IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

BERNAL—*Appellant.*
Marquis of DONEGAL and others—*Respondents.*

March 28, July 29, 1814. —April 14, July 7, 1815.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

A. an expectant heir being indebted to B. his friend and father-in-law, and B. being indebted to C., A. gives C. post-obit bonds in discharge of his debt to B., and C. gives B. credit in account for half the amount of the bonds. After the death of A.'s father, when the bonds had become payable, A. and B. by deeds deliberately executed acknowledge the fairness of the transaction. A. then files a bill against C. and B. to set the bonds aside on the ground of imposition and want of consideration; and afterwards dismisses his bill as against B. and examines him as a witness; so that no relief could be had by any party against B. in that cause. Held by the Lords, reversing a decree of the Irish Chancery, that under these circumstances of acknowledgment, dismissal, and examination of B. as a witness, A. had debarred himself from impeaching the consideration for the bonds, and that he could not impeach the securities for fraud or imposition: but that, from the confidential situation of B. with regard to A., and the knowledge which C. had of all their transactions, the bonds ought not to be available as post-obit bonds, but only for the sums actually allowed by C. as the consideration for them, with interest from their dates.

Marquis of Donegal's bill, filed June, 1803.

THE proceedings in this cause commenced by a bill filed by the Respondent, the Marquis of Donegal, against the Appellant Bernal, and against Edward May, to set aside certain securities granted by the Marquis to Bernal, on the ground of want of consideration. The amount of the case stated in

March 28, July 29, 1814. —April 14, July 7, 1815.

EXPECTANT HEIR.—CONSENT ORDERS. —PRACTICE.

Post-obit bonds given by the Marquis to Bernal, in consideration of certain other bonds, which, as the bill alleged, were worth nothing.

the bill was that, in 1795, the Marquis, at that time Lord Belfast, his father, who afterwards died in 1799, being then alive but unwell, was much distressed for money, and that he applied to Edward May for certain bonds in May's possession, executed by one Wharton, for the purpose of raising money upon them. He was then informed that the bonds belonged to Bernal, and it was agreed that the Marquis should have them upon giving to Bernal four post-obit bonds, conditioned for payment, on his father's death, of the several sums of 24,000*l.* 12,000*l.* 500*l.* and 10,000*l.* The bills stated, that the only consideration for these post-obit bonds were the bonds of Wharton, which turned out to be of no value, as no money could be raised upon them. The bill also stated, that in 1795 a suit in the English Chancery had been instituted by Wharton against May and Bernal, and that an account of all dealings and transactions between the parties had been decreed, but did not mention any thing as to the nature or result of that suit. It was further stated, after the death of the Marquis's father, Bernal had proceeded on the post-obit bonds, and also on a bond for 40,000*l.* given without any consideration for it, and levied several sums, and the bill prayed that they might be delivered up to be cancelled, the Marquis offering to restore Wharton's bonds, and that accounts might be accordingly taken, and an injunction granted, &c.

Bernal's answer.

Bernal's statement in his answer placed the matter in a new light. He stated that he had been first employed in 1791 as agent in London for May, who then resided at York, to pay and re-

ceive monies; that in 1795 May was indebted to him for cash advanced, and for acceptances to the amount of 28,000*l.* and that having then refused to make any further advances, he was informed for the first time that the money, together with other sums, had been applied by May to the use of the Marquis; that it being represented to him that the Marquis was thus indebted to May, he consented, at his and May's request, to accept of the first post-obit bond for 24,000*l.* from the Marquis, who wished to discharge part of his debt to May in this manner, and he, Bernal, allowed May credit in account for 12,000*l.* for this bond; and that the Marquis, before executing the bond, being interrogated by Mr. G. Ellison, Bernal's solicitor, declared that he had received the full consideration for it; that Bernal then continued his advances to May, who stated that he applied the money to the Marquis's use, and that then the other post-obit bonds were given for a similar consideration, amounting in all to 23,250*l.*; for which sum May was allowed credit in his account. It was further stated in the answer, that in February, 1796, the Marquis, who had previously married May's daughter, conveyed his estates expectant on his father's death to May, in trust for the payment of his debts, and that in this conveyance it was recited, that May had received the full consideration of these post-obit bonds from Bernal, and the Marquis from May, and that the Marquis and May had in December, 1795, executed another bond in the penal sum of 40,000*l.* conditioned for payment of 20,000*l.* for the security of Bernal, on account of still further ad-

March 28, July 29, 1814. —April 14, July 7, 1815.

EXPECTANT HEIR.—CONSENT ORDERS. —PRACTICE.

That the post-obit bonds were given in consideration of sums allowed in account to May, to whom the Marquis was indebted in the amount.

Trust deed of Feb. 1796, between May and the Marquis, in which the fairness of Bernal's debt was acknowledged.

March 28, July 29, 1814. —April 14, July 7, 1815.

EXPECTANT HEIR.—CONSENT ORDERS. —PRACTICE.

vances by him to May, for the use of the Marquis. The answer further stated that in 1799 the Marquis, upon the death of his father, conveyed his estates to trustees to settle his affairs, with powers to issue assignable debentures to his creditors; and that upon Bernal's agreeing to withdraw certain executions issued upon the above securities, the Marquis, at a meeting requested by Lyon his solicitor and one of the trustees in the presence of the solicitor, in March 1800, gave Bernal an undertaking in writing, to procure for him debentures on his Irish estates for 46,500*l.* the amount of the post-obit bonds; that the debentures were not given, and that another execution having issued, the Marquis, by deed of covenant dated 18th October, 1800, again ratified the debt, and engaged to procure the debentures, upon which that execution likewise was withdrawn, but that still the debentures were not given.

Trust deed of 1799.

Undertaking, March, 1800.

Deed, Oct. 18. 1800.

July, 1804. Amended bill.

The bill was then amended, and further stated that Bernal was proceeding at law on a 60,000*l.* bond procured from the Marquis without consideration and by fraud, and prayed to have it cancelled, and for an injunction. In the answer to this, various transactions between the parties were set forth, the effect of which was to show that the bond was given further to secure Bernal, both as to the former and future advances for May and the Marquis; and it was further stated that this bond, as well as the deed of October, 1800, had been deliberately considered by the Marquis and his legal advisers before the execution. The answer also stated a deed August 27, 1795, between the

Bernal's answer.

Marquis, May, and Bernal, in which the Marquis admitted himself debtor to May in more than 23,000*l.* and it was agreed that the debt should be discharged by the post-obit bonds to Bernal. To this suit May put in no answer.

March 28, July 29, 1814. —April 14, July 7, 1815. EXPECTANT HEIR.—CONSENT ORDERS. —PRACTICE.

The Appellant then filed a cross bill, to which the Marquis, May, the trustees under the deed of 1799, and Mr. Const, who had some concern in it, were made parties; praying that the trusts of the deed of February, 1796, conveying the estates to May for payment of the Marquis's debts might be carried into effect, and Bernal declared an incumbrancer, &c. To this the Marquis and May put in answers, stating in substance as in the Marquis's bill, and the other parties did not appear.

Jan. 1804. Cross bill by Bernal.

The Court was afterwards moved on the part of the Marquis to continue the injunction in the first cause till the hearing; and at the same time on the part of Bernal in the cross cause, that the Marquis might give security to abide the decree in the first cause, &c. or that the injunction might be dissolved. Upon the hearing of these motions, the Court made an order of July 18, 1805, entitled in both causes, by which the injunction was continued, "the said Edward May, the Marquis of "Donegal, and J. Bernal, respectively *consenting* "*in open Court* that the accounts therein directed "should be forthwith taken." The order then went on to direct, "that the Marquis should give "security in 20,000*l.* to abide the result of the "accounts; and that an account should be taken of "all dealings and transactions between May and "Bernal, between May and the Marquis, and be-

Order by consent July 18, 1805.

March 28 July 29, 1814. —April 14, July 7, 1815.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

" tween the Marquis and Bernal," with particular directions as to each, so as to unravel the whole matter. The Marquis having neglected to give the proper security, Bernal obtained orders of the 2d and 25th January, 1806, dissolving the injunction as to 23,000*l.* &c. and proceeded at law to levy, &c.

Master's report, Feb. 17, 1806, on the order of reference by consent.

Under the order by consent, the Master made a report upon the facts as appearing on the evidence for Bernal, the other parties not having examined any witnesses, and stated that after the draft of his report had been made up, and notice given of a day for signing it, the Marquis on that day applied for leave to examine witnesses and adduce further evidence, but that he, the Master, had refused, on the authority of *Thomson v. Lamb*, 7 Ves. 587.

Order, March 1, 1806, discharging the order by consent, &c.

The Marquis then moved, as Bernal had proceeded at law to stay proceedings on this report on affidavits, that he had not been able to procure his evidence in time for it; and Bernal at the same time moved, among other things, that the causes might be set down to be heard on the Master's report, under the consent order of July 18, 1805: whereupon the Court, by order in both causes dated March 1, 1806, dissolved the injunctions obtained in the original cause, and discharged the order by consent of July 18, 1805, and the Master's report under it, &c.

The Marquis then had his bill dismissed as far as respected May, who had never answered it, and then examined May and other witnesses in chief for the hearing, and cross-examined Bernal's witnesses who had been previously examined.

By an order or decree made in the cross cause dated March 14, 1805, the bill had been ordered to be taken as confessed as against the Defendants who refused to appear; and it was ordered that the Marquis should carry into effect the trust deed of February, 1796; and that an account should be taken, and the sums which should be found due to the Appellant should be charged on the estates of the Marquis, &c. As the order of July 18, 1805, included every thing, Bernal did not proceed upon this order in the cross cause. This cross cause, however, was brought on for hearing (it did not appear how) along with the first cause, on June 9, 1807.

March 28, July 29, 1814. —April 14, July 7, 1815. EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

Cross cause.

Cross cause irregularly brought on for hearing.

On that day the Court decreed in the first cause, "that the post-obit bonds and bond for 40,000*l.* "were obtained by fraud and imposition on the "Marquis, then an expectant heir; that the bond "for 60,000*l.* was also obtained by fraud and im- "position on the Marquis; and that these several "bonds and judgments should stand only as a se- "curity for what should appear to be really due "from the Marquis to the Appellant; that the "other deeds were fraudulent and void; and that "the Master should take an account of all dealings "and transactions between the Marquis and Ber- "nal, and of the money received by the Marquis "from Bernal himself, or advanced by Bernal to "May, or any other person, for the Marquis's use; "*and which actually came to the Marquis's hands,* "*&c.*"

Decree in the first cause, June 9, 1807.

On the same day, in the cross cause, the bill was ordered to be dismissed with costs, as to

Cross bill dismissed.

March 28, July 29, 1814. —April 14, July 7, 1815.

EXPECTANT HEIR.—CONSENT ORDERS. —PRACTICE.

all the parties except May and the Marquis, and as to them without costs.

From the order of March 1, 1806, setting aside the consent order, and from the decree and order of June 9, 1807, Bernal appealed.

Appeal. March 28, 1814.

Sir S. Romilly (for Appellant) argued that the Court had no authority to set aside the consent order of the 18th July, 1805: 1st, because it ought to be considered as a decretal order; and a decree could not be set aside on motion or petition, but on re-hearing or by bill of review: 2d, because a consent order could not be set aside except by consent. *Northcote v. Northcote*, H. 1702, Vin. Abr. 398.—*Harrison v. Rumsay*, 2 Ves. 488, 9.—*Wall v. Bulkely*, 1 Bro. C. C. 484., and other later cases might be mentioned. The Marquis was not entitled to have a reference back again to the Master. Could any instance be produced of a party being allowed to keep back his own witnesses, waiting to see the evidence on the other side, and then producing his own? No error was pointed out in the report, nor was the application for leave to except, but to be permitted to produce new evidence. The decree of 1807 was besides objectionable, in as much (among other reasons) as it directed the accounts to be taken on a most unjust principle—Bernal being to be allowed only such sums as he could prove to have actually come into the hands of the Marquis.

Northcote v. Northcote, Colles, P. C. 287.—2 Eq. Ab. 279.

Mr. Hart on the same side stated, as a farther authority in support of the inflexibility of a consent order, the case of *Noel v. Godfrey*, at the Rolls, 27th April, 1812. But even on the merits, which

he commented on at some length, admitting the additional evidence, the decretal order of July, 1805, ought to stand, and not the decree of 1807. March 28, 1814.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

Mr. Leach (for the Respondents). The merits appeared to be abandoned, and the case was put on the want of authority in the Court to alter the order of 18th July, 1805; but an interlocutory order might be altered by an interlocutory order; and as to the point of consent, it was not an order by consent, or if it had been so, the Appellant must be held by his subsequent acts to have consented to the discharge. The report did not accomplish the object of the Court, the Master not having inquired at all; and he, Leach, was informed that in Ireland exceptions did not lie to a report on an interlocutory order, and that the way was to move to discharge it.

Lord Eldon, (C.) They will contend that the Court had no authority to introduce the words "and "which came to the hands of the Marquis," unless under special circumstances, and that here there was no evidence to warrant so unusual a direction. In many cases it may be right, but it must be founded on evidence. The Appellant says there is no such evidence, and in the case of a decree so special the Respondents must show the grounds of it. Now where is that evidence?

Mr. Wetherell followed on the same side, and argued the cause with reference both to the consent order and the merits.

Lord Eldon, (C.) I certainly have peculiar satisfaction, and I am sure it must afford satisfac- July 29, 1814. Judgment.

July 29, 1814.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

tion to your Lordships, and be considered as a great protection to the House, that my noble and learned friend (Redesdale) who has presided in the Irish Court of Chancery happens to be present when we are called upon to give judgment in these Irish causes: and looking at the manner and form of proceeding here, and all the circumstances of the case, and the judgment given, I hope I do not go too far when I say, that it is a case which has puzzled me more than almost any other I ever met with in the whole course of my professional life. The original cause arose upon a bill filed by the Marquis of Donegal in the Court of Chancery in Ireland, in 1803, which, however, by no means stated many of the most important circumstances of the case. It represented that the Appellant, Bernal, had by some undue means obtained from Wharton certain bonds and securities (the history of which has been amply detailed in a late proceeding in the Court of Chancery here) amounting to about 26,000*l.* in the whole; and that in 1794 Wharton applied to the Respondent, Edward May (afterwards the Marquis's father-in-law, your Lordships will please to recollect), to assist him in getting up the same, and making some composition with the Appellant Bernal; that it was agreed that Wharton should execute other bonds to May, which were to be assigned to the Appellant for whatever sum May should so compound with him on account of Wharton; that May accordingly received these other bonds, and that the originals were cancelled or given up; that the Marquis's father being then alive, but in a very weak and delicate state of health, and not expected to live long, and the Marquis being his eldest son

Wharton v. May, 5 Ves. 27.

and heir apparent, and entitled to considerable estates, &c., and being then about twenty-three years of age, and distressed for money, and it being suggested to him that Wharton's securities were good, and that money could be raised upon them, he applied to May to purchase for him these bonds of Wharton. (His Lordship here stated at length the case made by the bill, which, as it has been before stated, it is unnecessary to repeat, and then continued.) So that the original bill was of this nature: that Wharton's bonds which were worth nothing were, through the intervention of May, given by Bernal to the Marquis, and that in consideration of these bonds so worth nothing the Marquis had given these four post-obit bonds for the sums therein mentioned, and a bond and judgment in the penal sum of 40,000*l.* And now by this bill he says, "Take back Wharton's paper which is worth no-"thing, deliver me up the post-obit bonds, relieve "me from the obligation of the judgment for "40,000*l.*, and so make an end of the business." To this bill May was made a party, and properly so made if it turned out that he had any thing to do with the considerations which have been passing between these parties, and with the transactions in which they were engaged. Your Lordships will see presently how that matter stands.

July 29, 1814.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

Nature of the original bill.

The Appellant put in his answer to this original bill, and he admitted that he had obtained these four post-obit bonds of the Marquis; but he said it was by no means true that the consideration for them was these bonds of Wharton; for that May was very largely indebted to him, Bernal, and that

July 29, 1814.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

it was represented to him, on the other hand, that the Marquis of Donegal was very largely indebted to May; that therefore the real transaction was this, that inasmuch as Lord Donegal was thus alleged to be largely indebted to May, and that as May was very largely indebted to Bernal, and as the Marquis of Donegal could only pay by these post-obit papers, the real nature of the case was this—that the Appellant, Bernal, discharged May to the amount; and that the Marquis, in consideration of these bonds; was to have credit as against May to the same amount as that in which May was released by Bernal; that the whole was a mere transfer of the debt; and that all this story about Wharton's bonds was mere moonshine. Bernal says, "If

Nature of the answer.

"I am to receive neither what May owed me nor "what is secured by these post-obit bonds, the Mar- "quis and May have contrived to deprive me of what "I have advanced; and the Marquis having thus got "rid of May as his creditor, the result of the whole "is this, that May being released by me by putting "the Marquis with these post-obit bonds in his "place, releasing the Marquis to the amount, the "Marquis now alleges that he received no con- "sideration for these post-obit bonds, and desires "that as May has got his receipt in full from Ber- "nal, he, the Marquis, who came in his place, may "have his receipt in full too, leaving me, Bernal, "without debtor or remedy." (His Lordship then proceeded to state Bernal's answer (*vide ante*), and called the attention of the House to the recital in the trust deed of February, 1796, where it was stated that May stood justly indebted to Bernal

in the sum of 23,250*l.*, being the consideration, as alleged in the answer, for the post-obit bonds; and their Lordships would observe, that this was in a deed between May and the Marquis.) To this suit there were no other parties but the Plaintiff the Marquis of Donegal, and Bernal and May the Defendants.

July 29, 1814.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

Bernal then filed a cross bill, for the purpose of establishing his securities, &c., and to this suit he made the Marquis, May, the trustees under the trust deed of 1799, and Mr. F. Const, a gentleman of considerable reputation at the bar here—in short, all necessary persons—parties. The Marquis put in an answer to this bill, in which he again suggested, that the consideration of the securities he had given was of the nature he had stated in his bill. May likewise put in a short answer amounting to little; but which was meant certainly to confirm the representation made by the Marquis as to the consideration. My noble friend (*Redesdale*) puts me in mind of what is a very material circumstance, that it is not stated any where in these pleadings that any assignments were ever made of these bonds of Wharton, and one can hardly suppose that, if they had been the real foundation of this transaction, assignments would not have been made of them for obvious reasons.

Cross cause.

May having put in an answer to this bill of Bernal's, but no answer to that of the Marquis of Donegal, an order was made in both causes on the 18th July, 1805, and I shall read that order to your Lordships, putting you in mind that it is the order which has been so often spoken of as an order

Order by consent, July 18, 1805.

July 29, 1814.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

made *by consent*. I think your Lordships will see that that order had directed inquiries which would certainly have brought before the Court what was the real truth, and what was the actual nature of the transactions between Bernal and the Marquis, between Bernal and May, and between May and the Marquis. It was to this effect: (here his Lordship read the order, for the substance of which, *vide ante*.)

Your Lordships will observe that, if this had been proceeded in, the truth of the case as between all these parties, and as between each class of them, and every two of them, in every way of classing them, would have been made to appear: and if it turned out that Bernal had given releases of debts which May substantially and truly owed to him in consideration of the Marquis's giving him his bonds, then it would be most obvious and just that, if May was placed in a situation in which he should have the benefit of those releases, Bernal should have his money; and that Bernal was not to be sent out of doors, making a present to May of all that May was indebted to him, and not leaving any demand either upon May or upon the Marquis.

An order by consent cannot be got rid of but by consent.

But a party to such order taking proceedings inconsistent with it has waved his right to insist on the rule.

It has been stated very truly that an order by consent cannot be got rid of but by consent; but where any proceedings are taken, in a cause by a party, if those proceedings are not consistent with the execution of that order to which he alleges all parties have consented, he has waved the right to insist upon the rule, that an order made by consent cannot be got rid of but by consent. And I apprehend that the Lord Chancellor of Ireland discharged

this order by consent, upon grounds such as those to which I allude—that Bernal's proceedings in the cause were such as made it fit, as against him, to throw matters back again into that state in which they stood before this order was made. Such I take to have been (the noble Lord will tell me whether I am right) the ground on which the noble Lord proceeded.

July 29, 1814.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

Lord Redesdale. The ground was this. Bernal represented that the conditions on the part of the Marquis and on the part of May, upon which that consent was given, not having been complied with, he ought to be at liberty to proceed at law, and to take out execution for the money which he had a right to levy. It was impossible to suffer him to take out execution at law and to proceed upon the account in equity; because, if he elected to proceed on the account in equity, the injunction must be continued of course. When therefore he insisted upon the right to take what he could at law, he necessarily abandoned his right to proceed in equity. And as he insisted upon that which, the Marquis not having given the security, he had a right to, the necessary consequence was that the whole order was to be set aside. But this having arisen in consequence of the default of the Marquis to give the proper security, the whole expense of the proceeding was thrown upon the Marquis, who was directed to pay all the costs which had been incurred under that order by consent; because the order failed in consequence of the Marquis not having given that security.

A party cannot proceed at law and upon an account in equity relative to the same matter, but must make his election.

Lord Eldon, (C.) Your Lordships will accord-

July 29, 1814.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

ingly find that the Marquis did not give the security for the 20,000*l.* mentioned in this order, and that he did not deposit the bonds of Wharton in the Bank of Ireland as directed, and therefore the Court at the instance of Bernal, on 2d January 1806, made an order to dissolve the injunction issued against the Appellant, as far as respected the sum of 23,000*l.*; and that the Sheriff of Antrim should pay the monies which might come to his hands into the Bank of Ireland, in the name of the Accountant General, to the credit of the causes; and then by another order, dated 25th January, 1806, the Sheriff was directed to keep the money levied under the executions in his own hands.

Then there was a report made by the Master which I do not state to your Lordships; and motions were made on the one hand to stay the proceedings; and counter-motions made on the other side, which produced an order to which it is necessary to call your Lordships' attention. It is dated the 1st March, 1806, and is the order first complained of; and it is in these words: (reads the order dissolving the injunction obtained in the first cause, setting aside the consent order and report, and ordering the Marquis of Donegal to pay the costs, &c.)

This order having been made, your Lordships will permit me just shortly to observe, that it restored the two causes to this state. It restored the Marquis of Donegal's cause to a state in which he was Plaintiff, and Bernal and May were Defendants, May having put in no answer. It restored the cross cause to a state in which Bernal was Plaintiff, and

Lord Donegal and May were Defendants: they had put in answers: the other Defendants, the Trustees had put in no answers; and the causes respectively being in this state, they should have been proceeded in as causes in those respective stages required to be proceeded in. The first step which the Marquis of Donegal took was to obtain an order to dismiss both his original and his amended bill as against May, so as to leave Bernal the only defendant to that suit; to a suit which, as your Lordships must have heard in the course of what I have been stating, involved so directly the consideration of the state of the accounts of May with Bernal, and May with the Marquis of Donegal, as bearing upon the consideration for these bonds which the Marquis had given to Bernal: a proceeding most injurious to Bernal, if the Marquis could make out that he ought to be relieved from those bonds, if it was possible to contend that he could be relieved from them after so many deeds reciting his liability, and notwithstanding the effect of so many releases and discharges, which, in that way of putting it, ought not to be effectual releases and discharges.

July 29, 1814.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

They then proceeded in the cross cause, according to the course of their practice in Ireland, taking the bill as confessed against these other defendants, and so on; till at length the cross cause comes on to be heard I cannot very well tell how. My noble friend says, perfectly irregularly. It is enough for me to say I cannot find out how it came on.

Irregularity in hearing the cross cause.

Lord Redesdale. It is stated that no proceeding was taken in it by Bernal after the order of March 14, 1805, and therefore it could never have come on

July 29, 1814.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

regularly, as he had not complied with the order. It could not be brought on by the Defendant, as he could only dismiss the bill for want of prosecution.

Lord Eldon, (C.) I should have no difficulty in the world, if this were a cause in the Court of Chancery in England, to have said that it came on as it ought not to have done: but the practice in these Irish causes is so different, that I rather choose to state my ignorance than to apply to an Irish Chancery cause those decisive assertions which would better become me in an English cause, the form of which I am better acquainted with. But here I should mention to your Lordships a circumstance of a very singular kind; that the Marquis not only dismisses his bill as to May, but examines May as a witness forsooth to support him in his suit. Now there is nothing better established than this, that if you choose to examine a defendant as a witness you cannot have any decree against him. If May had remained a party to the cause, the examining May as a witness would have been clearly on the part of the Marquis saying this, "I can "have no decree against May." It would be saying, also, "I cannot give you, May, the benefit of "any decree I obtain against Bernal." But it would be saying a great deal more still; for if the real equity of the case were that the releases and discharges given to May should not stand as against Bernal, but that May should pay to Bernal what he was indebted to him, and that he should take these pieces of paper, the post-obit bonds; if Lord Donegal has, by examining him as a witness, put the case into such circumstances that no relief can

The consequence of the dismissal of the bill as against May, and his examination as a witness.

be had against May in that cause, he must be considered as having undertaken to do what the equity of the case would have required to be done with respect to Bernal by May; and if you cannot restore him to the situation of a defendant, with the demand of an account open against him exactly as it was before, your Lordships must consider this as a case, in my judgment, in which the Marquis of Donegal would be bound to place Bernal in that situation, whatever it might be, if he was a creditor of May, which he would be entitled to hold as against May, and as against him, the Marquis: which would undoubtedly be to say, that he must pay the debt, the relinquishment of which was the consideration of these bonds.

July 29, 1814.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

The Marquis bound to make good to Bernal whatever Bernal might be entitled to as against May.

Upon what ground the decree made in this cause proceeds I am totally at a loss to state to your Lordships. I agree in the principle as to expectant heirs, that Courts of Equity throw around them a security against the effects of their own contracts, which security no other person but those acting from distress or ignorance receive; and when persons deal with expectant heirs, there is thrown upon them the *onus* of proving the transaction a fair transaction. But we are not to carry the principle to the extent of saying that an expectant heir may take out of any man's pocket any thing he pleases, and never replace it; and it will not do setting up by a bill, unless you prove it, that you received as a consideration bonds of which you can make nothing. If you can make out that case in fact, you make out a case entitling you to substantial relief. But if the Marquis of Donegal thought proper to relieve May,

Expectant heirs. Courts of Equity protect them in their contracts, as they do those who act from distress or ignorance; and the burden of proving the transaction fair is thrown upon those dealing with them.

July 29, 1814.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

Decree of 1807 unfounded.

standing in that situation of friend and acquaintance, and afterwards father-in-law, and to procure for him the benefit of a release of Bernal's demands upon him, it is carrying the thing too far to say a man shall not be placed in a situation, in which, to use a homely phrase, he shall have his own again.

The decree declares, "that the four several post-"obit bonds, amounting together to the sum of "46,500*l.*, and also the bond for 40,000*l.*, and also "the warrants of attorney to enter judgment on the "same, were obtained by fraud and imposition "practised upon the Marquis of Donegal, then an "expectant heir; and that the bond of 60,000*l.* "was obtained by fraud and imposition on the Mar-"quis; and that the several bonds and judgments "should stand as a security only for the sums "which, on the accounts directed, should appear "to be really due from the Marquis of Donegal to "Bernal." Why so? The case made out on the part of Bernal never was this, that the Marquis of Donegal himself was his debtor, but that the Marquis of Donegal was debtor to May; that May was indebted to him; that they shifted the relation of debtor and creditor: "And that the deeds of August "27, 1795, and October 18, 1800, were fraudulent "and void as against the Marquis of Donegal." Why are these deeds fraudulent and void? Upon what evidence? If the bonds and judgments though obtained by fraud and imposition were still to stand as securities for what was really due in that way of taking the accounts, why are they not directed so to stand as a security? Then there was to be "an

July 29, 1814

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

"account of all the dealings and transactions be-
"tween the Marquis of Donegal and Bernal; and
"of all and every the sum and sums of money re-
"ceived by the Marquis of Donegal, of Bernal him-
"self, or by advances made by Bernal to May, or
"any other person for the use of the Marquis."
And then follow these words; "*and which came to*
"*the hands of the Respondent, the Marquis of*
"*Donegal.*" It will perhaps be in the recollection of some of those who now hear me, that at the time this matter was argued at the bar, I put it to Mr. Leach to state what were the particular circumstances in proof in this case, which led the Court to say that Bernal was not entitled to have credit against the Marquis of Donegal, according to the usual terms of a decree, for the sums of money he had advanced to him or to any other person to his use; and why he was to be limited by the decree to such sums of money as he had advanced to May, for the use of the Marquis of Donegal, and which May had actually advanced to the Marquis; the ordinary decree being, as in all justice it must be, "I
"have a right to all sums of money which I have
"advanced to you or for your use." There ought to be something like fraud proved between May and Bernal, if Bernal was to have cut off from his demand all such sums as he had advanced to May for the Marquis, but which May had not applied to the purpose for which it was advanced. To be sure, if Bernal was not to have against the Marquis an account of the sums of money which May had received to his use, but had not so applied them, the Marquis must have done great injustice; for in-

No evidence to support the special terms of the decree.

July 29, 1814.

EXPECTANT HEIR.—CONSENTORDERS.—PRACTICE.

stead of praying that May might account for the sums he had received to his use, he so arranges his cause, as to make May no longer a party to it, and therefore so as to make it impossible for Bernal to have relief for those sums which May—in this way of putting the case—is supposed to have received of Bernal for the use of the Marquis, but did not apply to his use. I never heard the circumstances stated which would justify that part of the decree; and having charged myself with the duty of looking through the proofs, I have never been able to find any such circumstances.

Cross cause. Bill ought not to have been dismissed.

Then as to the cross cause, to be sure one should have thought it impossible to dismiss the bill. If the Marquis of Donegal had a right to have a decree directing all these accounts, cutting down these securities, ordering some of them to stand as a security for the just balance, but totally destroying others of them; if Bernal filed his bill to have an account taken upon the plan and the principles upon which he said the account ought to be taken, in order to do justice, surely the Court ought to make a decree in his cause, to give him at least that benefit which, as a defendant in the Marquis's cause, they did give him; and more especially as in the other cause the Marquis had not brought before the Court his friend May, in whom estates were vested for the payment of the Marquis's debts, and these among the rest as far as they could be demanded. The Marquis had not brought the Trustees before the Court; and therefore in that cause in which they were made parties, unless the Court went the length of declaring that these reiterated securities were one

July 29, 1814.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

and all tainted with fraud, in such a way that no benefit could be taken of them, Bernal was entitled to a decree to a certain extent. If there was any truth in that which Bernal stated, that the Marquis was really indebted to May, and that Bernal was a creditor of May; if the Marquis would not permit his bonds to be bonds operating to the extent of the sum that May had his release for, Bernal was clearly entitled to stand in the place of May, as against the Marquis, to the extent to which he had been a creditor of May, and so far to have the benefit of these securities: and although the bill had been taken *pro confesso* as against all the other Defendants in the mode of proceeding I before alluded to, even as against all these Defendants who could not be before the Court, and although a decree had been made against these Defendants, that bill is dismissed with costs to be paid to those very persons! Such being the very singular nature of these proceedings, I trust your Lordships will not think I have betrayed great imbecility of mind, (God knows my head is so much fatigued with the great number of causes to which I have given my attention, that I should not much wonder at a great degree of imbecility,) when I say that I never saw a case which puzzled me more than this, and I scarcely know how to get out of it; indeed without the assistance of my Noble and Learned Friend I never should have got to the end of it, for I could not understand it. But then to get to the end of this cause now, there is nobody who carries further than I do, or is more willing than I am to apply, the principle of guarding expectant heirs against the

July 29, 1814.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

The principle of protecting expectant heirs in their dealings does not extend to the avoiding of their engagements deliberately entered into, so as not to oblige them to refund what was actually advanced to them.

effects of their own profligacy and ignorance. But you cannot carry that to the extent of saying that you shall brush away every deed that a man has executed in the course of a long period of time acting deliberately with the advice of counsel and solicitors at different periods of the transactions, and so shall brush them away as not to call upon the heir expectant when he becomes possessed of property with which he can do justice, at least not to keep in his own pocket the money which has come out of the pockets of other persons. Now where the evidence is to be found which justifies this decree I do not know. I have considerable difficulty whether, after the risk was run upon the post-obit bonds, we are quite justified in relieving against them as post-obit bonds; and yet I think we are; for considering the situation of confidence in which May stood with respect to the Marquis, and the sort of intercourse and knowledge of all the transactions of May which I think Bernal must have had in this case, I am disposed upon the whole rather to advise your Lordships to make these instruments a security only for the sums which were actually advanced to the Marquis, or to his use, than to say in this case that the post-obit bonds should be available as post-obit bonds. But the misfortune of the case is, as it seems to me, that attending to the nature of the proceedings we can go no further than to declare what is the fair result in point of principle and fact of such transactions as we know, and then direct accounts to be taken according to the principle which follows from the facts as we have them. I shall therefore propose to

your Lordships in both the cases to come to this decision (reads the judgment, *vide post*). July 29, 1814.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

Point of Practice. April 14, 1815.

It appeared that some errors had crept into the judgment of the House as first drawn up, and upon petition by the Marquis to have the mistakes rectified, and the statement of his agent at the bar that counsel had some additional reasons to urge, the parties were permitted to bring one counsel on each side, the Lord Chancellor observing that this was not meant as a rehearing, but simply to correct the mistakes which had been made in drawing up the judgment. On the 14th April, 1815, Mr. Leach appeared for the Respondents, and Sir S. Romilly for the Appellant. Mr. Leach stated that he had not before gone into the merits, as he understood that the counsel on the other side rested their case on the want of authority in the Court to discharge the consent order; and he was proceeding to argue the case on the general merits, when Sir S. Romilly interrupted him, observing that it was at any rate incompetent now to go into the general merits, but that in point of fact the merits had been before fully argued on both sides.

Lord Eldon, (C.) This now becomes a very important point with a view to the practice of the House, and the matter must stand over till we consider of it. I apprehend the contents of the printed cases are to be considered a judicial representation as much as the speeches of counsel.

Lord Redesdale. The papers at least went into the merits, but at any rate the House is not to have

No rehearing in the House of Lords.

April 14, 1815.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

its judgment reviewed merely because counsel may have omitted to make observations.

Counsel were ordered to withdraw, and were no more heard in the case. On the 7th July the House ordered the proper alterations to be made. The corrected judgment is as follows.

Judgment of the House of Lords, July 7, 1815.

Order, March, 1806, *affirmed.*

Decree, 1807, in the first cause *reversed.*

" It is ordered and adjudged, &c. that the order " of the 1st March, 1806, complained of in the " said respective appeals be, and the same is hereby " *affirmed.* And it is further ordered and adjudged " that the decree of 9th June, 1807, complained of " in the said first-mentioned appeal be, and the " same is hereby, *reversed.* And it is hereby de- " clared that the Respondent, the Marquis of " Donegal, by the indenture of the 18th October, " 1800, having acknowledged that the several post- " obit bonds of the 8th June, 1795, for 24,000*l.*; " of the 20th June, 1795, for 12,000*l.* and 500*l.*; " and of 6th July, 1795, for 10,000*l.*; had been " given in consideration of the sums of 12;000*l.*, " 6,000*l.*, 250*l.*, and 5,000*l.*, advanced, lent, and " paid, by the Appellant to the said Respondent, or " for his use, and at his direction and request: and " it also appearing that the said Respondent's bond " of the 18th October was defeasible on payment " by the said Respondent to the Appellant of several " sums advanced and to be advanced by the Appel- " lant to or for the use of the said Edward May in " manner therein mentioned, and such costs, " charges, damages, and expenses, as therein men- " tioned: and it appearing by the evidence in the " cause that the drafts of the said deed and bond of " the 18th October, 1800, were taken by the said

" Respondent for the purpose of laying the same
" before Francis Const, Esq. in the said proceedings
" named on behalf of the said Respondent, and
" were afterwards returned by the said Respondent
" to the solicitor for the Appellant, with a declara-
" tion that the same had been perused and approved
" by the said Francis Const, and that the said deed
" and bond were afterwards deliberately executed
" by the said Respondent; and the said Respondent
" having dismissed his bill as against the said Ed-
" ward May, and examined him as a witness, so
" that no account can be taken against the said
" Edward May, either of his dealings or transac-
" tions with the Respondent or with the Appellant,
" the said Respondent has debarred himself from
" impeaching the considerations of the said several
" securities as appearing thereon, and as stated in
" the said deed and bond of the 18th October, 1800,
" and the said Respondent cannot now impeach the
" said securities for fraud or imposition, or the
" considerations for the same. But it is further
" declared that under the particular circumstances
" of this case the said post-obit bonds ought to
" stand as a security only for the principal sums
" stated in the said deed of the 18th October, 1800,
" to have been the consideration for the same re-
" spectively, with interest thereon at the rate of
" five per cent. per annum from the dates of the
" said bonds respectively. And it is further ordered
" that it be referred to one of the Masters of the
" Court of Chancery to take an account of what is
" due to the Appellant for principal and interest on
" the said post-obit bonds according to the declara-
" tion aforesaid, and to take an account of what is

July 7, 1815.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

July 7, 1815.

EXPECTANT HEIR.—CONSENT ORDERS.—PRACTICE.

" due to the Appellant on the bond of the 18th " October, 1800, according to the declaration afore- " said. And it is further declared that in taking " such account the Respondent, the Marquis, must " under the circumstances be bound by the accounts " settled between the said Edward May and the " Appellant, except so far as the said Marquis shall " be able to falsify the same, or show any errors " or over charges therein, &c. &c." The remaining part of the judgment consisted of directions for taking the accounts on the above principles.

The decree of dismissal in the cross cause was *reversed.*

Agent for Appellant, COLE.
Agent for Respondents, LYON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION, (1ST DIV.)

ARBUCKLE—*Appellant.*
TAYLOR AND OTHERS—*Respondents.*

April 27, May 1, 1815.

ALLEGED MALICIOUS PROSECUTION AND WRONGOUS IMPRISONMENT.

It seems that where a partner of a firm prosecutes for an alleged theft of property belonging to the partnership, and an action is brought for a malicious prosecution and wrongous imprisonment, neither the company nor the other individual partners can be dealt with as prosecutors merely because the property belonged to the firm.

It seems that an action for a malicious prosecution cannot be sustained; though the accusation be false, if the prosecutor can show probable cause for the charge.

Dicente Lord Eldon, Chancellor, that a magistrate is