

# IRISH CHANCERY REPORTS.

## REPORTS OF CASES

ARGUED AND DETERMINED IN

THE HIGH COURT OF CHANCERY,

Court of Appeal in Chancery,

ROLLS COURT,

THE LANDED ESTATES COURT,

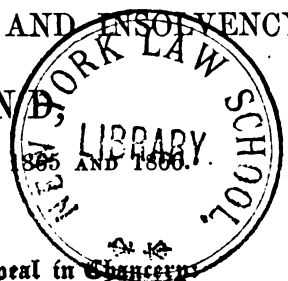
AND

COURT OF BANKRUPTCY AND INSOLVENCY,

IN

IRELAND,

DURING THE YEARS 1864, 1865 AND 1866.



Chancery, and Court of Appeal in Chancery

By EDMUND T. BEWLEY, Esq.

AND LESLIE S. MONTGOMERY, Esq.

Rolls:

By EDWARD SHIRLEY TREVOR, Esq.

Landed Estates Court:

By JOHN FALLON, Esq.

### VOL. XVI.

DUBLIN:

HODGES, SMITH & CO., 104 GRAFTON STREET.

1866.

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# JUDGES AND LAW OFFICERS,

*During the period of these Reports.*

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## HIGH COURT OF CHANCERY.

*Lord Chancellor.*—The Right Hon. MAZIERE BRADY.

*Master of the Rolls.*—The Right Hon. THOMAS BERRY CUSACK SMITH.

## COURT OF APPEAL IN CHANCERY.

The Right Hon. THE LORD CHANCELLOR.

*Lord Justice.*—The Right Hon. FRANCIS BLACKBURNE.

## LANDED ESTATES COURT.

*Judges.*—The Hon. MOUNTIFORT LONGFIELD.

The Hon. CHARLES JAMES HARGREAVE.

The Hon. WILLIAM C. DOBBS.

## COURT OF BANKRUPTCY AND INSOLVENCY.

*Judges.*—The Hon. WALTER BERWICK.

The Hon. DAVID LYNCH.

## ATTORNEYS-GENERAL.

The Right Hon. THOMAS O'HAGAN, Q. C.

The Right Hon. JAMES A. LAWSON, Q. C.

## SOLICITORS-GENERAL.

JAMES A. LAWSON, Esq., Q. C.

EDWARD SULLIVAN, Esq. Q. C.

## SERJEANTS.

JOHN HOWLEY, Esq., Q. C.

EDWARD SULLIVAN, Esq., Q. C.

RICHARD ARMSTRONG, Esq., Q. C.

1865.  
*Rolls.*

FOWLER v. FOWLER.

DODWELL v. THE ATTORNEY-GENERAL.

DODWELL v. FOWLER.

Dec. 4.  
1866.  
Jan. 15.

An order was made in these causes and matters, on the 25th of June 1860, whereby it was amongst other things ordered, that the receiver, during the life of James Crofton Dodwell, should pay the balance on foot of each of his accounts, to the persons and in the proportions in the said order mentioned—i. e., three sixty-fifth parts of said balances to Mary Byrne during her natural life, and nine sixty-fifth parts to the Crown, or to such person as her Majesty might depute to receive the same.

By letters patent from the Crown, dated the 17th of October 1861, an annuity of £52. 13s. was granted out of the said nine sixty-fifth parts to Henry Tobias Peyton, to hold to him and his heirs during the life of the said Mary Byrne, on the trusts therein mentioned; that is to say, that he was to pay the said annuity “into the hands of the said Mary Byrne alone, her executors or administrators, and that she is not to have the power of depriving herself thereof, or of any part thereof, either by sale, mortgage, or anticipation.”

William Clifford Tute obtained a judgment against the said Mary Byrne, by the name of Mary Fowler, on the 25th of June 1861, which judgment was registered as a mortgage against the three undivided sixty-fifth shares in the said order of the 25th of June 1860 mentioned, but it was not registered against the said annuity.

the Crown to a trustee, on trust to pay it into the hands of M. B. alone, her executors or administrators, and that she was not to have the power of depriving herself thereof, either by sale, mortgage, or anticipation.

*Held*, that a judgment registered as a mortgage, under the 13 & 14 Vic., c. 29, was an involuntary alienation, and was not a breach of the condition.

A judgment was obtained against M. F. on a promissory note signed by M. F., and was registered as a mortgage, under the 13 and 14 Vic., c. 29, against M. F. The real name of the defendant was M. B., and she was so named in a Crown grant, and in certain Chancery proceedings; but she had passed by the surname of F., having cohabited with a man of that name.

*Held*, that the judgment was duly registered as a mortgage.

The Crown, by its prerogative, may annex a condition against alienation to a grant in fee.

An annuity was granted by

1865.  
*Rolls.*  
 FOWLER  
 v.  
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 ———  
*Statement.*

The affidavit purported to be sworn before a Commissioner of the Court of Common Pleas. The judgment was obtained in the Court of Exchequer, on a promissory note signed by Mary Byrne by the name of Mary Fowler. It appeared from affidavits filed in support of the present motion, that Mary Byrne had cohabited with a person of the name of J. V. Fowler, and had adopted his name, and had on several occasions signed securities under the name of Mary Fowler.

On the 3rd of May 1865 William Clifford Tute assigned the said judgment and judgment mortgage to James Henry Patrickson.

James Henry Patrickson obtained a judgment against Mary Byrne on the 10th of March 1865, by the name of Mary Fowler, in the Court of Exchequer in Ireland, to secure the principal sum of £48. 14s. 7d., besides £7. 18s. 11d. costs; and on the 22nd of June 1865, the said James Henry Patrickson registered the said judgment as a mortgage against the said three undivided sixty-fifth parts in the order of the 25th of June 1860 mentioned, and also against the said annuity of £52. 13s. The said James Henry Patrickson, in an affidavit filed in the cause and matters on the 21st of November 1865, stated that there was a balance due on foot of the said annuity, up to the 1st of July 1865, of £83. 4s. 8d. That affidavit then states the sum due to James Henry Patrickson on foot of the judgment.

A motion was now made on the part of the said James Henry Patrickson, to be paid on foot of the sum due to him on the judgment mortgage, the balance in the receiver's hands on foot of the three undivided sixty-fifth shares, which, under the said order of the 25th of June 1860, was payable to the said Mary Byrne; and to be paid, on foot of the judgment obtained by the said James Henry Patrickson, the arrears due on the said annuity.

Mr. *Lawless*, and Mr. *Skeleton*, in support of the motion.

*Argument.* First; the judgments were properly registered against Mary Fowler. Mary Byrne had adopted the surname of Fowler, as she had a right to do; a person may change his surname, though he cannot change his Christian name: *Staunton v. Staunton (a)*. The

securities on which the judgments were obtained were given by her, and the judgments were recovered against her by that name: *Shep. Touch.*, p. 233; *Co. Lit.* 3 a; *Gould v. Barnes* (a); *Williams v. Bryant* (b); *Rex v. Billinghamurst* (c).

Secondly; admitting that the Crown may annex a condition against alienation to an absolute grant, the condition was not broken. It is to be construed as a non-alienation clause in a lease. The recovery of a judgment, and the registration of it as a mortgage, were proceedings *in invitum*—an assignment by operation of law,—which will not create a forfeiture: *Reidy v. Pierce* (d); *Stultz's case* (e); *Baggett v. Meux* (f). The Crown alone can take advantage of the breach of the condition: 3 *Com. Dig.*, *Condition O. Sarel's Trusts* (g); *Baker v. Brady* (h).

Mr. John Fallon, against the motion.

First; the affidavit to register the second judgment was sworn before a Commissioner for the Court of Common Pleas, who had no jurisdiction to take it: *Shaw v. Perkin* (i). The affidavit is a nullity.

Secondly; the 13 & 14 *Vic.*, c. 29, s. 6, requires the name of the party to be stated in the affidavit for registration. The real name was Mary Byrne; she is so called in the grant, in the proceedings in this cause, and the notice of motion.

Thirdly; the Crown by its prerogative may annex a condition against alienation to an absolute grant: *Bro. Abr.*, tit. *Prerogative*, pl. 102; *Co. Lit.* 223 a; *Com. Dig.*, tit. *Condition*, D, 6; *Chitty on Prer.* 386, note h, 388. The condition in this grant is most comprehensive. The annuity is to be paid into the hands of Mary Byrne; and she is not to have the power of depriving herself of it by sale, mortgage, or anticipation. It is sought to deprive her of it by means of a mortgage, contrary to the express condition of the grant. A distinction was no doubt established in *Reidy*,

(a) 3 Taunt. 504.

(c) 3 M. & S. 250.

(e) 4 D. M. & Gor. 404.

(g) 10 Jur. 876.

(b) 5 M. & W. 447.

(d) 11 Ir. Ch. Rep. 361.

(f) 1 Ph. 627.

(h) 7 D. M. & Gor. 507.

(i) 1 Dowl., N. S. 306.

1865.  
Rolls.  
FOWLER  
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FOWLER.  
Argument.

1865.  
*Rolls.*  
 FOWLER  
 v.  
 FOWLER.  
 ———  
*Argument.*

v. *Pierce* between a voluntary and an involuntary alienation; but the distinction was founded on the condition in that case, which was not large enough to comprise the latter. Here the word "anticipation" is used; and it comprises every species of alienation, voluntary or involuntary.

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*Judgment.*

The MASTER OF THE ROLLS, after stating the facts said:—

The first ground of defence set up in this case by Mary Byrne against the motion of James Henry Patrickson is, that the affidavits to register the judgments as mortgages are invalid under the sixth section of the Judgment Mortgage Act (13 & 14 of *The Queen*, c. 29), which requires that the affidavit should state the name of the defendant in the judgment; and Mary Byrne says that her name is Mary Byrne, and not Mary Fowler. Her true name no doubt is Mary Byrne; but she had lived with Mr. J. V. Fowler, and had several illegitimate children by him; and she signed securities and letters on different occasions by the name of Mary Fowler, as appears by some of the affidavits which have been filed. The judgment obtained by William Clifford Tute against her was obtained against her by the name of Mary Fowler, spinster; and the affidavit of William Clifford Tute so describes her. That judgment was obtained against her on a promissory note signed by her in the name of Mary Fowler; and she was accordingly sued as Mary Fowler; and judgment was obtained against her in that name; and I do not understand that a person who gives a security by a particular name, and is sued by that name, and does not defend the suit, can afterwards be permitted to say that was not her name. You might under the old law have pleaded the misnomer in abatement; but I do not understand how a party against whom a judgment has been obtained by a particular surname is to be permitted to say that it was not her surname.

It is then contended that the affidavit is entitled in the Exchequer, and that the Commissioner before whom it was sworn (Jackson Thorman) states himself to be a Commissioner of the Court of Common Pleas. I have, however, obtained a certificate from Mr. Yeo, Clerk of the Rules of the Court of Exchequer,

that the said Commissioner was also a Commissioner of the Court of Exchequer at the time the affidavit was sworn.

With respect to the affidavit of James Henry Patrickson to register his judgment, Mary Byrne is described as Mary Fowler, otherwise Byrne; but the judgment was obtained against her as Mary Fowler otherwise Byrne, on foot of a bill of exchange signed by her as Mary Fowler; and I do not think that after judgment she can raise any question of misnomer. The affidavit, however, of James Henry Patrickson registered the judgment not only against the three sixty-fifth parts in the order of the 25th of June 1860 mentioned, but also against the annuity granted by the letters patent; and it has been contended by Mary Byrne's Counsel that the Crown had a right by the prerogative to impose the condition against alienation in the letters patent mentioned; and *Brooke's Abridgment*, tit. *Prerogative*, pl. 102, and *Chitty on the Prerogative*, page 386, note *h*, and also page 388, have been referred to. In the case of lands the grantee of the Crown does not by taking them from the Crown acquire any particular privileges: *Chitty on the Prerogative*, 399; and therefore I think that the question to be considered is, whether a grantee from the Crown, where there is a condition against alienation, is not in the same position as a grantee from a subject, in those cases where a condition against alienation is legal. In the latter case, a condition against alienation in a lease does not prevent the lease being taken in execution and sold: *Doe d. Mitchenson v. Carter (a)*. That case was recognised by the Court of Appeal in the case of *Ex parte Domville (b)*. In the present case I apprehend that a judgment mortgage is a proceeding *in invitum*, and does not fall within the clause against alienation in the letters patent, which appears to me to apply to voluntary alienations.

I am of opinion therefore that I am bound to make an order on the notice, that the receiver should pay the arrears of the annuity to James Henry Patrickson.

I sent in an order last sittings; but I have thought it better to state in writing the grounds of my judgment.

(a) 8 T. R. 57.

(b) 14 Ir. Chan. Rep. 19.

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Judgment.

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