at such transactions, though in the present case your Lordships think that you are bound by length of time, and on that account prevented from applying that principle. Whether that degree of jealousy is largely applied in Ireland, where these perpetual annuities are so common, the House may receive some information from another noble Lord.

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which Courts of Equity look at with jealousy.

Lord Redesdale. This case involves a very important question. It was a very common practice with mortgagees in Ireland, by procuring a lease from the mortgagor to obtain a benefit beyond the legal interest of the money. Your Lordships observe that the mortgagor, from the circumstances of control under which he stands with respect to the mortgagee, cannot deal with him as he could with other persons, and as the mortgagee can make no effectual lease without the concurrence of the mortgagor, if the mortgagor refuses to accede to the terms of the mortgagee the latter may distress him so as to make it better for him to consent to a lease on unreasonable conditions than refuse to comply.

There have been cases, one of which came before Lord Clare, and another before me* when in Ireland, where advantage was taken of these circumstances, and the transaction was set aside.

* Qr. Gubbins v. Creed, 2 Scho. Lef. 218.

In this case the transaction in 1734, for that was the date of the lease, took place very recently after

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the mortgage had been increased and the mortgagor appeared to be distressed. The lease then (it was improperly so called, as it was a conveyance by lease and release) was made but a very short time after the increase of the mortgage from 280*l.* to 800*l.* The mortgage had been so increased in January, 1734, and the lease was made in May, 1734; so that there was only the interval of the months of February, March, and April, between the transactions. The reason for taking this lease was a plausible and a very common one, namely, to secure the punctual payment of the interest; for if the mortgagee had 80*l.* rent to pay and 40*l.* interest to receive, he retained the interest and the rent was reduced to 40*l.*

A transaction of this kind, if recently impeached, ought to be set aside, as it procured for the mortgagee an advantage beyond the interest of his money, and incumbered the equity of redemption.

A transaction of this sort, if recently impeached, should be set aside; for it not only had the effect of procuring for the mortgagee an advantage beyond the legal interest of the mortgage money, but it also incumbered the equity of redemption; for the mortgagor would have nothing to sell to redeem the mortgage but the fee-farm rent. A bill of foreclosure might be filed against him, the expenses of which he would have to pay, and unless he could sell the rent to as much advantage as he could the lands without that burthen, he suffered a loss by the transaction. Then if the transaction had been recently challenged it ought to have been rescinded, on the principle that the mortgagee by this means gained an advantage beyond the interest of his mortgage money. But though the transaction was in 1734, John Hickes remained several years without impeaching it; and on the part of the Re-

spondent there was evidence to show that he was not so distressed as he was represented to be, for the evidence in the letters to Cooke shows that he was in a situation with respect to other transactions which required money (reads a letter from John Hickes, dated May, 1736, where he spoke of having taken a new farm, &c.). Now this was two years after the transaction, and is evidence that he was not in very great distress; and there are other letters affording similar evidence. . . . .

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Then, on the death of John, Lewis succeeded, and he dealt with this as John had done, and Lewis died in 1769, so that neither John nor Lewis complained of this during a period of 35 years; and thus the matter stood on the death of Lewis when the Appellant succeeded, Francis having previously died without issue.

It should seem that the rent had not been very regularly paid after the death of Lewis Hickes. But the transaction stood unimpeached till June, 1781, a period of nearly 50 years, during which it was suffered to rest. As I said before, if this transaction had been earlier challenged, it was one which ought not to have stood. But when I consider the lapse of time, and the prodigious change in the value of landed property which has in the interval taken place, I doubt whether that justice could now be done in rescinding the transaction which would have been done if it had been recently challenged. The family of Mr. Cooke must have considered this property as their own; they must have dealt with it as such, and for any thing that appears might have improved it as such. It is besides, probably,

The change which in a long course of time takes place in the value and circumstances of property, and the consequent difficulty or impossibility of doing that justice between parties which may be

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done where transactions are recently challenged, are reasons why length of time is a bar to the relief in cases where the transactions, if early impeached, are such as ought to be set aside.

The proper principle is, that no contract between mortgagor and mortgagee for a beneficial interest to the latter out of the mortgaged premises, where the mortgage continues, if impeached within a reasonable time, ought to stand.

so mixed with Mr. Cooke's own part of Cloonora that it cannot be distinguished; and it appears to have been the subject of a family settlement in Cooke's family.

I think then that the bill was properly dismissed. But it does appear fit that your Lordships should not be content with a bare affirmance of the decree, but that you should state the principles upon which that affirmance rests. The decree is rather of a particular nature; for though it dismisses the bill with costs, it is with a sort of undertaking that the payment of the costs should not be enforced: so that it appears the Court below had considerable hesitation in dismissing the bill. Your Lordships, in affirming the decree, will be anxious not to injure the principle; and the only proper principle is this, that, although a mortgagee may, without imputation, contract for the purchase or release of the equity of redemption, no agreement between mortgagor and mortgagee for a beneficial interest out of the mortgaged premises (such as a lease) where the mortgage continues, ought to stand, if impeached within a reasonable time, from the great advantage which the mortgagee has over the other party in such a transaction. If he purchases the equity of redemption, there can be no objection to that sort of contract. But the mortgagor holding it still, and the property being reduced in value to a fee-farm rent, so that by the incumbrance on the reversion he is disabled from redeeming so well as if that had not been done, and he being liable to have a bill of foreclosure filed against him the expenses of which he must pay, and to an action for the mortgage

money, such a transaction ought not to stand. Your Lordships therefore will show a strict adherence to the principle, and that nothing here but length of time and acquiescence for nearly fifty years by the father and his son Lewis Hickes, and also by the Appellant;—that nothing but this—induces you to affirm the decree.

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Ground of the judgment lapse of time before the transaction was impeached.

Decree *affirmed*, solely on the ground of the long acquiescence.

Agent for Appellant, BEETHAM.
Agent for Respondent, LANE.

ENGLAND.

APPEAL FROM THE COURT OF EXCHEQUER.

MORGAN and others—*Appellants*.
LEWES (SIR WATKIN) and his Daughter............... } *Respondents*.

ATTORNEY and agent advances money to his client and principal in various sums and at different periods, from 1773 to 1778, taking securities and getting accounts settled. The transactions impeached in 1783, and decree of the Court below and orders of the Lords proceeding upon its principle, that the settled accounts should be opened and the whole transactions sifted; and that the securities should not be admitted as evidence of the demands, but that the attorney should only be allowed in account the money actually advanced and proved to be so by other evidence than the securities and settlement of accounts.

March 15, 18, 20; April 1, 1816.

ACCOUNT.—ATTORNEY AND CLIENT.