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[Chan. Cham.]

to have abandoned the order so far as the same is beneficial to himself, and any party interested may take such proceedings as the order may in such case warrant, or as might have been taken if the order had not been made. Here the condition was not complied with, and I do not think the plaintiff can by an *ex parte* order revive the litigation, but I am of opinion he must make a special application for such order, as under the circumstances the Court may consider him entitled to. On the part of the plaintiff, it was argued that in any event this application cannot succeed, because the notice of motion is styled in the original cause, and not in the cause as revived. I think the plaintiff might have used the style as revived. Order 338 says, "an office copy of the order is "to be served upon the party or parties who "would be defendant or defendants to a bill of "revivor, or supplemental bill according to the "former practice of the Court, and such order "shall from the time of service, be binding upon "such parties." The persons added seem from the first to be looked upon as parties. The order to revive is a conditional one to go absolutely into effect, unless cause be shewn. The persons added are to be treated and named as parties from the time the order names them, unless they take proceedings to have their names struck out. The practice under the similar Order in England shews that this view is correct, for it treats such a case as the present (a motion to discharge the order to revive for irregularity), as an exception to what would be the ordinary rule as to the style of the cause. In 2 Dan. Chy. Pr. 1389 (5th ed.) the rule is laid down as follows, "If the order is sought to "be discharged on the ground of irregularity, "the notice of motion is properly entitled in "the abated suit only," citing *Stratford v. Baker*, L. R. 4 Eq. 256, which is an authority that supports this statement. As the present application is one to discharge for irregularity the order to revive, it comes within the above exception, and therefore the plaintiff was justified in using the style he did. On the part of the plaintiff, it was further urged that the application should have been made to the Court, and the Referee has no jurisdiction. Upon this objection, I think the plaintiff is entitled to succeed. The order to revive under the present practice takes the place of the order formerly made, not in Chambers, but in Court. The person served is to be at liberty to apply to the "Court" for the discharge of the order. The questions arising in cases of abatement are oftentimes quite as difficult of solution as those

occurring in the Master's office, where parties are added. In the latter case, the Master exercises his discretion, and from his order the appeal must be to the Court. In the former case, the Clerk of Records and Writs grants the order, and I do not think unless express power is given by the orders of the Court, or the practice warrants it, that such an application as the present can be made, except in Court. No authority was cited on this point in support of this application, and I have not been able to find any. Under the act appointing the Referee his power in Chambers is restricted, and he has no authority "in matters relating to appeals and applications in the nature of appeals." I think the present motion comes within the exception, and that the Referee has not the power to review what the Clerk of Records and Writs has done in this case, and therefore on this ground, that the order of the Referee should stand, and the present application be refused. I was asked not to charge the applicants with the costs of these motions. In every matter I think the costs should follow the event, unless some very good cause for a different result be shewn. I cannot say here that this has been done. There is no sufficient reason for charging the plaintiff with his costs of a motion in which he has succeeded, and I think he should have them against the defendant who moves.

Order affirmed.

FULLERTON V. KEELY.

Gen. Orders 434 and 435—Infants—Decree in Chambers—Setting down.

In suits for foreclosure or sale, motion for a decree is to be made in Chambers under Order 434, only when infants alone are concerned. If there be also adult defendants, the case should be regularly set down for hearing before the Court.

[January 20, 1873.—*Mr. Holmsted.*]

Fleming applied in chambers for a decree under Order 434. Besides the infants there were adult defendants against whom the bill had been taken *pro confesso*.

THE REFEREE.—This is an application which it is not within my jurisdiction to entertain. A case of *Lloyd v. Burke*, which was very similar to the present in its facts, was set down (29 Nov. 1872) by way of motion for decree, and His Lordship Vice Chancellor Strong held that it was properly so set down. He pointed out that Gen. Order 435 empowers the Registrar to issue a decree against adult defendants, under certain circumstances, but gives him no jurisdiction where infants are concerned. Such jurisdiction is given to the Referee in Chambers by Gen.