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WARD
v.
HARTPOLE.

IRELAND*.

(COURT OF CHANCERY.)

CHARLES WARD - - - - - - - - - - *Appellant.*

ROBERT HARTPOLE - - - - - - - - - - *Respondent.*

G. H., a tenant for life in a marriage settlement, is thereby empowered to make leases for lives of lands in Ireland, at the best rent, without fine; and a power was also given, with the consent of trustees, to raise any sum of money. The trustees, in pursuance of the power, consent that *G. H.* should, by mortgaging all or any part of the lands, or in any other manner he should think fit, raise any sum of money not exceeding 5,000 *l.*

Under this power and consent *G. H.*, in consideration of 300 *l.* and a rent, grants to *V. W.* part of the lands in settlement upon a lease for lives. The grant, and a receipt expressing that the 300 *l.* was raised under the power and consent as part of the 5,000 *l.*, were duly registered.

Before, and at the date of this grant, *V. W.* was the solicitor of *G. H.*, who was involved in litigation, and in distress.

The rent, with the premium calculated at six per cent, were considerably short of the annual value of the lands.

Upon a bill, by a tenant in remainder under the settlement, to set aside the lease, and on appeal, held, that the lease was a good execution of the power to raise money; but void, as obtained by a solicitor from his client, in circumstances of embarrassment, and at an under-value.

WILLIAM HARTPOLE, deceased, being seised of lands in Queen's county, under a grant from the Crown on the 5th and 6th of December 1707, mortgaged the premises to Thomas Tilson for 3,000 *l.* which were already subject to a prior mortgage for 2,394 *l.* and to other encumbrances to the amount of 7,000 *l.* and upwards. William Hartpole died in 1713, leaving Martha his widow, and George his only son, an infant.

* In this case the lease, having been made by appointment under a power, was disputed on two grounds; first, that it was not conformable to the power; secondly, that it was obtained by the undue influence of an attorney over his client, and at an under-value. The decision was against the validity of the lease, on the latter ground. On the question of conformity to the power the lease was held valid.

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Martha married Maurice Cuffee, who was appointed guardian to the infant, and resided in the mansion-house, and managed the estate.

In 1731 George Hartpole levied a fine.

On the 11th of March 1731 marriage articles were executed between George Hartpole and Mary Wemys, containing a power reserved for George Hartpole to make leases of the premises, or any part thereof, for any term or number of years, or for one, two, or three lives certain, or renewable for ever, at the best and most improved rent, without fine; such leases to commence in possession and not in reversion; with power also for George Hartpole, with consent of Henry Coddington and James Agar (the trustees) and the survivor of them and their heirs, and of Patrick Wemys, father of Mary Wemys) during his life, and after his decease, with the consent of his eldest son Henry Wemys, to raise any sum or sums of money for such uses and purposes as he George Hartpole should think fit, so as not to prejudice the jointure thereby agreed to be provided for Mary.

In 1731, shortly after George Hartpole's marriage, Vere Ward, the father of the Appellant, who was a practising attorney of the Court of Exchequer in Ireland, went to live near the residence of Mr. Hartpole. An intimacy commenced between them and Mr. Hartpole, who was then involved in law-suits instituted against him for debts due from his father, and charged upon his estate, employed Ward, as his agent to defend several of these suits, and to adjust and settle various accounts and demands with his tenants and others; by which means Ward became acquainted with Hartpole's situation, the circumstances and value of his estates, and the extent of his power under the marriage articles.

On the 19th of December 1732, George Hartpole agreed to demise to Vere Ward the lands of Ballyharmer, &c. for three lives (renewable for ever) at 80*l.* per annum.

In the year 1735, George Hartpole applied to Patrick Wemys, his wife's father, and to Henry Coddington, the surviving trustee named in the marriage articles of the 11th of March 1731, (James Agar, the other trustee, being dead) for liberty to raise a sum of money pursuant to the power for that purpose contained in these marriage articles.

Patrick Wemys and Henry Coddington, the surviving trustees in the said marriage articles, on the 29th of November 1735,

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executed a deed to George Hartpole, whereby, after reciting the marriage articles of George Hartpole and Máry Wemys, and the power and uses therein mentioned, and also reciting that James Agar the said trustee was dead, and that the said Henry Coddington survived him; and that the estate of George Hartpole was much encumbered with debts, which could not be discharged without raising money for that purpose, with the consent of Henry Coddington and Patrick Wemys, they, Henry Coddington and Patrick Wemys, in pursuance of the power reserved to them by the said articles, did at the request of George Hartpole consent that he should and might, by mortgaging all or any part of his lands in the Queen's county, or in any other manner he should think fit, raise any sum or sums of money not exceeding 5,000 *l.* in the whole, which when raised was to be by him applied towards discharging the debts affecting his estate, and for such other uses and purposes as he should think proper, which deed or instrument was duly registered at Dublin.

Vere Ward in the year 1735, continuing to practise as an attorney, was occasionally employed by Mr. Hartpole; but he had another solicitor who was principally employed by him. About this time Vere Ward was induced by Hartpole to build a house on part of his estate; and the lands of Acregallen (now Hollymount) containing about thirty-three acres, being untenanted, were proposed as an eligible situation.

About the months of February or March 1735, George Hartpole being desirous of raising a sum of 300 *l.* part of the 5,000 *l.* pursuant to his power and the consent of the trustees, he and Vere Ward came to an agreement for a lease of the lands of Acregallen, &c. containing about 250 acres.

On the faith of this agreement Vere Ward proceeded at a great expense to build a dwelling-house and several outhouses, to form a garden, and made many other valuable improvements on the premises.

By deeds of lease and release, bearing date the 12th and 13th days of November 1736, George Hartpole, in consideration of 300 *l.* paid by Vere Ward, granted, bargained, released, and confirmed unto Ward, his heirs and assigns, all the before-mentioned lands for the lives of Vere Ward, Lucy Ward his wife, and Nicholas Ward his son, and the survivors and survivor of them, with a covenant of renewal for ever, on the fall of each and every

life or lives, at the yearly rent of 42 *l.* payable half-yearly, clear of all taxes, quit and crown-rent only excepted. The lease and release were registered in 1736.

George Hartpole on the same 13th of November, gave the following receipt for the sum of 300 *l.*: "I, George Hartpole, "of Srhewle, in the Queen's county, esquire, do hereby acknow- "ledge to have received from Vere Ward, of Knockbegg, in the "said county, gentleman, the sum of 300 *l.* sterling, being the "sum mentioned in the said deed of release, by me this day exe- "cuted to the said Vere Ward, of the lands of Bohernesyre, and "other parcels of land therein mentioned, for three lives, with a "covenant of renewal for ever, at the yearly rent of 42 *l.* sterling; "which said sum of 300 *l.* I do acknowledge to have been by me "raised and taken in part of the sum of 5,000 *l.* which I am em- "powered to raise on my estate, by virtue of a power contained "and reserved in my articles of marriage, and a consent for that "purpose, bearing date the 29th day of November 1735, under "the hands and seals of Patrick Wemys, esquire, and Henry "Coddington, esquire, trustees in the said articles mentioned," which receipt was registered in the words above stated.

This sum of 300 *l.* was the first sum raised by George Hartpole under the power in his marriage articles.

On the 25th of January 1755, Vere Ward conveyed his interest to Robert Birch, in certain leases, dated in 1745 and 1750, which had been substituted for the lease of 1732.

George Hartpole died on the 4th of December 1763, leaving the Respondent, Robert Hartpole, his eldest son and heir, a minor.

Robert Hartpole having attained his age of twenty-one in Hilary term 1765, levied a fine, and suffered a recovery of the lands.

On the 24th of April 1765, Robert Hartpole filed a bill in the Court of Chancery in Ireland, against Vere Ward, Robert Birch, and others, stating among other things the several matters aforesaid, and praying that the several sales therein mentioned to have been made by George Hartpole might be set aside, as not warranted by the power in his marriage articles; and that the leases made to Vere Ward might also be set aside, as having been obtained by fraud and at great under value; and that the other leases therein mentioned to have been made by George Hartpole might also be set aside, as having been obtained by fraud and at under value; and that the deeds of purchase and leases afore-

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said might be brought in to be cancelled, or disposed of as the Court should direct; and that Robert Hartpole might be decreed to the mesne rates and profits thereof, severally from the death of George Hartpole, his father.

On the 18th of November 1765, Vere Ward put in an answer, stating among other things, that the fines paid on the leases were applied to discharge encumbrances affecting the estates of the Respondent; that George Hartpole had power to make the leases upon fines; that the rent reserved was the full value; that he had expended large sums in the improvement of the premises, and that the leases were fairly obtained without fraud, misrepretation, or improper influence.*

Vere Ward on the 30th of May 1771 filed a cross-bill against Robert Hartpole, stating the several matters in the answer to the original bill, and particularly stating that Lucy Ward, one of the lives in the leases, was dead; and that Vere Ward soon after her death had tendered the rent and fine, and a deed for renewal, pursuant to the covenant contained in the lease of 1736, by inserting the life of the Appellant, Charles Ward, instead of Lucy Ward, which Robert Hartpole refused to execute, or to receive the said fine; and further alleging that forcible possession of the lands demised had been taken by the Respondent, and rents improperly received from the under-tenants; prayed that the Respondent might be obliged to confirm all the leases made by George Hartpole, and deliver up the lands of Bohernesyre, and account with Vere Ward, and pay him the sum of 167*l.* 10*s.* and such other sums as he, Robert Hartpole, had received, or should receive thereout, and execute a renewal of the lease of the 13th of November 1736, and the leases assigned by Vere Ward to Robert Birch. And that in case Robert Hartpole should refuse the same, he might set forth a full account of the personal estate of George Hartpole, and how the same had been disposed of, and whether he died intestate, or made any will, and who acted as executor or administrator; and also what debts affected the real estate of William Hartpole and George Hartpole; and which of them had been discharged by George Hartpole or his guardians, and what

* An amended bill and answers to it were filed, relating chiefly to the age of George Hartpole when he executed the articles of settlement. but raising no question material to the points on which the case finally was adjudged. These pleadings are therefore omitted.

assignments had been executed, and that all proper accounts might be taken.

The Respondent, on the 24th of February 1770, put in his answer to the cross-bill, thereby stating a grant of the premises in question from King Charles the Second to William Hartpole, his grandfather, and his heirs male *, and that he died in 1713, leaving George Hartpole, his son, an infant, who became seised, and that he died in 1763, leaving him, the said Robert Hartpole, an infant, who became entitled to an estate-tail in the premises. He admitted that George Hartpole, his father, obtained the power before stated from the trustees to raise 5000 *l.* by leasing or otherwise; and that by the instrument of the 19th of December 1732, Vere Ward obtained a demise from George Hartpole, for lives renewable for ever of the lands therein comprised, and admitted the leases of the 13th of March 1745, and 2d of May 1750; and admitted that the demise of 1732 was surrendered by Vere Ward; on the execution of the leases of 1745 and 1750; and by such answer admitted that V. Ward had made several valuable improvements, and plantations, as in the cross-bill stated, to a considerable amount; and he also admitted the lease of 1736, and that the lands were not then in an improved state, but were encumbered with briars, thorns, and stumps of trees. He also admitted that on the death of Lucy Ward, Vere Ward had tendered the rent and a deed of renewal, pursuant to the covenant in the said lease, and the fine for renewal. And the Respondent by such answer admitted that Vere Ward did not owe any rent for the lands held by Thady Moore, but that the Respondent had not only received all the rents to May 1767, but also 167 *l.* over and above; and thereby admitted he refused to renew Vere Ward's lease; and that his father made his will and appointed executors, who had declined to act, and that no person had administered; that his father left some personal estate; and that his father and his guardians had paid judgment and other debts affecting his real estate: and he set out a schedule of his father's personal estate, and into whose hands it had come, and how it had been disposed of; and admitted that he had to that time administered his assets.

Vere Ward replied to the answer to the cross-bill, and the Respondent replied to Vere Ward's answer to the original and

* Quære, heirs male of his body.

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amended bills, and issue being joined in both the causes, witnesses were examined on both sides to the points in issue *; publication passed in both the causes, and they came on to be heard before the Lord Chancellor of Ireland on the 28th of January 1774, and on several other days; and on the 25th of February 1774, by decree in the causes, bearing date the same day, it was ordered and decreed, That the Respondent's original bill should be dismissed as to the defendant Robert Birch, without costs, by consent; and as to so much of the said bill as sought to set aside the lease of the 13th of November 1736, it was decreed that the Respondent was entitled to relief; and that the said lease should be set aside; and that the Respondent was entitled to an account of the profits of such parts of the lands in question as Vere Ward was in possession of from the time of the death of the Respondent's father; and it was referred to one of the Masters of the said court to take the said account, on the taking of which the parties were to have all just allowances. And it was thereby further ordered and decreed, That an injunction should be awarded in the original cause, to put the Respondent in possession of such part of the lands as were not then already in his possession, but not to issue as to the house, garden, and demesne, until the 1st day of then next Easter Term, or further order, but without prejudice to any remedy which Vere Ward might have against the representatives of George Hartpole, or his covenant in the said lease of the 13th of Nov. 1736; and that the Respondent should have his costs in the original cause to be taxed by the Master: And it was thereby further ordered and decreed, That the cross-bill should be dismissed with costs, not only as to that part which sought to have the lease of 13th of Nov. 1736 confirmed, but also that part which sought a renewal thereof; and as to such part of the cross-bill as sought a satisfaction out of the personal assets of George Hartpole, it was ordered that the same should be also dismissed, *no personal representative of George Hartpole appearing before the Court.*

Vere Ward, after the pronouncing of this decree, and on the 4th of April 1774, died intestate, whereby the suit, decree, and all the proceedings, became abated.

* The depositions are not inserted, because all the material evidence is noticed by Lord Mansfield, in moving judgment.

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Nicholas Ward, the eldest son, and next of kin of Vere Ward, became his administrator.

The suit, decree, and proceedings were revived by an order of the 8th of June 1774. Nicholas Ward, after exhibiting the original appeal, died before the hearing, and the Appellant, Charles Ward, as his heir at law, devisee, and residuary legatee, took administration, with his will annexed, and also administration *de bonis non*; and the appeal of the original testator was revived by the Appellant Ward.

The case was argued for the Appellant by Mr. *Wedderburne*, (then Solicitor General) and Mr. *Dunning*, on the following grounds:

1. Because *from* the Respondent's statement in his original and amended bills of the time of his grandfather's death, and the age of his father at that time, it was impossible his father could have been of full age at the time of his entering into the articles of the 11th of March 1731, and therefore he could not be bound by those articles.

Supposing George Hartpole to have been properly bound by the articles made on his marriage, yet as he had thereby a power to let leases of his estates comprised in those articles in the manner therein mentioned, and had also by those articles a power to raise any money thereon, with the consent of the trustees, or the survivor of them, and his wife's father, or if he should be dead, her brother; and as the surviving trustee and his wife's father executed such instrument as above stated, signifying their consent that he might by mortgaging his estate comprised in such articles, or in any other manner he should think fit, raise any sum not exceeding 5,000*l.*, such lease so made by such deeds of the 12th and 13th of November 1736, in consideration of 300*l.* really paid by Vere Ward, ought to be considered as a good lease, as being a proper execution in part of the power for raising money, so far as to raise 300*l.* in part of the 5,000*l.* he was so empowered to raise, and the receipt given by George Hartpole shows that was the intention of taking such sum of 300*l.*

It is objected that as there are two distinct powers contained in the marriage articles,—one for letting leases of estates therein comprised, and the other for raising money on those estates,—it was to be presumed that it was not intended that the power for

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raising money should be executed by letting leases, the power for letting leases only enabling George Hartpole to let such leases at the best improved rents, without taking any fines. And the lease in question having been made in consideration of 300*l.* would not be a good lease within the power for making leases; and as being a lease it would not be a good execution of the other power for raising money.

But it does not at all follow that because the power of letting leases of the estate was in the common form, they should be leases in possession and not in reversion, and should be let at the most improved rents without taking fines, therefore the other power for raising money, which was general, and only limited as to the mode of executing it, to be with the consent of the trustees or the survivor and the father, or if he should be dead, the brother of the lady, might not with their consent be executed for raising such money, either by letting parts of the estates for terms of years, or selling or mortgaging any part of the estates, or in any other manner whatever; and as the surviving trustee and the lady's father did, by the instrument of the 29th of November 1735, consent that George Hartpole might *by mortgage, or in any other manner he should think fit, raise any sum not exceeding* 5000*l.*, it was presumed he had thereby power to raise any part of it by taking a sum of money for letting leases, or in *any other manner he should think proper*; and that therefore the lease in question, made in consideration of 300*l.* being a fair lease, and made for a fair and valuable consideration, is a good execution of part of that power, and as such, a good and effectual lease.

It is further objected, that the 5,000*l.* which George Hartpole was so empowered to raise was all actually raised by mortgage of the estate; and therefore the 300*l.* raised on making such lease is more than he had power to raise.

But it appears by the pleadings in the cause, that the fact of the money having been raised by mortgage was not properly put in issue by such pleadings, and that therefore the evidence to it ought not to have been read; and when such evidence was read, it thereby appeared that the money was not so raised by any such mortgage till the year 1742, which was six years after the lease in question was made; and therefore, if the lease in question was a good lease within the power for raising money at the time of making it, nothing that was or could have been done after-

wards by any of the parties could any ways prejudice or invalidate that lease. And the rather that such lease and the receipt for 300 *l.*, which showed that it was made in pursuance of the power for raising money, were both registered; so that any person afterwards advancing money under that power might see that such sum of 300*l.* had been then already raised in part of such 5,000*l.*; and there was the more reason to support the lease in question in a court of equity, as the same was really made for a good and valuable consideration. And although the Respondent in his bill charged that it had been obtained by fraud and undue means, and at an undervalue, yet he had not attempted to support such charges by any proof. And it appeared on the contrary, by the most respectable evidence on the part of the Appellant, that the estate at the time of making such lease was in a very bad condition; and that the lease was made for a good and valuable consideration; and that the rent and the consideration paid for such lease was a full and fair value and consideration for such lease. And as the Respondent's grandfather was entitled to the estate comprised in such lease only under a grant from the Crown to him and the heirs male of his body; and he had not at the time of granting such lease, nor for several years afterwards, any son born; so that if he died before he had a son the estate would have reverted to the Crown. He had no other way of raising any money under such power than by granting leases of estates at rents something below the full value, and taking considerations for such leases, as nobody would then have lent any money on a mortgage of such estate under so precarious a title; and it appeared that he did not raise any money on any mortgage of the estate till six years after granting such lease, and after he had issue male.

If the lease in question had not originally been a good lease, yet as the Respondent after the death of George Hartpole his father, and after the Respondent had levied a fine, and suffered a recovery of the estate in question, actually received rent of the premises from Thady Moore, on Vere Ward's account, in the same manner as the Respondent's father had done, and Thady Moore was then tenant of part of the premises to Vere Ward, and paid the rent to the Respondent up to the 1st of May 1767, which is admitted by the Respondent's answer; and also 167 *l.* 10 *s.*, over and besides the rent incurred to that time; the Respondent ought to be considered as having thereby con-

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firmed that lease, and as being thereby barred and estopped from impeaching such lease, and consequently ought to renew the same according to the covenant therein contained.

If the lease in question could not be supported by the powers in the articles of the 11th of March 1731, and the same was on that account to be set aside in a court of equity, yet as the same was not; nor could be set aside on account of any fraud, or as having been granted at any undervalue, Vere Ward ought to have had an allowance for the pecuniary consideration he paid for such lease, and the monies he laid out in buildings and improvements on the premises, for which no provision was made by the decree.

The cross-bill ought not to have been dismissed on account of no personal representative of George Hartpole being before the Court; for as Vere Ward was certainly, in case the lease in question was to be set aside for want of George Hartpole having power to make it, entitled in a court of equity to have satisfaction out of George Hartpole's estate for the money paid by Vere Ward for such lease, and for the money he laid out in buildings and improvements upon the estate; and as it appeared by the Respondent's answer to the cross-bill, that although he was not the legal personal representative of his late father, yet he had actually possessed and administered his father's personal assets in the same manner as if he had actually been the personal representative; so that such personal representative, if there had been one, would only have been a proper party in point of form for taking the account, which in substance must and could only have been taken against the Respondent, who had alone possessed the assets. The Court might have directed such account to have been taken against the Respondent, giving Vere Ward leave to bring a proper legal representative of George Hartpole before the Master to substantiate the proceedings. Or the Court might have ordered the case to have stood over, with liberty to Vere Ward to have amended his bill, and brought proper parties before the Court, upon his paying the costs of that day's hearing.

For the Respondents, *Mr. Thurlow* (Attorney-General) and *Mr. Skinner.**

* The case was also signed by Mr. Fearne.

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It is in proof that George Hartpole was of age at the time of entering into his marriage articles in March 1731, and consequently he was bound by them. Under these articles he became only tenant for life of the lands leased by him to Vere Ward in 1736, without any other power of granting leases to exceed his own life than what was reserved to him by these articles. The leasing power reserved to him by these articles was confined to the granting of leases at full and improved rents, reserving no fine, and to commence in possession, and not in reversion. The lease granted to Vere Ward in 1736 had no one of these requisites to give it any validity; it was a lease granted at a considerable undervalue upon a fine of 300 *l.*, and not to commence in possession, but in reversion, there being prior leases of the same lands then subsisting. And to contend that a lease by a tenant for life, so totally inconsistent with and repugnant to the only power of leasing reserved to him, can be supported against those in remainder, is in effect to maintain that to reserve a leasing power to a tenant for life is nugatory, and that such tenant is neither restrained nor benefited by it, but may grant what leases he pleases without regard to such power or its restrictions.

But it is alleged that the lease in question was not granted in pursuance of the power of leasing reserved to George Hartpole by his marriage articles, but in exercise of the power contained in the same articles for enabling George Hartpole, with the consent of the trustees, to raise money for such purposes as he should think fit; that George Hartpole accordingly obtained the consent of Patrick Wemys and Henry Coddington, by the instrument or deed of the 29th of November 1735, for raising 5,000 *l.*; that the lease to Vere Ward was made in pursuance of this power and consent; and that the fine of 300 *l.* taken upon that lease was raised as part of the said 5,000 *l.* And in support of this, we are referred to a receipt said to have been given by George Hartpole to Vere Ward for the said 300 *l.* fine, expressing that the said fine was raised and taken as part of the 5,000 *l.* mentioned in the said deed of consent; and (what is more extraordinary) this receipt itself appears to have been registered.

It plainly appears that the lease in question was not intended or supposed to be made in pursuance of the power given to George Hartpole for raising 5,000 *l.*, because that power is not at all mentioned or referred to in that lease, nor does the lease

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itself afford any the most remote suggestion of an intended or supposed execution of that power; an omission which it is impossible to account for, if that lease was really intended as an execution of that power, and to derive its validity from it. As to what is mentioned in the receipt, it appears to have been a contrivance of Vere Ward to give a false colour to the transaction. The unusual artifice of registering a receipt of this nature seems plainly calculated to answer a purpose which a transaction fair and justifiable upon the face of it stands in no need of. And indeed what is stated in the Appellant's answers and cross-bill, that the lease of 1736 was granted in pursuance of an agreement of 1735, seems to put an end to the pretence of this lease being made in execution of the power required by the deed of consent. And there is another very material circumstance, which seems to prove that this fine of 300 *l.* taken upon the granting the lease to Vere Ward could not have been taken by George Hartpole himself as any part of the 5,000 *l.* which he was so empowered to raise, which is, that George Hartpole did actually raise the sum of 5,364 *l.* in pursuance of that power, by three several sales of different parts of the estates over which such power extended. Now this fact leaves no room at all for any constrained contruction to bring the 300 *l.* fine taken upon Vere Ward's lease within the description of any part of the 5,000 *l.* raised by George Hartpole in pursuance of his power. The whole of that sum, and more, having been thus raised accordingly in a manner more direct, and pursuant to that power, than the extraordinary mode of granting leases upon fines.

The power for raising 5,000 *l.* could not enable George Hartpole to grant the lease in question; the leasing power contained in the marriage articles expressly restrained George Hartpole from granting any leases at an undervalue, or upon fines, or in reversion. Now is it possible to imagine that the power immediately following was intended to reduce the preceding power to a nullity by removing these restrictions, and establishing those very leases which were so expressly provided against in the leasing power? Powers for raising money are usually executed by sale or mortgage of the lands, and are not supposed to impart a leasing power, which is always provided for by a distinct and very different clause. The manner in which the execution of the power is guarded by the different consent of trustees, mani-

fests the intention to prevent the issue or those in remainder from being unreasonably or unnecessarily prejudiced by the execution of it. Such intention is answered by the usual mode of raising money by sale or mortgage, because in those cases the value of the estate is diminished no further than to the amount of the sum raised by the execution of the power: but if the power for raising 5,000 *l.* enabled George Hartpole to do it by leasing the lands upon fines, it is evident that he might, in order to obtain an immediate supply of the 5,000 *l.* have prejudiced the estate to the amount of 20,000 *l.* or upwards, by procuring the desired fines upon leases, without reserving one fourth of the annual rent which the lands were fairly worth, after allowing for the fines paid upon such leases. But it cannot be imagined that a latitude of power which might eventually prove so prejudicial to the issue could ever be consistent with the obvious intention of marriage articles, which were meant to secure a provision for such issue.

It is insisted, that if the lease granted to Vere Ward in 1736, did not pursue either the leasing power, or the power for raising the money, and is therefore to be set aside, yet the Appellant is entitled in equity to be repaid the fine he originally paid for the lease, and also to be allowed for the money he has expended in real improvements on the lands.

Whatever attention might have been paid to a claim of this nature in behalf of a lessee taking lands at a fair and full value, without notice of marriage articles, and entirely innocent of any fraudulent or undue practices in the obtaining his lease, it certainly cannot be urged with any degree of propriety or weight in the present case, where it is in full proof that Vere Ward had notice of the marriage articles at the time of obtaining the lease, and then and for some years before acted in the capacity of law-agent to the lessor, and for part of the time received his rents, and managed his estate, where it appears that he availed himself of the advantages of his confidential situation to impose upon his employer, and prevail upon him, under the pretence of assisting him in his pressing circumstances, to grant him the lease in question at a very considerable undervalue.

At law it is clear the Appellant would be entitled to no compensation or allowance in respect of the insufficiency of a title of which his father had notice at the time of taking the lease. And it must be submitted that for an agent to take advantage of

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his intimacy and influence with the person employing him, and to avail himself of the opportunities afforded him by his situation, as well as of the necessities of his employer, to obtain from him at a great undervalue a lease of part of the lands intrusted to his agency, appears to be such an abuse of confidence, such a flagrant breach of trust, as can give no claim to the favour, encouragement, or countenance of a Court of Equity.

The case having been argued on the 24th, 25th & 31st of January 1776, the judgment was moved in the House of Lords to the following effect, by

Lord Mansfield * :*

The Bill upon which this decree was made was brought by the Respondent against the Appellant's father, Vere Ward, to set aside a lease granted to him by the Respondent's father, George Hartpole, of certain lands in the Queen's County in Ireland, in consideration of a fine of 300 *l.* and a rent of 42 *l.* a year, and the grounds upon which it is sought to set aside the lease, are—

" 1st. That George Hartpole was only tenant for life of the lands in question under his marriage articles, with power 'to make leases for any term of years, or for one, two, or three lives certain, or renewable for ever, *at the best improved rent without fine*. Such leases to commence in possession, and not in reversion.' That the lease in question was granted on terms contrary to that power, and that therefore it is void.

" 2dly. That this lease was obtained by fraud, imposition, and misrepresentation of the value."

The Appellant's father by his answer insists that the lease is good under the power reserved to George Hartpole by the marriage articles, enabling him " *with the consent of the trustees, to* " *raise any sum or sums of money for such uses and purposes as he* " *should think fit.*" And the subsequent instrument executed by the trustees by which they consent " that he should raise the sum " of 5,000 *l.* by *mortgaging* all or any part of his estate, *or in* " *any other* manner he should think fit." He says, that the lease was granted at the full value, and denies that he made use of any fraud or misrepresentation in obtaining it.

* For this Note of the Judgment I am indebted to Mr. Palmer of Gray's Inn.

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The first question in this case is, whether the lease now impeached, as having been granted upon a fine, is at all within the substance or meaning of the power for raising money, or can be considered as any execution of it?

Powers, especially those in family settlements, being considered as reservations of so much of the absolute dominion of the estate, are to be construed equitably, and most favourably for the grantee; and therefore, where through mistake or inadvertency the several circumstances required by a power are not strictly and formally complied with, equity will interpose and supply the defect. The power indeed cannot be exceeded; but within the extent and compass of it, a Court of Equity will aid all defects of circumstances, and even where powers have been exceeded the execution is not absolutely void; for the court will correct the excess, and supply the execution as far as the power warrants.

In this case I am strongly inclined to think the decree proceeded chiefly on the ground of the lease not being warranted by the marriage articles. It is certain that the lease is not within because not made according to the power of *leasing*; but, upon the true construction of the power to raise money, and the consent of the trustees, and considering the known and long-established usage in Ireland, I think that this mode of *fining-down* might be one way of raising the money: the articles reserve a power to make leases for any term of years, or for one, two, or three lives certain, or *renewable for ever*; for a notion then prevailed in Ireland that granting leases for lives renewable for ever was a very advantageous manner of letting lands; it has however been found exceedingly detrimental and inconvenient.

The power to raise money enables George Hartpole to raise *any sum* for such uses as he should think fit, with the trustees consent; the trustees give their consent, and authorize him to raise 5000 *l.* by mortgage or otherwise, as he should think fit. Now, I am of opinion that by the terms of this power and the trustees consent he was clearly warranted to raise it by fines. The power is very remarkable and very uncommon; he is enabled to raise *any sum of money* for such uses and purposes as he should think fit, with the trustees consent. There is no sum mentioned; no particular mode prescribed for raising it; no restriction whatever as to the execution of the power, but that it should be *with the*

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trustees consent. Now this power operates as an exception, and so far as respects the execution of it, the power of leasing does not extend or interfere. When the power for raising money is satisfied, then indeed all leases afterwards made must be in conformity to the terms of the power of leasing, but those made in execution of the power of raising money cannot be affected by it. The trustees, as I have observed, tie the tenant for life down to no particular mode, but leave it to his discretion to raise it by mortgage, or in any other manner as he should judge proper; fining-down the rents was one of those other ways; selling was another; there was no way of raising money but by mortgaging, fining-down, or selling: he was left at his option. Great part of the lands he sold; they are quietly enjoyed, and no question is made as to the validity of those sales; why then might not money be as well raised by fines? It can make no difference by what means it is raised provided the value is given. I am clearly of opinion that it might be raised by *fines*, and that so far the lease is a good execution of the power under the trustees consent.

There was an argument made use of that the whole money and more had been raised by *sale* of the lands, and consequently that the 300 *l.* paid for the lease could not have been raised as part of the 5,000 *l.* But this will not hold, for that money was not raised for some years after granting the lease, and the lease takes notice that the 300 *l.* was raised as part of the 5,000 *l.*; and if the lease was good at the time of making, nothing done afterwards can invalidate it, if then the lease was within the power.

The next question is, whether there was any collusion or connivance between George Hartpole and the Appellant's father in making this lease, or any practice or fraud made use of by Ward in his relation of agent to the Respondent's father in obtaining it.

If there were any collusion between the tenant for life and the lessee, or any undue practices on the part of the latter to the prejudice of those in remainder, that would afford a sufficient ground for setting aside the lease, but it does not appear there was; there is no proof of it; the fine taken is no secret; it is rected in the body of the deed, and in the receipt it is mentioned to be raised as part of the 5,000 *l.* under the trustees consent and the

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power. It is a strong circumstance also that the receipt is registered; for though this is taken notice of on the part of the Respondent as a contrivance to answer some unfair purpose, yet here it was highly proper, in order to show that the sum of 300 *l.* had been raised in part of the 5,000 *l.*; there is no evidence of any misrepresentation; and it is not pretended that the Respondent's father was a weak extravagant man, liable to be easily misled or imposed upon, or that he did not apply the money thus raised to a good use; on the contrary, it appears that he very laudably applied it in paying off debts and discharging encumbrances to a very large amount, which descended upon him with the estate.

The last question, therefore, is, whether there was any fraud in this transaction as to the rent reserved by the lease? for if there was, it being to the prejudice of the heir, or person next in remai- ler under the articles, the lease would not be good as against the Respondent.

Now with respect to the value of the lands there is a good deal of contradictory evidence, and if the decree turned upon that point further inquiry might be ordered to ascertain the value; an issue could be directed. But I am unwilling that the parties should continue any longer in litigation, especially as upon the most attentive consideration of the evidence I am of opinion that sufficient appears to show that the rent reserved upon this lease was not the full value. From the evidence of one of Ward's own witnesses, and by his own accounts, as stated in the Appendix to the Respondent's case (which seems to be accurate,) it appears most clearly that the lands were let at an undervalue.—[Here his Lordship stated the calculation of the value of the lands from the Appendix, observing, that six per cent should be computed for the interest of the fine of 300 *l.*, that being the legal interest in Ireland, instead of five per cent, which was only allowed in the calculation.]—The account of Ward himself proves that the lands were worth 80 *l.* 17 *s.* 8 *d.* a year, whereas the rent reserved by the lease, together with the interest of the fine at six per cent, is only 60 *l.*, so that either the fine was inadequate, or the rent considerably below the value. If then the lease was not taken at the best improved rent, but at an undervalue, it ought not to stand, especially if any advantage

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was taken of George Hartpole's situation, of his necessity and distress in obtaining this lease, equity will relieve against it. That such an advantage was taken I am strongly inclined to believe; and what weighs with me is this,—the Respondent's father was a gentleman, like many others, involved in a great number of law-suits and difficulties *, and his affairs were exceedingly embarrassed: Ward was his agent and attorney, and consequently well acquainted with his situation, and seems to have been very ready to take advantage of it. This appears from a remarkable letter of Ward to Hartpole, dated the 8th November 1733, which is proved in the cause, and stated in the Appendix to the Respondent's case: in this letter Ward recommends "Fortitude to Mr. Hartpole in the gloomy appearance "of his affairs, and vigour in opposing the various suits and "difficulties he was engaged in:"—takes notice of his own conduct, and the expense of the suits, and desires to know "Whether "Mr. Hartpole would have the accounts between them appear "in the shape of bills of costs, or fix a *certain annual sum* in lieu "thereof." What, an attorney requires a *certain annual sum!* Why not his bill? But your Lordships will find he did not forget his bills. In one bill, amounting to 75*l.* 11*s.* is this article, "For attendance and care of several affairs relating to "Mr. Stevenson, and other creditors, from 1731 to 1734, 30*l.*" And in another bill, the amount of which is 25*l.* there is this charge, "Attendance on Mr. Hartpole's affairs, in general, &c. "from July 1734 to May 1736, 15*l.*" Such general charges as these most certainly would not be allowed to any attorney here.

We see then the distresses which Mr. Hartpole laboured under, and the disposition of Ward. In this situation the one was very apt to give, and the other too ready to take a good bargain. And if an attorney, knowing his client to be in such circumstances, takes from him any reward, or any security by way of gratuity or reward, pending the suits or business in which he is concerned, though no particular express act of fraud is proved, yet it shall not stand; it would be attended with dangerous consequences, and therefore it shall not be allowed. I remember the case of one Japhet Crook, a most vile miscreant, who had been engaged in various suits and scrapes, indicted for per-

* See *Kenrick* v. *Hudson*, in the House of Lords, 1773.

juries, forgeries and other crimes, and promised his attorney, who had been useful in procuring bail for him, and otherwise, as a compensation above his bill, to leave him 1,000*l.* by his will; and he gave the attorney instructions for preparing his will, with such a legacy, which he executed. The attorney afterwards, lest Crook should change his mind, got a bond from Crook to oblige him to leave the 1,000*l.* by his will. They afterwards quarrelled, and Crook made a new will, in which he omitted the legacy, stating as his reason that he had been imposed upon by his attorney; and he soon afterwards died possessed of a considerable fortune. The attorney sued the representative, who filed a bill to set aside the bond. The attorney put in his answer, and the cause came on to be heard before Lord Hardwicke. At first it did not stand a minute; no fraud was proved to have been made use of by the attorney, and the bill was dismissed. I, however, advised a re-hearing, and the cause came on again; and though there was no proof of fraud having been practised in obtaining the bond, yet from the general danger of establishing a precedent of an attorney taking such a security from a client in distress, as well as from the particular circumstances under which the bond was given, Lord Hardwicke reversed his own decree, and referred it to the Master to consider whether the attorney was entitled to any and what allowance.

The lease in question was granted for a consideration grossly inadequate; Hartpole knew it, but his distress compelled him to give way. Ward availed himself of the advantage of his situation, and thus obtained it at an undervalue. I am, therefore, of opinion that upon the ground of undervalue, coupled with the other circumstances which I have stated, the lease is void as to the Respondent, and that it should be set aside. But upon what terms should this be done? It is a maxim, that he who demands equity must render it; and when a man lays out money in lasting and useful improvements, and has not the benefit of them, why should he not be allowed for it? It is surely but just, as the Respondent has the advantage of the improvements made by the Appellant's father on the lands, and the Defendant is prevented from enjoying them, that some compensation should be made to him. Why should not the fine be paid back?

* See *Walmesley* v. *Booth*, 2 Atk. 25. 27.

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The decree saves a remedy against the personal representatives of George Hartpole on his covenant, and yet dismisses the cross-bill for want of a representative being before the Court, although it is clear that the Respondent had possessed and administered his father's assets, and thereby became executor *de son tort*, so that such representative would have been necessary in point of form only, for the account must have been taken against the Respondent, and therefore the bill should not have been dismissed upon this ground. But the account might have been taken against the Respondent, giving the Appellant liberty to bring a legal representative before the Master, or have ordered the cause to stand over, with liberty to amend the bill, and bring the proper parties before the Court. But what I shall propose will render this unnecessary.

There is another circumstance,—the costs. Costs, I take it, were given upon the ground of the lease having been obtained by fraud; but I think in this case each party should bear his own costs. I therefore submit the following variations; viz.

1st. That the lease be set aside upon payment to the Appellant of the fine of 300*l.* and the money laid out in the lasting improvements, with interest from the death of George Hartpole; and that an account be taken of the said 300*l.* and money laid out in improvements.

2dly. That so much of the decree as gives costs in the original or cross-cause, or saves any remedy against the representatives of George Hartpole, or enjoins the Respondent to be put into immediate possession, be reversed.

Which variations were agreed to by the House *.

* See the order in the printed cases of 1776, N° 7.

One of the arguments made use of at the Bar, to show that the lease was not within the leasing power, was, that it did not commence in possession; but this was not supported, for the proof offered, viz. memorials of the leases of part of the lands which were subsisting when this lease was made, could not be read, because it did not appear by the register's notes that they were read on the hearing below; and it is a rule that no new evidence can be read on an appeal, except where the refusal of permitting evidence offered to be read on the hearing is complained of by the appeal. But had the evidence been admissible, it would not have affected the decision.