

Chan. Cham.]

MEYERS v. MEYERS.

[Chan. Cham.]

1. That *Harris v. Meyers* had never been properly revived against the proper parties.

2. That the judgment of *Harris* was subsequent to the claims of other creditors who had writs of execution against the testator, or had Decrees for payment out of the lands sequestered.

3. That Turley claims a judgment and has brought his claim into the suit of *Meyers v. Meyers* for the purpose of proving his claim therein.

4. By a Decree of this Court in *Meyers v. Meyers* it was ordered that the lands in the said suit be sold and those sequestered are included.

5. That the writs are void against other creditors who are prior to Turley.

6. That the creditors are entitled to have the lands sold free from the writs of sequestration.

He contended that the leases were made in the absence of the creditors and settled on the understanding that they could not be held against the creditors. That the tenants could have no right against the creditors, and that if the applicants were entitled to have the writs set aside the most the tenants could claim would be compensation. That as to the first ground of setting aside the writs, viz.: that the suit had never been properly revived, the plaintiff, Turley, had to show that it was properly revived, and against the proper parties, in order to in any way affect the parties entitled to the estate, and anything done under the writ since the presumed Revivor could be of no avail. That Turley claimed to be the *absolute* owner of *Harris'* interest in the suit, whereas he was only mortgagee, and the representative of *Harris* ought to be before the Court as plaintiff or defendant. That interest should have been represented, he urged, before the suit could have been properly revived. The fact of the will never having been discovered would doubtless be relied upon by the respondents; this might be a good reason for an order never having been made but was no answer against an improper revivor of the suit. The order had been made in the absence of parties who ought to have been made parties and have received notice.

That as to the second ground the decree in *Meyers v. Meyers* was for the benefit of all creditors, and a sale of the property would cut out the sequestration, and the purchaser might come to this Court and seek to have it delivered up to him, but that the creditors were entitled to have the property sold in the best way possible, and to do this the writs of sequestration should be set aside before sale. It would no doubt be argued that there was not sufficient evidence before the Court on this application, of the claim of other creditors or their priorities, as they did not appear to be represented, but he submitted that the applicants under their decree for sale in *Meyers v. Meyers* as vendor's solicitors sufficiently represented and were entitled to shew the position of the creditors. And that the Court would restrain a judgment creditor who had proved his claim from proceeding to sell the property under his *f. fa.*, and for the same reason the Court would not allow a sequestrator to remain in possession after his claim has been proved in the Master's office.

*C. Moss*, for Loughhead and Anderson, tenants of portions of the sequestered lands under

leases granted by Sequestrator and approved by the Court, contended that the regularity or irregularity of the proceedings under the writ did not affect the lessees, but even assuming that the suit had never been properly revived, that was no reason for setting aside the writ of sequestration *in toto*. If while the writ was in force the suit became abated, the Court would give the parties time to revive it properly, and if they neglected to do so, the other parties must serve them with a notice to revive within a limited time. He quoted the expressions of Lord Hardwicke in the case of *White v. Hayward*, 2 Ves. Sr. 464, to the effect that the Court "*will not turn sequestrators out of possession but give time to revive the sequestration within reasonable time.*"

As to the second ground for setting the writ aside viz.: that there are claims prior to those of the sequestrators, proof had not been given that there were any creditors in the Master's office prior to Turley; but even supposing there were, they must come in to shew this, and the applicant here could not set up the rights of those other creditors. The application on the ground of prior claims he submitted was improperly made in chambers. The former practice was for the parties claiming priority to apply for an order to be examined *pro interesse suo*. This was the mode of procedure till 1853, and it still remains the practice in England. In this country the person so claiming must now apply to the Court, under General Order 398, and cannot come into Chambers, and it must be a party who might have come in *pro interesse suo* who can now make such a motion. At any rate the lessees should not be injuriously affected by anything done by the plaintiff Turley. These leases were made under the sequestration and by the authority of the Court, and leases so made were not to be set aside by the action of the plaintiff. These tenants have been acting in good faith, making improvements and expending money upon their farms. Each of them has paid sums to the Sheriff in advance, and in the terms of their leases is a clause which provides that if the sequestration should be discharged before the end of the term they should receive six months' notice from the parties entitled to the land before giving up possession. The Court provided specially for these lessees, and the six months' notice must be given to them before giving up their rights. They are not connected with the proceedings for revivor. They are in the position of purchasers *pro tanto*, and are not to be affected by any irregular proceeding, if it appears to be one that the Court could properly take, *Gunn v. Dobie* 15 Gr. 655; *Collins v. Denison* 2 Cham R. 465. They are entitled to all the privileges which the Court throws around purchasers.

*Hodgins*, for Sequestrators, argued that the parties now moving had recognized that the suit had been revived, and could not therefore now dispute it; they could not recognize or deny it as it suited their purpose. They were moving now a third time for what had been already refused them twice before. This application was simply an endeavour to reverse the order made in November last. That order directed the Master to settle the priorities of all creditors, and declared that all parties were to be at liberty to