legitimacy of the daughter, which is a point decided in the cause. June 29, 1816.

LEGITIMACY.—DAUGHTER, FOR A SUM OF MONEY, RENOUNCES TO HER FATHER HER CLAIMS UNDER HIS MARRIAGE-CONTRACT, AND DIES IN HIS LIFE-TIME.—WHAT IS THE EFFECT OF THE RENUNCIATION?

The cause was accordingly remitted for review, as to the principal point.

Agents for Appellants, SPOTTISWOODE and ROBERTSON.
Agent for Respondent, CHALMER.

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## IRELAND.

### APPEAL FROM THE COURT OF CHANCERY.

DALY and another—*Appellants.*
KELLY—*Respondent.*

A. and B. claim under separate wills as devisees of C., and upon suit at the instance of A. the will in favour of B. set aside, and that in favour of A. established. B. then sets up a bond of the devisor for 40,000*l.*, being more than the value of the whole property, on which bond he brings action at law and obtains judgment, whereupon A. amends his bill, and prays and obtains injunction to restrain execution. May 10, 1813. Feb. 7, 15, 25; May 21, 1816.

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A., after the will in his favour had been established, and before action on the bond, gives to D., his solicitor and attorney, a mortgage of the lands devised as a security for past and future costs in the proceedings, and for money advanced by D. to A. D. does not make himself a party, but suffers the suit to proceed in the name of A. as the sole Plaintiff.

Decree in 1800 for payment of the sum in the bond, with interest from the time of the devisor's death instead of from its date, so that the bond was partly relieved against; and *per* Lord Redesdale afterwards in Dom. Proc. the bill must be understood as having submitted to have the relief made

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effectual according to the rights of the parties. A. then compromises the suit, and refuses to appeal; and the whole property sold and purchased in trust for B. for a less sum than that reported due to him.

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D. files his bill against A., B., and another, charging collusion and fraud, and praying that the decree of 1800 might be declared void as against him, and that he might be at liberty to appeal from it in the name of A. if that should appear to be for his advantage. Decided that the mortgage was valid as between D. and A., and that D. had a right to appeal in A.'s name. Appeal accordingly by D. in A.'s name in the cause A. v. B., and appeal against the decree authorizing that appeal.

The House of Lords, without deciding whether D. had a right to appeal in this way, refer back D.'s cause to the Court below for re-hearing, that the Court might decide whether D. might not impeach the decree in the cause A. v. B. to the extent of his claims, by bill in the nature of a bill of review or otherwise, though the same remained in force against A.

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DENIS DALY, of Montpleasant, in the county of Galway, was seized of a considerable settled real estate, and also seized and possessed of a large property, real and personal, unsettled. He had two sons, Denis and Michael, and three daughters. Previous to, and from the year 1777 till the time of his death in 1791, he was in a state of animosity with his first son Denis, and on April 5, 1777, executed a bond conditioned for payment of 40,000*l.* to his son Michael, a sum larger than the amount of his whole unsettled property. The bond was made payable in May following, but appeared not intended to be really payable till the father's death; and the father afterwards gave a bond for 5000*l.* to a favourite, and dealt in all respects with the property as if the bond to Michael had not existed:

Bond, April 5, 1777, by Denis Daly to his son Michael.

and on this account it was afterwards contended that the father never meant that the bond should be obligatory at all, except in the event of his dying intestate, his object being at all events to exclude his first son from any share in the unsettled property. The anxiety of Michael to get a will made in his favour, and his paying the 5000*l.* bond when the person entitled challenged in chancery the will under which Michael afterwards claimed, though he (Michael) might as executor have retained, and thereby exhausted the whole fund, were also circumstances relied on to show that Michael himself did not consider the bond as obligatory. On the other hand there was evidence of the acknowledgment of the obligation in the bond by the father after he had made a will or wills, and a short time before his death. This bond, according to the statement of Michael in his answer to a bill in Chancery afterwards filed against him, after having been delivered to Michael and remaining some short time in his possession, was by him returned to his father, in whose custody till his death it continued uncancelled.

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In Feb. 1778, the year after the execution of the bond to Michael, Denis the father made a will, and thereby devised and bequeathed all his unsettled, real, and personal estates to his son Michael and his (Michael's) children.

First will of D. Daly, Feb. 13, 1778, in favour of Michael.

In 1790, he made another will, by which he devised and bequeathed all his real and personal estates to his grandson, Arthur Henry Daly, a younger son of Michael, subject to the payment of his debts and legacies.

July 20, 1790. Will in favour of Arthur Henry Daly, a younger son of Michael.

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Mar. 13, 1791. Will in favour of Michael.

Solicitor advances money to his client to carry on his suit, and to maintain him in the interim.

On March 13, 1791, the day before his death, he made a third will, devising and bequeathing all his unsettled real estates and personal property to his son Michael, who took possession accordingly, and possessed himself, among other things, of the 40,000*l.* bond.

Arthur Henry Daly, being led to believe that the will of 1791 had been obtained by undue means, was desirous to assert his right; but, having no funds to carry on the necessary proceedings, application was made to Kelly, a solicitor, who agreed to advance money to prosecute the suits, and to maintain A. H. Daly and his family in the mean time; and A. H. Daly, to secure Kelly, gave him bonds from time to time for the money advanced, on which judgments were entered up.

Will of 1791 set aside in the Prerogative Court.

In 1792, A. H. Daly proceeded in the Prerogative Court to have the probate granted to M. Daly under the will of 1791 revoked, to set that will aside, and to establish that of 1790. He prevailed in the suit, and the sentence was finally affirmed by the Court of Delegates in 1797.

1792. Bill in Chancery.

In the same year 1792, A. H. Daly filed his bill in Chancery against Michael Daly and others, impeaching the will of 1791, on the ground that the testator, at the time of its alleged execution, lay dying, and in a state of insensibility; and praying, among other things, that the will might be set aside and that of 1790 established, and also that the bond for 40,000*l.* might be declared void, and delivered up to be cancelled, on the ground that the testator did not sign it with intent that it should be obligatory on him in the event of his making a will.

Michael, in his anwer, insisted that the will of 1791 was valid; and that, in case it should be set aside, he had a right to set up the bond, which the testator had always admitted to be obligatory upon him; and then, alleging that the bond was payable at the time mentioned in it, May 1777, he insisted that a sum of 73,000*l.* was due to him on the foot of the bond. An issue was directed, to try the validity of the will of 1791, and a verdict given against it, the effect of which was understood to be to establish that of 1790 in favour of A. H. Daly.

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Answer.

Issue.

Verdict against will of 1791.

In this state of the proceedings A. H. Daly, by deed of mortgage, or what seems intended to have been, and was considered as a mortgage, of the date September 14, 1795, conveyed and assigned to Kelly all the personal property, and the rents and profits of the real estates, devised and bequeathed to him by the will of 1790, to secure the payment of 6,336*l.* the amount of the judgments, and such other sums as should be advanced by Kelly, or become due to him for costs. This deed was duly registered.

1795. Mortgage by client to the solicitor, for securing the payment of costs and money advanced.

Registered.

The bond, which had been in the custody of the Court of Chancery during these proceedings, was delivered to Michael Daly, who, in Hilary Term, 1797 (stated to be in 1791 in one of the cases), brought his action on the bond on the Pleas-side of the Exchequer; and the fact of the execution of the bond not being contested, A. H. Daly, after having filed a general demurrer to the declaration, was advised not to proceed in defence, and judgment by consent was entered up for the Plaintiff. A. H. Daly then amended his bill, and prayed and

Action on the bond, H. T. 1797.

Action bond not defended.

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obtained an injunction to restrain further proceedings at law on the bond and judgment.

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Injunction.

Decree, Mar. 7, 1800.

No interest allowed till testator's death.

The cause having been heard before Lord Chancellor Clare, his Lordship, on March 7, 1800, decreed that the bond should stand as a security for the principal sum of 40,000*l.* and interest from March 14, 1791, the time of the testator's death, and that the Master should take an account accordingly. The cause was re-heard, and in Nov. 1800, Lord Clare affirmed the original decree.

In May 1801, A. H. Daly executed a power of attorney, authorizing Kelly to lodge an appeal to the House of Lords; but, very soon afterwards, directed Kelly not to proceed with the appeal. Kelly then ceased to act for A. H. Daly. A report was made by consent that a sum of 55,906*l.* was due on the bond; and by a final decree, Feb. 17, 1802, this sum was decreed a charge on the real and personal estates of the obligor, which were directed to be sold. The property was accordingly put up to sale, and purchased by Richard Gore for 35,000*l.* in trust for Michael Daly.

Sale-purchase by Richard Gore in trust for M. Daly.

Nov. 1804. Bill by Kelly praying that the decree of 1800 might be declared void as to him, and for liberty to appeal from it in A. H. Daly's name.

In 1804 Kelly exhibited his bill in Chancery against A. H. Daly, M. Daly, and R. Gore, stating these circumstances, and that a sum of 10,493*l.* was now due to him for costs and advances, and that A. H. Daly had, by a fraudulent and collusive compromise with M. Daly, declined to prosecute the suit by appeal to the House of Peers; and praying that the decree of March 7, 1800, and all subsequent proceedings thereon might be decreed and deemed void as against Kelly, and his right and title under the aforesaid mortgage and assignment,

&c.; and that he might be at liberty, if he chose, to carry on the proceedings in the cause of "*Daly* "*v. Daly*," by way of appeal or otherwise, in the name of Arthur M. Daly. After answer put in by M. Daly, denying the fraud and collusion, and stating that A. M. Daly had desisted from the suit in question at the intervention of his friends and from despair of success, Kelly moved the Court for liberty, as prayed by his bill, to lodge an appeal in the name of A. H. Daly, in the cause "*Daly v.* "*Daly*," as the time was almost out. The Lord Chancellor (Redesdale), on August 21, 1805, made an order intitled in both causes, giving liberty to Kelly to enter an appeal accordingly, but without deciding the right; and this permission was to be "without prejudice to any question between the "parties, or to any objection which Michael Daly "might be advised to make to the prosecuting and "hearing such petition of appeal, Kelly undertaking "to pay any costs that might be awarded against "A. H. Daly, in consequence of the prosecution "of such petition; and it was further ordered that "A. H. Daly should be restrained from doing any "act to prevent such petition of appeal from being "presented and heard, or in any manner impeding "the same; and it was further ordered that Kelly "should forthwith speed his cause to a hearing, &c." The answer of A. H. Daly was put in after this order had been made, and denied fraud and collusion.

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Answer.

Order, 1805, giving permission to enter appeal.

Kelly did not speed his own cause to a hearing, but suffered it to rest, and entered an appeal in "*Daly v. Daly*," in the name of A. H. Daly, according to permission. M. Daly, and A. H. Daly,

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appealed from the order of permission, and, Michael Daly having died, the appeals were revived against John Sutherland, his legal personal representative. The appeals came on for hearing on May 10, 1813, but were ordered to stand over until the Court below, before which Kelly was directed to bring his own cause to a hearing, should decide on the validity of Kelly's security.

Appeal, 1813. Order that Kelly's cause be heard below.

Decree, Jan. 30, 1813. Mortgage valid as against A. H. Daly.

The Court, by decree of June 30, 1813, declared Kelly entitled as against A. H. Daly to the benefit of the mortgage of Sept. 14, 1795, for payment of the costs and advances; and that as it appeared that the mortgage security would be unavailable, in case the decree of March 7, 1800, in "*Daly v. Daly*" should stand and be in force; and as the only question to be determined was the validity and effect of the bond of April 5, 1777, being the point decided by the decree of March 7, 1800, from which an appeal had been lodged in the name of A. H. Daly; it was ordered that Kelly should be at liberty to prosecute the said appeal in the name of A. H. Daly; and that the account on the foot of the mortgage should be stayed till the appeal should be decided. From this decree A. H. Daly, and Sutherland representative of Mr. Daly, appealed.

Decree below that Kelly might appeal in name of A. H. Daly.

Appeal.

The causes came on again for hearing in the House of Lords on Feb. 7, 1816.

For the Appellants (Daly and Sutherland) it was contended that the prosecution of an appeal from a decree in equity by one in the name of another, could not be defended on principle, and as to precedent there was none. This right of suing in the

name of another was confined entirely to cases at law, where, from the maxim that a *chose* in action could not be assigned, it was necessary that the assignee should be allowed to sue in the name of the original party. The reason for permitting an assignee to sue in the name of the assignor there was, that the assignee could not proceed in his own name. That was not the case with Kelly, who, when he became a mortgagee, might have made himself a party. But this he neglected, and then attempted to prosecute an appeal in the name of another that other not wishing it. If Kelly had made himself a party by a supplemental bill, he might have prosecuted the appeal in his own name, as far as his interest was concerned. But, having neglected that, it would be a bad precedent if he were permitted to prosecute the appeal in this way. Kelly alleged fraud and collusion. If he could have proved that the decrees of Lord Clare had been obtained by fraud and collusion, he might have impeached them below on that ground. But no such thing was proved; and no fraud could be presumed, unless the decrees were so palpably erroneous that without fraud they could never have been made. The transaction with Kelly was unknown to Michael, and it was Kelly's fault that he did not assert his personal interest; and if the decree did not bind him against a new suit, how could he appeal against a decree by which he was not so bound?

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The case of a solicitor advancing money for his client, and taking a security of this kind, without disclosing the interest which he had in the cause, was always regarded with suspicion, and not one

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which ought to be favoured. A mortgagee before the suit was a necessary party, without whom the Court, if informed of the circumstance, would not proceed. To such a mortgagee the *lis pendens* was, by the policy of the law, considered as notice; and if he neglected to prosecute his interest below, he could not come in upon appeal. A mortgagee, whose interest accrued pending the suit, was, upon the general policy of the law, not a necessary party; because, if he were, the mortgagor, by continually creating fresh incumbrances during the course of the cause, might prevent its ever being brought to a termination. But in regard to appeals, mortgagees of both descriptions stood on the same footing, and could not then for the first time come into the cause, the interest having commenced before, or pending, the suit below. It would be of dangerous consequence to permit persons with notice, and especially solicitors in the cause, thus to lay over and throw the whole burthen on another party, and then come in at the close and take the advantage.

For the Respondent Kelly it was contended that, as it had now been decided that Kelly held a valid security, the compromise under the circumstances must have been fraudulent. Lord Redesdale, in 1805, had given permission to Kelly to appeal in A. H. Daly's name. (*Lord Eldon*, C. The difference is that the order of 1805 gives permission to enter the appeal, leaving to the Lords to decide the right; whereas the decree of 1813 decides that Kelly had the right to appeal. Could A. H. Daly have appealed on account of the alleged compromise,

and could Kelly appeal on any other ground than such as might have been taken by Daly, in whose name he appealed? Lord Manners has said that the mortgage is good as between A. H. Daly and Kelly, but he should have said whether it was good or bad as against Michael. Kelly's bill was founded on fraud, and charged collusion between A. H. Daly and Michael Daly; and, on that ground, prayed that Lord Clare's decree should be declared void as against Kelly. Did not that require judgment whether the mortgage was good as against Michael?) There was fraud in preventing the judgment from being reviewed. The bill prayed relief in the alternative that the decree might be held not binding on him, or if so that he might be at liberty to appeal. Lord Redesdale, when he permitted it, must have been of opinion that he might do so, consistently with the rules of the Court. (*Lord Eldon*, C. Do you know any case where a *mesne* incumbrancer, *lite pendente*, who has not made himself a party, has been allowed to appeal? and if fraud and collusion may be a ground for that, must not the fraud and collusion be proved? Was the land aliened before the bond was put in suit, or was there any question about the alienation in the cause "*Daly v. Daly*"?) The Court must have been aware of Kelly's interest. This was the case of a solicitor. Suppose a trustee refused to appeal against a decree, would that prevent the *cestui que trust* from appealing? No doubt the Court of Chancery would compel the trustee to permit his name to be used: and that is the case here, only that here there is an original bill to show the interest. Kelly appeared

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in two characters, as solicitor and mortgagee. There were *dicta* at law that an attorney by whose industry and at whose expense property was recovered had a lien upon it, and that a settlement or alienation without his consent was a fraud on the attorney. And so here the compromise itself was evidence of fraud and collusion. This was in principle like the case of a creditor not proceeding with due diligence where other creditors might come in and conduct the suit.

In reply it was contended that Lord Redesdale carefully avoided deciding the right to appeal. The whole foundation of Kelly's claim to appeal was the compromise. The answer had put him on proof of the fraud and collusion in that transaction. He had not proved it, and could not stir a step. The Court would say, You had a right to make yourself a party; and so it would in the case of a *cestui que trust*. The case of a creditor not proceeding with diligence did not at all apply. On the same principle that Kelly was bound to indemnify the other parties against the costs of the appeal, he ought to indemnify them also against the costs of all the proceedings since 1800.

*Sir S. Romilly*, *Mr. Leach*, and *Mr. Heald*, for Appellants; *Mr. Hart* and *Mr. Johnstone* for Respondent.

Feb. 7, 1816. *Lord Eldon* (C.) If I had not thought that a noble Lord (Redesdale), who usually attends here this day, I would have advised your Lordships not to proceed so far with these appeals now, as I

profess that I feel extreme difficulty in understanding these Irish causes as they are presented to us. The state of the case, if I understand it, is something of this nature. The first question was whether Michael Daly was entitled, as devisee of Denis Daly, the testator, or Arthur Henry Daly as devisee of the same testator; and that question depended upon two wills. Michael said he was a bond creditor of his father the testator for 40,000*l*. Arthur's claim was established under the will, and Michael's bond was held to be a valid security. Arthur had filed a bill as to the wills, also bringing into contest the bond for 40,000*l*., and praying for an injunction to restrain proceedings at law upon it. Lord Clare thought that the bond was a valid security; and, generally speaking, the result would have been that the bill would have been dismissed as to the injunction. But probably it may appear on looking at the bill, which I have not been able to get at, that there had been some passage in the bill as to relief on the bond, which may afford ground for this mode of proceeding. It had occurred to me to put this question to myself, how the land would be affected by such a proceeding in law or equity here. For where a real estate is in the heir at law or devisee of a person dying indebted by bond, and that is aliened before action commenced on the bond, the land is not affected by the judgment, but the money received would be assets to pay the debt. It is stated in one of these cases that the action was not brought till H. T. 1797, and in another place that the action was brought before the bill was filed; and whether before or after may be a very material question.

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Where a real estate is in the heir at law or devisee of one dying indebted by bond, and the estate is aliened before action brought on the bond, the land is not affected, but the alienor is liable for the value.

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Arthur was advised to bring the matter to a rehearing before Lord Clare, who affirmed his former decree; and so, on two hearings, this bond was held to be a valid security, which was an important circumstance with reference to the charge of collusion. As to the particular causes why Arthur had not appealed, I do not enter into the merits at present, as the question here must be decided on a drier ground. It is true the bill charges collusion, and your Lordships will attend to the distinction that it was not collusion up to Lord Clare's decree, but commencing after it, to prevent an appeal to this House. Then Kelly files an original bill, stating the incumbrance, as to which I shall only say at present that this House was well warranted in calling for the judgment of some Court as to the validity of that incumbrance before it proceeded further with the appeal, especially as that security was of a nature which Courts of Justice look at with great jealousy; and in March, 1813, the cause was ordered to stand over for that purpose. A motion had been made in Ireland that Kelly might be allowed to present a petition of appeal in the name of A. Daly; and that was allowed, as I understand it, because, if not allowed, it was questionable whether the petition could be presented in proper time, and the party could not otherwise, if the Court should think that the security was good, and that an appeal in this way was competent, have his relief, by reason, if I may use the expression, of the *ancientness* of his appeal. And so the order of 1805 was made. That amounts to no more than this: Here is a bill on account of this compromise, praying to have the benefit which the party would have

Mortgage by client to solicitor or attorney, of land in litigation in the cause, regarded by Courts of Justice with jealousy.

had if there had been no such compromise. It was merely a permission to present the appeal before the time elapsed, leaving it to the Lords to say whether this House would receive it. When that was considered in 1813, sufficient appeared on the face of the instrument of incumbrance to induce the House not to decide the case till they saw whether the instrument, which formed the ground of the demand, would be supported below. And the matter was accordingly deferred till the other cause was heard below; and now there is a decree that the security is good as against Arthur H. Daly for the costs in the prosecution of his cause. I do not desire your Lordships to go into the question as to the merits in that respect; that will be discussed hereafter. But, suppose for a moment that he had a right to this security on the land for past and future costs, the security must at least be regarded with a great deal of jealousy, because, when an attorney has such a security, there may not be so much caution in the expenses as would otherwise be applied. But, suppose the money has been actually advanced in behalf of Arthur H. Daly, there is not a word here as to the collusion, ; but the decree merely asserts that the mortgage is valid as against A. H. Daly, and that Kelly ought to have liberty to appeal in the name of A. H. Daly: and the difficulty is not confined to this; for you are placed in this difficulty also, whether you must not alter Lord Clare's decree, not only as far as respects the interest of Kelly, but whether you must not subvert it altogether with reference to the interest of A. H. Daly likewise, who is substantially no party here.

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Then is it the practice of a Court of Equity, or of this House, if, pending a suit, an incumbrance is effected, and the incumbrancer is not made a party, that he should be at liberty to appeal in the name of the original parties? This at least is a novelty. If it were clear that a judgment was obtained by a fraudulent collusion, then there might be a ground for it; and further, if a person were acting in a cause for the benefit of another, and the parties by a fraudulent collusion deprived him of his fair remuneration, I can conceive that, if the collusion were established, relief ought to be given in some way, by either vacating the judgment, or that, if there was an appeal in this way, this House might perhaps receive it. But the first question is whether it is a fraud, the not appealing in behalf of a party who stands on the simple ground of being made an incumbrancer during the suit. Some other things are also to be considered. In one page it is said that the action was before the alienation, and in another that it was after. But, whoever got land before the action brought, by alienation from the devisee or heir at law of a dead person, the land cannot be affected by a bond-creditor, but the money is assets for the payment; and here we may have to consider whether the bond would affect the land in the hands of Kelly at all. At law a bond attaches on the land by force of the judgment. But in equity the bond-creditor can only have satisfaction from the land in the mode of equitable execution; that is, by a sale of the land to pay the debt. But how can a sale be made without the party who has got the estate, and must make the conveyance?

Then another question is, whether Kelly ought not to have been a party to the suit, and to have appealed in his own name, confining it to his own interest, instead of coming in the name of Arthur H. Daly. I mention these things only to show the extreme difficulty which I feel in this case. Your Lordships know what valuable assistance we get in these Irish cases from a noble Lord not now here (Redesdale) even where the causes have not come before him below. He had this case before him, and knows more about it than the whole of the rest of us put together; certainly more than I do, for among these papers I cannot even find the bill. I propose, therefore, that the cause should stand over till that noble Lord can attend.

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*Lord Eldon* (C.) The order of 1805 was made by the then Chancellor, to enable the party to enter his appeal in time, in case it should appear that he had merits, and had a right so to appeal. Then the cause came on here, in 1813; and the question was, whether Kelly had a right to appeal in the name of A. H. Daly, and if he had, whether he had any merits: and the order made on that occasion, according to the impression on my mind, was, that the Court of Chancery below should decide both questions, whether he had merits, and whether he had a right to appeal in this form. One of the difficulties which occurred to me in this case was, whether there was not an alienation of this property before any suit on the bond. It was likewise a singularity in the case, that this was a bill for an injunction to restrain proceedings at law on a bond;

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and the consequence, generally speaking, when there appeared no ground for this injunction, would be that the bill as to that would be dismissed. But I stated before, that there might possibly be something in the pleadings to induce the Court below to retain the bill in that respect, and so to turn the Defendant into a Plaintiff. The cause now comes here on appeal against the order of 1805, and an appeal against this decree of 1813, and it was insisted that the Court was wrong in permitting the appeal; for there was little argument, as yet, as to the point, whether the mortgage to Kelly was a valid security, nor was it necessary in the first cause. But, in 1813, the House had doubts as to the validity of the security, considering its nature as between solicitor and client. But it would not be necessary to go into that, if the House should be of opinion against the appeal in the first cause. Now when we made the order of 1813, we did not, as far as the impression on my mind goes, mean to decide that Kelly had a right to appeal in the name of Daly; but expected the Court below to give its opinion, not only as to the merits, but whether, supposing there were merits, the party ought to be allowed to prosecute the suit in this form. I did not consider the order of 1805, as determining any thing but this, that the party should be at liberty to enter his appeal: I take it, at present, that the security was valid. But there is one thing to be observed, that this suit originated by a bill for an injunction to stay proceedings at law on a bond. When it appeared that the equity could not be sustained in that view, the ordinary course here

would have been to dismiss the bill. But I take it that there was some specialty in the case to induce the Court retain it. There was another difficulty: if a bond creditor proceeds at law against a devisee, or heir at law, he takes execution against the land. But if he proceeds in equity he only gets satisfaction out of the land by sale for as much as is due; and then the conveyance must be executed by him who has the legal estate; and if there is an alienation pending the suit, though that would not prejudice the Plaintiff, yet the alienee must be brought before the Court in some shape or other. Here, I take it, the course would be to bring the alienee before the Court in order to convey. But the course in this case has been different; for Kelly appeals in the name of Daly, who, though he has a much greater interest, repudiates the suit; and if the Court was of opinion that he could so appeal, the decree ought to have been that he should only appeal to the extent of his own interest. What do you say to that, Mr. Hart? I confess I cannot get over it. (*Mr. Hart.* There was no change of possession, and Kelly had only the equitable, not the legal estate. There is no lease for a year). *Lord Eldon* (C.) It is stated, in one of the cases, that the mortgage was by lease and release, and we have been proceeding here on the supposition that this was correct.—*Hart.* The cases were prepared on the other side of the water.—*Lord Redesdale.* It is not the practice in Ireland, I believe, to make a lease for a year, as by act of parliament it is provided that a recital of a lease for a year in the Release shall be evidence of the lease.—*Lord Eldon* (C.)

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If land is aliened pending a suit in equity about it, though this will not prejudice the Plaintiff, the alienee ought to be brought before the Court.

In conveyances by lease and release, it seems not to be the practice in Ireland to make a lease for a year; but the recital in the release is evidence of the lease.

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(After looking at the deed.) This is neither lease nor Release, nor any thing like either. It seems to be no freehold conveyance at all, but only gives a right to the rents and profits till the debt is paid.

Feb. 25, 1816. Judgment.

*Lord Redesdale.* I shall state the circumstances of this case, as it appears to me they have not been exactly understood. The first bill was filed in 1792, to establish the will of 1790, and set aside that of 1791; and, an issue having been directed, a verdict was, in 1794, given against the will of 1791; the consequence of which was understood to be the establishment of the will of 1790, and there was an end of all dispute on that subject. Then, the will of 1790 being established, the mortgage to Kelly was made in September 1795, which mortgage was of an extraordinary nature, as he was only to enjoy the rents and profits till he was paid; so that the mortgage was made before there was any question as to the 40,000*l.* bond. The mortgage was registered in September 1795; and the effect of the registration is different in Ireland, from what it is in England in those instances in which it is used; as in Ireland the effect is to give a preference, both in law and equity, against all subsequent deeds whatever. The effect then was to give a prior right to the mortgagee, as this was an alienation by the devisee prior to the action on the bond. The action was brought after the alienation; and by the statute of Anne in Ireland, which is the same as the statute of William here, the alienation is not affected by the judgment, but the demand is personal against Arthur H. Daly for the value. This seems

Registration in Ireland gives a preference in law and equity against all subsequent deeds.

4 Anne, c. 5.

3 Gul. Mar. c. 14.

totally to have escaped attention. The action on the bond was then brought, and the judgment was subject to the mortgage to Kelly. The bond was not in suit till 1797; for the proceedings in the Ecclesiastical Court, annulling the probate taken under the will of 1791, were not completed till 1797. The action being brought, the bill was amended, and prayed an injunction; for Arthur Henry Daly seems to have been advised to make no defence at law against the bond; whether rightly advised or not is another question; but he seems to have been, in point of fact, so advised.

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Then the cause came to a hearing in March 1800, and the decree was of this description, that the bond should stand as a security to Michael Daly for the principal sum of 40,000*l.* with interest, from March 14, 1791, the day of the testator's death, instead of from the date in the bond, which, I presume, was founded on evidence that the bond was not intended to operate, unless in the event of no provision being made for Michael Daly by will. I do not see on what other ground it could be. Then an account is directed to be taken of what was due to M. Daly under the bond; and the Master was ordered to set off the amount of such sums as M. Daly had received. In November 1800, the cause was reheard, and the decree was affirmed. Now this decree supposes that the bond was to be relieved against to a certain extent, and is therefore so far correct; for whereas the bill prayed relief against the bond, the decree did relieve to a certain extent, but ordered payment of the bond according to the nature of the relief, and the bill

Bond payable in 1777. Obligor dies in 1791. Obligee brings action on the bond, and injunction to stay proceedings upon

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it. Bond is considered as valid, and decree for payment, but with interest only from the time of the obligor's death. This is correct, as the bond is relieved against to a certain extent, and the bill must be considered as having submitted to have the relief made effectual according to the rights of the parties.

must be understood as having, by implication at least, submitted to have the relief made effectual according to the rights of the parties.

This decree was followed up by an order in the common way, that the estates should be sold, and that all necessary parties should convey. That however did not bind Kelly. The real estates were sold to Gore in trust for M. Daly, and conveyed to him by A. H. Daly: so that Gore took only what A. H. Daly could give, and no more; and that was subject to the mortgage to Kelly.

Then Kelly filed his bill to establish his own mortgage, and charged collusion between the parties to defraud him (Kelly); and that in consequence of such collusion, A. H. Daly had abandoned an appeal from the decree, which he once intended, and that he (Kelly) was in danger of losing the benefit of his security. That bill was against M. Daly, A. H. Daly, and against Gore, and was properly so filed. Afterwards he moved the Court to be allowed to present an appeal in the name of A. H. Daly, in the cause of "*Daly v. Daly*," as the time was almost out. An order was accordingly made under the restrictions therein mentioned, and Kelly was also directed to speed his own cause to a hearing; but instead of that, he let it rest. It was material, however, that he should have speeded his own cause, as the decree in the other cause was still open to review in the Court of Chancery; and this bill was against Gore, who might dispute the validity of the mortgage.

Then the cause came here, and the Lords saw that there was an impeached mortgage, and that

the decree, not being affirmed here, was open to review below, so far as the interest of a third party was concerned. Then an order was made to speed Kelly's cause—(*Lord Eldon*, C. Is any decree in Kelly's cause made up? *Hart.* No. *Lord Eldon*, C. Then we cannot hear any appeal from it.) —and a decree was made in it. This decree proceeds on the idea that the Court could not enforce Kelly's security, in case the decree in "*Daly v. Daly*" should not be impeached here. That however was a mistake; for that decree not being affirmed here, the Court below could still take cognizance of it by review.

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The only way of proceeding therefore is to send this again to Ireland, that the Court below may try the question between Gore and Kelly, and whether Kelly cannot still have satisfaction out of the real estate of the testator Denis Daly. If that can be done, the consequence will be that the appeal in "*Daly v. Daly*" may drop, if Kelly may have a decree against the lands in the hands of Gore, which I think he may; and then A. H. Daly would be personally answerable to the others. We cannot proceed in these appeals as they stand.

*Lord Eldon* (C.) I concur in this view of the case, which is as I before stated, with the exception of my not having noticed the circumstance of the registration. But even now I cannot see the necessity of giving Kelly liberty to appeal against the decree in "*Daly v. Daly*." If the alienation was prior to the action on the bond, and the statute of Anne in Ireland is the same as the statute of Wil-

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If there are vexatious alienations pending a suit, the Court will restrain them.

liam here, the consequence is that the estate must answer the value of the incumbrance. As the Court cannot proceed but by sale of the estate, it is necessary to have the alienee before it to convey; and, if there are vexatious alienations pending a suit, the Court will restrain them.

*Sir S. Romilly.* The estate was devised by the testator Denis Daly, subject to the payment of his debts.

*Lord Redesdale.* That is a new question. If the testator devised the lands charged with payment of his debts, that puts an end to Kelly's security, unless he can impeach the bond.

*Sir S. Romilly.* It was not thought material to press that point, until the view now taken of the case by Lord Redesdale.

Formal Order, May 21, 1816.

The formal order of the House, after the common recitals, with the addition that, as the decree of 1813 had not been made up, the Lords could not hear an appeal from it; and that the minutes would only have warranted a decree establishing the right of Kelly to the benefit of the mortgage against A. H. Daly, and not against the other parties claiming the property comprised in the mortgage, by force of the decree of March 7, 1800, proceeded thus:—

"*It is ordered*, &c. that the said cause, in which "the said Thomas Kelly is Plaintiff, and the said "Arthur Henry Daly and others are Defendants, "be referred back to the said Court of Chancery in "Ireland, and that the said Thomas Kelly do apply "to the said Court for leave to re-hear the said cause,

" and to bring before the said Court on such re- May 21, 1816.
" hearing, or in such other manner as to the said
" Court shall seem fit, all proper parties for the MOTRGAGEE, PENDING A SUIT, &c.
" purpose of enabling the said Court to decide whe-
" ther the said Thomas Kelly is entitled to the be-
" nefit of the said indenture of mortgage, of the
" 14th day of Sept. 1795, against the several per-
" sons claiming the benefit of the said decree of the
" 7th day of March, 1800, notwithstanding such
" decree remains in force against the said Arthur
" Henry Daly; and whether the said Thomas
" Kelly has a right to impeach the said decree of
" the 7th March, 1800, being no party thereto, to
" the extent of his claims under the said indenture
" of mortgage, either by bill in the nature of a
" bill of review, or otherwise. And it is further or-
" dered, that the said appeal in the name of the
" said Arthur Henry Daly in the first-mentioned
" cause, and the appeal against the order made
" in that cause, and in the said cause of Kelly
" against Daly, for liberty to present such first
" appeal, do stand over until the further order of
" their Lordships."

Agents for Appellant, HANROTT and METCALFE.
Agent for Respondents, KEANE.